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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 RAUL ARELLANO, JR.,

11 Plaintiff,

12 v.

13 E. OJEDA, et al.,

14 Defendants.
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Case No. 14cv2401-MMA (JLB)

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT ON QUALIFIED
IMMUNITY;**

[Doc. No. 101]

**DENYING PLAINTIFF'S MOTION
TO STRIKE**

[Doc. No. 103]

21 Plaintiff Raul Arellano, Jr., a state prisoner proceeding *pro se*, brings an Eighth
22 Amendment conditions of confinement claim pursuant to 42 U.S.C. § 1983, arising out of
23 allegations that prison officials failed to adequately respond when his cell toilet clogged
24 and overflowed over the course of a long weekend. Defendants O. Mack and L. Helmick
25 move for summary judgment on the grounds that they are entitled to qualified immunity
26 from suit. *See* Doc. No. 101. Plaintiff moves to strike Defendants' motion for summary
27 judgment. *See* Doc. No. 103. For the reasons set forth below, the Court **DENIES**
28 Plaintiff's motion to strike and **GRANTS** Defendants' motion for summary judgment.

1 **BACKGROUND**¹

2 **A. Factual Background**

3 Plaintiff alleges that on or about April 17, 2014 through April 22, 2014, sewer
4 water flowed out through the toilet in his cell, leaving up to three millimeters of sewer
5 water on the floor, soaking his clothing, and making it difficult to eat or sleep due to the
6 smell. *See* Doc. No. 13 at 3.² On Thursday, April 17, 2014, Plaintiff advised an
7 unknown correctional officer of the issue. The unknown correctional officer told
8 Plaintiff that a plumber would be called the next day. *Id.*

9 According to Plaintiff, on Friday, April 18, 2014, while walking to the showers, he
10 complained to Defendant Correctional Officer Mack about the clogged toilet, and asked
11 for a plunger or to be switched to another cell. Plaintiff claims that he told Defendant
12 Mack that the night watch officer had put Plaintiff on the list for a plumber, and asked
13 Mack to check and see if a plumber had been called. According to Plaintiff, Defendant
14 Mack told him that “he would see what he could do,” but then did nothing. *Id.* at 4.
15 According to Defendant Mack, however, “[a]t no point while working in that building on
16 April 18, 2014, did I notice that inmate Arellano’s toilet was clogged up and overflowing,
17 or that there was sewage on his floor. I also did not notice any fluid coming out from
18 under any cell door that day. I would have noticed any such condition during my rounds
19 and reported it immediately.” Doc. No. 67-6 at 3 ¶ 5. Defendant Mack did not work any
20 other shift during the events in question.

21 Plaintiff further claims that on Saturday, April 19, 2014, an unknown correctional
22 officer told him that a plumber would not be coming to fix his toilet over the weekend.

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25 ¹ These facts are taken from Defendants’ Separate Statement of Undisputed Material Facts in Support of
26 the Motion for Summary Judgment; Defendants’ declarations submitted in support of the motion for
27 summary judgment; Plaintiff’s sworn Supplemental Response in Opposition to Defendant’s motion for
28 summary judgment; and Plaintiff’s verified Second Amended Complaint, *see Schroeder v. McDonald*,
55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995).

² Citations to electronically-filed documents refer to the pagination assigned by the CM/ECF system.

1 Plaintiff then filled out a Form 22 “Inmate/Parole Request for Interview, Item or
2 Service,” and gave it to Defendant Correctional Officer Helmick the next day for delivery
3 to Correctional Sergeant Ojeda. Plaintiff claims that he complained to Defendant
4 Helmick regarding the conditions in his cell, and Defendant Helmick responded by
5 telling Plaintiff to use his hands to unclog the toilet. *See* Doc. No. 87 at 3. According to
6 Defendant Helmick, however, “[a]t no time was there any evidence that there was one
7 inch of sewage in inmate Arellano’s cell from April 17 to 22, 2014. There was no
8 sewage smell in the building during the days I worked during that time period. Inmate
9 Arellano never told me there was a sewage problem in his cell. He never asked for a cell
10 change or for cleaning materials.” Doc. No. 67-5 at 5 ¶ 11.

11 According to Plaintiff, on Tuesday, April 22, 2014, he unclogged the toilet using
12 his hands and cleaned his cell using a twin-sized bed sheet and soap. *Id.*

13 **B. Procedural Background**

14 Based on these events, Plaintiff filed suit alleging that Correctional Officer
15 Helmick, Correctional Officer Mack, and Correctional Sergeant Ojeda violated his Eighth
16 Amendment rights, and seeking \$5,000,000.00 in damages. On March 30, 2018, the
17 Court granted summary judgment in favor of Defendants. *See* Doc. No. 87. The Court
18 determined that “[e]ven taking Plaintiff’s version of events as true, the unsanitary
19 conditions in his cell were not sufficiently severe or prolonged to rise to the level of an
20 Eighth Amendment violation.” *Id.* at 9. In other words, the Court concluded that no
21 reasonable jury could find that Plaintiff suffered an unconstitutional deprivation under the
22 objective component of Plaintiff’s Eighth Amendment claim. Once again taking the facts
23 in the light most favorable to Plaintiff, the Court assumed that Defendants were aware of
24 the conditions in Plaintiff’s cell, but further concluded that no reasonable jury could find
25 that any of the defendants acted with the requisite intent necessary to find a constitutional
26 violation. The Court directed the Clerk of Court to enter judgment in favor of
27 Defendants. *See* Doc. No. 88. After unsuccessfully challenging the summary judgment
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1 order under Federal Rule of Civil Procedure 59(e), Plaintiff filed an appeal. *See* Doc.
2 Nos. 90-92.

3 On January 22, 2019, the United States Court of Appeals for the Ninth Circuit
4 reversed the entry of judgment in favor of Defendants Mack and Helmick based on a
5 “genuine dispute of material fact as to whether defendants [Mack and Helmick] knew of
6 the sanitation issue and acted with deliberate indifference in failing to address it.” *See*
7 Doc. No. 100 at 3. The Ninth Circuit remanded the case back to this Court for further
8 proceedings. After spreading the circuit court’s mandate, the Court *sua sponte* ordered
9 Defendants Mack and Helmick to file a supplemental brief addressing whether they are
10 entitled to qualified immunity from suit. In response, Defendants filed the instant motion
11 for summary judgment. *See* Doc. No. 101. In lieu of a response, Plaintiff filed a motion
12 to strike Defendants’ motion for summary judgment. *See* Doc. No. 103. Plaintiff
13 challenges the Court’s ability to raise the issue of qualified immunity *sua sponte* and
14 argues Defendants may not have a third opportunity in this case to move for summary
15 judgment.

16 LEGAL STANDARD

17 *1. Summary Judgment*

18 “A party may move for summary judgment, identifying each claim or defense – or
19 the part of each claim or defense – on which summary judgment is sought. The court
20 shall grant summary judgment if the movant shows that there is no genuine dispute as to
21 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
22 P. 56(a). The party seeking summary judgment bears the initial burden of establishing
23 the basis of its motion and of identifying the portions of the declarations, pleadings, and
24 discovery that demonstrate absence of a genuine issue of material fact. *Celotex Corp. v.*
25 *Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it could affect the outcome of the
26 suit under applicable law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49
27 (1986). A dispute about a material fact is genuine if there is sufficient evidence for a
28 reasonable jury to return a verdict for the non-moving party. *Id.* at 248.

1 The party opposing summary judgment cannot “rest upon the mere allegations or
2 denials of [its] pleading but must instead produce evidence that sets forth specific facts
3 showing that there is a genuine issue for trial.” *Estate of Tucker v. Interscope Records*,
4 515 F.3d 1019, 1030 (9th Cir.), cert. denied, 555 U.S. 827 (2008) (internal quotation
5 marks omitted). In applying the standard set forth under Rule 56, district courts must
6 “construe liberally motion papers and pleadings filed by *pro se* inmates and . . . avoid
7 applying summary judgment rules strictly.” *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th
8 Cir. 2010).

9 **2. Qualified Immunity**

10 “The doctrine of qualified immunity protects government officials ‘from liability
11 for civil damages insofar as their conduct does not violate clearly established statutory or
12 constitutional rights of which a reasonable person would have known.’” *Stanton v. Sims*,
13 571 U.S. 3, 4-5 (2013) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Courts
14 analyze two prongs to determine whether qualified immunity applies: officers have
15 qualified immunity “unless (1) they violated a federal statutory or constitutional right,
16 and (2) the unlawfulness of their conduct was ‘clearly established at the time.’” *Easley v.*
17 *City of Riverside*, 890 F.3d 851, 855 (9th Cir. 2018) (quoting *District of Columbia v.*
18 *Wesby*, 138 S.Ct. 577, 589 (2018)). “Clearly established” means that the law was
19 “sufficiently clear that every reasonable official would understand that what he is doing”
20 is unlawful. *Wesby*, 138 S.Ct. at 589 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741
21 (2011)) (internal quotation marks omitted). This standard protects “all but the plainly
22 incompetent or those who knowingly violate the law” and leaves officers “ample room
23 for mistaken judgments.” *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986).

24 A district court may raise the issue of qualified immunity sua sponte and address it
25 on summary judgment. *Easley*, 890 F.3d at 855. Although qualified immunity is an
26 affirmative defense, “a district court is not proscribed from directing the parties to brief
27 the issue when it has been properly raised.” *Id.* District courts “unquestionably possess
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1 the power to enter summary judgment sua sponte even on the eve of trial.” *Norse v. City*
2 *of Santa Cruz*, 629 F.3d 966, 971 (9th Cir. 2010).

3 DISCUSSION

4 *1. Plaintiff’s Motion to Strike*

5 Plaintiff moves to strike Defendants’ motion as procedurally improper because
6 Defendants have twice moved for summary judgment in this action on other grounds.
7 *See* Doc. No. 103. Pursuant to Federal Rule of Civil Procedure 56, “[u]nless a different
8 time is set by local rule *or the court orders otherwise*, a party may file a motion for
9 summary judgment at any time until 30 days after the close of all discovery.” Fed. R.
10 Civ. P. 56(b) (emphasis added). The rule does not limit a party to filing only one motion,
11 and if the Court “orders otherwise,” as the Court has here, a party may file a motion more
12 than thirty days after the close of discovery. Moreover, Defendants’ current motion is
13 brought on different substantive grounds than the previous motions, and Defendants
14 preserved the right to move for summary judgment based on qualified immunity by
15 including it as an affirmative defense in their answer. *See* Doc. No. 53 at 5; Doc. No. 61
16 at 5; Fed. R. Civ. P. 8(c).

17 Plaintiff further contends that the Ninth Circuit’s ruling precludes dismissal of the
18 action based on Defendants’ qualified immunity. *See* Doc. No. 103. However, the Ninth
19 Circuit did not address the issue of qualified immunity, and “[l]ower courts are free to
20 decide issues on remand so long as they were not . . . decided explicitly or by necessary
21 implication in [the] previous disposition.” *Liberty Mut. Ins. Co. v. Equal Emp’t*
22 *Opportunity Comm’n*, 691 F.2d 438, 441 (9th Cir. 1982) (internal citations omitted).
23 Because “a district court is not proscribed from directing the parties to brief the issue
24 when it has been properly raised[,]” this Court has the authority to raise qualified
25 immunity sua sponte and direct the parties to brief the issue. *Easley*, 890 F.3d at 855. As
26 such, Defendants’ motion for summary judgment is properly before the Court.

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1 **2. Defendants’ Motion for Summary Judgment**

2 As an initial matter, the Court notes that it may “exercise [its] sound discretion in
3 deciding which of the two prongs of the qualified immunity analysis should be addressed
4 first in light of the circumstances in the particular case at hand.” *Pearson*, 555 U.S. at
5 236. If either prong is dispositive, the Court need not analyze the other prong. *Id.* at 236-
6 37.

7 A. Constitutional Violation

8 The Court previously concluded, based on the record viewed in the light most
9 favorable to Plaintiff, that “the unsanitary conditions in his cell were not sufficiently
10 severe or prolonged to rise to the level of an Eighth Amendment violation.” Doc. No. 87
11 at 9. The circuit court did not remark on this aspect of the Court’s ruling, nor did the
12 circuit court address in any fashion the objective component of Plaintiff’s Eight
13 Amendment claim against Defendants. *See, e.g., Foster v. Runnels*, 554 F.3d 807, 812
14 (9th Cir. 2009) (explaining that “[e]stablishing a violation of the Eighth Amendment
15 requires a *two-part* showing” of a “sufficiently serious deprivation” and “deliberate
16 indifference” on the part of the defendant) (emphasis added). Accordingly, the circuit
17 court did not “explicitly” decide the issue. *Liberty Mut. Ins. Co.*, 691 F.2d at 441. To the
18 extent the Court’s previous conclusion remains undisturbed after appellate review, it is
19 dispositive as to the first prong of the qualified immunity analysis and the Court need not
20 address the second prong. However, in an abundance of caution, the Court will do so.

21 B. Clearly Established Law

22 Qualified immunity “protects ‘all but the plainly incompetent or those who
23 knowingly violate the law.’” *Ashcroft*, 563 U.S. at 743 (quoting *Malley*, 475 U.S. at 343).
24 Government officials are protected from liability so long as their conduct does not violate
25 “clearly established statutory or constitutional rights of which a reasonable person would
26 have known.” *Stanton*, 571 U.S. at 4-5. The Ninth Circuit has established a broad view
27 of qualified immunity, holding that “if officers of reasonable competence could disagree
28 on th[e] issue [whether a chosen course of action is constitutional], immunity should be

1 recognized.” *Brewster v. Board of Educ. of Lynwood U. School Dist.*, 149 F.3d 971, 977
2 (9th Cir. 1998) (quoting *Malley*, 475 U.S. at 341). To successfully rebut an affirmative
3 defense of qualified immunity, “a plaintiff must show that the officer’s conduct was so
4 egregious that any reasonable person would have recognized a constitutional violation.”
5 *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991).

6 *i. Defendant Mack*

7 Plaintiff complained to Defendant Mack at “around 9 or 10 a.m.” about the
8 clogged toilet in his cell and asked for cleaning tools or to be switched to another cell, to
9 which Mack replied that “he would see what he could do.” Doc. No. 13 at 4. Plaintiff
10 also told Defendant Mack that the night watch officer had put Plaintiff on the list for a
11 plumber and asked Mack to check if a plumber had been called. Doc. No. 87 at 2.
12 Plaintiff insists that Defendant Mack ignored these requests. Defendant Mack claims that
13 “Inmate Arellano never told [him] that his toilet was clogged and that he had sewage
14 flowing out of it, and such a condition would not have gone unnoticed” due to the easily
15 visible location of Plaintiff’s cell. Doc. No. 101-6 at 4.

16 Defendant Mack’s shift ended at 2:00 p.m. that day, approximately four or five
17 hours after Plaintiff informed Mack of the clogged toilet, and Mack did not work another
18 shift during the events in question. Doc. No. 87 at 2. Viewing the facts in the light most
19 favorable to Plaintiff, even if Defendant Mack did not follow up on Plaintiff’s request for
20 the remainder of his shift, Plaintiff has not shown that Mack’s conduct was “so egregious
21 that any reasonable person would have recognized a constitutional violation.” *Romero*,
22 931 F.2d at 627.

23 While “severe and prolonged” lack of sanitation can be a constitutional violation,
24 *Anderson v. County of Kern*, 45 F.3d 1310, 1314 (9th Cir. 1995), the Ninth Circuit has
25 acknowledged that “toilets can be unavailable for some period of time without violating
26 the Eighth Amendment.” *Johnson v. Lewis*, 217 F.3d 726, 733 (9th Cir. 2000). The
27 *Anderson* Court found that being shackled to an unsanitary toilet for one night did not
28 rise to the level of a constitutional violation. *Anderson*, 45 F.3d at 1315. Here,

1 Defendant Mack’s failure to act during the last four to five hours of his shift – when the
2 night watch officer appeared to have addressed the situation by placing Plaintiff on the
3 list for a plumber – does not rise to the level of “clearly established” unlawfulness
4 required to abrogate immunity. *Easley*, 890 F.3d at 855. While Mack may have failed to
5 respond to Plaintiff’s requests immediately, Mack did not engage in conduct so egregious
6 that “every reasonable official would understand” him to have been violating the Eighth
7 Amendment. *Wesby*, 138 S.Ct. at 589. Held to the standard set in *Anderson*, Mack’s
8 conduct is not considered a “clearly established” constitutional violation, even if Mack
9 did nothing to respond to Plaintiff’s concerns during the remainder of his shift. *Id.*

10 In sum, “officers of reasonable competence could disagree” on the issue of whether
11 Defendant Mack’s failure to follow up for those four to five hours was unlawful, and
12 therefore Mack is entitled to qualified immunity. *Brewster*, 149 F.3d at 977.

13 *ii. Defendant Helmick*

14 Plaintiff asserts that he handed Defendant Helmick a Form 22 “Inmate/Parolee
15 Request for Interview, Item, or Service” for delivery to Correctional Sergeant Ojeda,
16 alerting Helmick to the sanitation issue in Plaintiff’s cell. Doc. No. 87 at 3. According to
17 Defendant Helmick, however, “[a]t no time was there any evidence that there was one
18 inch of sewage in inmate Arellano’s cell from April 17 to 22, 2014. There was no
19 sewage smell in the building during the days I worked during that time period. Inmate
20 Arellano never told me there was a sewage problem in his cell. He never asked for a cell
21 change or for cleaning materials.” Doc. No. 67-5 at 5.

22 In his deposition, Plaintiff admits he addressed the situation with Defendant
23 Helmick approximately one hour before the end of Helmick’s shift on April 20, 2014,
24 and Helmick responded by assuring Plaintiff that the sergeant would receive his Form 22
25 by the following day. Doc. No. 101-1 at 35. Plaintiff concedes that Defendant Helmick
26 did in fact read the Form 22 and forward it to the sergeant. *Id.* at 34. That Plaintiff
27 believes these responses were insufficient does not abrogate Helmick’s immunity unless
28 “every reasonable official would understand” him to have been acting unlawfully.

1 *Wesby*, 138 S.Ct. at 589. While Plaintiff may believe the sanitation issue could have
2 been addressed more efficiently, Defendant Helmick accepted the form and forwarded it
3 to the sergeant, just as Plaintiff asked. *See* Doc. No. 101-1 at 35. Such a response was
4 not “so egregious that any reasonable person would have recognized a constitutional
5 violation.” *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Defendant
6 Helmick is therefore entitled to qualified immunity.

7 C. Conclusion

8 In sum, the Court finds that Defendants Mack and Helmick are entitled to
9 immunity from suit for damages in their individual capacities.³

10 CONCLUSION

11 Based on the foregoing, the Court **GRANTS** Defendants’ motion for summary
12 judgment based on qualified immunity. The Court **DIRECTS** the Clerk of Court to enter
13 judgment accordingly and close the case.

14 **IT IS SO ORDERED.**

15 DATE: December 2, 2019

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18 HON. MICHAEL M. ANELLO
19 United States District Judge
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23 ³ Of course, qualified immunity is not available when an official is sued in his official capacity and the
24 plaintiff seeks prospective injunctive relief. *See Brandon v. Holt*, 469 U.S. 464, 472-73; *American Fire,*
25 *Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991). Here, Plaintiff also
26 sued Defendants in their official capacities and requested an injunction against retaliation “in any form.”
27 Doc. No. 13 at 9. To the extent this constitutes a request for prospective relief, it does not relate to
28 Plaintiff’s Eighth Amendment claims against these defendants or an ongoing constitutional violation.
As such, the request is barred by the Eleventh Amendment. *See Ex parte Young*, 209 U.S. at 157
(official sued must have some connection to enforcement of allegedly unconstitutional act); *Verizon Md.*
Inc. v. PSC, 535 U.S. 635, 645 (2002) (*Ex parte Young* applies where complaint alleges ongoing
violation of federal law and seeks relief properly characterized as prospective).