

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUG 24 2020

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

IKEMEFULA CHARLES IBEABUCHI,
AKA Charles Ikemefula Ibeabuchi,

Plaintiff-Appellant,

v.

EGGLESTON, Director of Operation,
FOIA/PA, Missouri Branch; et al.,

Defendants-Appellees.

No. 19-16963

D.C. No. 2:17-cv-04750-JAT-JZB
District of Arizona,
Phoenix

ORDER

Before: TASHIMA, BYBEE, and WATFORD, Circuit Judges.

Ibeabuchi's petition for panel rehearing (Docket Entry No. 13) is denied.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

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MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Submitted April 7, 2020**

Before: TASHIMA, BYBEE, and WATFORD, Circuit Judges.

Arizona state prisoner Ikemefula Charles Ibeabuchi, AKA Charles Ikemefula Ibeabuchi, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging constitutional claims arising out of his

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

immigration detention and his request for documents under the Freedom of Information Act. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

In his opening brief, Ibeabuchi fails to address how the district court erred by dismissing his action for failure to state a claim. As a result, Ibeabuchi has waived his challenge to the district court's order. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived."); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will not manufacture arguments for an appellant . . .").

We reject as meritless Ibeabuchi's contentions that the district court clerk's description of his motion to reopen the time to appeal was erroneous and that the district court should have granted him leave to amend sua sponte.

All pending motions are denied.

AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Ikemefula Charles Ibeabuchi,
Plaintiff,

No. CV 17-04750-PHX-JAT (JZB)

v.
Unknown Eggleston, et al.,
Defendants.

ORDER

15 Plaintiff Ikemefula Charles Ibeabuchi, who is now confined in CoreCivic's Eloy
16 Detention Center in Eloy, Arizona, filed a pro se civil rights Complaint pursuant to 42
17 U.S.C. § 1983 (Doc. 1) and an Application to Proceed In Forma Pauperis (Doc. 2). The
18 Court dismissed the Complaint because it failed to state a claim with leave to amend (Doc.
19 8). Plaintiff filed a First Amended Complaint (Doc. 10). In an Order filed on February 26,
20 2019, the Court dismissed the First Amended Complaint because it failed to state a claim
21 but granted Plaintiff 30 days in which to file a second amended complaint (Doc. 12). On
22 April 11, 2019, the Clerk of Court entered a judgment of dismissal after Plaintiff failed to
23 file a second amended complaint (Doc. 13).

24 Plaintiff filed an untimely “Motion for Notice of Appeal Fed. R. App. Proc. 4(b),”
25 which the Court construed as a motion to reopen the time to file an appeal under FRAP
26 4(a)(6) and, so construed, granted (Doc. 15). On September 10, 2020, the Ninth Circuit
27 Court of Appeals issued its mandate affirming the dismissal of this case on April 11, 2019,
28 pursuant to this Court’s February 26, 2019 Order. No. 19-16963 (9th Cir. Sept. 10, 2020).

1 Plaintiff has filed a Motion Requesting Final Order (Doc. 25). While far from clear,
2 Plaintiff appears to seek a copy of the Judgment in this case and the prior Order dismissing
3 his First Amended Complaint with leave to appeal so that he may seek certiorari. The
4 Court will grant the Motion to that extent. Otherwise, this case is and will remain closed.

5 **IT IS ORDERED:**

6 (1) Plaintiff's "Motion Requesting Final Order" (Doc. 25) is **granted** to the
7 extent stated below and is otherwise **denied**.

8 (2) The Clerk of Court must send Plaintiff a copy of the Judgment (Doc. 13) and
9 the February 26, 2019 Order (Doc. 12) to the address provided on his Motion Requesting
10 Final Order.

11 (3) The Clerk of Court must update the docket to reflect Plaintiff's current
12 address as listed on his Motion Requesting Final Order.

13 (4) This case must remain **closed**.

14 Dated this 20th day of November, 2020.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Ikemefula Charles Ibeabuchi,

10 Plaintiff,

11 v.

12 Unknown Eggleston, et al.,

13 Defendants.

14 **NO. CV-17-04750-PHX-JAT (JZB)**

15 **JUDGMENT IN A CIVIL CASE**

16 **Decision by Court.** This action came for consideration before the Court. The
17 issues have been considered and a decision has been rendered.

18 IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed
19 February 26, 2019, Plaintiff to take nothing, and the complaint and action are dismissed
20 with prejudice for failure to state a claim. This dismissal may count as a "strike" under
28 U.S.C. § 1915(g).

21 Brian D. Karth
22 District Court Executive/Clerk of Court

23 April 11, 2019

24 By s/ D. Draper
25 Deputy Clerk

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8

9 Ikemefula Charles Ibeabuchi,

No. CV 17-04750-PHX-JAT (JZB)

10 Plaintiff,

11 v.

ORDER

12 Unknown Eggleston, et al.,

13 Defendants.

14

15 Plaintiff Ikemefula Charles Ibeabuchi, who is now confined in the Arizona State
16 Prison Complex, Meadows Unit, in Florence, Arizona, filed a pro se civil rights Complaint
17 pursuant to 42 U.S.C. § 1983 (Doc. 1) and an Application to Proceed In Forma
18 Pauperis (Doc. 2). The Court dismissed the Complaint because it failed to state a claim
19 with leave to amend (Doc. 8). Plaintiff has filed a First Amended Complaint (Doc. 10).
20 The Court will dismiss the First Amended Complaint because it fails to state a claim but
21 will grant Plaintiff leave to amend.

22 **I. Statutory Screening of Prisoner Complaints**

23 The Court is required to screen complaints brought by prisoners seeking relief
24 against a governmental entity or an officer or an employee of a governmental entity. 28
25 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
26 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
27 relief may be granted, or that seek monetary relief from a defendant who is immune from
28 such relief. 28 U.S.C. § 1915A(b)(1)-(2).

1 A pleading must contain a “short and plain statement of the claim *showing* that the
 2 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
 3 not demand detailed factual allegations, “it demands more than an unadorned, the-
 4 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 5 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 6 conclusory statements, do not suffice.” *Id.*

7 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 8 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 9 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 10 that allows the court to draw the reasonable inference that the defendant is liable for the
 11 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
 12 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 13 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
 14 allegations may be consistent with a constitutional claim, a court must assess whether there
 15 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

16 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
 17 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342
 18 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent
 19 standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551
 20 U.S. 89, 94 (2007) (per curiam)).

21 If the Court determines that a pleading could be cured by the allegation of other
 22 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal
 23 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (en banc).
 24 Plaintiff’s First Amended Complaint will be dismissed for failure to state a claim, but
 25 because it may possibly be amended to state a claim, the Court will dismiss it with leave
 26 to amend.

27 **II. First Amended Complaint**

28 In his three-count First Amended Complaint, Plaintiff designates his claims as

1 asserting a deprivation of property without due process, excessive use of force, and a
 2 violation of equal protection. Plaintiff sues “Director of Operation, FOIA/PA” Eggleston¹;
 3 Deportation Officer Thompson of the Department of Homeland Security (DHS); and
 4 former Secretary of State John Kerry. Plaintiff seeks declaratory, injunctive, and
 5 compensatory relief.

6 **Background**

7 The following summary is cited to provide context for Plaintiff’s claims. Plaintiff,
 8 A070675261, is a citizen of Nigeria.² *See State v. Ibeabuchi*, No. 1 CA-CR 16-0542, 2017
 9 WL 5586968, at *1-2 (Ariz. Ct. App. Nov. 21, 2017). On November 8, 2001, Plaintiff
 10 pleaded guilty in Clark County District Court, case# C16162, to battery with intent to
 11 commit a crime and attempted sexual assault. *See Ibeabuchi v. Palmer*, No. 3:06cv00280
 12 (D. Nev. May 16, 2006), Doc. 1-2 at 6-10, 11-22. Plaintiff was sentenced to a term of five
 13 to thirty years followed by lifetime supervision. *Id.*, Doc. 1-3 at 5-6.

14 In 2003, Plaintiff pleaded guilty to attempted sexual assault and sexual abuse in
 15 Maricopa County Superior Court, case #CR 1999-095310, and he was sentenced to two
 16 years in prison followed by lifetime probation. *Ibeabuchi*, 2017 WL 5586968, at *1-2.
 17 Plaintiff signed the Uniform Conditions of Probation and acknowledged that all sex-
 18 offender terms would be imposed. *Id.* Plaintiff was released from the Arizona Department
 19 of Corrections on January 10, 2004 to the Nevada Department of Corrections.³ *Id.* In
 20

21 ¹ Plaintiff appears to be referring to Jill Eggleston, the Freedom of Information Act
 22 (FOIA) Officer/Public Liaison for United States Citizenship and Immigration Services
 23 (USCIS), a subsection of DHS. *See* <https://www.dhs.gov/foia-contact-information> (last
 24 visited Feb. 5, 2019). The primary location for DHS’s day-to-day FOIA/Privacy Act
 25 operations and appeals is at the National Records Center in Missouri. *See* USCIS FOIA
 Request Guide, at 2-3.

26 ² The Executive Office for Immigration Review Telephonic Case Information
 27 System (Ph. 1-800-898-7180) reports that Plaintiff was ordered removed by an
 immigration judge on October 5, 2004. The Board of Immigration Appeals affirmed the
 decision, and on August 11, 2015, denied Plaintiff’s motion to reopen his case.

28 ³ *See* <https://corrections.az.gov/public-resources/inmate-database> (last visited
 Feb. 20, 2019).

1 February 2014, Plaintiff was released from Nevada state prison and his custody transferred
 2 to Immigration and Customs Enforcement (ICE). *Id.* In his First Amended Complaint,
 3 Plaintiff indicates that in April 2015, he submitted a “notarized Form 656” seeking a copy
 4 of his immigration A-file.⁴ (Doc. 10 at 10.)

5 In November 2015, ICE released Plaintiff after the Nigerian government declined
 6 to issue him travel documents to return to Nigeria. *Ibeabuchi*, 2017 WL 5586968, at *1-2.
 7 The same month, Plaintiff reported to the Maricopa Adult Probation Department. *Id.* In
 8 2016, Plaintiff was charged with violating probation in CR 1999-095310. Plaintiff was
 9 subsequently found to have violated the terms of probation and was sentenced to prison.⁵
 10 An ICE detainer has been lodged against him upon release or the expiration of that
 11 sentence.⁶

12 Plaintiff has attached copies of various documents to his First Amended Complaint.
 13 These include the following:

- 14 • “Notification of Criminal Alien by Probation Agencies” completed by a
 15 Maricopa County Probation Officer on a United States Department of Justice
 16 Immigration and Naturalization Service form. (Doc. 10 at 29.)
- 17 • A copy of an October 5, 2016 DHS Immigration Detainer-Request for
 18 Voluntary Action prepared by Defendant Thompson for Maricopa County to
 19 detain Plaintiff for immigration authorities because Plaintiff had been
 20 convicted of an aggravated felony and probable cause existed for Plaintiff’s
 21 removal from the United States because a final order of removal had issued.⁷
 22 (*Id.* at 30.)
- 23 • A May 14, 2003 Minute Entry from Maricopa County Superior Court,
 24 case# CR 1999-095310, in which Plaintiff was sentenced to a suspended
 25 two-year sentence and lifetime probation following his guilty plea to
 26 attempted sexual assault and sexual abuse. (*Id.* at 31-34.)
- 27 • Copies of a May 9, 2003 Maricopa County Superior Court Uniform

24 ⁴ Plaintiff may be referring to Internal Revenue Service Offer and Compromise
 25 Form 656 to settle tax liabilities for less than the full amount owed. See
 26 <https://www.irs.gov/forms-pubs/about-form-656> (last accessed Feb. 20, 2019).

27 ⁵ See <https://corrections.az.gov/public-resources/inmate-database>, search Inmate
 28 177007 (last accessed Feb. 20, 2019).

26 ⁶ See n.5, *supra*.

27 ⁷ See n.2, *supra*.

Conditions of Probation form, which in part required Plaintiff to “Abide by the attached Special Conditions of Probation in this case,” *id.* at 35; Plaintiff’s Special Conditions of Probation, *id.* at 37; and the Judgment and Orders for Restitution, Fines, and Fees, *id.* at 36. The Special Conditions of Probation required Plaintiff to “attend, actively participate, and remain in sex offender treatment” and to submit to “any program of psychological or physiological assessment” if directed by the Probation Department to do so. (*Id.* at 37.)

- A copy of an October 5, 2016 “Petition to Revoke Probation-Order for Warrant” filed by the Maricopa County Probation Department against Plaintiff for violating three sex-offender probation conditions. (*Id.* at 38-39.) Attached to the Petition to Revoke is a copy of the May 9, 2003 “Original Conditions Signed.” (*Id.* at 40.)

III. Failure to State a Claim

Plaintiff indicates that he seeks relief under 42 U.S.C. § 1983, the Freedom of Information Act (FOIA) and the Privacy Act (PA), and/or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). As noted above, Plaintiff only names current or former federal employees as Defendants in his First Amended Complaint.

A. Relief under 42 U.S.C. § 1983

Plaintiff seeks relief under 42 U.S.C. § 1983, which provides a remedy for acts taken by persons acting under color of *state* law. However, Plaintiff sues only current or former federal employees or officers. Section 1983 does not afford relief against individuals who act under color of federal law. Accordingly, to the extent that Plaintiff seeks relief under § 1983, his claims will be dismissed.

B. Relief for FOIA/PA Violations

Although none of Plaintiff's claims is so-denominated, Plaintiff in part appears to seek relief for alleged violations of FOIA or the PA. Plaintiff indicates that he submitted a FOIA/PA request for his A-file, which he believes contains copies of an Internal Revenue Service (IRS) audit against Wells Fargo Bank, Bank of America, Cedric Kushner, and Cedric Kushner Promotions. Eighty-four pages of documents from Plaintiff's A-file were withheld in response to Plaintiff's FOIA/PA request. Plaintiff contends that the

1 withholding of the 84-pages caused him to lose personal property, which in turn prevented
 2 him from being able to hire counsel to challenge his criminal charges and/or probation
 3 violation proceedings. Plaintiff asserts that on April 1, 2005, "the Record disclosed" that
 4 DHS granted California attorney Frank Ronzio permission to review Plaintiff's record
 5 following a 2004 IRS audit of Plaintiff. Plaintiff asserts that Ronzio gained access via
 6 fraudulent misrepresentation and by signing Plaintiff's name. Plaintiff asserts that this also
 7 entitles him to access to his complete A-file. Plaintiff claims that Defendant Eggleston
 8 failed to provide him "his complete record on request," specifically his complete A-file in
 9 response to his FOIA request. Plaintiff claims that Eggleston's alleged failure violated his
 10 federal rights, privileges, or immunities, and resulted in the loss of personal property. (Doc.
 11 10 at 9.) According to Plaintiff, Eggleston's alleged withholding of the 84 pages from his
 12 A-file "caused" Plaintiff's imprisonment "due to lack of funds to retain Defense Counsel."⁸
 13 (*Id.*)

14 As the Court previously informed Plaintiff, violations of FOIA and the PA may only
 15 be brought against a federal agency, in this case, the USCIS. *Drake v. Obama*, 664 F.3d
 16

17 _____
 18 ⁸ In its last Order, the Court noted that:

19 According to the USCIS FOIA Guide, the *subject* of any requested
 20 records must sign the request or provide proof of identity before the records
 21 will be released to him. A third-party requester, i.e., a requester seeking
 22 records concerning or involving someone other than himself, is entitled to
 23 any public documents that may be in the record and documents that he may
 24 have submitted on behalf of the subject of the file, *but a third-party requester*
 25 *without written consent or proof of death from the subject will receive only*
 26 *nonexempt information and records determined to be releasable under FOIA.*
 27 USCIS FOIA Guide, at 7.

28 The Court concluded that the 84 pages withheld concerned a third-party from whom
 Plaintiff had not obtained consent. In his First Amended Complaint, Plaintiff contends that
 he was the subject of the records sought and that he did not, therefore, have to obtain
 consent from a third-party. Plaintiff appears to be correct, i.e., the 84 pages were not
 withheld because they contained private information concerning someone other than him.
 Nevertheless, an agency may withhold certain types of records concerning a subject. For
 example, certain law enforcement or terrorism-related records may be withheld. See 5
 U.S.C. § 552a(b). Plaintiff may challenge the failure to provide certain records under
 FOIA or the PA, but he must name a proper defendant, i.e., a federal agency, and facts to
 support that the agency improperly withheld requested records. Plaintiff has done neither
 in the First Amended Complaint.

1 774, 785 (9th Cir. 2011) (“FOIA does not apply to any of the Defendants because they are
 2 all individuals, not agencies.”); *Bettweiser v. Gans*, No. 1:15cv00493, 2017 WL 1217096,
 3 at *7 (D. Ida. Mar. 31, 2017), *aff’d* 715 Fed. App’x 767 (9th Cir. Mar. 22, 2018).

4 Because Plaintiff sues only individuals in his First Amended Complaint, he fails to
 5 name a proper defendant for any alleged FOIA or PA claim. Accordingly, Plaintiff fails to
 6 state a claim for alleged violation of FOIA or the PA and these allegations will be
 7 dismissed.

8 **C. Count I**

9 Plaintiff designates Count I as a claim for violation of equal protection based upon
 10 Eggleston’s alleged withholding of 84 pages from Plaintiff’s A-file. To the extent that
 11 Plaintiff asserts a violation of Equal Protection, he fails to state a claim.

12 “The Due Process Clause of the Fifth Amendment assures every person the equal
 13 protection of the laws, ‘which is essentially a direction that all persons similarly situated
 14 should be treated alike.’” *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1997) (quoting
 15 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).⁹ To state a claim for
 16 violation of the equal protection component of the Fifth Amendment’s Due Process Clause,
 17 a plaintiff must allege that he was treated differently than similarly-situated persons and
 18 that the different treatment was based either on a suspect classification, such as race or
 19 religion, or violated a fundamental right. *Patel v. United States Bureau of Prisons*, 515
 20 F.3d 807, 815, 816 (8th Cir. 2008). A plaintiff must also allege that the decision to treat
 21 him differently than similarly situated persons was motivated by intentional or purposeful
 22 discrimination. *Id.* Absent allegations that he is a member of a suspect class, or that a
 23 fundamental right has been violated, a plaintiff must allege facts to support that he was

24

25 ⁹ The Court assumes, without deciding, that relief pursuant to *Bivens* is available
 26 for equal protection claims. In *Ziglar v. Abbasi*, ___ U.S. ___, 137 S. Ct. 1843 (2017), the
 27 Supreme Court cautioned that “expanding the *Bivens* remedy is now a ‘disfavored’ judicial
 28 activity” and set forth a two-part test to determine whether a *Bivens* claim may proceed.
 137 S. Ct. at 1857 (quoting *Iqbal*, 556 U.S. at 675). A court must first consider whether
 the claim at issue extends *Bivens* in a new context from previously established *Bivens* cases.
Id. at 1859-60. If so, the court must apply a “special factors analysis” to determine whether
 there are “special factors counselling hesitation” in expanding *Bivens*. *Id.* at 1857, 1859-
 60.

1 intentionally treated differently from others who were similarly situated without a
 2 reasonable basis therefor. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).
 3 Conclusory allegations do not suffice. *See Village of Arlington Heights v. Metropolitan*
 4 *Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

5 Plaintiff does not allege that he is a member of a suspect class, *Hydrick v. Hunter*,
 6 466 F.3d 676, 700 (9th Cir. 2006), or facts to support that he has been treated differently
 7 based upon membership in any suspect class. Plaintiff also does not allege the violation of
 8 a fundamental right. Instead, as described above, Plaintiff alleges that 84 pages from his
 9 A-file were withheld from him in response to a FOIA request. Plaintiff fails to allege facts
 10 to support that anyone who was similarly situated to him was treated differently absent a
 11 rational basis. Accordingly, Plaintiff fails to state a claim for violation of equal protection
 12 in Count I and it will be dismissed.

13 **D. Count II**

14 Plaintiff designates Count II as a claim for violation of Equal Protection and the
 15 excessive use of force during an arrest by Thompson. The standard to state a claim for
 16 violation of Equal Protection is described above.

17 The use of excessive force by officers in the course of an arrest can violate an
 18 arrestee's Fourth Amendment right to be free from unreasonable seizures. *See White by*
 19 *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986). However, the Fourth
 20 Amendment does not prohibit the use of reasonable force. *Tatum v. City & County of San*
 21 *Francisco*, 441 F.3d 1090, 1095 (9th Cir. 2006). Whether force was excessive depends on
 22 "whether the officers' actions [were] 'objectively reasonable' in light of the facts and
 23 circumstances confronting them, without regard to their underlying intent or motivation."
 24 *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Tatum*, 441 F.3d at 1095; *Lolli v. County of*
 25 *Orange*, 351 F.3d 410, 415 (9th Cir. 2003). The Court must balance the nature and quality
 26 of the intrusion against the countervailing governmental interests at stake. *Graham*, 490
 27 U.S. at 396; *Lolli*, 351 F.3d at 415. Moreover,

28 [t]he "reasonableness" of a particular use of force must be

judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” violates the Fourth Amendment.

Graham, 490 U.S. at 396 (citations omitted). “Whether a particular use of force was ‘objectively reasonable’ depends on several factors, including the severity of the crime that prompted the use of force, the threat posed by a suspect to the police or to others, and whether the suspect was resisting arrest.” *Tatum*, 441 F.3d at 1095.

Plaintiff alleges the following:

Defendant Thompson acted with “deliberate indifference” to Plaintiff’s legal status, which Plaintiff claims is that of a United States citizen.¹⁰ According to Plaintiff, since March 23, 2016, Thompson has discriminated against “the Plaintiff’s Record on file, received by his Office on February 28, 2003, from Connie Casillas, Arizona Probation, Adult Probation” (citing exhibits to his First Amended Complaint). (Doc. 10 at 20.) Plaintiff appears to claim that the issuance of a replacement Alien Resident Card No. 2B041654108362 (expiring in 2026) by USCIS/DHS” conferred citizenship on him and that Thompson’s alleged refusal to acknowledge as much constitutes “a discrimination to the Derivative Class of Immigrant.” (*Id.*) Plaintiff claims, “Defendant’s failure to voluntarily update the Immigration Records about Plaintiff caused injury of Imprisonment to the Class of Invalidated Sentence.” (*Id.*) Plaintiff alludes to Form N-600¹¹ and states that “his Biometrics [were] captured on March 23, 2016” and that he is “awaiting civic test interviews and swearing-in ceremony in nine months thereafter.” (*Id.* at 21.) Thus, Plaintiff appears to believe that the cited activities reflect that he has been granted United States citizenship. (*Id.*) Plaintiff states that his prison unit’s resource library declined to

¹⁰ As reflected in n.2, *supra*, a final order of removal has been issued against Plaintiff; Plaintiff is not a United States citizen.

¹¹ Form N-600 is an application for Certificate of Citizenship; Form N-400 is the form to apply for citizenship. See <https://www.uscis.gov/n-600> (last accessed Feb. 20, 2019).

1 copy a “Request to Update” to be sent to Defendant Thompson, so Plaintiff’s Request was
2 never sent to Thompson. Plaintiff states that he has enclosed “a File-Record of the Arrest
3 Warrant of October 5, 2016.”¹² Plaintiff appears to claim that he was arrested for violating
4 the terms of his probation based upon a falsified copy of his “Original Conditions of
5 Probation,”¹³ which was submitted by his Probation Officer, Catherine Swalwell. (*Id.*)

6 Plaintiff also alludes to Thompson's arrest of Plaintiff at gunpoint and appears to
7 contend that such arrest constituted excessive force. Plaintiff does not allege when he was
8 arrested by Thompson at gunpoint or identify the circumstances surrounding that arrest.
9 That is, Plaintiff fails to allege *facts* concerning when and where he was arrested by
10 Thompson. Plaintiff states that Thompson

11 should ha[ve] known that[] the Plaintiff was at double jeopardy with the
12 arrest and/or[] that the Arresting Document was fabricated, and that, the
13 Arrest of the Plaintiff at gun-point, constituted excessive force, which made
14 him liable as charged. Whether as an, Accessory before the Fact or [an]
15 Accessory after the Fact, he, the Defendant Thompson deprived Plaintiff [of]
federal rights, privilege[s] and immunity and caused him Damage to
Imprisonment, by an excessive force by an Officer[.]

16 | (Id.)

17 Plaintiff seemingly alleges that Thompson discriminated against Plaintiff based
18 upon Plaintiff's immigration status, and Plaintiff appears to wrongly believe that he is a
19 United States citizen. However, as described above, a final order of removal has been
20 issued against Plaintiff. The issuance of an alien registration card does not confer
21 citizenship on an immigrant; to the contrary, it reflects that Plaintiff is *not* a citizen of the
22 United States. In any event, absent more, Plaintiff fails to allege facts to support that

27 ¹³ Presumably, Plaintiff is referring to the May 9, 2003 Maricopa County Superior
28 Court Uniform Conditions of Probation form, which in part required Plaintiff to “Abide by
* the attached Special Conditions of Probation” in Plaintiff’s Maricopa County criminal case.
(Doc. 10 at 35.)

1 Thompson violated Plaintiff's equal protection rights. Accordingly, Count II will be
 2 dismissed to the extent that Plaintiff asserts an equal protection violation.

3 Plaintiff also asserts that Thompson used excessive force against him by arresting
 4 him at gunpoint. Plaintiff fails to allege when or where Thompson arrested him or to allege
 5 facts to support that Thompson's display of his weapon was excessive under the
 6 circumstances at the time. Accordingly, Plaintiff also fails to state a claim for excessive
 7 use of force.

8 **D. Count III**

9 Plaintiff designates Count III as a claim for violation of equal protection, the
 10 standard for which is described above, against former Secretary of State Kerry. Plaintiff
 11 alleges that:

12 Defendant Kerry's "irrational denial of the Requester's copy as prescribed by
 13 FOIA/PA, had no governmental interest, which can preclude excessive force by an officer,
 14 conspiracy, or Equal Protection." (Doc. 10 at 11.) Records were not "escheated by the
 15 Government, which can absolve the claim against it." (*Id.*) "The Defendant" had no good
 16 faith affirmative defense, as required in *Gomez v. Toledo*, 446 U.S. 635 (1980)[,]¹⁴ which
 17 caused the Plaintiff's constitutional violation of Equal Protection by excessive force by an
 18 officer, at-law." (*Id.*) Plaintiff states that

19 The Defendant's supervisory capacity[] can be held liable by the Referral
 20 and the Record of the Page of the A-File, of Director Eggleston, with
 21 reference to the Department of State, to the extent that[] it was a known,
 22 transferred, published matter of the FOIA/PA in-regards to the subject
 23 herein, which permits Respondeat Superior of the Department of State.
 24 In short, the Defendant is accountable to the Plaintiff/subject's one-page,
 25 Freedom of Information Act and Privacy Act, whose litigation is the essence
 26 of excessive force by an Officer in Count III[] of this Complaint, as
 27 subsequent arrest of the Plaintiff was not obstructed by the Defendant, in his
 28 power to do so[,] which made him liable, at-law.

29 (*Id.* at 43.) Plaintiff also alludes to claims against third-party defendants under Rule

30 ¹⁴ In *Gomez*, the Supreme Court addressed the standard to state a § 1983 claim. As
 31 discussed above, Plaintiff does not state a claim under § 1983 against any Defendant
 32 because each of the Defendants acted under color of federal, not state, law.

1 14(a)(3) of the Federal Rules of Civil Procedure and to joinder under the Federal Rules of
 2 Civil Procedure. Plaintiff asserts that this Court should apply the claim against the
 3 Defendant as it deems appropriate under 28 U.S.C. §§ 754 and 959(a). As his injury,
 4 Plaintiff states that “Defendant acted[] to possess the property of the Plaintiff, in his
 5 custody without[] consent, (a felony) and injured Plaintiff by excessive force.” (*Id.* at 11.)

6 To the extent that Plaintiff asserts liability against Defendant Kerry based upon
 7 respondeat superior, Plaintiff fails to state a claim. *Iqbal*, 556 U.S. at 676. Otherwise,
 8 Plaintiff fails to allege when, where, or how Defendant Kerry allegedly violated Plaintiff’s
 9 federal constitutional or statutory rights. Indeed, Plaintiff’s allegations are difficult to
 10 follow or understand. Accordingly, Plaintiff fails to state a claim in Count III and it will
 11 be dismissed

12 **IV. Leave to Amend**

13 For the foregoing reasons, Plaintiff’s First Amended Complaint will be dismissed
 14 for failure to state a claim upon which relief may be granted. Within 30 days, Plaintiff may
 15 submit a second amended complaint to cure the deficiencies outlined above. The Clerk of
 16 Court will mail Plaintiff a court-approved form to use for filing a second amended
 17 complaint. If Plaintiff fails to use the court-approved form, the Court may strike the second
 18 amended complaint and dismiss this action without further notice to Plaintiff.

19 Plaintiff must clearly designate on the face of the document that it is the “Second
 20 Amended Complaint.” The second amended complaint must be retyped or rewritten in its
 21 entirety on the court-approved form and may not incorporate any part of the original
 22 Complaint or First Amended Complaint by reference. Plaintiff may include only one claim
 23 per count.

24 A second amended complaint supersedes the original Complaint and First Amended
 25 Complaint. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios v.*
 26 *Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court
 27 will treat the original Complaint and First Amended Complaint as nonexistent. *Ferdik*,
 28 963 F.2d at 1262. Any cause of action that was raised in the original Complaint or First

1 Amended Complaint and that was voluntarily dismissed or was dismissed without
 2 prejudice is waived if it is not alleged in a second amended complaint. *Lacey v. Maricopa*
 3 *County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).

4 **V. Warnings**

5 **A. Release**

6 If Plaintiff is released while this case remains pending, and the filing fee has not
 7 been paid in full, Plaintiff must, within 30 days of his release, either (1) notify the Court
 8 that he intends to pay the unpaid balance of his filing fee within 120 days of his release or
 9 (2) file a *non*-prisoner application to proceed in forma pauperis. Failure to comply may
 10 result in dismissal of this action.

11 **B. Address Changes**

12 Plaintiff must file and serve a notice of a change of address in accordance with Rule
 13 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
 14 relief with a notice of change of address. Failure to comply may result in dismissal of this
 15 action.

16 **C. Possible “Strike”**

17 Because the First Amended Complaint has been dismissed for failure to state a
 18 claim, if Plaintiff fails to file a second amended complaint correcting the deficiencies
 19 identified in this Order, the dismissal may count as a “strike” under the “3-strikes”
 20 provision of 28 U.S.C. § 1915(g). Under the 3-strikes provision, a prisoner may not bring
 21 a civil action or appeal a civil judgment in forma pauperis under 28 U.S.C. § 1915 “if the
 22 prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility,
 23 brought an action or appeal in a court of the United States that was dismissed on the
 24 grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be
 25 granted, unless the prisoner is under imminent danger of serious physical injury.” 28
 26 U.S.C. § 1915(g).

27 **D. Possible Dismissal**

28 If Plaintiff fails to timely comply with every provision of this Order, including these

1 warnings, the Court may dismiss this action without further notice. *See Ferdik*, 963 F.2d
2 at 1260-61 (a district court may dismiss an action for failure to comply with any order of
3 the Court).

4 **IT IS ORDERED:**

5 (1) The First Amended Complaint (Doc. 10) is **dismissed** for failure to state a
6 claim. Plaintiff has **30 days** from the date this Order is filed to file a second amended
7 complaint in compliance with this Order.

8 (2) If Plaintiff fails to file a second amended complaint within 30 days, the Clerk
9 of Court must, without further notice, enter a judgment of dismissal of this action with
10 prejudice that states that the dismissal may count as a “strike” under 28 U.S.C. § 1915(g)
11 and deny any pending unrelated motions as moot.

12 (3) The Clerk of Court must mail Plaintiff a court-approved form for filing a
13 civil rights complaint by a prisoner.

14 Dated this 26th day of February, 2019.

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19 James A. Teilborg
20 Senior United States District Judge
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