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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM CECIL THORNTON,	)	Civil No. 10cv01583 RBB
	)	
Plaintiff,	)	<b>ORDER GRANTING IN PART AND</b>
	)	<b>DENYING IN PART DEFENDANTS'</b>
v.	)	<b>MOTION TO DISMISS COMPLAINT</b>
	)	<b>[ECF NO. 24]</b>
ARNOLD SCHWARZENEGGER, Governor	)	
of California; MATTHEW CATE,	)	
Secretary of Corrections; JOHN	)	
DOE LEWIS, Parole Unit	)	
Supervisor; MARK JOSEPH, Parole	)	
Agent; CHRISTINE CAVALIN,	)	
Parole Agent; JOHN DOE #1,	)	
Parole Agent,	)	
	)	
Defendants.	)	
_____	)	

Plaintiff William Cecil Thornton, a state prisoner proceeding pro se and in forma pauperis, filed a Complaint under the Civil Rights Act pursuant to 42 U.S.C. § 1983 [ECF Nos. 1, 5]. In his Complaint, Thornton consented to magistrate judge jurisdiction. (Compl. 7, ECF No. 1.) On November 1, 2010, Defendants filed a Notice, Consent, and Reference of a Civil Action to a Magistrate Judge [ECF No. 23]. The next day, they filed a Motion to Dismiss Complaint, accompanied by a Memorandum of Points and Authorities,

1 and a Request for Judicial Notice [ECF No. 24]. This Court granted  
2 Plaintiff's two requests for an extension of time to respond to  
3 Defendants' Motion [ECF Nos. 29, 32, 43-44]. Thornton filed his  
4 Opposition to Motion to Dismiss Complaint on January 7, 2011, along  
5 with a Memorandum of Points and Authorities, and a Request for  
6 Judicial Notice [ECF No. 46]. On January 20, 2011, Defendants  
7 filed a Reply [ECF No. 53].

8 The Court has reviewed the Complaint and exhibits, Defendants'  
9 Motion to Dismiss and attachments, Plaintiff's Opposition and  
10 attachments, and Defendants' Reply. For the reasons stated below,  
11 Defendants' Motion to Dismiss is **GRANTED**.

#### 12 I. FACTUAL BACKGROUND

13 The allegations in the Complaint arise from events that  
14 occurred while Plaintiff was incarcerated at Richard J. Donovan  
15 State Prison ("Donovan"), as well as after he was released on  
16 parole.<sup>1</sup> (Compl. 1, 3, ECF No. 1.) In count one, Thornton  
17 contends that on November 10, 2007, he was released from Donovan on  
18 parole, where he had been serving time for a parole violation.  
19 (Id. at 3.) On September 17, 2007, before his release, Plaintiff  
20 claims he was served with papers informing him that he would not be  
21 allowed to live with his wife in their home because of "the  
22 provisions of Proposition 83, that . . . was applied to [him]  
23 because of [a] 1987 Tennessee case." (Id.) Thornton alleges that  
24 his parole conditions violate his constitutional rights to due  
25 process, freedom of association, and to be free from cruel and  
26 unusual punishment. (Id.)

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28 <sup>1</sup> Thornton is currently incarcerated at the California  
Correctional Institution in Tehachapi, California. (Id. at 1.)

1 In count two, Plaintiff maintains that on November 21, 2007,  
2 he was assigned to a "GPS unit of parole" and was given "overbroad  
3 conditions of parole." (Id. at 4.) He was assigned to a sex  
4 offender unit supervised by Parole Agent Christine Cavalin. (Id.)  
5 As a result, his rights to due process, to be free from cruel and  
6 unusual punishment, and his "interest of liberty" were violated.  
7 (Id.)

8 Finally, in count three, Plaintiff alleges he was "banished"  
9 from living with his wife in their residence because "it was not in  
10 compliance with Proposition 83 or California Penal Code § 3003.5."  
11 (Id. at 5 (citation omitted).) But in 2008, Plaintiff contends,  
12 another sex offender who had been assigned to the same parole unit,  
13 Richard Lilly, initiated an intimate relationship with Thornton's  
14 wife and was permitted to move into the residence with her. (Id.)  
15 Plaintiff states, "[Lilly] was allowed to move into the very home I  
16 was told was out of compliance to me as a sex offender." (Id.)  
17 Thornton argues that he was therefore discriminated against in  
18 violation of the Equal Protection Clause. (Id.)

## 19 II. APPLICABLE LEGAL STANDARDS

### 20 A. Motions to Dismiss Pursuant to Rule 12(b)(6)

21 A motion to dismiss for failure to state a claim pursuant to  
22 Federal Rule of Civil Procedure 12(b)(6) tests the legal  
23 sufficiency of the claims in the complaint. See Davis v. Monroe  
24 County Bd. of Educ., 526 U.S. 629, 633 (1999). "The old formula --  
25 that the complaint must not be dismissed unless it is beyond doubt  
26 without merit -- was discarded by the Bell Atlantic decision [Bell  
27 Atl. Corp. v. Twombly, 550 U.S. 544, 563 n.8 (2007)]." Limestone  
28 Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 803 (7th Cir. 2008).

1 A complaint must be dismissed if it does not contain "enough  
2 facts to state a claim to relief that is plausible on its face."  
3 Bell Atl. Corp., 550 U.S. at 570. "A claim has facial plausibility  
4 when the plaintiff pleads factual content that allows the court to  
5 draw the reasonable inference that the defendant is liable for the  
6 misconduct alleged." Ashcroft v. Iqbal, \_\_ U.S. \_\_, 129 S. Ct.  
7 1937, 1949 (2009). The court must accept as true all material  
8 allegations in the complaint, as well as reasonable inferences to  
9 be drawn from them, and must construe the complaint in the light  
10 most favorable to the plaintiff. Cholla Ready Mix, Inc. v. Civish,  
11 382 F.3d 969, 973 (9th Cir. 2004) (citing Karam v. City of Burbank,  
12 352 F.3d 1188, 1192 (9th Cir. 2003)); Parks Sch. of Bus., Inc. v.  
13 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995); N.L. Indus., Inc. v.  
14 Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

15 The court does not look at whether the plaintiff will  
16 "ultimately prevail but whether the claimant is entitled to offer  
17 evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232,  
18 236 (1974); see Bell Atl. Corp., 550 U.S. at 563 n.8. A dismissal  
19 under Rule 12(b)(6) is generally proper only where there "is no  
20 cognizable legal theory or an absence of sufficient facts alleged  
21 to support a cognizable legal theory." Navarro v. Block, 250 F.3d  
22 729, 732 (9th Cir. 2001) (citing Balistreri v. Pacifica Police  
23 Dep't, 901 F.2d 696, 699 (9th Cir. 1988)).

24 The court need not accept conclusory allegations in the  
25 complaint as true; rather, it must "examine whether [they] follow  
26 from the description of facts as alleged by the plaintiff." Holden  
27 v. Haqopian, 978 F.2d 1115, 1121 (9th Cir. 1992) (citation  
28 omitted); see Halkin v. VeriFone, Inc., 11 F.3d 865, 868 (9th Cir.

1 1993); see also Cholla Ready Mix, Inc., 382 F.3d at 973 (quoting  
2 Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir.  
3 1994)) (stating that on a Rule 12(b)(6) motion, a court "is not  
4 required to accept legal conclusions cast in the form of factual  
5 allegations if those conclusions cannot reasonably be drawn from  
6 the facts alleged[]"). "Nor is the court required to accept as  
7 true allegations that are merely conclusory, unwarranted deductions  
8 of fact, or unreasonable inferences." Sprewell v. Golden State  
9 Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

10 In addition, when resolving a motion to dismiss for failure to  
11 state a claim, courts generally may not consider materials outside  
12 of the pleadings. Schneider v. Cal. Dep't of Corrs., 151 F.3d  
13 1194, 1197 n.1 (9th Cir. 1998); Jacobellis v. State Farm Fire &  
14 Cas. Co., 120 F.3d 171, 172 (9th Cir. 1997); Allarcom Pay  
15 Television Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th  
16 Cir. 1995). "The focus of any Rule 12(b)(6) dismissal . . . is the  
17 complaint." Schneider, 151 F.3d at 1197 n.1. This precludes  
18 reviewing "new" allegations that may be raised in a plaintiff's  
19 opposition to a motion to dismiss brought pursuant to Rule  
20 12(b)(6). Id. (citing Harrell v. United States, 13 F.3d 232, 236  
21 (7th Cir. 1993)).

22 "When a plaintiff has attached various exhibits to the  
23 complaint, those exhibits may be considered in determining whether  
24 dismissal [i]s proper . . . ." Parks Sch. of Bus., Inc., 51 F.3d at  
25 1484 (citing Cooper v. Bell, 628 F.2d 1208, 1210 n.2 (9th Cir.  
26 1980)). The court may also look to documents "whose contents are  
27 alleged in a complaint and whose authenticity no party questions,  
28 but which are not physically attached to the [plaintiff's]

1 pleading.'" Sunrize Staging, Inc. v. Ovation Dev. Corp., 241 F.  
2 App'x 363, 365 (9th Cir. May 18, 2007) (quoting Janas v. McCracken  
3 (In re Silicon Graphics Inc. Sec. Litig.), 183 F.3d 970, 986 (9th  
4 Cir. 1999)) (alteration in original); see Stone v. Writer's Guild  
5 of Am. W., Inc., 101 F.3d 1312, 1313-14 (9th Cir. 1996).

6 **B. Standards Applicable to Pro Se Litigants**

7 Where a plaintiff appears in propria persona in a civil rights  
8 case, the court must construe the pleadings liberally and afford  
9 the plaintiff any benefit of the doubt. Karim-Panahi v. Los  
10 Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988). The rule  
11 of liberal construction is "particularly important in civil rights  
12 cases." Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992).  
13 In giving liberal interpretation to a pro se civil rights  
14 complaint, courts may not "supply essential elements of claims that  
15 were not initially pled." Ivey v. Bd. of Regents of the Univ. of  
16 Alaska, 673 F.2d 266, 268 (9th Cir. 1982). "Vague and conclusory  
17 allegations of official participation in civil rights violations  
18 are not sufficient to withstand a motion to dismiss." Id.; see  
19 also Jones v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir.  
20 1984) (finding conclusory allegations unsupported by facts  
21 insufficient to state a claim under § 1983). "The plaintiff must  
22 allege with at least some degree of particularity overt acts which  
23 defendants engaged in that support the plaintiff's claim." Jones,  
24 733 F.2d at 649 (internal quotation omitted).

25 Nevertheless, the court must give a pro se litigant leave to  
26 amend his complaint "unless it determines that the pleading could  
27 not possibly be cured by the allegation of other facts." Lopez v.  
28 Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (quoting Doe

1 v. United States, 58 F.3d 494, 497 (9th Cir. 1995)). Thus, before  
2 a pro se civil rights complaint may be dismissed, the plaintiff  
3 must be provided with a statement of the complaint's deficiencies.  
4 Karim-Panahi, 839 F.2d at 623-24. But where amendment of a pro se  
5 litigant's complaint would be futile, denial of leave to amend is  
6 appropriate. See James v. Giles, 221 F.3d 1074, 1077 (9th Cir.  
7 2000).

8 **C. Stating a Claim Under 42 U.S.C. § 1983**

9 To state a claim under § 1983, the plaintiff must allege facts  
10 sufficient to show (1) a person acting "under color of state law"  
11 committed the conduct at issue, and (2) the conduct deprived the  
12 plaintiff of some right, privilege, or immunity protected by the  
13 Constitution or laws of the United States. 42 U.S.C.A. § 1983  
14 (West 2010); Shah v. County of Los Angeles, 797 F.2d 743, 746 (9th  
15 Cir. 1986).

16 These guidelines apply to Defendants' Motion.

17 **III. DEFENDANTS' MOTION TO DISMISS**

18 All five named Defendants move to dismiss Plaintiff's  
19 Complaint for failure to allege facts sufficient to state a claim.  
20 (Mot. Dismiss 1, ECF No. 24.) They contest the path Thornton has  
21 chosen to question the conditions of his parole. Defendants argue  
22 that the challenge to parole conditions is not cognizable under §  
23 1983 and should have been brought in a petition for writ of habeas  
24 corpus. (Id. Attach. #1 Mem. P. & A. 4-6.) Next, they allege  
25 Plaintiff has failed to plead facts illustrating they were  
26 personally involved in any violation of Thornton's constitutional  
27 rights. (Id. at 6-7.) Defendants contend that Plaintiff attempts  
28 to use vicarious liability to hold them responsible for his parole

1 conditions. (Id. at 6.) They also assert they are entitled to  
2 qualified immunity for their actions. (Id. at 7-8.) Finally,  
3 Defendants maintain that they are absolutely immune from liability  
4 for monetary damages related to their official actions. (Id. at 8-  
5 9.)

6 **A. Request for Judicial Notice**

7 Both Plaintiff and Defendants request that the Court take  
8 judicial notice of several items. Defendants ask the Court to take  
9 judicial notice of the following records:

- 10 1. Notice of Sex Offender Registration Requirement,  
11 dated January 31, 2006;
- 12 2. Indictment for Rape, Criminal Court of Shelby  
13 County, Tennessee case no. 86-02052;
- 14 3. Judgment, Criminal Court of Shelby County,  
15 Tennessee, case number 86-02052;
- 16 4. Petition for Waiver of Trial by Jury, Criminal Court  
17 of Shelby County, Tennessee, case number 86-02052;  
[and]
- 18 5. Negotiated Plea Agreement, Criminal Court of Shelby  
19 County, Tennessee, case number 86-02052.

20 (Mot. Dismiss Attach. #2 Req. Judicial Notice 2, ECF No. 24.)

21 Thornton requests that the Court take judicial notice of the  
22 following nine items:

- 23 1. Parole Conditions Dated: November 21, 2007, June  
24 30, September 2, and December 17, 2008;
- 25 2. Parole Conditions Dated: March 24 and July 9, 2009;
- 26 3. Modified Conditions of Parole Dated: September 17  
27 and November 12, 2007;
- 28 4. Copies of MapQuest;
5. California Department of Corrections Face Sheet;
6. CDCR Parolee Interview Reports and Other Documents;
7. CDCR (602) Appeal to Agent Cavalin;



1 8. Letter From Richard Lilly to Parole Agent Cavalin  
2 and Agent Shannahan; [and]

3 9. CDCR 602 Appeal to Supervisor Lewis.

4 (Opp'n Attach. #2 Req. Judicial Notice 2-3, ECF No. 46.)

5 When ruling on motions to dismiss, courts may consider matters  
6 of which they take judicial notice. Lovelace v. Software Spectrum  
7 Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996) (citing Fed. R. Evid.  
8 201(f)). A fact subject to judicial notice is one that is "not  
9 subject to reasonable dispute in that it is either (1) generally  
10 known within the territorial jurisdiction of the trial court or (2)  
11 capable of accurate and ready determination by resort to sources  
12 whose accuracy cannot reasonably be questioned." Fed. R. Evid.  
13 201(b). "A court shall take judicial notice if requested by a  
14 party and supplied with the necessary information." Fed. R. Evid.  
15 201(d). Furthermore, judicial notice may be taken of "records of  
16 state agencies and other undisputed matters of public record."  
17 Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d  
18 861, 866 n.1 (9th Cir. 2004) (citing Lee v. City of Los Angeles,  
19 250 F.3d 668, 689 (9th Cir. 2001)).

20 **1. Defendants' Request**

21 Although unaccompanied by a declaration authenticating the  
22 documents, Defendants ask the Court to take judicial notice of the  
23 Notice of Sex Offender Registration Requirement, as well as four  
24 records pertaining to Thornton's 1986 Tennessee criminal case.  
25 (See Mot. Dismiss Attach. #2 Req. Judicial Notice 2, ECF No. 24.)  
26 Thornton has not asserted that the documents are not authentic or  
27 opposed taking judicial notice of the records.

28 //

1                   **a. Notice of sex offender registration requirement**

2           The California Department of Justice provides sex offenders  
3 with a notice advising them of their duty to register as a sex  
4 offender pursuant to California Penal Code sections 290 and 290.01.  
5 (Id. Ex. 1, at 5.) Defendants' Request for Judicial Notice  
6 includes a copy of the Notice of Sex Offender Registration  
7 Requirement with Thornton's initials, a signature, and a  
8 thumbprint. (Id.)

9           Courts may take judicial notice of "the records of state  
10 agencies and other undisputed matters of public record." Disabled  
11 Rights Action Comm., 375 F.3d at 866 n.1. Here, the notice to  
12 register as a sex offender is a record of the California Department  
13 of Justice ("DOJ"). "The California Department of Justice is  
14 clearly a state agency." Faruk Cenap Yetek DDS v. Dental Bd. of  
15 Cal., No. C09-3702, 2010 U.S. Dist. LEXIS 82529, at \*6 (N.D. Cal.  
16 June 22, 2010). Accordingly, Defendants' request that the Court  
17 take judicial notice of the Notice of Sex Offender Registration  
18 Requirement -- 290 P.C., signed by Thornton on January 31, 2006, is  
19 **GRANTED.** (Mot. Dismiss Attach. #2 Req. Judicial Notice 2, ECF No.  
20 24; id. Ex. 1, at 5.)

21                   **b. Documents relating to the Tennessee criminal case**

22           The remaining four documents that Defendants ask the Court to  
23 judicially notice relate to Thornton's 1986 case in the Criminal  
24 Court of Shelby County, Tennessee -- the indictment, the judgment,  
25 the petition for waiver of jury trial, and the plea agreement.  
26 (Mot. Dismiss Attach. #2 Req. Judicial Notice 2, ECF No. 24; id.  
27 Exs. 2-5.) A grand jury returned an indictment on April 22, 1986,  
28 charging Thornton with rape in case number 86-02052. (Id. Ex. 2,

1 at 7-8.) The indictment is accompanied by an "affidavit of  
2 complaint" and warrant ordering Thornton's arrest. (Id.) Next,  
3 Defendants include the 1987 judgment showing that Thornton pleaded  
4 guilty to sexual battery and was sentenced to one-year confinement  
5 at the local workhouse. (Id. Ex. 3, at 11.) They also have  
6 produced a copy of a jury trial waiver requesting that the  
7 Tennessee court accept Thornton's guilty plea. (Id. Ex. 4, at 13.)  
8 Lastly, Defendants include a negotiated plea agreement signed by  
9 Thornton. (Id. Ex. 5, at 15-16.)

10 On a motion to dismiss, a court may take judicial notice of  
11 "matters of public record." See Mack v. South Bay Beer Distribs.,  
12 Inc., 798 F.2d 1279, 1282 (9th Cir. 1986). Moreover, "courts  
13 routinely take judicial notice of documents filed in other  
14 courts . . . to establish the fact of such litigation and related  
15 filings." Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir.  
16 1991). The effect of taking judicial notice of documents filed in  
17 other courts, however, is limited. "On a Rule 12(b)(6) motion to  
18 dismiss, when a court takes judicial notice of another court's  
19 opinion, it may do so 'not for the truth of the facts recited  
20 therein, but for the existence of the opinion, which is not subject  
21 to reasonable dispute over its authenticity.'" Lee, 250 F.3d at  
22 690 (quoting South Cross Overseas Agencies v. Wah Kwong Shipping  
23 Grp. Ltd., 181 F.3d 410, 426-27 (3rd Cir. 1999)).

24 The records relating to Thornton's out-of-state criminal case  
25 "[are] not subject to reasonable dispute over [their]  
26 authenticity.'" Id. (quoting South Cross Overseas Agencies, 101 F.  
27 3d at 427). These documents appear to be authentic court records  
28 of the Criminal Court of Shelby County, Tennessee, and there is

1 nothing to suggest otherwise. (See Mot. Dismiss Attach. #2 Req.  
2 Judicial Notice Exs. 2-5, at 7-16, ECF No. 24.) Defendants'  
3 request that the Court take judicial notice of the indictment, the  
4 judgment, the petition for waiver of jury trial, and the plea  
5 agreement in Tennessee criminal case number 86-02052 is **GRANTED**.  
6 See Lee, 250 F.3d at 690; Mack, 798 F.2d at 1282; Kramer, 937 F.2d  
7 at 774.

## 8 **2. Plaintiff's Request**

9 Plaintiff asks that the Court take judicial notice of nine  
10 items, which are themselves composed of multiple documents. (Opp'n  
11 Attach. #2 Req. Judicial Notice 2-3, ECF No. 46.)<sup>2</sup> Like the  
12 Defendants, Thornton has not provided the Court with a declaration  
13 establishing the authenticity of the items. But Defendants do not  
14 dispute authenticity and do not oppose Plaintiff's request for  
15 judicial notice. The Court will address related documents  
16 together.

### 17 **a. Parole conditions, inmate appeals, and related** 18 **documents**

19 Plaintiff asks the Court to take judicial notice of parole  
20 conditions dated November 21, 2007, and June 30, September 2, and  
21 December 17, 2008. (Id. at 2, 5-33.) Thornton also includes  
22 parole conditions dated March 24 and July 9, 2009. (Id. at 2, 35-  
23 48.) All of the parole conditions are printed on a California  
24 Department of Corrections and Rehabilitation ("CDCR") form, and  
25 they are signed by Thornton, Parole Agent Cavalin, and the Parole

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26  
27 <sup>2</sup> Although Plaintiff refers to these records as both  
28 "exhibits" and "attachments," and with both letter and number  
designations, the Court will cite to the records using the page  
numbers assigned by the electronic case filing system ("ECF"). (See  
id. at 2-82.)

1 Unit Supervisor. (Id. at 6-7, 12-13, 19-20, 26-27, 33, 35, 41-42,  
2 48.) Next, Plaintiff includes a Modified Condition of Parole  
3 Addendum, a notice sent to Thornton regarding Proposition 83, and  
4 the Special Condition Addendum Global Positioning System (GPS).  
5 (Id. at 2, 50-52.) These documents are signed by Thornton and a  
6 member of the CDCR; the notice and special addendum are printed on  
7 CDCR forms. (Id.)

8       Additionally, Thornton attaches a CDCR Face Sheet, which is a  
9 log outlining Thornton's housing and employment history. (Id. at  
10 2, 57-58.) This is followed by two California Penal Code section  
11 290 registration receipts, a License and Certificate of Marriage, a  
12 Parolee Initial Interview form, and a Notification of Parolee  
13 Orientation. (Id. at 2, 60-64.) The parolee interview, dated  
14 April 30, 2007, is signed by Plaintiff and Parole Agent Miller.  
15 (Id. at 63.) Next, Thornton attaches a completed Inmate/Parolee  
16 Appeal Form ("602"), including Agent Cavalin's response at the  
17 informal level of review. (Id. at 2, 66.) Finally, Plaintiff  
18 submits a set of three administrative appeals, two of which include  
19 cover letters addressed to Defendants Lewis and Cavalin. (Id. at  
20 3, 72-81.) The initial grievances are dated September 28, 2008,  
21 and February 3 and May 13, 2010. (Id. at 73, 78, 81.) The  
22 grievances relate to Thornton's claim that he has been banished  
23 from his home. (Id. at 72-81.)

24       Some of the items are also attached to the Complaint, which  
25 makes them appropriate for consideration in ruling on the  
26 Defendants' Motion to Dismiss. (Compare Opp'n Attach. #2 Req.  
27 Judicial Notice 6-12, ECF No. 46, with Compl. Attach. #1 Ex. J, at  
28

1 1-7, ECF No. 1; compare Opp'n Attach. #2 Req. Judicial Notice 50-  
2 51, ECF No. 46, with Compl. Attach. #1 Ex. C, at 1-2, ECF No. 1.)

3 As discussed previously, courts may take judicial notice of  
4 records and reports of administrative bodies. Lundquist, 394 F.  
5 Supp. 2d at 1242-43. "Public records and government documents are  
6 generally considered 'not to be subject to reasonable dispute.'" Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue  
7 Shield, 630 F. Supp. 2d 842, 849 (S.D. Ohio 2003) (quoting Jackson  
8 v. City of Columbus, 194 F.3d 737 (6th Cir. 1999)). With the  
9 exception of two handwritten letters, Opp'n Attach. #2 Req.  
10 Judicial Notice 72, 76, ECF No. 46, Plaintiff's documents consist  
11 of records of either the State of California, the Department of  
12 Corrections, or the County of San Diego. They are the proper  
13 subject of judicial notice only to establish their existence or the  
14 result of an administrative process; Thornton cannot rely on them  
15 to establish any hearsay statements or contested facts contained in  
16 the documents. See Lee, 250 F.3d at 690; see also Lundquist, 394  
17 F. Supp 2d at 1242-43 (stating that courts may take judicial notice  
18 of records and reports of administrative bodies).

19  
20 The letters that accompany two of Thornton's 602 grievances  
21 are not public records or government documents. (See Opp'n Attach.  
22 #2 Req. Judicial Notice 72, 77, ECF No. 46.) Defendants do not  
23 object to any of Plaintiff's requests. (See Reply Opp'n Mot.  
24 Dismiss 1-3, ECF No. 53.) Even so, the letters are hearsay and not  
25 adjudicative facts. Rule 201(a) of the Federal Rules of Evidence  
26 governs only adjudicative facts. An adjudicative fact is "either  
27 (1) generally known within the territorial jurisdiction of the  
28 trial court or (2) capable of accurate and ready determination by

1 resort to sources whose accuracy cannot reasonably be questioned."  
2 Fed. R. Evid. 201(b). The Court does not take judicial notice of  
3 these two letters because their content is hearsay. For these two  
4 items, Thornton's request is **DENIED**. (Opp'n Attach. #2 Req.  
5 Judicial Notice 72, 77, ECF No. 46.) But Plaintiff's request that  
6 the Court take judicial notice of the remaining items listed above  
7 -- the parole conditions, the face sheet, the 602 grievances, the  
8 interview report, and other documents is **GRANTED**. (Opp'n Attach.  
9 #2 Req. Judicial Notice 2-52, 56-66, 73-76, 78-81, ECF No. 46.)

10 **b. MapQuest printout**

11 Thornton also seeks judicial notice of a map and printout from  
12 the mapping website MapQuest. (Id. at 54.) The documents show  
13 schools and the distance to each of them from Plaintiff's wife's  
14 residence in San Marcos, California. (Id.) In general, maps are  
15 "capable of accurate and ready determination by resort to sources  
16 whose accuracy cannot reasonably be questioned." Fed. R. Evid.  
17 201(b); see, e.g., Hays v. National Elec. Contractors Ass'n, 781  
18 F.2d 1321, 1323 (9th Cir. 1985) (taking judicial notice of a map to  
19 show counties included in a forty mile radius). Plaintiff's  
20 request that the Court take judicial notice of the MapQuest map and  
21 printout, to which Defendants have not objected, is **GRANTED**.<sup>3</sup>  
22 (Opp'n Attach. #2 Req. Judicial Notice 54-55, ECF No. 46.)

23 //

24 //

25

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26 <sup>3</sup> Plaintiff also describes the map as being created and sent  
27 by parole agents. (Opp'n Attach. #2 Req. Judicial Notice 4, ECF No.  
28 46.) The Court does not take judicial notice of the map's creator  
or that a specific person transmitted it. The Court takes judicial  
notice only of the map's existence and the geographical data it  
contains.

1                   **c. Letters to parole agents**

2           Plaintiff requests that this Court take judicial notice of  
3 three letters dated March 2, 2009. (Id. at 68-70.) The first  
4 appears to be signed by Richard Lilly and is addressed to Agent  
5 Shannahan. (Id. at 68.) The second letter is signed by Thornton's  
6 wife and his mother-in-law and is addressed to Agent Cavalin. (Id.  
7 at 69.) The third letter is signed by Lilly and is a duplicate of  
8 the letter Lilly addressed to Agent Shannahan, except that it is  
9 addressed to Agent Cavalin. (Id. at 70.)

10           Courts may deny requests to take judicial notice of letters  
11 when they contain evidentiary defects. See, e.g., Pratt v.  
12 California State Bd. of Pharmacy, 268 F. App'x 600, 603 (9th Cir.  
13 Feb. 14, 2008) (denying request to take judicial notice of a letter  
14 containing hearsay); Contreras Family Trust v. United States Dept.  
15 of Agric. Farm Service Agency, 205 F. App'x 580, 582 (9th Cir. Nov.  
16 13, 2006) (finding that district court did not abuse its discretion  
17 when denying a request to take judicial notice of an  
18 unauthenticated letter). These letters are hearsay and have not  
19 been authenticated. Consequently, Plaintiff's request that the  
20 Court take judicial notice of the two letters signed by Lilly and  
21 the letter signed by Thornton's wife and mother-in-law is **DENIED**.  
22 (Opp'n Attach. #2 Req. Judicial Notice 68-70, ECF No. 46.)

23 **B. Whether Plaintiff's Claims Are Cognizable Under § 1983**

24           Thornton argues that the conditions of his parole violate his  
25 constitutional rights. (See Compl. 3-7, ECF No. 1.) His first  
26 claim challenges the parole condition that prohibits him from  
27 "liv[ing] at my home with my wife because of provisions of  
28 Proposition 83 . . . ." (See id. at 3.) Plaintiff attaches to his



1 Complaint a forty-five-day notice sent to him from the CDCR,  
2 informing him that he had been given a parole condition requiring  
3 him to obey all laws, including Proposition 83, the Sexual Predator  
4 Punishment and Control Act ("Jessica's Law"). (Id. Attach. #1 Ex.  
5 C, at 8.) The notice states, "Jessica's Law means that if you have  
6 to sign up as a sex offender, you can not live within 2000 feet of  
7 a park or school. Also, PC 3003(g) says you cannot live within  
8 one-half-mile of a school." (Id.) It further states, "This letter  
9 is your notice to obey the law, and to tell you that your 45-day  
10 period starts on 9-17-07[.]" (Id.) Jessica's Law was applied to  
11 Plaintiff because of his 1986 Tennessee conviction for sexual  
12 battery. (See Compl. 3, ECF No. 1; id. Attach. #1 Ex. H, at 31.)

13 In Thornton's second claim, Plaintiff asserts that on November  
14 21, 2007, he was assigned to a GPS unit and a sex offender unit of  
15 parole. (Id. at 4.) Thornton attaches to his Complaint a notice,  
16 signed by Plaintiff, instructing him that as of November 21, 2007,  
17 he must participate in Global Positioning System ("GPS")  
18 monitoring. (Id. Attach. #1 Ex. E, at 18.) He also attaches his  
19 Special Conditions of Parole form, which requires that he register  
20 as a sex offender. (Id. Ex. J, at 41.) Plaintiff's second claim  
21 is that these overbroad parole conditions -- electronic monitoring  
22 and the registration requirement -- violate his civil rights. (See  
23 Compl. 4, ECF No. 1.)

24 Finally, Thornton's third claim is directed at the disparate  
25 treatment of him and Richard Lilly, a parolee who was allowed to  
26 live in Plaintiff's wife's residence even though Thornton was not.  
27 (Id. at 4-5.) Plaintiff asserts that he and Lilly were in the same  
28 sex offender parole unit. (Id. at 5.) Thornton submitted numerous

1 administrative grievances complaining of the discrimination against  
2 him. (Id. Attach. #1 Ex. D, at 11-16, Ex. F, at 21-24.) He  
3 contends that the parole condition requiring him to obey Jessica's  
4 Law is being applied in a discriminatory manner. (Compl. 4-5, ECF  
5 No. 1.)

6 Defendants argue that Plaintiff is challenging the fact or  
7 duration of his confinement. (Mot. Dismiss Attach. #1 Mem. P. & A.  
8 5, ECF No. 24.) Therefore, Thornton's claims should have been  
9 brought in a petition for writ of habeas corpus instead of a civil  
10 rights complaint. (Id.) To support their contention, Defendants  
11 rely on the Seventh Circuit's reasoning in Williams v. Wisconsin,  
12 336 F.3d 576 (7th Cir. 2003). (Mot. Dismiss Attach. #1 Mem. P. &  
13 A. 5-6, ECF No. 24.) There, the court held that the sole remedy  
14 for a parolee who challenges the conditions of parole in federal  
15 court is a writ of habeas corpus. Williams, 336 F.3d at 580.  
16 Defendants conclude, "Plaintiff's challenges to his parole  
17 conditions are not cognizable under 42 U.S.C. section 1983 because  
18 they are considered part of his sentence." (Motion Dismiss Attach.  
19 #1 Mem. P. & A. 6, ECF No. 24.)

20 In his Opposition, Thornton argues that he is not challenging  
21 his parole conditions. (Opp'n Attach. #1 Mem. P. & A. 2, ECF No.  
22 46.) Rather, Plaintiff asserts he is challenging the denial of his  
23 constitutional rights and the discrimination being applied to him.  
24 (Id.) Thornton explains that his claims are "very much cognizable  
25 under 42 U.S.C. § 1983 and should not be brought by any other  
26 means." (Id.)

27 In response, Defendants reiterate that challenges to parole  
28 conditions must be brought by petition for writ of habeas corpus,

1 not a complaint under § 1983. (Reply 2, ECF No. 53.) “[Plaintiff]  
2 claims he is challenging the denial of his constitutional rights,  
3 not his parole conditions. But the gravamen of Plaintiff’s entire  
4 Complaint is that his parole conditions violate his constitutional  
5 rights.” (Id.) Defendants state that Thornton’s requested relief  
6 -- an injunction to prohibit them from applying “any type of sex  
7 offender parole conditions” to him -- further indicates that  
8 Plaintiff’s claims challenge his parole conditions and should be  
9 raised in a habeas petition. (Id. (quoting Compl. 7, ECF No. 1).)

10 It is well-established that when a state prisoner challenges  
11 the legality or duration of his confinement, or raises  
12 constitutional challenges that could entitle him to earlier  
13 release, his exclusive federal remedy is a writ of habeas corpus.<sup>4</sup>  
14 Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser v.  
15 Rodriguez, 411 U.S. 475, 488-90 (1973)); see also Wilkinson v.  
16 Dotson, 544 U.S. at 78. The Supreme Court has emphasized that only  
17 habeas corpus jurisdiction is available to those attempting to  
18 “invalidate the duration of their confinement -- either directly  
19 through an injunction compelling speedier release or indirectly  
20 through a judicial determination that necessarily implies the  
21 unlawfulness of the State’s custody.” Dotson, 544 U.S. at 81  
22 (emphasis added). “[A] state prisoner’s § 1983 action is  
23 barred . . . no matter the relief sought (damages or equitable

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24  
25 <sup>4</sup> Although Thornton was incarcerated at the time he filed his  
26 Complaint, (Compl. 1, ECF No. 1), it is unclear whether his  
27 incarceration was the result of a violation of the parole  
28 conditions he complains of here. If so, Plaintiff’s challenge will  
result in a judgment that necessarily implies the invalidity of his  
conviction or sentence. For that reason, a habeas petition would  
be the only means available for Thornton’s constitutional challenge  
to his conditions of parole, and his § 1983 Complaint would be  
dismissed. See Wilkinson v. Dotson, 544 U.S. 74, 81-83 (2005).

1 relief), no matter the target of the prisoner's suit . . . if  
2 success in that action would necessarily demonstrate the invalidity  
3 of confinement or its duration." Id. at 81-82.

4 In Jones v. Cunningham, 371 U.S. 236 (1963), the Supreme Court  
5 recognized that parole conditions can "significantly restrain [the  
6 parolee's] liberty;" consequently, Jones was "in custody," and a  
7 habeas corpus petition was the appropriate vehicle to test the  
8 legality of his sentence. See id. at 242-43.

9 While petitioner's parole releases him from immediate  
10 physical imprisonment, it imposes conditions which  
11 significantly confine and restrain his freedom; this is  
12 enough to keep him in the 'custody' of the members of the  
13 . . . Parole Board within the meaning of the habeas  
14 corpus statute . . . .

15 Id.

16 Ten years after Jones, the Supreme Court reaffirmed the case's  
17 holding stating, "In 1963, the Court held that a prisoner released  
18 on parole from immediate physical confinement was nonetheless  
19 sufficiently restrained in his freedom as to be in custody for  
20 purposes of federal habeas corpus." Preiser v. Rodriguez, 411 U.S.  
21 475, 486 n.7 (1973) (citing Jones v. Cunningham, 371 U.S. 236).  
22 Preiser described Jones as "no more than a logical extension of the  
23 traditional meaning and purpose of habeas corpus -- to effect  
24 release from illegal custody." Id. As the Court explained,  
25 "[R]ecent cases have established that habeas relief is not limited  
26 to immediate release from illegal custody, but that the writ is  
27 available as well to attack future confinement and obtain future  
28 releases." Id. at 487; see also Braden v. 30th Judicial Circuit  
Court of Ky., 410 U.S. 484 (1973)); Carafas v. LaValle, 391 U.S.  
234, 239 (1968); Walker v. Wainwright, 390 U.S. 335 (1968).

1           Following this reasoning, courts in the Ninth Circuit have  
2 found that parolees and probationers are "in custody" if there are  
3 restraints on their freedom that are not imposed on the regular  
4 public. See, e.g., Goldyn v. Hayes, 444 F.3d 1062, 1063 n.2 (9th  
5 Cir. 2006) (discussing precedents holding that the person is "in  
6 custody" if "the legal disability in question somehow limits the  
7 putative habeas petitioner's movement[]"); Williamson v. Gregoire,  
8 151 F.3d 1180, 1182-83 (9th Cir. 1998) (determining challenge to  
9 conviction while on parole); see also Cordell v. Tilton, 515 F.  
10 Supp. 2d 1114, 1133 (S.D. Cal. 2007) (report & recommendation).

11           In Williamson v. Gregoire, 151 F.3d at 1183, the court  
12 explained the analysis:

13                     Thus, the boundary that limits the "in custody"  
14 requirement is the line between a "restraint on liberty"  
and a "collateral consequence of a conviction." . . .

15                     . . . .

16                     The precedents that have found a restraint on  
17 liberty rely heavily on the notion of a physical sense of  
18 liberty -- that is, whether the legal disability in  
19 question somehow limits the putative habeas petitioner's  
20 movement. The Supreme Court justified extending habeas  
21 corpus to aliens denied entry into the United States by  
22 explaining the denial of entry as an impingement on  
23 movement. And the Court relied on a similar rationale to  
explain why a parolee or convict released on his own  
recognizance is "in custody." This circuit similarly  
explained that mandatory attendance at an alcohol  
rehabilitation program satisfies the "in custody"  
requirement because it requires the petitioner's  
"physical presence at a particular place."

24 Id. (internal citations omitted). The Ninth Circuit concluded that  
25 the Washington state law requirement that sex offenders register  
26 with the county sheriff and notify the sheriff of any change of  
27 residence did not place Williamson "in custody" for purposes of  
28 federal habeas corpus. Id. at 1181, 1184-85. The court noted that

1 the Washington statutes did not restrict movement. Id. at 1184.  
2 "[T]he law does not specify any place in Washington or anywhere  
3 else where Williamson may not go. . . . Williamson cannot say that  
4 there is anywhere that the sex offender law prevents him from  
5 going." Id. Soon after Williamson, the Ninth Circuit held that  
6 the requirement under California law that sex offenders register  
7 annually with law enforcement authorities was insufficient to place  
8 them "in custody" and permit them to invoke federal habeas corpus  
9 jurisdiction. Henry v. Lungren, 164 F.3d 1240, 1241-42 (9th Cir.  
10 1999).

11 The conditions of parole challenged by Thornton restrain his  
12 movement. According to Plaintiff, his parole conditions did not  
13 permit him to return to his home and live with his wife. (Compl.  
14 3, ECF No. 1.) He could not live within one-half mile of a school  
15 or 2000 feet of a park. (Id. at 8.) The limitation on Thornton's  
16 movement is a significant restraint on his physical liberty and  
17 places him "in custody." Thornton's challenge to his parole  
18 conditions falls within the recognized scope of federal habeas  
19 corpus relief.

20 This conclusion is consistent with a more recent case, Wilson  
21 v. Belleque, 554 F.3d 816, 822 (9th Cir. 2009). There, court held  
22 that Wilson was "in custody" within the meaning of § 2241 "where  
23 the sovereign seeking to prosecute a petitioner [the State of  
24 Oregon] is currently detaining the petitioner based on convictions  
25 or charges not being challenged." Id. Wilson had filed a petition  
26 for habeas corpus relief and argued that his Fifth Amendment right  
27 against double jeopardy barred retrying him on lesser-included  
28 offenses. Id. at 820-21. Here, regardless of the basis of

1 Thornton's current state custody, his federal suit may proceed  
2 under § 2254. It is not clear, however, that a habeas corpus  
3 petition challenging conditions of parole is a parolee's only  
4 avenue of relief. See Cordell, 515 F. Supp. 2d at 1131-32 (report  
5 & recommendation). Thornton's case raises the issue of whether a  
6 parole condition limiting where a parolee may live can be  
7 challenged in a § 1983 action.

8       The Seventh Circuit still remains the only circuit court to  
9 directly address whether habeas corpus is the exclusive means to  
10 challenge parole conditions. In Drollinger v. Milligan, 552 F.2d  
11 1220 (7th Cir. 1977), one of the plaintiffs was challenging several  
12 of the conditions of her probation, including one "restrict[ing]  
13 her ability to share her living quarters with another person . . .  
14 ." The court held that her § 1983 complaint challenging the  
15 conditions of probation must be brought as a petition for habeas  
16 corpus. Id. at 1225. It acknowledged that probation is less  
17 confining than incarceration, which blurred the distinction between  
18 the fact of confinement and conditions of confinement. Id.  
19 Traditionally, the fact or duration of confinement is challenged by  
20 writ of habeas corpus, but conditions of prison life are challenged  
21 by civil rights complaints. See id. at 1224. Nonetheless, the  
22 court stated, "The elimination or substitution, for example, of one  
23 of the conditions of [Plaintiff's] probation would free her  
24 substantially from her confinement; figuratively speaking, one of  
25 the 'bars' would be removed from her cell." Id.; see also,  
26 Cordell, 515 F. Supp. 2d at 1132 (report and recommendation).

27       Sixteen years after Drollinger, the Seventh Circuit reaffirmed  
28 its holding. Williams v. Wisconsin, 336 F.3d 576 (7th Cir. 2003).

1 In Williams, the parolee brought a § 1983 complaint challenging a  
2 parole condition banning international travel. Id. at 579.  
3 Relying on Drollinger, the court held that the parole conditions  
4 “define the perimeters of [the parolee or probationer’s]  
5 confinement.” Id. at 580 (quoting Drollinger, 552 F.2d at 1224).  
6 The court concluded that the plaintiff should have brought a habeas  
7 corpus petition rather than a civil rights complaint. Id.

8 This Court previously addressed this question in Cordell v.  
9 Tilton, 515 F. Supp. 2d at 1132-33. In Cordell, a parolee brought  
10 three claims under § 1983, two of which challenged conditions  
11 placed on him while on parole. Cordell, 515 F. Supp. 2d at 1132  
12 (report & recommendation). One of the conditions prohibited the  
13 plaintiff from entering Orange County, which he argued effectively  
14 banished him from his own residence, in violation of his freedom of  
15 association. Id. The plaintiff’s challenges to the conditions of  
16 his parole were not cognizable under § 1983. Id. at 1132-33.  
17 “These claims force the Court to rule on the validity of the  
18 restrictions placed on Cordell by the CDC as part of his sentence,  
19 which can only properly be done in a habeas proceeding.” Id.  
20 (citation omitted).

21 The Ninth Circuit has not addressed whether Heck v. Humphrey  
22 prevents a parolee from preemptively challenging conditions of  
23 parole in a § 1983 complaint. See id. at 1132. The question  
24 remains unsettled among the district courts. Compare Ford v.  
25 Washington, No. 06-CV-1455-BR, 2007 U.S. Dist. LEXIS 41232, at \*12  
26 (D. Or. June 1, 2007) (stating parole conditions may be challenged  
27 under § 1983), and Yahweh v. U.S. Parole Comm’n, 158 F. Supp. 2d  
28 1332, 1340 (S.D. Fla. 2001) (finding that plaintiffs may challenge



1 parole conditions under either § 2254 or § 1983), with Moore v.  
2 Schwarzenegger, EDCV 09-1355, 2010 U.S. Dist. LEXIS 67461, at \*8  
3 (C.D. Cal. May 28, 2010) (noting that plaintiff's challenge of a  
4 parole condition restricting international travel was improperly  
5 brought under § 1983, and the claim should be dismissed without  
6 prejudice rather than converted to a claim for habeas corpus  
7 relief), and Moreno v. California, 25 F. Supp. 2d 1060, 1063 (N.D.  
8 Cal. 1998) (holding that challenges to conditions of parole are not  
9 cognizable under § 1983); see also Trimble v. City of Santa Rosa,  
10 49 F.3d 583, 586 (9th Cir. 1995) ("When the intent to bring a  
11 habeas petition is not clear, however, the district court should  
12 not convert a defective section 1983 claim into a habeas  
13 petition.").

14 The Supreme Court has not "recognized habeas as the sole  
15 remedy, or even an available one, where the relief sought would  
16 'neither terminat[e] custody, accelerat[e] the future date of  
17 release from custody, nor reduc[e] the level of custody." Skinner  
18 v. Switzer, \_\_ U.S. \_\_, 131 S. Ct. 1289, 1299 (2011) (quoting  
19 Dotson, 544 U.S. at 86 (Scalia, J., concurring)) (alterations in  
20 original). The Court explained that under existing case law, when  
21 a judgment in favor of the plaintiff would "necessarily imply" the  
22 invalidity of his conviction or sentence, the plaintiff may not  
23 proceed under § 1983. Id. at 1298-99 (citing Dotson, 544 U.S. at  
24 82; Heck, 512 U.S. at 487).

25 The parole conditions restricting where Thornton may live  
26 should be considered part of his sentence. See Cordell, 515 F.  
27 Supp. at 1132 (report & recommendation); see also, Cordell, 515 F.  
28 Supp. at 1121-22 (order adopting report & recommendation). The

1 claims in Plaintiff's Complaint will require that the Court  
2 determine the validity of the conditions placed on him as part of  
3 his previous sentence. A judgment in Plaintiff's favor would  
4 "necessarily imply" the invalidity of his sentence. See Skinner,  
5 \_\_\_ U.S. at \_\_\_, 131 S. Ct. at 1298-99 (citing Nelson v. Campbell,  
6 541 U.S. 637, 647 (2004)). Because each of Plaintiff's claims  
7 seeks relief that would free him from the custody of the California  
8 Parole Board, habeas corpus is the traditional and appropriate  
9 remedy. See Jones v. Cunningham, 371 U.S. at 243.

10 Whether habeas relief is available to challenge conditions of  
11 parole and whether it should be the parolee's sole federal remedy  
12 raise overlapping questions. In Preiser, the Court explained the  
13 dilemma.

14 The broad language of § 1983, however, is not  
15 conclusive of the issue before us. The statute is a  
16 general one, and, despite the literal applicability of  
17 its terms, the question remains whether the specific  
18 federal habeas corpus statute, explicitly and  
19 historically designed to provide the means for a state  
20 prisoner to attack the validity of his confinement, must  
21 be understood to be the exclusive remedy available in a  
22 situation like this where it so clearly applies.

23 Preiser, 411 U.S. at 489. Habeas corpus jurisdiction should be the  
24 exclusive vehicle for Thornton's challenge. First, "[t]he broad,  
25 general terms of section 1983 must necessarily yield to the  
26 narrower terms of the habeas statute; limitations contained within  
27 the more specific statute also limit the availability of remedies  
28 under the more general statute." Hanson v. Circuit Ct. of First  
Judicial Circuit, 591 F.2d 404, 410 (7th Cir. 1979). For example,  
if Thornton is "in custody" so that he can bring a habeas petition  
under § 2254, he must comply with the habeas statute of

1 limitations. See Ospina v. United States, 386 F.3d 750, 752 (6th  
2 Cir. 2004)(discussing § 2255).

3 Next, considerations of federal-state comity support this  
4 conclusion. See id. at 490.

5 [T]he reason why only habeas corpus can be used to  
6 challenge a state prisoner's underlying conviction is the  
7 strong policy requiring exhaustion of state remedies  
8 . . . to avoid the unnecessary friction between the  
9 federal and state court systems that would result if a  
lower federal court upset a state court conviction  
without first giving the state court system an  
opportunity to correct its own constitutional errors.

10 Id. California courts have an important interest in determining  
11 whether Thornton's challenge to the parole restrictions mandated by  
12 California's sex offender laws pass constitutional muster. The  
13 exhaustion requirement of the habeas statutes promotes that  
14 interest. These policy considerations reinforce the conclusion  
15 that habeas relief should be the sole federal remedy available to  
16 Thornton. Accordingly, Defendants' Motion to Dismiss counts one,  
17 two, and three is **GRANTED**.

18 Although Thornton may not pursue his claims pursuant to §  
19 1983, he should be free to do so in a habeas corpus petition. See  
20 Trimble, 49 F.3d at 586. When an action is barred by Heck, it  
21 should be dismissed without prejudice for failure to state a claim.  
22 Id. Thornton's claims in counts one, two, and three are therefore  
23 dismissed without prejudice to bringing a habeas corpus petition.

24 **C. Failure to Allege the Personal Involvement of Defendants**

25 Even if Plaintiff's allegations are cognizable under § 1983,  
26 they nonetheless fail to state a claim upon which relief may be  
27 granted. Defendants Schwarzenegger, Cate, Lewis, Cavalin, and  
28 Joseph alternatively argue that the Complaint should be dismissed

1 because Thornton failed to allege their personal involvement in the  
2 purported constitutional violation or a causal connection between  
3 any wrongful conduct and the deprivation. (Mot. Dismiss Attach. #1  
4 Mem. P. & A. 6, ECF No. 24.) Defendants contend that Thornton's  
5 allegations "simply state in what capacity the defendants are  
6 employed." (Id. at 7.) They further argue, "[Plaintiff] seems to  
7 be attempting to hold [Defendants] vicariously liable for  
8 conditions of parole placed on him before he was released from  
9 prison." (Id.) Therefore, Defendants contend, Thornton's claim is  
10 inadequate to establish liability. (Id.)

11 In response, Plaintiff asserts he has stated a claim against  
12 the Defendants, and the Court must construe his Complaint in the  
13 light most favorable to him. (Opp'n Attach. #1 Mem. P. & A. 2, ECF  
14 No. 46.) He argues that the "parole agents did imping[e] on [his]  
15 constitutionally protected rights." (Id. at 3.) Plaintiff claims  
16 the Constitution and the California Constitution allow him to live  
17 at his wife's residence. (Id. at 3-6.) Thornton relies on cases  
18 that struck down conditions that too broadly restricted  
19 probationers' and parolees' "important rights." (Id. at 4-5.)  
20 Plaintiff does not otherwise address Defendants' argument that he  
21 failed to allege their personal involvement.

22 "A person 'subjects' another to the deprivation of a  
23 constitutional right . . . if he does an affirmative act,  
24 participates in another's affirmative act, or omits to perform an  
25 act which he is legally required to do that causes the deprivation  
26 of which complaint is made." Johnson v. Duffy, 588 F.2d 740, 743  
27 (9th Cir. 1978) (citing Sims v. Adams, 537 F.2d 829 (5th Cir.  
28 1976)). To state a claim for monetary damages under § 1983, a

1 litigant must allege that each defendant committed some act, or  
2 failed to act in some way, which caused the plaintiff's injury.  
3 See Hydrick v. Hunter, 500 F.3d 978, 988 (9th Cir. 2007) (citing  
4 Leer v. Murphy, 844 F.2d 628, 633-34 (9th Cir. 1988)). "The  
5 inquiry into causation must be individualized and focus on the  
6 duties and responsibilities of each individual defendant whose acts  
7 or omissions are alleged to have caused a constitutional  
8 deprivation." Leer, 844 F.2d at 633 (citations omitted).  
9 Moreover, respondeat superior or vicarious liability is not  
10 available in a civil rights action, absent a state law that  
11 authorizes its application. Redman v. County of San Diego, 942  
12 F.2d 1435, 1446 (9th Cir. 1991); see also Samonte v. Bauman, 264 F.  
13 App'x 634, 636 (9th Cir. 2008) (finding that governor was not  
14 liable merely because of her position).

15 In his Complaint, Thornton names Arnold Schwarzenegger, former  
16 governor of California, because he "has control of state laws and  
17 enforcement of laws." (Compl. 2, ECF No. 1.) Plaintiff states  
18 that Matthew Cate, secretary of the California Department of  
19 Corrections, is liable because he is director of the department and  
20 has "control over [CDCR] policies and procedures." (Id.) Thornton  
21 sues "John Doe" Lewis, a parole unit supervisor, because he "is in  
22 control over the parole unit in Escondido, California." (Id.)  
23 Thornton also names Mark Joseph, a parole agent, who acted under  
24 color of law "as a parole agent." (Id.) Finally, he names  
25 Christine Cavalin, another parole agent, because she "was acting  
26 under color of law as [his] parole agent of record." (Id.)

27 Although each Defendant is sued in his or her individual  
28 capacity, Plaintiff does not include individualized allegations

1 describing the specific acts of each Defendant. (Compl. 3-5, ECF  
2 No. 1.) In count one, Plaintiff alleges that before he was  
3 released from custody for a previous parole violation, he received  
4 a notice informing him that he would not be allowed to live at his  
5 wife's residence because of Proposition 83. (Id. at 3.) On that  
6 basis, he claims that his rights to due process, freedom of  
7 association, and to be free from cruel and unusual punishment were  
8 violated. (Id.)

9 In count two, Thornton alleges that he was assigned to a sex  
10 offender and GPS units of parole. (Id. at 4.) He states that he  
11 was given overbroad parole conditions that were unrelated to his  
12 California criminal history. (Id.) Plaintiff alleges that he was  
13 assigned to Parole Agent Christine Cavalin. (Id.) Because of his  
14 parole conditions and parole unit assignments, Thornton claims that  
15 his rights to be free from cruel and unusual punishment, due  
16 process, and "interest of liberty" were violated. (Id.) He does  
17 not identify any other Defendant in count two.

18 Finally, Thornton contends in count three that he was told he  
19 could not live at his wife's residence because of Proposition 83  
20 and California Penal Code section 3003.5. (Id. at 5.) Yet,  
21 another member of the same sex offender unit of parole was allowed  
22 to live with Thornton's wife at her residence. (Id. at 5.)  
23 Plaintiff asserts this constitutes unconstitutional discrimination.  
24 (Id. at 4-5.) Count three does not identify the Defendant charged  
25 with specific acts of discrimination. (See id.)

26 Nonetheless, the Court must "construe the pleadings liberally  
27 and afford the plaintiff any benefit of the doubt." Karim-Panahi,  
28 839 F.2d at 623. When ruling on motions to dismiss, the Court is

1 aided in its determination by documents the plaintiff attaches to  
2 the complaint. Amfac Mortg. Corp. v. Arizona Mall of Tempe, Inc.,  
3 583 F.2d 426, 430 (9th Cir. 1978); see Schneider, 151 F.3d at 1197  
4 n.1 (stating that the face of the complaint, and the exhibits  
5 attached to it, "control the Rule 12(b)(6) inquiry[]"). "The court  
6 is not limited by the mere allegations contained in the complaint .  
7 . . . These [attached] documents, as part of the complaint, are  
8 properly a part of the court's review as to whether plaintiff can  
9 prove any set of facts in support of its claim . . . ." Amfac  
10 Mortg. Corp., 583 F.2d at 429; see also Quinn v. Ocwen Federal  
11 Bank, 470 F.3d 1240, 1244 (8th Cir. 2006) (finding that the court  
12 may use exhibits attached to the complaint for "all purposes").

13 Although Thornton's allegations are scant, when construed with  
14 the exhibits attached to the Complaint and items of which the Court  
15 takes judicial notice, they may be sufficient to survive the Motion  
16 to Dismiss. See Amfac Mortg. Corp., 583 F.2d at 429-30 (reviewing  
17 documents attached to the complaint when determining the  
18 sufficiency of a claim); Marshall v. Burden, No. 5:09-cv-00128-BSM-  
19 JJV, 2009 U.S. Dist. LEXIS 125174, at \*4 (E.D. Ark. Feb. 22, 2010)  
20 (considering inmate grievances attached to pleadings to give pro se  
21 plaintiff the "full benefit of a liberal construction").

22 Nonetheless, when liberally construing the Complaint, the Court  
23 does not "supply essential elements of a claim that were not  
24 initially pled." Ivey, 673 F.2d at 268.

25 **1. Count One**

26 Thornton, currently housed at the California Correctional  
27 Institution at Tehachapi, alleges that before his 2007 release from  
28 a parole violation, he received a notice informing him he could not

1 live at his wife's residence. (Compl. 1, 3, ECF No. 1.) The  
2 Complaint does not identify who Plaintiff believes is responsible  
3 for the claimed constitutional violations. Notably, Thornton does  
4 not assert that he is precluded from establishing a home and living  
5 with his wife at some other location. (Id.) Even if the Court  
6 assumes that the imposition of the restrictions on where Plaintiff  
7 may live is the basis for the violations, Plaintiff's allegations  
8 are insufficient. The notice is signed by James Tilton, and count  
9 one does not state that any of the named Defendants are responsible  
10 for the parole restrictions. (See Compl. Attach. #1 Ex. C, at 1,  
11 ECF No. 1.)

12 Plaintiff names Defendants Schwarzenegger, Cate, and Lewis  
13 because they hold supervisory positions as the governor, secretary  
14 of the department of corrections, or supervisor of the parole unit  
15 to which Plaintiff was assigned. (Compl. 2, ECF No. 1.) But §  
16 1983 of the Civil Rights Act does not authorize a plaintiff to  
17 bring a cause of action based on respondeat superior liability.  
18 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978) ("[T]he  
19 fact that Congress did specifically provide that A's tort became  
20 B's liability if B 'caused' A to subject another to a tort suggests  
21 that Congress did not intend § 1983 liability to attach where such  
22 causation was absent."); see also Motley v. Parks, 432 F.3d 1072,  
23 1081 (9th Cir. 2005). State officials are subject to suit in their  
24 personal capacities if "they play an affirmative part in the  
25 alleged deprivation of constitutional rights." King v. Atiyeh, 814  
26 F.2d 565, 568 (9th Cir. 1987); see also Redman, 942 F.2d at 1446.

27 Thornton's Complaint does not describe the conduct he  
28 attributes to Parole Agents Joseph and Cavalin. His Complaint must



1 "link each defendant to specific conduct." See Karim-Panahi, 839  
2 F.2d at 625 n.3. Plaintiff attaches several inmate grievances to  
3 the Complaint. (See Compl. Attach. #1 Ex. D, at 2-3, 5-6, Ex. F,  
4 at 1-3, ECF No. 1.) In his inmate appeals, Thornton identifies who  
5 was enforcing the parole conditions prohibiting him from living in  
6 his wife's residence. (Id.) In one appeal he wrote, "When  
7 released from parole on Nov. 9, 2007, was told by Agent Joseph that  
8 I could not live at my wife's house . . . ." (Id. Ex. A, at 2.)  
9 Again, in a subsequent appeal, Plaintiff explained he was told by  
10 Joseph that he could no longer live with his wife at her residence  
11 and that Thornton had been assigned to Parole Agent Cavalin of the  
12 "Inland GPS Unit." (Id. Ex. F, at 21.) In another grievance,  
13 Plaintiff stated that Cavalin imposed the same conditions on him,  
14 over his objection, after he was transferred to her supervision.  
15 (Id.; see also id. Ex. A, at 2.)

16 The allegations in the Complaint, the contents of the  
17 documents attached to it, and records judicially noticed fail to  
18 show that Defendants Schwarzenegger, Cate, or Lewis played a part  
19 in the alleged deprivations. (See generally Compl. 1-7, ECF No. 1;  
20 id. Attach. #1 Exs. A-K; Opp'n Attach. #2 Req. Judicial Notice 2-3,  
21 ECF No. 46.) "[State officials and] supervising officers can be  
22 held liable under section 1983 'only if they play an affirmative  
23 part in the alleged deprivation of constitutional rights.'" Graves  
24 v. City of Coeur D'Alene, 339 F.3d 828, 848 (9th Cir. 2003)  
25 (quoting another source), abrogated in part on other grounds by  
26 Hiibel v. Sixth Judicial Dist. Ct. of Nev., 542 U.S. 177 (2004).  
27 Defendants' Motion to Dismiss count one based on Thornton's failure  
28 to allege the personal involvement of Schwarzenegger, Cate, and

1 Lewis is **GRANTED**. Conversely, the allegations in the Complaint,  
2 supplemented by the attachments to it, are sufficient to state a  
3 claim against Defendants Joseph and Cavalin. As a result, their  
4 Motion to Dismiss is **DENIED**.

5 **2. Count Two**

6 Thornton alleges he was assigned to a GPS parole unit, given  
7 overbroad parole conditions, and was assigned to Parole Agent  
8 Cavalin's sex offender unit. (Compl. 4, ECF No. 1.) Plaintiff  
9 maintains that this violated his rights to be free from cruel and  
10 unusual punishment and to due process. (Id.)

11 Assuming the assignment to these parole units or the  
12 imposition of overbroad parole conditions violated Thornton's  
13 constitutional rights, count two fails to allege which Defendant  
14 made the assignments or imposed the conditions. Even so, the  
15 exhibits to the Complaint and the judicially noticed items show  
16 that Thornton contends that Defendants Joseph and Cavalin are  
17 responsible for his parole assignments and conditions. (See Compl.  
18 4, ECF No. 1.)

19 Plaintiff alleges that Defendant Cavalin was his parole agent  
20 of record. (Id.) Her name and signature appear on several  
21 attachments to the Complaint and in documents judicially noticed.  
22 (See Compl. Attach. #1 Exs. A at 2, B at 6, E at 19, G at 26, J at  
23 36-42, K at 44-50; Opp'n Attach. #2 Req. Judicial Notice 5-48, 52,  
24 66, 69-70, 81.) In the Complaint, Plaintiff does not make any  
25 allegations against Defendant Joseph. Nevertheless, attachments to  
26 the Complaint contain statements that Joseph was responsible for  
27 imposing a residency restriction on Thornton. (See Compl. Attach.  
28 #1 Exs. A, at 2, Ex. F, at 21.)

1 Thornton's assertions against Defendants Schwarzenegger, Cate,  
2 and Lewis are deficient. A plaintiff may not bring a civil rights  
3 claim based on respondeat superior liability. Monell, 436 U.S. at  
4 692. To the extent Thornton wishes to hold defendants  
5 Schwarzenegger, Cate, and Lewis liable for the violations he  
6 alleges in count two, he must show that they played an affirmative  
7 part in any violation. See King, 814 F.2d at 568. There are no  
8 facts included in the Complaint, the attachments, or items  
9 judicially noticed showing the involvement of the supervisory  
10 Defendants. (See generally Compl. 1-7, ECF No. 1; id. Attach. #1  
11 Exs. A-K; Opp'n Attach. #2 Req. Judicial Notice 1-82, ECF No. 46.)  
12 Consequently, Plaintiff has failed to state a claim against  
13 Defendants Schwarzenegger, Cate, and Lewis in count two, and their  
14 Motion to Dismiss on this basis is **GRANTED**. The Motion to Dismiss  
15 count two against Defendants Cavalin and Joseph is **DENIED**.

### 16 **3. Count Three**

17 Thornton claims he was banished from his home because living  
18 there would violate Proposition 83 and California Penal Code  
19 section 3003.5. (Compl. 5, ECF No. 1.) According to Plaintiff,  
20 Richard Lilly, a parolee in the same parole unit as Thornton, was  
21 allowed to live with Thornton's estranged wife in the same  
22 residence Thornton was banned from. (Id. at 4-5.) Plaintiff  
23 claims that he was subjected to unconstitutional discrimination.  
24 (Id.)

25 On its face, Count three lacks allegations specifying who was  
26 responsible for the parole conditions preventing Thornton from  
27 living at his wife's residence and allowing Lilly to do so. (See  
28 id.) Unlike counts one and two, however, the attachments provide

1 no additional facts supporting count three. (See, e.g., Compl.  
2 Attach. #1 Ex. D, at 12-13.) On the contrary, in an inmate  
3 grievance submitted on May 13, 2010, Thornton stated that Richard  
4 Lilly was assigned to Parole Agent Shannahan of the Inland GPS  
5 Unit.

6 Although Plaintiff has alleged that Cavalin and Joseph engaged  
7 in some conduct related to his claim in count three, Thornton must  
8 also allege enough facts to state a claim against them. See Fed.  
9 R. Civ. P. 12(b)(6). After reviewing the Complaint, the materials  
10 attached to the Complaint, as well as the materials of which the  
11 Court takes judicial notice, Thornton has not included facts  
12 sufficient to allege the involvement of Defendants Cavalin and  
13 Joseph in the purported discrimination. (See Compl. Attach. #1 Ex.  
14 D, at 2-3, 5-6, Ex. F, at 1-3, ECF No. 1.) Plaintiff contends that  
15 Joseph told him he could not live in the residence, and Cavalin  
16 imposed the same condition on him despite his objections. (Compl.  
17 Attach. #1 Ex. A, at 2, Ex. F, at 21, ECF No. 1.) But Plaintiff  
18 presents no facts demonstrating that Defendants Joseph or Cavalin  
19 had control over, or were responsible for, the terms of Lilly's  
20 parole. Without more, the allegations are insufficient to support  
21 Thornton's claim against Cavalin and Joseph in count three. (See  
22 Reese v. Jefferson School Dist. No. 14J, 208 F.3d 736, 740 (9th  
23 Cir. 2000) ("To succeed on a § 1983 equal protection claim, the  
24 plaintiffs must prove that the defendants acted in a discriminatory  
25 manner and that the discrimination was intentional.")

26 Similarly, as to Defendants Schwarzenegger, Cate, and Lewis,  
27 Thornton fails to allege facts demonstrating their personal  
28 involvement in any discrimination. Neither the Complaint, its

1 exhibits, nor the judicially noticed materials provide any facts  
2 related to these supervisory Defendants' conduct. (See generally  
3 Compl. 3-5, ECF No. 1; id. Attach. #1 Exs. A-K; Opp'n Attach. #2  
4 Req. Judicial Notice 1-82, ECF No. 46.) To state a claim,  
5 Plaintiff must allege that they played an affirmative part in the  
6 violation. See King, 814 F.2d at 568. Thornton has failed to  
7 include any claims directed at the Defendants. Accordingly, the  
8 Motion to Dismiss Thornton's claims in count three against each of  
9 the Defendants is **GRANTED**.

10 **D. Qualified Immunity**

11 Defendants argue that they are entitled to qualified immunity  
12 because they did not violate Plaintiff's constitutional rights.  
13 (See Mot. Dismiss Compl. Attach. #1 Mem. P. & A. 7-8, ECF No. 24.)  
14 "[E]ven if any of Defendants' actions could somehow be construed as  
15 a violation of Plaintiff's constitutional rights, such rights were  
16 not clearly established, and Defendants would not have been on  
17 notice that they were acting unlawfully." (Id. at 8.)

18 In response, Plaintiff argues that the Complaint "clearly  
19 shows a violation of his constitutional rights." (Opp'n Attach. #1  
20 Mem. P. & A. 6, ECF No. 46.) He quotes from the First, Fifth, and  
21 Fourteenth Amendments and concludes, "All of the above is clearly  
22 established to have been violated when parole agents forced  
23 Plaintiff to be banished from his home but allowed another sex  
24 offender to live there." (Id.) Thornton discusses California  
25 state court decisions recognizing liberty and property interests in  
26 continuing to live in one's home. (Id. at 4-5.)

27 "[G]overnment officials performing discretionary functions,  
28 generally are shielded from liability for civil damages insofar as

1 their conduct does not violate clearly established statutory or  
2 constitutional rights of which a reasonable person would have  
3 known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A  
4 constitutional right is "clearly established" if it is  
5 "'sufficiently clear that a reasonable official would understand  
6 that what he is doing violates that right.'" Hope v. Pelzer, 536  
7 U.S. 730, 739 (2002) (quoting Anderson v. Creighton, 483 U.S. 635,  
8 640 (1987)). This standard ensures that government officials are  
9 on notice of the illegality of their conduct before they are  
10 subjected to suit. Id. (citing Saucier v. Katz, 533 U.S. 194, 206  
11 (2001)). "This is not to say that an official action is protected  
12 by qualified immunity unless the very action in question has  
13 previously been held unlawful . . . ." Id. Qualified immunity  
14 protects "all but the plainly incompetent or those who knowingly  
15 violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). The  
16 Court should attempt to resolve threshold immunity questions at the  
17 earliest possible stage in the litigation. See Hunter v. Bryant,  
18 502 U.S. 224, 227 (1991); see also Crawford-El v. Britton, 523 U.S.  
19 574, 598 (1998) (noting that the purpose of resolving immunity  
20 issues early is so that officials are not subjected to unnecessary  
21 discovery or trial proceedings).

22 "The threshold inquiry a court must undertake in a qualified  
23 immunity analysis is whether plaintiff's allegations, if true,  
24 establish a constitutional violation." Hope, 536 U.S. at 736; see  
25 also Saucier, 533 U.S. at 201. If the allegations make out a  
26 constitutional violation, the Court must also determine whether the  
27 right alleged to have been violated is "clearly established."  
28 Saucier, 533 U.S. at 201. The Supreme Court recently

1 "reconsider[ed] the procedure required in Saucier, [and]  
2 conclude[d] that, while the sequence set forth there is often  
3 appropriate, it should no longer be regarded as mandatory."  
4 Pearson v. Callahan, 555 U.S. 223, \_\_ 129 S. Ct. 808, 818 (2009).

5 To overcome a defense of qualified immunity, the Plaintiff  
6 "must claim the defendants committed a constitutional violation  
7 under current law." Atteberry v. Nocona General Hosp., 430 F.3d  
8 245, 253 (9th Cir. 2005). In addition, "he must claim that the  
9 defendants' actions were objectively unreasonable in light of the  
10 law that was clearly established at the time of the actions  
11 complained of." Id. Objective reasonableness is a question of  
12 law. Id. at 256.

13 In determining if a right is clearly established,  
14 [this Court] looks to whether (1) it was defined with  
15 reasonable clarity, (2) the Supreme Court or the [circuit  
16 court of appeals for the jurisdiction] confirmed the  
17 existence of the right, and (3) a reasonable defendant  
18 would have understood that his conduct was unlawful.

17 Doninger v. Niehoff, Nos. 09-1452-cv (L), 09-1601-cv (XAP), 09-  
18 2261-cv (CON), 2011 U.S. App. LEXIS 8441, at \*25 (2d Cir. Apr. 25,  
19 2011) (citing Young v. Cnty. of Fulton, 160 F.3d 899, 903 (2d Cir.  
20 1998); see Dunn v. Castro, 621 F.3d 1196, 1201 (9th Cir. 2010)  
21 (looking to Supreme Court and Ninth Circuit precedent).

22 Thornton does not cite Supreme Court or Ninth Circuit case law  
23 to support his claim that the Defendants are not entitled to  
24 qualified immunity because the residency restrictions they imposed  
25 violated clearly established law. (See Opp'n Attach. #1 Mem. P. &  
26 A. 6, ECF No. 46.) Instead, he cites the First, Fifth, and  
27 Fourteenth Amendments, and People v. Pointer, 151 Cal. App. 3d  
28 1128, 1139-41, 199 Cal. Rptr. 357, 364-66 (1984) (finding that

1 probation condition prohibiting conception was unconstitutional),  
2 and People v. Beach, 147 Cal. App. 3d 612, 622-23, 195 Cal. Rptr.  
3 381, 387 (1983) (holding that "removing an elderly woman from her  
4 home of 24 years" as a condition of probation was  
5 unconstitutional).

6       Neither the Plaintiff nor the Court has identified any Supreme  
7 Court or Ninth Circuit Court of Appeals case authority that clearly  
8 establishes that in 2007 imposing residency restrictions required  
9 by Jessica's Law, or analogous laws, violated parolees'  
10 constitutional rights. Indeed, as of February 1, 2010, when the  
11 California Supreme Court decided In re E.J., 47 Cal. 4th 1258, 223  
12 P.3d 31, 104 Cal. Rptr. 3d 165 (2010), the constitutionality of the  
13 parole conditions mandated by Jessica's Law still had not been  
14 decided by the state supreme court.

15       When the law is uncertain, there are guideposts for the Court.

16       Absent binding precedent, we look to the all  
17 available decisional law, including the law of other  
18 circuits and district courts, to determine whether the  
19 right was clearly established. We also evaluate the  
20 likelihood that this circuit or the Supreme Court would  
21 have reached the same result.

22 Osolinski v. Kane, 92 F.3d 934, 936 (9th Cir. 1996) (citations  
23 omitted). Post-incident cases are generally not considered because  
24 they "could not have 'established' the law retroactively." Baker  
25 v. Racansky, 887 F.2d 183, 187 (9th Cir. 1989). But post-incident  
26 cases that determine whether the law was clearly established at the  
27 time of the incident are persuasive. Id.

28       In 2005, the Eighth Circuit decided Doe v. Miller, 405 F.3d  
700, 704 (8th Cir. 2005), and upheld an Iowa statute "that  
prohibits a person convicted of certain sex offenses involving



1 minors from residing within 2000 feet of a school or a registered  
2 child care facility.”

3           Because we conclude that the Constitution of the  
4 United States does not prevent the State of Iowa from  
5 regulating the residency of sex offenders in this manner  
6 in order to protect the health and safety of the citizens  
7 of Iowa, we reverse the judgment of the district court.  
8 We hold unanimously that the residency restriction is not  
9 unconstitutional on its face.

10 Id. at 704-05. The court identified twelve other states, including  
11 California, that had some form of residency restriction applicable  
12 to sex offenders. Id. at 714, 714 n.4.

13           The Eighth Circuit considered the issue again in a 2006  
14 challenge to an Arkansas law. Weems v. Little Rock Police Dep’t,  
15 453 F.3d 1010, 1013 (8th Cir. 2006). The court described the  
16 Arkansas restriction, “[Sex] [o]ffenders in these classes are not  
17 permitted ‘to reside within two thousand feet (2000’) of the  
18 property on which any public or private elementary or secondary  
19 school or daycare facility is located.’” Id. (quoting Ark. Code  
20 Ann. § 5-14-128(a)). Because the state statutes and guidelines  
21 provided for a “particularized risk assessment of sex offenders,”  
22 “Arkansas law is on even stronger constitutional footing than the  
23 Iowa statute.” Id. at 1017. The court found no due process  
24 violation. Id. at 1019-20.

25           More recently, in Hattar v. Poulos, No. ED CV 09-01722-DOC  
26 (VBK), 2010 U.S. Dist. LEXIS 99879, at \*19 (C.D. Cal. Aug. 3, 2010)  
27 (report & recommendation), adopted in 2010 U.S. Dist. LEXIS 98880,  
28 at \*1-2 (C.D. Cal. Sept. 15, 2010) (order adopting report &  
29 recommendation), the habeas petitioner challenged “the residency  
30 restriction set forth in Penal Code § 3003.5(b) and incorporated in  
31 his parole conditions . . . .” Judge Kenton concluded that there

1 was no clearly established Supreme Court law acknowledging "the  
2 right of a paroled sex offender to live wherever he wishes." Id.  
3 at \*22-23. The court noted, "Although he alleges that he can no  
4 longer live in his family residence, he has not alleged that he is  
5 unable to establish a home or live with his family members  
6 elsewhere." Id. at \*23.

7 Thornton has not sufficiently alleged that Defendants engaged  
8 in conduct that violated his constitutional rights. The  
9 constitutional right claimed by Thornton was not "clearly  
10 established" at the time he was subjected to the parole conditions.  
11 Accordingly, Defendants are entitled to qualified immunity, and  
12 their Motion to Dismiss on this basis is **GRANTED**.

13 **E. Absolute Immunity**

14 All of the Defendants argue that to the extent they were  
15 imposing parole conditions, they are entitled to absolute immunity.  
16 (Mot. Dismiss Attach. #1 Mem. P. & A. 8-9, ECF No. 24.) They  
17 assert that the imposition of parole conditions is a quasi-judicial  
18 function, and parole agents who impose the conditions are  
19 absolutely immune from liability. (Id. at 9.) Plaintiff does not  
20 address Defendants' absolute immunity argument in his Opposition.  
21 (See generally Opp'n Attach. #1 Mem. P. & A. 1-8, ECF No. 46.)

22 "The proponent of a claim to absolute immunity bears the  
23 burden of establishing the justification for such immunity."  
24 Antoine v. Byers & Anderson, 508 U.S. 429, 432 (1993). The  
25 Eleventh Amendment grants the states immunity from private civil  
26 suits. U.S. Const. amend. XI; Henry v. County of Shasta, 132 F.3d  
27 512, 517 (9th Cir. 1997), as amended, 137 F.3d 1372 (9th Cir.  
28 1998). It also provides immunity for state officials sued in their

1 official capacities. "[A] suit against a state official in his or  
2 her official capacity is not a suit against the official but rather  
3 is a suit against the official's office." Will v. Mich. Dep't of  
4 State Police, 491 U.S. 58, 71 (1989) (citing Brandon v. Holt, 469  
5 U.S. 464, 471 (1985)). "As such, it is no different from a suit  
6 against the State itself." Id. (citing Kentucky v. Graham, 473  
7 U.S. 159, 165-66 (1985)); Monell, 436 U.S. at 690 n.55.

8 Probation and parole officers are entitled to absolute  
9 immunity when performing quasi-judicial functions. Swift v.  
10 California, 384 F.3d 1184, 1189 (9th Cir. 2004). They are not  
11 entitled to absolute immunity, however, when performing functions  
12 similar to those of a police officer, such as taking a parolee into  
13 custody. Id. at 1191-92. Parole officers "are entitled to  
14 absolute quasi-judicial immunity for decisions 'to grant, deny, or  
15 revoke parole' because these tasks are 'functionally comparable' to  
16 tasks performed by judges." Id. at 1189 (quoting Sellars v.  
17 Proconier, 641 F.2d 1295, 1303 (9th Cir. 1981)). Absolute immunity  
18 has also been extended to parole officers "for the 'imposition of  
19 parole conditions' and the 'execution of parole revocation  
20 procedures'" because the Ninth Circuit treats such tasks as  
21 "integrally related to an official's decision to grant or revoke  
22 parole." Id. (quoting Anderson v. Boyd, 714 F.2d 906, 909 (9th  
23 Cir. 1983)).

24 Indeed, a state officer sued in his official capacity is  
25 entitled to Eleventh Amendment immunity. See Hafer v. Melo, 502  
26 U.S. 21, 25 (1991); Romano v. Bible, 169 F.3d 1182, 1185 (9th Cir.  
27 1999). But a state officer is not entitled to Eleventh Amendment  
28 immunity when he is sued in his individual capacity only. Hafer,

1 502 U.S. at 31; Romano, 169 F.3d at 1185; see Smith v. Kitzhaber,  
2 No. CV-00-326-ST, 2000 U.S. Dist. LEXIS 6998, at \*6-7 (D. Or. Mar.  
3 20, 2000); AIDS Healthcare Found. v. Belshe, No. CV97-3235 LGB  
4 (MCx), 1998 U.S. Dist. LEXIS 21367, at \*31 (C.D. Cal. Dec. 8,  
5 1998). "We hold that state officials, sued in their individual  
6 capacities, are 'persons' within the meaning of § 1983. The  
7 Eleventh Amendment does not bar such suits, nor are state officers  
8 absolutely immune from personal liability under § 1983 solely by  
9 virtue of the 'official' nature of their acts." Hafer, 502 U.S. at  
10 31.

11 To determine whether a state officer is sued in his individual  
12 or official capacity, the court must examine "the capacity in which  
13 the state officer is sued, not the capacity in which the officer  
14 inflicts the alleged injury." Hafer, 502 U.S. at 26 (emphasis  
15 added); Romano, 169 F.3d at 1185; Ashker v. California Dept. of  
16 Corrections, 112 F.3d 392, 395 (9th Cir. 1997). State officers are  
17 not entitled to immunity from suit simply because a plaintiff  
18 alleges they injured him while acting in their official capacities  
19 as employees of the state. Hafer, 502 U.S. at 26-27.

20 Thornton has not sued any of the Defendants in their official  
21 capacities. (Compl. 1-2, ECF No. 1.) Although his claims are  
22 related to the imposition and enforcement of his parole conditions,  
23 which is part of a parole officer's official duties, their immunity  
24 depends on the capacity in which the defendants are sued. See  
25 Hafer, 502 U.S. at 26; Cordell, 515 F. Supp. 2d at 1120 (order  
26 adopting report & recommendation); (see also Compl. 1-2, ECF No.  
27 1.) Because Thornton has explicitly sued Defendants in their  
28

1 individual capacities, they are not entitled to absolute immunity.<sup>5</sup>  
2 See Hafer, 502 U.S. at 31; Romano, 169 F.3d at 1185. Accordingly,  
3 Defendants' Motion to Dismiss based on absolute immunity is **DENIED**.

#### 4 IV. CONCLUSION

5 Because Plaintiff's claims are not cognizable under § 1983,  
6 Defendants' Motion to Dismiss the Complaint is **GRANTED**. Thornton's  
7 challenge to his conditions of parole must be prosecuted in a  
8 petition for habeas relief.

9 Defendants' Request for Judicial Notice is also **GRANTED**. As  
10 outlined above, Plaintiff's Request for Judicial Notice is **GRANTED**  
11 in part and **DENIED** in part.

12 Defendants' Motion to Dismiss the Complaint against Defendants  
13 Schwarzenegger, Cates, and Lewis for failing to allege their  
14 personal involvement is **GRANTED**. Defendants' Motion to Dismiss  
15 counts one and two against Defendants Cavalin and Joseph for  
16 failing to allege their individual involvement is **DENIED**; the  
17 Motion to Dismiss count three against them is **GRANTED**.  
18 Furthermore, Defendants' Motion to Dismiss Plaintiff's claims  
19 against all Defendants based on qualified immunity is **GRANTED**.  
20 Finally, because Defendants are sued in their individual capacities  
21 only, they are not entitled to absolute immunity, and their Motion  
22 to Dismiss the Complaint on this basis is **DENIED**.

23 \_\_\_\_\_  
24 <sup>5</sup> Thornton cannot cure other defects in this action by  
25 asserting a claim against these Defendants in their official  
26 capacities for the setting of parole conditions. "The imposition  
27 of parole conditions is an integral part of a decision to grant  
28 parole." Anderson v. Boyd, 714 F.2d 906, 909 (9th Cir. 1983)  
(citing Morrissey v. Brewer, 408 U.S. 471, 478 (1972)). "It  
follows that the defendants cannot be held liable [because of their  
absolute immunity] for conduct relating to the imposition of parole  
conditions." Id.; accord Fulton v. Thayer, No. CV 10-0137-GAF  
(MAN) 2010 U.S. Dist. LEXIS 25935, at \*11 (C.D. Cal. Mar. 19,  
2010).

1 Thornton's Complaint is dismissed without prejudice so that he  
2 may bring his claims in a properly filed habeas petition. Trimble  
3 v. City of Santa Rosa, 49 F.3d at 586.

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DATE: June 1, 2011

  
Ruben B. Brooks, Magistrate Judge  
United States District Court

cc: All Parties of Record