UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 21 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

VICKI CORONA,

Plaintiff - Appellant,

v.

CITY OF LOS ANGELES; et al.,

Defendants - Appellees.

No. 18-55985

D.C. No. 2:17-cv-02913-VBF-KK
U.S. District Court for Central California, Los Angeles

MANDATE

The judgment of this Court, entered February 27, 2019, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7

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No. 18-55985

D.C. No. 2:17-cv-02913-VBF-KK
Central District of California,
Los Angeles

ORDER

Before: CANBY, GRABER, and McKEOWN, Circuit Judges.

The district court certified that this appeal is not taken in good faith and has denied appellant leave to proceed in forma pauperis on appeal. *See* 28 U.S.C. § 1915(a). On September 12, 2018, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's September 12, 2018 order, and the opening brief received on October 19, 2018, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 7) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

DISMISSED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VICKI CORONA,

Plaintiff,

v.

CITY OF LOS ANGELES et al.,

Defendant(s).

Case No. LA CV 17-02913-VBF (KK)

ORDER

Denying Document #24 (Plaintiff's Motion for Relief from Judgment)

On October 3, 2017, Vicki Corona ("Plaintiff"), proceeding pro se, filed an "Objection to Order of August 23, 2017; Motion to Dismiss Order and Reinstate Case," which the Court previously construed as a motion for relief from judgment under Fed. R. Civ. P. 60(b) ("Motion"). *Accord Davenport v. Terhune*, 1999 WL 329090, *1 (N.D. Cal. May 14, 1999) ("The court will liberally construe the document to be a request under . . . 60(b) . . . ."). Today the Court construes the motion more specifically as arguably seeking relief from judgment under subsections one, four, and six of Rule 60(b). **For reasons set forth below, the Court will deny the Rule 60(b) motion, concluding that (1) a request for relief under 60(b)(1) is untimely and lacks merit; (2) a request for**

relief under 60(b)(6) is untimely and lacks merit; and (3) a request for 60(b)(4) relief is *not* untimely here, but it lacks merit.

In April 2017, plaintiff filed the 42 U.S.C. § 1983 complaint claiming that the City of Los Angeles, Eric Garcetti, and Does 1-10 violated her Fourth, Fifth, and Fourteenth Amendment rights, state law, and the L.A. Municipal Code. *See* Document ("Doc") 1. Plaintiff's claims primarily arose from defendants' issuance of Ordinance 184590, which plaintiff contends is "discriminatory" and "wage[d] war against the homeless . . . ." Doc 1 at 1, 3. The Ordinance's professed purposes include addressing unsanitary conditions, noise, and crime which result when persons dwell in their vehicles in residential and sensitive areas -- and studying "the impacts to health, safety and the physical environment" by allowing vehicle dwelling on public streets in the City. The Ordinance specifically allows individuals to dwell in a vehicle on "non-residential streets and on streets that do not have a school, pre-school, day care facility or park." Ord. No. 184590, amending LAMC 85.02 (Nov. 23, 2016), http://clkrep.lacity.org/onlinedocs/2014/14-1057-s1_ORD_184590_11-23-16.pdf (last visited June 15, 2018).

On May 9, 2017, the Magistrate issued an Order (Doc 7) dismissing the complaint with leave to amend. After plaintiff filed an amended complaint (Doc 8), the Magistrate issued a first Report and Recommendation ("FR&R") (Doc 9) on June 14, 2017, recommending that the action be dismissed without prejudice for lack of prosecution and failure to comply with orders. On June 15, 2017, Plaintiff filed Document 10, a response to the May 9, 2017 Order dismissing the Complaint, contending that she had stated a claim against defendants and expressly declining to file an amended complaint. On June 24, 2017, Plaintiff objected to the FR&R (Doc 11). On July 12, 2017, the Magistrate vacated the FR&R and dismissed the objections as moot, *see* Doc 12.

On July 13, 2017, the Magistrate issued a Second R&R (Doc 13) recommending that all federal-law claims be denied for failure to state a claim. On July 24, 2017, Plaintiff filed objections (Doc 15), and on August 10, 2017, the Magistrate issued a revised Final R&R ("FR&R") (Doc 16). On August 23, 2017, this Court issued an Order

(Doc 17) adopting the FR&R, denying the federal claims, declining supplemental jurisdiction over the state-law claims, and dismissing the case without leave to amend, and entered judgment accordingly (Doc 18).

Plaintiff filed this motion titled "Objection to Order of August 23, 2017; Motion to Dismiss Order and Reinstate Case" (Doc 19). The Court issued an Order (Doc 25) construing said filing as a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). **Plaintiff filed briefs (Doc 29 and 30), and in April 2018, defendants filed a Response (Doc 31) arguing that the motion is both untimely and meritless.**

On May 15, 2018, the Court issued a Notice (Doc 32) noting that plaintiff had e-mailed a reply to the chambers e-mail box without permission, in violation of C.D. Cal. Local Civil Rule 5-4.2, ordering Plaintiff to submit the document to the Clerk's Office in paper form for filing, and rejecting the document without filing it. One month later, on June 15, 2018, plaintiff filed a two-page "Response to Court's May 15, 2018 Notice of Discrepancy and Order" (Doc 33). Plaintiff maintains that she was within her rights in filing her reply brief by e-mailing it to this judge's chambers e-mailbox (Doc 33 at 2 paragraph 3). Plaintiff alleges that "on the same date [I] sent a courtesy copy of the brief via email to the Judge's chambers, a hard copy of the subject brief was sent via first-class mail to the same District Court filing window as always." Doc 33 at 1 paragraph 1.

The Court finds that (1) plaintiff never secured permission to file documents by e-mail in this case, and her attempted e-mail filing of her reply was invalid; **(2)** as plaintiff concedes, she has no proof of her allegation that she also sent the e-mailed reply brief to the Clerk's Office by paper mail sometime around or shortly before May 15, 2018, when the Court issued its Notice of Document Discrepancies; **and (3)** even if "plaintiff's mail-drop" did not receive the defendants' April 18, 2018 opposition brief until April 30, 2018 as plaintiff alleges (Doc 34 at 4-5 para. 8), the Clerk's Office did not receive plaintiff's reply properly by mail until *six weeks later*, on June 15, 2018.

Nonetheless, the Court will accept the accompanying document, number 34, as plaintiff's reply brief, but the reply is of no avail. Plaintiff's reply rarely

addresses the substance of anything stated by the defendants in their opposition brief. For example, the reply offers nothing to support relief from judgment under Rule 60(b) or otherwise when it complains at length about the Court and the defendants allegedly not using her proper name, *see* Doc 34 at 1-2 paragraph 2 (objecting to defendants "attaching a wrongfully presumed *persona designata*, *nom de guerre* created by them as VICKI CORONA" and "objection to the Court's use of such persona designate, as well") and *id.* at 5-6 (referring to herself as "a Sovereign, breathing, natural woman, not a 14th Amendment corporate Person . . ."); when it complains that the defendants should not label themselves "collective defendants", *id.* at 2 para. 3; or when it posits that it must be embarrassing for a mayor to be sued "by a lone, significant, homeless woman", *id.* at 2 para. 4. The reply also does nothing to carry plaintiff's burden of showing timeliness when it appears to allege, without support, that this District Judge and/or the Magistrate Judge have acted with impermissible bias and partiality in this case. *See* Doc 34 at 4 (citing 28 U.S.C. section 454's prohibition on federal judges practicing law, as well as Canon 3 of the Code of Conduct for United States Judges).

Liberally construed, Plaintiff's motion appears to seek relief from judgment under Fed. R. Civ. P. 60(b)(4) or 60(b)(6). Fed. R. Civ. P. 60(b) states that the Court may relieve a party of a final judgment or order for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;

> (5) the judgment has been satisfied, released or discharged, is based on an earlier judgment that has been reversed or vacated, or where applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

Here, Plaintiff argues that the August 23, 2017 judgment is void because the Court did "not follow the law" and "lost subject-matter jurisdiction" Doc 24 at 5. Because plaintiff is proceeding pro se, he is entitled to a liberal construction of his filings. *See Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197 (2007). Hence, liberally construed, Plaintiff appears to be seeking relief pursuant to Rule 60(b)(4) and/or Rule 60(b)(6). *See, e.g., Jabali v. Mau*, 2009 WL 1649735, *4 n.12 (D. Haw. June 9, 2009) (John Michael Seabright, J.) ("Liberally construing Jabali's Rule 60(b) motion, he may also request relief from judgment due to 'extraordinary circumstances' pursuant to Rule 60(b)(6).").

True Rule 60(b)(4) Motions Are Not Subject to Any Time Limit, But the Motion Is Untimely To the Extent that It Seeks Relief under Rule 60(b)(6). With an exception discussed below, "[a] motion under Rule 60(b) must be made within a reasonable time -- and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). **Because plaintiff's motion is not reasonably construed as seeking relief from judgment pursuant to Rule 60(b)(1), (2), or (3), her motion is not subject to the bright-line one-year deadline. Instead, plaintiff need only show that she filed her Rule 60(b)(4) / (6) motion within a reasonable time.** What constitutes a reasonable time "depends on the facts of each case", *US v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985), "'taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon [in the 60(b) motion], and prejudice to the other parties'", *Lemog v. US*, 587 F.2d 1188, 1196-97 (9th Cir. 2009) (quoting

Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981)). "Depending on the circumstances, a court may properly find that a reasonable time under the relevant circumstances was a short time indeed." *Century 21 Real Estate, LLC v. Camden Securities, Inc.*, No. LA CV 07-00834, 2013 WL 12054317, *2 (C.D. Cal. Jan. 25, 2013).

Defendants argue that plaintiff did not file the motion within a reasonable time because it was filed approximately ten days after the deadline to appeal had passed, Plaintiff has not provided any reason for her delay, and Defendants will be prejudiced if the Judgment is vacated, Doc 31. Plaintiff argues that her homelessness and the Court's refusal to accept a General Delivery address have "prevented" her timely response to court orders. *See* Doc 29 at 4-5. In her reply, plaintiff complains that the Court should not be deciding whether her motion is timely, Doc 34 at 3 paragraphs 6 & 8. Alternately, plaintiff contends that the timeliness of "the Appeal" – by which plaintiff presumably means her postjudgment motion – "is moot" because "Claimant [plaintiff] voided the order of Judge Fairbank [Motion to Dismiss Order; p.5, ll. 17-19] and requested another judge to hear the case", Doc 34 at 3 para. 7. The Court would note that this Court's final order and judgment adverse to plaintiff were never "voided", and plaintiff has not shown that the order and judgment are even potentially or arguably void*able*. **Faced with such a confused and weak attempt to show timeliness, the Court determines that plaintiff did not file this motion within a reasonable time.** *Cf. In re Ashai, Debtor*, No. LA CV 15-05057-VBF, 2017 WL 5495501, *4 (C.D. Cal. Nov. 13, 2017) ("[T]his FRCP 60(b) motion was not filed within a reasonable time, as required by Fed. R. Civ. P. 60(c). All of the arguments made in the motion were available to Ashai immediately upon entry of judgment, and he provides no excuse for waiting nearly two months to file a FRCP 60(b) motion rather than filing a timely FRCP 59(e) motion within 28 days of judgment."). **A request for 60(b)(6) relief, then, is time-barred and not properly before the Court.**

By contrast, the Court determines that to the extent that the motion seeks relief from judgment pursuant to 60(b)(4), it is *not* time-barred. "Unlike motions for

relief from judgment pursuant to Rule 60(b)(1), (2), or (3) (which must be filed within one year of the entry of judgment) or motions for relief from judgment pursuant to Rule 60(b)(5) or (6) (which must be filed within a reasonable time), '[m]otions to set aside a judgment as void under Rule 60(b)(4) may be brought at any time.'" *Inland Concrete Enterprises ESOP v. Kraft*, 318 F.R.D. 383, 410 (C.D. Cal. 2016) (quoting *Million (Far East), Ltd. v. Lincoln Provisions, Inc. USA*, 581 F. App'x 679, 682 (9th Cir. 2014) (citing *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987))), *recon. denied*, No. LA CV 10-01776 Doc. 20 (C.D. Cal. Oct. 5, 2017). *See also Rodriguez v. NDCHealth Corp.*, No. LA CV 10-3522-VBF, 2011 WL 13124037, *4 (C.D. Cal. Oct. 17, 2011) ("The Rule requires that a 60(b) motion be brought 'within a reasonable time', but if a judgment is void, a motion to set it aside may be brought at any time.") (citing *Owens-Corning Fiberglas Corp. v. Center Wholesale, Inc.*, 759 F.2d 1440, 1447-48 (9th Cir. 1985)); *Lee v. Aft-Yakima*, 2011 WL 4703106, *2 (E.D. Wash. Oct. 4, 2011) ("[M]otions for relief from judgment on the basis that the judgment was void are not subject to the one-year limitation period in Rule 60(c)(1)."). *Accord Days Inn Worldwide v. Patel*, 445 F.3d 899 (6th Cir. 2006); *US v. Boch Oldsmobile, Inc.*, 990 F.2d 657, 661 (1st Cir. 1990).

The reason for this judicially recognized exception to Fed. R. Civ. P. 60(c)(1) is that "'[a] void judgment is from its inception a legal nullity,'" *In re Sillman*, 2014 WL 223099, *5 (E.D. Cal. Jan. 21, 2014) (quoting *US v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990)). **To the extent that plaintiff is seeking relief pursuant to 60(b)(4), then, her motion is not time-barred.**

Nonetheless, on the merits, plaintiff has not shown that she is entitled to relief from judgment under 60(b)(4). "Rule 60(b)(4) provides for relief from judgment on the basis that a judgment is void. An incorrectly decided judgment is not itself sufficient to render a judgment void." *Life Alert Emergency Response, Inc. v. Lifewatch, Inc.*, No. 08-CV-02184-CAS, 2014 WL 2115189, *1 (C.D. Cal. May 19, 2014) (citing *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367 (2010) ("*Espinosa*")).

Although 60(b)(4) provides relief if the judgment is void as a matter of law, "[t]he list of such judgments is exceedingly short, and **'Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.'"** *Inland Concrete*, 318 F.R.D. at 410 (quoting *Dietz v. Bouldin*, 794 F.3d 1093, 1095 (9th Cir. 2015) (quoting *Espinosa*, 559 U.S. at 271), *aff'd o.g.*, – U.S. –, 136 S. Ct. 1885 (2016). Moreover, courts considering whether a judgment is void because of a jurisdictional defect "generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction." *Espinosa*, 559 U.S. at 270.

Next, a motion may be treated as a 60(b)(4) motion "only if the judgment at issue actually is void and not merely voidable . . . ." *Zone Sports Ctr., Inc., LLC v. Red Head, Inc.*, 2013 WL 2252016, *6 (N.D. Cal. May 22, 2013) (citing 12 J. Wm. Moore et al., Moore's Federal Practice ¶ 60.44 (3d ed. 1997)). As the Supreme Court held, "[i]f the court had jurisdiction of the cause and the party, its judgment is not void, but only voidable by writ of error." *Ball v. US*, 163 U.S. 662, 669-70, 16 S. Ct. 1192 (1896). *See, e.g., Beebe v. US*, 161 U.S. 104, 115, 16 S. Ct. 532 (1896) ("In respect of an execution issued on a judgment confessed prematurely, the execution may be erroneous and irregular, [but] it must be respected and enforced until vacated by motion to quash . . . .").

Here, Plaintiff appears to believe that she was denied due process because she was denied an opportunity to be heard and her "guaranteed civil and constitutional Rights were disregarded." Doc 29 at 5. Contrary to Plaintiff, the Court afforded her numerous opportunities to be heard and considered each of her objections. Plaintiff filed a response to the Order dismissing with leave to amend, which the Magistrate considered in revising the Second R&R. Plaintiff then filed objections to the Second R&R, which this Court considered de novo in accepting the Final R&R.

Moreover, it is well settled that there is no constitutional due process right to oral argument, *see Toquero v. INS*, 956 F.3d 193, 196 n.4 (9th Cir. 1992), and "the

opportunity to be heard orally on questions of law is not an inherent element of procedural due process, even where substantial questions of law are involved." *Burchett v. Cardwell*, 493 F.2d 492, 494 (9th Cir. 1974) (cite omitted); *see also Rector v. NY Bank of Mellon*, No. LA CV 12-08587, 2014 WL 12047052, *4 (C.D. Cal. Aug. 7, 2014) (denying 60(b) motion and holding that plaintiff had no due process right to oral argument) (Fairbank, J.); *Sudduth v. Bulosan*, 2009 WL 10673925, *2 (C.D. Cal. Sept. 3, 2009) (Gutierrez, J.) (citing *Greene v. WCI Holdings Corp.*, 136 F.3d 313, 316 (2d Cir. 1998)), *aff'd*, 418 F. App'x 633 (9th Cir. 2011).

In addition, "The Federal Rules of Civil Procedure and the Local Rules . . . are clear: Plaintiff has no right to oral argument." *Delman v. GEP Cencast, LLC*, 2009 WL 3415897, *1 (C.D. Cal. Oct. 21, 2009). Federal Rule of Civil Procedure 78(b) states that, "By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings." Similarly, Local Civil Rule 7-15 provides that "[t]he court may dispense with oral argument of any motion except where an oral hearing is required by statute, the F. R. Civ. P. or these Local Rules." **Therefore, Plaintiff is not entitled to relief from judgment on a due-process theory pursuant to Rule 60(b)(4).**

Having determined that plaintiff's motion is untimely to the extent that it seeks relief under 60(b)(6), the Court further determines that a 60(b)(6) request by plaintiff lacks merit on this record. Rule 60(b)(6) also allows a party to gain relief from judgment based on "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). "Judgments are not often set aside under Rule 60(b)(6)." *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006). While 60(b)(6) is referred to as a "catch all", courts interpret it "stringently." *Strobel v. Morgan Stanley*, 2007 WL 1053454, *8 (S.D. Cal. Apr. 9, 2007). The U.S. Supreme Court has noted that the subsection six should be applied only in "extraordinary circumstances," *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988), and our Circuit has stated that the rule is "an equitable remedy" used only to "prevent manifest injustice." *Latshaw*, 452 F.3d at 1103.

The motion fails to demonstrate that plaintiff is entitled to relief from judgment under 60(b)(6). The Motion does not raise any new argument, evidence, or facts that undermine the Court's prior findings. Plaintiff merely re-asserts claims previously presented in the Complaint, her response to the Order dismissing the Complaint with leave to amend, and her objections to the Second R&R. Plaintiff thus fails to show manifest injustice or extraordinary circumstances to warrant relief from judgment.

Penultimately, there is some authority that Rule 60(b)(1) is the only part of 60(b) that may be used to seek relief from a judgment that was predicated on a mistake of law by the Court. As written, plaintiff's motion could be read as arguing, *inter alia*, that this court made mistakes of law in entering judgment against her, **but the motion would be untimely if construed as a 60(b)(1) motion, as well.** "Circuit precedent . . . holds that a court may not find a 60(b)(1) motion to be filed 'within a reasonable time' unless it was filed within the time for taking an appeal." *Inland Concrete Enters., Inc. ESOP v. Kraft*, 318 F.R.D. 383, 411 (C.D. Cal. Aug. 24, 2016) (Fairbank, J.) (citing, *inter alia*, *Arrieta v. County of Kern*, 161 F. Supp.3d 919, 931 (E.D. Cal. 2016) ("'Rule 60(b)(1) allows the Court' to grant relief from judgment if the motion is 'filed within a reasonable time *not exceeding the time for appeal.*'") (citing *Gila River Ranch, Inc. v. US*, 368 F.2d 354, 357 (9th Cir. 1996))); *accord Lebahn v. Owens*, 813 F.3d 1300, 1305 (10th Cir. 2016) ("[A] Rule 60(b)(1) motion asserting mistake of law is untimely—and therefore gives the district court no authority to grant relief—unless brought within the time for appeal.") (citation omitted), *cited by Greg Young Pub'g, Inc. v. Zazzle, Inc.*, 2018 WL 836276, *3 (C.D. Cal. Feb. 8, 2018) (Stephen Wilson, J.).

Finally, even if a Rule 60(b)(1) motion based on a mistake of law were timely now, the motion would be barred by plaintiff's failure to appeal the judgment to the United States Court of Appeals for the Ninth Circuit. *See Wolff v. California*, 236 F. Supp.3d 1154, 1161 (C.D. Cal. 2017) ("[I]f the reason asserted for the Rule 60(b)[] motion could have been addressed on appeal from the judgment,' the motion must be

denied 'as merely an inappropriate substitute for an appeal.'") (quoting *Aikens v. Ingram*, 652 F.2d 496, 501 (4th Cir. 2011) (citing, *inter alia*, 11 Wright, Miller, & Kane, Fed. Prac. & Proc. Sec. 2864 at 359-60 & n.25 (2d ed. 1995))).

ORDER

Plaintiff's FRCP 60(b) motion for relief from judgment [Doc #24] is DENIED.

Any FRCP 59(e) motion to reconsider must be filed no later than July 16, 2018.[1] Plaintiff should not file a motion to reconsider unless she can present "new material facts or law that could not have been known to the [plaintiff] prior to the Court's decision or that have emerged after the decision was made." *Kashwere USAJPN, LLC v. Costco Wholesale Corp.*, 2014 WL 12561087, *2 (C.D. Cal. June 27, 2014).

This is an immediately appealable order.[2]

IT IS SO ORDERED.

Dated: June 19, 2018

Valerie Baker Fairbank

Hon. VALERIE BAKER FAIRBANK
Senior United States District Judge

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[1] *See Amerson v. Kindredcare, Inc.*, 606 F. App'x 371, 372 (9th Cir. 2015) (citing Fed. R. Civ. P. 6(b) and *Carter v. US*, 963 F.2d 1479, 1488 (9th Cir. 1992)). Also, "[a]ny motion for reconsideration must comply with Local Civil Rule 7-18." *Inland Concrete Enters. ESOP v. Kraft*, 318 F.R.D. 383, 422 (C.D. Cal. 2016); *see also In re Toys 'R Us Delaware, Inc. FACTA Lit.*, 2010 WL 11465406, *2 (C.D. Cal. Aug. 9, 2010); D*airy Employees Union Local No. 17 v. Ferreira Dairy*, 2015 WL 1952308, *2 (C.D. Cal. Apr. 18, 2015).

Under Federal Rule of Appellate Profedure 4(a)(4), a timely Rule 59(e) motion tolls the time to appeal the Order sought to be reconsidered.

[2] *See Zurich N. Am. v. Matrix Servs., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005). An appeal from the denial of a 60(b), however, is not a means to challenge the underlying decision. *See Browder v. Dir., Dep't of Corrs. of Ill.*, 434 U.S. 257, 263 n.7, 98 S. Ct. 556 (1978).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VICKI CORONA,

Plaintiff,

v.

CITY OF LOS ANGELES, et al.,

Defendants.

Case No. LA CV 17-02913-VBF-KK

ORDER

Overruling Plaintiff's Objections;

Adopting the Final R&R;

Denying Federal-Law Claims and Dismissing them With Prejudice;

Dismissing State-Law Claims Without Prejudice;

Terminating & Closing the Case (JS-6);

Directing Entry of Separate Judgment

Pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72, the Court has reviewed the Complaint, the relevant records on file, the Final Report and Recommendation ("FR&R") of the United States Magistrate Judge, plaintiff's objections to the FR&R, and the applicable law. The Court has engaged in de novo review of those portions of the FR&R to which plaintiff has specifically objected. Finding no error of law, fact, or logic in Magistrate Judge Kato's well-reasoned FR&R, the Court will accept its findings and conclusions and implement its recommendations.

Plaintiff's objection **[Doc # 15] is OVERRULED**.

The Final Report and Recommendation [Doc # 16] is ADOPTED.

The federal-law claims are **DENIED** and **DISMISSED with prejudice.**

The Court **DECLINES** supplemental jurisdiction over all state-law claims.

All state-law claims are **DISMISSED without prejudice** to plaintiff asserting them in an appropriate state or local court, if any.

The Clerk of Court **SHALL TERMINATE and close this case (JS-6)**.

IT IS SO ORDERED.

Dated: Wednesday, August 23, 2017

Valerie Baker Fairbank

VALERIE BAKER FAIRBANK
Senior United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VICKI CORONA, Plaintiff, v. CITY OF LOS ANGELES, et al., Defendants.	Case No. CV 17-2913-VBF (KK) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Final Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, Senior United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

SUMMARY OF RECOMMENDATION

On April 18, 2017, Plaintiff Vicki Corona ("Plaintiff"), proceeding pro se and in forma pauperis, filed a Complaint ("Complaint") pursuant to 42 U.S.C. § 1983 ("Section 1983") alleging defendants City of Los Angeles, Eric Garcetti, and Does 1 through 10 ("Defendants") violated her Fourth, Fifth, and Fourteenth Amendment rights. Plaintiff also raised state law claims, as well as violations of Sections 80.07 and 80.10 of the Los Angeles Municipal Code. For the reasons set

forth below, the Court recommends the Complaint be DISMISSED for failure to state a claim and without leave to amend.

II.

PROCEDURAL HISTORY

On April 18, 2017, Plaintiff filed a Complaint pursuant to Section 1983 against Defendants. ECF Docket No. ("Dkt.") 1.

On May 9, 2017, the Court found the Complaint suffered from numerous deficiencies and dismissed the Complaint with leave to amend for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(6) ("Order"). Dkt. 7, Order. The Court granted Plaintiff until May 31, 2017 to file a First Amended Complaint ("FAC"). Id.

On June 20, 2017, Plaintiff filed a response to the Court's May 9, 2017 Order ("Response"). Dkt. 10. In the Response, Plaintiff claims she has sufficiently stated a claim against Defendants and expressly declines to file a FAC. See id. at 12.

On July 13, 2017, the Court issued a Report and Recommendation recommending dismissal because Plaintiff expressly declined to file a FAC and, thus, failed to cure any of the deficiencies identified by the Court's June 20, 2017 Order. Dkt. 13.

On July 24, 2017, Plaintiff filed Objections to the Court's Report and Recommendation. Dkt. 15. In the Objections, Plaintiff again argues she has sufficiently stated a claim and, thus, has "found no reason to amend." Id. at 7.

III.

ALLEGATIONS IN THE COMPLAINT

According to the Complaint, in January 2017, defendant Garcetti issued Ordinance # 184590 ("Ordinance"), which Plaintiff alleges is "discriminatory" and "wages war against the homeless through widespread deceit, fraud, misconduct, extortion, and misrepresentations of the Supreme Law of the Land."

Dkt. 1 at 1, 3. Plaintiff claims that because of the "national economic downturn during the last few years," many individuals have been forced "to make their car their home." Id. Plaintiff alleges the Ordinance targets this "specific group of vulnerable people, forbidding them to park within 500 feet of a park, school, or daycare center at all times, as well as residential streets between 9 PM and 8 AM." Id. at 3. Plaintiff further alleges those targeted by the Ordinance "were promised safe, parking spots, yet no such designated lots or space exist." Id. Plaintiff claims, as a result of the Ordinance, people "are being criminalized, bullied, discriminated against, harassed, displaced, threatened, and thrown into isolated, obscure, unfamiliar, outlying areas of the CITY." Id. Specifically, Plaintiff claims the Ordinance places her, as a single female, "into unimaginable danger and severely limits or denies her access to places essential to her work and well-being." Id.

Plaintiff alleges the Ordinance violates her due process right under the Fifth and Fourteenth Amendments because it deprives her of her "right to be secure in her property" by "destroy[ing] its value" and "restrict[ing] or interrup[ing] its common, necessary or profitable use." Id. at 5. Additionally, Plaintiff alleges the Ordinance infringes upon her right "to travel and park without licensing, registration, etc." Id. at 6. Plaintiff also claims the Ordinance violates her Fourth Amendment right because it "allows government employees to peer through car windows to determine if someone is living therein."[1] Id. Lastly, Plaintiff appears

[1] In Plaintiff's Objections, Plaintiff also alleges her car "was confiscated and held for ransom at some point." Id. at 6. Plaintiff, however, failed to include this fact in her original Complaint. Thus, the Court may not consider this fact as it requires looking beyond Plaintiff's original Complaint. Schneider v. California Department of Corrections, 151 F.3d 1194, 1197 n. 1 (9th Cir. 1998) ("[I]n determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss"); Acedo v. DMAX, Ltd., No. CV 15-2443-MMM (ASX), 2015 WL 12912365, at *20 (C.D. Cal. July 31, 2015) (holding that, although newly alleged facts in an opposition to motion to dismiss would likely be sufficient to raise a claim, the claim must be dismissed because the newly alleged facts were not included in the original complaint). Moreover, despite being given an opportunity to amend her complaint, Plaintiff has repeatedly expressed her intent to stand on her original complaint and refused to file an amended complaint. See Dkt. 10 at 12; Dkt. 15 at 7.

to allege a violation under the Fourteenth Amendment's Equal Protection Clause because the Ordinance specifically targets homeless individuals living in their car. Id. at 3, 6.

Plaintiff additionally raises state law claims for (1) fraud because her car does not fall under the definition of "motor vehicle" and thus is not subject to the Ordinance; and (2) extortion because the Ordinance threatens fines and force for "infractions which are not crimes and are not arrestable offenses." Id. at 8, 10. Lastly, Plaintiff claims the Ordinance violates Sections 80.07 and 80.10 of the Los Angeles Municipal Code, which require sign postings to inform Los Angeles residents of the Ordinance. Id. at 7-11.

As a result of these claims, Plaintiff seeks injunctive relief and $500,000 in punitive damages. Id. at 13.

IV.

STANDARD OF REVIEW

As Plaintiff is proceeding in forma pauperis, the Court must screen the Complaint and is required to dismiss the case at any time if it concludes the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); see Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998).

In determining whether a complaint fails to state a claim for screening purposes, the Court applies the same pleading standard from Rule 8 of the Federal Rules of Civil Procedure ("Rule 8") as it would when evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012). Under Rule 8(a), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

A complaint may be dismissed for failure to state a claim "where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." Zamani v. Carnes, 491 F.3d 990, 996 (9th Cir. 2007) (citation omitted). In considering whether a complaint states a claim, a court must accept as true all of the material factual allegations in it. Hamilton v. Brown, 630 F.3d 889, 892-93 (9th Cir. 2011). However, the court need not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). Although a complaint need not include detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Cook, 637 F.3d at 1004 (citation omitted).

"A document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Woods v. Carey, 525 F.3d 886, 889-90 (9th Cir. 2008) (citation omitted). "[W]e have an obligation where the p[laintiff] is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the p[laintiff] the benefit of any doubt." Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012) (citation omitted).

If the court finds the complaint should be dismissed for failure to state a claim, the court has discretion to dismiss with or without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000). Leave to amend should be granted if it appears possible the defects in the complaint could be corrected, especially if the plaintiff is pro se. Id. at 1130-31; see also Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995). However, if, after careful consideration, it is clear a complaint

cannot be cured by amendment, the court may dismiss without leave to amend. Cato, 70 F.3d at 1107-11; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 972 (9th Cir. 2009).

V.

DISCUSSION

A. PLAINTIFF FAILS TO STATE FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS CLAIMS FOR DEPRIVATION OF PROPERTY AGAINST DEFENDANTS

1. Applicable Law

The Due Process Clause of the Fifth and Fourteenth Amendments guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S.C.A. Const. Amend. V, XIV. "[I]ndividuals must receive notice and an opportunity to be heard before the Government deprives them of property." United States v. James Daniel Good Real Prop., 510 U.S. 43, 48, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993).

Additionally, under the Fifth Amendment's Taking Clause as applied to the states through the Due Process Clause of the Fourteenth Amendment, "private property [shall not] be taken for public use without just compensation." U.S.C.A. Const. Amend. V. There are two types of "per se" takings: (1) permanent physical invasion of the property, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); and (2) a deprivation of all economically beneficial use of the property, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–16, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

2. Analysis

Here, Plaintiff does not allege a permanent physical invasion of her property or a deprivation of her personal property. Instead, Plaintiff appears to allege the Ordinance violates her Fifth and Fourteenth Amendment rights because it deprives her of one of its economically beneficial uses - namely her vehicle's function of

providing her with shelter. Compl. at 5. Plaintiff, however, fails to allege facts that the Ordinance deprives her of "*all* economically beneficial use of the property" as required for a Takings Clause claim. See Lucas, 505 U.S. at 1015-16 (emphasis added). Significantly, Plaintiff does not allege the Ordinance prevents Plaintiff from using her car as a mode of transportation. Thus, Plaintiff's Fifth and Fourteenth Amendment deprivation of property claims are subject to dismissal.

B. PLAINTIFF FAILS TO STATE AN UNCONSTITUTIONAL INFRINGEMENT ON HER RIGHT TO TRAVEL CLAIM AGAINST DEFENDANTS

1. Applicable Law

Although not explicitly found in any constitutional provision, the "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." Dunn v. Blumstein, 405 U.S. 330, 338, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972) (quoting United States v. Guest, 383 U.S. 745, 758, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966)). A state law implicates the right to travel when (1) the law actually deters such travel, see, e.g., Shapiro v. Thompson, 394 U.S. 618, 629, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969) (overruled on other grounds); (2) when impeding travel is the law's primary objective, see Zobel v. Williams, 457 U.S. 55, 62, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982); Shapiro, 394 U.S. at 628–31; or (3) when the law uses "'any classification which serves to penalize the exercise of that right.'" Dunn, 405 U.S. at 340 (quoting Shapiro, 394 U.S. at 634); Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986); Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1109 (E.D. Cal. 2012) (recognizing constitutional right to travel in the context of a challenge to city ordinance). Nevertheless, there is no "fundamental right to drive" and "burdens on a single mode of transportation do not implicate the right to interstate travel." Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999) (finding state's requirement that drivers provide social security number to obtain a driver's license and

subsequent denial of a driver's license to plaintiff because he refused to provide the information number did not violate his constitutional right to travel).

Furthermore, pursuant to their police powers, states and cities have the right to regulate their roads and "the federal government has no constitutional authority to interfere with a state's exercise of its police power except to the extent the state's action intrudes on any of the spheres in which the federal government itself enjoys the power to regulate." United States v. Snyder, 852 F.2d 471, 475 (9th Cir. 1988); see also Mackey v. Montrym, 443 U.S. 1, 17, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979) (holding a state's interest in public safety includes a "paramount interest . . . in preserving the safety of its public highways"); Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates, 583 F.3d 716, 723 (9th Cir. 2009) (noting "city retains power to do 'such things in regard to the streets and the use thereof as were justified in the legitimate exercise of the police power'" (internal citation omitted)).

2. Analysis

Here, Plaintiff alleges the Ordinance denies her the "freedom to travel and park without licensing, registration, etc." Compl. at 6. However, pursuant to its police powers, states have the authority to regulate their roads, which includes issuing ordinances regulating when and where people may park and requiring individuals have proper licensing in order to drive. See Snyder, 852 F.2d at 475. Furthermore, Plaintiff has failed to present any facts which show (1) the Ordinance has actually deterred her ability to travel; (2) the primary objective of the Ordinance is to impede travel; or (3) the Ordinance uses "any classification which serves to penalize the right to travel." See Shapiro, 394 U.S. at 629. Rather, Plaintiff has merely alleged a "burden on a single mode of transportation." Miller, 176 F.3d at 1205. Thus, Plaintiff's claim for unconstitutional infringement on her right to travel is subject to dismissal.

C. PLAINTIFF FAILS TO STATE A FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM

1. Applicable Law

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)). In order to state a Section 1983 equal protection claim, a plaintiff must allege she was discriminated against based on membership in a protected class or treated differently from others who were similarly situated without a rational basis. See Serrano, 345 F.3d at 1082 (requirements for Section 1983 equal protection claim based on membership in protected class); Gallo v. Burson, 568 F. App'x 516, 517 (9th Cir. 2014) (affirming district court dismissal of inmate's equal protection claim)[2]. "Similarly situated" persons are those "who are in all relevant aspects alike." Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

2. Analysis

Here, Plaintiff's Equal Protection claim is premised on the fact that the Ordinance targets and discriminates against homeless individuals. As a preliminary matter, homeless individuals are not a protected class. See Nails v. Haid, No. SACV 12-0439-GW (SS), 2013 WL 5230689, at *3 (C.D. Cal. Sept. 17, 2013). Accordingly, Plaintiff must allege facts to show the Ordinance is not "rationally related to legitimate legislative goals." City of Cleburne, Tex., 473 U.S. at 439.

As it stands, the Ordinance's professed purposes include, among others, addressing unsanitary conditions, noise, and crime, which have resulted when

[2] The Court may cite to unpublished Ninth Circuit opinions issued on or after January 1, 2007. U.S. Ct. App. 9th Cir. R. 36-3(b); Fed. R. App. P. 32.1(a).

persons dwell in their vehicles in residential and sensitive areas, and studying "the impacts to health, safety and the physical environment" by allowing vehicle dwelling on public streets in the City. See Ordinance No. 184590. While Plaintiff claims the Ordinance targets homeless individuals and "seeks to victimize, criminalize, and classify all homeless living in their cars," Plaintiff fails to allege any facts to show the Ordinance is premised on a hostile and discriminatory purpose specifically directed at the homeless. See Response at 4. Notably, the Ordinance specifically allows individuals to dwell in the vehicle, provided the vehicle is on "non-residential streets and on streets that do not have a school, pre-school, day care facility or park." See Ordinance No. 184590. Furthermore, Plaintiff has failed to allege any *facts* to show the Ordinance is being applied in a way that specifically targets homeless individuals over those who are not homeless. Cf. Ashbaucher v. City of Arcata, No. CV 08-2840 MHP (NJV), 2010 WL 11211481, at *13 (N.D. Cal. Aug. 19, 2010), report and recommendation adopted, No. C 08-02840 MHP, 2010 WL 11211527 (N.D. Cal. Dec. 1, 2010) (holding allegations that an ordinance is *selectively enforced* against homeless individuals states a plausible claim for relief under the Equal Protection Clause).

Finally, to the extent Plaintiff attempts to allege the Ordinance discriminates against homeless *women* specifically, she has failed to provide sufficient facts to state a claim for gender discrimination caused by the Ordinance on its face, or as applied to her and other homeless women. See Isaacson v. Horne, 716 F.3d 1213, 1231 (9th Cir. 2013) ("[T]he facial versus as-applied distinction is relevant when a claimed statutory defect applies to a sub-category of the people affected by the law, and the court must determine whether that particular sub-category may challenge the statute as a whole, including its application to people who are not similarly situated.").

Hence, because Plaintiff has failed to present facts to show how the Ordinance treats her differently than any other similarly situated individuals, Plaintiff's Equal Protection claim is subject to dismissal.

D. PLAINTIFF FAILS TO STATE A FOURTH AMENDMENT UNLAWFUL SEARCH AND SEIZURE CLAIM AGAINST DEFENDANTS

1. Applicable Law

The Fourth Amendment prohibits "unreasonable searches and seizures." Heien v. N. Carolina, __ U.S. __, 135 S. Ct. 530, 534, 190 L. Ed. 2d 475 (2014). However, "visual observation by a law enforcement officer situated in a place where he has a right to be is not a search within the meaning of the fourth amendment." United States v. Orozco, 590 F.2d 789, 792 (9th Cir. 1979) (quoting United States v. Coplen, 541 F.2d 211, 214 (9th Cir. 1976), cert. denied, 429 U.S. 1073, 97 S. Ct. 810, 50 L. Ed. 2d 791 (1977)). Because anyone walking past a vehicle can generally see inside, there is no reasonable expectation of privacy protected by the Fourth Amendment. See id.; Katz v. United States, 389 U.S. 347, 351-52, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); United States v. Martinez-Fuerte, 428 U.S. 543, 558, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976) (holding visual inspection of a car does not implicate the Fourth Amendment provided the inspection is "limited to what can be seen without a search").

2. Analysis

Here, Plaintiff does not allege police officers actually searched her car. Rather, she simply claims the Ordinance "allows government employees to peer through car windows to determine if someone is living therein" and that employees may "presume the car is someone's home if the windows are obscured in any way." Compl. at 5. Furthermore, Plaintiff implicitly concedes her vehicle is situated on public streets and has failed to allege any facts suggesting government employees were "situated in a place where [they did not have] a right to be." Id. at

3-4; see Orozco, 590 F.2d at 792. Thus, because the alleged searches did not constitute anything more than "visual observation by a law enforcement officer situated in a place where he has a right to be," Plaintiff's Fourth Amendment claim is subject to dismissal. See Orozco, 590 F.2d at 792.

E. PLAINTIFF FAILS TO STATE AN EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CLAIM AGAINST DEFENDANTS[3]

1. Applicable Law

The Eighth Amendment's prohibition against cruel and unusual punishment "imposes substantive limits on what can be made criminal and punished as such." Ingraham v. Wright, 430 U.S. 651, 667-68, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977). Accordingly, "laws criminalizing an individual's status, rather than specific conduct, are unconstitutional." Cobine v. City of Eureka, No. C 16-02239 JSW, 2016 WL 1730084, at *5 (N.D. Cal. May 2, 2016) (citing Robinson v. California, 370 U.S. 660, 666-67 (1962)). Specifically, courts have found a plaintiff, who is homeless, may state a valid Eighth Amendment claim for laws that punish involuntary conduct that is "an unavoidable consequence of being human and homeless without any available shelter." Cobine, 2017 WL 1488464, at *4 (citing Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007)) (holding an ordinance prohibiting public camping violates the Eighth Amendment if the court determines (1) the homeless have no choice but to sleep in public spaces because, for example, there is insufficient shelter space; and

[3] In her Response, Plaintiff raises an Eighth Amendment cruel and unusual punishment claim, which was not included in her original Complaint. Resp. at 5. However, as Plaintiff has expressly declined to file a FAC and because Plaintiff's Eighth Amendment claim appears to be futile, the Court recommends dismissing the claim without leave to amend. See id. at 12; Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990) (holding a court may deny leave to amend if permitting an amendment would result in futility for lack of merit).

(2) enforcement of the ordinance penalizes the homeless for engaging in innocent activity and effectively criminalizes the status of being homeless).

2. Analysis

Here, Plaintiff argues the Ordinance makes "it a crime for homeless people to sleep in safer places when none of the promised parking spaces have been provided and when there is insufficient shelter space, and when no crime has been committed." Resp. at 5. Plaintiff, however, has failed to state an Eighth Amendment claim because the Ordinance (1) targets "conduct" – namely vehicle-dwelling in particular areas - as opposed to an individual's "status"; and (2) does not punish involuntary conduct that is "an avoidable consequence of being human and homeless" because the Ordinance leaves all people who dwell in their cars the option of parking on public roads. See Cobine, 2017 WL 1488464, at *4-*5. Thus, Plaintiff's Eighth Amendment claim is subject to dismissal.

F. THE COURT DECLINES TO EXERCISE SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S STATE LAW CLAIMS

The Court has original jurisdiction solely over Plaintiff's federal law claims brought under Section 1983, which should be dismissed for the reasons set forth above. "Where a district court dismisses every claim over which it had original jurisdiction, it retains pure discretion in deciding whether to exercise supplemental jurisdiction over the remaining claims." Lacey v. Maricopa County, 649 F.3d 1118, 1137 (9th Cir. 2011) (internal citation, alterations, and quotation marks omitted); see also 28 U.S.C. § 1367(c). Thus, because Plaintiff's federal law claims should be dismissed the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims. Accordingly, Plaintiff's state law claims are dismissed for lack of jurisdiction.

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G. THE COMPLAINT SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND

As discussed in Section V.A.-E., Plaintiff fails to state a Section 1983 claim against Defendants. In the Court's May 9, 2017 Order, the Court informed Plaintiff of the Complaint's deficiencies and provided her with an opportunity to "attempt to cure the deficiencies." Dkt. 7 at 10. Despite this option, Plaintiff objected to the Court's findings and expressly declined to file a FAC. See Dkt. 10 at 12. Thus, because the Court provided Plaintiff with "adequate opportunity to amend [her] defective complaint," Plaintiff's Complaint should be dismissed without leave to amend. Miller v. Williams, 976 F.2d 737 (9th Cir. 1992).

VI.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED the District Court issue an Order: (1) accepting this Final Report and Recommendation; and (2) directing Judgement be entered dismissing Plaintiff's (a) federal claims without prejudice[4], and (b) state law claims without prejudice.

Dated: August 10, 2017

HONORABLE KENLY KIYA KATO
United States Magistrate Judge

[4] While the Court has granted Plaintiff an opportunity to amend her Complaint, she has repeatedly refused to amend and chooses instead to stand on her deficient claims. In light of Plaintiff's pro se status and out of an abundance of caution, however, the Court recommends dismissing both federal and state law claims without prejudice. See Oliver v. Michaud, No. 16CV53-LAB (JLB), 2016 WL 3552045, at *3 (S.D. Cal. June 30, 2016) (dismissing "without prejudice, but without leave to amend" even after plaintiff's "latest filing ma[de] clear he does not intend to obey" the court's "order requiring him to file an amended complaint, [and] even after being warned that failure to do so would result in dismissal").

Additional material from this filing is available in the Clerk's Office.