



1 Plaintiff later filed a “Motion to Amend to Add Additional Claims and Reliefs” [Doc. No.  
2 10]. On November 25, 2008, this matter was reassigned to District Judge John A. Houston for  
3 all further proceedings [Doc. No. 11].

## 4 II.

### 5 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

6 The Prison Litigation Reform Act (“PLRA”) obligates the Court to review complaints  
7 filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained  
8 in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of  
9 criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary  
10 program,” “as soon as practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b).  
11 Under these provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any  
12 portion thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from  
13 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203  
14 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,  
15 446 (9th Cir. 2000) (§ 1915A).

16 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
17 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is  
18 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,  
19 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing  
20 an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of  
21 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(3). *Id.* at 1127 (“[S]ection  
22 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint  
23 that fails to state a claim.”); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)  
24 (discussing 28 U.S.C. § 1915A).

25 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
26 allegations of material fact and must construe those facts in the light most favorable to the  
27 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
28 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s

1 duty to liberally construe a pro se's pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,  
2 839 F.2d 621, 623 (9th Cir. 1988), is "particularly important in civil rights cases." *Ferdik v.*  
3 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

4 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person  
5 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived  
6 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the  
7 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*  
8 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d  
9 1350, 1354 (9th Cir. 1985) (en banc).

10 In his Complaint, Plaintiff claims that prison officials violated his First Amendment rights  
11 when they confiscated his "American Curves" magazine because prison officials claimed it  
12 contained nudity. (*See* Compl. at 2.) Plaintiff acknowledges that the magazine contained nudity  
13 but alleges that prison officials should have cut out the offending pages or "cover them with a  
14 marker." (*Id.*)

15 A prison may adopt regulations which impinge on an inmate's constitutional rights if  
16 those regulations are "reasonably related to legitimate penological interests." *Turner v. Safley*,  
17 482 U.S. 78, 89 (1987). The relevant factors in determining whether a regulation, or its  
18 application in a particular situation, is reasonable are as follows: (1) whether there is a valid,  
19 rational connection between the regulation and a legitimate and neutral government interest, (2)  
20 whether there are alternative means of exercising the constitutional right, (3) the impact the  
21 accommodation of the right will have on prison staff and other prisoners, and (4) whether the  
22 regulation is an exaggerated response to prison concerns, in light of readily available  
23 alternatives. *Turner*, 482 U.S. at 89-91.

24 The issue of whether the prison's regulation banning all material containing nudity is  
25 rationally related to a legitimate penological interest under *Turner* has been decided by the Ninth  
26 Circuit in *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999) (en banc). In *Mauro*, the Ninth  
27 Circuit held, after applying the *Turner* factors, that a county jail's regulation banning "sexually  
28 explicit materials," which were defined as "materials that show frontal nudity," was reasonably

1 related to a legitimate penological purpose. *Id.* at 1057. Thus, Plaintiff's First Amendment  
2 claim relating to prison officials' refusal to allow material which contains nudity is dismissed  
3 for failing to state a claim upon which relief can be granted.

4 Accordingly, Plaintiff's Complaint is dismissed for failing to state a claim upon which  
5 relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). *See Lopez*, 203 F.3d  
6 at 1126-27; *Resnick*, 213 F.3d at 446, n.1. However, Plaintiff is hereby granted an opportunity  
7 to amend. *Lopez*, 203 F.3d at 1127 (leave to amend is generally appropriate unless the court has  
8 determined, "that the pleading could not possibly be cured by the allegation of other facts.").

9 **III.**

10 **CONCLUSION AND ORDER**

11 Good cause appearing, **IT IS HEREBY ORDERED** that:

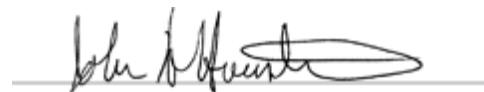
12 Plaintiff's Complaint [Doc. No. 1] is **DISMISSED** without prejudice for failing to state  
13 a claim upon which relief may be granted. *See* 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b).  
14 However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed"  
15 in which to file a First Amended Complaint which cures all the deficiencies of pleading noted  
16 above. Defendants not named and all claims not re-alleged in the Amended Complaint will be  
17 deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

18 Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief  
19 may be granted, it may be dismissed without further leave to amend and may hereafter be  
20 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79  
21 (9th Cir. 1996).

22 **IT IS FURTHER ORDERED** that:

23 Plaintiff's "Motion to Amend to Add Additional Claims and Relief" [Doc. No. 11] is  
24 **DENIED** as moot in light of the Court's Order permitting Plaintiff to file a First Amended  
25 Complaint.

26 DATED: January 13, 2009

27 

28 JOHN A. HOUSTON  
United States District Judge