

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 26 2017

FOR THE NINTH CIRCUIT

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

NICHOLAS PATRICK,

No. 17-16243

Plaintiff-Appellant,

D.C. No. 1:16-cv-00239-LJO-MJS

v.

MEMORANDUM*

REYNAGA; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, Chief Judge, Presiding

Submitted December 18, 2017**

Before: WALLACE, SILVERMAN, and BYBEE, Circuit Judges.

Nicholas Patrick, a California state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging constitutional violations. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under 28 U.S.C § 1915(e)(2)(B)(ii). *Barren v. Harrington*, 152 F.3d

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

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

1193, 1194 (9th Cir. 1998) (order). We may affirm on any basis supported by the record. *Lopez v. Smith*, 203 F.3d 1122, 1126 (9th Cir. 2000). We affirm in part, reverse in part, and remand.

Dismissal of Patrick's equal protection claim was proper because Patrick failed to allege facts sufficient to show that defendants discriminated against him based on his membership in a protected class. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (although pro se pleadings are liberally construed, a plaintiff must allege facts sufficient to state a plausible claim); *Serrano v. Francis*, 345 F.3d 1071, 1081-82 (9th Cir. 2003) (setting forth elements of an equal protection claim).

Patrick alleged that defendants withheld his outgoing mail to state courts. Liberally construed, these allegations are sufficient to warrant ordering defendants to file an answer. *See Wilhelm v. Rotman*, 680 F.3d 1113, 1116 (9th Cir. 2012); *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (describing prisoners' First Amendment right to send and receive mail). We reverse the judgment in part and remand for further proceedings on this claim only.

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).

We do not consider documents not presented to the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990) (“Documents or facts not presented to the district court are not part of the record on appeal.”).

AFFIRMED in part, REVERSED in part, and REMANDED.