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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

NARVIS NONNETTE,
Plaintiff,
v.
GAVIN NEWSOM et al,
Defendants.

Case No. 5:20-cv-01218-CJC (MAA)

**MEMORANDUM DECISION AND
ORDER DISMISSING SECOND
AMENDED COMPLAINT WITH
LEAVE TO AMEND**

I. INTRODUCTION

On June 16, 2020, the Court received a *pro se* putative class action lawsuit filed by Plaintiffs Narvis Nonnette, William Roberts, and Richard Cooper, alleging violations of their civil rights pursuant to 42 U.S.C. § 1983. (Compl., ECF No. 1.) After Plaintiff Roberts severed his claims on August 31, 2020 (ECF No. 14) and Plaintiff Cooper was terminated on October 16, 2020 (ECF No. 21), the only remaining Plaintiff in this case is Plaintiff Nonnette (“Plaintiff”). Plaintiff filed a Request to Proceed Without Prepayment of Filing Fees on September 15, 2020 (ECF No. 16), which the Court granted on September 18, 2020 (ECF No. 17).

On October 22, 2020, the Court screened and dismissed the Complaint with leave to amend. (Order Dismiss. Compl., ECF No. 22.) On February 3, 2021, the Court received Plaintiff’s First Amended Complaint (“FAC”). (FAC, ECF No. 29.)

1 On February 19, 2021, the Court received a second document entitled “First
2 Amended Complaint,” which differed from the FAC and therefore was docketed as
3 Plaintiff’s Second Amended Complaint (“SAC”). (SAC, ECF No. 31.)

4 The Court has screened the SAC, and dismisses it with leave to amend for the
5 reasons stated below. No later than May 13, 2021, Plaintiff must either: (1) file a
6 Third Amended Complaint; or (2) advise the Court that Plaintiff no longer intends to
7 pursue this lawsuit.

8 9 **II. PLAINTIFF’S ALLEGATIONS AND CLAIMS¹**

10 **A. Defendants**

11 The SAC is filed against: (1) Governor Gavin Newsom, governor of the State
12 of California; (2) Doe #1; (3) Sheriff Chad Bianco, Sheriff of Riverside County;
13 and (4) Doe #2 (each, a “Defendant” and collectively, “Defendants”). (SAC 3–4.)²
14 Each Defendant is sued in his or her individual and official capacities. (*Id.*)

15 16 **B. Claim I**

17 On March 19, 2020, Defendant Newsom issued an “illegal and
18 unconstitutional” Executive Order to the state Judicial Council, giving them “carte
19 blanche” discretion to make any modifications to legal practice and procedure
20 necessary in order to continue conducting business. (*Id.* at 6–7.) Defendant Doe #1
21 assisted Defendant Newsom. (*Id.* at 4.) Plaintiff asserts that Defendant Newsom
22 “seized control of the judicial and legislative branches of California government by
23 empowering himself to govern by decree and suspend any laws that stand in his
24 way.” (*Id.* at 9.) Plaintiff contends that even if the language in the Emergency
25

26 ¹ The Court summarizes Plaintiff’s allegations and claims in the SAC, without
27 opining on their veracity or make any findings of fact.

28 ² Citations to pages in docketed documents reference those generated by CM/ECF.

1 Service Act (“Act”) is interpreted as giving Defendant Newsom legislative powers,
2 then the Act itself must be struck down as unconstitutional in violation of federal
3 and state constitutions and under the separation of powers doctrine. (*Id.*)

4 Armed with the Executive Order from Defendant Newsom, the Judicial
5 Council issued an “illegal and unconstitutional” statewide order on March 23, 2020
6 to the judicial branch, including all superior courts, continuing all criminal matters
7 indefinitely and eliminating all statutory timelines for prosecuting a criminal case—
8 specifically, the “10-court-day” and “60-calendar-day” rules. (*Id.* at 7–8.) As a
9 result, the California court system was “closed” between March 19, 2020 to June 17,
10 2020 (“Closure”). (*Id.* at 8.)

11 Plaintiff asserts that by issuing the Executive Order, Defendant Newsom
12 “ordered and set in motion” the deprivation of Plaintiff’s rights, as follows. First,
13 the Riverside County Superior Court (“Superior Court”) held proceedings without
14 Plaintiff present during the Closure, and without providing notice to Plaintiff or his
15 counsel, in violation of the Sixth Amendment and Fourteenth Amendment Due
16 Process Clause, and also in violation of Plaintiff’s Sixth Amendment right to
17 counsel. (*Id.* at 5, 8–9.) Second, the Superior Court summarily waived Plaintiff’s
18 Sixth Amendment right to a speedy trial without Plaintiff’s consent. (*Id.* at 5, 9.)
19 Third, Plaintiff was denied all privileges and immunities as a United States citizen.
20 (*Id.* at 5–6, 9.) Fourth, Plaintiff was denied equal protection of the laws, in violation
21 of the Fourteenth Amendment. (*Id.* at 6, 9.)
22

23 **C. Claim II**

24 Defendant Bianco ordered and set in motion “detaining and clustering of
25 Plaintiff with other pre-trial detainees in small living spaces waiting for Coronavirus
26 to explode.” (*Id.* at 11.) On April 10, 2020, Defendant Bianco ordered a lockdown
27 of all Riverside County Jail inmates, including Plaintiff, due to the Coronavirus,
28 which remains in effect as of February 8, 2021. (*Id.* at 12.) Defendant Bianco failed

1 to put in place any type of safety measures that would slow or stop the spread of
2 infection. (*Id.*) Defendant Bianco has turned Riverside County Jail into a
3 “superspreader distribution center.” (*Id.* at 13.) Defendant Doe #2 assisted
4 Defendant Bianco. (*Id.* at 4.)

5 Defendant Bianco has not followed this Court’s order to provide social
6 distancing. (*Id.* at 13.) On court days, inmates are: packed into holding cells to
7 await transport to the court; chained up and packed in “side by side like sardines” in
8 the bus; unloaded from the buses and packed into court holding cells; and are only
9 socially-distanced once they enter the courtroom. (*Id.*) Dorms consist of ten-man
10 and twenty-man units and bunk beds are space approximately twenty inches apart
11 and twenty inches above. (*Id.*) Inmates are ordered to their beds at 11 p.m. and
12 program resumes the following day at 8 a.m., so inmates are forced to spend nine
13 hours each day confined to their beds in close proximity with each other. (*Id.* at 14.)

14 On October 28, 2020, Plaintiff was moved from cell E1-18 to E3-56. (*Id.*)
15 Plaintiff did not request a cell move. (*Id.*) Plaintiff’s new cellmate was Scott
16 Lapresle. (*Id.* at 15.) That night Plaintiff could not sleep because Mr. Lapresle was
17 breathing and snoring so loudly it sounded like he was dying. (*Id.*) When Plaintiff
18 asked Mr. Lapresle about his breathing the next morning, Mr. Lapresle said it was
19 due to growths on his heart. (*Id.*) A few days later, medical staff came to give the
20 over fifty inmates Coronavirus tests, which are given every two weeks. (*Id.*)
21 Medical staff gave Plaintiff a Coroavirus test, but did not ask Mr. Lapresle to test.
22 (*Id.*) When Plaintiff asked Mr. Lapresle why he did not take the test, Mr. Lapresle
23 said they “they no [sic] better than to ask him.” (*Id.*)

24 On November 8, 2020, Mr. Lapresle was breathing erratically and struggling
25 to get air, wheeled himself to the nurses’ station, and was rushed to an outside
26 hospital at Moreno Valley. (*Id.* at 15–16.) At 11:30 p.m. that night, Plaintiff was
27 called to the nurses’ station and informed that Mr. Lapresle had a serious case of
28 Coronavirus and was on a respirator and that Plaintiff had to test for the virus. (*Id.*)

1 at 16.) Plaintiff was tested and placed into quarantine; the test came back positive
2 five days later. (*Id.*) Plaintiff was transferred to Banning County Jail for an
3 additional seventeen days of quarantine and treatment. (*Id.*) Plaintiff asserts that the
4 unrequested cell move from a Coronavirus-free cell to a Coronavirus-infected cell
5 with Mr. Lapresle repeatedly refusing the test demonstrates a deliberate indifference
6 to Plaintiff’s safety and well-being and is punishment without due process of law.
7 (*Id.*)

8 Plaintiff asserts a violation of the Eighth Amendment right against cruel and
9 unusual punishment and Fifth Amendment guarantee of due process. (*Id.* at 11.)

10
11 **D. Relief Requested**

12 Plaintiff seeks: (1) damages in excess of \$1,000,000; (2) a declaration
13 affirming that a state governor cannot suspend Plaintiff’s constitutional rights as a
14 United States citizen for any reason, “Coronavirus or otherwise”; (3) a declaration
15 affirming that a state governor cannot steal liberty without due process of law for
16 any reason “pandemic or otherwise”; (4) a declaration that a state governor cannot
17 change the law, and that only the legislature can; and (5) a preliminary injunction
18 staying all state court proceedings pending federal court adjudication of this case.
19 (*Id.* at 17–18.)

20
21 **III. LEGAL STANDARD**

22 Federal courts must conduct a preliminary screening of any case in which a
23 prisoner seeks redress from a governmental entity or officer or employee of a
24 governmental entity (28 U.S.C. § 1915A), or in which a plaintiff proceeds *in forma*
25 *pauperis* (28 U.S.C. § Section 1915(e)(2)(B)). The court must identify cognizable
26 claims and dismiss any complaint, or any portion thereof, that is: (1) frivolous or
27 malicious, (2) fails to state a claim upon which relief may be granted, or (3) seeks

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1 monetary relief from a defendant who is immune from such relief. 28 U.S.C.
2 §§ 1915(e)(2)(B), 1915A(b).

3 When screening a complaint to determine whether it fails to state a claim upon
4 which relief can be granted, courts apply the Federal Rule of Civil Procedure³
5 12(b)(6) (“Rule 12(b)(6)”) standard. *See Wilhelm v. Rotman*, 680 F.3d 1113, 1121
6 (9th Cir. 2012) (applying the Rule 12(b)(6) standard to 28 U.S.C. § Section 1915A);
7 *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (applying the Rule 12(b)(6)
8 standard to 28 U.S.C. § 1915(e)(2)(B)(ii)). To survive a Rule 12(b)(6) dismissal, “a
9 complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
10 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
11 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
12 plausibility when the plaintiff pleads factual content that allows the court to draw the
13 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*
14 Although “detailed factual allegations” are not required, “an unadorned, the-
15 defendant-unlawfully-harmed-me accusation”; “labels and conclusions”; “naked
16 assertion[s] devoid of further factual enhancement”; and “[t]hreadbare recitals of the
17 elements of a cause of action, supported by mere conclusory statements” do not
18 suffice. *Id.* “Dismissal under Rule 12(b)(6) is appropriate only where the complaint
19 lacks a cognizable legal theory or sufficient facts to support a cognizable legal
20 theory.” *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir.
21 2013) (quoting *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th
22 Cir. 2008)).

23 In reviewing a Rule 12(b)(6) motion to dismiss, courts will accept factual
24 allegations as true and view them in the light most favorable to the plaintiff. *Park v.*
25 *Thompson*, 851 F.3d 910, 918 (9th Cir. 2017). Moreover, where a plaintiff is
26 appearing *pro se*, particularly in civil rights cases, courts construe pleadings liberally
27

28 ³ All further references to “Rule” are to the Federal Rules of Civil Procedure.

1 and afford the plaintiff any benefit of the doubt. *Wilhelm*, 680 F.3d at 1121. “If
2 there are two alternative explanations, one advanced by defendant and the other
3 advanced by plaintiff, both of which are plausible, plaintiff’s complaint survives a
4 motion to dismiss under Rule 12(b)(6).” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th
5 Cir. 2011). However, the liberal pleading standard “applies only to a plaintiff’s
6 factual allegations.” *Neitzke v. Williams*, 490 U.S. 319, 330 n.9 (1989), *superseded*
7 *by statute on other grounds*, 28 U.S.C. § 1915. Courts will not “accept any
8 unreasonable inferences or assume the truth of legal conclusions cast in the form of
9 factual allegations.” *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). In
10 giving liberal interpretations to complaints, courts “may not supply essential
11 elements of the claim that were not initially pled.” *Chapman v. Pier 1 Imps. (U.S.),*
12 *Inc.*, 631 F.3d 939, 954 (9th Cir. 2011) (quoting *Pena v. Gardner*, 976 F.2d 469, 471
13 (9th Cir. 1992)).

14 15 **IV. DISCUSSION**

16 **A. Exhaustion of Available Administrative Remedies Is Mandatory**

17 As part of the Prison Litigation Reform Act of 1995 (“PLRA”), Congress
18 amended and strengthened the requirement that prisoners pursuing civil rights claims
19 under Section 1983 or another Federal statute must first exhaust available
20 administrative remedies. *See* 42 U.S.C. § 1997e(a) (“No action shall be brought
21 with respect to prison conditions under [Section 1983], or any other Federal law, by
22 a prisoner confined in any jail, prison, or other correctional facility until such
23 administrative remedies as are available are exhausted.”). “[T]he PLRA’s
24 exhaustion requirement applies to all inmate suits about prison life, whether they
25 involve general circumstances or particular episodes” *Porter v. Nussle*, 534
26 U.S. 516, 532 (2002). The PLRA’s exhaustion requirement is mandatory, *Jones v.*
27 *Bock*, 549 U.S. 199, 211 (2007), but “hinges on the ‘availab[ility]’ of administrative
28 remedies: An inmate, that is, must exhaust available remedies, but need not exhaust

1 unavailable ones,” *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) (alteration in
2 original). Exhaustion cannot be satisfied by exhausting available remedies during
3 the course of the litigation. *McKinney v. Carey*, 311 F.3d 1198, 1199–1200 (9th Cir.
4 2002). If a prisoner has not completed his or her available administrative remedies
5 before filing a complaint, the court must dismiss the action without prejudice. *Id.* at
6 1200–01.

7 Neither the Complaint nor SAC disclose whether Plaintiff exhausted
8 administrative remedies before filing this lawsuit. (*See generally* Compl., SAC.)
9 The FAC—which the Court never screened because the SAC was received shortly
10 after the FAC was submitted—states that Plaintiff did not file a grievance
11 concerning the issues in the lawsuit, and did not complete the grievance procedure.
12 (FAC 2.) Specifically, the FAC states: “The issues in this Complaint are
13 constitutional questions of law and deal with an emergency pandemic and life and
14 death situations A grievance has nothing to do with state court proceedings.”
15 (*Id.*)

16 “Failure to exhaust under the PLRA is ‘an affirmative defense the defendant
17 must plead and prove.’” *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014)
18 (quoting *Jones*, 549 U.S. at 204). Defendants have not yet been served and have not
19 met their burden “to prove that there was an available administrative remedy, and
20 that the prisoner did not exhaust that available remedy.” *See id.* at 1172. The Court
21 cautions Plaintiff that if he did not exhaust available administrative remedies before
22 filing this lawsuit, the lawsuit will have to be dismissed without prejudice, even if
23 Plaintiff later exhausts administrative remedies. *See McKinney*, 311 F.3d at 1200–
24 01. Exhaustion is required even if Plaintiff seeks relief that is not available in
25 grievance proceedings. *See Porter*, 534 U.S. at 524. There is no exception to the
26 PLRA’s administrative exhaustion requirement for alleged threat of potential harm.
27 *See, e.g., Wells v. CDCR*, No. 2:18-cv-0970 WBS KJN P, 2018 U.S. Dist. LEXIS
28 96980, at *5 (E.D. Cal. June 8, 2018) (rejecting argument that plaintiff was exempt

1 from administratively exhausting claims due to “emergency complaint of potential
2 harm” because “there is no exception to the administrative exhaustion requirement
3 based on an alleged threat of potential harm”); *Hoffman v. Palagummi*, No. 2:16-cv-
4 3030-TLN-EFB P, 2019 U.S. Dist. LEXIS 23741, at *9 (E.D. Cal. Feb. 12, 2019)
5 (“[T]he PLRA makes no provision for an ‘imminent danger’ or other emergency
6 exception to its exhaustion requirements.”).

7 If Plaintiff did not exhaust his available administrative remedies prior to filing
8 this lawsuit, he may voluntarily dismiss this lawsuit and re-file it after completing
9 mandatory exhaustion (a Notice of Voluntary Dismissal form is attached).

11 **B. Plaintiff Fails to State Any Section 1983 Claims**

12 1. Legal Standard

13 Section 1983 provides:

14 Every person who, under color of any statute, ordinance, regulation,
15 custom, or usage, of any State . . . , subjects, or causes to be subjected,
16 any citizen of the United States or other person within the jurisdiction
17 thereof to the deprivation of any rights, privileges, or immunities
18 secured by the Constitution and laws, shall be liable to the party
injured in an action at law

19 42 U.S.C. § 1983. “Section 1983 does not create any substantive rights, but is
20 instead a vehicle by which plaintiffs can bring federal constitutional and statutory
21 challenges to actions by state and local officials.” *Anderson v. Warner*, 451 F.3d
22 1063, 1067 (9th Cir. 2006). “The purpose of §1983 is to deter state actors from
23 using the badge of their authority to deprive individuals of their federally
24 guaranteed rights and to provide relief to victims if such deterrence fails.” *Wyatt v.*
25 *Cole*, 504 U.S. 158, 161 (1992). “To state a claim under § 1983, a plaintiff must
26 allege the violation of a right secured by the Constitution and laws of the United
27 States, and must show that the alleged deprivation was committed by a person
28 acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988).

1 Liability under Section 1983 cannot be established solely on a theory of
2 *respondeat superior* based on the unconstitutional conduct of subordinates. *See*
3 *Iqbal*, 556 U.S. at 676 (“Government officials may not be held liable for the
4 unconstitutional conduct of their subordinates under a theory of *respondeat*
5 *superior*.”); *Monell v. Dep’t of Social Servs.*, 436 U.S. 658, 691 (1978) (finding no
6 vicarious liability for municipalities under Section 1983). “The inquiry into
7 causation must be individualized and focus on the duties and responsibilities of
8 each individual defendant whose acts or omissions are alleged to have caused a
9 constitutional deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1998).
10 The requisite causal connection can be established when a person (1) “does an
11 affirmative act, participates in another’s affirmative acts, or omits to perform an act
12 which he is legally required to do that causes the deprivation”; or (2) “set[s] in
13 motion a series of acts by others which the actor knows or reasonably should know
14 would cause others to inflict the constitutional injury.” *Lacey v. Maricopa County*,
15 693 F.3d 896, 915 (9th Cir. 2012) (en banc) (quoting *Johnson v. Duffy*, 588 F.2d
16 740, 743–44 (9th Cir. 1978)). “Even if a supervisory official is not directly
17 involved in the allegedly unconstitutional conduct, ‘[a] supervisor can be liable in
18 his individual capacity for his own culpable action or inaction in the training,
19 supervision, or control of his subordinates; for his acquiescence in the constitutional
20 deprivation; or for conduct that showed a reckless or callous indifference to the
21 rights of others.’” *Keates v. Koile*, 883 F.3d 1228, 1243 (9th Cir. 2018) (alteration
22 in original) (quoting *Starr*, 652 F.3d at 1208).

23
24 2. Plaintiff Fails to State a Claim Against Doe Defendants #1–2

25 “[C]onclusory and/or speculative allegations about a Doe Defendant’s
26 possible or suspected involvement in the constitutional deprivations alleged will not
27 support a claim against that individual and will result in dismissal.” *Merritt v. City*
28 *of Laguna Beach*, No. SACV 19-2437-CJC (KS), 2020 U.S. Dist. LEXIS 119814, at

1 *11 (C.D. Cal. May 19, 2020). The SAC names two Doe Defendants (SAC 4), but
2 does not allege any specific acts of wrongdoing by either Defendant Doe #1 or #2
3 (*see generally id.*). The only allegation about Defendant Doe #1 is that he or she
4 “assisted Defendant Newsom by setting in motion a series of acts that he/she should
5 have known would cause Plaintiff a constitutional injury,” while the only allegation
6 regarding Doe Defendant #2 is that he or she “assisted Defendant Bianco.” (*Id.* at
7 4.) These speculative allegations are insufficient to state a claim against Defendants
8 Doe #1–2. *See Twombly*, 550 U.S. at 555 (“Factual allegations must be enough to
9 raise a right to relief above the speculative level . . .”).

10 “As a general rule, the use of ‘John Doe’ to identify a defendant is not
11 favored.” *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). However, there
12 are circumstances where the identity of an alleged defendant will not be known
13 before filing a complaint. In such situations, plaintiffs should be given an
14 opportunity through discovery to identify the unknown defendants. *Id.* Here,
15 however, it appears that Defendants Doe #1–2 may be “merely placeholders
16 representing Plaintiff’s misguided attempt to preserve the possibility of adding
17 additional defendants in the future.” *Merritt*, 2020 U.S. Dist. LEXIS 119814, at *11.
18 The proper method of adding new parties in federal court is Federal Rule of Civil
19 Procedure 15. *Fifty Assoc. v. Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1191 (9th
20 Cir. 1970); *Coleman v. Fed. Intermediate Credit Bank*, 600 F. Supp. 97, 101 (D. Or.
21 1984).

22 For these reasons, Plaintiff fails to state any claims against Defendants Doe
23 #1–2. If Plaintiff includes Doe Defendants in any amended complaint, he must
24 correct these deficiencies or risk their dismissal.

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1 3. Plaintiff Fails to State a Claim Against Defendant Newsom in
2 his Individual Capacity

3 a. *Sixth Amendment Rights to Speedy Trial, Presence, and*
4 *Counsel; Fourteenth Amendment Right to Due Process*

5 “The Sixth Amendment provides that ‘in all criminal prosecutions, the
6 accused shall enjoy the right to a speedy and public trial.’” *United States v.*
7 *Sandoval*, 990 F.2d 481, 482 (9th Cir. 1993)) (quoting U.S. Const. amend. VI). The
8 Sixth Amendment also provides that “[i]n all criminal prosecutions, the accused
9 shall enjoy the right . . . to have the Assistance of Counsel for his defence.”
10 *Nordstrom v. Ryan*, 762 F.3d 903, 909 (9th Cir. 2014) (alteration in original)
11 (quoting U.S. Const. amend. VI). The Sixth Amendment’s Confrontation Clause
12 guarantees “the accused’s right to be present in the courtroom at every stage of his
13 trial.” *Illinois v. Allen*, 397 U.S. 337, 338 (1970). The constitutional right to
14 presence is “protected by the Due Process Clause in some situations where the
15 defendant is not actually confronting witnesses or evidence against him.” *United*
16 *States v. Gagnon*, 470 U.S. 522, 526 (1985).

17 Plaintiff alleges that Defendant Newsom violated his Sixth Amendment and
18 Fourteenth Amendment Due Process rights by issuing an Executive Order that gave
19 the state Judicial Council “carte blanche” discretion to make any modifications to
20 legal practice and procedure necessary in order to continue conducting business.
21 (SAC 7.) Plaintiff asserts that as a result of Defendant Newsom’s Executive Order,
22 the Judicial Council continued all criminal matters and there was a Closure of
23 California courts between March 19, 2020 to June 17, 2020. (*Id.* at 8.) Plaintiff
24 blames Defendant Newsom for the Superior Court holding proceedings without
25 Plaintiff during the Closure without providing notice to Plaintiff or his counsel, and
26 for the Superior Court waiving Plaintiff’s Sixth Amendment right to a speedy trial
27 without his consent. (*Id.* at 5, 8–9.)

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1 Plaintiff's Sixth Amendment and Fourteenth Amendment Due Process claims
2 against Defendant Newsom fail for three reasons. First, the SAC does not allege a
3 non-speculative causal connection between Defendant Newsom's only action
4 alleged in the SAC—issuing an Executive Order empowering the state Judicial
5 Council to respond to COVID-19—and Plaintiff's constitutional harms. *See*
6 *Twombly*, 550 U.S. at 556 (explaining that Rule 8 requires that “factual allegations
7 must be enough to raise a right to relief above the speculative level”). Defendant
8 Newsom cannot be held responsible under a theory of *respondeat superior* for the
9 actions of others. *See Iqbal*, 556 U.S. at 676. There is nothing in the SAC
10 connecting Defendant Newsom to the Superior Court's alleged infringements of
11 Plaintiff's constitutional rights other than “labels and conclusion” and ““naked
12 assertion[s]’ devoid of ‘further factual enhancement.’” *See Iqbal*, 556 U.S. at 678
13 (quoting *Twombly*, 550 U.S. at 555, 557). “A plaintiff must allege facts, not simply
14 conclusions, that show an individual was personally involved in the deprivation of
15 his civil rights.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

16 Second, because Plaintiff has a pending state criminal proceeding, the Court
17 would have to stay Plaintiff's Sixth Amendment and Fourteenth Amendment Due
18 Process claims in accordance with *Younger* abstention until the end of Plaintiff's
19 state criminal prosecution. *See Gilbertson v. Albright*, 381 F.3d 965, 968 (9th Cir.
20 2004). Under *Younger v. Harris*, 401 U.S. 37 (1971), a federal court generally must
21 abstain from hearing a case that would enjoin or otherwise interfere with ongoing
22 state criminal proceedings. *Younger* abstention is required if the following elements
23 are met: (1) state proceedings are ongoing; (2) the state proceedings implicate
24 important state interests; (3) the state proceedings provide the federal litigant an
25 adequate opportunity to raise the federal claims; and (4) the federal proceedings
26 would interfere with the state proceedings in a way that *Younger* disapproves. *San*
27 *Jose Silicon Valley Chamber of Com. Pol. Action Comm. v. City of San Jose*, 546
28 F.3d 1087, 1092 (9th Cir. 2008). A narrow exception to *Younger* abstention exists,

1 but only “in cases of proven harassment or prosecutions undertaken by state officials
2 in bad faith without hope of obtaining a valid conviction and perhaps in other
3 extraordinary circumstances where irreparable injury can be shown is federal
4 injunctive relief against pending state prosecutions appropriate.” *Perez v. Ledesma*,
5 401 U.S. 82, 85 (1971); *see also Middlesex County Ethics Comm. v. Garden State*
6 *Bar Ass’n.*, 457 U.S. 423, 435 (1982).

7 Each of the *Younger* elements is met in this case. First, Plaintiff’s state
8 criminal proceeding is ongoing, as stated in the SAC. (*See generally* SAC.)
9 Second, the state criminal proceedings implicate important state interests. *See Kelly*
10 *v. Robinson*, 479 U.S. 36, 49 (1986) (“[T]he States’ interest in administering their
11 criminal justice systems free from federal interference is one of the most powerful
12 of the considerations that should influence a court considering equitable types of
13 relief.”). Third, the state proceedings provide Plaintiff an adequate opportunity to
14 raise his claims, including trial and state appellate review. *See Pennziol Co. v.*
15 *Texaco, Inc.*, 481 U.S. 1, 15 (1987) (holding that federal courts should assume that
16 state procedures will afford adequate opportunity for consideration of constitutional
17 claims “in the absence of unambiguous authority to the contrary”). Fourth,
18 Plaintiff’s Sixth Amendment and Fourteenth Amendment Due Process claims
19 threaten to interfere with the state criminal proceedings in a manner that *Younger*
20 disapproves. *See Baffert v. Cal. Horse Racing Bd.*, 332 F.3d 613, 617 (9th Cir.
21 2003) (concluding that the fact that a state proceeding is ongoing would necessarily
22 mean interference by a federal court). Furthermore, Plaintiff has not clearly alleged
23 a basis for an exception to the application of *Younger* abstention. Thus, the Court is
24 constrained to stay Plaintiff’s claims pursuant to *Younger*.

25 Finally, Plaintiff’s Sixth Amendment claims are not cognizable in a Section
26 1983 action at this time for a separate reason. Federal law provides two main
27 avenues to relief on complaints related to imprisonment: (1) a petition for habeas
28 corpus, 28 U.S.C. § 2254, and (2) a complaint under Section 1983. *Muhammed v.*

1 *Close*, 540 U.S. 749, 750 (2004) (per curiam). “Challenges to the validity of any
2 confinement or to particulars affecting its duration are the province of habeas
3 corpus; requests for relief turning on circumstances of confinement may be
4 presented in a § 1983 action.” *Id.* (citations omitted). Habeas is the exclusive
5 vehicle for claims brought by state prisoners that fall within the core of habeas.
6 *Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016). A Section 1983 action
7 challenging a conviction or sentence does not accrue and cannot be pursued until the
8 underlying conviction or sentence is invalidated. *Heck v. Humphrey*, 512 U.S. 477,
9 489–90 (1994); *Rosales-Martinez v. Palmer*, 753 F.3d 890, 896 (9th Cir. 2014).

10 Here, Plaintiff’s Sixth Amendment and Fourteenth Amendment Due Process
11 claims would necessarily imply the invalidity of Plaintiff’s conviction, and
12 therefore cannot be brought in a Section 1983 action until his underlying conviction
13 or sentence is invalidated. *See, e.g., Valdez v. Rosenblum*, 302 F.3d 1039, 1049 (9th
14 Cir. 2002) (barring under *Heck* a Sixth Amendment right to counsel claim because
15 it would necessarily imply the invalidity of plaintiff’s conviction); *Peterson v.*
16 *County of Okanogan*, No. CV-07-0394-EFS, 2008 U.S. Dist. LEXIS 140125, at *6
17 (E.D. Wash. Mar. 28, 2008) (“The *Heck* bar applies because, if the Court
18 determined that a speedy trial violation had occurred, this ruling would ‘necessarily
19 imply the invalidity of [Plaintiff’s] conviction.’”) (quoting *Heck*, 512 U.S. at 487));
20 *Langrock v. County of Ventura*, No. CV 17-01200 BRO (RAO), 2017 U.S. Dist.
21 LEXIS 225900, at *13–14 (C.D. Cal. May 19, 2017) (“[I]f this court were to enter a
22 judgment based on a determination that [Plaintiff’s] alleged absence[] made his
23 criminal proceedings fundamentally unfair, it would be implying the invalidity of
24 his criminal proceedings. Such a claim is properly asserted in a habeas corpus
25 petition, not in a section 1983 civil rights action.”) (internal citation and quotation
26 marks omitted)).

27 For these reasons, the SAC fails to state any Sixth Amendment and Fourteenth
28 Amendment Due Process claims against Defendant Newsom. If Plaintiff includes

1 these claims in any amended complaint, they will be subject to *Younger* abstention.
2 Only after the underlying criminal case is concluded and Plaintiff can demonstrate
3 that his underlying conviction has been overturned will such claims be cognizable
4 under Section 1983.

5
6 b. *Fourteenth Amendment Equal Protection*

7 “The Equal Protection Clause of the Fourteenth Amendment provides that
8 ‘[n]o State shall . . . deny to any person within its jurisdiction the equal protection of
9 the laws.’” *Angelotti Chiropractic v. Baker*, 791 F.3d 1075, 1085 (9th Cir. 2015)
10 (alteration in original) (quoting U.S. Const. amend. XIV, § 1). “The Equal
11 Protection Clause requires the State to treat all similarly situated people equally.”
12 *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1123 (9th Cir. 2013).
13 “This does not mean, however, that all prisoners must receive identical treatment
14 and resources.” *Id.* A plaintiff can state an equal protection claim: (1) by alleging
15 “facts plausibly showing that ‘the defendants acted with an intent or purpose to
16 discriminate against [them] based upon membership in a protected class,” *id.*
17 (alteration in original) (quoting *Thornton v. City of St. Helens*, 425 F.3d 1158, 1166
18 (9th Cir. 2005)); or (2) as a “class of one” by alleging that plaintiff has “been
19 intentionally treated differently from others similarly situated and that there is no
20 rational basis for the treatment,” *Village of Willowbrook v. Olech*, 528 U.S. 562,
21 564 (2000).

22 Here, Plaintiff alleges that Defendant Newsom ordered and set in motion the
23 deprivation of Plaintiff’s right to equal protection of the law. (SAC 6, 9.) These
24 allegations do not state a claim because they are “labels and conclusions” and
25 “devoid of ‘further enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550
26 U.S. at 555, 557). In addition, nowhere in the SAC does Plaintiff identify his
27 protected class. (*See generally id.*) Prisoners are not a suspect class for equal
28 protection purposes, *Rodriguez v. Cook*, 169 F.3d 1176, 1179 (9th Cir. 1999), and

1 Plaintiff does not allege that Defendants treated Plaintiff differently due to a suspect
2 distinction, *see New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (noting that
3 “suspect distinctions such as race, religion, or alienage” are protected classes for
4 equal protection purposes). Moreover, Plaintiff also does not include any allegations
5 from which it reasonably could be inferred that Defendant Newsom acted with an
6 intent or purpose to discriminate against Plaintiff *because of* his membership in a
7 protected class. *See Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003)
8 (“Intentional discrimination means that a defendant acted at least in part *because of* a
9 plaintiff’s protected status.”) (quoting *Maynard v. City of San Jose*, 37 F.3d 1396,
10 1404 (9th Cir. 1994)). Finally, Plaintiff does not allege any facts to support the
11 conclusion that Defendant Newsom intentionally treated Plaintiff differently from
12 others similarly situated without any rational basis for the treatment. *See Village of*
13 *Willowbrook*, 528 U.S. at 564.

14 For these reasons, Plaintiff fails to state a Fourteenth Amendment equal
15 protection claim against Defendant Newsom. If Plaintiff includes a Fourteenth
16 Amendment equal protection claim in any amended complaint, he must cure these
17 deficiencies or risk its dismissal.

18
19 c. *Privileges and Immunities Clause*

20 The Privileges and Immunities Clause provides that “[t]he Citizens of each
21 State shall be entitled to all Privileges and Immunities of Citizens in the several
22 States.” U.S. Const. art. IV, § 2, cl. 1. “This clause seeks to prevent ‘a state from
23 discriminating against citizens of other states in favor of its own.’” *Nat’l Ass’n for*
24 *the Advancement of Multijurisdiction Prac. v. Berch*, 973 F. Supp. 2d 1082, 1110
25 (D. Ariz. 2013) (quoting *Hague v. C.I.O.*, 307 U.S. 496, 511 (1939)).
26 “Discrimination on the basis of out-of-state residency is a necessary element for a
27 claim under the Privileges and Immunities Clause.” *Gianni v. Real*, 911 F.2d 354,
28 357 (9th Cir. 1990).

1 Here, Plaintiff alleges that Defendant Newsom ordered the suspension of
2 Plaintiff's privileges and immunities. (SAC 6, 9.) These allegations cannot state a
3 claim because they are conclusory and "devoid of 'further enhancement.'" *Iqbal*,
4 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557). Furthermore, there are no
5 allegations to suggest that the Privileges and Immunities Clause even applies to this
6 lawsuit, as there are no allegations from which it reasonably could be inferred that
7 Defendant Newsom discriminated against Plaintiff on the basis of his out-of-state
8 residency. *See Gianni*, 911 F.2d at 357 ("The absence of any disparate treatment of
9 nonresidents is fatal to [plaintiff's] claims.") Indeed, Plaintiff does not even allege
10 that he is an out-of-state resident. (*See generally* SAC.)

11 For these reasons, Plaintiff fails to state a privileges and immunities claim
12 against Defendant Newsom. If Plaintiff includes a privileges and immunities claim
13 in any amended complaint, he must cure these deficiencies or risk its dismissal.

14
15 4. Plaintiff Fails to State a Claim Against Defendant Newsom in
16 his Official Capacity

17 A suit against a defendant in his or her official capacity "generally
18 represent[s] only another way of pleading an action against an entity of which an
19 officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (citation
20 omitted) (quoting *Monell*, 436 U.S. at 690 n.55). Plaintiff alleges that Defendant
21 Newsom is the Governor of California. (SAC 3.) Thus, the official capacity claim
22 against Defendant Newsom is treated as a claim against the State of California. *See*
23 *Leer*, 844 F.2d at 631–32 (explaining that a lawsuit against state prison officials in
24 their official capacities was a lawsuit against the state).

25 "The Eleventh Amendment prohibits federal courts from hearing suits brought
26 against an unconsenting state." *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951
27 F.2d 1050, 1053 (9th Cir. 1991). "[A]n entity with Eleventh Amendment immunity
28 is not a 'person' within the meaning of § 1983." *Howlett v. Rose*, 496 U.S. 356, 365

1 (1990) (discussing *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989)). “State
2 immunity extends to state agencies and to state officers, who act on behalf of the
3 state and can therefore assert the state’s sovereign immunity.” *Nat. Res. Def.*
4 *Council v. Cal. Dep't of Transp.*, 96 F.3d 420, 421 (9th Cir. 1996)). “Therefore,
5 state officials sued in their official capacities . . . are not ‘persons’ within the
6 meaning of § 1983 and are therefore generally entitled to Eleventh Amendment
7 immunity.” *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007). There are only
8 three exceptions to Eleventh Amendment immunity: (1) “a state may waive its
9 Eleventh Amendment defense”; (2) “Congress may abrogate the States’ sovereign
10 immunity by acting pursuant to a grant of constitutional authority”; and (3) “under
11 the *Ex parte Young* doctrine, the Eleventh Amendment does not bar a suit against a
12 state official when that suit seeks . . . prospective injunctive relief.” *Douglas v. Cal.*
13 *Dep't of Youth Auth.*, 271 F.3d 812, 817–18 (9th Cir. 2001) (alteration in original)
14 (quotation marks and citations omitted). The State of California has not waived its
15 Eleventh Amendment immunity with respect to Section 1983 claims, and the
16 Supreme Court has held that Section 1983 was not intended to abrogate a State’s
17 Eleventh Amendment immunity. *Brown v. Cal. Dep't of Corr.*, 554 F.3d 747, 752
18 (9th Cir. 2009).

19 In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court “provided a
20 narrow exception to Eleventh Amendment immunity for certain suits seeking
21 declaratory and injunctive relief against unconstitutional actions taken by state
22 officers in their official capacities.” *Rounds v. Or. State Bd. of Higher Educ.*, 166
23 F.3d 1032, 1036 (9th Cir. 1999). “Under the *Ex parte Young* doctrine, a plaintiff
24 may maintain a suit for *prospective relief* against a state official in his official
25 capacity, when that suit seeks to correct an ongoing violation of the Constitution or
26 federal law.” *Cardenas v. Anzai*, 311 F.3d 929, 934–35 (9th Cir. 2002). To state an
27 official capacity claim against state officials, a plaintiff “is not required to allege a
28 named official’s personal involvement in the acts or omissions constituting the

1 alleged constitutional violation.” *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707
2 F.3d 1114, 1127 (9th Cir. 2013). Rather, a plaintiff need only “identify a practice,
3 policy, or procedure that animates the constitutional violation at issue,” *Ariz.*
4 *Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) (citing
5 *Hafer v. Melo*, 502 U.S. 21, 25 (1991)), and “name the official within the entity who
6 can appropriately respond to injunctive relief,” *Hartmann*, 707 F.3d at 1127. In
7 addition, a plaintiff must allege an ongoing violation of federal law and seek relief
8 that is properly characterized as prospective. *Verizon Md. Inc. v. Pub. Serv.*
9 *Comm’n of Md.*, 535 U.S. 635, 645 (2002).

10 Here, to the extent that Plaintiff seeks prospective relief, the SAC does not
11 allege any State of California practice, policy, or procedure that animates any
12 constitutional violations. (*See generally* SAC.) Furthermore, for the reasons
13 discussed in Section IV.B.3, *supra*, the SAC does not state a claim for violation of
14 the Sixth Amendment, Fourteenth Amendment Due Process Clause, Fourteenth
15 Amendment Equal Protection Clause, or Privileges and Immunities Clause. Thus,
16 the SAC does not state any claims falling within the *Ex Parte Young* exception to
17 Eleventh Amendment immunity.

18 For these reasons, Plaintiff fails to state any claims against Defendant
19 Newsom in his official capacity. If Plaintiff includes official capacity claims for
20 damages against Defendant Newsom in any amended complaint, they will be
21 subject to dismissal. If Plaintiff files an amended complaint with official capacity
22 claims against Defendants Newsom for prospective relief, he must correct these
23 deficiencies or risk their dismissal.

24
25 5. Plaintiff Fails to State a Fourteenth Amendment Claim Against
26 Defendant Bianco in his Individual Capacity

27 Plaintiff asserts that Defendant Bianco violated his Eighth Amendment right
28 against cruel and unusual punishment and his Fifth Amendment due process rights.

1 (SAC 11.) However, “[i]nmates who sue prison officials for injuries suffered while
2 in custody may do so under the Eighth Amendment’s Cruel and Unusual
3 Punishment clause or, if not yet convicted, under the Fourteenth Amendment’s Due
4 Process Clause.” *Castro v. County of Los Angeles*, 833 F.3d 1060, 1067–68 (9th
5 Cir. 2016). Furthermore, the Due Process of the Fifth Amendment applies only to
6 actions of the federal government, while the Fourteenth Amendment prohibits
7 deprivations of due process by the several States. *Castillo v. McFadden*, 399 F.3d
8 993, 1002 n.5 (9th Cir. 2005). Because Plaintiff is a pretrial detainee and is not
9 alleging due process violations by the federal government, the Court will examine
10 Plaintiff’s claim against Defendant Bianco pursuant to the Fourteenth Amendment
11 Due Process Clause. *See Sagana v. Tenorio*, 384 F.3d 731, 736–37 (9th Cir. 2004)
12 (“A party need not plead specific legal theories in the complaint, so long as the
13 other side receives notice as to what is at issue in the case.”) (internal quotation
14 marks omitted)).

15 The Due Process Clause of the Fourteenth Amendment protects pretrial
16 detainees—who have not been adjudged guilty of any crime—from any conditions
17 or restrictions that amount to punishment. *Bell v. Wolfish*, 441 U.S. 520, 535–37
18 (1979); *see also Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002)
19 (“Pretrial detainees have a substantive due process right against restrictions that
20 amount to punishment.”). “This right is violated if restrictions are ‘imposed for the
21 purpose of punishment.’” *Valdez*, 302 F.3d at 1045 (quoting *Bell*, 441 U.S. at 535).
22 Unless there is evidence of intent to punish, those conditions or restrictions that are
23 reasonably related to legitimate penological objectives do not violate pretrial
24 detainees’ right to be free from punishment. *See Bell*, 441 U.S. at 538–39. Prison
25 and jail administrators are “accorded wide-ranging deference in the adoption and
26 execution of policies and practices that in their judgment are needed to preserve
27 internal order and discipline and to maintain institutional security.” *Id.* at 547.

28 ///

1 A pretrial detainee’s Fourteenth Amendment failure-to-protect claim requires
2 the following elements: (1) the defendant made an intentional decision regarding the
3 conditions under which the plaintiff was confined; (2) those conditions put the
4 plaintiff at substantial risk of suffering serious harm; (3) the defendant did not take
5 reasonable available measures to abate that risk, even though a reasonable officer in
6 the circumstances would have appreciated the high degree of risk involved—making
7 the consequences of the defendant’s conduct obvious; and (4) by not taking such
8 measures, the defendant caused the plaintiff’s injuries. *Castro*, 833 F.3d at 1070.
9 With respect to the third element, the defendant’s conduct must be objectively
10 unreasonable, a determination that will turn on the facts and circumstances of each
11 particular case. *Id.* There mere lack of due care does not violate the Fourteenth
12 Amendment. *Gordon v. County of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018);
13 *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986) (holding that the Due Process
14 clause is not violated by negligence). A plaintiff must “prove more than negligence
15 but less than subjective intent—something akin to reckless disregard.” *Castro*, 833
16 F.3d at 1071.

17 Here, the SAC makes general allegations about Riverside County Jail’s
18 shortcomings in light of COVID-19: lack of social distancing, moving Plaintiff to
19 another cell, and lack of COVID-19 testing of Plaintiff’s cellmate. (*See* SAC 11–
20 16.) These general allegations—devoid of any specific factual allegations regarding
21 Defendant Bianco—do not state a Fourteenth Amendment claim against Defendant
22 Bianco. *See, e.g., Leeper v. County of Sacramento*, No. 2:20-cv-0960 AC P, 2020
23 U.S. Dist. LEXIS 120008, at *6 (E.D. Cal. July 8, 2020) (holding that general
24 allegations that jail was not meeting CDC recommendations in responding to
25 COVID-19, including “social distancing, masks, uncleanly environment and . . .
26 without any medical testing being done” was not specific enough to state cognizable
27 Fourteenth Amendment claim). “A cognizable claim must specifically identify
28 defendant’s challenged conduct, explain how that conduct is unreasonable under the

1 circumstances, and describe how defendant’s conduct has harmed plaintiff.” *Gay v.*
2 *California*, No. 2:20-cv-1276 AC P, 2020 U.S. Dist. LEXIS 120007, at *6 (E.D. Cal.
3 July 8, 2020) (holding that complaint, premised solely on plaintiff’s alleged inability
4 to socially distance from other detainees during COVID-19 pandemic, does not state
5 a cognizable Fourteenth Amendment claim). The SAC does not include any
6 allegations about Defendant Bianco’s specific acts or failures beyond general
7 conclusory statements. *See Iqbal*, 556 U.S. at 678 (explaining that “labels and
8 conclusions” and “naked assertion[s] devoid of further factual enhancement” are
9 insufficient to state a claim). As explained in Section IV.B.1, *supra*, Plaintiff cannot
10 be held responsible for the actions of others under a theory of *respondeat superior*.
11 *See Iqbal*, 556 U.S. at 676.

12 For these reasons, Plaintiff fails to state a Fourteenth Amendment claim
13 against Defendant Bianco in his individual capacity. If Plaintiff files an amended
14 complaint with this claim, he must correct its deficiencies or risk its dismissal.

15
16 6. Plaintiff Fails to State a Fourteenth Amendment Claim Against
17 Defendant Bianco in his Official Capacity

18 “[A]n official-capacity suit is, in all respects other than name, to be treated as
19 a suit against the entity.” *Kentucky*, 473 U.S. at 166. Plaintiff alleges that
20 Defendant Bianco is Sheriff of Riverside County. (SAC 4.) Thus, the official
21 capacity claims against Defendant Bianco are treated as claims against Riverside
22 County. *See Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1250 (9th Cir. 2016)
23 (explaining that claims against county sheriff sued in his official capacity are treated
24 as claims against the county).

25 “A municipality or other local government [including counties] may be liable
26 under [Section 1983] if the governmental body itself ‘subjects’ a person to a
27 deprivation of rights or ‘causes’ a person ‘to be subjected’ to such deprivation.”
28 *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (citing *Monell*, 436 U.S. at 692).

1 “[A] municipality can be found liable under § 1983 only where the municipality
2 *itself* causes the constitutional violation at issue.” *City of Canton v. Harris*, 489
3 U.S. 378, 385 (1989). “A municipality cannot be held liable *solely* because it
4 employs a tortfeasor—or in other words, a municipality cannot be held liable under
5 Section 1983 on a *respondeat superior* theory.” *Monell*, 436 U.S. at 691.

6 “In order to establish municipal liability, a plaintiff must show that a ‘policy
7 or custom’ led to the plaintiff’s injury.” *Castro*, 833 F.3d at 1073 (quoting *Monell*,
8 436 U.S. at 694). “Official municipal policy includes the decisions of a
9 government’s lawmakers, the acts of its policymaking officials, and practices so
10 persistent and widespread as to practically have the force of law.” *Connick*, 563
11 U.S. at 61. A rule or regulation “promulgated, adopted, or ratified by a local
12 governmental entity’s legislative body” constitutes a municipal policy. *Thompson*
13 *v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *overruled on other*
14 *grounds by Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010)
15 (en banc). “A policy has been defined as ‘a deliberate choice to follow a course of
16 action . . . made from among various alternatives by the official or officials
17 responsible for establishing final policy with respect to the subject matter in
18 question.’” *Waggy v. Spokane County Washington*, 594 F.3d 707, 713 (9th Cir.
19 2010) (alteration in original) (quoting *Long v. County of Los Angeles*, 442 F.3d
20 1178, 1185 (9th Cir. 2006)). “[I]n addition to an official policy, a municipality may
21 be sued for constitutional deprivations visited pursuant to governmental custom
22 even though such custom has not received formal approval through the
23 [governmental] body’s official decisionmaking channels.” *Navarro v. Block*, 72
24 F.3d 712, 714 (9th Cir. 1996) (quotations omitted) (citing *Monell*, 436 U.S. at 690–
25 91). However, liability for a custom will attach only if a plaintiff pleads that his or
26 her injury resulted from a “permanent and well-settled” practice. *Thompson*, 885
27 F.2d at 1444. Allegations of random acts or isolated events are insufficient to
28 establish a municipal custom. *Navarro*, 72 F.3d at 714.

1 Furthermore, there must be a “direct causal link between a municipal policy
2 or custom and the alleged constitutional deprivation.” *City of Canton*, 489 U.S. at
3 385. Municipal policy “‘causes’ an injury where it is the ‘moving force’ behind the
4 constitutional violation, or where ‘the [municipality] itself is the wrongdoer.’”
5 *Chew v. Gates*, 27 F.3d 1432, 1444 (9th Cir. 1994) (citations omitted). The
6 municipal policy “need only cause a constitutional violation; it need not be
7 unconstitutional per se.” *Jackson v. Gates*, 975 F.2d 648, 654 (9th Cir. 1992).

8 Here, the SAC fails to state a Fourteenth Amendment claim against Riverside
9 County because (1) there are no allegations of any Riverside County policy or
10 custom; and (2) there are no allegations from which it reasonably could be inferred
11 that any such Riverside County policy or custom caused Plaintiff’s constitutional
12 injuries. *See, e.g., Heard v. Superior Court*, No. 2:20-cv-01589-KJM-CKD, 2020
13 U.S. Dist. LEXIS 155390, at *8 (E.D. Cal. Aug. 26, 2020) (dismissing *Monell* claim
14 for jail’s failure to impose social distancing, use of face masks, and for transfer of
15 plaintiff to dorm where other inmates were not tested because “Plaintiff has not
16 identified any specific county custom or policy that was the moving force for the
17 unsafe jail conditions”).

18 For these reasons, Plaintiff fails to state a Fourteenth Amendment claim
19 against Defendant Bianco in his official capacity. If Plaintiff files an amended
20 complaint with this claim, he must correct its deficiencies or risk its dismissal.

21 22 **V. CONCLUSION**

23 For the reasons stated above, the Court **DISMISSES** the SAC **WITH**
24 **LEAVE TO AMEND**. Plaintiff may have an opportunity to amend and cure the
25 deficiencies in light of his *pro se* prisoner status. If Plaintiff intends to pursue this
26 matter, he must file a Third Amended Complaint (“TAC”) by May 13, 2021.

27 The TAC must cure the pleading defects discussed above and shall be
28 complete in itself without reference to the SAC. *See* L.R. 15-2 (“Every amended

1 pleading filed as a matter of right or allowed by order of the Court shall be complete
2 including exhibits. The amended pleading shall not refer to the prior, superseding
3 pleading.”). This means that Plaintiff must allege and plead any viable
4 claims in the TAC again. Plaintiff shall not include new defendants or new
5 allegations that are not reasonably related to the claims asserted in the SAC.

6 In any amended complaint, Plaintiff should confine his allegations to those
7 operative facts supporting each of his claims. Plaintiff is advised that pursuant to
8 Rule 8, all that is required is a “short and plain statement of the claim showing that
9 the pleader is entitled to relief.” **Plaintiff strongly is encouraged to utilize the**
10 **standard civil rights complaint form when filing any amended complaint, a**
11 **copy of which is attached.** In any amended complaint, Plaintiff should identify the
12 nature of each separate legal claim and make clear what specific factual allegations
13 support each of his separate claims. Plaintiff strongly is encouraged to keep his
14 statements concise and to omit irrelevant details. It is not necessary for Plaintiff to
15 cite case law, include legal argument, or attach exhibits at this stage of the litigation.
16 Plaintiff also is advised to omit any claims for which he lacks a sufficient factual
17 basis.

18 **The Court cautions Plaintiff that failure to timely file a TAC will result in**
19 **a recommendation that this action be dismissed for failure to prosecute and/or**
20 **failure to comply with court orders pursuant to Rule 41(b).**

21 Plaintiff is not required to file an amended complaint, especially since a
22 complaint dismissed for failure to state a claim without leave to amend may count
23 as a “strike” for purposes of the *in forma pauperis* statute, 28 U.S.C. § 1915(g).⁴

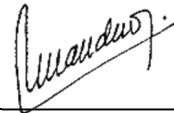
24
25 ⁴ Inmates who have accumulated three or more “strikes” are not permitted to bring
26 a civil lawsuit or appeal a judgment in a civil action *in forma pauperis*—that is,
27 without prepayment of the filing fee—unless the inmate is under imminent danger
28 of serious physical injury. See 28 U.S.C. § 1915(g). Instead, inmates with three or
more “strikes” generally must pay their full filing fee upfront in order to file a civil
lawsuit or appeal a civil judgment.

1 Instead, Plaintiff may request voluntary dismissal of the action pursuant to Federal
2 Rule of Civil Procedure 41(a) using the attached Notice of Voluntary Dismissal
3 form.

4 Plaintiff is advised that the undersigned Magistrate Judge's determination
5 herein that the allegations in the SAC are insufficient to state a particular claim
6 should not be seen as dispositive of the claim. Accordingly, although the
7 undersigned Magistrate Judge believes Plaintiff has failed to plead sufficient factual
8 matter in the pleading, accepted as true, to state a claim for relief that is plausible on
9 its face, Plaintiff is not required to omit any claim or Defendant in order to pursue
10 this action. However, if Plaintiff decides to pursue a claim in an amended
11 complaint that the undersigned Magistrate Judge previously found to be
12 insufficient, then, pursuant to 28 U.S.C. § 636, the undersigned Magistrate Judge
13 ultimately may submit to the assigned District Judge a recommendation that such
14 claim may be dismissed with prejudice for failure to state a claim, subject to
15 Plaintiff's right at that time to file objections. *See* Fed. R. Civ. P. 72(b); C.D. Cal.
16 L.R. 72-3.

17 IT IS SO ORDERED.

18 DATED: April 13, 2021



MARIA A. AUDERO
UNITED STATES MAGISTRATE JUDGE

19
20
21 Attachments

22 Form Civil Rights Complaint (CV-66)

23 Form Notice of Dismissal

24

25

26

27

28