

1 186). Plaintiff also filed Objections to the Findings and Recommendations (ECF No. 181), to
2 which all Defendants except Johnson replied (ECF Nos. 181).²

3 This Court reviews de novo those portions of the proposed findings of fact to which
4 objection has been made. 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore*
5 *Business Machines*, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982); see
6 also *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009). As to any portion of the proposed
7 findings of fact to which no objection has been made, the Court assumes its correctness and
8 decides the motions on the applicable law. See *Orand v. United States*, 602 F.2d 207, 208 (9th
9 Cir. 1979). The magistrate judge’s conclusions of law are reviewed de novo. See *Britt v. Simi*
10 *Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

11 Having carefully reviewed the entire file under the applicable legal standards, the Court
12 finds the Findings and Recommendations to be supported by the record and by the magistrate
13 judge’s analysis.

14 Defendants (except Johnson) object to the denial of qualified immunity for Defendant
15 Lynch on the basis that there was no caselaw as of June 2008 identifying a “clearly established
16 right” relating to comments about grievances, and the Findings and Recommendations’ reliance
17 on the 2009 case *Brodheim v. Cry*³ was misplaced. (ECF No. 179 at 5.) Defendants’ objection
18 misconstrues the careful reasoning of the Findings and Recommendations. While the Findings
19 and Recommendations reference *Brodheim* in the qualified immunity analysis, they also identify
20 a number of cases arising within this circuit in 2008 which support the magistrate judge’s
21 analysis. (See, e.g., ECF No. 177 at 20.) Plaintiff also identified a number of Eastern District
22 cases that support the recommendation to deny qualified immunity at this stage in the pleadings.
23 (See ECF No. 171 at 31.) Furthermore, the Findings and Recommendations correctly reason that
24 Lynch’s comment could be construed as a threat in retaliation for Plaintiff’s grievance filing.

25 ² Defendant Johnson is represented by different counsel from the other Defendants.

26 ³ *Brodheim v. Cry*, No. CIV S-02-0573-FCD-EFB-P, 2007 WL 2118935, at *1 (E.D. Cal.
27 Jul. 20, 2007), report and recommendation adopted, No. CIV S-02-0573-FCD-EFB-P, 2007 WL
28 2789467 (E.D. Cal. Sept. 25, 2007), *aff’d in part and rev’d in part*, 584 F.3d 1262 (9th Cir.
2009).

1 Such a comment would infringe upon Plaintiff's clearly established right to be free from
2 retaliation for filing prison grievances. Accordingly, Defendants' objection is overruled.

3 In addition to filing his own objections, Defendant Johnson requested the Court clarify the
4 Findings and Recommendations to specifically include that Plaintiff may not seek damages for
5 wrongful incarceration. (ECF No. 180 at 2–3.) However, Johnson's request appears unnecessary
6 in light of the fact that the recommendation to deny Defendants' combined motions based on the
7 favorable termination rule was expressly premised on the finding that Plaintiff is only seeking
8 damages for the alleged violation of his access to the courts, and not for wrongful incarceration.
9 (See ECF No. 177 at 6–7.) Furthermore, Plaintiff already conceded he is not pursuing wrongful
10 incarceration damages in this action unless he is successful on his federal habeas petition that is
11 currently on appeal to the Ninth Circuit. (See *id.* at 6 (citing ECF No. 104 at 30).) Johnson's
12 request is therefore DENIED as premature at this juncture.

13 Finally, Plaintiff's objections to the recommendation to grant Defendant Pool qualified
14 immunity are unavailing. The Court declines to reject the reasoning set forth in the Findings and
15 Recommendations and their reliance on *Richey v. Dahne*, 733 F. App'x 881 (9th Cir. 2018), in
16 favor of various unpublished district court cases that are not binding on this Court. Indeed, the
17 Court agrees with Defendants that the cases identified by Plaintiff are easily distinguishable from
18 the instant action and therefore unpersuasive. (See ECF No. 184 at 3–5.) Accordingly, Plaintiff's
19 objections are overruled.

20 Accordingly, IT IS HEREBY ORDERED that:

21 1. The Findings and Recommendations filed December 5, 2019 (ECF No. 177), are
22 adopted in full;

23 2. Defendants' Motions for Judgment on the Pleadings (ECF Nos. 167, 169) are
24 GRANTED in part, and DENIED in part, as follows:

25 a. Defendants' motions as to Plaintiff's first and second causes of action (access to
26 the courts and withholding of Plaintiff's legal mail), based on lack of standing and the favorable
27 termination rule, are DENIED;

28 b. Defendant Pool's motion as to Plaintiff's first and third causes of action (access

1 to the courts and right to file prison grievances) is GRANTED, without leave to amend, for
2 failure to state a claim;⁴

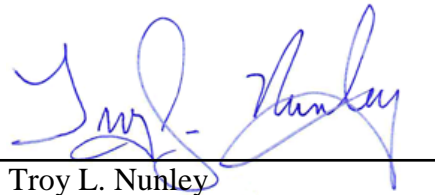
3 c. Defendant Pool's request for qualified immunity as to Plaintiff's fourth cause of
4 action (retaliation) is GRANTED, and Defendant Pool is DISMISSED from this action;

5 d. Defendant Lynch's motion and request for qualified immunity as to Plaintiff's
6 fourth cause of action (retaliation) are DENIED, without prejudice; and

7 e. Defendants Quinn and Besenaiz's motion as to all new claims asserted against
8 them in the Fourth Amended Complaint (first, second, and fourth causes of action) is GRANTED,
9 without leave to amend, and Defendants Quinn and Besenaiz are DISMISSED from this action.⁵

10 IT IS SO ORDERED.

11 DATED: April 10, 2020

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Troy L. Nunley
United States District Judge

22 ⁴ The Court notes the Findings and Recommendations support granting Pool's motion
23 without leave to amend as to the first and third causes of action because Plaintiff has had multiple
24 opportunities to amend and the Court finds Plaintiff cannot cure the defects identified by the
Findings and Recommendations through amendment. *Doe v. United States*, 58 F.3d 484, 497
(9th Cir. 1995); *Gardner v. Marino*, 563 F.3d 981, 990 (9th Cir. 2009).

25 ⁵ To the extent the Findings and Recommendations recommend dismissal of only the fourth
26 cause of action on statute of limitation grounds, the Court finds dismissal of the first and second
27 causes of action on the same grounds is appropriate based on the magistrate judge's findings (see
28 ECF No. 177 at 29). Further, because these claims are time-barred, amendment would be futile.
Therefore, the claims are dismissed without leave to amend. *Doe*, 58 F.3d at 497; *Gardner*, 563
F.3d at 990.