



1 I grant the defendants' motion to dismiss because Festa's injunctive relief request is  
2 moot, his claims against the defendants in their official capacities are barred, he fails to allege  
3 confinement conditions that are objectively severe or prolonged, and Lavell is entitled to  
4 qualified immunity for the equal protection claim. I deny Festa leave to amend his injunctive  
5 relief request, his claims against the defendants in their official capacities, and his equal  
6 protection claim because amendment would be futile. But I grant him leave to amend his Eighth  
7 Amendment and First Amendment retaliation claims against Lavell.

## 8 **I. DISCUSSION**

### 9 **A. Motion to Dismiss Standard**

10 "To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
11 accepted as true, to state a claim to relief that is plausible on its face. . . . A claim has facial  
12 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable  
13 inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S.  
14 662, 678 (2009) (quotation and citation omitted). "Determining whether a complaint states a  
15 plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw  
16 on its judicial experience and common sense." *Id.* at 679. In making this determination, I take as  
17 true all allegations of material fact stated in the complaint and construe them in the light most  
18 favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996).  
19 Allegations of a pro se complaint are held to less stringent standards than formal pleadings  
20 drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980).

### 21 **B. Injunctive Relief**

22 The defendants move to dismiss Festa's request for injunctive relief arguing that it is  
23 moot and vague. They argue his request is moot because Festa is no longer in prison and it is

1 vague because it fails to identify the injunctive relief he is requesting. Festa responds that his  
2 request is not moot because he could return to the same prison if he violates his parole  
3 requirements. He argues his request is not vague because his complaint included sufficient  
4 allegations to support it and the court allowed Festa to proceed with this request.

5       Generally, an inmate’s transfer to another prison facility or his release from prison will  
6 render moot any claims for injunctive and declaratory relief relating to prison conditions (unless  
7 the suit has been certified as a class action) because the inmate would no longer benefit from  
8 having the injunction issued. *Alvarez v. Hill*, 667 F.3d 1061, 1064 (9th Cir. 2012). There are two  
9 exceptions to this mootness doctrine. First, a transferred prisoner’s request for injunctive relief is  
10 not moot if the policy under which the alleged violation occurred is “system wide” and one of  
11 the defendants is in charge of the policy. *Walker v. Beard*, 789 F.3d 1125, 1132 (9th Cir. 2015).  
12 Second, a request for an injunction is not moot if the challenged action is “too short to be fully  
13 litigated prior to its cessation or expiration,” and “there is a reasonable expectation that the same  
14 complaining party will be subjected to the same action again.” *Wiggins v. Rushen*, 760 F.2d  
15 1009, 1011 (9th Cir. 1985). The mere possibility that a former prisoner will be sent to prison  
16 again is “too speculative to rise to the level of reasonable expectation or demonstrated  
17 probability . . . .” *Id.*

18       Festa’s request for injunctive relief is moot because he is no longer in prison and neither  
19 exception applies. His request does not meet the system wide policy exception because Festa  
20 was not transferred to another prison, he does not allege that any of the defendants’ actions were  
21 based on a system wide policy, and none of the three defendants is a prison official with the  
22 authority to create or change prison policy. *See* ECF No. 39 at 4–6 (Lavell is a correctional  
23 officer while Wikoff and Gordon are senior correctional officers); *Id.* at 27–30 (Festa cites prison

1 policies to support his contention the defendants violated those policies). Festa's injunctive  
2 relief request does not meet the second exception because the possibility that he could return to  
3 prison by violating parole is too speculative. Even if Festa were to commit another crime or  
4 violate his parole, there is no reasonable expectation that he would be convicted, return to the  
5 same prison under the watch of the same officers, and be subject to similar alleged violations.  
6 Accordingly, I grant the defendants' motion to dismiss Festa's request for injunctive relief.

### 7 **C. Official Capacity**

8 The defendants argue that Festa's claims for money damages against them in their  
9 official capacities are barred under the Eleventh Amendment and the jurisdictional limitations of  
10 42 U.S.C. § 1983. Festa responds that Nevada law allows prisoners to pursue a civil suit for  
11 losses incurred during incarceration, despite the state's sovereign immunity, if the prisoner  
12 exhausted all available administrative remedies.

13 Festa's § 1983 claims against the defendants in their official capacities are barred because  
14 such claims are against the state itself and Nevada has not waived its sovereign immunity under  
15 the Eleventh Amendment. *O'Connor v. State of Nev.*, 686 F.2d 749, 750 (9th Cir. 1982); Nev.  
16 Rev. Stat. § 41.031(3). Neither a state nor an officers in their official capacity is considered a  
17 "person" for purposes of a § 1983 claim. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71  
18 (1989). Thus, plaintiffs can bring § 1983 claims against state officials in Nevada only in their  
19 individual capacities. *See N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys.*, 807  
20 P.2d 728, 732 (Nev. 1991) (applying *Will* to determine that § 1983 claims cannot be maintained  
21 against Nevada state officials and employees in their official capacities).

22 Festa contends that Nevada Revised Statutes § 41.031(1), which allows civil actions  
23 against the State, and § 41.0337, which allows civil actions against state employees acting within

1 the scope of their employment, collectively allow him to bring § 1983 claims against the  
2 defendants despite Nevada’s sovereign immunity in § 41.031(3). However, a “State may not, by  
3 statute or common law, create a cause of action under § 1983 against an entity whom Congress  
4 has not subjected to liability,” and because “the word ‘person’ in § 1983 . . . exclude[s] States,  
5 neither a federal court nor a state court may entertain a § 1983 action against such a defendant.”  
6 *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 376 (1990). Thus, neither § 41.0337 nor  
7 § 41.031 applies to § 1983 claims. *Craig v. Donnelly*, 439 P.3d 413, 415–16 (Nev. App. 2019)  
8 (“Because neither the State nor state employees in their official capacities can be proper  
9 defendants to 42 U.S.C. § 1983 claims, Nevada Revised Statutes § 41.031 and § 41.0337  
10 necessarily do not apply to such claims.”). Thus, I grant the defendants’ motion to dismiss  
11 Festa’s § 1983 claims for money damages against them in their official capacities.

#### 12 **D. Eighth Amendment**

13 In count four of his TAC, Festa alleges that during a prisoner transport, Lavell repeatedly  
14 denied him access to the restroom causing him to defecate in a bag while he was waiting in a cell  
15 with other prisoners. ECF No. 39 at 24. Lavell argues that Festa fails to state a cognizable  
16 Eighth Amendment claim because his allegations amount to only a minor and temporary  
17 deprivation. Festa counters that his allegations are distinguishable from the cases the defendants  
18 cite because Lavell’s conduct was retaliatory.

19 “The Eighth Amendment’s prohibition against cruel and unusual punishment protects  
20 prisoners not only from inhumane methods of punishment, but also from inhumane conditions of  
21 confinement.” *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006). “Prison officials  
22 have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation,  
23 medical care, and personal safety.” *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). To

1 state a cognizable Eighth Amendment claim for indifference to inhumane conditions of  
2 confinement, a plaintiff must plausibly allege facts that if true would show (1) under an objective  
3 standard that “the deprivation was sufficiently serious to form the basis for an Eighth  
4 Amendment violation;” and (2) under a subjective standard that the defendant “acted with a  
5 sufficiently culpable state of mind.” *Id.* (quotations omitted).

6 Objectively, “extreme deprivations are required to make out a conditions-of-confinement  
7 claim,” and thus “only those deprivations denying the minimal civilized measure of life’s  
8 necessities are sufficiently grave to form the basis of an Eighth Amendment violation.” *Hudson*  
9 *v. McMillian*, 503 U.S. 1, 9 (1992) (quotation omitted). Deprivations and unsanitary conditions  
10 of confinement that are temporary generally do not rise to the level of constitutional violations.  
11 *See Anderson v. Cnty. of Kern*, 45 F.3d 1310, 1314–15 (9th Cir. 1995).

12 In assessing unconstitutional conditions of confinement claims, courts consider “[t]he  
13 circumstances, nature, and duration of a deprivation of these necessities.” *Johnson*, 217 F.3d at  
14 731. “The more basic the need, the shorter the time it can be withheld.” *Id.* “[T]oilets can be  
15 unavailable for some period of time without violating the Eighth Amendment.” *Id.* at 733.  
16 However, allegations that prisoners were held in a prison yard overnight with no access to toilet  
17 facilities, which made some inmates soil themselves, and that the inmates were then left in soiled  
18 pants for four days were sufficient to state an Eighth Amendment violation. *Id.* at 732. Likewise,  
19 allegations that inmates were held in a prison yard overnight with no access to toilets and that  
20 prisoners were allowed to relieve themselves only in a manner that inevitably resulted in them  
21 urinating on other inmates were sufficient to state a claim. *Id.* at 733.<sup>2</sup>

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23 <sup>2</sup> *See also McCray v. Burrell*, 516 F.2d 357, 366–69 (4th Cir. 1974) (holding that a prisoner  
stated a claim where he alleged that he was deprived of clothes and held in a concrete cell with  
an excrement encrusted pit toilet for two days without bedding, sink, washing facilities, or toilet

1 In his TAC, Festa does not state how long the alleged incident occurred. But he attaches  
2 to his complaint the notice of charges that Lavell filed against him for this incident.<sup>3</sup> The notice  
3 of charges states that Lavell began allowing prisoners to use the restroom at 5:45 a.m., and Festa  
4 repeatedly asked him for permission to do so. ECF No. 39 at 41. Around 6:05 a.m., Festa  
5 defecated in a bag while waiting in his holding cage. *Id.* Lavell immediately sent him to the  
6 restroom, and by 6:30 a.m. the incident was over. *Id.* Festa also attaches to his TAC a statement  
7 by fellow inmate Eric Aghasizada, who states that Festa was denied use of the restroom for an  
8 hour and a half. ECF No. 39-1 at 11-12. Thus, it is reasonable to infer that Festa was deprived of  
9 using the restroom for at most an hour and a half.<sup>4</sup>

10 Festa fails to plausibly allege a severe or prolonged deprivation under the objective  
11 standard because he alleges a minor deprivation of restroom access that lasted at most 90  
12 minutes. Because Festa's allegations fail to meet the objective standard, which is necessary for a  
13 cognizable claim, I need not address his allegation that Lavell's conduct was retaliatory, which  
14 would be considered under the subjective standard. Furthermore, even if Festa's allegations  
15 could amount to an Eighth Amendment violation, Festa has not identified clearly established law  
16 that would have put Lavell on notice that a 90-minute denial of access to the restroom would

17 \_\_\_\_\_  
18 paper); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972) (holding that a prisoner stated  
19 a claim where he alleged that he was confined for five days in a strip cell with only a pit toilet  
and no light, sink, or washing facilities).

20 <sup>3</sup> I may consider allegations contained in the pleadings, exhibits attached to the complaint, and  
21 matters properly subject to judicial notice when ruling on a motion to dismiss. *Swartz v. KPMG*  
*LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

22 <sup>4</sup> Festa later added in his response to the defendants' motion to dismiss that he was made to  
23 "suffer in his own filth for the remainder of the transport," again without stating the duration of  
the transport. ECF No. 91 at 6–8. In considering a motion to dismiss, I generally consider only  
the allegations in the plaintiff's complaint. *Swartz*, 476 F.3d at 763. But even if I could consider  
this new allegation, it still does not state how long Festa allegedly had to endure this unsanitary  
condition.

1 violate Festa's Eighth Amendment rights, so Lavell is entitled to qualified immunity. *See Saucier*  
2 *v. Katz*, 533 U.S. 194, 201 (2001); *Green v. Camreta*, 588 F.3d 1011, 1031 (9th Cir. 2009). I  
3 therefore grant the defendants' motion to dismiss Festa's Eighth Amendment claim against  
4 Lavell.

#### 5 **E. Equal Protection**

6 Festa asserts a class of one equal protection claim against Lavell based on Lavell  
7 allowing the other prisoners to use the restroom but repeatedly denying him access. ECF No. 39  
8 at 24. Lavell moves to dismiss the equal protection claim based on qualified immunity, arguing  
9 that Festa cannot identify clearly established law that would have put Lavell on notice that while  
10 supervising multiple inmates, temporarily depriving one of them of restroom access would  
11 violate the Equal Protection Clause. Festa responds that Lavell acted in retaliation and it is  
12 clearly established that officials cannot intentionally retaliate against him.

13 To determine if qualified immunity applies, I consider whether the facts alleged by the  
14 plaintiff set forth a violation of a constitutional right and whether the right at issue was clearly  
15 established at the time of the defendant's alleged misconduct. *Pearson v. Callahan*, 555 U.S.  
16 223, 232 (2009). I may address these questions in any order. *Id.* at 236. "A right is clearly  
17 established for purposes of qualified immunity only where [t]he contours of the right [are]  
18 sufficiently clear that a reasonable official would understand that what he is doing violates that  
19 right." *Frudden v. Pilling*, 877 F.3d 821, 831 (9th Cir. 2017) (quotation omitted, alterations in  
20 original). "The plaintiff bears the burden to show that the contours of the right were clearly  
21 established." *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011).

22 To succeed on a "class of one" claim, Festa must allege facts plausibly showing that  
23 Lavell "(1) intentionally (2) treated [him] differently than other similarly situated [prisoners],



1 (3) without a rational basis.” *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011).  
2 Festa must allege Lavell’s conduct was intentional, but he need not show that Lavell was  
3 “motivated by subjective ill will.” *Id.* The rational basis prong “turns on whether there is a  
4 rational basis for the distinction, rather than the underlying government action.” *Id.* at 1023  
5 (emphasis omitted).

6 At the time of the incident, Festa was one of many prisoners that Lavell was supervising  
7 and allowing to use the restroom while the prisoners were waiting to be transported to another  
8 prison. ECF No. 39 at 24. As discussed above, it is reasonable to infer that Lavell did not allow  
9 Festa to use the restroom for at most 90 minutes. Festa has not identified clearly established law  
10 that would have put Lavell on notice that when supervising multiple inmates who request to use  
11 the restroom, he violates the Equal Protection Clause by allowing some to go before others over  
12 a 90-minute period.<sup>5</sup> Even if this amounted to an equal protection violation, “a reasonable but  
13 mistaken belief that his conduct was lawful would result in the grant of qualified immunity.”  
14 *Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003). Lavell could have reasonably  
15 believed that requiring Festa to wait to use the restroom was lawful given that he was supervising  
16 multiple inmates who were requesting to use the restroom. He therefore is entitled to qualified  
17 immunity for this claim.

18 Festa focuses on his contention that Lavell denied him use of the restroom in retaliation  
19 for his filing grievances against Gordon. However, as I stated in the screening order, Festa did  
20 not allege in the TAC “facts sufficient to show that [Lavell was] aware of his complaints against  
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22 <sup>5</sup> Indeed, this potentially puts a correctional officer in a no-win situation. When supervising  
23 multiple prisoners, he inevitably must choose the order in which those inmates use the restroom  
while also maintaining security over the other prisoners. It cannot be said that by letting  
everyone else go first, he has violated the equal protection rights of the one who goes last.

1 Gordon, much less that [Lavell] denied him access to the toilet because of those complaints.”  
2 ECF No. 59 at 18. Accordingly, Festa failed to allege facts sufficient to support a retaliation  
3 claim. *Id.*

4 **F. Leave to Amend**

5 When a court dismisses a complaint, a pro se plaintiff should be given leave to amend  
6 with directions for curing the deficiencies, unless it is clear that the deficiencies could not be  
7 cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995). Where, as  
8 here, the plaintiff’s claims are barred as a matter of law and a reasonable inference demonstrates  
9 that he cannot state a claim even when provided an opportunity to amend, the deficiencies cannot  
10 be cured so amendment would be futile. Festa’s injunctive relief request is moot and his § 1983  
11 claims for money damages against the defendants’ in their official capacities are barred as a  
12 matter of law, so amendment would be futile for those claims.

13 However, I grant Festa leave to amend his § 1983 Eighth Amendment and First  
14 Amendment retaliation claims against Lavell because Festa may be able to cure the deficiencies  
15 identified in this order and the screening order. In his opposition, Festa offers new allegations  
16 that he had to sit in soiled pants for the duration of the transport. ECF No. 91 at 6–7, 9.  
17 Although he does not identify how long that was, it is possible that it was sufficiently long to  
18 support an Eighth Amendment claim. Additionally, he attaches to his opposition a declaration in  
19 which he states that during the transport incident, the “prison guards,” including Lavell, stated  
20 “we know who you are, going around suing people, this is what you get.” ECF No. 91 at 12.  
21 While I cannot consider these new allegations in deciding this motion because I am confined to  
22 the allegations in the TAC, these new allegations provide a basis to conclude that amendment  
23

1 may not be futile for these claims. I therefore grant Festa leave to amend his Eighth Amendment  
2 and First Amendment claims against Lavell.<sup>6</sup>

3 **II. CONCLUSION**

4 I THEREFORE ORDER that the defendants' motion to dismiss (**ECF No. 86**) is  
5 **GRANTED**. Plaintiff Anthony Festa's request for injunctive relief, claims for money damages  
6 under 42 U.S.C. § 1983 against defendants Justin Gordon, Michael Lavell, and Joshua Wikoff in  
7 their official capacities, and equal protection claims are dismissed with prejudice.

8 I FURTHER ORDER that by June 8, 2020, plaintiff Anthony Festa may file an amended  
9 complaint to cure the deficiencies identified in this order and in the screening order only with  
10 respect to his Eighth Amendment and First Amendment retaliation claims against defendant  
11 Michael Lavell. I remind Festa that if he chooses to amend, his amended complaint must be a  
12 complete document in and of itself and will supersede the third amended complaint in its  
13 entirety. Any allegations, parties, or requests for relief from prior papers that are not carried  
14 forward in the amended complaint will no longer be before the court. If Festa chooses not to  
15 amend, the case will proceed on those claims that are still pending following the screening order  
16 and Michael Lavell will be dismissed as a defendant.

17 DATED this 4th day of May, 2020.

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19 \_\_\_\_\_  
20 ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE

21 \_\_\_\_\_  
22 <sup>6</sup> I recognize that the defendants' motion does not address First Amendment retaliation because I  
23 dismissed that claim in the screening order. Nevertheless, it is clear from the briefing that Festa  
is contending Lavell acted with retaliatory motive. He has attested to facts in his affidavit  
attached to the motion to dismiss that, if properly alleged in an amended complaint, would  
plausibly state that Lavell knew that Festa had filed complaints against Gordon and that Lavell  
deprived him of access to restroom in retaliation for those complaints.