

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 22 2022

FOR THE NINTH CIRCUIT

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

MICHAEL EARL BOSSE,

No. 21-35448

Plaintiff-Appellant,

D.C. No. 1:19-cv-00271-REB

v.

MEMORANDUM*

RANDY BLADES, Warden, SICI; RDU
STAFF; RDU SERGEANTS 8 HOUSE;
IDOC; CARLIN; MCKAY; HIGGINS;
BELIDEAU; WOODLAND, Capt.;
WARDEN'S OFFICE STAFF; 2 AT S.I.C.;
LEE, Officer, Sergeant; HANSEN,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Idaho
Ronald E. Bush, Magistrate Judge, Presiding**

Submitted November 15, 2022***

Before: CANBY, CALLAHAN, and BADE, Circuit Judges.

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

** The parties consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c).

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

Idaho state prisoner Michael Earl Bosse appeals pro se from the district court's summary judgment and dismissal order in his 42 U.S.C. § 1983 action alleging constitutional claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014) (en banc) (summary judgment for failure to exhaust); *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii)); *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (dismissal under 28 U.S.C. § 1915A). We may affirm on any basis supported by the record. *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008). We affirm.

The district court properly granted summary judgment on Bosse's failure-to-protect claim against defendant Lee because Bosse failed to exhaust his administrative remedies and failed to raise a genuine dispute of material fact as to whether administrative remedies were effectively unavailable to him. *See Ross v. Blake*, 578 U.S. 632, 638, 641-44 (2016) (explaining that an inmate must exhaust such administrative remedies as are available before bringing suit, and describing limited circumstances in which administrative remedies are unavailable); *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (“[P]roper exhaustion of administrative remedies . . . means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).” (citation, internal quotation marks, and emphasis omitted)); *Albino*, 747 F.3d at 1172 (noting that once the

defendant has carried the burden to prove there was an available administrative remedy, the burden shifts to the plaintiff to produce evidence showing that administrative remedies were effectively unavailable to him).

Dismissal of Bosse's failure-to-protect and substantive due process claims against defendant Higgins was proper because Bosse failed to allege facts sufficient to state a plausible claim. *See Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994) (setting forth elements of a failure-to-protect claim); *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1111 (9th Cir. 2010) (noting that for a substantive due process claim, "[t]he Court has repeatedly spoken of the cognizable level of executive abuse of power as that which shocks the conscience" (citation and internal quotation marks omitted)).

To the extent Bosse contends prison officials are denying him access to the courts, this contention is unsupported by the record.

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

All pending motions are denied as moot.

AFFIRMED.