

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CHARLES A. ROGERS,  
Plaintiff,  
v.  
K. CAMPBELL, et al.,  
Defendants.

Case No. 1:21-cv-00021-JLT-SKO (PC)

**FINDINGS AND RECOMMENDATIONS  
TO GRANT IN PART AND DENY IN PART  
DEFENDANTS' MOTION TO DISMISS**

(Doc. 29)

**14-DAY OBJECTION DEADLINE**

Plaintiff Charles A. Rogers is proceeding pro se and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983.

**I. RELEVANT BACKGROUND**

The Court issued its Third Screening Order on January 26, 2024, finding Plaintiff's third amended complaint plausibly alleged a First Amendment retaliation claim against Defendant Campbell, as well as violations of the Fourteenth Amendment due process clause against Defendants Cates and Sullivan. (Doc. 22.)

On April 5, 2024, Defendants Campbell, Cates and Sullivan filed a motion to dismiss, alleging Plaintiff fails to state claims upon which relief can be granted. (Doc. 29.) Plaintiff filed an opposition (Doc. 31) and Defendants replied (Doc. 33).

//

1                   **II.     PLAINTIFF’S CLAIMS**

2                   The operative complaint is Plaintiff’s third amended complaint filed April 26, 2023. (*See*  
3 Doc. 21.) At screening, this Court summarized Plaintiff’s facts as follows:

4   ***The Factual Allegations***

5                   Plaintiff alleges that on June 9, 2020, he wrote a letter to Defendant  
6 Sullivan explaining Defendant Campbell had been withholding  
7 Plaintiff’s mail “without any notification for more than 2 months.”  
8 (Doc. 21 at 2.) Plaintiff asserts Defendant Campbell summoned  
9 Plaintiff and informed him that his incoming mail was being  
10 withheld “in search of contraband.” (*Id.*) Campbell also informed  
11 Plaintiff that no contraband had been found. (*Id.*) Plaintiff alleges  
12 Campbell wanted to know why the “return address on the mail was  
13 fraudulent? Plaintiff could not confirm or deny.” (*Id.*)

14                   Plaintiff asserts he filed an appeal regarding Campbell’s withholding  
15 of his mail. (Doc. 21 at 2.) He contends Defendant Sullivan  
16 “responded to [his] letter using vague and ambiguous terms” and did  
17 not address Campbell’s actions. (*Id.*) Plaintiff contends Defendant  
18 Cates heard the appeal and denied it. (*Id.*) Plaintiff asserts the appeal  
19 “was granted at the highest level, in that defendant Campbell violated  
20 the California Code of Regulations, Title 15 §3136(a)” by  
21 withholding Plaintiff’s mail without notifying Plaintiff. (*Id.* at 2-3,  
22 emphasis in original.)

23                   Plaintiff alleges that on November 3, 2020, he received a Notification  
24 of Disapproval for Mail/Packages/Publications form, stating  
25 Plaintiff’s incoming mail was contraband. (Doc. 21 at 3.) Plaintiff  
26 asserts he submitted an Inmate Request for Interview form, asking  
27 Campbell to clarify how his incoming mail was considered  
28 contraband. (*Id.*) Plaintiff alleges Campbell responded ambiguously,  
“not stating exactly what is the contraband that was allegedly []  
mailed” to Plaintiff. (*Id.*) Plaintiff then filed an appeal alleging  
Campbell was “displaying acts of harassment and retaliation” after  
the previously filed appeal. (*Id.*) Plaintiff alleges the justification “for  
the withholding of [his] mail by Campbell is the postage stamp that  
states: ‘Free Matter for the Blind and Physically Handicapped.’” (*Id.*)

Next, Plaintiff alleges he sent a letter to Sullivan explaining  
Campbell’s withholding of his mail and asking Sullivan to instruct  
Campbell to forward Plaintiff’s mail and “cease from these acts of  
retaliation and harassment.” (Doc. 21 at 3.) He alleges the letter “fell  
on deaf ears.” (*Id.*)

(Doc. 22 at 6-7.) Further facts relating to Plaintiff’s allegations included the following, in relevant  
part:

Claim One: Retaliation by Defendant Campbell

Plaintiff contends Defendant Campbell “acted with retaliation and

1 conscious disregard” of his constitutional right to file a grievance  
2 “against any malicious actions of prison staff, especially Campbell.”  
3 (Doc. 21 at 3-4.) He states he wrote Defendant Sullivan about  
4 Campbell’s actions and four months later he was advised by  
5 Campbell that his mail was contraband. (*Id.* at 4.) Plaintiff states he  
6 did not receive an infraction for attempting to introduce contraband  
7 into a prison facility. (*Id.*) He contends the retaliatory action did not  
8 advance any legitimate penological goal and that Campbell’s actions  
9 were willful, reckless and done in conscious disregard of his rights.  
10 (*Id.*)

11 Claim Two: Due Process Violations by Defendants Cates and  
12 Sullivan

13 Plaintiff contends Defendants Cates and Sullivan “acted with  
14 deliberate indifference” towards him when they failed to stop the  
15 constitutional violations to which he was subjected. (Doc. 21 at 5.)  
16 Plaintiff states he wrote a letter to Defendant Sullivan about  
17 Campbell having withheld his mail for two months and eventually  
18 Defendant Cates denied his grievance. (*Id.*) When Plaintiff  
19 “furthered the appeal to the highest level,” it was granted. (*Id.*)  
20 Plaintiff alleges his “correspondent mailed 2 letters to Sullivan,  
21 October 4, 2020 and December 4, 2020,” informing Sullivan of the  
22 constitutional violations regarding the withholding of Plaintiff’s  
23 incoming mail. (*Id.*) Plaintiff asserts he “sent 3 letters to Cates, May  
24 19, 2021; September 27, 2021; and September 29, 2021.” (*Id.*) He  
25 contends the May 2021 letter concerned Campbell’s withholding of  
26 his mail and the September 2021 letter involved a complaint about  
27 mailroom staff withholding his “mail where some of his mail  
28 plaintiff received it more than 2 months later.” (*Id.* at 5-6.) Plaintiff  
alleges he “informed Cates that he still holds the evidence of the  
mailroom purposely holding his mail.” (*Id.* at 6.) Plaintiff states he  
“wanted to know how it is that he cannot dispute the finding of the  
mailroom that the photos plaintiff received in the mail was not  
appropriate,” but received no response. (*Id.*) Plaintiff asserts the  
September 2021 letter asked Cates to accept his “602 and instruct the  
prison appeals coordinator to log his appeal and forward it for  
response, because [he] submitted the appeal previously and it is  
believed that the appeal was discarded.” (*Id.*) Plaintiff asserts Cates  
never responded, “nor did anyone at the appeals office.” (*Id.*)  
Plaintiff contends his “correspondent has written Cates 4 times ...  
asking Cates to acknowledge the wrongdoings of the mailroom staff  
and order the staff to cease from their continuous constitutional  
violations.” (*Id.*) Plaintiff asserts “Cates and Sullivan were eerily  
silent” and that both violated their duties “mandated by DOM §  
33070.5.” (*Id.*)

25 (Doc. 22 at 7-8.) Considering the allegations in light of Plaintiff’s claims, the Court found as  
26 follows:

27 Here, liberally construing the third amended complaint, Plaintiff  
28 states a cognizable First Amendment retaliation claim against  
Defendant Campbell. Plaintiff contends Campbell took adverse

1 action against him by withholding and continuing to withhold his  
2 mail because Plaintiff filed a grievance against Campbell, and  
3 thereby chilled Plaintiff's exercise of his First Amendment rights and  
4 Campbell's actions did not advance any legitimate penological goal.  
5 *Rhodes*, 408 F.3d at 567-68; *McCollum*, 647 F.3d at 882

6 ...

7 Plaintiff contends Defendants Cates and Sullivan "acted with  
8 deliberate indifference ... when they failed (as prison wardens) to put  
9 a stop to the constitutional violations that [he] was being subjected  
10 to." (Doc. 21 at 5.) Defendants Cates and Sullivan are identified as  
11 wardens at the California Correctional Institution ("CCI"), and  
12 neither is identified as having been personally involved in  
13 withholding Plaintiff's mail. Their involvement is instead centered  
14 on the failure to respond to Plaintiff's letters regarding Defendant  
15 Campbell's withholding of Plaintiff's legal mail, a related lack of  
16 notice, and the failure to remedy the matter when his grievance  
17 concerning the withheld mail was granted at the highest level.  
18 However, liability may not be imposed on supervisory personnel for  
19 the actions or omissions of their subordinates under the theory of  
20 respondeat superior. *Iqbal*, 556 U.S. at 676-77. Thus, Defendants  
21 Cates and Sullivan are not liable merely as supervisors for the actions  
22 or omissions of their subordinate, Defendant Campbell. ... Plaintiff  
23 does not allege Defendants Cates and Sullivan personally  
24 participated in or directed the violations concerning his withheld  
25 mail. Plaintiff does allege Cates and Sullivan were aware of the  
26 violations and failed to take any action to prevent the violations. ...  
27 Plaintiff also contends Defendants Cates and Sullivan violated  
28 "Department Operations Manual § 33070.5" which amounts to  
violation of prison procedure or policy. *Sorreles*, 290 F.3d at 972.  
Therefore, liberally construing the third amended complaint,  
Plaintiff makes the required showing by alleging he advised both  
Cates and Sullivan in writing that Campbell had withheld his mail  
for two months without providing notice and that Defendants failed  
to act. Although Plaintiff provides some dates and appears to omit  
other dates, at the pleading stage, the Court finds Plaintiff sufficiently  
alleges Fourteenth Amendment due process violations. ... In sum,  
liberally construing the third amended complaint, Plaintiff has  
plausibly alleged Fourteenth Amendment due process violations  
against Defendants Cates and Sullivan as they both had knowledge  
of the alleged constitutional violations suffered by Plaintiff regarding  
the lack of notice of his withheld mail and failed to act.

(Doc. 22 at 8-11.)

### III. LEGAL STANDARDS

#### *Motions to Dismiss*

A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In resolving a 12(b)(6) motion, the Court's review is generally limited to the "allegations contained in the pleadings, exhibits attached to the complaint,

1 and matters properly subject to judicial notice.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519  
2 F.3d 1025, 1030-31 (9th Cir. 2008) (internal quotation marks & citations omitted). Dismissal is  
3 proper if there is a “lack of a cognizable legal theory or the absence of sufficient facts alleged  
4 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
5 1988) (citation omitted).

6 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
7 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556  
8 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court  
9 “accept[s] as true all well-pleaded allegations of material fact, and construe[s] them in the light  
10 most favorable to the non-moving party.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998  
11 (9th Cir. 2010) (citation omitted). In addition, the Court construes pleadings of pro se prisoners  
12 liberally and affords them the benefit of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir.  
13 2010) (citation omitted). However, “the liberal pleading standard ... applies only to a plaintiff’s  
14 factual allegations,” not his legal theories. *Neitze v. Williams*, 490 U.S. 319, 330 n.9 (1989).

15 When resolving a motion to dismiss under Rule 12(b)(6), a court may not consider  
16 materials outside the complaint, including new allegations in an opposition. *Guamataotao v. Dir.*  
17 *Of Dep’t of Revenue & Taxation*, 236 F.3d 1077, 1083 (9th Cir. 2001); *Schneider v. California*  
18 *Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (finding new allegations contained  
19 in an opposition to a motion to dismiss to be irrelevant for Rule 12(b)(6) purposes).

### 20 ***First Amendment Retaliation***

21 Prisoners have a First Amendment right to file prison grievances and retaliation against  
22 prisoners for exercising this right is a constitutional violation. *Rhodes v. Robinson*, 408 F.3d 559,  
23 566 (9th Cir. 2005); *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003). A claim for First  
24 Amendment retaliation in the prison context requires: (1) that a state actor took some adverse  
25 action against the plaintiff (2) because of (3) the plaintiff’s protected conduct, and that such  
26 action (4) chilled the plaintiff’s exercise of his First Amendment rights, and (5) “the action did  
27 not reasonably advance a legitimate correctional goal.” *Rhodes*, 408 F.3d at 567-68; *Brodheim v.*  
28 *Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). To prove the second element, retaliatory motive, a

1 plaintiff must show that his protected activities were a “substantial” or “motivating” factor behind  
2 the defendant’s challenged conduct. *Brodheim*, at 1269, 1271. Plaintiff must provide direct or  
3 circumstantial evidence of defendant’s alleged retaliatory motive; mere speculation is not  
4 sufficient. *See McCollum v. CDCR*, 647 F.3d 870, 882-83 (9th Cir. 2011); *Wood v. Yordy*, 753  
5 F.3d 899, 905 (9th Cir. 2014). In addition to demonstrating defendant’s knowledge of plaintiff’s  
6 protected conduct, circumstantial evidence of motive may include: (1) proximity in time between  
7 the protected conduct and the alleged retaliation; (2) defendant’s expressed opposition to the  
8 protected conduct; and (3) other evidence showing that defendant’s reasons for the challenged  
9 action were false or pretextual. *McCollum*, 647 F.3d at 882.

#### 10 ***Fourteenth Amendment Due Process***

11 The Due Process Clause protects prisoners from deprivation of property without due  
12 process of law. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). The Due Process Clause “protects  
13 persons against deprivations of life, liberty, or property; and those who seek to invoke its  
14 procedural protection must establish that one of these interests is at stake.” *Wilkinson v. Austin*,  
15 545 U.S. 209, 221 (2005).

16 Prisoners have a liberty interest in the receipt of mail which triggers procedural due  
17 process guarantees. *Krug v. Lutz*, 329 F.3d 692, 696-97 (9th Cir. 2003). If prison officials  
18 withhold mail, a prisoner has a due process right to receive notice that his incoming mail is being  
19 withheld. *See Frost v. Symington*, 197 F.3d 348, 353-54 (9th Cir. 1999); *see also Prison Legal*  
20 *News v. Cook*, 238 F.3d 1145, 1152-53 (9th Cir. 2001) (holding that due process rights apply to  
21 withheld mail where prisoners had constitutionally protected right to receive the mail).

22 Withholding delivery of inmate mail must be accompanied by minimum procedural safeguards.  
23 *Procunier v. Martinez*, 416 U.S. 396, 417-18 (1974), overruled on other grounds by *Thornburgh*  
24 *v. Abbott*, 490 U.S. 401 (1989). These procedural safeguards include: (1) notifying the inmate that  
25 the mail was seized; (2) allowing the inmate a reasonable opportunity to protest the decision; and  
26 (3) referring any complaints to a prison official other than the one who seized the mail.

27 *Procunier*, 416 U.S. at 418-19; *Krug*, 329 F.3d at 698. A prisoner also has a due process right to  
28 appeal the exclusion of mail to a prison official other than the one who made the initial exclusion

1 decision. *Id.* at 697-98 & n.5. A brief delay in the process of an inmate’s mail without notice to  
2 the inmate is not a violation of the Fourteenth Amendment. *Sorrels v. McKee*, 290 F.3d 965, 972  
3 (9th Cir. 2002). And “[o]nly if the failure to provide notice was pursuant to prison policy does  
4 this constitute a due process violation actionable under § 1983.” *Id.*

5 **IV. SUMMARY OF THE PARTIES’ POSITIONS**

6 ***Defendants’ Motion to Dismiss (Doc. 29)***

7 Defendants contend Plaintiff’s First Amendment retaliation claim against Defendant  
8 Campbell fails to allege sufficient facts to satisfy several elements of that claim. Defendants  
9 further contend that Plaintiff’s Fourteenth Amendment claims against Defendants Sullivan and  
10 Cates fail to state a claim upon which relief can be granted because the allegations “were in  
11 contravention of prison policy, and were rectified by the appeal process.”

12 ***Plaintiff’s Opposition (Doc. 31)***

13 Plaintiff contends he must be given the benefit of the doubt to allow for a consideration of  
14 the merits of his claims. He asserts his claims “meet the requirements of notice pleading” and that  
15 Defendants’ “papers fail[] to support their motions to dismiss and on appeal demonstrate that they  
16 had fair notice of what Plaintiff’s claims are and the grounds upon which they rest.” Lastly,  
17 Plaintiff asserts “it should be concluded that this Court has jurisdiction.”

18 ***Defendants’ Reply (Doc. 32)***

19 Defendants state that Plaintiff’s opposition “fails to provide any compelling argument why  
20 any of his claims should survive” and Plaintiff did not substantively address any of the arguments  
21 asserted in the motion to dismiss.

22 **V. DISCUSSION**

23 **A. Plaintiff Sufficiently Alleges a Retaliation Claim Against Campbell**

24 Defendants contend Plaintiff has failed to sufficiently allege the second, fourth and fifth  
25 elements of a First Amendment retaliation claim. Plaintiff’s opposition fails to address  
26 Defendants’ argument.

27 //

28 //





1 Plaintiff's first grievance followed a letter to Sullivan complaining of Campbell's  
2 withholding his mail in the absence of notice and Campbell later informing Plaintiff the  
3 withholding was the result of a "search for contraband." Plaintiff asserts his grievance was  
4 granted because Campbell was found in violation of policy.

5 On November 3, 2020, Plaintiff received notice from Campbell that his incoming mail  
6 was being withheld as contraband because it included a "postage stamp that states: 'Free Matter  
7 For The Blind And Physically Handicapped.'" When Plaintiff's earlier grievance was granted  
8 because Campbell was found to have violated policy, Campbell's subsequent notice of  
9 withholding Plaintiff's incoming mail as contraband can amount to circumstantial evidence of  
10 retaliatory motive. Stated another way, at the pleading stage, Plaintiff's allegations involving the  
11 withholding of his incoming mail by Campbell as contraband because that indicated the sender  
12 (not Plaintiff as the recipient) was employing a service permitting blind or physically disabled  
13 persons to mail certain materials free of charge can be reasonably inferred to be retaliatory  
14 conduct. *McCullum*, 647 F.3d at 882-83; *Pratt*, 65 F.3d at 808. Under these circumstances,  
15 Plaintiff's allegation regarding retaliatory conduct is not merely speculative. *McCullum*, at 882-  
16 83. Liberally construing Plaintiff's allegations and affording him the benefit of any doubt, this  
17 Court finds Plaintiff pled sufficient facts to establish retaliatory motive by Campbell.

18 Defendants cite to *Calihan v. Adams*, N. 1:09-CV-1373-MJS (PC), 2011 WL 284467, at  
19 \*6-7 (E.D. Cal. Jan. 26, 2011), in support of their contention that Plaintiff has failed to adequately  
20 allege retaliatory animus. The *Calihan* court stated: "it is not entirely clear in Plaintiff's  
21 complaint, but it appears that Plaintiff is making a claim that Defendants are retaliating against  
22 him for pursuing his constitutional rights, i.e., that Defendant Adams directed continued  
23 interference with his mail after Plaintiff [] filed a grievance" for that interference. *Id.* at \*6.  
24 Discussing the causation prong, the *Calihan* court found: "It is unclear why Plaintiff believes that  
25 the grievance was the cause of his mail being delayed when the same or similar interference was

26 handicap." See [https://faq.usps.com/s/article/What-is-Free-Matter-for-the-Blind-or-Other-Physically-  
27 Handicapped-Persons](https://faq.usps.com/s/article/What-is-Free-Matter-for-the-Blind-or-Other-Physically-Handicapped-Persons), as of 11/14/2024. Fed. R. Evid. 201; see *Gerritsen v. Warner Bros. Entm't Inc.*, 112  
28 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) ("Under Rule 201, the court can take judicial notice of public  
records and government documents available from reliable sources on the Internet, such as websites run by  
governmental agencies").

1 occurring before the grievance was filed; indeed it was the subject of the grievance. Plaintiff has  
2 failed to establish causation and motive sufficient to satisfy the second prong of his retaliation  
3 claim.” *Id.* at \*7.

4 Here, Plaintiff alleges he complained to the warden about not receiving notice that his  
5 mail was being withheld, Campbell advised Plaintiff his mail was being withheld as potential  
6 contraband, and when Plaintiff grieved the withholding in the absence of notice, the grievance  
7 was granted at the highest level, finding Campbell violated regulations. Plaintiff’s incoming mail  
8 was then withheld on the basis it included an improper stamp or postage. Unlike *Calihan*,  
9 Plaintiff alleges conduct beyond “the same or similar interference.” Plaintiff alleges Campbell  
10 withheld Plaintiff’s incoming mail because the third level grievance review determined Campbell  
11 violated policy regarding a lack of notice and Campbell identified a later piece of incoming mail  
12 as contraband based upon a stamp or postage affixed by the sender about a program available to  
13 blind or physically handicapped persons.

14 At this stage of the proceedings, liberally construing the complaint and affording Plaintiff  
15 the benefit of all doubt, the Court finds Plaintiff sufficiently alleged the second element of a  
16 retaliation claim.

## 17 2. The Chilling Element Is Sufficiently Pled

18 The fourth element requires showing a chilling of the exercise of Plaintiff’s First  
19 Amendment rights. *Rhodes*, 408 F.3d at 567-68. “[A] plaintiff who fails to allege a chilling effect  
20 may still state a claim if he alleges he suffered some other harm.” *Brodheim*, 584 F.3d at 1269.  
21 That the retaliatory conduct did not chill Plaintiff from suing the alleged retaliator does not defeat  
22 the retaliation claim at the motion to dismiss stage. *Rhodes*, 408 F.3d at 569.

23 Defendants contend Plaintiff “fails to allege that the conduct described chilled the exercise  
24 of his First Amendment right,” and the allegations in the operative complaint “suggest that  
25 Plaintiff was unfazed by the alleged conduct as he continued to pursue administrative remedies  
26 and communicate with Prison officials via mail regarding his grievances.” Defendants  
27 additionally state that Plaintiff fails to allege he was prevented from sending mail or that all of his  
28 incoming mail was withheld.

1 First, the fact Plaintiff continued to pursue his remedies and to communicate with prison  
2 officials does not defeat his claim against Defendant Campbell at this stage of the proceedings.  
3 *Rhodes*, 408 F.3d at 569. Second, Defendants cites to no legal authority that requires Plaintiff to  
4 allege he was prevented from sending mail or that all of his incoming mail was withheld. Plaintiff  
5 does not have to show he was actually chilled and prevented from sending mail or that all of his  
6 incoming mail was withheld. In *Rhodes*, the Ninth Circuit “explicitly held that an objective  
7 standard governs the chilling inquiry; a plaintiff does not have to show that ‘his speech was  
8 actually inhibited or suppressed,’ but rather that the adverse action at issue ‘would chill or silence  
9 a person of ordinary firmness from future First Amendment activities.’” *Brodheim*, 584 F.3d at  
10 1271 (citing *Rhodes*, 408 F.3d at 568-69). Further, “a plaintiff who fails to allege a chilling effect  
11 may still state a claim if he alleges he suffered some other harm” as a retaliatory adverse action.  
12 *Brodheim*, 584 F.3d at 1269 (citing *Rhodes*, 408 F.3d at 567 n.11).

13 Here, Plaintiff’s operative complaint alleges he suffered harm in the form of “personal  
14 property loss.” At this stage of the proceedings, liberally construing the complaint and affording  
15 Plaintiff the benefit of all doubt, the Court finds Plaintiff sufficiently alleged the fourth element of  
16 a retaliation claim.

### 17 3. The Legitimate Correctional Goal Element Is Sufficiently Pled

18 The fifth element requires a showing that the action did not reasonably advance a  
19 legitimate correctional goal. *Rhodes*, 408 F.3d at 567-68. Plaintiff bears the burden of pleading  
20 and proving the absence of legitimate correctional goals for the conduct of which he complains.  
21 *See Pratt*, 65 F.3d at 806. A plaintiff may do so “by alleging, in addition to retaliatory motive,  
22 that the defendant’s actions were arbitrary and capricious ... or that they were ‘unnecessary to the  
23 maintenance of order in the institution.’” *Watison v. Carter*, 668 F.3d 1108, 1114-15 (9th Cir.  
24 2012) (citations omitted).

25 Here, Plaintiff’s third amended complaint alleges that Campbell’s “retaliatory action did  
26 not advance any legitimate penological goals.” This refers to the November 2020 conduct  
27 involving withholding Plaintiff’s incoming mail as contraband because it involved “a postage  
28 stamp that states: ‘Free Matter For The Blind And Physically Handicapped.’” (Doc. 21 at 4.)

1 Liberally construing the complaint, and resolving all doubt in Plaintiff's favor, it can be  
2 reasonably inferred Campbell's actions were arbitrary and capricious. *Watison*, 668 F.3d at 1114-  
3 15.

4 It is unclear how the withholding of incoming mail, sent by an outside individual who  
5 apparently used a government program providing blind and physically handicapped individuals  
6 with access to postage, was necessary to the maintenance of order in the institution. *See Rizzo v.*  
7 *Dawson*, 778 F.2d 527, 532 (9th Cir. 1985) (“[P]laintiff has alleged that [prison official] Stocker's  
8 actions were retaliatory and were arbitrary and capricious. He has thereby sufficiently alleged that  
9 the retaliatory acts were not a reasonable exercise of prison authority and that they did not serve  
10 any legitimate correctional goal”). At this stage of the proceedings, liberally construing the  
11 complaint and affording Plaintiff the benefit of all doubt, the Court finds Plaintiff has sufficiently  
12 alleged the fifth element of a retaliation claim.

#### 13 4. Summary

14 For the foregoing reasons, the Court finds Plaintiff has alleged sufficient facts concerning  
15 the second, fourth, and fifth elements of a First Amendment retaliation claim. It will therefore  
16 recommend that Defendants' motion to dismiss the retaliation claim against Defendant Campbell  
17 be denied.

#### 18 **B. Plaintiff Fails to Allege Due Process Violations Against Cates and Sullivan**

19 Defendants contend Plaintiff has not alleged a Fourteenth Amendment due process  
20 violation because Plaintiff failed to allege that the lack of notice concerning the withholding of  
21 his mail was pursuant to a prison policy.

22 “[W]ithhold[ing] delivery of [inmate mail] must be accompanied by minimum procedural  
23 safeguards.” *Sorreles v. McKee*, 290 F.3d 965, 972 (9th Cir. 2002) (as amended) (citation omitted,  
24 alterations in original). In particular, an inmate has a due process liberty interest in receiving  
25 notice that his incoming mail is being withheld. *Id.* However, “[o]nly if the failure to provide  
26 notice was pursuant to prison policy does this constitute a due process violation actionable under  
27 § 1983.” *Id.*

1 Plaintiff does not allege that the asserted misconduct was *pursuant to* prison policy.  
2 Plaintiff instead alleges that his incoming mail was withheld *in violation of* prison procedure. (*See*  
3 Doc. 21 at 2-3 [grievance granted “at highest level, in that defendant Campbell violated the  
4 California Code of Regulations, Title 15 § 3136(a) when he withheld plaintiff’s mail without  
5 notification”].) Therefore, no actionable due process violation has been alleged. *Sorrels*, 290 F.3d  
6 at 972; *Aguilar v. Carpio*, No. 1:17-cv-01190-DAD-GSA-PC, 2019 WL 3409902, at \*6 (E.D.  
7 Cal. July 29, 2019) (“Plaintiff alleges that defendant Carpio was *in violation of* CDCR regulations  
8 and the Department Operations Manual for failing to timely notify him that his mail was  
9 withheld. Thus, the failure to notify of the rejection was unauthorized and contrary to prison  
10 policy. It constitutes at most negligence and does not state a due process violation under § 1983”  
11 [italics added]);<sup>2</sup> *Jackson v. Medina*, No. EDCV 13-01930-JVS (DTB), 2016 WL 7638200, at \*6,  
12 (C.D. Cal. Oct. 31, 2016) (“plaintiff alleges that his mail was withheld *in violation of* prison  
13 procedure. ... Plaintiff does not maintain that the alleged misconduct was pursuant to prison  
14 policy. Thus, plaintiff has not stated a Due Process violation under Section 1983” [italics in  
15 original]).

16 Defendants also contend Plaintiff cannot allege a due process claim against Defendants  
17 Cates and Sullivan because “neither was involved in the alleged initial two-month lack of notice.”  
18 Defendants assert that Cates and Sullivan “did not have knowledge of the lack of notice until they  
19 were allegedly informed by Plaintiff in his letter and 602 appeal.”

20 Regarding Defendants Cates and Sullivan, Plaintiff’s operative complaint alleges they  
21 violated their duty pursuant to section 33070.5 of the Department Operations Manual. (*See* Doc.  
22 21 at 6 [“both of them violated their duties as mandated by DOM §33070.5”].) Plaintiff alleges  
23 his “correspondent mailed 2 letters to Sullivan” on October 4, 2020, and on December 4, 2020,  
24 “informing [S]ullivan of the constitutional violations of plaintiff’s incoming mail being  
25 wrongfully withheld.” (*Id.* at 5.) Plaintiff further alleges he “sent 3 letters to Cates.” (*Id.*) These  
26 letters consist of a May 19, 2021, letter stating that “once again Campbell [was] withholding

---

27  
28 <sup>2</sup> Compare to *Zavala v. Rios*, No. 1:09-cv-679 MJS (PC), 2013 WL 4401883, at \*3 (E.D. Cal. Aug. 15, 2013)  
 (“Plaintiff alleges that a prison policy caused his mail to be withheld and packages returned without notice to him.  
 Plaintiff has stated a cognizable due process claim”).

1 plaintiff's mail," a September 27, 2021, letter involving a "complaint about the mailroom staff is  
2 purposely withholding plaintiff's mail where some of his mail plaintiff received it more than 2  
3 months later," and a September 29, 2021, letter asking "Cates to accept plaintiff's 602 and  
4 instruct the prison appeals coordinator to log his appeal and forward it for a response ...." (*Id.* at  
5 5-6.) Plaintiff also alleges his "correspondent has written Cates 4 times, on September 10, 2020;  
6 December 20, 2020; August 20, 2020; and October 21, 2021." (*Id.* at 6.) On those occasions,  
7 Plaintiff's correspondent asked Cates "to acknowledge the wrongdoings of the mailroom staff and  
8 order the staff to cease from their continuous constitutional violations." (*Id.*)

9 Section 33070.5 titled "Employee Expectations and Reporting" provides as follows:

10 (a) Each employee, regardless of classification or rank, shall adhere  
11 to the department's Employee Performance Standards set forth in  
12 Title 15, section 3391, and be responsible for the following:

13 (1) Referring all observed misconduct or any unethical or illegal  
14 activity toward an inmate or parolee to CST via the Central  
15 Repository;

16 (2) Referring verbal allegations of unnecessary or excessive use of  
17 force and staff sexual misconduct, including sexual harassment,  
18 toward an inmate or parolee to CST via the Central Repository, and  
19 immediately forward the complaint to their Hiring Authority;

20 (3) Advising the complainant on how to submit their complaint in  
21 writing for verbal complaints not involving unnecessary or excessive  
22 use of force and staff sexual misconduct, including sexual  
23 harassment, toward an inmate or parolee; and

24 (4) Reporting alleged staff misconduct promptly to a supervisor or  
25 other appropriate departmental, governmental, or law enforcement  
26 entity. If information is reported verbally to a supervisor, the  
27 employee shall also submit a written report to the supervisor.

28 (<https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2024/03/2024-DOM.pdf>.)

Plaintiff alleges a due process violation against Cates and Sullivan for their failure to report illegal activity to the central repository—Campbell's withholding of his mail without notice. These allegations are insufficient to state claims against Cates and Sullivan.

Plaintiff has not alleged that Cates or Sullivan "observed misconduct or any unethical or illegal activity toward an inmate." Nor did Plaintiff's complaints about Campbell to Cates or Sullivan involve unnecessary or excessive force or staff sexual misconduct or harassment. Only

1 subsection (4) section 33070.5 —reporting alleged staff misconduct promptly to a supervisor or  
2 other appropriate departmental, governmental, or law enforcement entity—is potentially relevant  
3 because Plaintiff asserts Cates and Sullivan failed to report Campbell’s misconduct promptly to a  
4 supervisor or other appropriate entity.

5 Plaintiff’s claims against Cates and Sullivan rest on Campbell’s failure to notify Plaintiff  
6 that his mail was being withheld. As noted above, because Plaintiff alleges Campbell withheld his  
7 mail *in violation of* prison procedure rather than *pursuant to* prison procedure, he cannot state  
8 claims against Cates and Sullivan based on their failure to report Campbell’s purported  
9 misconduct.<sup>3</sup> For that same reason, whether and when Cates and Sullivan had notice of Plaintiff’s  
10 complaints about Campbell’s failure to notify him of withheld incoming mail are not  
11 determinative. Standing alone, the allegations that Cates and Sullivan violated prison regulations<sup>4</sup>  
12 do not state a section 1983 claim. *See Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009)  
13 (California prison regulations “do not establish a federal constitutional violation”); *see also*  
14 *Dillingham v. Garcia*, No. 1:19-cv-00461-AWI-GSA-PC, 2020 WL 2836449, at \*14 (E.D. Cal.  
15 June 1, 2020) (section 1983 does not provide remedy for alleged violations of California  
16 Department of Corrections and Rehabilitation Department Operations Manual); *Kitilya v. Calif.*  
17 *Dep’t of Corrections and Rehabilitation*, No. 2:18-cv-0672 JAM DB P, 2018 WL 3129816, at \*2  
18 (E.D. Cal. June 20, 2018) (“Section 1983 provides no redress for prison officials’ mere violation  
19 of state prison regulations”). Accordingly, Cates and Sullivan did not commit a federal  
20 constitutional violation by failing to report alleged staff misconduct.

21 In sum, Plaintiff fails to sufficiently allege due process violations against Defendants  
22 Cates and Sullivan. Granting Plaintiff leave to amend these claims would be futile. *Hartmann v.*

---

23  
24 <sup>3</sup> *See, e.g., Nunez v. Ramirez*, No. 09cv413 WQH (BLM), 2010 WL 1222058, at \*6 (S.D. Cal. Mar. 24,  
25 2010) (“Plaintiff’s free speech and retaliation claims are dependent on whether his statement ‘If you saw  
26 who was drinking, why don’t you address that person instead of disrespecting everybody’ is speech  
27 protected by the First Amendment. Because the statement is not protected speech in the prison context, his  
28 free speech and retaliation claims fail regardless of whether he has alleged all of the other elements of  
these claims”).

<sup>4</sup> Prison policies, regulations, or guidelines do not constitute federal law; instead, they are “primarily  
designed to guide correctional officials in the administration of a prison...not...to confer rights on inmates.”  
*Sandin v. Conner*, 515 U.S. 472, 481-82 (1995).

1 CDCR, 707 F.3d 1114, 1130 (9th Cir. 2013) (“A district court may deny leave to amend when  
2 amendment would be futile”); *Jackson*, 2016 WL 7638200, at \*6 (“because it is not possible for  
3 plaintiff to cure this deficiency through amendment, the Court recommends that plaintiff’s  
4 Fourteenth Amendment claim with respect to the withholding of his mail be dismissed without  
5 leave to amend”). The Court will recommend Defendants’ motion to dismiss Plaintiff’s due  
6 process claims against Cates and Sullivan be granted.

7 **IV. CONCLUSION AND RECOMMENDATIONS**

8 Based upon the foregoing, **IT IS HEREBY RECOMMENDED** that:

9 1. Defendants’ motion to dismiss (Doc. 29) be **GRANTED in part** and **DENIED in**  
10 **part** as follows:

11 a. Defendants’ motion to dismiss Plaintiff’s First Amendment retaliation claim  
12 against Defendant Campbell be **DENIED**; and

13 b. Defendants’ motion to dismiss Plaintiff’s Fourteenth Amendment due process  
14 claims against Defendants Cates and Sullivan be **GRANTED**.

15 These Findings and Recommendations will be submitted to the United States District  
16 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). **Within 14 days**  
17 after being served with a copy of these Findings and Recommendations, a party may file written  
18 objections with the Court. Local Rule 304(b). The document should be captioned, “Objections to  
19 Magistrate Judge’s Findings and Recommendations” and **shall not exceed fifteen (15) pages**  
20 without leave of Court and good cause shown. The Court will not consider exhibits attached to  
21 the Objections. To the extent a party wishes to refer to any exhibit(s), the party should reference  
22 the exhibit in the record by its CM/ECF document and page number, when possible, or otherwise  
23 reference the exhibit with specificity. Any pages filed in excess of the fifteen (15) page limitation  
24 may be disregarded by the District Judge when reviewing these Findings and Recommendations  
25 under 28 U.S.C. § 636(b)(1)(C). A party’s failure to file any objections within the specified time

26 //

27 //

28 //



1 may result in the waiver of certain rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th  
2 Cir. 2014).

3  
4 IT IS SO ORDERED.

5 Dated: November 25, 2024

*/s/ Sheila K. Oberto*  
UNITED STATES MAGISTRATE JUDGE

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28