



1 U.S.C. § 1915(a). Therefore, Plaintiff’s motion to proceed *in forma pauperis* (Doc. 3) is **GRANTED**.

2 **II. Screening Requirement**

3 When a plaintiff proceeds *in forma pauperis*, the Court is required to review the complaint, and  
4 shall dismiss the case at any time if the Court determines that the allegation of poverty is untrue, or the  
5 action or appeal is “frivolous, malicious or fails to state a claim on which relief may be granted; or . . .  
6 seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. 1915(e)(2). A  
7 claim is frivolous “when the facts alleged arise to the level of the irrational or the wholly incredible,  
8 whether or not there are judicially noticeable facts available to contradict them.” *Denton v. Hernandez*,  
9 504 U.S. 25, 32-33 (1992).

10 **III. Pleading Standards**

11 General rules for pleading complaints are governed by the Federal Rules of Civil Procedure. A  
12 pleading stating a claim for relief must include a statement affirming the court’s jurisdiction, “a short  
13 and plain statement of the claim showing the pleader is entitled to relief; and . . . a demand for the  
14 relief sought, which may include relief in the alternative or different types of relief.” Fed. R. Civ. P.  
15 8(a). The Federal Rules adopt a flexible pleading policy, and *pro se* pleadings are held to “less  
16 stringent standards” than pleadings by attorneys. *Haines v. Kerner*, 404 U.S. 519, 521-21 (1972).

17 A complaint must give fair notice and state the elements of the plaintiff’s claim in a plain and  
18 succinct manner. *Jones v. Cmty Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Further, a  
19 plaintiff must identify the grounds upon which the complaint stands. *Swierkiewicz v. Sorema N.A.*, 534  
20 U.S. 506, 512 (2002). The Supreme Court noted,

21 Rule 8 does not require detailed factual allegations, but it demands more than an  
22 unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers  
23 labels and conclusions or a formulaic recitation of the elements of a cause of action will  
not do. Nor does a complaint suffice if it tenders naked assertions devoid of further  
factual enhancement.

24 *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (internal quotation marks and citations omitted).

25 Conclusory and vague allegations do not support a cause of action. *Ivey v. Board of Regents*, 673 F.2d  
26 266, 268 (9th Cir. 1982). The Court clarified further,

27 [A] complaint must contain sufficient factual matter, accepted as true, to “state a claim  
28 to relief that is plausible on its face.” [Citation]. A claim has facial plausibility when  
the plaintiff pleads factual content that allows the court to draw the reasonable  
inference that the defendant is liable for the misconduct alleged. [Citation]. The

1           plausibility standard is not akin to a “probability requirement,” but it asks for more than  
2           a sheer possibility that a defendant has acted unlawfully. [Citation]. Where a complaint  
3           pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of  
4           the line between possibility and plausibility of ‘entitlement to relief.’

5           *Iqbal*, 566 U.S. at 678 (citations omitted). When factual allegations are well-pled, a court should  
6           assume their truth and determine whether the facts would make the plaintiff entitled to relief; legal  
7           conclusions in the pleading are not entitled to the same assumption of truth. *Id.*

8           The Court has a duty to dismiss a case at any time it determines an action fails to state a claim,  
9           “notwithstanding any filing fee that may have been paid.” 28 U.S.C. § 1915e(2). Accordingly, a court  
10          “may act on its own initiative to note the inadequacy of a complaint and dismiss it for failure to state a  
11          claim.” *See Wong v. Bell*, 642 F.2d 359, 361 (9th Cir. 1981) (citing 5 C. Wright & A. Miller, *Federal*  
12          *Practice and Procedure*, § 1357 at 593 (1963)). However, leave to amend a complaint may be granted  
13          to the extent deficiencies of the complaint can be cured by an amendment. *Lopez v. Smith*, 203 F.3d  
14          1122, 1127-28 (9th Cir. 2000) (en banc).

#### 14          **IV. Section 1983 Claims**

15          Plaintiff seeks to state a claim pursuant to 42 U.S.C. § 1983 (“Section 1983”), which “is a  
16          method for vindicating federal rights elsewhere conferred.” *Albright v. Oliver*, 510 U.S. 266, 271  
17          (1994). An individual may bring a civil rights action pursuant to Section 1983, which provides:

18               Every person who, under color of any statute, ordinance, regulation, custom, or usage,  
19               of any State or Territory... subjects, or causes to be subjected, any citizen of the United  
20               States or other person within the jurisdiction thereof to the deprivation of any rights,  
                 privileges, or immunities secured by the Constitution and laws, shall be liable to the  
                 party injured in an action at law, suit in equity, or other proper proceeding for redress...

21          42 U.S.C. § 1983. To plead a Section 1983 violation, a plaintiff must allege facts from which it may be  
22          inferred that (1) a constitutional right was deprived, and (2) a person who committed the alleged  
23          violation acted under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Williams v. Gorton*,  
24          529 F.2d 668, 670 (9th Cir. 1976).

25          A plaintiff must allege a specific injury was suffered, and show causal relationship between the  
26          defendant’s conduct and the injury suffered. *See Rizzo v. Goode*, 423 U.S. 362, 371-72 (1976). Thus,  
27          Section 1983 “requires that there be an actual connection or link between the actions of the defendants  
28          and the deprivation alleged to have been suffered by the plaintiff.” *Chavira v. Ruth*, 2012 WL

1 1328636 at \*2 (E.D. Cal. Apr. 17, 2012). An individual deprives another of a federal right “if he does  
2 an affirmative act, participates in another’s affirmative acts, or omits to perform an act which he is  
3 legally required to do so that it causes the deprivation of which complaint is made.” *Johnson v. Duffy*,  
4 588 F.2d 740, 743 (9th Cir. 1978). In other words, “[s]ome culpable action or inaction must be  
5 attributable to defendants.” See *Puckett v. Corcoran Prison - CDCR*, 2012 WL 1292573, at \*2 (E.D.  
6 Cal. Apr. 13, 2012).

## 7 **V. Discussion and Analysis**

8 Plaintiff asserts that on September 29, 2013, he was riding his bicycle when Bakersfield Police  
9 Officers Scott Roberts and Randy Petris “attempted a routine stop.” (Doc. 1 at 3.) Plaintiff alleges that  
10 he fled on his bike, and the officers followed him with their vehicle. (*Id.*) He reports the officers  
11 caught up “[a] few streets down,” and “Officer Scott Roberts . . . struck [him] with the BPD’s Police  
12 cruiser.” (*Id.*) Plaintiff alleges that he was knocked off the bicycle and “was thrown, by the force of  
13 the strike, forwards a couple of yards,” into a mailbox. (*Id.* at 4.)

14 According to Plaintiff, he “attempted to run across the street,” but was in “extreme pain.” (Doc.  
15 1 at 4.) Plaintiff asserts that “[t]he pain was so severe that he rendered [him] completely weak and  
16 made [him] decide and choose to lie down on the street and wait for [his] inevitable arrest.” (*Id.*) He  
17 alleges that he “completely surrendered.” (*Id.*) Plaintiff asserts that when the officers arrived, “Officer  
18 Randy Petris . . . began to strike and assault [him] with his baton while [he] was on the floor.” (*Id.*)  
19 Plaintiff asserts he “was struck about 7 to 10 times,” to the point he “went unconscious due to the shock  
20 of the pain.” (*Id.*) Plaintiff asserts that as a result of the officers’ actions, he “was left with a fractured  
21 left ulna forearm bone, wrist dislocation (left bone), [and] wrist fractures.” (*Id.*)

22 Based upon these facts, Plaintiff asserts the defendants are liable for violations of his Fifth and  
23 Fourteenth Amendment rights. (Doc. 1 at 4.)

### 24 **A. Fifth Amendment Violation**

25 Plaintiff alleges a violation of his civil rights under the Fifth Amendment. However, the Fifth  
26 Amendment applies only to actions by the federal government. *Rank v. Nimmo*, 677 F.2d 692, 701  
27 (9th Cir. 1982). There must be a “significantly close nexus” between the federal government and the  
28 actor for the Fifth Amendment to apply to nonfederal entities or individuals. *Id.* Here, Plaintiff has

1 not made any factual allegations regarding the officers' connections to the federal government. Thus,  
2 Plaintiff fails to state a claim for a Fifth Amendment violation, and the claim is **DISMISSED**.

3 **B. Excessive Force Amounting to Punishment**

4 The Supreme Court of the United States has determined that the Due Process Clause of the  
5 Fourteenth Amendment protects individuals who have not yet been convicted of a crime "from the use  
6 of excessive force that amounts to punishment." *Graham v. Connor*, 490 U.S. 386, 388 (1989).

7 However, allegations of excessive force during the course of an arrest are analyzed under the Fourth  
8 Amendment, which prohibits arrests without probable cause or other justification. *Id.* ("claim[s] that  
9 law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or  
10 other 'seizure' ... are properly analyzed under the Fourth Amendment's 'objective reasonableness'  
11 standard"); *see also Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994) ("the use of force to effect an  
12 arrest is subject to the Fourth Amendment's prohibition on unreasonable seizures").

13 The Supreme Court explained,

14 As in other Fourth Amendment contexts . . . the "reasonableness" inquiry in an excessive  
15 force case is an objective one: the question is whether the officers' actions are  
16 "objectively reasonable" in light of the facts and circumstances confronting them, without  
17 regard to their underlying intent or motivation. An officer's evil intentions will not make  
18 a Fourth Amendment violation out of an objectively reasonable use of force; nor will an  
19 officer's good intentions make an objectively unreasonable use of force constitutional.

20 *Graham*, 490 U.S. at 396-97 (1989) (internal citations omitted). In applying this standard, the Ninth  
21 Circuit instructs courts to consider "the totality of the circumstances and . . . whatever specific factors  
22 may be appropriate in a particular case." *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010).

23 Here, Plaintiff asserts defendant Roberts struck him with a police cruiser and that after he had  
24 surrendered, defendant Petris struck him with a baton to the point that Plaintiff lost consciousness. In  
25 *Graham*, the Supreme Court set forth factors to be considered in evaluating whether the force used was  
26 reasonable, "including the severity of the crime at issue, whether the suspect poses an immediate threat  
27 to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade  
28 arrest by flight." *Id.*, 490 U.S. at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)). In addition,  
Court may consider "whether officers administered a warning, assuming it was practicable." *George v.*  
*Morris*, 736 F.3d 829, 837-38 (9th Cir. 2013) (citing *Scott v. Harris*, 550 U.S. 372, 381-82 (2007)).

1 Ultimately, the “reasonableness” of the actions “must be judged from the perspective of a reasonable  
2 officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396.

3 Here, based upon the facts alleged, Plaintiff may have posed a threat to the safety of others and  
4 was attempting to escape. However, the Ninth Circuit has observed that evaluation of whether the  
5 force used was reasonable “is ordinarily a question of fact for the jury.” *Liston v. Cnty. of Riverside*,  
6 120 F.3d 965, 976 n.10 (9th Cir. 1997); *see also Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002) (a  
7 determination on the reasonableness of the use of force “nearly always requires a jury to sift through  
8 disputed factual contentions, and to draw inferences therefrom”). Moreover, the Ninth Circuit has also  
9 determined that the use of force upon a person after surrender constitutes excessive force. *LaLonde v.*  
10 *County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000). Accordingly, for screening purposes only, the  
11 Court finds the facts alleged sufficient to support a cognizable claim for the use of excessive force  
12 under the Fourth Amendment.

### 13 C. Equal Protection

14 Plaintiff alleges that the use of excessive force violated his “14<sup>th</sup> Amendment rights of equal  
15 protection under the law . . .” (Doc. 1 at 5) The cornerstone of the equal protection right is that  
16 similarly situated people are required to be treated similarly. *City of Cleburne, Tex. v. Cleburne Living*  
17 *Center*, 473 U.S. 432, 439 (1985).

18 Plaintiff seems to claim that his equal protection rights were violated because he was profiled  
19 as a gang member. However, membership in a gang is not a protected class. Moreover, though  
20 Plaintiff seems to state that a Caucasian man would not have been treated in the same manner in which  
21 he was, this is a conclusion rather than a factual allegation demonstrating that the use of force was  
22 motivated by racial animus or was discriminatory in any manner. To the contrary, Plaintiff asserts that  
23 at the time the force was used, he was aware the officers intended a “routine stop” and an “inevitable  
24 arrest” but, despite this, he evaded the officers. *Id.* at 3. His conclusion that the police would have  
25 taken a different tact with a white man lacks factual support. Thus, there are no facts alleged that the  
26 stop and arrest was based on something other than unlawful conduct by Plaintiff. As a result, the  
27 Court finds Plaintiff has failed to state an equal protection claim.

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1           **D.       Municipal liability**

2           To establish municipal liability under *Monell v. Department of Social Services of City of New*  
3 *York*, 436 U.S. 658, 694 (1978), a plaintiff must first establish that the state actor deprived him of a  
4 constitutional right and that an official city policy, custom, or practice of the entity was the moving  
5 force behind the constitutional injury. *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). A “policy” is  
6 a “deliberate choice to follow a course of action ... made from among various alternatives by the  
7 official or officials responsible for establishing final policy with respect to the subject matter in  
8 question.” *Fogel v. Collins*, 531 F.3d 824, 834 (9th Cir.2008). A “custom” is a “widespread practice  
9 that, although not authorized by written law or express municipal policy, is so permanent and well-  
10 settled as to constitute a custom or usage with the force of law.” *St. Louis v. Praprotnik*, 485 U.S. 112,  
11 127 (1988); *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 890 (9th Cir.1990).

12           While asserting the Bakersfield Police Department should be held liable, Plaintiff fails to set  
13 forth any factual allegations to suggest that an unconstitutional custom or policy caused his injuries.  
14 Seemingly, Plaintiff is asserting that the entity is liable because it employed the officers who used the  
15 force. This is insufficient. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989) (no respondeat superior  
16 liability under 42 U.S.C. § 1983); *Monell*, 436 U.S. at 691 (no municipal liability for a constitutional  
17 violation merely because of the employment relationship). Thus, Plaintiff has failed to state a claim  
18 against the Bakersfield Police Department.

19           **VI.       Conclusion and Order**

20           Plaintiff fails to state a cognizable claim for a violation of the Fifth Amendment or for a  
21 violation of equal protection under the Fourteenth Amendment. Likewise, Plaintiff has failed to state  
22 a claim against the Bakersfield Police Department. However, Plaintiff has stated a cognizable claim  
23 for excessive force in violation of the Fourteenth Amendment by Officers Roberts and Petris.

24           Plaintiff will be given **one** opportunity to file an amended complaint curing the deficiencies  
25 identified in this order. *See Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Alternatively,  
26 Plaintiff may notify the Court in writing that he does not wish to file an amended complaint and is  
27 willing to proceed only on his cognizable claim for excessive force rising to the level of punishment.  
28 At that time, the Court will dismiss the Bakersfield Police Department as a defendant and Plaintiff’s

1 claim for a violation of the Fifth Amendment, and issue summons.

2 The amended complaint must bear the docket number assigned this case and must be labeled  
3 “First Amended Complaint.” Plaintiff is advised that the Court cannot refer to a prior pleading in  
4 order to make Plaintiff his First Amended Complaint complete, and that after an amended complaint is  
5 filed, the other pleadings no longer serves any function in the case. *See Loux v. Rhay*, 375 F.2d 55, 57  
6 (9th Cir. 1967) (explaining that as a general rule, an amended complaint supersedes the original  
7 complaint). Finally, Plaintiff is warned that “[a]ll causes of action alleged in an original complaint  
8 which are not alleged in an amended complaint are waived.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th  
9 Cir. 1986) (citation omitted).

10 Based upon the foregoing, **IT IS HEREBY ORDERED:**

- 11 1. Plaintiff’s motion to proceed *in forma pauperis* (Doc. 3) is **GRANTED**;
- 12 2. Within 21 days from the date of service of this order, Plaintiff must either:
  - 13 a. File an amended complaint curing the deficiencies identified by the Court in this  
14 order, **or**
  - 15 b. Notify the Court in writing of his willingness to proceed only on his claims for  
16 violations of the Fourth and Fourteenth Amendment against Defendants Roberts  
17 and Petris; and
- 18 3. If Plaintiff fails to comply with this order, the action will be dismissed for failure to  
19 obey a court order.

20  
21 IT IS SO ORDERED.

22 Dated: June 30, 2014

/s/ Jennifer L. Thurston  
23 UNITED STATES MAGISTRATE JUDGE