

1 1915(e)(2)(B)(ii).

2 A complaint must contain “a short and plain statement of the claim showing that the pleader
3 is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
4 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
5 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (citing Bell
6 Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). While a
7 plaintiff’s allegations are taken as true, courts “are not required to indulge unwarranted inferences.”
8 Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and
9 citation omitted).

10 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings
11 liberally construed and to have any doubt resolved in their favor. Hebbe v. Pliler, 627 F.3d 338,
12 342 (9th Cir. 2010) (citations omitted). To survive screening, Plaintiff’s claims must be facially
13 plausible, which requires sufficient factual detail to allow the Court to reasonably infer that each
14 named defendant is liable for the misconduct alleged, Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949
15 (quotation marks omitted); Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).
16 The sheer possibility that a defendant acted unlawfully is not sufficient, and mere consistency with
17 liability falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949
18 (quotation marks omitted); Moss, 572 F.3d at 969.

19 **II. Plaintiff’s Allegations**

20 Plaintiff currently is housed at the United States Penitentiary, Hazelton in Bruceton Mills,
21 West Virginia. The events in the complaint are alleged to have occurred while Plaintiff was housed
22 at the United States Penitentiary, Atwater, in Atwater, California. Plaintiff names the United States
23 as the sole defendant and asserts a claim for violation of the Eighth Amendment to the United States
24 Constitution.

25 In relevant part, Plaintiff alleges that on December 6, 2016, he was physically, sexually and
26 verbally assaulted and battered. Plaintiff further alleges that there was a use of force “team”
27 conducted on him in cell 117 A Range in the SHU. (ECF No. 1 at p. 3.) Plaintiff was in the shower
28 sitting when “they” came in and began striking him with closed fists to the face, head and upper

1 body. (Id.) When Plaintiff was turned over to be restrained, he was bent over the shower and his
2 pants were pulled down. One of the officers began wiping OC spray on Plaintiff’s anus and genitals
3 and another officer whispered in Plaintiff’s ear, “How do you like that faggot.” Plaintiff was then
4 placed in an outside rec cage. Around 20 plus inmates, SIS Lt. P. Hayes said, “Harris you’re here
5 cause you got caught sucking dick at your last spot and they smash you.!!” (Id.) Plaintiff contends
6 that all or most of this should be on video per policy.

7 Plaintiff asserts that he suffered multiple bruises, contusions, cuts, scrapes, excessive
8 burning to his anus and genitals and trauma from sexual abuse. Plaintiff seeks damages in the
9 amount of \$10,000.

10 **III. Discussion**

11 **A. United States as Defendant**

12 A Bivens claim may only be maintained against officials acting under color of federal law
13 in their individual capacities—neither the United States, nor any of its agencies, is a proper
14 defendant. FDIC v. Meyer, 510 U.S. 471, 486 (1994) (federal agencies are not proper defendants
15 in a Bivens action). Thus, the United States is not a proper defendant in this action.

16 **B. Bivens Actions Following Ziglar v. Abbasi**

17 Plaintiff is a federal prisoner proceeding under Bivens. To date, the Supreme Court has
18 only recognized a Bivens remedy in the context of the Fourth, Fifth, and Eighth Amendments. See
19 Bivens, 403 U.S. 388 (Fourth Amendment prohibition against unreasonable searches and seizures);
20 Davis v. Passman, 442 U.S. 228 (1979) (Fifth Amendment gender-discrimination); Carlson v.
21 Green, 446 U.S. 14 (1980) (Eighth Amendment Cruel and Unusual Punishments Clause for failure
22 to provide adequate medical treatment). The Supreme Court has recently made clear that
23 “expanding the Bivens remedy is now a disfavored judicial activity,” and has “consistently refused
24 to extend Bivens to any new context or new category of defendants. Ziglar v. Abbasi, 137 S.Ct.
25 1843, 1857 (2017) (citations omitted).

26 If a claim presents a new context in Bivens, then the court must consider whether there are
27 special factors counseling against extension of Bivens into this area. Abassi, 137 S.Ct. at 1857. The
28 Supreme Court’s precedents “now make clear that a Bivens remedy will not be available if there

1 are ‘special factors counselling hesitation in the absence of affirmative action by Congress.’” Id.
2 Thus, “the inquiry must concentrate on whether the Judiciary is well suited, absent congressional
3 action or instruction, to consider and weigh the costs and benefits of allowing a damages action to
4 proceed.” Id. at 1857–58. This requires the court to assess the impact on governmental operations
5 system-wide, including the burdens on government employees who are sued personally, as well as
6 the projected costs and consequences to the government itself. Id. at 1858. In addition, “if there is
7 an alternative remedial structure present in a certain case, that alone may limit the power of the
8 Judiciary to infer a new Bivens cause of action.” Id.

9 Plaintiff alleges a claim for excessive force in violation of the Eighth Amendment. As
10 indicated above, in Carlson, the Supreme Court extended Bivens to a claim arising from the Cruel
11 and Unusual Punishments Clause of the Eighth Amendment based on the failure to provide
12 adequate medical treatment. 446 U.S. 14. However, deliberate indifference to a serious medical
13 need, see Carlson, 446 U.S. at 16 n.1, is different than Plaintiff’s claims arising out of an alleged
14 use of excessive force. Accordingly, because Plaintiff’s Eighth Amendment claim arises in a
15 different context from that of Carlson, the Court also must employ a special factors analysis for this
16 claim. See Ziglar, 137 S.Ct. at 1864 (“[E]ven a modest extension [of Bivens] is still an extension.”).

17 As discussed in Ziglar, “the existence of alternative remedies usually precludes a court from
18 authorizing a Bivens action.” Ziglar, 137 S.Ct. at 1865. It is clear that Plaintiff has alternative
19 remedies available to him, including the Bureau of Prisons administrative grievance process and a
20 federal tort claims action. Moreover, “legislative action suggesting that Congress does not want a
21 damages remedy is itself a factor counseling hesitation.” Id. As noted by the Supreme Court:

22 Some 15 years after Carlson was decided, Congress passed the Prison Litigation
23 Reform Act of 1995, which made comprehensive changes to the way prisoner abuse
24 claims must be brought in federal court. So it seems clear that Congress had specific
25 occasion to consider the matter of prisoner abuse and to consider the proper way to
26 remedy those wrongs. This Court has said in dicta that the Act’s exhaustion
provisions would apply to Bivens suits. But the Act itself does not provide for a
standalone damages remedy against federal jailers. It could be argued that this
suggests Congress chose not to extend the Carlson damages remedy to cases
involving other types of prisoner mistreatment.

27 Id. (internal citations omitted). Congress has been active in the area of prisoners’ rights, and its
28 actions do not support the creation of a new Bivens claim. This deficiency cannot be cured by

1 amendment.

2 **C. Verbal Harassment**

3 Insofar as Plaintiff alleges that prison staff verbally harassed him, Plaintiff's complaint fails
4 to set forth a viable claim. The Eighth Amendment's protections do not necessarily extend to mere
5 verbal sexual harassment. See Austin v. Terhune, 367 F.3d 1167, 1171 (9th Cir. 2004).

6 **IV. Conclusion and Recommendation**

7 Plaintiff's complaint fails to state a cognizable Bivens claim for relief under federal law.
8 The deficiencies in Plaintiff's complaint cannot be cured by amendment, and thus leave to amend
9 is not warranted. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

10 Accordingly, the Court HEREBY RECOMMENDS as follows:

- 11 1. This action be dismissed for failure to state a cognizable claim for relief pursuant to 28
12 U.S.C. § 1915A; and
- 13 2. Plaintiff's pending motions, if any, be terminated.

14 These Findings and Recommendation will be submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
16 **(14) days** after being served with these Findings and Recommendation, Plaintiff may file written
17 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
18 Findings and Recommendation." Plaintiff is advised that failure to file objections within the
19 specified time may result in the waiver of the "right to challenge the magistrate's factual findings"
20 on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
21 F.2d 1391, 1394 (9th Cir. 1991)).
22 IT IS SO ORDERED.

23 Dated: June 27, 2018

24 /s/ Barbara A. McAuliffe
25 UNITED STATES MAGISTRATE JUDGE
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