

1 per 28 U.S.C. § 1915(g). An inmate who has had three or more prior actions or appeals dismissed
2 as frivolous, malicious, or for failure to state a claim upon which relief may be granted, and has
3 not alleged imminent danger of serious physical injury does not qualify to proceed *in forma*
4 *pauperis*. See 28 U.S.C. § 1915(g); *Richey v. Dahne*, 807 F.3d 1201, 1208 (9th Cir. 2015).

5 Section 1983 “provides a cause of action for the deprivation of any rights, privileges, or
6 immunities secured by the Constitution and laws of the United States.” *Wilder v. Virginia Hosp.*
7 *Ass’n*, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is not itself a source of
8 substantive rights, but merely provides a method for vindicating federal rights conferred
9 elsewhere. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989).

10 To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a
11 right secured by the Constitution or laws of the United States was violated and (2) that the alleged
12 violation was committed by a person acting under the color of state law. See *West v. Atkins*, 487
13 U.S. 42, 48 (1988); *Ketchum v. Alameda Cnty.*, 811 F.2d 1243, 1245 (9th Cir. 1987).

14 **C. Summary of the Complaint**

15 Plaintiff alleges that the implementation of Assembly Bill (“AB”) 966 which caused
16 condom dispensers to be placed in every CDCR prison violates the rights of heterosexual inmates.
17 Plaintiff names Chief of Appeals M. Voong and Appeals Examiner J. Night as defendants and
18 desires for AB 966 to be repealed and monetary damages paid to every heterosexual inmate in
19 CDCR’s custody. Plaintiff does not identify which of his civil rights he believes were violated by
20 Defendants and the implementation of AB 966.

21 As discussed in greater detail below, these allegations do not state a cognizable claim for
22 relief under § 1983. Plaintiff is given the pleading requirements, the legal standards for the
23 claims it appears he is attempting to state, and one opportunity to file an amended complaint. If
24 Plaintiff intended to state claims other than those addressed in this order, he should specifically
25 identify which of his rights he believes were violated by the implementation of AB 966.

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1 **D. Pleading Requirements**

2 **1. Federal Rule of Civil Procedure 8(a)**

3 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited
4 exceptions,” none of which applies to section 1983 actions. *Swierkiewicz v. Sorema N. A.*, 534
5 U.S. 506, 512 (2002); Fed. R. Civ. Pro. 8(a). A complaint must contain “a short and plain
6 statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. Pro. 8(a).
7 “Such a statement must simply give the defendant fair notice of what the plaintiff’s claim is and
8 the grounds upon which it rests.” *Swierkiewicz*, 534 U.S. at 512.

9 Violations of Rule 8, at both ends of the spectrum, warrant dismissal. A violation occurs
10 when a pleading says too little -- the baseline threshold of factual and legal allegations required
11 was the central issue in the *Iqbal* line of cases. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678,
12 129 S.Ct. 1937 (2009). The Rule is also violated, though, when a pleading says *too much*.
13 *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir.2011) (“[W]e
14 have never held -- and we know of no authority supporting the proposition -- that a pleading may
15 be of unlimited length and opacity. Our cases instruct otherwise.”) (citing cases); *see also*
16 *McHenry v. Renne*, 84 F.3d 1172, 1179–80 (9th Cir.1996) (affirming a dismissal under Rule 8,
17 and recognizing that “[p]rolix, confusing complaints such as the ones plaintiffs filed in this case
18 impose unfair burdens on litigants and judges”).

19 Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a
20 cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556
21 U.S. 662, 678 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
22 Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim that is
23 plausible on its face.’” *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 555. Factual
24 allegations are accepted as true, but legal conclusions are not. *Iqbal*. at 678; *see also Moss v. U.S.*
25 *Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009); *Twombly*, 550 U.S. at 556-557.

26 While “plaintiffs [now] face a higher burden of pleadings facts,” *Al-Kidd v. Ashcroft*,
27 580 F.3d 949, 977 (9th Cir. 2009), the pleadings of *pro se* prisoners are still construed liberally
28 and are afforded the benefit of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).

1 However, “the liberal pleading standard . . . applies only to a plaintiff’s factual allegations,”
2 *Neitze v. Williams*, 490 U.S. 319, 330 n.9 (1989), “a liberal interpretation of a civil rights
3 complaint may not supply essential elements of the claim that were not initially pled,” *Bruns v.*
4 *Nat’l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) quoting *Ivey v. Bd. of Regents*,
5 673 F.2d 266, 268 (9th Cir. 1982), and courts are not required to indulge unwarranted inferences,
6 *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and
7 citation omitted). The “sheer possibility that a defendant has acted unlawfully” is not sufficient,
8 and “facts that are ‘merely consistent with’ a defendant’s liability” fall short of satisfying the
9 plausibility standard. *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949; *Moss*, 572 F.3d at 969.

10 Further, “repeated and knowing violations of Federal Rule of Civil Procedure 8(a)’s ‘short
11 and plain statement’ requirement are strikes as ‘fail[ures] to state a claim,’ 28 U.S.C. § 1915(g),
12 when the opportunity to correct the pleadings has been afforded and there has been no
13 modification within a reasonable time.” *Knapp v. Hogan*, 738 F.3d 1106, 1108-09 (9th Cir.
14 2013).

15 DISCUSSION

16 **A. Plaintiff’s Claims**

17 **1. Inmate Appeals**

18 Plaintiff grieves the processing and reviewing of his 602 inmate appeal/staff complaint by
19 Chief of Appeals M. Voong and Appeals Examiner J. Night.

20 “[A prison] grievance procedure is a procedural right only, it does not confer any
21 substantive right upon the inmates.” *Azeez v. DeRobertis*, 568 F. Supp. 8, 10 (N.D. Ill. 1982)
22 accord *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993); see also *Ramirez v. Galaza*, 334
23 F.3d 850, 860 (9th Cir. 2003) (no liberty interest in processing of appeals because no entitlement
24 to a specific grievance procedure); *Massey v. Helman*, 259 F.3d 641, 647 (7th Cir. 2001)
25 (existence of grievance procedure confers no liberty interest on prisoner); *Mann v. Adams*, 855
26 F.2d 639, 640 (9th Cir. 1988). “Hence, it does not give rise to a protected liberty interest
27 requiring the procedural protections envisioned by the Fourteenth Amendment.” *Azeez v.*
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1 *DeRobertis*, 568 F. Supp. at 10; *Spencer v. Moore*, 638 F. Supp. 315, 316 (E.D. Mo. 1986).
2 Similarly, actions in reviewing prisoner’s administrative appeal cannot serve as the basis for
3 liability under a § 1983 action. *Buckley*, 997 F.2d at 495. The argument that anyone who knows
4 about a violation of the Constitution and fails to cure it has violated the Constitution himself is
5 not correct. “Only persons who cause or participate in the violations are responsible. Ruling
6 against a prisoner on an administrative complaint does not cause or contribute to the violation.”
7 *Greeno v. Daley*, 414 F.3d 645, 656-57 (7th Cir.2005) accord *George v. Smith*, 507 F.3d 605,
8 609-10 (7th Cir. 2007); *Reed v. McBride*, 178 F.3d 849, 851-52 (7th Cir.1999); *Vance v. Peters*,
9 97 F.3d 987, 992-93 (7th Cir.1996).

10 Thus, since he has neither a liberty interest, nor a substantive right in inmate appeals,
11 Plaintiff fails and is unable to state a cognizable claim against Voong and Night for processing
12 and denying his 602 inmate appeals in which he complained about AB 966.

13 **2. Equal Protection**

14 The Equal Protection Clause requires that persons who are similarly situated be treated
15 alike. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439(1985); *Hartmann v.*
16 *California Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1123 (9th Cir. 2013); *Furnace v. Sullivan*,
17 705 F.3d 1021, 1030 (9th Cir. 2013); *Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008). To
18 state a claim, Plaintiff must show that Defendants intentionally discriminated against him based
19 on his membership in a protected class. *Hartmann*, 707 F.3d at 1123; *Furnace*, 705 F.3d at 1030;
20 *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003); *Thornton v. City of St. Helens*, 425 F.3d
21 1158, 1166-67 (9th Cir. 2005); *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001).

22 If the action in question does not involve a suspect classification, a plaintiff may establish
23 an equal protection claim by showing that similarly situated individuals were intentionally treated
24 differently without a rational relationship to a legitimate state purpose. *Engquist v. Oregon*
25 *Department of Agriculture*, 553 U.S. 591, 601-02 (2008); *Village of Willowbrook v. Olech*, 528
26 U.S. 562, 564 (2000); *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1972); *Lazy Y Ranch*
27 *Ltd. v. Behrens*, 546 F.3d 580, 592 (9th Cir. 2008); *North Pacifica LLC v. City of Pacifica*, 526
28 F.3d 478, 486 (9th Cir. 2008), *see also Squaw Valley Development Co. v. Goldberg*, 375 F.3d

1 936, 944 (9th Cir.2004); *Sea River Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th
2 Cir. 2002). To state an equal protection claim under this theory, a plaintiff must allege that: (1)
3 the plaintiff is a member of an identifiable class; (2) the plaintiff was intentionally treated
4 differently from others similarly situated; and (3) there is no rational basis for the difference in
5 treatment. *Village of Willowbrook*, 528 U.S. at 564. Further, to establish a violation of the Equal
6 Protection Clause, the prisoner must present evidence of discriminatory intent. *See Washington v.*
7 *Davis*, 426 U.S. 229, 239-240 (1976); *Serrano*, 345 F.3d at 1081-82; *Freeman v. Arpio*, 125 F.3d
8 732, 737 (9th Cir. 1997).

9 “Where the challenged governmental policy is ‘facially neutral,’ proof of its
10 disproportionate impact on an identifiable group can satisfy the intent requirement only if it tends
11 to show that some invidious or discriminatory purpose underlies the policy.” *Lee v. City of Los*
12 *Angeles*, 250 F.3d 668, 687 (9th Cir. 2001) (citing *Village of Arlington Heights v. Metro. Hous.*
13 *Dev. Corp.*, 429 U.S. 252 (264-66) (1977) (internal citations omitted)). “The mere fact that [a]
14 facially neutral polic[y] had a foreseeably disproportionate impact on an identifiable group does
15 not mean that [it] violated the Equal Protection Clause.” *Id.* at 687.

16 Plaintiff does not state a cognizable Equal Protection claim. There is no basis to find that
17 heterosexual orientation is a protected class. Plaintiff does not demonstrate that he was
18 intentionally treated differently from other heterosexual inmates, or establish any discriminatory
19 intent on the part of the named Defendants.

20 Further, AB 966 is a valid and current law. It is the duty of prison personnel to implement
21 a state policy where there is no clearly established law prohibiting its use. *Jeffers v. Gomez*, 267
22 F.3d 895, 916 (9th Cir. 2001). Prison personnel have no duty to change CDCR policy that
23 complies with a statewide practice, particularly those codified by state statute. *Id.* Thus, Plaintiff
24 fails and is unable to state a cognizable claim against Voong and Night for the implementation of
25 AB 966 in CDCR facilities.

26 **ORDER**

27 For the reasons set forth above, Plaintiff’s Complaint is dismissed and he is granted one
28 opportunity to file a first amended complaint within **thirty (30) days**. If Plaintiff needs an

1 extension of time to comply with this order, Plaintiff shall file a motion seeking an extension of
2 time no later than **thirty (30) days** from the date of service of this order.

3 Plaintiff must demonstrate in any first amended complaint how the conditions complained
4 of have resulted in a deprivation of Plaintiff's constitutional rights. See *Ellis v. Cassidy*, 625 F.2d
5 227 (9th Cir. 1980). The first amended complaint must allege in specific terms how each named
6 defendant is involved. There can be no liability under section 1983 unless there is some
7 affirmative link or connection between a defendant's actions and the claimed deprivation. *Rizzo*
8 *v. Goode*, 423 U.S. 362 (1976); *May v. Enomoto*, 633 F.2d 164, 167 (9th Cir. 1980); *Johnson v.*
9 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

10 Plaintiff's first amended complaint should be brief. Fed. R. Civ. P. 8(a). Such a short and
11 plain statement must "give the defendant fair notice of what the . . . claim is and the grounds upon
12 which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) quoting *Conley v.*
13 *Gibson*, 355 U.S. 41, 47 (1957). Although accepted as true, the "[f]actual allegations must be
14 [sufficient] to raise a right to relief above the speculative level . . ." *Twombly*, 550 U.S. 127, 555
15 (2007) (citations omitted).

16 Plaintiff is further reminded that an amended complaint supercedes the original, *Lacey v.*
17 *Maricopa County*, Nos. 09-15806, 09-15703, 2012 WL 3711591, at *1 n.1 (9th Cir. Aug. 29,
18 2012) (en banc), and must be "complete in itself without reference to the prior or superceded
19 pleading," Local Rule 220.

20 The Court provides Plaintiff with opportunity to amend to cure the deficiencies identified
21 by the Court in this order. *Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff
22 may not change the nature of this suit by adding new, unrelated claims in his first amended
23 complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (no "buckshot" complaints).

24 Based on the foregoing, it is HEREBY ORDERED that:

- 25 1. Plaintiff's Complaint is dismissed, with leave to amend;
- 26 2. The Clerk's Office shall send Plaintiff a civil rights complaint form;
- 27 3. Within **twenty-one (21) days** from the date of service of this order, Plaintiff must
28 file a first amended complaint curing the deficiencies identified by the Court in

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this order or a notice of voluntary dismissal; and

- 4. **If Plaintiff fails to comply with this order, this action will be dismissed for failure to obey a court order and for failure to state a cognizable claim.**

IT IS SO ORDERED.

Dated: **June 6, 2017**

/s/ Sheila K. Overt
UNITED STATES MAGISTRATE JUDGE