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8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA

10  
11 **ALCAPONE ALO,**

12 **Plaintiff,**

13 **v.**

14 **CAROLE GOLDSMITH, et al.,**

15 **Defendants.**

Case No. 1:23-cv-00536-SAB

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DISMISSING ACTION  
FOR FAILURE TO STATE A CLAIM, FOR  
FAILURE TO COMPLY WITH COURT  
ORDE, AND FAILURE TO PROSECUTE

ORDER DIRECTING CLERK OF COURT  
TO RANDOMLY ASSIGN DISTRICT  
JUDGE

(ECF Nos. 1, 7)

**OBJECTIONS DUE WITHIN 14 DAYS**

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19 **I.**

20 **INTRODUCTION AND BACKGROUND**

21 Alcapone Alo (“Plaintiff”), proceeding *pro se* and *in forma pauperis*, filed this action on  
22 April 6, 2023. (ECF No. 1.) The Court initially denied Plaintiff’s *in forma pauperis* application,  
23 and later granted *in forma pauperis* status on April 13, 2023, based on a long form application.  
24 (ECF Nos. 3, 4, 6.) On May 10, 2023, the Court screened Plaintiff’s complaint and found it did  
25 not state a cognizable claim. (ECF No. 7.) The order was served on Plaintiff by postal mail and  
26 contained notice that Plaintiff was required to file an amended complaint within thirty (30) days.  
27 (Id.) The order further notified Plaintiff that if “[i]f Plaintiff fails to file a first amended  
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1 complaint in compliance with this order, the Court will recommend to the district judge that this  
2 action be dismissed, with prejudice, for failure to obey a court order, failure to prosecute, and for  
3 failure to state a claim.” (Id. at 22 (emphasis in original).)

4 Plaintiff did not file an amended complaint by the deadline to do so, and did not  
5 otherwise respond to the Court’s order or file any additional documents with the Court.  
6 Accordingly, the Court issues these findings and recommendations recommending that  
7 Plaintiff’s complaint be dismissed for failure to state a cognizable claim, and recommending this  
8 action be dismissed for failure to prosecute and failure to comply with the Court’s order.

9 **II.**

10 **SCREENING REQUIREMENT**

11 Notwithstanding any filing fee, the court shall dismiss a case if at any time the Court  
12 determines that the complaint “(i) is frivolous or malicious; (ii) fails to state a claim on which  
13 relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from  
14 such relief.” 28 U.S.C. § 1915(e)(2); see Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000)  
15 (section 1915(e) applies to all *in forma pauperis* complaints, not just those filed by prisoners);  
16 Calhoun v. Stahl, 254 F.3d 845 (9th Cir. 2001) (dismissal required of *in forma pauperis*  
17 proceedings which seek monetary relief from immune defendants); Cato v. United States, 70  
18 F.3d 1103, 1106 (9th Cir. 1995) (district court has discretion to dismiss *in forma pauperis*  
19 complaint under 28 U.S.C. § 1915(e)); Barren v. Harrington, 152 F.3d 1193 (9th Cir. 1998)  
20 (affirming sua sponte dismissal for failure to state a claim). The Court exercises its discretion to  
21 screen the plaintiff’s complaint in this action to determine if it “(i) is frivolous or malicious; (ii)  
22 fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a  
23 defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2).

24 In determining whether a complaint fails to state a claim, the Court uses the same  
25 pleading standard used under Federal Rule of Civil Procedure 8(a). A complaint must contain “a  
26 short and plain statement of the claim showing that the pleader is entitled to relief . . .” Fed. R.  
27 Civ. P. 8(a)(2). Detailed factual allegations are not required, but “[t]hreadbare recitals of the  
28 elements of a cause of action, supported by mere conclusory statements, do not suffice.”

1 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S.  
2 544, 555 (2007)).

3 In reviewing the *pro se* complaint, the Court is to liberally construe the pleadings and  
4 accept as true all factual allegations contained in the complaint. Erickson v. Pardus, 551 U.S. 89,  
5 94 (2007). Although a court must accept as true all factual allegations contained in a complaint,  
6 a court need not accept a plaintiff’s legal conclusions as true. Iqbal, 556 U.S. at 678. “[A]  
7 complaint [that] pleads facts that are ‘merely consistent with’ a defendant’s liability . . . ‘stops  
8 short of the line between possibility and plausibility of entitlement to relief.’ ” Id. (quoting  
9 Twombly, 550 U.S. at 557). Therefore, the complaint must contain sufficient factual content for  
10 the court to draw the reasonable conclusion that the defendant is liable for the misconduct  
11 alleged. Iqbal, 556 U.S. at 678.

### 12 III.

#### 13 COMPLAINT ALLEGATIONS

14 The Court accepts Plaintiff’s allegations in the complaint as true *only* for the purpose of  
15 the *sua sponte* screening requirement under 28 U.S.C. § 1915.

16 Plaintiff names all Defendants in their individual and official capacities. Plaintiff first  
17 names as a Defendant Dr. Carole Goldsmith, identified as a District Chancellor. Plaintiff then  
18 names four persons under the heading “Governing Board”: (1) Nasreen Johnson, President; (2)  
19 Magdalena Gomez, Vice President; (3) Danielle Parra, Secretary; and (4) Richard M. Caglia,  
20 Trustee. Plaintiff then names the following Defendants under the heading “Financial Aid  
21 Office”: (1) Sylvia Cuevas, Manager of Financial Aid; (2) Mikki Johnson, Director of Financial  
22 Aid; and (3) other unknown members of the Financial Aid Committee. Plaintiff then names Dr.  
23 Robert Pimentel, President of Fresno City College, and Lataria Halls, Vice President of Fresno  
24 City College.

25 Plaintiff alleges that on January 6, 2022, Plaintiff attended the Spring term at Fresno City  
26 College with the intention of becoming an auto mechanic. (Compl. 3.) Plaintiff attempted to  
27 complete 12 units, but was unsuccessful in completing all courses according to 20 U.S.C. 1091  
28 standards and institution satisfaction. Plaintiff refers to a S.C.C.C.D. SAP Policy (“SAP

1 Policy”). On June 1, 2022, Plaintiff received an email from the financial aid office indicating a  
2 decision had been made after reviewing his file, and that informed Plaintiff that the school was  
3 placing him on a financial aid warning status due to not meeting the program satisfaction and  
4 SAP Policy. While he was placed on the warning status, Plaintiff states the SAP Policy  
5 requirements allow the student to meet with a financial aid specialist counselor to map out an  
6 academic plan, and then the responsibility would rest on the student to execute such plan.  
7 Plaintiff states that prior to the committee’s decisions, he was not given the opportunity defend,  
8 and not given an opportunity to present his argument and evidence orally.

9 On August 13, 2022, Plaintiff filed an appeal. Plaintiff was told to fill out the forms, turn  
10 it in, and wait for the decision to be made. On September 12, 2022, the appeal was denied  
11 stating Plaintiff was not meeting the requirements specified in the SAP Policy.

12 On December 7, 2022, the financial aid office emailed Plaintiff with a 2021-2022  
13 Referral Notification Letter, stating they had referred debt to the U.S. Department of Education,  
14 Debt Resolution Division. When attempting to register for the 2022-2023 term, Plaintiff states  
15 the “Holder of Overpayment Debt” (the Fresno City College/Financial Aid Office), was  
16 preventing him from registering for courses due to overpayment that had been referred to the  
17 secretary in accordance with 34 CFR 690.79(c)) Plaintiff avers that after referring payments to  
18 the secretary, the institution need make no further effort to recover overpayments after  
19 complying with 34 CFR 690.79(b)(2)).

20 Plaintiff states Defendants are authorized under “C.F.R. Title 34 Education to statutorily  
21 deprive a student of the right to a **‘Protected Property Interest’ afforded by the 14<sup>th</sup>**  
22 **[A]mendment** without regards to some form of hearing,” and “[n]othing stated within the codes  
23 on providing a hearing to students that have been or will be deprived of this right,” and Plaintiff  
24 is certain that students before and after him will suffer the same consequences. (Compl. 3.)

25 Plaintiff brings three claims. First, Plaintiff claims a violation of the Due Process Clause  
26 under the Fifth and Fourteenth Amendments, based on Defendants’ failure to provide a proposed  
27 termination and pre-termination hearing prior to terminating “Title IV/Public Benefits . . . within  
28

1 the meaning of 8 U.S.C. [§] 1611(c)1.”<sup>1</sup> Plaintiff claims that between August 23, 2022, until  
2 September 12, 2022, Plaintiff was deprived of the right to be heard and right to be present his  
3 argument orally, and proffers that written submission does not constitute oral argument because  
4 it is not an effective means to communicate with the decision maker. (Compl. 4.)

5 Plaintiff’s second claim is for “conspiracy to deprivation of rights under color of law and  
6 ‘custom and usage.’ ” (Compl. 4.) Here, Plaintiff states that the Governing Board and District  
7 Chancellor “had the opportunity & the authority to prohibit its employees from continuously  
8 violating my right to be heard,” and that “[t]he ‘Board’ was also aware of the situation because I  
9 sent them a copy of my complaint demanding to be heard but failed to conduct a hearing.”  
10 (Compl. 4.)

11 Plaintiff’s third claim is “challenging the constitutionality of statute at large, C.F.R. Title  
12 34 Education, & S.C.C.C.D. SAP Policy.” (Compl. 4.) Here, Plaintiff states that “[w]hile  
13 providing hearings are not required for some benefits, Title IV have echoed amongst high courts  
14 as a ‘Protected Property Interest’ within the meaning of ‘Life, Liberty, & Property’ specified in  
15 [the] 14<sup>th</sup> [A]mendment. Therefore, statute at large, C.F.R. Title 34 Education, & S.C.C.C.D.  
16 SAP Policy lacks the meaning of due process.” (Compl. 4.)

17 By way of relief, Plaintiff requests that: (1) a preliminary injunction ordering the  
18 Defendants to restore the Plaintiff’s financial aid status to good standing, waiving any allegedly  
19 owed fees and debt; (2) \$500.00 per Defendant, in damages pursuant to 42 U.S.C. § 1983; and  
20 (3) \$3,000.00 for mental and emotional distress caused by the denial of due process. (Compl. 4.)

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24 <sup>1</sup> Plaintiff does not refer to his citizenship or residency status as related to the denial of his financial aid. The cited  
25 provision is entitled “Aliens who are not qualified aliens ineligible for Federal public benefits,” and provides in one  
26 regard that “[n]otwithstanding any other provision of law and except as provided in subsection (b), an alien who is  
27 not a qualified alien (as defined in section 1641 of this title) is not eligible for any Federal public benefit (as defined  
28 in subsection (c)),” and also provides that such subsection does not apply to a number of statutorily excepted  
categories of “Federal public benefits,” including medical assistance under Title XIX of the Social Security Act. 8  
U.S.C. § 1611(a)-(b)(1)(A). Further, “Federal public benefit” is defined to include “any . . . postsecondary  
education . . . or any other similar benefit for which payments or assistance are provided to an individual . . . by an  
agency of the United States or by appropriated funds of the United States.” 8 U.S.C. § 1611(c)(1)(B).

1 **IV.**

2 **DISCUSSION**

3 For the reasons explained in the Court’s screening order and reiterated below, Plaintiff’s  
4 complaint fails to state a cognizable claim. Plaintiff was provided the opportunity to file an  
5 amended complaint to attempt to correct the deficiencies at issue, but Plaintiff did not do so by  
6 the deadline. For the reasons explained below, the Court recommends this action be dismissed  
7 for failure to state a claim, and for failure to prosecute and obey the order of the Court.

8 **A. Federal Rule of Civil Procedure 8**

9 Pursuant to Rule 8(a), a complaint must contain “a short and plain statement of the claim  
10 showing that the pleader is entitled to relief[.]” Fed. R. Civ. P. 8(a)(2). “Such a statement must  
11 simply give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which  
12 it rests.” Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (citation and internal  
13 quotation marks omitted). Detailed factual allegations are not required, but “[t]hreadbare recitals  
14 of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
15 Iqbal, 556 U.S. at 678 (citation omitted). This is because, while factual allegations are accepted  
16 as true, legal conclusions are not. Id.; see also Twombly, 550 U.S. at 556-57; Moss v. U.S.  
17 Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). Therefore, Plaintiff must set forth “sufficient  
18 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” Iqbal,  
19 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). “A claim has facial plausibility when the  
20 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
21 defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678 (citing Twombly, 550  
22 U.S. at 556).

23 As currently pled, Plaintiff’s complaint does not contain enough factual details to permit  
24 the Court to draw the reasonable inference that any named Defendants are liable for any  
25 misconduct alleged. Iqbal, 556 U.S. at 678. Plaintiff does not state any specific actions that any  
26 named Defendants took relating to any alleged misconduct. Plaintiff does not mention any of the  
27 individual Defendants again after naming them as Defendants, and the only time Plaintiff uses a  
28 term other than generally referring to all “Defendants,” is under the second claim for conspiracy,

1 where Plaintiff alleges that the Governing Board generally, and the District Chancellor, “had the  
2 opportunity & the authority to prohibit its employees from continuously violating my right to be  
3 heard,” and mentions the “Board” was aware of the situation because he sent them of a copy of  
4 his complaint requesting a hearing. Plaintiff makes no specific allegation explaining when or  
5 how communications were made to any specific Defendants on the dates provided. Plaintiff only  
6 vaguely states he filed an appeal and that the appeal was denied. Plaintiff does not describe who  
7 the appeal was made to, or the basis of the appeal.

8 Plaintiff’s complaint fails to give fair notice of all of the allegations and claims directed  
9 against the Defendants. For these reasons, Plaintiff’s complaint does not comply with the  
10 requirements of Rule 8(a)(2).

11 **B. Linkage Requirement under Section 1983 and Supervisory Liability**

12 For the same reasons explained in the previous section, Plaintiff also fails to establish an  
13 adequate link between the actions of any named Defendant and the constitutional injury. Section  
14 1983 provides a cause of action for the violation of Plaintiff’s constitutional or other federal  
15 rights by persons acting under color of state law. Nurre v. Whitehead, 580 F.3d 1087, 1092 (9th  
16 Cir 2009); Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); Jones v.  
17 Williams, 297 F.3d 930, 934 (9th Cir. 2002). The statute provides:

18 Every person who, under color of [state law] ... subjects, or causes to be  
19 subjected, any citizen of the United States ... to the deprivation of any rights,  
20 privileges, or immunities secured by the Constitution ... 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. “Section 1983 is not itself a source of substantive rights, but merely provides  
22 a method for vindicating federal rights elsewhere conferred.” Crowley v. Nevada ex rel. Nevada  
23 Sec’y of State, 678 F.3d 730, 734 (9th Cir. 2012) (citing Graham v. Connor, 490 U.S. 386, 393-  
24 94 (1989)) (internal quotation marks omitted). The statute requires that there be an actual  
25 connection or link between the actions of the defendants and the deprivation alleged to have been  
26 suffered by Plaintiff. See Monell v. Dep’t of Soc. Servs., 436 U.S. 658 (1978); Rizzo v. Goode,  
27 423 U.S. 362 (1976). Thus, to state a claim, Plaintiff must allege facts demonstrating the  
28 existence of a link, or causal connection, between each Defendant’s actions or omissions and a

1 violation of his federal rights. Lemire v. California Dep't of Corr. and Rehab., 726 F.3d 1062,  
2 1074-75 (9th Cir. 2013); Starr v. Baca, 652 F.3d 1202, 1205-08 (9th Cir. 2011). The Ninth  
3 Circuit has held that “[a] person ‘subjects’ another to the deprivation of a constitutional right,  
4 within the meaning of section 1983, if he does an affirmative act, participates in another’s  
5 affirmative acts or omits to perform an act which he is legally required to do that causes the  
6 deprivation of which complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

7 Thus, there is no *respondeat superior* liability under section 1983, and therefore, each  
8 defendant is only liable for his or her own misconduct. Iqbal, 556 U.S. at 677. To state a claim,  
9 Plaintiff must demonstrate that each defendant personally participated in the deprivation of his  
10 rights. Jones, 297 F.3d at 934. In other words, to state a claim for relief under § 1983, Plaintiff  
11 must link each named defendant with some affirmative act or omission that demonstrates a  
12 violation of his federal rights.

13 Plaintiff vaguely refers a claim of conspiracy in the complaint. In the context of  
14 conspiracy claims brought pursuant to section 1983, a complaint must “allege [some] facts to  
15 support the existence of a conspiracy among the defendants.” Buckey v. County of Los Angeles,  
16 968 F.2d 791, 794 (9th Cir. 1992); Karim-Panahi v. Los Angeles Police Department, 839 F.2d  
17 621, 626 (9th Cir. 1988). Plaintiff must allege that defendants conspired or acted jointly in  
18 concert and that some overt act was done in furtherance of the conspiracy. Sykes v. California,  
19 497 F.2d 197, 200 (9th Cir. 1974).

20 A conspiracy claim brought under section 1983 requires proof of “an agreement or  
21 meeting of the minds to violate constitutional rights,” Franklin v. Fox, 312 F.3d 423, 441 (9th  
22 Cir. 2001) (quoting United Steel Workers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1540-  
23 41 (9th Cir. 1989) (citation omitted)), and an actual deprivation of constitutional right, Hart v.  
24 Parks, 450 F.3d 1059, 1071 (9th Cir. 2006) (quoting Woodrum v. Woodward County, Oklahoma,  
25 866 F.2d 1121, 1126 (9th Cir. 1989)). ““To be liable, each participant in the conspiracy need not  
26 know the exact details of the plan, but each participant must at least share the common objective  
27 of the conspiracy.”” Franklin, 312 F.3d at 441 (quoting United Steel Workers, 865 F.2d at 1541).

28 Plaintiff’s complaint contains insufficient factual allegations to state a claim pursuant to



1 Section 1983.<sup>2</sup>

2 **C. Clarification of Plaintiff’s Allegations and Legal Challenges**

3 It is unclear as to certain policies and terms Plaintiff refers to in the complaint, and the  
4 Court turns to clarify some background information underlying Plaintiff’s allegations, as to  
5 explain further the reasoning behind the Court’s finding the complaint is insufficient under Rule  
6 8 and to establish liability under Section 1983, as the Court found in the previous subsections. It  
7 is also helpful to engage in this discussion before turning to the legal standards applicable to due  
8 process challenges generally and specifically as to educational financial aid.

9 It appears Plaintiff generally refers to and challenges the constitutionality of C.F.R. Title  
10 34, as related to the requirements of Title IV. “Title IV of the Higher Education Act was  
11 established ‘to assist in making available the benefits of postsecondary education to eligible  
12 students...in institutions of higher education,’ and authorizes federal student financial aid  
13 programs, such as Pell Grants, 20 U.S.C. § 1070a, and federal work-study programs.” Oakley v.  
14 Devos, No. 20-CV-03215-YGR, 2020 WL 3268661, at \*4 (N.D. Cal. June 17, 2020) (citations  
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16 <sup>2</sup> Plaintiff also refers to “custom and usage” in the complaint. To the extent Plaintiff is attempting to establish  
17 liability based on a custom or policy, Plaintiff has failed to show an underlying constitutional violation, nor a policy  
18 that was the moving force behind such alleged violation, aside from vaguely asserting that “students before and after  
19 have and will suffer the same consequences.” (Compl. 3.) A local government unit may only be held liable if it  
20 inflicts the injury complained of through a policy or custom. Waggy v. Spokane County Washington, 594 F.3d 707,  
21 713 (9th Cir. 2010). Generally, to establish municipal liability, the plaintiff must show that a constitutional right  
22 was violated, the municipality had a policy, that policy was deliberately indifferent to plaintiff’s constitutional  
23 rights, and the policy was “the moving force” behind the constitutional violation. Bd. of Cty. Comm’rs of Bryan  
24 Cty., Okl. v. Brown, 520 U.S. 397, 400 (1997); Burke v. County of Alameda, 586 F.3d 725, 734 (9th Cir. 2009);  
25 Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1185-86 (9th Cir. 2002). “The custom or policy must be a  
26 ‘deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials  
27 responsible for establishing final policy with respect to the subject matter in question.’ ” Castro v. Cty. of Los  
28 Angeles, 833 F.3d 1060, 1075 (9th Cir. 2016) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986)).  
There can be no municipal liability without an underlying constitutional violation. Scott v. Henrich, 39 F.3d 912,  
916 (9th Cir. 1994). A Monell claim can proceed under three theories of municipal liability: “(1) when official  
policies or established customs inflict a constitutional injury; (2) when omissions or failures to act amount to a local  
government policy of deliberate indifference to constitutional rights; or (3) when a local government official with  
final policy-making authority ratifies a subordinate’s unconstitutional conduct.” Brown v. Contra Costa Cty., No. C  
12-1923 PJH, 2014 WL 1347680, at \*8 (N.D. Cal. Apr. 3, 2014) (citing Clouthier v. Cty. of Contra Costa, 591 F.3d  
1232, 1249-50 (9th Cir. 2010)). Whichever theory is alleged, the plaintiff must plead facts showing that “the policy  
is the moving force behind the constitutional violation.” Dougherty v. City of Covina, 654 F.3d 892, 900-01 (9th  
Cir. 2011); see also City of Oklahoma v. Tuttle, 471 U.S. 808, 823 (1985) (“At the very least there must be an  
affirmative link between the policy and the particular constitutional violation alleged.”). Further, “[p]roof of a  
single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the  
incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be  
attributed to a municipal policymaker.” Tuttle, 471 U.S. at 823-24.

1 omitted).

2 Plaintiff's complaint identifies 20 U.S.C. 1091. Plaintiff doesn't specifically assert which  
3 provision of the statute he is relying on. Plaintiff's complaint does not establish what type or  
4 what amount of financial aid Plaintiff received. The complaint does not, for example, specify  
5 whether Plaintiff received grants, a loan, or work assistance.

6 The Court shall excerpt the general provisions pertaining to receiving a grant, loan, or  
7 work assistance, and the portion of the law pertaining to satisfactory progress:

8 In order to receive any grant, loan, or work assistance under this  
9 subchapter, a student must—

10 (1) be enrolled or accepted for enrollment in a degree, certificate,  
11 or other program (including a program of study abroad approved  
12 for credit by the eligible institution at which such student is  
13 enrolled) leading to a recognized educational credential at an  
institution of higher education that is an eligible institution in  
accordance with the provisions of section 1094 of this title, except  
as provided in subsections (b)(3) and (b)(4), and not be enrolled in  
an elementary or secondary school;

14 (2) if the student is presently enrolled at an institution, be  
15 maintaining satisfactory progress in the course of study the student  
is pursuing in accordance with the provisions of subsection (c);

16 (3) not owe a refund on grants previously received at any  
17 institution under this subchapter, or be in default on any loan from  
18 a student loan fund at any institution provided for in part E, or a  
loan made, insured, or guaranteed by the Secretary under this  
subchapter for attendance at any institution; . . .

19 (5) be a citizen or national of the United States, a permanent  
20 resident of the United States, or able to provide evidence from the  
21 Immigration and Naturalization Service that he or she is in the  
United States for other than a temporary purpose with the intention  
of becoming a citizen or permanent resident; and

22 (6) if the student has been convicted of, or has pled nolo  
23 contendere or guilty to, a crime involving fraud in obtaining funds  
24 under this subchapter, have completed the repayment of such funds  
to the Secretary, or to the holder in the case of a loan under this  
subchapter obtained by fraud. . . .

25 . . . (c) **Satisfactory progress**

26 (1) For the purpose of subsection (a)(2), a student is maintaining  
satisfactory progress if—

27 (A) the institution at which the student is in attendance, reviews the  
28 progress of the student at the end of each academic year, or its  
equivalent, as determined by the institution, and

1 (B) the student has a cumulative C average, or its equivalent or  
2 academic standing consistent with the requirements for graduation,  
3 as determined by the institution, at the end of the second such  
4 academic year.

5 20 U.S.C. § 1091(a)-(c).<sup>3</sup>

6 Thus, in part, Title IV is restricted as follows:

7 [T]he following categories of students, among others, are not  
8 eligible for title IV assistance: (a) Dreamers with or without  
9 Deferred Action for Childhood Arrival status; (b) other students  
10 with undocumented status; (c) students with pending asylum  
11 applications; (d) students with Temporary Protected Status or  
12 Deferred Enforced Departure status; and (e) students with U-visas.  
13 Among citizens and non-citizens alike, title IV also excludes from  
14 eligibility students who: (a) do not have a high school diploma,  
15 General Education Development certificate or equivalent, or  
16 recognized exception to these requirements; (b) are enrolled only  
17 in non-credit courses; (c) have not registered with Selective  
18 Service (males 18-25); (d) are also enrolled in high school; (e)  
19 have not maintained a “C” average or above by the end of their  
20 second year; or (f) are in default on a federal student loan or owe  
21 any refund amount on a federal student grant.

22 Oakley, 2020 WL 3268661, at \*4 (citations omitted).

23 It appears “SCCCD” refers to State Center Community College District. See  
24 Richardson-Bass v. State Ctr. Cmty. Coll. Dist., No. 19-CV-01566-AWI-SAB, 2020 WL  
25 5658225, at \*1 (E.D. Cal. Sept. 23, 2020) (“The public entity that operates and controls [Fresno  
26 City College] is Defendant State Center Community College District (‘SCCCD’).”); Thomas v.  
27 Fresno City Coll., No. 115CV00826DADBAM, 2016 WL 1572739, at \*1 (E.D. Cal. Apr. 19,

28 <sup>3</sup> Plaintiff also cites to 34 C.F.R. 690.7(b)(2) and (c). It is not clear the significance of the citation. The regulation  
pertains to instances where an institution becomes ineligible to participate in the grant or loan program:

(b) If an institution becomes ineligible to participate in the Federal Pell Grant Program during an  
award year, an eligible student who was attending the institution and who submitted a valid SAR  
to the institution, or for whom the institution obtained a valid ISIR, before the date the institution  
became ineligible is paid a Federal Pell Grant for that award year for—

(1) The payment periods that the student completed before the institution became ineligible; and  
(2) The payment period in which the institution became ineligible.

(c)(1) If an institution loses its eligibility to participate in the Direct Loan program under the  
provisions of subpart M or N of 34 CFR part 668, it also loses its eligibility to participate in the  
Federal Pell Grant Program for the same period of time.

(2) That loss of eligibility must be in accordance with the provisions of 34 CFR 668.187(d) or  
668.206(d).

34 C.F.R. § 690.7(b)-(c).

1 2016).

2           It appears that the SAP Policy is a “satisfactory academic progress” policy. See  
3 Crawford v. San Diego City Cmty. Coll., No. 18CV0831, 2018 WL 3629901, at \*2 (S.D. Cal.  
4 July 31, 2018). “Colleges that participate in federal student loan programs are required to  
5 maintain policies for satisfactory academic progress, and to confirm that students who are  
6 otherwise eligible for student aid under the Higher Education Act are making satisfactory  
7 academic progress under those policies.” Id. (“As required under these regulations, City College  
8 maintains a policy which outlines the school’s standards for maintaining satisfactory academic  
9 progress and provides reasons which may result in a student’s disqualification from financial  
10 aid.” (citing 34 C.F.R. §§ 668.16(e), 668.32(f), & 668.34)); see also Calisesi ex rel. U.S. v. Hot  
11 Chalk, Inc., No. CV-13-01150-PHX-NVW, 2015 WL 1966463, at \*7 (D. Ariz. May 1, 2015)  
12 (“In order for an institution to participate in a Title IV, Higher Education Act program, *i.e.*,  
13 become an ‘eligible institution,’ the institution must enter into a written Program Participation  
14 Agreement with the Secretary of the Department of Education and agree that it will comply with  
15 all statutes of or applicable to Title IV and all applicable regulations prescribed under Title IV.”).

16           The Fresno City College website contains the following information pertaining to its  
17 SAP Policy:

18           Satisfactory Academic Progress (SAP) Policy

19           You must meet three requirements to be considered to be making  
20 Satisfactory Academic Progress in order to receive financial aid.

21           1. Maintain a minimum cumulative Grade Point Average (GPA) of  
22 2.0. This is the Qualitative Measure. A, B, C, D, RD, and F grades  
23 are used to calculate a student's GPA. Transferable units from prior  
colleges are not included in the GPA calculation. (If all classes are  
taken on a credit/non-credit basis, the GPA requirement will not  
apply).

24           2. Receive credit for at least 67% of the total units attempted.  
25 This is the Quantitative Measure (Pace of Progression).  
26 Withdrawals (W), Incompletes (I or IP), No Credit (N, NC or NP),  
Report Delay (RD) and Failing (F) grades are considered units  
attempted.

27           3. Have attempted less than 150% of the maximum cumulative  
28 units required for completion of their program. This is the  
Maximum Timeframe.

1 See <https://www.fresnocitycollege.edu/admissions-aid/financial-aid-office/financial-aid-rules>  
2 .html (last accessed May 8, 2023).<sup>4</sup> The college website also provides the following information  
3 concerning withdrawal of financial aid and return of Title IV funds:

#### 4 Withdrawals and Return of Title IV Funds Policy

5 Title IV funds are awarded to a student under the assumption that  
6 the student will attend school for the entire period for which the  
7 financial aid is awarded. When a student withdraws from all  
8 classes, the financial aid award amount for the student is affected.  
9 When a student receives a combination of F/W/I/RDs or all  
10 F/I/RDs, we must treat it as if the student stopped attending all  
11 classes. If there are any grade changes it is the student's  
12 responsibility to notify the Financial Aid Office prior to September  
13 30<sup>th</sup> of the next school year.

14 According to Federal Student Aid regulations:

15 When a student fails to begin attendance in all classes but receives  
16 financial aid, the entire amount must be returned. The student is  
17 considered a “no show”. The institution will return all federal  
18 funds disbursed to the student back to the Department of  
19 Education, and the student will be billed the amount returned.

20 When a student withdraws before completing more than 60% of  
21 the term, the student may no longer be eligible for the full amount  
22 of Title IV funds that the student was originally scheduled to  
23 receive. The financial aid office will perform a return of funds  
24 calculation to determine how much the institution and the student  
25 must return. If the institution is required to return funds on the  
26 student’s behalf, the student will be billed and a hold will be  
27 placed on the student’s account, which will prevent students from  
28 registering from classes and obtaining academic transcripts.

When a student withdraws after completing more than 60% of the  
term, the student will not owe any repayment to the institution or  
the Department of Education. The student has earned 100% of the  
financial aid received.

When a student withdraws and the return of Title IV funds  
calculation performed indicates that a student has not received all  
financial aid entitled to, it is called a post-withdrawal  
disbursement. Our office will notify you by email.

24 See <https://www.fresnocitycollege.edu/admissions-aid/financial-aid-office/financial-aid->

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25 <sup>4</sup> Although not determinative to the Court’s screening decision here, the Court finds it prudent to refer to this  
26 information in order to clarify the information contained in Plaintiff’s complaint, which was insufficient. See  
27 United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (“Even if a document is not attached to a complaint, it  
28 may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document  
forms the basis of the plaintiff’s claim.”). The Court finds the SAP Policy and other information concerning Title IV  
funds and agreements between students and the college, form the basis of Plaintiff’s claims as proffered in the  
complaint.

1 rules.html (last accessed May 8, 2023). The Fresno City College website also contains a “Terms  
2 of Agreement,” outlining the terms applicable when a student accepts financial aid:

3 Terms of Agreement

4 Upon acceptance of financial aid (cashing a check or accepting  
5 direct deposit), I hereby certify that:

6 I will enroll in an eligible program and attend classes at one (or  
7 more) of the campuses/centers through State Center Community  
8 College District.

9 I understand that my financial aid award is subject to change  
10 according to my enrollment status.

11 I understand that if repayment is required, I will be ineligible to  
12 receive any additional grant money until repayment is complete. I  
13 understand that under repayment or default status, academic  
14 transcripts will not be released to other institutions.

15 I have read SCCCD’s Financial Aid Satisfactory Academic  
16 Progress Policy and understand I must meet these standards in  
17 order to continue receiving financial aid.

18 I will promptly answer all letters related to my financial aid.

19 I will notify the Financial Aid Office if I change financial aid unit  
20 status, change attending institution or enroll in more than one  
21 institution.

22 I realize payment of EOPS or OASIS funds are contingent upon  
23 compliance with all applicable guidelines.

24 I realize I must be in the proper number of units approximately ten  
25 days before check disbursement date in order to receive my  
26 financial aid and I understand that I may NOT be paid for short-  
27 term or wait-list classes until officially enrolled in and actually  
28 attending them.

I agree to repay any funds disbursed to me in error, or for any  
period of time I was not eligible to receive funding or was not  
enrolled.

I also understand that any fees owed to the institution will be  
subtracted from my financial aid check unless alternate payment  
arrangements have been made with the Campus Business Office.

25 See [https://www.fresnocitycollege.edu/admissions-aid/financial-aid-office/financial-aid-  
27 rules.html](https://www.fresnocitycollege.edu/admissions-aid/financial-aid-office/financial-aid-<br/>26 rules.html) (last accessed May 8, 2023).

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1           **D.       Insufficient Facts to State Due Process Claim**

2           The Due Process Clause of the Fourteenth Amendment protects two distinct but related  
3 rights: procedural due process and substantive due process. Albright v. Oliver, 510 U.S. 266,  
4 272 (1994). The substantive protections of the due process clause bar certain governmental  
5 actions regardless of the fairness of the procedures that are used to implement them. Cty. of  
6 Sacramento v. Lewis, 523 U.S. 833, 840 (1998). Therefore, the substantive protections of the  
7 due process clause are intended to prevent government officials from abusing their power or  
8 employing it as an instrument of oppression. Lewis, 523 U.S. at 846. In order to state a cause of  
9 action for a deprivation of due process, a plaintiff must first identify a life, liberty, or property  
10 interest for which the protection is sought. Wilkinson v. Austin, 545 U.S. 209, 221 (2005);  
11 Brittain v. Hansen, 451 F.3d 982, 991 (9th Cir. 2006).

12           “The requirements of procedural due process apply only to the deprivation of interests  
13 encompassed by the Fourteenth Amendment’s protection of liberty and property.” Bd. of  
14 Regents of State Colleges v. Roth, 408 U.S. 564, 569–70 (1972). “[P]rocedural due process  
15 claims are resolved by balancing tests, where differing interests can give rise to many differing  
16 procedural requirements.” Brittain, 451 F.3d at 1000. “(D)ue process is flexible and calls for  
17 such procedural protections as the particular situation demands.” Mathews v. Eldridge, 424 U.S.  
18 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

19           “A party does not have a property interest if the party has a ‘unilateral expectation’ or an  
20 ‘abstract desire or need for it.’ ” Calvillo Manriquez v. Devos, 345 F. Supp. 3d 1077, 1099–100  
21 (N.D. Cal. 2018) (quoting Foss v. Nat’l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir.  
22 1998)). “Where a regulation creates the alleged entitlement, the question is whether the benefit  
23 is ‘mandatory in nature.’ ” Id. Thus, “[a]n individual asserting a loss of due process must show  
24 that ‘an existing law, rule, or understanding makes the conferral of benefit mandatory.’ ” Calvillo  
25 Manriquez, 345 F. Supp. 3d at 1100 (quoting U.S. v. Guillen-Cervantes, 748 F.3d 870, 872 (9th  
26 Cir. 2014)).

27           Depending on the circumstances, students may be entitled to some form of procedural  
28 due process before grants, loans, scholarships, or other financial assistance is revoked. See R.W.

1 v. Columbia Basin Coll., No. 4:18-CV-5089-RMP, 2019 WL 13201974, at \*7 (E.D. Wash. Oct.  
2 4, 2019) (“Although not briefed in the current motions for summary judgment, the school may  
3 have deprived R.W. of his financial aid in violation of the Fourteenth Amendment Due Process  
4 Clause. Prior to the trespass order, R.W. was receiving financial aid. He lost his financial aid  
5 mid-year after CBC concluded that he had violated the Student Code of Conduct.”), rev’d and  
6 remanded, 842 F. App’x 153 (9th Cir. 2021); Austin v. Univ. of Oregon, 925 F.3d 1133, 1139  
7 (9th Cir. 2019) (“We assume, without deciding, that the student athletes have property and  
8 liberty interests in their education, scholarships, and reputation as alleged in the complaint.”).

9       There are insufficient facts for the Court to determine if any property interest attached to  
10 Plaintiff’s financial aid such that Plaintiff was entitled a hearing. It appears Plaintiff received  
11 financial aid for one semester, did not comply with the SAP Policy, was ordered to return the  
12 overpayment of funds due to noncompliance with the SAP policy, and then was unable to enroll  
13 in the next semester of classes due to such overpayment of financial aid. Plaintiff claims he was  
14 entitled to a hearing, however, it is unclear what process Plaintiff actually received because the  
15 complaint lacks sufficient factual details, and further, it does not appear Plaintiff would be  
16 entitled to a hearing based on his allegations.

17       Based on the allegations, Plaintiff has not stated a claim for violation of his federal rights,  
18 and under the relevant law, it does not appear Plaintiff would have a property right under the  
19 facts as alleged that would entitle him to a hearing. See Ryan v. Harlan, No. CV-10-626-ST,  
20 2011 WL 711110, at \*8–9 (D. Or. Feb. 22, 2011) (“Ryan received financial aid for one semester  
21 on a contract that specifically noted it was only for one term. Unlike the situation in Goldberg,  
22 there was nothing continuous about this one semester’s worth of aid that would trigger a due  
23 process violation if terminated. Ryan’s application for student financial aid for the fall 2009  
24 term was an initial application that was deficient according to the federal, state, and PSU  
25 financial aid eligibility requirements. He had no recognized property interest in the termination  
26 of aid he never initially received. Thus, Ryan was neither qualified for nor entitled to due  
27 process because he did not have a property interest in continuing financial aid.”); Alston v.  
28 Pennsylvania State Univ., No. 1:14-CV-2480, 2015 WL 9660019, at \*5 (M.D. Pa. June 9, 2015)



1 (“ ‘The Higher Education Act does not create a property right entitled to due process protection  
2 in students like Robinette who seek federal financial aid to attend a community college,” and ‘no  
3 property right entitlement to federal financial assistance for students.’ ” (quoting Robinett v.  
4 Delgado Cmty. Coll., No. CIV.A.99-2545, 2000 WL 1720553, at \*7 (E.D. La. Nov. 17, 2000))),  
5 report and recommendation adopted, No. 14-CV-02480, 2016 WL 74795 (M.D. Pa. Jan. 7,  
6 2016), aff’d, 685 F. App’x 158 (3d Cir. 2017).

7           It does not appear that Plaintiff disputes he did not fulfill the requirements of the SAP  
8 Policy, stating in the complaint that “I was unsuccessful in completing all my courses according  
9 to [SAP Policy]” (Compl. 3). See Holt v. Munitz, 87 F.3d 1319 (9th Cir. 1996) (“The purpose of  
10 the PRHF is to ‘provide ... a program of grants to assist in making available the benefits of a  
11 post-baccalaureate education to graduate ... students who demonstrate financial need.’ 20 U.S.C.  
12 § 1134d(a). In light of this statute, it was reasonable for the defendants to request that Holt fill  
13 out the financial-aid forms and it is unreasonable for Holt to contend that he had any property  
14 interest in the fellowship funds absent proof of financial need. Because Holt cannot establish  
15 that he had a property interest in receiving PRHF funds, he cannot establish that he was entitled  
16 to notice and a hearing under the due process clause.”). Courts looking to claims apparently  
17 similar to what Plaintiff is claiming in regards to failing to comply with a SAP Policy, have  
18 found no such property or liberty interest implicated:

19           Plaintiff’s references to a “federal right to a hearing and to SAP  
20 appeals” suggest possible claims under the Fourteenth  
21 Amendment. However, to establish either a procedural or  
22 substantive due process claim under the Fourteenth Amendment,  
23 Plaintiff would first have to show that he had a constitutionally  
24 protected liberty or property interest. He provides no basis for his  
25 assertion that he was entitled to a hearing concerning the denial of  
26 financial aid for education, and the Court is unaware of any such  
27 right. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1,  
28 37 (1973) (finding no fundamental right to education); Bd. of  
Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (“To  
have a property interest in a benefit, a person clearly must have  
more than an abstract need or desire for it. He must have more than  
a unilateral expectation of it. He must, instead, have a legitimate  
claim of entitlement to it.”); see also Dozier v. Loop Coll., 776  
F.2d 752, 753 (7th Cir. 1985) (finding “no right to college  
education at public expense”) (internal citations omitted).

1 Mondragon v. Baruch Coll., No. 15-CV-7378 (DLI)(LB), 2018 WL 4689192, at \*4 (E.D.N.Y.  
2 Sept. 28, 2018).<sup>5</sup>

3         There are insufficient facts to both determine whether Plaintiff had a protected property  
4 interest, and whether the process he was afforded was sufficient, in for example Plaintiff alleges  
5 he did complete some sort of written appeal process, but was not able to present oral arguments.  
6 See Robinett, 2000 WL 1720553, at \*7 (“The record does not support [a claim that Delgado  
7 failed to hold a hearing on Robinett’s financial aid disqualification] because Robinett fails to  
8 establish that he had a property interest [and] even if plaintiff had a property right and even if  
9 some of his due process claims had not prescribed, the undisputed facts establish that he received  
10 adequate process [as] [a]fter he was notified of his disqualification in 1995, Robinett filed a  
11 written appeal with Delgado's Financial Aid Office . . . [and] had the opportunity to explain why  
12 Delgado should make an exception in his case to its policy that students who exceeded 95 hours  
13 (or, under the current policy, 99 hours) are disqualified from financial aid.”), aff'd, 273 F.3d  
14 1095 (5th Cir. 2001).

15         Accordingly, the Court concludes that Plaintiff has not stated a claim for violation of his  
16 due process rights under the Fourteenth Amendment.

17         **E. Eleventh Amendment Immunity**

18         While Plaintiff’s complaint does not state a viable claim for the reasons explained above,  
19 assuming arguendo he did, the Court provides information to the Plaintiff concerning the ability  
20 to sue these Defendants in both their official and individual capacities.

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21 <sup>5</sup> The Mondragon court also found the Higher Education Act did not provide a private right of action under Section  
22 1983:

23         In light of Plaintiff’s allegation that he submitted a timely SAP appeal under Section 484 of the  
24 Higher Education Act, the Court also has considered whether this Act provides a basis for his  
25 claim to a hearing and an appeal that is enforceable under § 1983. It does not. *See Sanon v. Dep’t*  
26 *of Higher Educ.*, 453 F. App’x 28, 29 (2d Cir. 2011) (finding that the Higher Education Act “does  
27 not provide student borrowers a private right of action to enforce its provisions.”) (internal  
28 citations omitted); *see also Shevtsov v. Los Angeles Cmty. Coll. Dist.*, 185 F. App’x 644, 645 (9th  
Cir. 2006) (“The district court ... properly concluded that [the plaintiff] could not bring a 42  
U.S.C. § 1983 claim based on an alleged violation of the Higher Education Act.”) (internal  
citations omitted).

27 Mondragon, 2018 WL 4689192, at \*4; *see also Shevtsov v. Los Angeles Cmty. Coll. Dist.*, 185 F. App’x 644, 645  
28 (9th Cir. 2006) (“The district court also properly concluded that Vladimir Shevtsov could not bring a 42 U.S.C. §  
1983 claim based on an alleged violation of the Higher Education Act.”).

1 Plaintiff does not sue the Fresno City College itself, which would have had Eleventh  
2 Amendment immunity. See Thomas, 2015 WL 13237069, at \*2 (“Within California, the Ninth  
3 Circuit has determined that Eleventh Amendment immunity extends to California community  
4 college school districts.”) (citations omitted); Young v. Reedley Cmty. Coll., No. 1:11-CV-590  
5 GSA, 2012 WL 253213, at \*4 (E.D. Cal. Jan. 26, 2012) (“Since Ninth Circuit law is clear,  
6 Defendants RCC and SCCCD are entitled to Eleventh Amendment immunity for Plaintiff’s  
7 section 1983 and 1985 claims, as well as the policy and custom claim.”).

8 Plaintiff does sue all Defendants in their individual *and* official capacities. To the extent  
9 the Defendants are sued in their official capacity they would also be immune under the Eleventh  
10 Amendment as to monetary damages. See Mitchell v. Los Angeles Cmty. Coll. Dist., 861 F.2d  
11 198, 201–02 (9th Cir. 1988) (“We hold that, under California law, the district is a state entity that  
12 possesses eleventh amendment immunity from the appellant’s section 1981, 1983 and 1985  
13 claims in damages and for injunctive relief. Likewise, the individual defendants share in the  
14 district’s eleventh amendment immunity because they were sued in their official capacities.”);  
15 Grosz v. Lassen Cmty. Coll. Dist., 360 F. App’x 795, 799 (9th Cir. 2009) (“As stated above, the  
16 District defendants have Eleventh Amendment immunity from § 1983 claims, and, thus,  
17 plaintiffs may only proceed against Cissell on these claims.”); Wasson v. Sonoma Cnty. Jr. Coll.  
18 Dist., 4 F. Supp. 2d 893, 902 (N.D. Cal. 1997) (“Both parties acknowledge that the District is a  
19 California community college district . . . all claims against the District and the Governing Board  
20 are dismissed, without prejudice to refile in state court.”).

21 However, to the extent Plaintiff is requesting prospective injunctive relief by requesting  
22 this financial aid status be restored to good standing, the Defendants may be sued in their official  
23 capacity. See Young v. Reedley Cmty. Coll., No. 1:11-CV-590 GSA, 2012 WL 253213, at \*5  
24 (E.D. Cal. Jan. 26, 2012) (“[O]ne exception to this rule is that the Eleventh Amendment does not  
25 bar suits for prospective declaratory or injunctive relief against state officials in their official  
26 capacity . . . Plaintiff has requested declarative and injunctive relief in addition to monetary  
27 damages [and] [t]herefore, Defendant’s Motion to Dismiss Defendant Uribe in his official  
28 capacity is granted regarding Plaintiff’s request for monetary damages, but is denied regarding

1 Plaintiff's request for declaratory and injunctive relief.”); see also Wasson, 4 F. Supp. 2d at 903  
2 (“When a plaintiff sues a state official in his or her official capacity for a violation of federal  
3 constitutional or statutory law, the federal court may award an injunction governing the official's  
4 future conduct, but may not award retroactive monetary relief . . . [a] state official is not a person  
5 for purposes of § 1983 and may not be sued under § 1983 in his official capacity for damages,  
6 although he may be sued for injunctive relief.”).

7 The Defendants, as sued in their individual capacities, can be liable for monetary  
8 damages. See Wasson, 4 F. Supp. 2d at 902 (“The Eleventh Amendment does not bar federal  
9 court suits against a state officer in his individual capacity, regardless of the relief sought.”).

10 However, for the reasons explained above, Plaintiff's complaint does not state a  
11 cognizable claim against any of the named Defendants.

#### 12 **F. Challenges to Constitutionality**

13 For the reasons explained above, Plaintiff's complaint does not satisfy the requirements  
14 of Rule 8 or the requirements to state a claim under Section 1983. Similarly, as to Plaintiff's  
15 challenge that Title IV or Title 34 is unconstitutional, Plaintiff's vague generalized challenge to  
16 the laws as a whole, do not state a cognizable claim.

17 When a plaintiff seeks to challenge a statute as unconstitutional there are two types of  
18 challenges: “facial challenges” and “as-applied” challenges. “Facial challenges seek to have a  
19 statute declared unconstitutional on the face of the statute, and the “standard presents an  
20 extremely high bar because a plaintiff must show that the statute is unconstitutional *in all*  
21 possible applications and situations.” Isbelle v. Denney, No. 1:19-CV-00093-DCN, 2019 WL  
22 5580951, at \*2 (D. Idaho Oct. 29, 2019); see also S.D. Myers, Inc. v. City & Cnty. of San  
23 Francisco, 253 F.3d 461, 467 (9th Cir. 2001) (“In order to prevail on this facial challenge to the  
24 Ordinance, Myers must meet a high burden of proof; it must ‘establish that no set of  
25 circumstances exists under which the [Ordinance] would be valid. The fact that [the Ordinance]  
26 might operate unconstitutionally under some conceivable set of circumstances is insufficient to  
27 render it wholly invalid.’ ” (quoting U.S. v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95  
28 L.Ed.2d 697 (1987))); Vanguard Med. Mgmt. Billing, Inc. v. Baker, No. EDCV 17-965-

1 GW(DTBX), 2018 WL 6137194, at \*7 (C.D. Cal. July 2, 2018) (“Thus, the fact that a statute  
2 ‘might operate unconstitutionally *under some circumstances* is not enough to render it invalid  
3 against a facial challenge.’ ” (quoting City of Los Angeles, Calif. v. Patel, 576 U.S. 409, 409,  
4 135 S. Ct. 2443, 2446, 192 L. Ed. 2d 435 (2015))). The standard was recently clarified as to a  
5 vagueness challenged. See Helicopters for Agric. v. Cnty. of Napa, 384 F. Supp. 3d 1035, 1039  
6 (N.D. Cal. 2019) (“Before Guerrero, plaintiffs mounting a facial challenge for vagueness had to  
7 ‘establish that no set of circumstances exists under which the statute would be valid,’ a high bar .  
8 . . . [however] [o]ur court of appeals found that two Supreme Court decisions . . . expressly  
9 rejected the ‘no set of circumstances’ test in the void for vagueness context.”) (citations omitted).

10 The Court therefore finds Plaintiff’s vague challenge to the entirety of the statutory  
11 schemes underlying Title IV and Title 34, do not present a cognizable facial constitutional  
12 challenge.

13 Additionally, Plaintiff’s vague challenge to the entirety of the statutory schemes  
14 underlying Title IV and Title 34, do not present a cognizable as-applied constitutional challenge  
15 for purposes of Rule 8. “As-applied challenges, on the other hand, do not look at the text, or  
16 face, of the statute, but rather argue that even if a law is valid on its face, it may nonetheless—as  
17 the name suggests—be unconstitutionally applied. Isbelle, 2019 WL 5580951, at \*2. “The  
18 question in an as-applied challenge is whether the statute is unconstitutional when applied in a  
19 particular case,” and therefore, [s]pecific facts are critical.” Id. (citations omitted). Here, as the  
20 Court found above, Plaintiff has not provided sufficient facts to satisfy the pleading requirements  
21 of Rule 8, and for the same reason finds Plaintiff has not stated a cognizable as-applied  
22 challenge. See Wal-Mart Stores, Inc. v. City of Turlock, 483 F. Supp. 2d 987, 996–97 (E.D. Cal.  
23 2006) (“When faced with a claim that application of a statute renders it unconstitutional, a court  
24 must analyze the statute as applied to the particular case, *i.e.*, how it operates in practice against  
25 the particular litigant and under the facts of the instant case, not hypothetical facts in other  
26 situations.”); Dairy v. Bonham, No. C-13-1518 EMC, 2013 WL 3829268, at \*5 n.3 (N.D. Cal.  
27 July 23, 2013) )”[T]o make an ‘as applied’ challenge a plaintiff must allege specific facts  
28 regarding application of the challenged law.”).

1 Accordingly, for all of the above reasons, the Court finds Plaintiff's complaint does not  
2 state a cognizable claim for violation of Plaintiff's federal rights. Because Plaintiff did not file  
3 an amended complaint, based on the initially filed complaint, the Court recommends dismissal  
4 for failure to state a claim.

5 **G. Failure to Prosecute and Comply with Court Order**

6 Plaintiff has failed to comply with the May 10, 2023, order granting him leave to file an  
7 amended complaint. (ECF No. 7.) A court may dismiss an action based on a party's failure to  
8 prosecute an action, failure to obey a court order, or failure to comply with local rules. See, e.g.  
9 Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance with local  
10 rule); Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to  
11 comply with an order to file an amended complaint); Carey v. King, 856 F.2d 1439, 1440-41 (9th  
12 Cir. 1988) (dismissal for failure to comply with local rule requiring pro se plaintiffs to keep court  
13 apprised of address); Malone v. United States Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987)  
14 (dismissal for failure to comply with court order); Henderson v. Duncan, 779 F.2d 1421, 1424  
15 (9th Cir. 1986) (dismissal for lack of prosecution and failure to comply with local rules).

16 "In determining whether to dismiss an action for lack of prosecution, the district court is  
17 required to consider several factors: '(1) the public's interest in expeditious resolution of  
18 litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants;  
19 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less  
20 drastic sanctions.' " Carey, 856 F.2d at 1440 (quoting Henderson v. Duncan, 779 F.2d 1421,  
21 1423 (9th Cir. 1986)). These factors guide a court in deciding what to do, and are not conditions  
22 that must be met in order for a court to take action. In re Phenylpropanolamine (PPA) Products  
23 Liability Litigation, 460 F.3d 1217, 1226 (9th Cir. 2006) (citation omitted).

24 In this instance, the public's interest in expeditious resolution of the litigation and the  
25 Court's need to manage its docket weigh in favor of dismissal. In re Phenylpropanolamine  
26 (PPA) Products Liability Litigation, 460 F.3d at 1226. Plaintiff was ordered to file an amended  
27 complaint within thirty (30) days of May 10, 2023. Plaintiff has neither filed an amended  
28 complaint nor otherwise requested an extension of time to do so.

1 Plaintiff's failure to comply with the order of the Court hinders the Court's ability to  
2 move this action towards disposition, and indicates that Plaintiff does not intend to diligently  
3 litigate this action.

4 Since it appears that Plaintiff does not intend to litigate this action diligently there arises a  
5 rebuttable presumption of prejudice to the defendants in this action. In re Eisen, 31 F.3d 1447,  
6 1452-53 (9th Cir. 1994). This risk of prejudice may be rebutted if Plaintiff offers an excuse for  
7 the delay. In re Eisen, 31 F.3d at 1453. Plaintiff has not responded to the Court's order so the  
8 risk of prejudice to the defendants also weighs in favor of dismissal.

9 The public policy in favor of deciding cases on their merits is outweighed by the factors  
10 in favor of dismissal. It is Plaintiff's responsibility to move this action forward. This action can  
11 proceed no further without Plaintiff's cooperation and compliance with the order at issue. There  
12 is no operative pleading that states a claim in this matter and the action cannot simply remain  
13 idle on the Court's docket, unprosecuted. In this instance, the fourth factor does not outweigh  
14 Plaintiff's failure to comply with the Court's orders.

15 Finally, monetary sanctions are not available to induce compliance because Plaintiff is  
16 proceeding *in forma pauperis* in this action. Additionally, a court's warning to a party that their  
17 failure to obey the court's order will result in dismissal satisfies the "consideration of  
18 alternatives" requirement. Ferdik, 963 F.2d at 1262; Malone, 833 F.2d at 132-33; Henderson,  
19 779 F.2d at 1424. On May 10, 2023, the Court specifically informed Plaintiff why his complaint  
20 was deficient and did not state a cognizable claim. Plaintiff was specifically warned "if  
21 Plaintiff fails to file a first amended complaint in compliance with this order, the Court will  
22 recommend to the district judge that this action be dismissed, with prejudice, for failure to obey a  
23 court order, failure to prosecute, and for failure to state a claim." (ECF No. 7 at 22 (emphasis in  
24 original).)

25 Accordingly, the Court finds that the balance of the factors weighs in favor of dismissing  
26 this action for Plaintiff's failure to submit an amended complaint in compliance with the Court's  
27 order issued May 10, 2023, and for Plaintiff's failure to prosecute this action despite the Court's  
28 express warning and opportunity to submit an amended complaint.

V.

**RECOMMENDATION AND ORDER**

Based on the foregoing, IT IS HEREBY RECOMMENDED that this matter be DISMISSED with prejudice for Plaintiff's failure to state a claim, failure to prosecute, and failure to comply with an order of the Court.

These findings and recommendations are submitted to the District Judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within **fourteen (14) days** of service of these recommendations, any party may file written objections to these findings and recommendations with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The District Judge will review the Magistrate Judge's findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS FURTHER ORDERED that the Clerk of the Court be DIRECTED to randomly assign a District Judge to this action.

IT IS SO ORDERED.

Dated: June 28, 2023

  
UNITED STATES MAGISTRATE JUDGE