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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH B. GIBBS,  
Plaintiff,  
v.  
J. R. BRADFORD, et al.,  
Defendants.

No. 2:16-cv-0544-EFB P

ORDER GRANTING IFP AND DISMISSING  
COMPLAINT PURSUANT TO 28 U.S.C. §  
1915A

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He has filed an application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and a request that this case be reassigned to United States Magistrate Judge Allison Claire.

**I. Request to Proceed In Forma Pauperis**

Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

**II. Screening Requirement and Standards**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion

1 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which  
2 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such  
3 relief.” *Id.* § 1915A(b).

4 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)  
5 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and  
6 plain statement of the claim showing that the pleader is entitled to relief, in order to give the  
7 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*  
8 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).  
9 While the complaint must comply with the “short and plain statement” requirements of Rule 8,  
10 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556  
11 U.S. 662, 679 (2009).

12 To avoid dismissal for failure to state a claim a complaint must contain more than “naked  
13 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of  
14 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of  
15 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at  
16 678.

17 Furthermore, a claim upon which the court can grant relief must have facial plausibility.  
18 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual  
19 content that allows the court to draw the reasonable inference that the defendant is liable for the  
20 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a  
21 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*  
22 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the  
23 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

### 24 **III. Screening Order**

25 The court has reviewed plaintiff’s complaint (ECF No. 1) pursuant to § 1915A and finds  
26 that the allegations are too vague and conclusory to state a cognizable claim for relief.<sup>1</sup> The

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27 <sup>1</sup> Plaintiff raised similar allegations in an action that was assigned to Magistrate Judge  
28 Claire. *See* Case No. 2:14-cv-0831-TLN-AC. While still in the screening stage, plaintiff

1 complaint names Bradford, Casto, Waddle, Advincula, Cross, and Aubert as defendants. The  
2 intended claims for relief are for retaliation and denial of access to courts in violation of the First  
3 Amendment. Under the standards discussed below, plaintiff has not pleaded sufficient facts to  
4 state a proper claim for relief. Although the Federal Rules adopt a flexible pleading policy, a  
5 complaint must give fair notice and state the elements of the claim plainly and succinctly. *Jones*  
6 *v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at  
7 least some degree of particularity overt acts which defendants engaged in that support plaintiff's  
8 claim. *Id.* Because plaintiff fails to state a claim for relief, the complaint must be dismissed.

9 Plaintiff will be granted leave to file an amended complaint, if he can allege a cognizable  
10 legal theory against a proper defendant and sufficient facts in support of that cognizable legal  
11 theory. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (*en banc*) (district courts must  
12 afford pro se litigants an opportunity to amend to correct any deficiency in their complaints).  
13 Should plaintiff choose to file an amended complaint, the amended complaint shall clearly set  
14 forth the claims and allegations against each defendant. Any amended complaint must cure the  
15 deficiencies identified above and also adhere to the following requirements:

16 Any amended complaint must identify as a defendant only persons who personally  
17 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*  
18 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a  
19 constitutional right if he does an act, participates in another's act or omits to perform an act he is  
20 legally required to do that causes the alleged deprivation).

21 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).

22 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. *George*  
23 *v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

24 Any amended complaint must be written or typed so that it so that it is complete in itself  
25 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended

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26 voluntarily dismissed that action. *Id.*, ECF No. 28. Plaintiff now requests that this action be  
27 reassigned to Judge Claire. ECF No. 5. He does not explain why he seeks such reassignment,  
28 and the request is denied without prejudice to the proper filing of a notice of related cases in  
accordance with Local Rule 123.

1 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the  
2 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114  
3 F.3d 1467, 1474 (9th Cir. 1997) (the “‘amended complaint supersedes the original, the latter  
4 being treated thereafter as non-existent.’”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.  
5 1967)).

6 The court cautions plaintiff that failure to comply with the Federal Rules of Civil  
7 Procedure, this court’s Local Rules, or any court order may result in this action being dismissed.  
8 *See E.D. Cal. L.R. 110.*

9 In addition, the court notes that the following legal standards may apply to plaintiff’s  
10 intended claim for relief.

11 To state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal  
12 constitutional or statutory right; and (2) that the violation was committed by a person acting under  
13 the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d  
14 930, 934 (9th Cir. 2002).

15 An individual defendant is not liable on a civil rights claim unless the facts establish the  
16 defendant’s personal involvement in the constitutional deprivation or a causal connection between  
17 the defendant’s wrongful conduct and the alleged constitutional deprivation. *See Hansen v.*  
18 *Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).  
19 Plaintiff may not sue any official on the theory that the official is liable for the unconstitutional  
20 conduct of his or her subordinates. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Plaintiff must  
21 identify the particular person or persons who violated his rights. He must also plead facts  
22 showing how that particular person was involved in the alleged violation.

23 Prisoners have a constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S.  
24 817, 828 (1977). “[T]he fundamental constitutional right of access to the courts requires prison  
25 authorities to assist inmates in the preparation and filing of meaningful legal papers by providing  
26 prisoners with adequate law libraries or adequate assistance from persons trained in the law.” *Id.*  
27 Inmates do not have “an abstract, freestanding right to a law library or legal assistance,” and  
28 “cannot establish relevant actual injury simply by establishing that [the] prison’s law library or

1 legal assistance program is subpar in some theoretical sense.” *Lewis v. Casey*, 518 U.S. 343, 351  
2 (1996). The right to litigation assistance “is limited to the tools prisoners need in order to attack  
3 their sentences, [either] directly or collaterally, and in order to challenge the conditions of their  
4 confinement.” *Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir. 2011). (quotations omitted).  
5 The right to legal assistance is limited to the pleading stage. *Id.*

6 Prisoners also have the right “to litigate claims challenging their sentences or the  
7 conditions of their confinement to conclusion without *active interference* by prison officials.”  
8 *Silva*, 658 F.3d at 1102. An inmate alleging a violation of this right must show that the  
9 deprivation actually injured his litigation efforts, in that the defendant hindered his efforts to  
10 bring, or caused him to lose, an actionable claim challenging his criminal sentence or conditions  
11 of confinement. *See Lewis*, 518 U.S. at 351; *Christopher v. Harbury*, 536 U.S. 403, 412-15  
12 (2002).

13 To state a viable First Amendment retaliation claim, a prisoner must allege five elements:  
14 “(1) An assertion that a state actor took some adverse action against an inmate (2) because of (3)  
15 that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First  
16 Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.”  
17 *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). If plaintiff intends to assert a  
18 retaliation claim, he must allege facts showing that defendants were aware of his prior  
19 engagement in protected conduct and that his protected conduct was “the ‘substantial’ or  
20 ‘motivating’ factor” behind their alleged misconduct. *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th  
21 Cir. 2009). Generally speaking, a retaliation claim cannot rest on the logical fallacy of *post hoc*,  
22 *ergo propter hoc*, literally, “after this, therefore because of this.” *See Huskey v. City of San Jose*,  
23 204 F.3d 893, 899 (9th Cir. 2000).

#### 24 **IV. Summary of Order**


25 Accordingly, IT IS HEREBY ORDERED that:

- 26 1. Plaintiff’s request to proceed in forma pauperis (ECF No. 2) is granted.
- 27 2. Plaintiff’s request that this action be reassigned to Judge Claire (ECF No. 5) is  
28 denied without prejudice.

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- 3. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in accordance with the notice to the California Department of Corrections and Rehabilitation filed concurrently herewith.
- 4. The complaint is dismissed with leave to amend within 30 days. The complaint must bear the docket number assigned to this case and be titled "Amended Complaint." Failure to comply with this order will result in dismissal of this action for failure to prosecute. If plaintiff files an amended complaint stating a cognizable claim the court will proceed with service of process by the United States Marshal.

Dated: October 3, 2017.

  
EDMUND F. BRENNAN  
UNITED STATES MAGISTRATE JUDGE