

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Ninth Circuit (Jan. 22, 2026)

Appendix B — Docket Entry Refusing Panel Rehearing (Feb. 3, 2026)

Appendix C — Docket Entry Refusing En Banc Rehearing (Feb. 6, 2026)

Appendix D — Order of the United States District Court for the Southern District of California (Aug. 21, 2024)

Appendix E — Petition for Panel Rehearing (Feb. 1, 2026) — contains exact recorded quotes proving the plea breach

Appendix F — Petition for Rehearing En Banc (Feb. 5, 2026) — contains complete recorded evidence table and raises conflict with Santobello, Neitzke, and Miroth

Appendix G — Supplemental Brief (filed Nov. 2024) — contains complete evidence table with timestamps

Appendix H — Federal Habeas Traverse with Appendix A (filed Jan. 16, 2026) — complete evidentiary record

Appendix A — Order of the United States Court of Appeals for the
Ninth Circuit (Jan. 22, 2026)

[Insert 9th Circuit Order here]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 22 2026

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

ROBERT EMERT,

Plaintiff - Appellant,

v.

ANDREA SCHUCK; et al.,

Defendants - Appellees.

No. 24-5856

D.C. No. 3:24-cv-00002-AGS-AHG
Southern District of California,
San Diego

ORDER

Before: WARDLAW, CLIFTON, and R. NELSON, Circuit Judges.

After considering the responses to the court's October 22, 2024 and December 4, 2024 orders and the opening brief, we dismiss this appeal as frivolous. *See* 28 U.S.C. § 1915(a), (e)(2).

All pending motions are denied as moot.

No further filings will be entertained in this closed case.

DISMISSED.

Appendix D — Order of the United States District Court for the Southern District of California (Aug. 21, 2024)

[Insert District Court Order here]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Robert EMERT,

Plaintiff,

1

Andrea SCHUCK, et al.,

Defendants.

Case No.: 24-cv-0002-AGS-AHG

**ORDER GRANTING IFP MOTION
(ECF 7), DISMISSING COMPLAINT
WITHOUT LEAVE TO AMEND,
AND CLOSING CASE**

Plaintiff Robert Emert, suing for alleged civil-rights violations under 42 U.S.C.

§ 1983, moves to proceed in forma pauperis. For the reasons below, that motion is granted,

but his complaint is dismissed without leave to amend.

IFP MOTION

Typically, parties instituting a civil action in a United States district court must pay filing fees of \$405.¹ See 28 U.S.C. § 1914(a). But if granted the right to proceed in forma pauperis, a plaintiff need not pay those fees. *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).

Emert owns only one asset—a non-operational vehicle he values at \$2,500. (ECF 7, at 2.) He has no money in his bank accounts, has no income, is “over \$50k in debt,” and depends entirely on the “charity of [his] family” for housing and food. (*Id.*) The Court finds that Emert has sufficiently shown an inability to pay the initial fees. *See Blount v. Saul*, No. 21-cv-0679-BLM, 2021 WL 1561453, at *1 (S.D. Cal. Apr. 21, 2021) (“It is well-settled that a party need not be completely destitute to proceed IFP.”).

¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$55. *See* 28 U.S.C. § 1914(a); Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2023).

28 U.S.C. § 1915(e) SCREENING

When reviewing an IFP motion, the court must screen the complaint and dismiss it if it “fails to state a claim,” 28 U.S.C. § 1915(e)(2)(B), judged by the same “Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim,” *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). The 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) (quotation marks omitted). Although a plaintiff’s allegations are taken as true, courts “are not required to indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (cleaned up). Pro se pleadings are “to be liberally construed.” *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

A. Background

12 This is the fourth of six federal cases Emert recently filed that stem from either his
13 2023 state-court criminal conviction or a family-court decision affecting his parental-
14 custody rights.² In this iteration, Emert claims that his “criminal defense attorney,”
15 defendant Jose Badillo, negotiated an “oral plea agreement” with defendant Deputy District
16 Attorney Dawn Balerio and Emert’s ex-wife, defendant Andrea Schuck. (ECF 1, at 4–5,
17 7.) A “custody provision” of that agreement allegedly provided that Emert’s son Bryce
18 “would return to Plaintiff’s custody in a shared custody arrangement if Plaintiff pled guilty
19 to resolve criminal charges.” (*Id.* at 3.) Emert “pled guilty on April 4, 2023,” but he says
20 defendants “now falsely claim the plea deal did not contain any agreement regarding letting
21 Bryce reside with plaintiff.” (*Id.*) Emert neither provides the plea colloquy from that

² The other five cases are: *Emert v. Vena*, No. 3:23-cv-0230-RSH-AHG (S.D. Cal. Aug. 14, 2023) (filed Feb. 7, 2023); *Emert v. San Diego Superior Ct.*, No. 3:23-cv-1723-BAS-MSB (S.D. Cal. Oct. 4, 2023) (filed Sept. 18, 2023); *Emert v. California*, No. 3:23-cv-2318-JES-VET (S.D. Cal. Apr. 4, 2024) (filed Dec. 20, 2023); *Emert v. San Diego Bd. of Supervisors*, 3:24-cv-0671-JO-MSB (S.D. Cal. Apr. 12, 2024) (filed Apr. 12, 2024); and *Emert v. San Diego Superior Ct.*, No. 3:24-cv-0924-LL-MSB (S.D. Cal. May 31, 2024) (filed May 30, 2024).

1 hearing nor attests that the judge taking his plea was aware of any “custody provision.”
2 He was sentenced to and “remain[s] on a restrictive 3-year probation term.” *See Emert v.*
3 *California*, No. 3:23-cv-2318-JES-VET (S.D. Cal. Apr. 4, 2024), ECF 4, at 2.

4 Emert sues his ex-lawyer Badillo, prosecutor Balerio, and his ex-wife Schuck,
5 claiming that their “breach of the plea agreement violated [his] constitutional rights under
6 the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.” (*Id.*
7 at 5.) As circumstantial proof of his claims, Emert attaches transcripts of phone calls with
8 his ex-wife and his ex-lawyer during the weeks after his plea, which he surreptitiously
9 recorded. (*See id.* at 8–181.) These, he claims, “conclusively demonstrate that Defendants
10 made and breached an enforceable plea agreement.” (*Id.* at 6.)

11 He bases federal jurisdiction on defendant “Balerio’s role in making the plea
12 agreement which the other defendants failed to honor.” (*Id.* at 3.) He asks the Court to
13 “order[] Defendants to specifically perform the original plea agreement by letting Bryce
14 live with his father.” (*Id.*)

15 **B. Discussion**

16 Section 1983 lawsuits are “a private right of action against individuals who, acting
17 under color of state law, violate federal constitutional or statutory rights.” *Devereaux v.*
18 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (citing 42 U.S.C. § 1983). To state a § 1983
19 claim, a plaintiff must plausibly allege “both (1) deprivation of a right secured by the
20 Constitution and laws of the United States, and (2) that the deprivation was committed by
21 a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138
22 (9th Cir. 2012).

23 **1. Deputy District Attorney Balerio**

24 Emert fails to plausibly allege how Balerio violated his constitutional rights.
25 “In order for a person acting under color of state law to be liable under section 1983 there
26 must be a showing of personal participation in the alleged rights deprivation.” *Jones v.*
27 *Williams*, 297 F.3d 930, 934 (9th Cir. 2002). Emert’s allegations of any involvement by
28 Balerio with custody issues are paper-thin. First, he says Balerio once spoke with Schuck

1 about “what [Schuck] wants [] out of [Emert] and what [Schuck] wants in regards to
2 [Emert’s] participation in [their son’s] life.” (*Id.* at 137.) He also claims that his then-lawyer
3 told him Balerio “agreed to a plea deal whereby [Emert’s son] would return to [Emert’s]
4 custody.” (*Id.* at 3.) Accepting as true that Emert’s lawyer told him this (even though the
5 lawyer denies it (*see id.*)), it does not follow that Balerio actually agreed to any such thing.
6 In fact, the Court is entitled to treat this inference with some skepticism. After all, Balerio
7 has no power to enforce a private citizen’s surrender of her child-custody rights—let alone
8 set aside a family-court ruling granting those rights.

9 Several other circumstances also seem to absolve Balerio of any § 1983 liability.
10 Emert does not allege that Balerio directly promised him anything about parental rights or
11 that she mentioned custody during his plea colloquy, when he could have objected. He
12 merely asserts in a conclusory fashion that Balerio’s “involvement created a binding
13 agreement under state law”—yet he admits it was “the other defendants [who] failed to
14 honor” any purported arrangement. (ECF 1, at 3.) Balerio is not specifically alleged to
15 have taken any “affirmative act, participate[d] in another’s affirmative acts, or omit[ted] to
16 perform an act [she was] legally required to do” that resulted in a violation of Emert’s due-
17 process rights. *See Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

18 And the attached documents undermine Emert’s claim that any custody agreement
19 involving Balerio existed. “[W]hen an exhibit to a complaint is inconsistent with the
20 complaint’s allegations, the exhibit controls.” *Nguyen v. Bank of Am., NA*, 563 F. App’x
21 558, 558 (9th Cir. 2014). The nearly 200 pages of recorded phone calls point to two
22 separate arrangements—the actual plea agreement with the state and an “agreement to
23 agree” about custody between Emert and his ex-wife Schuck. (*See generally* ECF 1,
24 at 8–181.) The transcripts indicate Emert understood all along that any agreement with his
25 ex-wife was separate from his plea deal. After he’d pleaded guilty, Emert told Schuck:
26 “I thought *we* were going to come to an agreement. . . . I took the deal based on what you
27 said.” (ECF 1, at 63 (emphasis added).) Schuck then told him “we have [a] little ways to
28 go before we can do an agreement” and insisted that any arrangement between them be “in

1 writing.” (*Id.* at 68, 111.) Emert acknowledged that Schuck’s “[l]awyers were *going to*
2 draft something and propose it to” him. (*Id.* at 176 (emphasis added).) Weeks later, he still
3 “look[ed] forward to an agreement” with her but had “not received that yet.” (*Id.* at 176,
4 179.) Finally, a full six weeks after Emert’s guilty plea, Schuck indicated that they had
5 reached an impasse: “We are not in negotiations nor will we be until you do as I have
6 requested and drop your other cases. At that point I will work with you for some shared
7 physical (only) custody of Bryce.” (*Id.* at 180.) If any understandings were receded from,
8 they involved only private citizens, not the state. Emert does not plausibly allege that
9 Balerio had any connection with this second, inchoate arrangement between the parents.
10 Perhaps Emert took the plea deal in the misplaced hope that his ex-wife would
11 independently cede custody. But that has nothing to do with Balerio.

12 Nor does he state a § 1983 equal-protection claim against Balerio. To do so,
13 “a plaintiff must show that the defendants acted with an intent or purpose to discriminate
14 against the plaintiff based upon membership in a protected class.” *Barren v. Harrington*,
15 152 F.3d 1193, 1194 (9th Cir. 1998). Emert seems to assert he’s in a protected class of
16 “similarly situated parents.” (ECF 1, at 5.) But he doesn’t explain how Balerio treated him
17 differently from those outside the class concerning custody agreements in plea deals. With
18 the fall of that theory, so fall his chances of prosecuting a § 1983 claim against Balerio.

19 **2. *Badillo and Schuck***

20 Emert cannot maintain a § 1983 claim against his ex-wife or ex-lawyer, since he
21 fails to allege how either was acting under color of state law. Emert does mention that
22 “Badillo failed to secure the plea agreement regarding Bryce’s custody in writing,” but to
23 the extent he may be trying to allege legal malpractice against his ex-lawyer, the Court
24 declines to exercise supplemental jurisdiction over that or any other construable state-law
25 claim. (See ECF 1, at 3.)

26 **3. *Improper Vehicle for Remedy Sought***

27 Even if Emert had managed to state a § 1983 claim, the relief he requests—“specific
28 performance” of the alleged plea agreement so he can gain physical custody of his son (see

1 ECF 1, at 4)—is not properly sought under that statute. Moreover, specific performance is
2 impossible. Even if Emert’s plea deal somehow included a child-custody provision,
3 42 U.S.C. § 1983 does not authorize this Court to summarily annul a state’s custody ruling.
4 With very few exceptions, a California family court “that has made a child custody
5 determination . . . has exclusive, continuing jurisdiction over the determination.” *See* Cal.
6 Fam. Code § 3422(a). What’s more, the family court itself cannot modify its ruling without
7 a showing “that there is new evidence or that there are changed circumstances that make a
8 change of placement in the best interest of the child.” *In re Stephanie M.*, 867 P.2d 706,
9 718 (Cal. 1994). Nor can this Court constitutionally order Emert’s ex-wife to disregard the
10 family-court determination, relinquish her parental rights, and hand over her child.

11 When a “breach of plea agreement” claim is brought and “specific performance is
12 impossible,” as it is here, “the only other possible remedy is rescission of the plea
13 agreement and withdrawal of the guilty plea.” *Carter v. Sandoval*, No. 2:18-cv-02064-
14 RFB-EJY, 2020 WL 4668190, at *6 (D. Nev. July 9, 2020), *aff’d*, 859 F. App’x 53
15 (9th Cir. 2021). Such a claim “may not be pursued in a § 1983 action,” as “habeas corpus
16 is the exclusive remedy to attack the legality of the conviction or sentence.” *Id.* (citing
17 *Nettles v. Grounds*, 840 F.3d 922, 933 (9th Cir. 2016)).

18 Finally, even if the Court were to construe Emert’s complaint as a habeas petition,
19 it would fail. A federal habeas petitioner must exhaust state remedies by “present[ing] the
20 California Supreme Court with a fair opportunity to rule on the merits of every issue
21 raised.” *Emert v. California*, No. 3:23-cv-2318-JES-VET, 2024 WL 787381, at *1 (S.D.
22 Cal. Feb. 26, 2024) (dismissing Emert’s previous habeas action for failure to exhaust).
23 Separately and additionally, “a petitioner must name the state officer having custody of
24 him as the respondent.” *Id.* at *2. Emert has done neither.

25 **C. Denial of Leave to Amend**

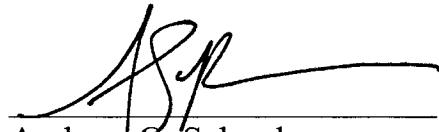
26 Accordingly, the complaint fails to survive screening and must be dismissed for
27 failure to state a claim. *See* 28 U.S.C. § 1915(e). Although a “court should not dismiss a
28 pro se complaint without leave to amend unless it is absolutely clear that the deficiencies

1 of the complaint could not be cured by amendment," no such cure is possible here. *See*
2 *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (cleaned up). Because the relief
3 Emert seeks is not even available under § 1983, any amendment would be futile; in such a
4 case, courts may deny leave to amend. *See Joe v. Supreme Ct. of Cal.*, No. 22-16224, 2023
5 WL 5346048, at *1 (9th Cir. Aug. 21, 2023) (affirming denial of leave to amend for pro se
6 pleading when "amendment would be futile").

7 **D. Conclusion**

8 Emert's IFP motion (ECF 7) is **GRANTED**. But his complaint is **DISMISSED** for
9 failure to state a claim, without leave to amend. All other outstanding motions (ECF 8 &
10 9) are **DENIED AS MOOT**. The Clerk is directed to close this case.

11 Dated: August 21, 2024

12 
13 Andrew G. Schopler
14 United States District Judge

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Appendix E — Petition for Panel Rehearing (Feb. 1, 2026) — contains exact recorded quotes proving the plea breach

[Insert Panel Rehearing Petition here]

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