

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Bejarano v. Lynch

Bejarano · No. 2:23-cv-1620-WBS-JDP (P) · Decided May 14, 2025

SUMMARY

The document is an order and findings and recommendations in a prisoner civil-rights action brought under 42 U.S.C. § 1983. The magistrate judge concludes that the second amended complaint fails to state First Amendment retaliation and Fourteenth Amendment due-process claims, recommends dismissal without leave to amend, and recommends denial of a preliminary injunction. The court denies the motion for appointment of counsel without prejudice.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Jeremy D. Peterson
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	May 14, 2025
DOCKET	2:23-cv-1620-WBS-JDP (P)
DISPOSITION	other
PROCEDURAL POSTURE	Findings and recommendations on screening of a state prisoner's second amended complaint under 28 U.S.C. § 1915(e), together with an order denying appointment of counsel without prejudice and recommendations concerning dismissal and preliminary injunctive relief.
STANDARD OF REVIEW	On screening, the court applies the Rule 8(a)(2) and Rule 12(b)(6)-type plausibility standard, accepting well-pleaded factual allegations and construing a pro se complaint liberally, while disregarding conclusory legal allegations. Dismissal without leave to amend is proper only when it is absolutely clear that the deficiencies cannot be cured by amendment. A preliminary injunction requires likelihood of success on the merits, likelihood of irreparable harm, a favorable balance of equities, and consistency with the public interest.
PRECEDENTIAL VALUE	Nonprecedential findings and recommendations of a federal magistrate judge; no final adoption is shown in the provided text.

PARTIES

Bob Bejarano v. Jeff Lynch, Robert Hart, Paul Bettencourt, R. Valine, F. Boe, K. Steele, David Bauchman, D. Gonzalez, J. Lanier, C. Castillo, L. Cerrillo, P. Martinusen, D. Roth, S. Marsh

TOPICS

prisoners rights

section 1983

civil rights

first amendment

procedural due process

PRACTICE AREAS

Prisoner civil rights

constitutional litigation

federal civil procedure

injunctive relief

QUESTIONS PRESENTED

1. Whether the second amended complaint stated a First Amendment retaliation claim based on plaintiff's alleged self-representation in court.
2. Whether the second amended complaint stated a Fourteenth Amendment procedural due process claim based on allegedly false disciplinary reports, hearing procedures, and loss of contact visitations.
3. Whether the official-capacity claims stated a claim for damages or prospective injunctive or declaratory relief.
4. Whether the complaint violated Federal Rule of Civil Procedure 18 by joining unrelated claims against multiple defendants.
5. Whether plaintiff was entitled to a preliminary injunction.
6. Whether plaintiff was entitled to appointment of counsel.

HOLDINGS

1. The official-capacity claims failed to state a claim. Damages claims against state officers in their official capacities are barred by the Eleventh Amendment, while the alleged prospective official-capacity claims failed because plaintiff did not specify concrete prospective relief or allege the required connection between the defendants and enforcement of the challenged conduct. The claims against the wardens also failed because plaintiff alleged no policy or custom supporting entity liability under § 1983.
2. Plaintiff failed to state a First Amendment retaliation claim because self-representation in a criminal matter arises under the Sixth Amendment rather than the First Amendment, and, even assuming self-representation could constitute protected conduct, the complaint did not allege that the defendants knew of plaintiff's self-representation or acted because of it.
3. Plaintiff failed to state a Fourteenth Amendment due process claim because prisoners have no constitutionally protected liberty interest in contact visitation, and loss of contact visitation is an ordinary incident of prison life rather than an atypical and significant hardship.
4. Dismissal without leave to amend was recommended because plaintiff had already received a final opportunity to amend and the identified deficiencies could not be cured by further amendment.

KEY QUOTATIONS

“A complaint must contain a short and plain statement that plaintiff is entitled to relief, Fed. R. Civ. P. 8(a) (2), and provide “enough facts to state a claim to relief that is plausible on its face,”” (at 2)

“For an inmate to state a First Amendment retaliation claim, he must allege that “(1) . . . a state actor took some adverse action against [him] (2) because of (3) [his] protected conduct, and that such action (4) chilled the . . . exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.”” (at 6)

“The guarantee of procedural due process under the Fourteenth Amendment only applies when there is a constitutionally protected liberty or property interest at stake.” (at 9)

“To obtain injunctive relief, plaintiff must show (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction would be in the public interest.” (at 10)

FACTUAL BACKGROUND

Plaintiff alleged that correctional officers at several California institutions falsified or approved false rule-violation reports concerning possession or distribution of heroin between 2018 and 2022. He alleged that he was found guilty at a November 2022 disciplinary hearing based on the allegedly fabricated reports and lost contact visitations. He further alleged that the charges were retaliatory because he represented himself in a Sacramento Superior Court matter in October 2021.

PROCEDURAL HISTORY

Plaintiff, a state prisoner proceeding pro se, filed a second amended complaint asserting First Amendment retaliation and Fourteenth Amendment due process claims against fourteen correctional officers in their individual and official capacities. The magistrate judge concluded that the complaint failed to state any cognizable claim, recommended dismissal without leave to amend and denial of the preliminary injunction, and denied appointment of counsel without prejudice. The findings and recommendations were submitted to the assigned district judge under 28 U.S.C. § 636(b)(1); the text does not state that the district judge adopted them.

DISPOSITION

other

CASES CITED

- Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)
- Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009)
- Kobold v. Good Samaritan Regional Medical Center, 832 F.3d 1024, 1038 (9th Cir. 2016)
- Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1264 n.2 (9th Cir. 2006) (en banc)
- Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam)
- Hayes v. Idaho Correctional Center, 849 F.3d 1204, 1208 (9th Cir. 2017)

- *Bruns v. National Credit Union Administration*, 122 F.3d 1251, 1257 (9th Cir. 1997)
- *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982)
- *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007)
- *Schucker v. Rockwood*, 846 F.2d 1202, 1203-04 (9th Cir. 1988) (per curiam)
- *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)
- *Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007)
- *Bair v. Krug*, 853 F.2d 672, 675 (9th Cir. 1988)
- *Ex Parte Young*, 209 U.S. 123, 157 (1908)
- *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012)
- *Weinapple v. Bonta*, No. 24-cv-1769-DAD-JDP, 2024 WL 5118224, at *2 (E.D. Cal. Dec. 16, 2024)
- *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999) (per curiam)
- *L.A. County Bar Association v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992)
- *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985)
- *Green v. Mansour*, 474 U.S. 64, 74 (1985)
- *Natural Resources Defense Council v. California Department of Transportation*, 96 F.3d 420, 423-24 (9th Cir. 1996)
- *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991)
- *Monell v. Department of Social Services*, 436 U.S. 658, 691, 694 (1978)
- *Long v. County of Los Angeles*, 442 F.3d 1178, 1186 (9th Cir. 2006)
- *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)
- *Trudeau v. Warden*, No. 13cv01691 LJO DLB, 2014 WL 5325339, at *3 (E.D. Cal. Oct. 17, 2024)
- *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012)
- *Pratt v. Rowland*, 65 F.3d 802, 806, 808 (9th Cir. 1995)
- *Cejas v. Paramo*, No. 14-CV-1923-WQH(WVG), 2017 WL 1166288, at *6 (S.D. Cal. Mar. 28, 2017)
- *Wood v. Yordy*, 753 F.3d 899, 904-05 (9th Cir. 2014)
- *Phillips v. Chappel*, No. 17-00875 EJD, 2018 WL 9875249, at *3 (N.D. Cal. Aug. 15, 2018)
- *Ingraham v. Wright*, 430 U.S. 651, 672 (1977)
- *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)
- *Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir. 2002)
- *Knox v. Biter*, No. 18-cv-00761-AWI-SAB, 2018 WL 4039971, at *2 (E.D. Cal. Aug. 22, 2018)
- *Barnett v. Centoni*, 31 F.3d 813, 817 (9th Cir. 1994) (per curiam)
- *Macedon v. California Department of Corrections*, 67 F. App'x 407, 408 (9th Cir. 2003)
- *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)
- *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015)
- *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998)
- *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991)

OPINION

(PC) Bejarano v. Lynch

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 11 BOB BEJARANO, Case No. 2:23-cv-1620-WBS-JDP (P) 12 Plaintiff,

13 v. ORDER; FINDINGS AND

RECOMMENDATIONS

14 JEFF LYNCH, et al., 15 Defendants. 16 17 18 Plaintiff, a state prisoner proceeding pro se, brings his second amended complaint against 19 fourteen named defendants—correctional officers at plaintiff’s current and former correctional 20 institutions—in their individual and official capacities, alleging that they retaliated against him in 21 violation of the First Amendment and violated his Fourteenth Amendment due process rights 22 during a disciplinary hearing. ECF No. 25. He further moves for a preliminary injunction, id. at 23 5, and appointment of counsel, ECF No. 26. Plaintiff’s second amended complaint fails to state a 24 claim, and I recommend that it be dismissed without leave to amend. I also recommend that 25 plaintiff’s request for a preliminary injunction be denied. I will deny plaintiff’s motion for 26 appointment of counsel without prejudice. 27 28 1 Second Amended Complaint 2 I. Screening and Pleading Requirements 3 A federal court must screen the complaint of any claimant seeking permission to proceed 4 in forma pauperis. See 28 U.S.C. § 1915(e). The court must identify any cognizable claims and 5 dismiss any portion of the complaint that is frivolous or malicious, fails to state a claim upon 6 which relief may be granted, or seeks monetary relief from a defendant who is immune from such 7 relief. Id. 8 A complaint must contain a short and plain statement that plaintiff is entitled to relief, 9 Fed. R. Civ. P. 8(a)(2), and provide “enough facts to state a claim to relief that is plausible on its 10 face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard does not 11 require detailed allegations, but legal conclusions do not suffice. See *Ashcroft v. Iqbal*, 556 U.S. 12 662, 678 (2009). If the allegations “do not permit the court to infer more than the mere 13 possibility of misconduct,” the complaint states no claim. Id. at 679. The complaint need not 14 identify “a precise legal theory.” *Kobold v. Good Samaritan Reg’l Med. Ctr.*, 832 F.3d 1024, 15 1038 (9th Cir. 2016). Instead, what plaintiff must state is a “claim”—a set of “allegations that 16 give rise to an enforceable right to relief.” *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264 17 n.2 (9th Cir. 2006) (en banc) (citations omitted). 18 The court must construe a pro se litigant’s complaint liberally. See *Haines v. Kerner*, 404 19 U.S. 519, 520 (1972) (per curiam). The court may dismiss a pro se litigant’s complaint “if it 20 appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which 21 would entitle him to relief.” *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1208 (9th Cir. 2017). 22 However, ““a liberal interpretation of a civil rights complaint may not supply essential elements 23 of the claim that were not initially pled.”” *Bruns v.*

Nat'l Credit Union Admin., 122 F.3d 1251, 24 1257 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)). 25 II. Allegations 26 Plaintiff names fourteen individuals as defendants: Robert Hart, Paul Bettencourt, R. 27 Valine, F. Boe, K. Steele, David Bauchman, D. Gonzalez—correctional officers at California 28 State Prison-Sacramento; J. Lanier, a correctional officer at Sierra Conservation Center; C. 1 Castillo, L. Cerrillo, P. Martinusen, D. Roth, S. Marsh, and Jeff Lynch—correctional officers at 2 California State Prison-Corcoran. ECF No. 25 at 2, 6-7. He brings his claims against defendants 3 in their individual and official capacities and requests monetary, injunctive, and declaratory relief. 4 Id. He also seeks a preliminary injunction. Id. at 5. 5 Plaintiff alleges that on August 30, 2018, Hart wrote plaintiff up with a rule violation 6 report (“RVR”) for possession of a controlled substance. Id. at 8. He alleges that Hart falsified 7 the RVR to state that plaintiff had swallowed two bundles of heroin. Id. Then, Bettencourt added 8 false information into the RVR to support Hart’s charge, stating that he performed a drug test on 9 one of the bundles. Id. Steele then reviewed the RVR and approved it. Id. at 8-9. Boe later 10 added a supplemental report to add a conspiracy charge to plaintiff’s RVR, which plaintiff alleges 11 was also based on false information. Id. at 9. On September 3, 2018, Boe reviewed the RVR and 12 approved it, although, according to plaintiff, important documents were missing. Id. 13 On September 10, 2018, plaintiff alleges that Bettencourt performed a second drug test on 14 the bundles and confirmed the presence of heroin. Id. Plaintiff alleges that the test results were 15 fabricated because no record of the test was placed in his file. Id. Plaintiff then alleges that 16 Lanier falsely supported Bettencourt’s drug screen by stating that he was a witness. Id. at 9-10. 17 The next day, Boe signed off on Bettencourt and Lanier’s allegedly false RVR. Id. at 10. Then 18 Baughman reviewed and signed the RVR. Id. 19 Years later, on April 27, 2022, Valine wrote plaintiff up with another RVR for distributing 20 a controlled substance, but this time used a “higher charge.” Id. Plaintiff alleges that Valine used 21 the same fabricated evidence from the 2018 RVR to support the April 2022 RVR. Id. Plaintiff 22 asserts that Valine stated that he wrote plaintiff up based on the Sacramento County District 23 Attorney’s forensic analysis of the two heroin bundles. Id. Gonzales and Boxall reviewed and 24 approved the April 2022 RVR. Id. at 11. 25 Plaintiff alleges that he was written up a third time on May 24, 2022, by Castillo, with the 26 same charges as appeared in the April 2022 RVR. Id. Cerrillo wrote him up a fourth time on 27 October 19, 2022, again with the same information as appeared in the April 2022 RVR. Id. In 28 the October 2022 RVR, Cerrillo noted that the Sacramento District Attorney’s Office had chosen 1 to refer the case for adjudication. Id. Roth reviewed the notice of adjudication and failed to 2 correct the allegedly false information. Id. at 12. 3 On November 1, 2022, Martinusen conducted a disciplinary hearing relating to plaintiff’s 4 2018 and April 2022 RVR charges. Id. Martinusen found plaintiff guilty and allegedly told him 5 that the adjudication was based on the 2018 RVR and the April 2022 RVR. Id. Plaintiff alleges 6 that this decision was based on false evidence. Id. Marsh and Lynch reviewed and approved the 7 disciplinary hearing results, allegedly knowing that it was based on false evidence. Id. at 12-13. 8 Plaintiff alleges that, at each step in

this process, officers knowingly provided false information in 9 the RVRs. Id. at 8-13. He also alleges that the officers who reviewed and approved the RVRs 10 did so knowing that the information provided was false and fabricated. Id. 11 Based on these allegations, plaintiff brings a First Amendment retaliation claim and a 12 Fourteenth Amendment due process claim against all defendants. Id. at 14-16. As for the First 13 Amendment claim, plaintiff alleges that all defendants violated his First Amendment right against 14 retaliation after he chose to represent himself pro se in the Sacramento Superior Court on October 15 12, 2021. Id. at 14. He contends that his choice in representing himself prompted officers to 16 write him up on higher charges. Id. He also contends that there is a causal connection between 17 him representing himself and facing a more serious charge, and that he suffered an adverse action 18 in being charged with the higher offense. Id. He contends that retaliatory intent can be inferred 19 from the timeline of events. Id. at 15. 20 Plaintiff next alleges that defendants violated his due process rights when they continued 21 to falsify disciplinary reports against him, and that this has caused him to lose contact visitations 22 since 2018. Id. He contends that he was not given a fair and impartial disciplinary hearing, and 23 that his loss of contact visitations is an atypical hardship. Id. at 15-16. 24 III. Analysis 25 A. Rule 18 26 As an initial matter, plaintiff's complaint contains several unrelated claims in violation of 27 the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 18(a); *George v. Smith*, 507 F.3d 605, 28 607 (7th Cir. 2007) ("Thus multiple claims against a single party are fine, but Claim A against 1 Defendant 1 should not be joined with unrelated Claim B against Defendant 2."). Plaintiff brings 2 two claims against fourteen officials at three different correctional institutions. See ECF No. 25 3 at 2, 5-7. Plaintiff lumps his First Amendment retaliation claims against each defendant into one 4 claim, and he does the same for his Fourteenth Amendment claim. See id. at 14-16. Plaintiff's 5 single First Amendment retaliation claim relates to at least three different instances of alleged 6 retaliation, and no allegation demonstrates how these claims are connected to each another. See 7 id. While this issue alone might justify dismissing plaintiff's complaint with leave to amend, 8 further analysis has convinced me that dismissal without leave to amend is appropriate. See 9 *Schucker v. Rockwood*, 846 F.2d 1202, 1203-04 (9th Cir. 1988) (per curiam) ("Dismissal of a pro 10 se complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of 11 the complaint could not be cured by amendment.") (internal quotation marks and citations 12 omitted). 13 B. Official Capacity Claims 14 The Eleventh Amendment bars claims for damages against state officers sued in their 15 official capacities. See *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Flint v. Dennison*, 488 16 F.3d 816, 824-25 (9th Cir. 2007); *Bair v. Krug*, 853 F.2d 672, 675 (9th Cir. 1988). However, the 17 doctrine set forth in *Ex Parte Young*, 209 U.S. 123 (1908), provides for a narrow exception for 18 prospective injunctive or declaratory relief against state officers in their official capacities for 19 alleged violations of federal law. *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 20 1134 (9th Cir. 2012); see also *Weinapple v. Bonta*, No. 24-cv-1769-DAD-JDP, 2024 WL 21 5118224, at *2 (E.D. Cal. Dec. 16, 2024) (applying the *Ex Parte Young* doctrine to a claim for 22 declaratory relief). 23 Under *Ex Parte Young*, "the state

official sued ‘must have some connection with the 24 enforcement of the act’ to avoid making that official a mere representative of the state.” *Culinary 25 Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999) (per curiam) (quoting 26 *Ex Parte Young*, 209 U.S. at 157). This connection “must be fairly direct; a generalized duty to 27 enforce state law or a general supervisory power over those persons responsible for enforcing the 28 challenged provision will not subject an official to suit.” *L.A. Cnty. Bar Ass’n v. Eu*, 979 F.2d 1 697, 704 (9th Cir. 1992). Additionally, the relief sought needs to be directly stated, as “[p]recede 2 resolution, not general admonition, is the function of declaratory relief.” *United States v. 3 Washington*, 759 F.2d 1353, 1357 (1985). 4 As to all non-warden defendants—that is, all defendants except Bauchman, Marsh, and 5 Lynch—plaintiff’s official-capacity claims fail. While plaintiff purports to bring these official 6 capacity claims for injunctive and declaratory relief, he does not specify what exactly he is 7 requesting. See ECF No. 1 at 5, 16; *Washington*, 759 F.2d 1353, 1357 (discussing the 8 significance of “concrete facts which underlie a dispute in a particular case”). There is not even 9 an indication whether plaintiff seeks retrospective or prospective relief—a key distinction. See 10 *Green v. Mansour*, 474 U.S. 64, 74 (1985); *Nat. Res. Def. Council v. Cal. Dep’t of Transp.*, 96 11 F.3d 420, 423-24 (9th Cir. 1996) (affirming dismissal of claims for civil penalties and declaratory 12 relief based on past conduct). Finally, plaintiff makes no allegations demonstrating how these 13 non-warden defendants are officially connected to the actions of which he complains, as these 14 non-warden defendants merely have duty to enforce state law or a general supervisory power over 15 those persons responsible for enforcing the challenged provision, meaning they are not subject to 16 suit. See *L.A. Cnty. Bar Ass’n*, 979 F.2d at 704. As such, plaintiff’s claims against the non- 17 warden defendants in their official capacities fail to state a claim. 18 As for the remaining defendants—wardens at their respective correctional facilities— 19 plaintiff’s official-capacity claims also fail. An official capacity claim against a government 20 employee is, for all intents and purposes, a claim against the employing government entity. *Larez 21 v. City of L.A.*, 946 F.2d 630, 646 (9th Cir. 1991). A government entity cannot be held liable 22 under § 1983 for the acts of its employees solely on a respondeat superior theory. *Monell v. Dept 23 of Soc. Servs.*, 436 U.S. 658, 691 (1978). Vicarious liability attaches to a municipality only when 24 the municipality itself causes the constitutional violation at issue, which occurs only when the 25 harm results from the municipality’s policy or custom. See *id.* at 694 (“[I]t is when execution of a 26 government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts 27 may fairly be said to represent official policy, inflicts the injury that the government as an entity 28 is responsible under § 1983.”). To satisfy *Monell*’s requirements, a plaintiff must identify a 1 policy or custom, connect the policy or custom to the city itself, and show that an injury was 2 incurred because of the execution of that policy or custom. See *Long v. Cnty. of Los Angeles*, 442 3 F.3d 1178, 1186 (9th Cir. 2006). Plaintiff makes no allegations showing there is a relevant 4 municipal policy or custom here. See generally ECF No. 25. As such, plaintiff’s allegations 5 against the remaining warden defendants in their official capacities fail to state a claim. 6 C. First Amendment

Retaliation 7 For an inmate to state a First Amendment retaliation claim, he must allege that “(1) . . . a 8 state actor took some adverse action against [him] (2) because of (3) [his] protected conduct, and 9 that such action (4) chilled the . . . exercise of his First Amendment rights, and (5) the action did 10 not reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567- 11 68 (9th Cir. 2005). Prisoners retain their First Amendment right to file prison grievances, and the 12 constitution protects inmates from being retaliated against for exercising this right. *Id.* at 567. 13 Separately, the right to self-representation in a criminal matter, including access to the courts, 14 arises under the Sixth Amendment. *Trudeau v. Warden*, No. 13cv01691 LJO DLB, 2014 WL 15 5325339, at *3 (E.D. Cal. Oct. 17, 2024). 16 “[D]irect evidence of retaliatory intent rarely can be pleaded in a complaint.” *Watison v. 17 Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). As such, an “allegation of a chronology of events 18 from which retaliation can be inferred is sufficient to survive dismissal.” *Id.*; see also *Pratt v. 19 Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (“timing can properly be considered as circumstantial 20 evidence of retaliatory intent”). Nevertheless, knowledge of the protected activity is “critical” 21 because an officer cannot act “in retaliation for—or because of—something about which he had 22 no knowledge.” *Cejas v. Paramo*, No. 14-CV-1923-WQH(WVG), 2017 WL 1166288, at *6 23 (S.D. Cal. Mar. 28, 2017); see also *Wood v. Yordy*, 753 F.3d 899, 904-05 (9th Cir. 2014) 24 (affirming grant of summary judgment where there was no evidence that defendants knew about 25 plaintiff’s prior lawsuit, or that defendants’ disparaging remarks were made in reference to prior 26 lawsuit); *Pratt*, 65 F.3d at 808 (concluding that the prisoner failed to establish a retaliation claim 27 when there was no evidence that prison officials knew of the conduct giving rise to the alleged 28 retaliatory action); *Garcia v. Diaz*, No. 5:20-cv-02564-FLA (MAA), 2021 WL 4775633, at *8 1 (C.D. Cal. Aug. 24, 2021) (finding a complaint failed to state a First Amendment retaliation claim 2 where there were no allegations to suggest defendants had knowledge of plaintiff’s prison 3 grievances). 4 Here, plaintiff’s claim against all defendants for First Amendment retaliation fails to state 5 a claim. First, it does not appear that plaintiff participated in protected conduct under the First 6 Amendment. Plaintiff asserts that defendants retaliated against him because he chose to represent 7 himself in a matter before the Sacramento Superior Court—presumably related to his drug 8 charges from the RVRs. See ECF No. 25 at 14. However, the right to self-representation in a 9 criminal matter, including access to the courts, is a right under the Sixth Amendment, not the First 10 Amendment. As such, it does not appear that plaintiff participated in conduct protected by the 11 First Amendment. See *Phillips v. Chappel*, No. 17-00875 EJD, 2018 WL 9875249, at *3 (N.D. 12 Cal. Aug. 15, 2018) (dismissing a First Amendment claim predicated on plaintiff’s exercise of his 13 Sixth Amendment right to self-representation because the First Amendment “does not” include 14 the right to self-representation, and “[p]laintiff present[ed] no case law supporting such a 15 proposition”). 16 Nevertheless, plaintiff’s claim fails for other reasons. Assuming self-representation is 17 protected under the First Amendment, plaintiff alleges that he chose to defend himself in October 18 2021. See *id.* at 14. Thus, claims against Hart, Bettencourt, Boe, Lanier, and

Baughman fail 19 because their participation in this alleged First Amendment claim occurred in 2018—almost three 20 years before plaintiff represented himself in court. See *id.* at 8-10. Logically, those defendants 21 could not have committed retaliatory actions against plaintiff for actions plaintiff had not yet 22 participated in, meaning their actions in writing the RVR was not “because of” plaintiff’s 23 activities. See *Rhodes*, 408 F.3d at 567-68. 24 The retaliation claims against Valine, Gonzales, Boxall, Castillo, Cerrillo, Roth, 25 Martinusen, Marsh, and Lynch similarly fail to state a claim. Plaintiff makes no allegation that 26 any of these defendants was aware that plaintiff chose to represent himself in court. See generally 27 ECF No. 25 at 10-13. Plaintiff again fails to allege the “because of” element. See *Rhodes*, 408 28 F.3d at 567-68. Although plaintiff asserts that a retaliatory inference could be drawn from the 1 timeline, see ECF No. 25 at 15, plaintiff’s allegation is conclusory and does not allow for a 2 retaliatory inference to be implied where these defendants are not alleged to have knowledge of 3 the potential First Amendment activity at issue. Thus, plaintiff fails to state a cognizable First 4 Amendment retaliation claim against any defendant. 5 D. Fourteenth Amendment Due Process 6 The guarantee of procedural due process under the Fourteenth Amendment only applies 7 when there is a constitutionally protected liberty or property interest at stake. *Ingraham v. 8 Wright*, 430 U.S. 651, 672 (1977). A protected liberty interest can arise from a state law created 9 expectation or interest. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). “[I]t is well-settled that 10 prisoners have no constitutional right while incarcerated to contact visits.” *Gerber v. Hickman*, 11 291 F.3d 617, 621 (9th Cir. 2002); see also *Knox v. Biter*, No. 18-cv-00761-AWI-SAB, 2018 WL 12 4039971, at *2 (E.D. Cal. Aug. 22, 2018) (“Prisoners also have no right to contact visitation.”) 13 (citing *Barnett v. Centoni*, 31 F.3d 813, 817 (9th Cir. 1994) (per curiam)). Instead, “an inmate’s 14 inability to visit with whom he wishes is an ‘ordinary incident of prison life’” and does not 15 impose an atypical and significant hardship. *Macedon v. Cal. Dep’t of Corr.*, 67 F. App’x 407, 16 408 (9th Cir. 2003). 17 Plaintiff’s due process claim hinges on one identified liberty interest—his right to contact 18 visitations. See ECF No. 25 at 15-16. However, plaintiff has no liberty interest in contact 19 visitations. See *Wilkinson*, 545 U.S. at 221; see also *Knox*, 2018 WL 4039971, at *2. Without a 20 protected liberty interest at stake, the Fourteenth Amendment does not apply, see *Ingraham*, 430 21 U.S. at 672, and plaintiff’s allegations cannot state a cognizable due process claim. 22 E. Dismissal Without Leave to Amend 23 When I screened plaintiff’s first amended complaint, I informed plaintiff that a second 24 amended complaint would provide his “final opportunity to amend and better explain his claims” 25 before I recommended dismissing this action. Plaintiff has had this final opportunity, but he has 26 not sufficiently stated any claim against any defendant, and I do not believe further amendment 27 will cure any of the deficiencies outlined above. See *Schucker*, 846 F.2d at 1203-04. As such, I 28 recommend that plaintiff’s second amended complaint be dismissed without leave to amend. 1 Request for a Preliminary Injunction 2 Plaintiff also moves for a preliminary injunction. ECF No. 25 at 5. To obtain injunctive 3 relief, plaintiff must show (1) likelihood of success on the merits; (2) likelihood of

irreparable 4 harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and 5 (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 6 20 (2008). “The first factor under *Winter* is the most important—likely success on the merits.” 7 *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). Here, plaintiff cannot demonstrate a 8 likelihood of success on the merits, since the complaint fails to state a claim. As such, his request 9 for a preliminary injunction should be denied. 10 Motion for Appointment of Counsel 11 Plaintiff also moves for appointment of counsel. ECF No. 26. In light of the above 12 recommendations, I will deny plaintiff’s motion for appointment of an attorney without prejudice. 13 If these recommendations are not adopted, the issue may be revisited. 14 Accordingly, it is hereby ORDERED that plaintiff’s motion for appointment of counsel, 15 ECF No. 26, is DENIED without prejudice. 16 Further, it is RECOMMENDED that: 17 1. Plaintiff’s second amended complaint, ECF No. 25, be DISMISSED without leave 18 to amend and the Clerk of Court be directed to close this action. 19 2. Plaintiff’s request for a preliminary injunction, ECF No. 25 at 5, be DENIED. 20 These findings and recommendations are submitted to the United States District Judge 21 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days of 22 service of these findings and recommendations, any party may file written objections with the 23 court and serve a copy on all parties. Any such document should be captioned “Objections to 24 Magistrate Judge’s Findings and Recommendations,” and any response shall be served and filed 25 within fourteen days of service of the objections. The parties are advised that failure to file 26 objections within the specified time may waive the right to appeal the District Court’s order. See 27 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 28 1991). 1 | 1718 SO ORDERED. 3 (— Dated: _ May 14, 2025 ssn (aioe 4 JEREMY D. PETERSON

UNITED STATES MAGISTRATE JUDGE

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