



1 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an  
2 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
3 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
4 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
5 Cir. 1989) (“[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
6 meritless legal theories or whose factual contentions are clearly baseless.” (citation and internal  
7 quotations omitted)), superseded by statute on other grounds as stated in Lopez v. Smith, 203  
8 F.3d 1122, 1130 (9th Cir. 2000); Franklin, 745 F.2d at 1227.

9 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and plain  
10 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the  
11 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atl.  
12 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
13 However, in order to survive dismissal for failure to state a claim a complaint must contain more  
14 than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
15 allegations sufficient “to raise a right to relief above the speculative level.” Id. (citations  
16 omitted). “[T]he pleading must contain something more . . . than . . . a statement of facts that  
17 merely creates a suspicion [of] a legally cognizable right of action.” Id. (alteration in original)  
18 (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216, pp.  
19 235-36 (3d ed. 2004)). “[A] complaint must contain sufficient factual matter, accepted as true, to  
20 ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
21 (quoting Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads  
22 factual content that allows the court to draw the reasonable inference that the defendant is liable  
23 for the misconduct alleged.” Id. In reviewing a complaint under this standard, the court must  
24 accept as true the allegations of the complaint. See Hosp. Bldg. Co. v. Rex Hosp. Tr., 425 U.S.  
25 738, 740 (1976). The court must also construe the pleading in the light most favorable to the  
26 plaintiff and resolve all doubts in the plaintiff’s favor. See Jenkins v. McKeithen, 395 U.S. 411,  
27 421 (1969).

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1 II. Fifth Amended Complaint

2 Plaintiff's fifth amended complaint brings two claims against the State of California, the  
3 sole defendant. ECF No. 41.

4 In Count I, plaintiff claims that he suffers from a physical disability, De Quervain's  
5 tenosynovitis, which makes it difficult to handwrite, and that he is required to submit written  
6 requests in order to access the programs offered by the California Department of Corrections  
7 (CDCR). Id. at 4. Plaintiff specifically alleges that his ability to submit grievances and  
8 "communicate with the courts, press, and government officials" has been hindered by the State.  
9 Id. He states that in November 2012 his primary care physician ordered that he be given a  
10 typewriter to accommodate his disability, but when he attempted to obtain a typewriter he was  
11 informed by social worker Ms. Miller that an unidentified captain instructed her to not provide  
12 plaintiff with a typewriter. Id. at 5. When plaintiff proceeded to request an alternate  
13 accommodation in the form of an inmate handwriting assistant, this request was denied by Officer  
14 Ramirez in December 2012. Id.

15 In Count II, plaintiff alleges that he has been diagnosed with bipolar disorder and that  
16 beginning in April 2012 he has been denied access to law enforcement investigative and  
17 protective services. Id. at 7. Plaintiff alleges that when he was denied these services, his mental  
18 health disability was specifically cited as the reason for the denial. Id. Plaintiff claims that in  
19 July and December 2012; January, July, September, and October 2013; and April and July 2014  
20 he submitted multiple criminal complaints alleging that CDCR officials "had attempted to murder  
21 plaintiff and are engaging in an ongoing conspiracy to murder plaintiff." Id. at 8. He states these  
22 complaints were sent to the California Office of the Inspector General, CDCR's Office of Internal  
23 Affairs, Warden Duff, the Solano County Sheriff's Office, the Solano County District Attorney's  
24 Office, the California Attorney General's Office, the State Senate, and too many others to name.  
25 Id.

26 III. Claims Under Title II of the ADA

27 Title II of the ADA prohibits a public entity from discriminating against a qualified  
28 individual with a disability on the basis of that disability. 42 U.S.C. § 12132 (1994); Weinreich

1 v. Los Angeles Cnty. Metro Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997). In other words, the  
2 ADA is designed to challenge the denial of a benefit or service accorded similarly situated  
3 individuals “by reason of” the plaintiff’s disability. The Supreme Court has held that Title II of  
4 the ADA applies to state prisons. Pennsylvania Dept. of Corr. v. Yeskey, 524 U.S. 206, 210  
5 (1998). To state a claim under Title II, the plaintiff must allege four elements:

6 (1) he is an individual with a disability; (2) he is otherwise qualified  
7 to participate in or receive the benefit of some public entity’s  
8 services, programs, or activities; (3) he was either excluded from  
9 participation in or denied the benefits of the public entity’s services,  
10 programs, or activities, or was otherwise discriminated against by  
11 the public entity; and (4) such exclusion, denial of benefits, or  
12 discrimination was by reason of [his] disability.

13 Simmons v. Navajo Cnty., 609 F.3d 1011, 1021 (9th Cir. 2010) (quoting McGary v. City of  
14 Portland, 386 F.3d 1259, 1265 (9th Cir. 2004)); Weinreich, 114 F.3d at 978. “[I]nsofar as Title II  
15 [of the ADA] creates a private cause of action for damages against the States for conduct that  
16 actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.”  
17 United States v. Georgia, 546 U.S. 151, 159 (2006).

#### 18 IV. Claim for Which a Response Will Be Required

19 In Count I of the complaint, plaintiff alleges that in November and December 2012, he  
20 was denied accommodations for his disability that would have allowed him to communicate in  
21 writing. ECF No. 41 at 4-5. He claims that the refusal to provide him with an accommodation  
22 prevented him from being able to take advantage of the majority of programs offered by the  
23 CDCR and specifically prevented him from being able to submit grievances or communicate with  
24 the courts and other outside entities. Id. He further states that were it not for his disability and  
25 CDCR’s refusal to accommodate his disability, he would be able to avail himself of these  
26 services, programs, and activities. Id. Plaintiff has pled sufficient facts to state a claim under  
27 Title II of the ADA based on the denial of access to CDCR programs and services as a result of  
28 the refusal to accommodate his disability. Defendant will be required to answer Count I of the  
fifth amended complaint.

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1 V. Failure to State a Claim

2 In dismissing the fourth amended complaint with leave to amend, the court directed  
3 plaintiff to identify both “the ‘criminal predation complaint,’ and who was involved in denying  
4 the requested protection.” ECF No. 39 at 6. Plaintiff has stated that starting in July 2012 he  
5 submitted numerous complaints related to CDCR officials attempting to murder him and  
6 identified some of the individuals and agencies to which he submitted the complaints. ECF No.  
7 41 at 8. However, plaintiff states that he was denied services starting in April 2012, which is  
8 prior to his first request. He has also failed to identify any specifics related to his “criminal  
9 predation complaint” or who denied him protection based upon his disability, despite an explicit  
10 instruction to do so. Id. at 7-8. Identifying who the complaints were sent to is not the same as  
11 identifying who denied plaintiff’s requests for assistance. Moreover, two of the agencies listed  
12 are not State agencies and if either of those agencies denied plaintiff’s requests, those denials  
13 would not support a claim against the State. Plaintiff has failed to allege facts sufficient to put the  
14 State on notice as to the basis of his claim, and in light of plaintiff’s numerous, unsuccessful  
15 attempts at amendment, the court will recommend dismissal of the claim without leave to amend.

16 VI. No Leave to Amend

17 If the court finds that a complaint should be dismissed for failure to state a claim, the court  
18 has discretion to dismiss with or without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1126-  
19 30 (9th Cir. 2000) (en banc). Leave to amend should be granted if it appears possible that the  
20 defects in the complaint could be corrected, especially if a plaintiff is pro se. Id. at 1130-31; see  
21 also Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995) (“A pro se litigant must be given  
22 leave to amend his or her complaint, and some notice of its deficiencies, unless it is absolutely  
23 clear that the deficiencies of the complaint could not be cured by amendment.”) (citing Noll v.  
24 Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987)). However, if, after careful consideration, it is clear  
25 that a complaint cannot be cured by amendment, the court may dismiss without leave to amend.  
26 Id. at 1005-06.

27 The undersigned finds that Count II of plaintiff’s fifth amended complaint fails to state a  
28 claim upon which relief may be granted. Moreover, despite guidance on the necessary pleading

1 requirements and notification of the defects in his previous complaints (ECF Nos. 5, 12, 28, 39),  
2 plaintiff has been unable to state a viable claim. Plaintiff has also ignored explicit instructions  
3 from this court to identify details of the criminal complaint that he submitted and which  
4 individual or entity denied the request based on his disability. In light of plaintiff's continued  
5 inability to state a claim, the court concludes that further amendment would be futile. "A district  
6 court may deny leave to amend when amendment would be futile." Hartmann v. CDCR, 707  
7 F.3d 1114, 1130 (9th Cir. 2013).

8 The undersigned therefore recommends dismissing the claim in Count II without leave to  
9 amend. Although "[t]he court should freely give leave when justice so requires," Fed. R. Civ. P.  
10 15(a)(2), plaintiff has already been provided four opportunities to amend his complaint to correct  
11 deficiencies (ECF Nos. 5, 12, 28, 39). Further leave to amend is unwarranted and would likely be  
12 futile.

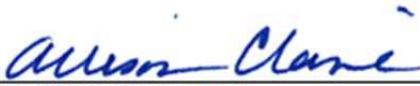
13 Accordingly, IT IS HEREBY RECOMMENDED that:

- 14 1. Count II be dismissed without leave to amend.
- 15 2. Service of Count I of the fifth amended complaint be ordered on defendant State of  
16 California.
- 17 3. The Clerk of the Court be ordered to provide to plaintiff a blank summons, a copy of  
18 the pleading filed November 6, 2014 (ECF No. 41), one USM-285 form, and instructions for  
19 service of process on defendant State of California.
- 20 4. Within thirty days of service of an order adopting these findings and recommendations,  
21 plaintiff shall return the Notice of Submission of Documents with the completed summons, the  
22 completed USM-285 form, and two copies of the endorsed fifth amended complaint filed  
23 November 6, 2014. Plaintiff need not attempt service on defendant and need not request waiver  
24 of service. Upon receipt of the above-described documents, the court will direct the United States  
25 Marshal to serve the above-named defendant pursuant to Federal Rule of Civil Procedure 4  
26 without payment of costs. Defendant State of California will be required to respond to plaintiff's  
27 allegations in Count I within the deadlines stated in Federal Rule of Civil Procedure 12(a)(1).
- 28 5. Failure to comply with the order will result in a recommendation that this action be

1 dismissed.

2           These findings and recommendations are submitted to the United States District Judge  
3 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days  
4 of the filing of these findings and recommendations, plaintiff may file written objections with the  
5 court. Such a document should be captioned “Objections to Magistrate Judge’s Findings and  
6 Recommendations.” Plaintiff is advised that failure to file objections within the specified time  
7 may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th  
8 Cir. 1991).

9 DATED: October 20, 2015

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11 ALLISON CLAIRE  
12 UNITED STATES MAGISTRATE JUDGE  
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