



1 “Same as original complaint”). Because plaintiff did not restate the facts alleged in his original  
2 complaint, he again failed to state a claim upon which relief can be granted. Accordingly, on  
3 October 19, 2018, the court directed plaintiff to show cause why this case should not be dismissed  
4 for failure to obey a court order and failure to state a claim. ECF No. 16. The court granted  
5 plaintiff leave to file an amended complaint within thirty days. *Id.* Thirty days have passed, and  
6 plaintiff failed to respond, thereby violating the court’s order.

7 The court may dismiss a case brought by a prisoner seeking relief against a governmental  
8 entity or officer or employee of a governmental entity for plaintiff’s failure to state a claim. *See*  
9 28 U.S.C. § 1915A(a). Here, the court twice found that plaintiff failed to state a claim, ECF No.  
10 9; ECF No. 16, so the case may be dismissed on this basis.

11 The court may also dismiss a case for plaintiff’s failure to prosecute or failure to comply  
12 with a court order. *See* Fed. R. Civ. P. 41(b); *Hells Canyon Pres. Council v. U.S. Forest Serv.*,  
13 403 F.3d 683, 689 (9th Cir. 2005). Involuntary dismissal is a harsh penalty, but a district court  
14 has duties to resolve disputes expeditiously and to avoid needless burden for the parties. *See*  
15 Fed. R. Civ. P. 1; *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002).

16 In considering whether to dismiss the case for failure to prosecute, a court ordinarily  
17 considers five factors: “(1) the public’s interest in expeditious resolution of litigation; (2) the  
18 court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy  
19 favoring disposition of cases on their merits and (5) the availability of less drastic sanctions.”  
20 *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010) (quoting *Henderson v. Duncan*, 779  
21 F.2d 1421, 1423 (9th Cir.1986)). These heuristic factors merely guide the court’s inquiry; they  
22 are not conditions precedent for dismissal. *See In re Phenylpropanolamine (PPA) Products*  
23 *Liability Litig.*, 460 F.3d 1217, 1226 (9th Cir. 2006).

24 “The public’s interest in expeditious resolution of litigation always favors dismissal.”  
25 *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (quoting *Yourish v. California*  
26 *Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly, this factor weighs in favor of  
27 dismissal.

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1 Turning to the risk of prejudice, pendency of a lawsuit, on its own, is not sufficiently  
2 prejudicial to warrant dismissal. *Id.* (citing *Yourish*, 191 F.3d at 991). However, delay inherently  
3 increases the risk that witnesses’ memories will fade and evidence will become stale, *id.* at 643,  
4 and it is plaintiff’s failure to prosecute this case that is causing delay. Therefore, the third factor  
5 weighs in favor of dismissal.

6 As for the availability of lesser sanctions, at this stage in the proceedings there is little  
7 available to the court that would constitute a satisfactory lesser sanction while protecting the court  
8 from further unnecessary expenditure of its scarce resources. Monetary sanctions are of little use,  
9 considering plaintiff’s incarceration and *in forma pauperis* status, and—given the stage of these  
10 proceedings—the preclusion of evidence or witnesses is not available. While dismissal is a harsh  
11 sanction, the court has already found that plaintiff’s complaint failed to state a claim. *See* ECF  
12 No. 9; ECF No. 16

13 Finally, because public policy favors disposition on the merits, this factor weighs against  
14 dismissal. *Id.*

15 After weighing the factors, including the court’s need to manage its docket, the court finds  
16 that dismissal is appropriate. The court will recommend dismissal without prejudice.

### 17 **Findings and Recommendations**

18 The court recommends that the case be dismissed without prejudice for plaintiff’s failures  
19 to state a claim, to prosecute, and to comply with court orders.

20 The undersigned submits these findings and recommendations to the U.S. district judge  
21 presiding over the case under 28 U.S.C. § 636(b)(1)(B) and Local Rule 304. Within 14 days of  
22 the service of the findings and recommendations, the parties may file written objections to the  
23 findings and recommendations with the court and serve a copy on all parties. The document  
24 containing the objections must be captioned “Objections to Magistrate Judge’s Findings and  
25 Recommendations.” The presiding district judge will then review the findings and  
26 recommendations under 28 U.S.C. § 636(b)(1)(C). The parties’ failure to file objections within  
27 the specified time may waive their rights on appeal. *See Wilkerson v. Wheeler*, 772 F.3d 834, 839  
28 (9th Cir. 2014).

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IT IS SO ORDERED.

Dated: December 12, 2018

  
UNITED STATES MAGISTRATE JUDGE