NOT FOR PUBLICATION

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA DAVIS BLAND, Plaintiff-Appellant, v. SCOTT KERNAN; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Defendants-Appellees.	No. 20-16565 D.C. No. 2:19-cv-01315-TLN-EFB MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted September 14, 2021**

Before: PAEZ, NGUYEN, and OWENS, Circuit Judges.

California state prisoner Joshua Davis Bland appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 and Religious Land Use and Institutionalized Persons Act ("RLUIPA") action alleging religious discrimination.

* 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).

We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's dismissal of a complaint as frivolous. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order). We may affirm on any basis supported by the record. *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2014). We affirm.

Dismissal of Bland's First Amendment and RLUIPA claims was proper because Bland failed to allege facts sufficient to show that the policy of the California Department of Corrections and Rehabilitation prohibiting incarcerated persons from possessing pornographic materials bore no reasonable relationship to the legitimate penological interest of prison security, or that the policy substantially burdened his religious practice. *See Jones v. Williams*, 791 F.3d 1023, 1031-32 (9th Cir. 2015) (setting forth elements of a § 1983 free exercise claim); *Walker v. Beard*, 789 F.3d 1125, 1137-38 (9th Cir. 2015) (setting forth elements of a RLUIPA claim); *Mauro v. Arpaio*, 188 F.3d 1054, 1059-60 (9th Cir. 1999) (explaining that prison's ban on sexually explicit material did not violate the First Amendment).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Bland's motion for exigent adjudication (Docket Entry No. 10) is denied as moot.

AFFIRMED.

UNITED STATES COURT OF APPEALS

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JOSHUA DAVIS BLAND, Plaintiff-Appellant, v. SCOTT KERNAN; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Defendants-Appellees.	No. 20-16565 D.C. No. 2:19-cv-01315-TLN-EFB Eastern District of California, Sacramento ORDER

Before: PAEZ, NGUYEN, and OWENS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Bland's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 13) are denied. Bland's motion to stay the mandate, set forth in the petitions, is denied.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSHUA DAVIS BLAND, AKA JOSHUA-DAVIS BLAND,

Plaintiff,

v.

SCOTT KERNAN, et al.,

Defendants.

No. 2:19-cv-1315-EFB P

ORDER AND FINDINGS AND RECOMMENDATIONS

Plaintiff, a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983, seeks leave to proceed in forma pauperis (ECF No. 6). For the reasons stated hereafter, the court grants that request but recommends that the complaint be dismissed without leave to amend.

I. Application to Proceed in Forma Pauperis

Plaintiff's application (ECF No. 6) makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

II. Screening Requirements

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The

court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

A claim "is [legally] frivolous where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). "[A] judge may dismiss [in forma pauperis] claims which are based on indisputably meritless legal theories or whose factual contentions are clearly baseless." *Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), *superseded by statute on other grounds as stated in Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000); *Neitzke*, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *Id.*

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). However, in order to survive dismissal for failure to state a claim, a complaint must contain more than "a formulaic recitation of the elements of a cause of action;" it must contain factual allegations sufficient "to raise a right to relief above the speculative level." *Id.* (citations omitted). "[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* (alteration in original) (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d ed. 2004)).

"[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 556). In reviewing a complaint under this standard, the court must accept as true the allegations of the complaint in question,

Hospital Bldg. Co. v. Rex Hosp. Trs., 425 U.S. 738, 740 (1976), as well as construe the pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff's favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

III. Analysis

Plaintiff alleges that CDCR's ban on all "pictorials of frontal nudity, sexual penetration, ejaculatory functions, and urination of all-aged humans" infringes upon his right to practice his religion as an "Erosian." ECF No. 1. The Supreme Court has held that a claim is frivolous "when the facts alleged arise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." *Denton v. Hernandez*, 504 U.S. 25, 33 (1992); *see also Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (holding that "§ 1915(d)'s term 'frivolous,' when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation."). The court concludes that plaintiff's allegation of religious discrimination based on the restricted materials listed above is nonsensical, obviously irrational, and therefore, frivolous. As a result, the complaint should be dismissed without leave to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1127 n.8 (9th Cir. 2000) ("When a case may be classified as frivolous or malicious, there is, by definition, no merit to the underlying action and so no reason to grant leave to amend.").

IV. Conclusion

Accordingly, it is ORDERED that:

1. Plaintiff's application to proceed in forma pauperis (ECF No. 6, 16) is granted;

2. Plaintiff shall pay the statutory filing fee of $350. All payments shall be collected in accordance with the notice to the California Department of Corrections and Rehabilitation filed concurrently herewith; and

3. The Clerk of the Court shall randomly assign a United States District Judge to this case.

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Further, it is RECOMMENDED that plaintiff's complaint (ECF No. 1) be dismissed without leave to amend as frivolous.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, plaintiff may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: March 20, 2020.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE