



1 and exhibits with a priority mail flat-rate box using a brass slip to request that officials arrange  
2 for postage. That night, Corrections Officer Coulston came to his cell and told him that  
3 Lieutenant Hunt, who was one of the officers having final authority over brass slips, was denying  
4 Plaintiff's use of the brass slip, claiming Plaintiff would have to use stamps even though he was  
5 indigent. Hunt said an administrative regulation (AR) required a court order for Plaintiff to use a  
6 flat-rate box even though that was the only way to mail his petition and exhibits, and even  
7 though Plaintiff had used this method of mailing for two years without issue.

8           Coulston told Plaintiff that Hunt said he was tired of inmates not being able to pay back  
9 the cost of postage, but Plaintiff provided proof he had paid back all previous brass slips. Hunt  
10 did not care. According to the relevant AR, there is no limit to the amount of postage debt an  
11 inmate may accumulate, and a court order is required only for certified mail.

12           Plaintiff filed an emergency grievance explaining the nature of the time bar and the right  
13 of access to the courts, noting that Hunt should not respond because it would be a violation of  
14 policy and conflict since the grievance was about Hunt. Hunt answered the grievance anyway,  
15 and denied it. In an inmate request form (also known as a kite), Filson agreed with Hunt's  
16 application of the regulations and said no one was violating Plaintiff's rights. Plaintiff believes  
17 this conduct was in retaliation for Plaintiff's history of filing grievances and for filing a motion  
18 for summary judgment in a civil rights action that upset the administration, just a few weeks  
19 before this incident.

20           Hunt's actions prompted Plaintiff to immediately file a motion for an extension to file his  
21 habeas petition. He sent kites with new brass slips but they were returned without a response. He  
22 claims that Hunt was holding on to the petition and had thrown out the brass slip.

23

1 The petition ended up being mailed late, and at the time he filed his complaint he did not  
2 know if the state court would grant him equitable tolling.<sup>1</sup>

3 On January 12, 2017, Plaintiff was transferred without notice from Southern Desert  
4 Correctional Center (SDCC) to the private Core Civic Saguaro Correctional Center in Arizona,  
5 where he claims he was subject to harsher treatment. Officials said they were transferring  
6 inmates to that facility who were disruptive and dangerous, based on gang activity. Plaintiff  
7 claims he has no gang affiliations, no institutional violence and only one minor write up. His  
8 only “disruptions” were the civil rights action he mentioned previously and a grievance filed the  
9 month he was transferred. Since he met none of the transfer criteria, he believes the transfer was  
10 in retaliation for enforcing his civil rights. He claims that Nancy Flores and Robert Mears (as  
11 well as dismissed defendant Jo Gentry) were responsible for drafting the list of inmates to be  
12 transferred.

13 Defendants move for summary judgment, arguing: state officials cannot be sued for  
14 damages in their official capacities; Plaintiff has not set forth a claim for prospective relief  
15 against Defendants in their official capacities; Plaintiff did not exhaust his administrative  
16 remedies before filing suit; Defendants did not retaliate against Plaintiff; and Defendants are  
17 entitled to qualified immunity.

## 18 **II. LEGAL STANDARD**

19 The legal standard governing this motion is well settled: a party is entitled to summary  
20 judgment when “the movant shows that there is no genuine issue as to any material fact and the

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22 <sup>1</sup> Since Plaintiff did not allege actual injury. *i.e.*, that the state court rejected his petition, he was  
23 not permitted to proceed with an access to courts claim related to the untimely habeas petition.  
Plaintiff’s exhibits demonstrate he did not suffer actual injury because the state court eventually  
agreed with him that the delay was due to interference by prison officials and the court  
considered the belated petition on the merits. (*See* ECF No. 43-1 at 59-62.)

1 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp.*  
2 *v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is "genuine" if the  
3 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.*  
4 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is "material" if it could affect the outcome  
5 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary  
6 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the  
7 other hand, where reasonable minds could differ on the material facts at issue, summary  
8 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

9 "The purpose of summary judgment is to avoid unnecessary trials when there is no  
10 dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18  
11 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose  
12 of summary judgment is "to isolate and dispose of factually unsupported claims"); *Anderson*, 477  
13 U.S. at 252 (purpose of summary judgment is to determine whether a case "is so one-sided that  
14 one party must prevail as a matter of law"). In considering a motion for summary judgment, all  
15 reasonable inferences are drawn in the light most favorable to the non-moving party. *In re*  
16 *Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach*  
17 *& Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, "if the evidence of the  
18 nonmoving party "is not significantly probative, summary judgment may be granted." *Anderson*,  
19 477 U.S. at 249-250 (citations omitted). The court's function is not to weigh the evidence and  
20 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;  
21 *Anderson*, 477 U.S. at 249.

22 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.  
23 "When the party moving for summary judgment would bear the burden of proof at trial, 'it must

1 come forward with evidence which would entitle it to a directed verdict if the evidence went  
2 uncontroverted at trial.’... In such a case, the moving party has the initial burden of establishing  
3 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.*  
4 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations  
5 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or  
6 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate  
7 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving  
8 party cannot establish an element essential to that party’s case on which that party will have the  
9 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

10         If the moving party satisfies its initial burden, the burden shifts to the opposing party to  
11 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*  
12 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine  
13 dispute of material fact conclusively in its favor. It is sufficient that “the claimed factual dispute  
14 be shown to require a jury or judge to resolve the parties’ differing versions of truth at trial.”  
15 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987)  
16 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment  
17 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475  
18 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the  
19 pleadings and set forth specific facts by producing competent evidence that shows a genuine  
20 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

1 **III. DISCUSSION**

2 **A. Rule 56(d)**

3 Plaintiff's response and declaration in support of his response mention that Defendants  
4 did not respond to two discovery requests until six days after they filed their motion for summary  
5 judgment; therefore, Plaintiff claims that discovery is still outstanding. (ECF No. 43-1 at 2 ¶ 3.)

6 "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot  
7 present facts essential to justify its opposition, the court may: (1) defer considering the motion or  
8 deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any  
9 other appropriate order." Fed. R. Civ. P. 56(d).

10 "Rule 56(d) provides a 'device for litigants to avoid summary judgment when they have  
11 not had sufficient time to develop affirmative evidence.'" *Stevens v. Corelogic, Inc.*, 899 F.3d  
12 666, 678 (9th Cir. 2018) (quoting *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000  
13 (9th Cir. 2002)). "A party seeking additional discovery under Rule 56(d) must 'explain what  
14 further discovery would reveal that is essential to justify [its] opposition to the motion[ ] for  
15 summary judgment.'" *Id.* (quoting *Program Eng'g, Inc. v. Triangle Publ'ns, Inc.*, 634 F.2d 1188,  
16 1194 (9th Cir. 1980) (alterations original, quotations omitted).

17 Plaintiff does not state why he was not able to incorporate the discovery responses into  
18 his brief when he still had time to file his response after the discovery responses were served.  
19 Nor does he assert that he needed to undertake further discovery to prepare his response.  
20 Therefore, to the extent his statements can be construed as a request under Rule 56(d), the  
21 request should be denied.

1 **B. Background Facts**

2 During the time period at issue, Plaintiff was initially incarcerated at Ely State Prison  
3 (ESP), and Hunt was a night-shift lieutenant at ESP, whose duties included processing brass slips  
4 for postage that accompanied legal mail from indigent inmates. (Hunt Decl., ECF No. 40-2 ¶¶ 4-  
5 5.)

6 Plaintiff was transferred from ESP to SDCC in December of 2017, and was then  
7 transferred from SDCC to Saguaro Correctional Center (SCC) in Arizona (also referred to as  
8 NVB). (ECF No. 40-1 at 2.) At the time, Meares and Flores were employed by NDOC in the  
9 Offender Management Division (OMD), with duties that included arranging for the transfer of  
10 inmates from NDOC facilities to SCC. (Meares Decl., ECF No. 40-3 ¶ 4; Flores Decl., ECF No.  
11 40-4 ¶ 4.)

12 **C. Exhaustion**

13 **1. Standard**

14 The Prison Litigation Reform Act (PLRA) provides that “[n]o action shall be brought  
15 with respect to prison conditions under section 1983 of this title, or any other Federal law, by a  
16 prisoner confined in any jail, prison, or other correctional facility until such administrative  
17 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). An inmate must exhaust his  
18 administrative remedies irrespective of the forms of relief sought and offered through  
19 administrative avenues. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

20 The failure to exhaust administrative remedies is "an affirmative defense the defendant  
21 must plead and prove." *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v.*  
22 *Bock*, 549 U.S. 199, 204, 216 (2007)). "If undisputed evidence viewed in the light most favorable  
23 to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under

1 Rule 56. If material facts are disputed, summary judgment should be denied, and the district  
2 judge rather than a jury should determine the facts [in a preliminary proceeding]." *Id.*, 1168,  
3 1170-71 (citations omitted).

4         Once a defendant shows that the plaintiff did not exhaust available administrative  
5 remedies, the burden shifts to the plaintiff “to come forward with evidence showing that there is  
6 something in his particular case that made the existing and generally available administrative  
7 remedies effectively unavailable to him." *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d  
8 767, 778 n. 5 (9th Cir. 1996)); *Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016) (inmate  
9 plaintiff did not meet his burden when he failed to identify any actions prison staff took that  
10 impeded his ability to exhaust his administrative remedies, or otherwise explain why he failed to  
11 comply with the administrative remedies process)).

12         Exhaustion cannot be satisfied by filing an untimely or otherwise procedurally infirm  
13 grievance, but rather, the PLRA requires “proper exhaustion.” *Woodford v. Ngo*, 548 U.S. 81, 89  
14 (2006). “Proper exhaustion” refers to “using all steps the agency holds out, and doing so  
15 *properly* (so that the agency addresses the issues on the merits).” *Id.* (emphasis in original)  
16 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). Thus, “[s]ection 1997e(a)  
17 requires an inmate not only to pursue every available step of the prison grievance process but  
18 also to adhere to the ‘critical procedural rules’ of that process.” *Reyes v. Smith*, 810 F.3d 654,  
19 657 (9th Cir. 2016) (quoting *Woodford*, 548 U.S. at 90). “[I]t is the prison’s requirements, and  
20 not the PLRA, that define the boundaries of proper exhaustion.” *Jones v. Bock*, 549 U.S. 199,  
21 218 (2007).

22         To reiterate, an inmate need only exhaust “available” administrative remedies. *See Ross*  
23 *v. Blake*, 136 S.Ct.1850, 1858 (2016). “Accordingly, an inmate is required to exhaust those, but



1 only those, grievance procedures that are ‘capable of use’ to obtain ‘some relief for the action  
2 complained of.’” *Id.* at 1859 (quoting *Booth*, 532 U.S. at 738).

### 3 **2. NDOC’s Grievance Process**

4 An inmate within NDOC must utilize the grievance process set forth in AR 740 to  
5 exhaust administrative remedies. The inmate must proceed through three levels to properly  
6 exhaust administrative remedies: informal, first and second levels. AR 740 also provides a  
7 process for filing emergency grievances. If an emergency grievance is not deemed an  
8 emergency, the inmate may appeal the determination through the regular grievance process.  
9 (ECF No. 40-6 (AR 740, effective Jan. 3, 2017), ECF No. 40-7 (AR 740 effective  
10 March 7, 2017).)

### 11 **3. Analysis**

12 According to Defendants, Plaintiff only filed two grievances in 2017 and 2018.) Neither  
13 address the mailing of his habeas petition or his transfer to SCC. (ECF No. 40-8.)

14 In his complaint, Plaintiff claims to have filed an emergency grievance on the issue of his  
15 habeas petition not being mailed, but Defendants claim that NDOC records do not reflect the  
16 filing of an emergency grievance. (ECF No. 40-8; Gittere Decl., ECF No. 40-9 ¶ 8.)

#### 17 **a. Mailing of the Habeas Petition**

18 In his response, Plaintiff submits two emergency grievances regarding the mailing of his  
19 habeas petition. He filed an emergency grievance on January 8, 2017, stating that he was told  
20 that Hunt was denying his priority mail flat-rate box because it was legal mail. He explained that  
21 it was legal mail for a writ of habeas corpus, with a deadline of January 12, 2017. It is signed as  
22 being received that same date. The response states: “Current policy does not allow any other mail  
23

1 than 1st class without orders from the courts, send it 1st class.” Plaintiff signed the grievance as  
2 disagreeing with the determination on  
3 January 9, 2017. (ECF No. 43-1 at 37-38.)

4 The form instructed Plaintiff that a formal grievance could be pursued if the inmate  
5 disagreed with the outcome. (*Id.* at 37.) It is unclear why this emergency grievance did not  
6 appear in Gittere’s search of Plaintiff’s grievance records.

7 Plaintiff filed another emergency grievance on January 9, 2017, asking whether the  
8 habeas petition was sent, reiterating that the deadline was January 12, 2017. The response states:  
9 “Hunt is correct you cannot send priority/certified unless the court has ordered it per AR.” He  
10 was instructed to contact the mail room for his box. Plaintiff signed the form indicating his  
11 disagreement that same day. Again, the form instructed Plaintiff that he could pursue a formal  
12 grievance in the event he disagreed with the outcome. (ECF No. 43-1 at 39.) It is also not clear  
13 why this emergency grievance did not show up in Defendants’ search.

14 Plaintiff acknowledges that he did not file a formal grievance on this issue. Instead, he  
15 argues that he could not wait for completion of the formal grievance process because he had to  
16 address the untimely filing of his habeas petition in state court. Plaintiff does not explain why he  
17 could not assert an argument for equitable tolling in the state court without first completing the  
18 formal grievance process. In fact, Plaintiff’s own exhibits demonstrate that he did file a motion  
19 for an extension of time to file his habeas petition, but he never formally submitted it to the  
20 court. (ECF No. 43-1 at 55.) Plaintiff subsequently filed a supplemental petition asserting that  
21 good cause existed to overcome the untimeliness of his petition, arguing that the delay was due  
22 to interference by prison officials. (ECF No. 43-1 at 56.) The state court agreed with Plaintiff,  
23 and considered the belated petition on the merits. (ECF No. 43-1 at 60-61.)

1 In any event, Plaintiff did not file this *federal action* until September 10, 2018,  
2 demonstrating that he had sufficient time to complete the formal grievance process regarding the  
3 claim of retaliation regarding the mailing of his habeas petition in January of 2017.

4 In sum, the court finds that Plaintiff did not properly exhaust his administrative remedies  
5 as to the retaliation claim against Filson and Hunt. As Plaintiff points out, the time to grieve this  
6 issue has long since passed; therefore, instead of a dismissal of the claim without prejudice,  
7 summary judgment should be granted in favor of Hunt and Filson.

#### 8 **b. Transfer to Arizona**

9 Insofar as Plaintiff claims he was unable to grieve the issue of his transfer to Arizona  
10 because he had been transferred, Defendants state that nothing in AR 740 prevents an inmate  
11 from grieving an issue while no longer at the institution at which an alleged violation of rights  
12 occurred. In addition, they state that AR 740 provides for review by persons and institutions  
13 responsible for the issue. They contend that there is no evidence that Plaintiff attempted to use  
14 the grievance process to protest his transfer.

15 Plaintiff, on the other hand, states that once he was transferred, he was not permitted to  
16 file a grievance against NDOC. (ECF No. 43-1 at 12 ¶ 14.) Once he returned to NDOC, the time  
17 to file a grievance on this issue had long expired, making administrative remedies unavailable.

18 (*Id.* ¶ 15.)

19 In their reply, Defendants argue that Plaintiff has provided no evidence that  
20 administrative remedies were unavailable to him once he was transferred to Arizona.

21 Defendants ignore Plaintiff's statement in his declaration that once he was transferred to  
22 Arizona, he was precluded from filing a grievance against NDOC. In addition, AR 740 does not  
23 describe the process for an inmate who is transferred to an out-of-state institution to grieve

1 something that occurred while he was housed within NDOC. AR 740 governs the grievance  
2 process *within NDOC*. Defendants have not demonstrated that Plaintiff received instructions on  
3 how to grieve issues that occurred within NDOC once he was transferred to Arizona.

4 The court finds Plaintiff has provided evidence that administrative remedies were  
5 unavailable to him once he was transferred to Arizona to grieve his transfer. Therefore, insofar as  
6 Meares and Flores move for summary judgment as to the retaliation claim against them on the  
7 basis that Plaintiff failed to exhaust his administrative remedies, their motion should be denied.

8 The court will now address the merits argument for Plaintiff's retaliation claim against  
9 Meares and Flores.

## 10 **C. Retaliation**

### 11 **1. Standard**

12 "Section 1983 provides a cause of action for prison inmates whose constitutionally  
13 protected activity has resulted in retaliatory action by prison officials." *Jones v. Williams*, 791  
14 F.3d 1023, 1035 (9th Cir. 2015); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Such a  
15 claim consists of the following elements: "(1) An assertion that a state actor took some adverse  
16 action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action  
17 (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not  
18 reasonably advance a legitimate correctional goal." *Jones*, 791 F.3d at 1035 (quoting *Rhodes v.*  
19 *Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)).

20 "The First Amendment guarantees a prisoner a right to seek redress of grievances from  
21 prison authorities as well as a right of meaningful access to the courts." *Id.* (citing *Bradley v.*  
22 *Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995)).

1           **2. Analysis**

2           Defendants argue that there is no evidence that Flores or Meares knew of any alleged  
3 protected conduct by Plaintiff before his transfer to Arizona. In their declarations, they each state  
4 that originally, a list of 200 inmates for transfer to Arizona was compiled (before they were with  
5 the Offender Management Division (OMD)). The list was compiled based on Arizona staff  
6 advising NDOC they could accept the transfer of inmates of any security level. After the original  
7 list of 200 inmates was compiled, and approximately 135 inmates from NDOC transferred there,  
8 Arizona staff notified NDOC that they had limited housing remaining for inmates in disciplinary  
9 segregation or who otherwise presented management or housing problems. Then, Meares and  
10 Flores were directed to scratch the remaining inmates from the original list and develop a new  
11 list of approximately 65 inmates for transfer to Arizona. The criteria for the new list were: that  
12 the inmates have enough time remaining on their sentence; the inmates have no court hearings  
13 scheduled or medical issues that would prevent transfer; and the inmates could be housed in  
14 general population setting with each other and with other inmates in Arizona. Meares and Flores  
15 began compiling the list by pulling a list of inmates with long-term sentences remaining to be  
16 served. Plaintiff was placed on the list of transfer to Arizona because of his life sentence and he  
17 otherwise fit the criteria discussed above. (Meares Decl., ECF No. 40-3; Flores Decl., ECF No.  
18 40-4.)

19           Both Meares and Flores state that at no time did they receive a request from anyone at  
20 ESP or SDCC to transfer Plaintiff to Arizona to retaliate against him. In addition, both assert that  
21 they have any knowledge of any grievances filed by Rodriguez or any civil rights complaints  
22 filed by Plaintiff before they compiled the transfer list. (*Id.*)  
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1 Defendants have provided evidence that there is no causal connection between the  
2 decision to transfer Plaintiff and any protected conduct by Plaintiff: that they were not aware of  
3 Plaintiff filing any grievances or civil rights complaints before compiling the list that included  
4 Plaintiff. Plaintiff focuses on the initial criteria to transfer inmates to Arizona, but provides *no*  
5 *evidence* to create a genuine dispute of material fact as to the causation element of this claim. In  
6 other words, he has not submitted evidence to establish that Plaintiff was put on the transfer list  
7 *because of* his protected conduct.

8 As such, Meares and Flores are entitled to summary judgment as to the retaliation claim  
9 asserted against them.

10 In light of the court's conclusion, it need not reach Defendants' other arguments.

#### 11 **IV. RECOMMENDATION**

12 IT IS HEREBY RECOMMENDED that the District Judge enter an order **GRANTING**  
13 Defendants' motion for summary judgment.

14 The parties should be aware of the following:

15 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
16 this Report and Recommendation within fourteen days of being served with a copy of the Report  
17 and Recommendation. These objections should be titled "Objections to Magistrate Judge's  
18 Report and Recommendation" and should be accompanied by points and authorities for  
19 consideration by the district judge.

1           2. That this Report and Recommendation is not an appealable order and that any notice of  
2 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
3 until entry of judgment by the district court.

4  
5 Dated: September 21, 2021

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7 William G. Cobb  
8 United States Magistrate Judge  
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