

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

DEC 13 2022

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

ARNOLDO ANTONIO GARCIA,

Plaintiff-Appellant,

v.

AFOD VALDEZ, ICE Director, Adelanto  
Detention Facility, individual capacity; et al.,

Defendants-Appellees.

No. 21-56017

D.C. No. 5:14-cv-02533-MWF-AS  
Central District of California,  
Riverside

ORDER

Before: WALLACE, TALLMAN, and BYBEE, Circuit Judges.

The district court has certified that this appeal is not taken in good faith and has denied appellant's motion to proceed in forma pauperis on appeal. *See* 28 U.S.C. § 1915(a). On December 8, 2021, this 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 December 8, 2021 order, and the opening brief filed on October 20, 2021, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 3) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

No further filings will be entertained in this closed case.

**DISMISSED.**

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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION  
10

11 ARNOLDO ANTONIO GARCIA,  
12 Plaintiff,  
13 v.  
14 AFOD VALDEZ, et al.,  
15 Defendants.  
16

Case No. EDCV 14-02533-MWF (AS)  
  
REPORT AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE JUDGE

17 This Report and Recommendation is submitted to the Honorable  
18 Michael W. Fitzgerald, United States District Judge, pursuant to  
19 28 U.S.C. § 636 and General Order 05-07 of the United States  
20 District Court for the Central District of California.  
21

22 I. INTRODUCTION  
23

24 On December 10, 2014, Arnolando Antonio Garcia ("Plaintiff"),  
25 proceeding *pro se*, filed a Civil Rights Complaint pursuant to  
26 Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).  
27 (Dkt. No. 1). Plaintiff also filed a Request To Proceed Without  
28 Prepayment of Filing Fees, or *in forma pauperis* ("IFP"). (Dkt.

1 No. 3). At that time, Plaintiff was in the custody of the Bureau  
2 of Immigration and Customs Enforcement ("ICE") at the Adelanto  
3 Detention Center ("Adelanto").<sup>1</sup> On December 16, 2014, Plaintiff  
4 filed a First Amended Complaint in which he named as defendants  
5 Jeh Johnson, then Secretary of Homeland Security; Thomas Winkowski,  
6 then Acting Director of ICE; and Afod Valdez, then ICE Director at  
7 Adelanto. (Dkt. No. 5 at 1- 2). The District Court screened the  
8 First Amended Complaint, as prescribed by 28 U.S.C. § 1915(e)(2),  
9 and dismissed it without leave to amend for lack of subject matter  
10 jurisdiction. The Court also found that the action was frivolous  
11 or malicious and failed to state any claim. (Dkt. Nos. 6, 11).

12  
13 Plaintiff appealed the dismissal to the Ninth Circuit. (Dkt.  
14 Nos. 7-10, 12). On March 18, 2021, the Ninth Circuit issued a  
15 Memorandum Opinion reversing and remanding the action, finding  
16 that, while the First Amended Complaint did fail to state a claim  
17 for relief, this Court had improperly dismissed the action for lack

18  
19  
20 <sup>1</sup> A few months earlier, on September 15, 2014, Plaintiff  
21 filed a petition for writ of habeas corpus in this Court, pursuant  
22 to 28 U.S.C. § 2241. (See Garcia v. Clark, C.D. Cal. Case No. EDCV  
23 14-1915-MWF (AS)). The Petition contended that his request for  
24 release on bond had been improperly denied and ICE officials were  
25 refusing to transport him to hearings in State Court. (*Id.*, Dkt.  
26 No. 1). The Court dismissed the 2014 Petition on November 25,  
27 2014, because the Court lacked jurisdiction over the challenge to  
28 the bond determination and Plaintiff's claim regarding  
transportation by ICE was improperly pled under § 2241. (*Id.*, Dkt.  
Nos. 3-4). On July 5, 2016, Plaintiff filed a habeas petition in  
this Court pursuant to 28 U.S.C. § 2254, in which he challenged  
his State Court guilty plea. (See Garcia v. Lucero, C.D. Cal. Case  
No. EDCV 16-1449-MWF (AS)). The Court dismissed the 2016 Petition  
on March 9, 2017. (*Id.*, Dkt. Nos. 12, 14-15).

1 of jurisdiction, and Plaintiff should have been given leave to  
2 amend his claims. (Dkt. No. 13 at 2-4).

3  
4 In accordance with the Ninth Circuit's Memorandum Opinion,  
5 the Court again screened the First Amended Complaint pursuant to  
6 28 U.S.C. § 1915(e)(2) and dismissed it with leave to amend on  
7 April 2, 2021. (Dkt. No. 15).<sup>2</sup> On May 10, 2021, Plaintiff filed  
8 a Second Amended Complaint ("SAC") in which he named as defendants  
9 Alejandro Mayorkas, Secretary of Homeland Security; Johnson, Acting  
10 Director of ICE; Valdez, then ICE Director at Adelanto; and "Does"  
11 1-10. Plaintiff appeared to name the defendants in their  
12 individual and official capacities. (See Dkt. No. 26 at 2-4). The  
13 Court then screened the SAC, finding that (1) Plaintiff continued  
14 to name defendants in both their official and individual  
15 capacities, even though he had been admonished about proceeding  
16 with any civil rights claim against federal officials in their  
17 official capacities; (2) the SAC failed to allege any  
18 constitutional violation by Defendants Mayorkas and Johnson; (3)  
19 Plaintiff failed to provide sufficient factual allegations against  
20 any "Doe" Defendant; (4) Plaintiff could not raise a claim pursuant  
21 to a state statute or the Fourteenth Amendment against any federal  
22 official; (5) Plaintiff's allegations failed to plausibly allege a  
23 claim for violation of his right of access to the courts; and (6)  
24 even if Plaintiff were to add factual allegations to an amended  
25 pleading, it appeared that no remedy would be available for his

26  
27 <sup>2</sup> Magistrate judges may dismiss a pleading with leave to  
28 amend without approval from the district judge. McKeever v. Block,  
932 F.2d 795, 798 (9th Cir. 1991).

1 alleged constitutional violations under Bivens. For these reasons,  
2 the Court dismissed Plaintiff's SAC with leave to amend on June  
3 14, 2021. (See Dkt. No. 27). Plaintiff was admonished that, if  
4 he wished to pursue this action and file an amended pleading, his  
5 Third Amended Complaint must cure the pleading defects discussed  
6 in the Court's Order and must "identify the nature of each separate  
7 legal claim." (*Id.* at 14-15).

8  
9 Plaintiff filed a Third Amended Complaint ("TAC") on July 15,  
10 2021, (dkt. No. 28), which the Court has screened pursuant to 28  
11 U.S.C. § 1915(e)(2). For the reasons discussed below, the Court  
12 finds that Plaintiff has failed to cure the defects of his three  
13 earlier pleadings, and that the TAC violates Federal Rules of Civil  
14 Procedure 8(a) ("Rule 8"), and fails to allege "enough facts to  
15 state a claim for relief that is plausible on its face" against  
16 any Defendant. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570  
17 (2007). Accordingly, it is recommended that Plaintiff's TAC be  
18 dismissed without leave to amend.

## 19 20 II. PLAINTIFF'S ALLEGATIONS

21  
22 The TAC appears to name as defendants Afod Valdez, then ICE  
23 Director at Adelanto; Officer "J.I." at Adelanto; and Does 1-10,  
24 and indicates that these Defendants are being sued in their  
25 individual capacities. (Dkt. No. 28 at 1-2). However, the TAC  
26 alleges that "Defendants Mayorkas, Johnson, and any Defendant in  
27 his/her official and/or individual capacity" is "legally  
28 responsibl[e] for all of the injuries and/or damages sustained by

1 Plaintiff. (*Id.* at 3). It is not clear if this allegation pertains  
2 to the defendants named in the TAC who differ somewhat from those  
3 listed in Plaintiff's three prior pleadings.<sup>3</sup> The TAC also names  
4 one individual officer, identified only as "J.I.," who is alleged  
5 be the "ICE Officer" at Adelanto. The sole factual allegation  
6 raised against this individual is that J.I. denied a written  
7 request for transportation to Superior Court that Plaintiff  
8 submitted in August 2014. (*Id.* at 2, 5). Plaintiff seeks only  
9 monetary damages in the TAC. (*Id.* at 8).

10  
11 The only "Cause of Action" that Plaintiff raises in the TAC  
12 is essentially identical to the one "Cause of Action" that  
13 Plaintiff raised in each of his earlier pleadings, albeit against  
14 different defendants. (See Dkt. No. 1 at 1; Dkt. No. 5 at 1; Dkt.  
15 No. 26 at 2; Dkt. No. 28 at 2). This single "Cause of Action"  
16 references Bivens; Monell v. New York City Dep't of Soc. Servs.,  
17 436 U.S. 658 (1978); an administrative grievance that was denied  
18 by Director Valdez; Plaintiff's right of access to the courts; the  
19 First Amendment; his Fifth Amendment "Due Process rights to request  
20 the Superior Court to withdraw his Plea"; Cal. Penal Code § 1381.5;  
21 the Fourteenth Amendment's "right to substantive due process"; his  
22 "right to appear" in Superior Court; a deprivation of liberty and  
23 "freedom from personal harm"; and a conspiracy by "the individual  
24 Defendants." (Dkt. No. 28 at 2, 4-8). In the TAC, Plaintiff has  
25 added allegations concerning his former public defender, but that

26  
27 <sup>3</sup> Plaintiff has named Director Valdez as a defendant in  
28 each of his pleadings.

1 individual is not named as a defendant and the new facts are not  
2 material to any claim Plaintiff appears to be raising in the TAC  
3 against any named defendant. (*Id.* at 4). Plaintiff has also added  
4 a paragraph speculating as to the reasons why he "was denied  
5 transportation to all his Court Hearings" by the defendants, as  
6 well as the actions that would have occurred in his "Superior Court  
7 case" had Plaintiff been "allowed to appear" for such hearings.  
8 (*Id.* at 7). These speculative allegations are unsupported by any  
9 facts.

10  
11 The factual allegations set forth in Plaintiff's pleadings  
12 pertain to a guilty plea that he entered in November 2012 in a case  
13 in the County of San Bernardino Superior Court. Plaintiff alleges  
14 that his then public defender "mislead" him into entering the plea  
15 to a violation of state law. In 2013, when Plaintiff was  
16 represented by a different public defender, the Superior Court  
17 granted a motion to withdraw Plaintiff's guilty plea. However,  
18 Plaintiff was not transported to attend the relevant hearing or on  
19 the following day during which the Superior Court rescinded its  
20 order withdrawing Plaintiff's plea and reinstated his guilty plea.  
21 Plaintiff alleges that the plea was reinstated because the Superior  
22 Court incorrectly believed that Plaintiff was a "fugitive," and  
23 Defendants had refused to allow Plaintiff to be transported to  
24 Superior Court. (*Id.* at 4, 7).

25  
26 Plaintiff additionally alleges that, on August 6, 2014, when  
27 he submitted an ICE Detainee Request to be transported to the  
28 Superior Court for a hearing, Officer J.I. denied the request and

1 stated, "We do not facilitate transport to court hearings." (*Id.*  
2 at 5 (capitalization altered from original)). On August 8, 2014,  
3 Plaintiff submitted a grievance regarding the failure to transport  
4 him, but Defendant Valdez denied the grievance, stating that  
5 Plaintiff would not be transported until his appeal was denied -  
6 apparently in reference to Plaintiff's immigration appeal that was  
7 then pending in the Ninth Circuit. Plaintiff characterizes the  
8 written statement as "fascist" and alleges that the refusal to  
9 transport him to Superior Court violated California law. (*Id.*).

10  
11 Plaintiff also alleges that, in September 2014, he was told  
12 by his attorney at the time that the Superior Court would not  
13 consider his petition for dismissal unless Plaintiff was present.  
14 Plaintiff, however, could not appear because "Defendants refused  
15 to allow Plaintiff to be transported in Superior Court." (*Id.* at  
16 6). Plaintiff claims that "Defendants' conduct" deprived Plaintiff  
17 of "rights, privileges, and immunities secured to him by the  
18 Constitution" and violated the First and Fourteenth Amendments.  
19 (*Id.* at 7). Finally, Plaintiff states the conclusory allegation  
20 that the "acts of the individual Defendants in conspiring to  
21 deprive Plaintiff of his constitutionally protected rights were  
22 done with evil motive or intent, or with reckless or callous  
23 indifference to said Plaintiffs [sic] rights." (*Id.* at 8).

### 24 25 III. STANDARD OF REVIEW

26  
27 Congress mandates that District Courts screen civil complaints  
28 filed by plaintiffs who are proceeding *in forma pauperis*. See 28

1 U.S.C. § 1915(e)(2)(B). A court may dismiss such a complaint if  
2 the court concludes that the complaint: (1) is frivolous or  
3 malicious, (2) fails to state a claim upon which relief may be  
4 granted, or (3) seeks monetary relief from a defendant who is  
5 immune from such relief. 28 U.S.C. § 1915(e)(2); accord Lopez v.  
6 Smith, 203 F.3d 1122, 1126-27 & n.7 (9th Cir. 2000) (en banc)  
7 (noting that § 1915(e) applies to all IFP complaints); Calhoun v.  
8 Stahl, 254 F.3d 845 (9th Cir. 2001) ("the provisions of 28 U.S.C. §  
9 1915(e)(2)(B) are not limited to prisoners").

10  
11 Dismissal for failure to state a claim is appropriate if a  
12 complaint fails to proffer "enough facts to state a claim for  
13 relief that is plausible on its face." Bell Atl. Corp. v. Twombly,  
14 550 U.S. 544, 570 (2007). "A claim has facial plausibility when  
15 the plaintiff pleads factual content that allows the court to draw  
16 the reasonable inference that the defendant is liable for the  
17 misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009);  
18 accord Hartmann v. Cal. Dep't of Corr. & Rehab., 707 F.3d 1114,  
19 1122 (9th Cir. 2013). A plaintiff must provide "more than labels  
20 and conclusions" or a "formulaic recitation of the elements" of  
21 his claim. Twombly, 550 U.S. at 555. However, "[s]pecific facts  
22 are not necessary; the [complaint] need only give the defendant  
23 fair notice of what the claim is and the grounds upon which it  
24 rests." Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam)  
25 (citation and alterations omitted). In addition, dismissal may be  
26 appropriate if a complaint violates Rule 8 of the Federal Rules of  
27 Civil Procedure. See, e.g., McHenry v. Renne, 84 F.3d 1172, 1179

1 (9th Cir. 1996); Nevijel v. N. Coast Life Ins. Co., 651 F.2d 671,  
2 673 (9th Cir. 1981).

3  
4 In considering whether to dismiss a complaint, a court is  
5 generally limited to the pleadings and must construe "[a]ll factual  
6 allegations set forth in the complaint . . . as true and . . . in  
7 the light most favorable" to the plaintiff. Lee v. City of Los  
8 Angeles, 250 F.3d 668, 688 (9th Cir. 2001). Moreover, *pro se*  
9 pleadings are "to be liberally construed" and "held to less  
10 stringent standards" than those drafted by a lawyer. Erickson,  
11 551 U.S. at 94 (citation omitted). However, the "tenet that a  
12 court must accept as true all of the allegations contained in a  
13 complaint is inapplicable to legal conclusions." Iqbal, 556 U.S.  
14 at 678. Rather, a court first "discount[s] conclusory statements,  
15 which are not entitled to the presumption of truth, before  
16 determining whether a claim is plausible." Salameh v. Tarsadia  
17 Hotel, 726 F.3d 1124, 1129 (9th Cir. 2013); see also Chavez v.  
18 United States, 683 F.3d 1102, 1108 (9th Cir. 2012). Dismissal of  
19 a pleading for failure to state a claim may be warranted based on  
20 either the lack of a cognizable legal theory or the absence of  
21 factual support for a cognizable legal theory. Mendiondo v.  
22 Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

#### 23 24 IV. DISCUSSION

25  
26 Plaintiff's Third Amended Complaint warrants dismissal  
27 without further leave to amend because it violates Rule 8 and once  
28

1 again fails to state a claim upon which relief may be granted,  
2 despite Plaintiff's three attempts at amendment.

3  
4 **A. Official-Capacity Claims Are Not Permitted Under *Bivens***

5  
6 As Plaintiff previously has been admonished, he may not  
7 proceed with any Bivens claims against federal officials in their  
8 official capacities. Here, it is not clear if Plaintiff is  
9 purporting to sue defendants in both their individual and official  
10 capacities. While Plaintiff indicates, in the caption of his TAC  
11 and the paragraphs naming Valdez and J.I. as defendants, that these  
12 defendants are named in their individual capacities (Dkt. No. 28  
13 at 1-2), he then references Defendants Mayorkas, Johnson, and other  
14 Defendants in "his/her official" capacity. (*Id.* at 3).

15  
16 A claim against a federal official in his or her official  
17 capacity is effectively a claim against the United States.  
18 Kentucky v. Graham, 473 U.S. 159, 165 (1985) (official-capacity  
19 suits "generally represent only another way of pleading an action  
20 against an entity of which an officer is an agent"); Community  
21 House, Inc. v. City of Boise, Idaho, 623 F.3d 945, 966-67 (9th Cir.  
22 2010) (an official capacity suit is treated as a suit against the  
23 entity). Absent an unequivocal waiver, the doctrine of sovereign  
24 immunity bars suits against the United States and its agencies.  
25 See FDIC v. Meyer, 510 U.S. 471, 475 (1994); Gilbert v. DaGrossa,  
26 756 F.2d 1455, 1458-59 (9th Cir. 1985) (suits against officers and  
27 employees of the United States in their official capacities are  
28 barred by sovereign immunity absent an explicit waiver). The

1 United States has not waived its sovereign immunity for  
2 constitutional torts or actions. See, e.g., Jachetta v. United  
3 States, 653 F.3d 898, 904 (9th Cir. 2011) (citing Meyer, 510 U.S.  
4 at 478). Accordingly, Plaintiff may not raise any claims against  
5 federal officials in their official capacities pursuant to Bivens.  
6 See Ministerio Roca Solida v. McKelvey, 820 F.3d 1090, 1094 (9th  
7 Cir. 2016) ("By definition, Bivens suits are individual capacity  
8 suits and thus cannot enjoin official government action.").

9  
10 **B. Plaintiff's TAC Violates Rule 8**

11  
12 Rule 8 of the Federal Rules of Civil Procedure governs how a  
13 plaintiff must plead claims in a complaint. Specifically, Rule  
14 8(a) requires that a pleading contain "'a short and plain statement  
15 of the claim showing that the pleader is entitled to relief,' in  
16 order to 'give the defendant fair notice of what the . . . claim  
17 is and the grounds upon which it rests.'" Twombly, 550 U.S. at  
18 555 (quoting Fed. R. Civ. P. 8(a); omission in original). Further,  
19 "[e]ach allegation must be simple, concise, and direct." Fed. R.  
20 Civ. P. 8(d)(1). Conclusory allegations are insufficient. See  
21 Iqbal, 556 U.S. at 678, 686. Accordingly, a pleading violates  
22 Rule 8 if "one cannot determine from the complaint who is being  
23 sued, for what relief, and on what theory." McHenry, 84 F.3d at  
24 1178.

25  
26 Plaintiff has previously been admonished that his pleadings  
27 violate Rule 8 because he does not set forth factual allegations  
28 against each named Defendant alleging "simply, concisely, and

1 directly [the] events" that entitle him to damages from such  
2 Defendant. Johnson v. City of Shelby, 574 U.S. 10, 12 (2014). The  
3 various amended complaints that Plaintiff has filed in this action  
4 allege that unspecified "Defendants" at unspecified times "refused  
5 to allow Plaintiff to be transported from [Adelanto] to Superior  
6 Court for any reason," or that Valdez and the "Doe" Defendants  
7 "consistently refused to allow Plaintiff to be transported" at  
8 unspecified times. (See, e.g., Dkt. No. 5 at 4; Dkt. No. 28 at 4,  
9 6). Plaintiff also alleges that Defendant Valdez rejected a  
10 grievance that Plaintiff filed in August 2014 regarding a refusal  
11 by ICE to transport Plaintiff to Superior Court (Dkt. No 28 at 5),  
12 but Plaintiff does not set forth any factual allegations showing  
13 simply and directly how the rejection of this one grievance caused  
14 Plaintiff to be unable to proceed with his criminal matter in  
15 Superior Court. Plaintiff also alleges that the "wrongful acts"  
16 or "conduct" of unspecified "Defendants" caused Plaintiff to be  
17 "deprived of his liberty," and he references the "Fifth and  
18 Fourteenth Amendments." (*Id.* at 7). However, the TAC does not  
19 clearly allege any facts showing how the actions of a specific  
20 named defendant are alleged to have caused a violation of  
21 plaintiff's rights pursuant to the Fifth Amendment. Further, as  
22 set forth below, federal officials are not subject to the  
23 Fourteenth Amendment.

24  
25 After being provided with multiple opportunities to amend his  
26 pleading to correct these defects, Plaintiff still fails to clearly  
27 allege what claim he wishes to raise against which defendant  
28 arising from what factual allegations. Plaintiff continues to

1 allege a single "Cause of Action" in each of his pleadings that  
2 refers generally to "Defendants" and references numerous legal  
3 theories. Plaintiff has failed to cure the deficiencies in his  
4 pleadings as set forth in the Court's Order Dismissing First  
5 Amended Complaint With Leave to Amend (Dkt. No. 15) and Order  
6 Dismissing Second Amended Complaint With Leave to Amend (Dkt. No.  
7 27). Instead, Plaintiff filed nearly identical pleadings following  
8 each Order, merely changing or omitting some defendants, omitting  
9 his request for injunctive relief (which is not available in a  
10 Bivens action), adding factual allegations concerning individuals  
11 who are not named as defendants in this action, and adding  
12 speculative and unsupported allegations regarding the reasons for  
13 the alleged refusal by defendants to transport Plaintiff to  
14 Superior Court. These conclusory allegations are not entitled to  
15 a presumption of truth, and the Court discounts them in determining  
16 whether Plaintiff's TAC raises any claim that is plausible. See,  
17 e.g., Salameh, 726 F.3d at 1129.

18  
19 In the TAC, plaintiff continues to raise only one cause of  
20 action in which he appears to be attempting to assert multiple  
21 claims. Plaintiff alleges facts within this single cause of action  
22 that concern individuals not named as defendants and fails to  
23 clearly allege how the actions of any named defendant caused  
24 Plaintiff to suffer a federal constitutional violation.  
25 Accordingly, the Court finds that the fails to meet the basic  
26 requirement of Rule 8 that a pleading set forth a minimal factual  
27 and legal basis for each claim sufficient to allow each defendant  
28 to discern what he or she is being sued for. See McHenry, 84 F.3d

1 at 1177; see also Twombly, 550 U.S. at 555 ("[f]actual allegations  
2 must be enough to raise a right to relief above the speculative  
3 level").

4  
5 Because Plaintiff's TAC does not provide the named defendants  
6 with fair notice of the specific claims being raised against each  
7 of them or the grounds upon which any claim rests, Plaintiff's TAC  
8 violates Rule 8.

9  
10 **C. Plaintiff May Not Raise Claims Under Cal. Penal Code § 1381.5**  
11 **or the Fourteenth Amendment Against Federal Defendants**  
12

13 Plaintiff's TAC once again alleges that the refusal by  
14 defendants in general to transport Plaintiff to Superior Court  
15 violated Cal. Penal Code § 1381.5. (Dkt. No. 28 at 5). Plaintiff  
16 argues that this provision of state law required "the Federal  
17 correctional institution" to bring Plaintiff to state court.  
18 (*Id.*). However, this state statute does not - and indeed cannot -  
19 require conduct by federal officials which are the only named  
20 defendants. The statute instead requires the district attorney of  
21 the respective county (who is a state official) to request that  
22 federal custodial officials release a defendant to attend a state  
23 criminal proceeding if that defendant has first made such an  
24 inquiry to the respective district attorney.<sup>4</sup> Cal. Penal Code

25  
26 <sup>4</sup> The statute also pertains only to the transport of a  
27 defendant who "has been convicted of a crime and has entered upon  
28 a term of imprisonment therefore in a federal correctional  
institution." Cal. Penal Code § 1381.5. Plaintiff, on the other  
hand, was in federal immigration custody at the relevant time.

1 § 1381.5. Plaintiff has previously been admonished that he may  
2 not raise any claims pursuant to this statute against any defendant  
3 named in this action. See Dkt. No. 27 at 10.

4  
5 In addition, Plaintiff cites the Fourteenth Amendment. (Dkt.  
6 No. 28 at 7). The provisions of the Fourteenth Amendment, however,  
7 are applicable only to states and state actors. See, e.g., District  
8 of Columbia v. Carter, 409 U.S. 418, 424 (1973) ("actions of the  
9 Federal Government and its officers are beyond the purview of the  
10 [Fourteenth] Amendment"). The Court has previously warned  
11 Plaintiff that federal officials are not subject to the Fourteenth  
12 Amendment. (Dkt. No. 27 at 11). Instead, the Fifth Amendment's  
13 Due Process Clause applies to federal government actors. See,  
14 e.g., Castillo v. McFadden, 399 F.3d 993, 1002 n.5 (9th Cir. 2005)  
15 (noting that the "Fifth Amendment prohibits the federal government  
16 from depriving persons of due process, while the Fourteenth  
17 Amendment explicitly prohibits deprivations without due process by  
18 the several States"). Plaintiff's factual allegations in the TAC  
19 are insufficient to state any plausible claim against a named  
20 defendant pursuant to the Fifth Amendment.

21  
22 **D. The TAC Fails to Plausibly Allege an Actual Injury**

23  
24 To establish a violation of his constitutional right of access  
25 to the courts, Plaintiff must show an "actual injury," defined as  
26 "actual prejudice with respect to contemplated or existing  
27 litigation, such as inability to meet a filing deadline or present  
28 a claim." Lewis v. Casey, 518 U.S. 343, 348 (1996) (citation and

1 internal quotations omitted). In the TAC, Plaintiff appears to  
2 allege that defendants violated his right of access to the courts  
3 by refusing to transport him to the state Superior Court for some  
4 hearings. (See Dkt. No. 28 at 5-7). Plaintiff generally does not  
5 specify what the hearings he alleges he missed were about or how  
6 he was harmed or prejudiced by failing to appear at them. The one  
7 hearing that Plaintiff alleges defendants caused him to miss for  
8 which he alleges an "injury" concerns the criminal proceeding on  
9 July 17, 2013. (*Id.* at 4). On that date, according to Plaintiff,  
10 Defendants' refusal to transport him to the San Bernardino County  
11 Superior Court caused the Superior Court to rescind a prior order  
12 withdrawing Plaintiff's guilty plea, thus reinstating the guilty  
13 plea, on the false grounds that Plaintiff was a "fugitive." (*Id.*).  
14

15 However, these allegations appear to contradict court orders  
16 from Plaintiff's 2015 state habeas proceedings, which were also  
17 previously lodged in Plaintiff's 2016 habeas action in this Court.<sup>5</sup>  
18 (See Garcia v. Lucero, C.D. Cal. Case No. EDCV 16-1449-MWF(AS),  
19 Dkt. No. 7). Specifically, according to an order issued by the  
20 San Bernardino County Superior Court on November 19, 2015, the  
21 Superior Court had reinstated Plaintiff's guilty plea on July 17,  
22 2013, not because Plaintiff was a "fugitive," but rather because  
23 the court's prior decision to vacate the guilty plea (on July 16,  
24

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25 <sup>5</sup> The Court may take judicial notice of state court orders.  
26 See Fed.R.Evid.201©; Harris v. Cnty of Orange, 682 F.3d 1126, 1132  
27 (9th Cir. 2012) ("We may take judicial notice of undisputed matters  
28 of public record, including documents on file in federal or state  
courts.") (citation omitted).

2013) was made in error.<sup>6</sup> (See id., Dkt. No. 7-15 (Lodgment 14)). Therefore, contrary to Plaintiff's allegations in his pleadings in this action, the state court's decisions apparently had nothing to do with Plaintiff's failure to appear at his hearings in Superior Court because he was in ICE custody at the time.<sup>7</sup> This Court "need not [] accept as true allegations that contradict matters properly subject to judicial notice or by exhibit," Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.), amended on denial of reh'g, 275 F.3d 1187 (9th Cir. 2001) (citation omitted). As such, even assuming that any defendant in this action refused to provide Plaintiff with transportation to one or more of his State Court hearings, the documents the Court has taken judicial notice of show

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<sup>6</sup> More specifically, the Superior Court's November 2015 order rejected plaintiff's state habeas claim that his trial counsel had mislead Plaintiff to plead guilty by failing to properly advise him of the immigration consequences of the plea. (Garcia v. Lucero, C.D. Cal. Case No. EDCV 16-1449-MWF(AS), Dkt. No. 7-15 (Lodgment 14)). The court determined that Plaintiff had been properly informed of the consequences of his plea. (*Id.* at 6-7). Regarding the court's initial decision, on July 16, 2013, to vacate the guilty plea, the Superior Court observed that the court had done so improperly based on an attorney's stipulation. (*Id.* at 3 & n.3, 8). According to the Superior Court, it was error to have permitted the withdrawal of Plaintiff's guilty plea absent any "legal or factual basis," and the court subsequently corrected its own error by reinstating the guilty plea the next day, July 17, 2013, after conferring with Plaintiff's counsel. (*Id.* at 3, 8).

<sup>7</sup> Partly for this reason, this Court dismissed Plaintiff's 2016 petition for federal habeas relief under to 28 U.S.C. § 2254, in which Plaintiff claimed, in part, that state officials should have "either had ICE transport [him] to [his] Motion Hearings or dismiss [his] charges," on the grounds that the Superior Court had "illegally" vacated the order withdrawing his guilty plea because Plaintiff was a "fugitive," despite that immigration authorities refused to permit him to be transported. (See Garcia v. Lucero, C.D. Cal. Case No. EDCV 16-1449-MWF(AS), Dkt. Nos. 1, 12).

1 that Plaintiff did not suffer any actual injury as a result of such  
2 refusal.

3  
4 Accordingly, following Plaintiff's multiple attempts at  
5 amendment, it has become clear to the Court that Plaintiff will  
6 not be able to raise any claim against any defendant in this action  
7 for an alleged violation of his right of access to the courts.

8  
9 **E. The TAC Should be Dismissed Without Further Leave to Amend**

10  
11 The Court is mindful that, because plaintiff is appearing *pro*  
12 *se*, the Court must construe the allegations of the TAC liberally  
13 and must afford plaintiff the benefit of any doubt. Further, leave  
14 to amend should be freely given "when justice so requires." Fed.  
15 R. Civ. P. 15(a)(2). "[T]his policy is to be applied with extreme  
16 liberality." Desertrain v. City of Los Angeles, 754 F.3d 1147,  
17 1154 (9th Cir. 2014) (citation omitted). When dismissing a  
18 complaint for failure to state a claim, the Court should grant  
19 leave to amend "unless it determines that the pleading could not  
20 possibly be cured by the allegation of other facts." Lopez, 203  
21 F.3d at 1127 (citation omitted). Nevertheless, a court "may  
22 exercise its discretion to deny leave to amend due to 'undue delay,  
23 bad faith or dilatory motive on part of the movant, repeated failure  
24 to cure deficiencies by amendments previously allowed, undue  
25 prejudice to the opposing party and futility of amendment.'" Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 892 (9th Cir.  
26 2010) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962))  
27 (alterations omitted); see also Gonzalez v. Planned Parenthood of  
28

1 L.A., 759 F.3d 1112, 1116 (9th Cir. 2014) (a "district court's  
2 discretion in denying amendment is particularly broad when it has  
3 previously given leave to amend" (internal quotation marks  
4 omitted)). Additionally, if amendment would be futile, then the  
5 court may dismiss the pleading with prejudice. Mujica v. AirScan  
6 Inc., 771 F.3d 580, 593 & n.8 (9th Cir. 2014).

7  
8 Here, Plaintiff has already been provided with multiple  
9 opportunities to file an amended pleading. Although the Court  
10 provided Plaintiff with clear instructions about the defects of  
11 his First Amended Complaint and his Second Amended Complaint as  
12 well as how he should proceed to correct those defects, Plaintiff  
13 instead elected to file essentially the same pleading with minor  
14 non-substantive changes. The TAC, which is Plaintiff's fourth  
15 attempt at alleging sufficient facts to state a claim for relief  
16 that is plausible on its face, still violates Rule 8, and it fails  
17 to allege "simply, concisely, and directly [the] events" that  
18 plaintiff alleges entitle him to damages from any Defendant.  
19 Johnson, 574 U.S. at 12. Plaintiff continues to allege claims  
20 under a state statute and the Fourteenth Amendment, which are not  
21 cognizable against the federal officials that he names as  
22 defendants in this action.

23  
24 Moreover, even if Plaintiff was provided with another  
25 opportunity for amendment, additional factual allegations are  
26 unlikely to be sufficient to raise a claim upon which relief may  
27 be granted. As Plaintiff has previously been admonished, it  
28 remains unclear whether any remedy under Bivens is available for

1 the constitutional deprivations that he appears to be alleging in  
2 his pleadings. Although Plaintiff's factual allegations are not  
3 specific enough to determine if a Bivens action would potentially  
4 lie, the Court notes that the United States Supreme Court has made  
5 clear that expanding the Bivens remedy is a "disfavored" judicial  
6 activity. See, e.g., Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020)  
7 (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017)). The  
8 Supreme Court has never recognized a Bivens remedy for a First  
9 Amendment claim arising from denial of access to the courts. See  
10 Reichle v. Howards, 566 U.S. 658, 663 n.4 (2012) ("We have never  
11 held that Bivens extends to First Amendment claims."); Iqbal, 556  
12 U.S. at 675 ("we have declined to extend Bivens to a claim sounding  
13 in the First Amendment"); see also Buenrostro v. Fajardo, 770 Fed.  
14 Appx. 807, 808 (9th Cir. May 22, 2019) (declining to extend Bivens  
15 to a First Amendment claim for retaliation raised by a prisoner);  
16 Schwarz v. Meinberg, 761 Fed. Appx. 732, 734-35 (9th Cir. Feb. 13,  
17 2019) (declining to extend a Bivens remedy to a prisoner's claim  
18 of denial of access to the courts) (cases now citable for their  
19 persuasive value pursuant to Ninth Circuit Rule 36-3).

20  
21 The Court has accepted Plaintiff's factual allegations as  
22 true, liberally construed the claims that he appears to be raising,  
23 and given Plaintiff the benefit of any doubt. However, Plaintiff's  
24 TAC once again fails to raise "more than a sheer possibility" that  
25 any defendant violated Plaintiff's federal Constitutional rights.  
26 See, Iqbal, 556 U.S. at 678 (the "plausibility standard" requires  
27 "more than a sheer possibility that a defendant has acted  
28 unlawfully"). The Court therefore recommends that the TAC be

1 dismissed without further leave to amend because it has become  
2 clear that providing Plaintiff with additional opportunities for  
3 amendment would be futile. See, e.g., Cervantes v. Countrywide  
4 Home Loans, Inc., 656 F.3d 1034, 1041 (9th Cir. 2011) (dismissal  
5 without leave to amend is proper when amendment would be futile);  
6 Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d 1083, 1088 (9th Cir.  
7 2002) (denial of leave to amend is not an abuse of discretion if  
8 the "basic flaw" in the underlying facts cannot be cured by  
9 amendment).

10  
11 **V. RECOMMENDATION**

12  
13 Consistent with the foregoing, IT IS RECOMMENDED that the  
14 District Court issue an Order: (1) approving and accepting this  
15 Report and Recommendation, (2) dismissing Plaintiff's Third Amended  
16 Complaint without leave to amend for failure to state a claim, and  
17 (3) entering Judgment dismissing this action with prejudice.

18  
19 Dated: August 12, 2021

20 \_\_\_\_\_  
21 /s/  
22 ALKA SAGAR  
23 UNITED STATES MAGISTRATE JUDGE

24  
25 **NOTICE**

26 Reports and Recommendations are not appealable to the Court  
27 of Appeals, but may be subject to the right of any party to file  
28 Objections as provided in Local Civil Rule 72 and review by the

1 District Judge whose initials appear in the docket number. No  
2 Notice of Appeal pursuant to the Federal Rules of Appellate  
3 Procedure should be filed until entry of the Judgment of the  
4 District Court.

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JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

ARNOLDO ANTONIO GARCIA,  
Plaintiff,

v.

AFOD VADEZ, et al.,  
Defendants.

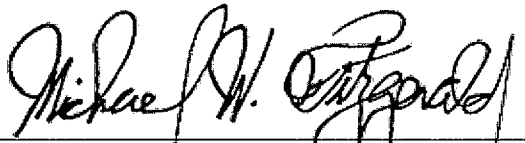
CASE NO. EDCV 14-02533-MWF (AS)

**JUDGMENT**

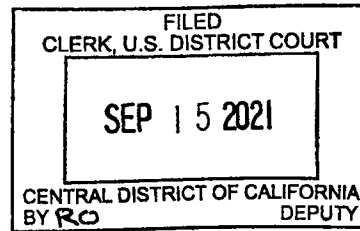
Pursuant to the Court's Order Accepting Findings, Conclusions  
and Recommendations of United States Magistrate Judge,

**IT IS ADJUDGED** that the above-captioned action is dismissed  
with prejudice.

DATED: August 31, 2021

  
MICHAEL W. FITZGERALD  
UNITED STATES DISTRICT JUDGE

Name ARNOLDO ANTONIO GARCIA  
 Address 1175 Serrano Dr.  
 City, State, Zip Colton, CA., 92324  
 Phone TEL.: (909) 761-3785  
 Fax \_\_\_\_\_  
 E-Mail garciaarnoldo784@gmail.com  
☐ FPD ☐ Appointed ☐ CJA ☒ Pro Per ☐ Retained



**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

~~ARNOLDO ANTONIO GARCIA,~~

PLAINTIFF(S),

v.

AFOD VALDEZ, as ICE Director, Adelanto Detention  
 Facility, in his individual capacity, "J. I.", an Officer, et al  
 DEFENDANT(S).

CASE NUMBER:

EDCV14-02533-MWF(AS)

**NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that ARNOLDO ANTONIO GARCIA hereby appeals to  
*Name of Appellant*  
 the United States Court of Appeals for the Ninth Circuit from:

**Criminal Matter**

- ☐ Conviction only [F.R.Cr.P. 32(j)(1)(A)]  
☐ Conviction and Sentence  
☐ Sentence Only (18 U.S.C. 3742)  
☐ Pursuant to F.R.Cr.P. 32(j)(2)  
☐ Interlocutory Appeals  
☐ Sentence imposed:

☐ Bail status:

**Civil Matter**

- ☐ Order (specify):  
☒ Judgment (specify):  
 Entered August 31, 2021  
☐ Other (specify):

Imposed or Filed on August 31, 2021. Entered on the docket in this action on August 31, 2021.

A copy of said judgment or order is attached hereto.

September 9, 2021  
 Date

*Arnoldo J. Garcia*  
 Signature  
☒ Appellant/ProSe ☐ Counsel for Appellant ☐ Deputy Clerk

**Note:** The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

ARNOLDO ANTONIO GARCIA,  
Plaintiff,

v.

AFOD VADEZ, et al.,  
Defendants.

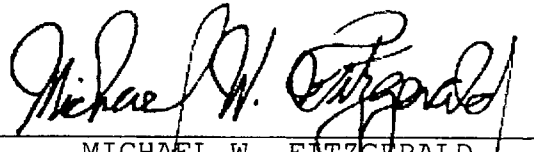
CASE NO. EDCV 14-02533-MWF (AS)

**JUDGMENT**

Pursuant to the Court's Order Accepting Findings, Conclusions  
and Recommendations of United States Magistrate Judge,

**IT IS ADJUDGED** that the above-captioned action is dismissed  
with prejudice.

DATED: August 31, 2021

  
MICHAEL W. FITZGERALD  
UNITED STATES DISTRICT JUDGE

Attorney List:

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Plaintiff in Pro Se.

TRACY WILKINSON, U. S. Attorney

Central District of California

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TEL.: (213) 894-2400



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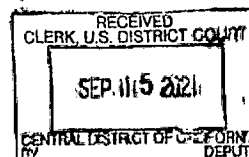
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*CENTRAL DISTRICT OF CALIFORNIA*  
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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

DEC 8 2021

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

ARNOLDO ANTONIO GARCIA,

Plaintiff-Appellant,

v.

AFOD VALDEZ, ICE Director, Adelanto  
Detention Facility, individual capacity; et  
al.,

Defendants-Appellees.

No. 21-56017

D.C. No.

5:14-cv-02533-MWF-AS

Central District of California,  
Riverside

ORDER

A review of the district court's docket reflects that the district court has certified that this appeal is not taken in good faith and is frivolous and has denied appellant's motion to proceed in forma pauperis on appeal. *See* 28 U.S.C. § 1915(a). This court may dismiss a case at any time, if the court determines the case is frivolous. *See* 28 U.S.C. § 1915(e)(2).

Within 35 days after the date of this order, appellant must:

- (1) file a motion to dismiss this appeal, *see* Fed. R. App. P. 42(b), or
- (2) file a statement explaining why the appeal is not frivolous and should go forward.

If appellant does not respond to this order, the Clerk will dismiss this appeal for failure to prosecute, without further notice. *See* 9th Cir. R. 42-1. If appellant files a motion to dismiss the appeal, the Clerk will dismiss this appeal, pursuant to

Federal Rule of Appellate Procedure 42(b). If appellant submits any response to this order other than a motion to dismiss the appeal, the court may dismiss this appeal as frivolous, without further notice.

If appellant files a statement that the appeal should go forward, appellees may file a response within 10 days after service of appellant's statement.

The briefing schedule for this appeal is stayed.

The Clerk shall serve on appellant: (1) a form motion to voluntarily dismiss the appeal, and (2) a form statement that the appeal should go forward. Appellant may use the enclosed forms for any motion to dismiss the appeal or statement that the appeal should go forward.

FOR THE COURT:

MOLLY C. DWYER  
CLERK OF COURT

By: Joseph Williams  
Deputy Clerk  
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

NOV 17 2022

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

ARNOLDO ANTONIO GARCIA,

Plaintiff-Appellant,

v.

AFOD VALDEZ, ICE Director, Adelanto  
Detention Facility, individual capacity; et al.,

Defendants-Appellees.

No. 21-56017

D.C. No. 5:14-cv-02533-MWF-AS  
Central District of California,  
Riverside

ORDER

The panel that decided appeal No. 15-55129 has declined to accept this appeal as a comeback case. *See* 9th Cir. Gen. Ord. 3.6(d). Accordingly, appellant's motion to assign this appeal to the prior panel (Docket Entry No. 9) is denied.

The briefing schedule remains stayed pending further order of the court.

FOR THE COURT:

MOLLY C. DWYER  
CLERK OF COURT

By: Matthew Narensky  
Deputy Clerk  
Ninth Circuit Rule 27-7

(a)

(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)

(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of-

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401 (b) of title 18,

United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)

(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that-

(A) the allegation of poverty is untrue; or

(B) the action or appeal-

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)

(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)

(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.