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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Edward Vincent Ray, Jr.,)	No. CV 13-0088-PHX-GMS (SPL)
Plaintiff,)	ORDER
vs.)	
James MacDonald, et al.,)	
Defendants.)	

Plaintiff Edward Vincent Ray, Jr., who is a California inmate confined in the La Palma Correctional Center (LPCC)¹, a Corrections Corporation of America (CCA) facility in Eloy, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and

¹ LPCC is a California Out-of-State Correctional Facility (COCF) under California’s COCF program to relieve overcrowding in California state prisons. See Washington v. Adams, No. 1:09cv0827, 2012 WL 113743, at *1 n.3 (E.D. Cal. 2012); Martinez v. Brown, No. 08cv0565, 2011 WL 1130458, at *5 n. 6 (S.D. Cal. Mar.25, 2011); MacCharles v. Holder, No. C10-3106, 2011 WL 334271, at * 1 (N.D. Cal. Jan. 31, 2011); McDade v. Lea, No. CV10-8889, 2011 WL 282993, at * 1 n.1 (C.D. Cal. Jan. 05, 2011). The COCF program is one in which male California Department of Corrections and Rehabilitation (CDCR) inmates are transferred to out-of-state correctional facilities that have contracted with CDCR to provide housing, security, health care and rehabilitative programming services to CDCR inmates. Cal. Code Regs. tit. 15, § 3000. COCF is a unit within the CDCR-Division of Adult Institutions whose mission is to transfer inmates out of state for the purpose of alleviating overcrowding within existing institutions. James v. Sweeny, No. 1:12cv1704, 2013 WL 129393, at *1 n.1 (E.D. Cal. Jan. 9, 2013). “Inmates transferred to a COCF program facility “remain under the legal custody of the CDCR and shall be subject to the rules, rights and privileges of the CDCR in accordance with [Title 15] of the California Code of Regulations.” Id. at 4, n.7 (citing Cal. Code Regs. tit. 15, § 3379(a)(9)(I)).

1 an Application to Proceed *In Forma Pauperis*.² (Doc. 1, 2.) Plaintiff also filed a motion for
2 injunctive relief, a declaration, and a motion to expedite his motion for injunctive relief.
3 (Doc. 4, 5, 7.) The Court will dismiss the Complaint for failure to state a claim with leave
4 to amend and will deny the motions.

5 **I. Application to Proceed *In Forma Pauperis* and Filing Fee**

6 Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.
7 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1).
8 The Court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). The statutory
9 fee will be collected monthly in payments of 20% of the previous month's income each time
10 the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a
11 separate Order requiring the appropriate government agency to collect and forward the fees
12 according to the statutory formula.

13 **II. Statutory Screening of Prisoner Complaints**

14 The Court is required to screen complaints brought by prisoners seeking relief against
15 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
16 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
17 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
18 be granted, or that seek monetary relief from a defendant who is immune from such relief.
19 28 U.S.C. § 1915A(b)(1), (2).

20 A pleading must contain a "short and plain statement of the claim *showing* that the
21 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not

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23 ² Plaintiff indicates that he commenced this action prior to fully exhausting his
24 administrative remedies. Exhaustion is required for all suits about prison life, Porter v.
25 Nussle, 534 U.S. 516, 523 (2002), regardless of the type of relief offered through the
26 administrative process, Booth v. Churner, 532 U.S. 731, 741 (2001). Further, under the
27 Prison Litigation Reform Act (PLRA), a prisoner must exhaust available administrative
28 remedies *before* bringing a federal action concerning prison conditions. See 42 U.S.C.
§ 1997e(a); Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009). However, exhaustion
is an affirmative defense that may be waived if not raised. Jones v. Bock, 549 U.S. 199, 212
(2007). The defendant bears the burden of raising and proving the absence of exhaustion.
Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003).

1 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
2 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
3 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
4 statements, do not suffice.” Id.

5 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
6 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,
7 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
8 that allows the court to draw the reasonable inference that the defendant is liable for the
9 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
10 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
11 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
12 allegations may be consistent with a constitutional claim, a court must assess whether there
13 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

14 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
15 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th
16 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
17 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,
18 94 (2007) (*per curiam*)).

19 If the Court determines that a pleading could be cured by the allegation of other facts,
20 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the
21 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court
22 should not, however, advise the litigant how to cure the defects. This type of advice “would
23 undermine district judges’ role as impartial decisionmakers.” Pliler v. Ford, 542 U.S. 225,
24 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was
25 required to inform a litigant of deficiencies). The Court will dismiss Plaintiff’s Complaint
26 for failure to state a claim, but because the Complaint may possibly be saved by amendment,
27 the Court will dismiss the Complaint with leave to amend.

28 / / /

1 **III. Complaint**

2 Plaintiff alleges two counts for violation of his First Amendment mail rights. Plaintiff
3 sues the following LPCC employees: Warden James MacDonald; Mailroom Supervisor Gary
4 L. Ralston; Donald Justus, Jr.; and Ashlee Pratt. Plaintiff seeks injunctive, compensatory,
5 and punitive relief.

6 **Background**

7 Plaintiff (Plaintiff or Ray Jr.) and his son, Edward V. Ray, III (Ray III), each filed a
8 petition for writ of habeas corpus under 28 U.S.C. § 2254 in the Northern District of
9 California challenging their respective California state convictions. See Ray v. Cate, No. C-
10 10-1582 (Ray Jr.); Ray v. Cate, No. C-11-1604 (Ray III). Both were convicted in some of
11 the same robberies, but each was also convicted of offenses for which the other was not. See
12 Ray, No. C-10-1582, doc. 27. On December 2, 2011, the District Court for the Northern
13 District of California designated the habeas cases as related. Id.³ Both habeas cases remain
14 pending.

15 Except as otherwise indicated, Plaintiff alleges, or attachments to the Complaint or
16 the motion for injunctive relief reflect, the following facts: on December 29, 2009, the CDCR
17 authorized, via Form 1074, correspondence between Plaintiff and Ray III. (Doc. 5, Ex. B.)
18 At the time, Plaintiff was incarcerated in Solano State Prison in Vacaville, California, and
19 Ray III was incarcerated in the North Fork Correctional Facility in Sayre, Oklahoma. (Doc.
20 5 at 3.) On August 29, 2012, Ray III was transferred to LPCC. (See Doc. 5, Ex. D.) On
21 November 6, 2012, Plaintiff was transferred to LPCC, but assigned to a different unit than
22 his son. (Id.)

23 On November 19, 2012, Plaintiff submitted an “Inmate/Parolee Request for Interview,
24 Item or Service” (Inmate Request) to LPCC mail room staff. (Doc. 5, Ex. D.) Plaintiff
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26 ³ Documents filed in Plaintiff’s habeas case reflect that Plaintiff was convicted by a
27 jury of 21 counts of robbery on 15 separate occasions between July 12, 2005 and August 27,
28 2006 and that he was sentenced to more than 38 years in prison. Id., doc. 59-1 at 11. Ray
III was convicted by a jury of 30 counts of robbery and one count of assault on 21 separate
occasions and was sentenced to eight years in prison. Id.

1 reported that his son was also at LPCC and that he believed that his mail was being mixed
2 up with his son's and asked mail room staff to verify their inmate numbers to avoid mix-ups.
3 (Id.)

4 On December 5, 2012, Plaintiff submitted another Inmate Request to mail room staff.
5 In this Inmate Request, Plaintiff stated that he and his son had been approved to correspond
6 via Form 1074 and that they had an "active pending case," but that he was not receiving mail
7 from his son.⁴ (Doc. 5, Ex. E.) Plaintiff asked for an explanation for delays in receiving
8 mail from his son, when they were both held at LPCC, and asserted that LPCC was violating
9 California prison regulations. (Id.) About the same time, Plaintiff submitted another Inmate
10 Request to Defendant Ralston's attention in which Plaintiff accused Ralston of violating
11 Plaintiff's constitutional rights by intercepting his mail. (Doc. 5, Ex. F.) In a response dated
12 December 7, 2012, Ralston told Plaintiff to submit another Form 1074, which he provided
13 to Plaintiff. (Id.) It is unclear whether Ralston knew of the prior approval or whether that
14 approval remained in effect despite Plaintiff's transfer from Solano.

15 On December 10, 2012, Plaintiff filed an Inmate Appeal concerning the Inmate
16 Requests submitted on November 19 and December 5 and 7, 2012. (Doc. 5, Ex. G.) On
17 December 19, 2012, Plaintiff submitted an Inmate Request to Warden MacDonald asking
18 why MacDonald had not responded to his Inmate Appeal. (Doc. 1, Ex. 1; 5, Ex. G.) In a
19 January 7, 2013 response, MacDonald stated that Plaintiff continued to violate policy by
20 inserting "your son's mail into yours," directed Plaintiff to stop the practice, and warned
21 Plaintiff that he would lose his inmate-to-inmate mail privileges. (Doc. 1, Ex. 1.) On
22 January 8, 2013, Plaintiff submitted a request for supervisor review stating that
23 MacDonald's response made no sense and that Plaintiff had been sending his son documents
24 pertaining to their related pending cases.⁵ (Id.) Although not without ambiguity, MacDonald
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26 ⁴ Plaintiff stated that he spoke to family members via telephone and that those family
27 members had been informed by Plaintiff's son that he had sent mail to his father.

28 ⁵ Plaintiff referred to the related cases as a "joint case." As noted above, each filed
separate habeas actions, which were found to be related but not consolidated. Each case

1 apparently referred to Plaintiff's inclusion of legal pleadings or filings with his
2 correspondence.

3 On January 7, 2013, Plaintiff submitted an Inmate Request to D. Doty, which was
4 referred to Ralston. (Doc. 1, Ex. 3.) In it, Plaintiff complained that California prison
5 regulations required that mail be delivered to an inmate as soon as possible, but not later than
6 seven days from receipt of the mail. (Id.) Plaintiff asserted that his "legal mail" from
7 California had taken more than the seven days to be delivered and asked that the delay in
8 delivery of mail be rectified. (Id.) On January 9, 2013, Ralston responded that legal mail
9 was processed every day that it was received, that it had priority, and that it could take 3-5
10 days to receive mail from the post office. (Id.) Ralston also noted that delays before mail
11 arrived at LPCC were beyond LPCC's control. (Id.) Plaintiff submitted a request for
12 supervisor review claiming that Ralston was harassing him and disputing Ralston's
13 contention that delays occurred prior to arrival of mail at LPCC.⁶ (Id.)

14 On January 8, 2013, Plaintiff submitted an Inmate Request to Ralston. (Doc. 1, Ex.
15 2.) In it, Plaintiff stated that he was going to sue Ralston for failing to process mail between
16 him and his son as co-litigants and approved correspondents. (Id.) On January 9, 2013,
17 Ralston responded that Plaintiff was violating LPCC's policy for correspondence. (Id.) On
18 January 10, 2013, Plaintiff submitted another request for supervisor review. (Id.)

19 Plaintiff generally contends that since his arrival at LPCC, correspondence sent by
20 him to his son has been held and returned to him. He contends that coffee, or some other
21 liquid, was spilled on one piece of returned correspondence, which damaged documents
22 included in the correspondence. Plaintiff claims that he has not been afforded notice and an
23 opportunity to appeal the "confiscation" of his outgoing mail to his son and that he has not
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25 remains distinct.

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27 ⁶ Presumably, Plaintiff's outgoing mail to his son still had to be routed through the
28 U.S. Post Office before arriving back at LPCC for delivery to Ray III. That is, nothing
suggests that inmates could correspond with other inmates in the same facility via interoffice
mail.

1 received timely responses to his grievances regarding “seizures” of his mail to his son.⁷
2 Plaintiff also generally alleges that correspondence from his son to him has been seized
3 without notice and an opportunity to be heard or to appeal such seizure. Plaintiff contends
4 that these acts violate prison regulations and state and federal law.

5 **IV. Failure to State a Claim**

6 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
7 conduct about which he complains was committed by a person acting under the color of state
8 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.
9 Outlander, 879 F.2d 583, 587 (9th Cir. 1989). Negligence is not sufficient to state a claim
10 under § 1983. Daniels v. Williams, 474 U.S. 327, 330-31 (1986). In addition, a plaintiff
11 must allege that he suffered a specific injury as a result of the conduct of a particular
12 defendant and he must allege an affirmative link between the injury and the conduct of that
13 defendant. Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976).

14 **A. Justus and Pratt**

15 Plaintiff sues Donald Justus, Jr., and Ashlee Pratt. Plaintiff fails to allege their
16 connection, if any, to LPCC.⁸ Thus, it is unclear whether they may be properly sued under
17 § 1983, i.e., that they acted under color of state law. Moreover, Plaintiff fails to allege any
18 facts against either Justus or Pratt.

19 To state a claim against a defendant, “[a] plaintiff must allege facts, not simply
20 conclusions, that show that an individual was personally involved in the deprivation of his
21 civil rights.” Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). For an individual
22 to be liable in his official capacity, a plaintiff must allege that the official acted as a result of
23 a policy, practice, or custom. See Cortez v. County of Los Angeles, 294 F.3d 1186, 1188

25 ⁷ Rather than confiscation or seizure, Plaintiff appears to seek relief based on prison
26 officials’ return of Plaintiff’s outgoing mail back to him.

27 ⁸ Plaintiff failed to comply with the Instructions for completing the court-approved
28 form complaint by listing these Defendants and their positions on page 2 of the form
complaint.

1 (9th Cir. 2001). Further, there is no *respondeat superior* liability under § 1983, so a
2 defendant's position as the supervisor of someone who allegedly violated a plaintiff's
3 constitutional rights does not make him liable. Monell v. Dep't of Soc. Servs., 436 U.S. 658,
4 691 (1978); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in his
5 individual capacity, "is only liable for constitutional violations of his subordinates if the
6 supervisor participated in or directed the violations, or knew of the violations and failed to
7 act to prevent them." Taylor, 880 F.2d at 1045. In addition, where a defendant's only
8 involvement in allegedly unconstitutional conduct is the denial of administrative grievances,
9 the failure to intervene on a prisoner's behalf to remedy the alleged unconstitutional behavior
10 does not amount to active unconstitutional behavior for purposes of § 1983. See Shehee v.
11 Luttrell, 199 F.3d 295, 300 (6th Cir. 1999); accord Proctor v. Applegate, 661 F.Supp.2d 743,
12 765 (W.D. Mich. 2009); Stocker v. Warden, No. 1:07-CV-00589, 2009 WL 981323, at *10
13 (E.D. Cal. Apr. 13, 2009); Mintun v. Blades, No. CV-06-139, 2008 WL 711636, at *7 (D.
14 Idaho Mar. 14, 2008); see also Gregory v. City of Louisville, 444 F.3d 725, 751 (6th Cir.
15 2006) (a plaintiff must allege that a supervisor defendant did more than play a passive role
16 in an alleged violation or mere tacit approval thereof; a plaintiff must allege that the
17 supervisor defendant somehow encouraged or condoned the actions of their subordinates).
18 Because Plaintiff fails to allege any facts in his Complaint against Defendants Justus and
19 Pratt, they will be dismissed.

20 **B. Non-Compliance with Prison Regulations**

21 Plaintiff in part appears to assert claims based on the alleged failure of Defendants to
22 comply with prison regulations in the handling of mail or in connection with his grievances.
23 Plaintiff fails to state a claim on either basis. "There is no legitimate claim of entitlement to
24 a [prison] grievance procedure." Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988); accord
25 Ramirez v. Galaza, 334 F.3d 850 (9th Cir. 2003). And non-compliance with prison policies
26 or grievance procedures, absent more, does not rise to the level of a constitutional violation.
27 Id. Further, California prison regulations do not give rise to protected due process rights.
28

1 Romero v. Katavich, No. 1:11cv0935, 2012 WL 484782, at *11 (E.D. Cal. Feb. 14, 2012).⁹

2 Therefore, to the extent that Plaintiff seeks relief against Defendants for non-compliance with
3 grievance procedures or prison regulations, he fails to state a claim.

4 **C. Legal Mail**

5 Plaintiff in part asserts a violation of his First Amendment mail rights. Specifically,
6 he asserts that his First Amendment right to send mail to, and to receive mail from, his son,
7 who is also an inmate, has been violated. Plaintiff refers to the correspondence to or from
8 his son as “legal mail” on the basis that such mail concerns their respective habeas cases.

9 Under the First Amendment, only mail from an inmate’s attorney, or prospective
10 attorney, constitutes “legal mail” that, when appropriately labeled, is entitled to greater
11 protection than other mail. See Wolff v. McDonnell, 418 U.S. 539, 576 (1974) (stating that
12 legal mail must be specifically marked as originating from an attorney). Plaintiff and his son
13 are each representing themselves in their respective habeas cases and neither is an attorney
14 representing the other.¹⁰ Therefore, mail from Plaintiff to his son or from his son to Plaintiff
15 does not constitute “legal mail” entitled to greater protection under the First Amendment.
16 Accordingly, Plaintiff fails to state a claim for interference with legal mail.

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19 ⁹ Explaining that, “Liberty interests may arise from the Due Process Clause itself or
20 from state law. Hewitt v. Helms, 459 U.S. 460, 466-68, 103 S.Ct. 864, 74 L.Ed.2d 675
21 (1983). Liberty interests created by state law are generally limited to freedom from restraint
22 which ‘imposes atypical and significant hardship on the inmate in relation to the ordinary
incidents of prison life.’ Sandin v. Conner, 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d
418 (1995)” (citing Ramirez, 334 F.3d at 860).

23 ¹⁰ Although a non-attorney litigant may appear on his own behalf, he cannot represent
24 another litigant; only an attorney may appear on behalf of another person. See C.E. Pope
25 Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987) (a non-attorney has no
26 authority to appear as an attorney for anyone other than himself); Elustra v. Mineo, 595 F.3d
27 699, 704 (7th Cir. 2010) (“Normally, representative parties such as next friends may not
28 conduct litigation *pro se*; pleadings may be brought before the court only by parties or their
attorney.”); Simon v. Hartford Life, Inc., 546 F.3d 661 (9th Cir. 2008) (in action brought by
pro se litigant, the real party in interest must be the person who by substantive law has the
right to be enforced); Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, (9th Cir.
2007).

1 **D. Non-Legal Mail**

2 An inmate retains First Amendment rights not inconsistent with his status as a prisoner
3 and with legitimate penological objectives of the corrections system. See Shaw v. Murphy,
4 532 U.S. 223, 231 (2001); Clement v. California Dep’t of Corr., 364 F.3d 1148, 1151 (9th
5 Cir. 2004). Thus, an inmate has a First Amendment right to receive mail; however, that
6 “right is subject to ‘substantial limitations and restrictions in order to allow prison officials
7 to achieve legitimate correctional goals and maintain institutional security.’” Prison Legal
8 News v. Lehman, 397 F.3d 692, 699 (9th Cir. 2005); Morrison v. Hall, 261 F.3d 896 (9th Cir.
9 2001); Prison Legal News v. Cook, 238 F.3d 1145 (9th Cir. 2001). A prisoner also has a
10 Fourteenth Amendment due process liberty interest in receiving notice that his incoming mail
11 has been withheld by prison authorities. Frost v. Symington, 197 F.3d 348, 353 (9th Cir.
12 1999). Nevertheless, jails and prisons may regulate the processing of inmate mail so long
13 as those regulations further an important or substantial government interest other than the
14 suppression of expression. See Procunier v. Martinez, 416 U.S. 396, 411-12 (1974),
15 overruled on other grounds, Thornburgh v. Abbott, 490 U.S. 401, 412-414 (1989); Valdez
16 v. Rosenbaum, 302 F.3d 1039, 1048 (9th Cir. 2002) (jail personnel may regulate speech if
17 a restriction is reasonably related to legitimate penological interests and an inmate is not
18 deprived of all means of expression, citing Turner v. Safley, 482 U.S. 78, 92 (1986)). Thus,
19 jails and prisons may regulate the processing of inmate mail so long as those regulations
20 further an important or substantial government interest other than the suppression of
21 expression. See Procunier, 416 U.S. at 411-12, 413-14. “Prevention of criminal activity and
22 the maintenance of prison security are legitimate penological interests which justify the
23 regulation of both incoming and outgoing prisoner mail.” O’Keefe v. Van Boening, 82 F.3d
24 at 326.

25 **1. Damaged Mail**

26 Plaintiff asserts that on one occasion, a piece of his outgoing mail, which contained
27 documents, was returned to him and the documents were stained. Plaintiff fails to allege any
28 facts to support that the staining was the result of anything other than negligence. He also

1 fails to allege facts to connect any Defendant to the staining of the documents. Accordingly,
2 Plaintiff fails to state a claim based on this allegation.

3 **2. Incoming Mail from Plaintiff's Son**

4 Plaintiff contends that prison officials have failed to deliver, or have seized or returned
5 mail from Plaintiff's son to Plaintiff. Plaintiff wholly fails to allege facts to support these
6 assertions. Although *pro se* pleadings are liberally construed, Haines v. Kerner, 404 U.S.
7 519, 520-21 (1972), conclusory and vague allegations will not support a cause of action.
8 Ivey v. Board of Regents of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Further,
9 a liberal interpretation of a civil rights complaint may not supply essential elements of the
10 claim that were not initially pled. Id. Further, Plaintiff's son, rather than Plaintiff, may seek
11 relief for asserted violations of his outgoing mail rights. Accordingly, these allegations will
12 be dismissed.

13 **3. Plaintiff's Outgoing Mail to his Son**

14 Plaintiff primarily seeks relief for the return of outgoing mail to his incarcerated son.
15 Plaintiff contends that several letters to his son were returned to him by prison officials.
16 Attachments to Plaintiff's Complaint and motion indicate that Plaintiff failed to comply with
17 prison or facility-specific rules concerning outgoing mail. California prison regulations
18 provide that "[t]he maximum weight for a First-Class letter is 13 ounces." Cal. Code Regs.,
19 tit. 15, § 3133. Further, these regulations provide that an inmate's failure to comply with the
20 law, policies, and regulations, or with "approved facility mail procedures may result in the
21 temporary suspension or denial of correspondence between the persons involved." Cal. Code
22 Regs., tit. 15, § 3132(a).

23 Plaintiff indicates that he enclosed documents in the mail to his son. (See Doc. 1 at
24 6) (referring to his right to send "motions, pleadings, evidence and any other legal document
25 to assist each other . . . "). Plaintiff does not allege that the outgoing letters to his son
26 complied with prison regulations concerning the weight, and other requirements, for such
27 mail. But he alleges that letters to his son were returned to him for failure to comply with
28 prison or facility regulations concerning such mail. Plaintiff does not allege that he was

1 otherwise unable to communicate with his son, nor does he allege that he was disciplined for
2 his alleged non-compliance with prison or facility regulations concerning such mail.¹¹
3 Because Plaintiff fails to state a claim for violation of his First Amendment rights, Counts
4 I and II will be dismissed.

5 **V. Leave to Amend**

6 For the foregoing reasons, Plaintiff’s Complaint will be dismissed for failure to state
7 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first
8 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail
9 Plaintiff a court-approved form to use for filing a first amended complaint. If Plaintiff fails
10 to use the court-approved form, the Court may strike the amended complaint and dismiss this
11 action without further notice to Plaintiff.

12 Plaintiff must clearly designate on the face of the document that it is the “First
13 Amended Complaint.” The first amended complaint must be retyped or rewritten in its
14 entirety on the court-approved form and may not incorporate any part of the original
15 Complaint by reference. Plaintiff may include only one claim per count.

16 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
17 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
18 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
19 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original
20 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
21 565, 567 (9th Cir. 1987).

22 **VI. Motion for Injunctive Relief**

23 As noted above, Plaintiff has also filed a motion for injunctive relief and a motion to
24 expedite seeking to enjoin Defendants from tampering with his mail to his son. Plaintiff
25 seeks an injunction until he exhausts prison administrative remedies.

27 ¹¹ Plaintiff also asserts a failure to provide postage for his outgoing mail. However,
28 absent more, that also fails to state a claim because it does not implicate a constitutionally
protected right.

1 To obtain injunctive relief, the moving party must show “that he is likely to succeed
2 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
3 that the balance of equities tips in his favor, and that an injunction is in the public interest.”
4 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008); Am. Trucking Assoc., Inc.
5 v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009). In addition, the “serious
6 questions” version of the sliding scale test for preliminary injunctions remains viable after
7 the Supreme Court’s decision in Winter. Alliance for the Wild Rockies v. Cottrell, 632 F.
8 3d 1127, 1134-35 (9th Cir. 2011). Under that test, a preliminary injunction is appropriate
9 when a plaintiff demonstrates that “serious questions going to the merits were raised and the
10 balance of hardships tips sharply in [plaintiff’s] favor.” Id. (citing Lands Council v. McNair,
11 537 F.3d 981, 987 (9th Cir. 2008) (en banc)). That approach requires that the elements of
12 the preliminary injunction test be balanced, so that a stronger showing of one element may
13 offset a weaker showing of another. “For example, a stronger showing of irreparable harm
14 to plaintiff might offset a lesser showing of likelihood of success on the merits.” Alliance
15 for the Wild Rockies, 632 F.3d at 1135. A plaintiff must also satisfy the other Winter factors,
16 including the likelihood of irreparable harm. Id. The moving party has the burden of proof
17 on each element of the test. Environmental Council of Sacramento v. Slater, 184 F. Supp.
18 2d 1016, 1027 (E.D. Cal. 2000).

19 In addition, a temporary restraining order without notice may be granted *only* if
20 “specific facts in an affidavit or verified complaint clearly show that immediate and
21 irreparable injury, loss, or damage will result to the movant before the adverse party can be
22 heard” and the movant certifies to the court in writing any efforts made to give notice and
23 the reasons that notice should not be required. Fed.R.Civ.P. 65(b). Further, “[t]he court may
24 only issue a preliminary injunction on notice to the adverse party.” Fed.R.Civ. P. 65(a)(1).

25 As discussed herein, Plaintiff fails to state a claim for violation of his constitutional
26 rights against any Defendant. Moreover, Plaintiff has not set forth specific facts that clearly
27 show that an immediate and irreparable injury, loss, or damage will result before the adverse
28 parties may be heard. Nor has he certified in writing the efforts made to give notice or

1 reasons why notice should not be required. For these reasons, Plaintiff’s motion for
2 injunctive relief and to expedite will be denied.

3 **VII. Warnings**

4 **A. Release**

5 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.
6 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay
7 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result
8 in dismissal of this action.

9 **B. Address Changes**

10 Plaintiff must file and serve a notice of a change of address in accordance with Rule
11 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
12 relief with a notice of change of address. Failure to comply may result in dismissal of this
13 action.

14 **C. Copies**

15 Plaintiff must submit an additional copy of every filing for use by the Court. See
16 LRCiv 5.4. Failure to comply may result in the filing being stricken without further notice
17 to Plaintiff.

18 **D. Possible “Strike”**

19 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails
20 to file an amended complaint correcting the deficiencies identified in this Order, the
21 dismissal may count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).
22 Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil
23 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior
24 occasions, while incarcerated or detained in any facility, brought an action or appeal in a
25 court of the United States that was dismissed on the grounds that it is frivolous, malicious,
26 or fails to state a claim upon which relief may be granted, unless the prisoner is under
27 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

28 / / /

**Instructions for a Prisoner Filing a Civil Rights Complaint
in the United States District Court for the District of Arizona**

1. Who May Use This Form. The civil rights complaint form is designed to help incarcerated persons prepare a complaint seeking relief for a violation of their federal civil rights. These complaints typically concern, but are not limited to, conditions of confinement. **This form should not be used to challenge your conviction or sentence.** If you want to challenge a state conviction or sentence, you should file a petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody. If you want to challenge a federal conviction or sentence, you should file a motion under 28 U.S.C. § 2255 to vacate sentence in the federal court that entered the judgment.

2. The Form. **Local Rule of Civil Procedure (LRCiv) 3.4(a) provides that complaints by incarcerated persons must be filed on the court-approved form.** The form must be typed or neatly handwritten. The form must be completely filled in to the extent applicable. All questions must be answered clearly and concisely in the appropriate space on the form. If needed, you may attach additional pages, **but no more than fifteen additional pages**, of standard letter-sized paper. You must identify which part of the complaint is being continued and number all pages. If you do not fill out the form properly, you will be asked to submit additional or corrected information, which may delay the processing of your action. You do not need to cite law.

3. Your Signature. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

4. The Filing and Administrative Fees. The total fees for this action are \$400.00 (\$350.00 filing fee plus \$50.00 administrative fee). If you are unable to immediately pay the fees, you may request leave to proceed *in forma pauperis*. Please review the “Information for Prisoners Seeking Leave to Proceed with a (Non-Habeas) Civil Action in Federal Court *In Forma Pauperis* Pursuant to 28 U.S.C. § 1915” for additional instructions.

5. Original and Judge’s Copy. You must send an **original plus one copy** of your complaint and of any other documents submitted to the Court. You must send one additional copy to the Court if you wish to have a file-stamped copy of the document returned to you. All copies must be identical to the original. Copies may be legibly handwritten.

6. Where to File. You should file your complaint in the division **where you were confined when your rights were allegedly violated.** See LRCiv 5.1(a) and 77.1(a). If you were confined in Maricopa, Pinal, Yuma, La Paz, or Gila County, file in the Phoenix Division. If you were confined in Apache, Navajo, Coconino, Mohave, or Yavapai County, file in the Prescott Division. If you were confined in Pima, Cochise, Santa Cruz, Graham, or Greenlee County, file in the Tucson Division. **Mail the original and one copy of the complaint with the \$400 filing and administrative fees or the application to proceed *in forma pauperis* to:**

Phoenix & Prescott Divisions:
U.S. District Court Clerk
U.S. Courthouse, Suite 130
401 West Washington Street, SPC 10
Phoenix, Arizona 85003-2119

OR

Tucson Division:
U.S. District Court Clerk
U.S. Courthouse, Suite 1500
405 West Congress Street
Tucson, Arizona 85701-5010

7. Change of Address. You must immediately notify the Court and the defendants in writing of any change in your mailing address. **Failure to notify the Court of any change in your mailing address may result in the dismissal of your case.**

8. Certificate of Service. You must furnish the defendants with a copy of any document you submit to the Court (except the initial complaint and application to proceed *in forma pauperis*). Each original document (except the initial complaint and application to proceed *in forma pauperis*) must include a certificate of service on the last page of the document stating the date a copy of the document was mailed to the defendants and the address to which it was mailed. See Fed. R. Civ. P. 5(a), (d). Any document received by the Court that does not include a certificate of service may be stricken. A certificate of service should be in the following form:

I hereby certify that a copy of the foregoing document was mailed
this _____ (month, day, year) to:

Name: _____

Address: _____

Attorney for Defendant(s)

(Signature)

9. Amended Complaint. If you need to change any of the information in the initial complaint, you must file an amended complaint. The amended complaint must be written on the court-approved civil rights complaint form. You may file one amended complaint without leave (permission) of Court before any defendant has answered your original complaint. See Fed. R. Civ. P. 15(a). After any defendant has filed an answer, you must file a motion for leave to amend and lodge (submit) a proposed amended complaint. LRCiv 15.1. In addition, an amended complaint may not incorporate by reference any part of your prior complaint. LRCiv 15.1(a)(2). **Any allegations or defendants not included in the amended complaint are considered dismissed.** All amended complaints are subject to screening under the Prison Litigation Reform Act; screening your amendment will take additional processing time.

10. Exhibits. You should not submit exhibits with the complaint or amended complaint. Instead, the relevant information should be paraphrased. You should keep the exhibits to use to support or oppose a motion to dismiss, a motion for summary judgment, or at trial.

11. Letters and Motions. It is generally inappropriate to write a letter to any judge or the staff of any judge. The only appropriate way to communicate with the Court is by filing a written pleading or motion.

12. Completing the Civil Rights Complaint Form.

HEADING:

1. Your Name. Print your name, prison or inmate number, and institutional mailing address on the lines provided.
2. Defendants. If there are **four or fewer** defendants, print the name of each. If you name **more than four** defendants, print the name of the first defendant on the first line, write the words “and others” on the second line, and attach an additional page listing the names of **all** of the defendants. Insert the additional page after page 1 and number it “1-A” at the bottom.
3. Jury Demand. If you want a jury trial, you must write “JURY TRIAL DEMANDED” in the space below “CIVIL RIGHTS COMPLAINT BY A PRISONER.” Failure to do so may result in the loss of the right to a jury trial. A jury trial is not available if you are seeking only injunctive relief.

Part A. JURISDICTION:

1. Nature of Suit. Mark whether you are filing the complaint pursuant to 42 U.S.C. § 1983 for state, county, or city defendants; “Bivens v. Six Unknown Federal Narcotics Agents” for federal defendants; or “other.” If you mark “other,” identify the source of that authority.
2. Location. Identify the institution and city where the alleged violation of your rights occurred.
3. Defendants. Print all of the requested information about each of the defendants in the spaces provided. If you are naming more than four defendants, you must provide the necessary information about each additional defendant on separate pages labeled “2-A,” “2-B,” etc., at the bottom. Insert the additional page(s) immediately behind page 2.

Part B. PREVIOUS LAWSUITS:

You must identify any other lawsuit you have filed in either state or federal court while you were a prisoner. Print all of the requested information about each lawsuit in the spaces provided. If you have filed more than three lawsuits, you must provide the necessary information about each additional lawsuit on a separate page. Label the page(s) as “2-A,” “2-B,” etc., at the bottom of the page and insert the additional page(s) immediately behind page 2.

Part C. CAUSE OF ACTION:

You must identify what rights each defendant violated. The form provides space to allege three separate counts (**one violation per count**). If you are alleging more than three counts, you must provide the necessary information about each additional count on a separate page. Number the additional pages “5-A,” “5-B,” etc., and insert them immediately behind page 5. Remember that you are limited to a total of fifteen additional pages.

1. Counts. You must identify which civil right was violated. **You may allege the violation of only one civil right per count.**
2. Issue Involved. Check the box that most closely identifies the issue involved in your claim. **You may check only one box per count.** If you check the box marked "Other," you must identify the specific issue involved.
3. Supporting Facts. After you have identified which civil right was violated, you must state the supporting facts. Be as specific as possible. You must state what each individual defendant did to violate your rights. If there is more than one defendant, you must identify which defendant did what act. You also should state the date(s) on which the act(s) occurred, if possible.
4. Injury. State precisely how you were injured by the alleged violation of your rights.
5. Administrative Remedies. You must exhaust any available administrative remedies before you file a civil rights complaint. See 42 U.S.C. § 1997e. Consequently, you should disclose whether you have exhausted the inmate grievance procedures or administrative appeals for each count in your complaint. If the grievance procedures were not available for any of your counts, fully explain why on the lines provided.

Part D. REQUEST FOR RELIEF:

Print the relief you are seeking in the space provided.

SIGNATURE:

You must sign your name and print the date you signed the complaint. Failure to sign the complaint will delay the processing of your action. Unless you are an attorney, you may not bring an action on behalf of anyone but yourself.

FINAL NOTE

You should follow these instructions carefully. Failure to do so may result in your complaint being stricken or dismissed. All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number the pages.

Name and Prisoner/Booking Number

Place of Confinement

Mailing Address

City, State, Zip Code

(Failure to notify the Court of your change of address may result in dismissal of this action.)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

_____,)
(Full Name of Plaintiff) Plaintiff,)

vs.)

CASE NO. _____
(To be supplied by the Clerk)

(1) _____,)
(Full Name of Defendant)

(2) _____,)

(3) _____,)

(4) _____,)

Defendant(s).)

Check if there are additional Defendants and attach page 1-A listing them.)

**CIVIL RIGHTS COMPLAINT
BY A PRISONER**

- Original Complaint
- First Amended Complaint
- Second Amended Complaint

A. JURISDICTION

1. This Court has jurisdiction over this action pursuant to:
- 28 U.S.C. § 1343(a); 42 U.S.C. § 1983
 - 28 U.S.C. § 1331; Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).
 - Other: _____.

2. Institution/city where violation occurred: _____.

B. DEFENDANTS

- 1. Name of first Defendant: _____ . The first Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
- 2. Name of second Defendant: _____ . The second Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
- 3. Name of third Defendant: _____ . The third Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
- 4. Name of fourth Defendant: _____ . The fourth Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)

If you name more than four Defendants, answer the questions listed above for each additional Defendant on a separate page.

C. PREVIOUS LAWSUITS

- 1. Have you filed any other lawsuits while you were a prisoner? Yes No
- 2. If yes, how many lawsuits have you filed? _____. Describe the previous lawsuits:
 - a. First prior lawsuit:
 - 1. Parties: _____ v. _____
 - 2. Court and case number: _____
 - 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - b. Second prior lawsuit:
 - 1. Parties: _____ v. _____
 - 2. Court and case number: _____
 - 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - c. Third prior lawsuit:
 - 1. Parties: _____ v. _____
 - 2. Court and case number: _____
 - 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____

If you filed more than three lawsuits, answer the questions listed above for each additional lawsuit on a separate page.

D. CAUSE OF ACTION

COUNT I

1. State the constitutional or other federal civil right that was violated: _____
_____.

2. **Count I.** Identify the issue involved. Check **only one**. State additional issues in separate counts.
 Basic necessities Mail Access to the court Medical care
 Disciplinary proceedings Property Exercise of religion Retaliation
 Excessive force by an officer Threat to safety Other: _____.

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count I. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

_____.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

_____.

5. **Administrative Remedies:**
a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No
b. Did you submit a request for administrative relief on Count I? Yes No
c. Did you appeal your request for relief on Count I to the highest level? Yes No
d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____
_____.

COUNT II

1. State the constitutional or other federal civil right that was violated: _____
_____.

2. **Count II.** Identify the issue involved. Check **only one**. State additional issues in separate counts.
 Basic necessities Mail Access to the court Medical care
 Disciplinary proceedings Property Exercise of religion Retaliation
 Excessive force by an officer Threat to safety Other: _____.

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count II. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

_____.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

_____.

5. **Administrative Remedies.**
a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No
b. Did you submit a request for administrative relief on Count II? Yes No
c. Did you appeal your request for relief on Count II to the highest level? Yes No
d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____
_____.

COUNT III

1. State the constitutional or other federal civil right that was violated: _____
_____.

2. **Count III.** Identify the issue involved. Check **only one**. State additional issues in separate counts.

<input type="checkbox"/> Basic necessities	<input type="checkbox"/> Mail	<input type="checkbox"/> Access to the court	<input type="checkbox"/> Medical care
<input type="checkbox"/> Disciplinary proceedings	<input type="checkbox"/> Property	<input type="checkbox"/> Exercise of religion	<input type="checkbox"/> Retaliation
<input type="checkbox"/> Excessive force by an officer	<input type="checkbox"/> Threat to safety	<input type="checkbox"/> Other: _____.	

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count III. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

_____.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

_____.

5. **Administrative Remedies.**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No

b. Did you submit a request for administrative relief on Count III? Yes No

c. Did you appeal your request for relief on Count III to the highest level? Yes No

d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____
_____.

If you assert more than three Counts, answer the questions listed above for each additional Count on a separate page.

E. REQUEST FOR RELIEF

State the relief you are seeking:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
DATE

SIGNATURE OF PLAINTIFF

(Name and title of paralegal, legal assistant, or other person who helped prepare this complaint)

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number all pages.