

1 D. Houston.

2 Pending is Defendants’ Motion to Dismiss (Doc. 15), Motion to File Redacted Exhibits
3 (Doc. 15-6), and Motion to Strike (Doc. 38). For the reasons set forth below, Defendants’ Motion
4 Dismiss (Doc. 15) is **GRANTED**. Defendants’ Motion to Strike (Doc. 38) is **DENIED**, and
5 Defendants’ Motion to File Redacted Exhibits (Doc. 15-6) is **DENIED AS MOOT**.

6 **I. FACTUAL BACKGROUND**

7 A. Existing Law Prior to S.B. 132

8 Since at least 2017, Title 15 of the California Code of Regulations § 3269 (“Inmate
9 Housing Assignments”) governed the placement of transgender inmates within the California
10 prison system. *See* CAL. CODE REGS. tit. 15, § 3269 (2017). The Code of Regulations provided:
11 “Transgender inmates and inmates having symptoms of gender dysphoria as identified and
12 documented in [the Strategic Offender Management System (SOMS)] by medical or mental
13 health personnel within a CDCR institution shall be referred to a classification committee for a
14 determination of appropriate housing at a designated institution.” CAL. CODE REGS. tit. 15, §
15 3269(g) (2017).² For the classification of inmates, “the classification process shall take into
16 consideration the inmate’s needs, interests and desires, his/her behavior and placement score in
17 keeping with the Department and institution’s/facility’s program and security missions and public
18 safety.” CAL. CODE REGS. tit. 15, § 3375(b) (2017) (“Classification Process”).³

19 In April 2019, the California Senate Committee on Public Safety considered the merits of
20 S.B. 132. S. COMM. PUB. SAFETY, B. ANALYSIS, S.B. 132 (Cal. Apr. 23, 2019).⁴ In the legislative
21 analysis of S.B. 132, the bill’s author, Senator Wiener, acknowledged that “the California Code of
22 Regulations establishes a process by which an incarcerated transgender person is assigned to
23 housing at a designated institution.” *Id.* at 4. At that time, CDCR’s Department Operations

24 _____
25 ² Since 2022, the Code of Regulations now contains this provision, with the exact language as prior versions, located
at § 3269(h), respectively. *See* CAL. CODE REGS. tit. 15, § 3269(h) (2022–23).

26 ³ This language has not changed since 2017, except for the 2019 added sub-section, requiring an “automated needs
27 assessment tool that identifies an inmate’s criminogenic needs” to be administered according to § 3375.6. CAL. CODE
REGS. tit. 15, § 3375(b)(1) (2019).

28 ⁴ The California Senate’s legislative analysis can be located at:
https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB132.

1 Manual (“DOM”) required “[i]nmates who have been diagnosed as transgender or intersex, as
2 documented on the Medical Classification Chrono” to “be referred to a classification committee
3 for review of all case factors and determination of appropriate institutional placement and housing
4 assignment.” *Id.* at 7 (citing DOM § 62080.14); *see also* CAL. CODE REGS. tit. 15, § 3269 (2017)
5 (transgender inmates referred to a classification committee). CDCR specified that the housing of
6 transgender inmates had “to ensure inmate-patients receive the necessary medical care/mental
7 health treatment, transgender or intersex inmate-patients.” S. COMM. PUB. SAFETY, B. ANALYSIS
8 at 7 (citing DOM § 62080.14).

9 However, Senator Wiener determined that this housing-transfer process did not go far
10 enough to protect transgender women from rape and assault. *Id.* at 4. Indeed, the Senator
11 commented, “[t]hese processes and criteria fail[ed] to take into account a person’s gender identity
12 and their perception of safety, making them more vulnerable to violence from other incarcerated
13 people and solitary confinement while incarcerated.” *Id.* The Senate’s analysis of S.B. 132 cited
14 to a study by the University of California, Irvine, which “found that transgender inmates were 13
15 times more likely to be sexually assaulted in prison than non-transgender inmates,” *id.* at 7
16 (citation omitted), and that to best protect these particularly vulnerable transgender inmates,
17 CDCR “sometimes remove[s] these inmates from the general population.” *Id.* Thus, the
18 California Legislature considered the merits of S.B. 132, which aimed in part, “to eliminate the
19 practice of placing transgender inmates in segregated housing units when the inmate does not
20 perceive a risk of violence or victimization if housed in another type of housing, and to require
21 that transgender inmates are housed at a facility consistent with the inmate’s gender identity.” *Id.*
22 at 11.

23 B. S.B. 132

24 On September 26, 2020, California Governor Gavin Newsom signed into law, “The
25 Transgender Respect, Agency, and Dignity Act,” Cal. S.B. 132 (2020), *codified at* Cal. Penal
26 Code §§ 2605, 2606 [hereinafter, “S.B. 132”]. Penal Code § 2605 requires CDCR officials to
27 “ask each individual entering into the custody of the department to specify all of the following:”
28 (1) their gender identity of male, female, or nonbinary; (2) whether they identify as transgender,

1 nonbinary, or intersex; and (3) their gender pronoun and honorific. Cal. Penal Code § 2605(a)(1)-
2 (3).⁵ CDCR may not discipline an inmate who refuses to answer or who fails to disclose complete
3 information. *Id.* § (b). Section 2605 requires CDCR facility staff to “promptly repeat the process
4 of offering the individual an opportunity to specify the gender pronoun and honorific most
5 appropriate for staff to use in reference to that individual[.]” *Id.* § (c). Finally, section 2605
6 prohibits “[s]taff, contractors, and volunteers of the department” from “consistently fail[ing] to
7 use the gender pronoun and honorific an individual has specified in all verbal and written
8 communications with or regarding the individual that involve use of a pronoun and honorific.”
9 *Id.* § (d).

10 S.B. 132 added section 2606 to the California Penal Code, which adds in relevant part:

- 11 (a) An individual incarcerated by the Department of Corrections and
12 Rehabilitation who is transgender, nonbinary, or intersex, regardless of
13 anatomy, shall:
- 14 (1) Be addressed in a manner consistent with the incarcerated
15 individual’s gender identity.
16 . . .
 - 17 (3) Be housed at a correctional facility designated for men or women
18 based on the individual’s preference, including, if eligible, at a
19 residential program for individuals under the jurisdiction of the
20 department . . .
 - 21 (4) Have their perception of health and safety given serious
22 consideration in any bed assignment, placement, or programming
23 decision within the facility in which they are housed . . . including,
24 but not limited to, granting single-cell status, housing the
25 individual with another incarcerated person of their choice, or
26 removing the individual or individuals who pose a threat from any
27 location where they may have access to the individual who has
28 expressed a safety concern. If, pursuant to this paragraph, the
individual is not granted an alternative based on their perception of
health and safety, the department shall document the reasons for
that denial and share them with the individual.
- (b) If the Department of Corrections and Rehabilitation has management or
security concerns with an incarcerated individual’s search preference . . .
or preferred housing placement . . . , the Secretary of the Department of
Corrections and Rehabilitation, or the secretary’s designee, shall, before
denying a search preference or housing the incarcerated individual in a
manner contrary to the person’s preferred housing placement, certify in

⁵ The term “gender pronoun” is defined as a person’s “third-person singular personal pronoun, such as ‘he,’ ‘she,’ or ‘they,’” and the term “honorific” is defined as “a form of respectful address typically combined with an individual’s surname,” such as “mister” (“Mr.”) or “miss” (“Ms.”). *See* Cal. Penal Code §§ 2605(e)(1)–(2).

1 writing a specific and articulable basis why the department is unable to
2 accommodate that search or housing preference.

3 Cal. Penal Code. §§ 2606(a)(1)–(3), (b).

4 C. Plaintiffs’ Complaint

5 Plaintiffs, who are inmates at the Central California Women’s Facility, filed the instant
6 Complaint challenging S.B. 132 on several constitutional grounds. (*See generally* Doc. 1; *id.* at
7 ¶¶ 69–72.)⁶ Plaintiffs complain that S.B. 132 has created unsafe living conditions for cisgender,
8 female inmates because “men commit the vast majority of violent and sexual offenses, [] women
9 are disproportionately victimized by male sexual violence,” (*id.* at ¶ 5), and “[r]egardless of the
10 self-declared ‘gender identity’ of individual men or women, women are placed at heightened risk
11 of sexual violence, sexual harassment, and trauma conditions (such as post-traumatic stress
12 disorder) when forced to share housing quarters with men.” (*Id.* at ¶ 8.)

13 Plaintiffs’ Complaint alleges that “[b]y requiring women’s correctional facilities to
14 become mixed-sex facilities, S.B. 132 places incarcerated women in significantly increased
15 danger of physical and sexual violence, consequences of consensual or nonconsensual sex with
16 men (such as pregnancy and sexually transmitted disease), infringes upon the dignity of women to
17 bodily security and privacy, and removes the rehabilitative benefits that accrue to women in an
18 exclusively-female correctional facility.” (*Id.* at ¶ 12.) Plaintiffs also allege that “CDCR has
19 been approving transfers of men into women’s facilities pursuant to S.B. 132 in a manner not
20 consistent with S.B. 132.” (*Id.* at ¶¶ 36(a)–(d) (list of examples Plaintiffs believe are incorrect
21 applications of S.B. 132).)

22 *i. Effects of S.B. 132 on Plaintiffs*

23 Since the implementation of S.B. 132, Plaintiffs represent that they “have experienced
24 fear, anxiety, depression, and/or post-traumatic stress disorder, as a direct result of now:”

25 [S]haring close-quarters housing, showering, dining, and recreation with men;
26 observing that some incarcerated women are now having sexual relations with
incarcerated men transferred into CIW and CCWF, creating a risk of pregnancy

27 _____
28 ⁶ Plaintiffs also complain about similar conditions allegedly occurring at the California Institution for Women, however, none of the Plaintiffs are currently incarcerated there. (*See* Doc. 1 at ¶¶ 69–72 (all named plaintiffs stating they are housed at CCWF).)

1 and the health and emotional complications from becoming pregnant while
2 incarcerated, which would not have occurred but for S.B. 132; and observing
3 changes to the environment of women’s facilities to become more like men’s
4 facilities, to the emotional and psychological detriment of incarcerated women.

5 (*Id.* at ¶ 42; *see also id.* at ¶ 47 (“[W]omen in CIW and CCWF experience psychological
6 distress, fear, and anxiety at the constant possibility of additional men being house in the
7 women’s facilities.”).)

8 Plaintiffs allege that “some incarcerated women sharing a cell with a man, along with
9 other women, now make sleep schedules among the women so that a woman is on watch to try to
10 prevent rape by the male cellmate.” (*Id.* at ¶ 43.) Plaintiffs state that prison staff in these
11 facilities are “now armed with new, stronger pepper spray and riot control measures in
12 anticipation that men are stronger and more violent than women.” (*Id.* at ¶ 44.) Women’s
13 facilities “have procured condoms,” “changed contraceptive policy to make them available to all
14 female inmates,” and have provided “printed information about pregnancy and sexually
15 transmitted diseases,” in anticipation that cisgender and transgender women would be sexually
16 active. (*Id.* at ¶ 45.)

17 Plaintiffs also fear that “CCF has considered cutting down the only shade trees in the
18 exercise yard, which also attract birds that the women enjoy and appreciate, because incarcerated
19 men might use the trees as weapons and/or because the trees cause visual blind spots that present
20 security risks;” “numerous women suffered psychological distress at the prospect of having the
21 women’s only connection to nature stripped away because of the presence of male offenders.”
22 (*Id.* at ¶ 46.)

23 Furthermore, Plaintiffs complain that “incarcerated women have filed administrative
24 grievances requesting that CDCR stop transferring men into the women’s facilities, [but] CDCR
25 has altered the complaining inmate’s statements recounted or summarized in the written
26 complaint forms” by changing the gender identity of “men” to “transgender females” or
27 “transgender women,” “thereby altering the complaining inmate’s own words, perception, and
28 substance of requested corrective action.” (*Id.* at ¶ 48.)

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1 Amendments to the United States Constitution, as well as several provisions of the California
2 Constitution. (*See generally* Doc. 1 at 20–35.)

3 Before the Court is Defendants’ Motion to Dismiss brought under Federal Rules of Civil
4 Procedure 12(b)(1) and 12(b)(6), attacking, in part, Plaintiffs’ basis for establishing Article III
5 standing on their federal constitutional claims. (*See* Doc. 15-1 at 1–20.) The motion is supported
6 by the Intervenor who also argue that Plaintiffs lack Article III standing. (Doc. 32 at 18–23.)
7 Plaintiffs oppose the motion. (Doc. 36.)

8 **III. LEGAL STANDARDS**

9 A. Rule 12(b)(1)

10 “Federal courts are courts of limited jurisdiction,’ possessing ‘only that power authorized
11 by Constitution and statute.’” *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v.*
12 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)); *Exxon Mobil Corp. v. Allapattah*
13 *Servs., Inc.*, 545 U.S. 546, 552 (2005). As such, “[i]t is to be presumed that a cause lies outside
14 this limited jurisdiction. . . and the burden of establishing the contrary rests upon the party
15 asserting jurisdiction.” *Kokkonen*, 511 U.S. at 377 (internal citations omitted); *Advanced*
16 *Integrative Med. Sci. Inst., PLLC v. Garland*, 24 F.4th 1249, 1256 (9th Cir. 2022) (same).

17 Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may challenge a
18 claim for relief for lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). It is
19 well-established that Article III “[s]tanding is a constitutional requirement for the exercise of
20 subject matter jurisdiction over disputes in federal court.” *Tailford v. Experian Info. Sols., Inc.*,
21 26 F.4th 1092, 1099 (9th Cir. 2022) (citing *Spokeo v. Robins*, 578 U.S. 330, 339 (2016)). Thus,
22 even where the defendant fails to raise or challenge a claim or Complaint for lack of standing,
23 “federal courts have a duty to raise, sua sponte, questions of standing before addressing the
24 merits” of any claim. *Iten v. Los Angeles*, 81 F.4th 979, 984 (9th Cir. 2023) (citing *Steel Co. v.*
25 *Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998)); *Jones v. L.A. Cent. Plaza LLC*, 74 F.4th
26 1053, 1058 (9th Cir. 2023) (“[A] jurisdictional issue such as Article III standing may be raised
27 sua sponte by the court at any time.”) (citation omitted); *see also* Fed. R. Civ. P. 12(h)(3)
28 (requiring that “the court must dismiss the action” if it “determines at any time that it lacks

1 subject-matter jurisdiction.”).

2 Article III of the Constitution limits the Court’s authority to resolving “Cases” or
3 “Controversies.” U.S. CONST., art. III, § 2. “The doctrine of standing, among others, implements
4 this limit on [the Court’s] authority.” *Dep’t of Educ. v. Brown*, 600 U.S. 551, 561 (2023)
5 (internal quotation marks and citation omitted). The Supreme Court “has established that the
6 irreducible constitutional minimum of standing contains three elements that a plaintiff must plead
7 and—ultimately—prove.” *Id.* (internal quotation marks and citation omitted). “First, the plaintiff
8 must have suffered an injury in fact that is both concrete and particularized and actual or
9 imminent, not conjectural or hypothetical.” *Id.* (internal quotation marks and citation omitted).
10 “Second, the plaintiff’s injury must be fairly traceable to the challenged action of the defendant,
11 meaning that there must be a causal connection between the injury and the conduct complained
12 of.” *Id.* (internal quotation marks and citation omitted). “Third, it must be likely, as opposed to
13 merely speculative, that the injury will be redressed by a favorable decision.” *Id.* (internal
14 quotation marks and citation omitted).

15 “‘The party invoking federal jurisdiction bears the burden of establishing’ the [three]
16 elements of standing, and ‘each element must be supported in the same way as any other manner
17 on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence
18 required at the successive stages of the litigation.’” *Meland v. WEBER*, 2 F.4th 838, 843 (9th Cir.
19 2021) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). “If at least one plaintiff has
20 standing, the suit may proceed.” *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) (citing
21 *Rumsfeld v. F. for Acad. and Inst. Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006)). “And standing is not
22 dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and
23 for each form of relief that they seek (for example, injunctive relief and damages).” *TransUnion*
24 *LLC v. Ramirez*, 594 U.S. 413, 430–31 (2021) (parenthetical in original) (citations omitted).

25 *i. Facial Attack vs. Factual Attack*

26 “Rule 12(b)(1) jurisdictional attacks can be either facial or factual.” *San Diego Cnty.*
27 *Credit Union v. Citizens Equity First Credit Union*, 65 F.4th 1012, 1028 (9th Cir. 2023) (citation
28 omitted), *cert. denied*, 144 S. Ct. 190 (2023). “In a facial attack, the challenger asserts that the

1 allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction.
2 By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by
3 themselves, would otherwise invoke federal jurisdiction.” *Edison v. United States*, 822 F.3d 510,
4 517 (9th Cir. 2016) (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.
5 2004)). The movant determines whether an attack is facial or factual, such as by introducing
6 evidence outside the pleadings. *Compare San Diego Cnty. Credit Union*, 65 F.4th at 1028
7 (“CEFCU made the strategic decision to assert a factual jurisdictional attack in its motion to
8 dismiss.”) with *Mecinas v. Hobbs*, 30 F.4th 890, 896 (9th Cir. 2022) (“Here, the Secretary’s
9 motion was based solely on the allegations in Plaintiffs’ amended complaint. It thus did not
10 convert the motion to dismiss into a factual motion.”).

11 B. Rule 12(b)(6)

12 Pursuant to Rule 12(b)(6), a defendant may move to dismiss a claim in the plaintiff’s
13 complaint if the allegation “fail[s] to state a claim upon which relief can be granted.” Fed. R.
14 Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), the plaintiff’s complaint
15 “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible
16 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,
17 550 U.S. 544, 570 (2007)).

18 “At the pleading stage, all allegations of material fact are taken as true and construed in
19 the light most favorable to the non-moving party.” *In re Facebook, Inc. Internet Tracking Litig.*,
20 956 F.3d 589, 601 (9th Cir. 2020). A claim is facially plausible “when the plaintiff pleads factual
21 content that allows the court to draw the reasonable inference that the defendant is liable for the
22 misconduct alleged.” *Iqbal*, 556 U.S. at 678. As such, the plausibility standard is a
23 “context-specific task that requires the reviewing court to [1] draw on its judicial experience and
24 common sense,” *Iqbal*, 556 U.S. at 679, and [2] to “draw all reasonable inferences in favor of the
25 nonmoving party.” *Boquist v. Courtney*, 32 F.4th 764, 773 (9th Cir. 2022) (quoting *Retail Prop.*
26 *Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014)).
27 “Ultimately, dismissal is proper under Rule 12(b)(6) if it appears beyond doubt that the
28 non-movant can prove no set of facts to support its claims.” *Boquist*, 32 F.4th at 773–74 (internal

1 citation and quotation marks omitted) (cleaned up).

2 Finally, though resolution of a motion to dismiss under Rule 12(b)(6) is normally confined
3 to the allegations stated in the complaint, the Court “may also ‘consider [1] materials that are
4 submitted with and attached to the complaint’; [2] judicial notice of matters of public record’; and
5 [3] unattached evidence on which the complaint necessarily relies if: [a] the complaint refers to
6 the document; [b] the document is central to the plaintiff’s claim; and [c] no party questions the
7 authenticity of the document.” *Beverly Oaks Physicians Surgical Ctr., LLC v. Blue Cross &
8 Blue Shield of Ill.*, 983 F.3d 435, 439 (9th Cir. 2020) (quoting *United States v. Corinthian Colls.*,
9 655 F.3d 984, 998–99 (9th Cir. 2011)). The Court may review such material without converting a
10 motion to dismiss into a motion for summary judgment. *Harris v. Cnty. of Orange*, 17 F.4th 849,
11 865 (9th Cir. 2021); *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018).

12 **IV. DISCUSSION**

13 A. Motion to Strike (Doc. 38)

14 In their Opposition to Defendants’ Motion to Dismiss, Plaintiffs attached declarations
15 from the named Plaintiffs in this suit (Docs. 36-1–36-3, 36-12), current and former California
16 inmates (Docs. 36-6–36-9, 36-11), two experts (Docs. 36-4, 36-5), and (4) counsel for Plaintiffs
17 (Doc. 36-10). Defendants object to the declarations, asserting that (1) they are “immaterial” and
18 “wholly irrelevant” to the Court’s evaluation of the pending motion to dismiss, and (2) that they
19 are extrinsic evidence that the Court may not rely on when evaluating Defendants’ motion
20 because they were not attached to Plaintiffs’ Complaint nor incorporated by reference in the
21 Complaint. (Doc. 38 at 3–5.)⁷

22 Plaintiffs argue that Defendants’ motion to dismiss “relied upon a substantial amount of
23 extrinsic evidence (314 pages) to factually ‘attack’ Plaintiffs’ standing to pursue claims and to
24 argue that Plaintiffs fail to state claims upon which relief may be granted.” (Doc. 41 at 4.)
25 Consequently, they argue that, on this basis, they may introduce evidence too. The extent to
26 which they are correct depends upon the nature of the attack.

27 *i. Facial Attack*

28 ⁷ From this point forward, the Court refers to CM/ECF pagination, or, where unavailable, the parties’ PDF pages.

1 “Ordinarily, a court may look only at the face of the complaint to decide a motion to
2 dismiss.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). There
3 are, of course, three well-known exceptions to this general rule: (1) materials attached to the
4 Complaint; (2) judicial notice of matters of public record; and (3) unattached evidence
5 incorporated into the complaint, for which it necessarily relies. *Beverly Oaks Physicians*, 983
6 F.3d at 439 (citation omitted). This means that when ruling on a 12(b)(6) motion to dismiss, “the
7 Court may not consider any declaration[s] [nor] exhibits that Plaintiff[s] [have] attached to [their]
8 opposition, nor may the Court consider the facts that Plaintiff[s] assert[] in [their] opposition.”
9 *Bd. of Trs. of the Bay Area Roofers Health & Welfare Tr. Fund v. Gudgel Yancey Roofing Inc.*,
10 225 F. Supp. 3d 1106, 1114 (N.D. Cal. 2016) (citation omitted). This situation changes when a
11 party raises a factual attack for lack of subject-matter jurisdiction under Rule 12(b)(1). *San Diego*
12 *Cnty. Credit Union*, 65 F.4th at 1028; *Mecinas*, 30 F.4th at 896.

13 Defendants bring a facial challenge to Plaintiffs’ Eighth Amendment allegations, Free
14 Exercise and Establishment Clause allegations under the First Amendment, and Equal Protection
15 Clause allegations under the Fourteenth Amendment. (See Doc. 15-1 at 6 (“In asserting an Eighth
16 Amendment claim[] the Plaintiffs’ *allegations* depend upon five assumptions that are generously
17 described as speculative . . .”) (emphasis added); *id.* at 8 (“Plaintiffs also *do not allege* any harm
18 resulting from the *alleged* free exercise and establishment claims.”) (emphases added); *id.* at 9
19 (“Plaintiffs’ free exercise and establishment claims *depend upon allegations of harm* shared by
20 the general public that cannot serve as the basis for standing.”) (emphasis added); *id.* (“Plaintiffs’
21 equal protection claim *fails to allege* any harm.”) (emphasis added).) In each instance,
22 Defendants attack Plaintiffs’ *allegations*, making Defendants’ challenges to Plaintiffs’ Article III
23 standing *only* a facial attack for these claims. *Edison*, 822 F.3d at 517 (“In a facial attack, the
24 challenger asserts that the allegations contained in a complaint are insufficient on their face to
25 invoke federal jurisdiction.”). Indeed, in each section of their motion, Defendants cite only to
26 paragraphs set forth in Plaintiffs’ Complaint. (Doc. 15-1 at 6 (citing Doc. 1 at ¶¶ 42–48 and p.
27 21:13–17), 8 (citing to Doc. 1 at 10, 22–23), 9 (citing Doc. 1 at 25).) Thus, the Court will not
28 entertain any evidence as to these claims, except that which is permitted under Rule 12(b)(6).

1 altered their internal grievances. (Doc. 15-1 at 7–8.) This clearly intertwines the inquiry
2 regarding the Court’s jurisdiction for this claim, and the substantive merits of Plaintiffs’ free
3 expression claim, and is therefore inappropriate. Accordingly, the Court will neither review
4 Defendants’ Motion to Strike (Doc. 38) nor Plaintiffs’ attached declarations to their Opposition in
5 response to Defendants’ factual challenge of standing.

6 Therefore, Defendants’ Motion to Strike Plaintiffs’ Declarations (Doc. 38), which this
7 Court treats as Objections to Plaintiffs’ Declarations, is **DENIED**. Because Defendant’s Motion
8 to File Redacted Exhibits to Thissen Declaration (Doc. 15-6) is a motion regarding documents
9 related to Defendant’s factual attack on standing, this motion is **DENIED AS MOOT**.

10 B. Defendants’ Motion to Dismiss (Doc. 15)

11 *i. Redundant Defendants*

12 Defendants argue that the Court should dismiss defendants Houston, Allison, and Pallares
13 “because their state-entity employer is a named defendant.” (Doc. 15-1 at 26 (capitalizations and
14 emphasis omitted).) Indeed, the complaint sues each of the defendants in their official capacities
15 while, at the same time, naming the CDCR. (Doc. 1 at 19-20.) However, Plaintiffs’ only
16 requested relief in this case is for declaratory and injunctive relief, not monetary damages. (*Id.* at
17 34–35.)

18 When a plaintiff sues a state official for monetary damages in her official capacity, it “is
19 not a suit against the official but rather is a suit against the official’s office,” and “[a]s such, it is
20 no different from a suit against the State itself.” *Will v. Mich. Dep’t of State Police*, 591 U.S. 58,
21 71 (1989) (collecting cases); *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985) (“[A] plaintiff
22 seeking to recover on a damages judgment in an official-capacity suit must look to the
23 government entity itself.”) (footnote omitted). A state official sued in their official capacity for
24 injunctive relief is considered a “person” under § 1983 and “official-capacity actions for
25 prospective relief are not treated as actions against the State.” *Will*, 591 U.S. at 71 n.10 (internal
26 quotation marks and citations omitted); *see also Cornel v. Hawaii*, 37 F.4th 527, 531 (9th Cir.
27 2022) (“[S]tate officials are ‘persons’ under §1983 when sued for prospective injunctive relief.”)
28 (citation omitted).

1 Accordingly, because Plaintiffs have sued CDCR state officials, Allison, Pallares, and
2 Houston for only prospective relief, in their official capacities, the Court cannot determine that
3 they are redundant defendants. Defendants’ motion is denied on this ground.

4 *ii. Abandoned Claims*

5 Defendants argue that “[t]he Eleventh Amendment bars this Court from hearing Plaintiffs’
6 California constitutional claims.” (Doc. 15-1 at 22.) Defendants request that the Court dismiss
7 Plaintiffs’ California constitutional claims against both the state official defendants and the
8 CDCR,⁸ citing to *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) and
9 Ninth Circuit authority in support of this proposition. (*Id.*) Perhaps recognizing the futility of
10 disagreement, Plaintiffs do not address this portion of the motion. (*See generally* Doc. 36.)

11 The Court deems their claims waived as to the California State Constitutional claims. *See*
12 *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 881 (9th Cir. 2022); *Est. of Sumner v.*
13 *Cal. Dep’t of Corr. and Rehab.*, No. 2:22-cv-01638-JAM-DB, 2023 WL 3304233, at *2 (E.D.
14 Cal. May 8, 2023) (holding, in part, that Plaintiff’s “failure to address CDCR’s Eleventh
15 Amendment argument” constituted waiver of that argument). This action shall proceed against
16 Defendants based only on Plaintiffs’ federal claims.

17 *iii. Eleventh Amendment Immunity*

18 Though neither the Defendants nor Intervenors raised Eleventh Amendment immunity
19 regarding Plaintiffs’ *federal* causes of action, the Court may *sua sponte* address state sovereign
20 immunity issues, as the doctrine implicates this Court’s subject-matter jurisdiction. *Seminole*
21 *Tribe v. Florida*, 517 U.S. 44, 54 (1996) (“For over a century we have reaffirmed that federal
22 jurisdiction over suits against unconsenting States was not contemplated by the Constitution when
23 establishing the judicial power of the United States.”) (internal quotation marks and citation
24 omitted); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 952 (9th Cir. 2008) (“The Eleventh

25 ⁸ Plaintiffs’ California constitutional claims do not explicitly state whether they are brought against some or all of the
26 defendants to this action. (*See generally* Doc. 1 at 26–33 (state constitutional causes of action).) The Court infers from
27 Defendants’ citations and broad language in argument, that Defendants raised Eleventh Amendment immunity for both
28 the state officials and the CDCR. (*See* Doc. 15-1 at 22 (citing *Vasquez v. Rauckauckas*, 734 F.3d 1025, 1041 (9th Cir.
2013) for the proposition that “state officials” are immune from federal courts instructing them on state law, and *S.B.*
v. Cal. Dep’t of Educ., 327 F. Supp. 3d 1218, 1235 (E.D. Cal. 2018)—a case where the Court afforded a state agency
and state officials immunity from suit under the Eleventh Amendment.)

1 Amendment has been authoritatively construed to deprive federal courts of jurisdiction over suits
2 by private parties against unconsenting States.”) (footnote omitted) (citing *Seminole Tribe v.*
3 *Florida*, 517 U.S. 44, 54 (1996)); *In re Jackson*, 184 F.3d 1046, 1048 (9th Cir. 1999) (“Eleventh
4 Amendment sovereign immunity limits the jurisdiction of the federal courts and can be raised by
5 a party at any time during judicial proceedings or by the court sua sponte.”) (citations omitted);
6 *Charley’s Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.*, 810 F.2d 869, 873 n.2 (9th Cir.
7 1987) (“Like a jurisdictional bar and unlike a traditional immunity, however, the effect of the
8 Eleventh Amendment must be considered *sua sponte* by federal courts.”) (citation omitted).

9 The Eleventh Amendment immunizes states from suit in federal court “by citizens and
10 noncitizens alike,” and “extends not just to suits in which the state itself is a named party but also
11 to those against an arm of the state.” *Kohn v. State Bar of Cal.*, 87 F.4th 1021, 1025–26 (9th Cir.
12 2023) (collecting cases) (cleaned up) (internal quotation marks omitted); e.g., *Munoz v. Sup. Ct.*
13 *of L.A. Cnty.*, 91 F.4th 977, 980 (9th Cir. 2024) (holding Superior Court of State of California
14 immune from suit under the Eleventh Amendment because it is an arm of the state). However, a
15 state “may choose to waive its immunity in federal court at its pleasure,” but its waiver and
16 consent “must be unequivocally expressed” and “may not be implied.” *Chicken Ranch Rancheria*
17 *of Me-Wuk Indians v. California*, 65 F.4th 1145, 1148 (9th Cir. 2023) (internal quotation marks
18 and citations omitted); *Doe v. Regents of Univ. of Cal.*, 891 F.3d 1147, 1152–53 (9th Cir. 2018).

19 As a state agency, it is a long-established principle that the California Department of
20 Corrections and Rehabilitation is immune from suit in federal court under the Eleventh
21 Amendment. *Brown v. Cal. Dep’t of Corr.*, 554 F.3d 747, 752 (9th Cir. 2009) (“The district court
22 correctly held that the California Department of Corrections and the California Board of Prison
23 Terms were entitled to Eleventh Amendment immunity.”) (citation omitted); see also *Stevenson*
24 *v. Cal. Dep’t of Corr. and Rehab.*, No. 23-55090, 2023 WL 6879351, at *1 (9th Cir. Oct. 18,
25 2023); *Sands v. Cal. Dep’t of Corr. and Rehab.*, 683 F. App’x 559, 559 (9th Cir. 2017) (“The
26 district court properly dismissed Sands’ action because the California Department of Corrections
27 and Rehabilitation, as a state agency, is immune from suit under the Eleventh Amendment[.]”)
28 (citations omitted); *Est. of Sumner*, 2023 WL 3304233, at *2 (“In turn, the Eleventh Amendment

1 unequivocally precludes Plaintiffs['] claims against CDCR.”).

2 While not fully briefed by CDCR,⁹ the Court cannot conclude that CDCR has
3 unequivocally waived immunity and consented to federal jurisdiction. Though CDCR has
4 appeared and defended this action through the filing of a motion to dismiss, these actions do not
5 constitute unequivocally expressing a waiver of immunity or consent to suit. *See, e.g., Demshki*
6 *v. Monteith*, 255 F.3d 986, 989 (9th Cir. 2001) (“[Plaintiff] also argues that [defendant] waived its
7 Eleventh Amendment immunity by defending the case on the merits and by supposedly failing to
8 raise immunity in a timely manner. This contention is without merit.”); *see also Regents*, 891
9 F.3d at 1152–53 (noting that defendants’ failure to raise Eleventh Amendment immunity on first
10 motion to dismiss did not unequivocally express waiving immunity defense asserted in second
11 motion to dismiss). Accordingly, the Court must **DISMISS** Plaintiffs’ action against CDCR on
12 this basis alone.

13 *iv. Article III Redressability*

14 On the other hand, the Court notes that Plaintiffs have failed to show that it is “likely, as
15 opposed to merely speculative, that the[ir] injur[ies] will be redressed by a favorable decision.”
16 *Dep’t of Educ. v. Brown*, 600 U.S. 551, 561 (2023). Plaintiffs have the burden to show that they
17 have Article III standing for each claim pressed and for each of form of requested relief sought.
18 *TransUnion LLC v. Ramirez*, 594 U.S. 413, 430–31 (2021); *Meland v. WEBER*, 2 F.4th 838, 843
19 (9th Cir. 2021). This requirement does not change in either the declaratory judgment or
20 permanent injunction context. *See Haaland v. Brackeen*, 599 U.S. 255, 292–93 (2023) (analyzing
21 standing for plaintiffs’ requests for declaratory and injunctive relief); *Clapper v. Amnesty Int’l,*
22 *USA*, 568 U.S. 398, 407–10 (2013) (analyzing standing for plaintiffs’ requests for a declaratory
23 judgment and permanent injunction); *San Diego Cnty. Credit Union v. Citizens Equity First*
24 *Credit Union*, 65 F.4th 1012, 1022 (9th Cir. 2023) (Article III standing requirement “is not
25 relaxed in the declaratory judgment context.”) (internal quotation marks and citation omitted).

26 The last element—redressability—“requires that the court be able to afford relief *through*

27
28 ⁹ CDCR did, at least in part, raise Eleventh Amendment immunity in the body of its motion. (*See supra*; Doc. 15-1 at 22.)

1 *the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion
 2 *explaining* the exercise of its power.” *Haaland*, 599 U.S. at 294 (emphases in original) (citations
 3 omitted). “To establish Article III redressability, the plaintiffs must show that the relief they seek
 4 is both (1) substantially likely to redress their injuries; and (2) within the district court’s power to
 5 award.” *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020). “To determine whether
 6 an injury is redressable, a court will consider the relationship between the judicial relief requested
 7 and the injury suffered.” *California v. Texas*, 593 U.S. 659, 671 (2021) (internal quotation marks
 8 and citation omitted).

9 In their Complaint, Plaintiffs have alleged the following injuries:

- 10 (1) Experiencing “fear, anxiety, depression, and/or post-traumatic stress
 11 disorder, as a direct result of”:
- 12 a. “[S]haring close-quarters housing, showering, dining, and
 13 recreation with [transgender women]”;
 - 14 b. Observing that some incarcerated women are having sexual
 15 relations with some incarcerated transgender women; and
 - 16 c. “[O]bserving changes to the environment of women’s facilities
 17 to become more like men’s facilities”;
- 18 (2) “[S]ome incarcerated women . . . now make sleep schedules” to
 19 prevent the alleged rape by transgender inmates;¹⁰
- 20 (3) Prison staff are armed with new, stronger pepper spray and riot control
 21 measures in anticipation that transgender women are allegedly
 22 “stronger and more violent”;¹¹
- 23 (4) Women’s facilities have new contraceptive policies;¹²
- 24 (5) CCWF “has considered cutting down the only shade trees in the
 25 exercise yard” because transgender women may “use the trees as
 26 weapons and/or because the trees cause visual blind spots” that pose
 27 security risks. “[N]umerous women suffered psychological distress at
 28 the prospect of having [their] only connection to nature stripped

10 As this alleged injury relates only to “some incarcerated women” and not the named Plaintiffs to this lawsuit, this injury is not sufficiently particularized to state a cognizable Article III injury. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (“For an injury to be ‘particularized,’ it must affect the plaintiff in a personal and individual way.”) (internal quotation marks omitted) (collecting cases).

¹¹ Similarly, this injury has no relation to the Plaintiffs. Instead, it merely complains about additional alleged burdens incurred by CDCR staff—not the Plaintiffs to this suit. *Spokeo*, 578 U.S. at 339. Even if the suggestion is that these more forceful responses will be used against Plaintiffs in the event their conduct gives rise to the need for the use force, officers may only use that amount of force consistent with the Fourth Amendment.

¹² Plaintiffs have failed to allege how this constitutes an alleged injury that is particularized to them, especially because the facilities have “changed contraceptive policy to make them available to *all* females.” (Doc. 1 at ¶ 45 (emphasis added).)

1 away”;¹³

2 (6) The “statutory directive” imposes cruel and unusual punishment “by
3 subjecting [Plaintiffs] to substantially increased risk of sexual
4 harassment, sexual assault, rape, and physical violence, and to
5 psychological fear of such harms” because there is a “known
6 substantial risk or probability that such violence will occur”;¹⁴

7 ¹³ “Article III requires a ‘certainly impending’ injury or, at the very least, a ‘substantial risk that the harm will
8 occur[.]’” *Lake v. Fontes*, 83 F.4th 1199, 1204 (9th Cir. 2023) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S.
9 149, 158 (2014)). Regarding this allegation that CCWF “has considered cutting down” shade trees, “Plaintiffs
10 simply have not plausibly alleged a ‘real and immediate threat of’ future injury.” *Id.* (quoting *City of Los Angeles v.*
11 *Lyons*, 461 U.S. 95, 103 (1983)). “Such ‘some day’ intentions” of cutting down shade trees in the exercise yard—
12 “without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not
13 support a finding of the ‘actual or imminent’ injury that [the Supreme Court’s] cases require.” *Lujan v. Defs. of*
14 *Wildlife*, 504 U.S. 555, 564 (1992) (emphasis in original).

15 Furthermore, “[t]he Supreme Court has repeatedly reiterated that . . . allegations of possible future injury are not
16 sufficient.” *Cal. Chamber of Com. v. Council for Educ. and Rsch. on Toxics*, 29 F.4th 468, 476 (9th Cir. 2022)
17 (citing *Clapper*, 568 U.S. at 409) (internal quotation marks omitted). Thus, the “prospect” that CDCR may cut down
18 shade trees at women’s facilities cannot suffice as a proper Article III injury in fact allegation. *Id.*

19 ¹⁴ On this Eighth Amendment claim, Plaintiffs alleged injuries fail to establish probabilistic standing. *Lake*, 83 F.4th
20 at 1204. The allegation that there is a “substantially increased risk of sexual” harassment and assault, is a conclusion,
21 unsupported by factual allegations. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888 (1990) (disregarding
22 “conclusory allegations” of standing affidavit); *Daniel v. Nat’l Park Serv.*, 891 F.3d 762, 765 (9th Cir. 2018)
23 (“Daniel lacks standing because her complaint makes only conclusory allegations . . .”); *Carrico v. City and Cnty. of*
24 *S.F.*, 656 F.3d 1002, 1006 (9th Cir. 2011) (“This conclusory allegation is insufficient to establish standing.”) (citation
25 omitted). The Court therefore gives no weight to Plaintiffs’ Eighth Amendment allegations of alleged future harm of
26 rape and assault. *Daniel*, 891 F.3d at 767 (holding threadbare and “naked assertions fail our edict that a plaintiff may
27 not rely on a bare legal conclusion to assert injury-in-fact[.]”) (internal quotation marks and citation omitted).

28 Also, Plaintiffs may not base their claim for injunctive relief on past harms of alleged rape and assault without more.
29 *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 680–81 (9th Cir. 2023)
30 (“To bring a claim for prospective injunctive relief, the plaintiff must demonstrate that he has suffered or is
31 threatened with a concrete and particularized legal harm, coupled with a *sufficient likelihood* that he will again be
32 wronged in a similar way.”) (emphasis added) (internal quotation marks and citation omitted). Plaintiffs have not
33 tied their past harms to a written policy, *id.*, nor expressed that the harms of rape and assault are *ongoing* to each or
34 any plaintiff. *Phillips v. U.S. Customs and Border Prot.*, 74 F.4th 986, 991 (9th Cir. 2023).

35 The ongoing nature of such harassment, assault, and violence is necessary, particularly to Plaintiffs’ claims against
36 state officials to fall under the *Ex parte Young* exception. *Va. Off. for Prot. and Advocacy v. Stewart*, 563 U.S. 247,
37 255 (2011) (“[I]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a
38 court need only conduct a ‘straightforward inquiry into whether the complaint alleges an ongoing violation of federal
39 law and seeks relief properly characterized as prospective.’”) (internal quotation marks and citation omitted); *Ctr. for*
40 *Biological Diversity v. U.S. Forest Serv.*, 80 F.4th 943, 955 (9th Cir. 2023) (“*Ex Parte Young* allows suits seeking
41 prospective relief against a state official who has a fairly direct connection to an ongoing violation of federal law.”)
42 (internal quotation marks and citations omitted).

43 Finally, this allegation—on its face—does not contest the alleged unlawful activity of *Defendant CDCR*, but instead,
44 surmises about the independent conduct of third parties—incarcerated transgender women. “[W]here a causal
45 relation between injury and challenged action depends upon the decision of an independent third party . . . standing is
46 not precluded, but it is ordinarily substantially more difficult to establish.” *California v. Texas*, 593 U.S. 659, 675
47 (2021) (cleaned up) (internal quotation marks and citations omitted). “To satisfy that burden, the plaintiff must show
48 at the least that third parties will likely react in predictable ways,” *id.* (internal quotation marks and citation omitted),
and “that the injury was not the result of the *independent* action of some third party,” but that “the government’s

1 (7) Plaintiffs have filed administrative grievances requesting CDCR stop
2 transferring transgender women into their facilities, but CDCR has
3 allegedly altered their statements by changing the gender identity of
4 “men” to “transgender females” or “transgender women”;

5 (8) S.B. 132 allegedly compels CDCR inmates to use transgender
6 inmates’ preferred gender pronouns;¹⁵

7 _____
8 unlawful conduct is *at least a substantial factor motivating the third parties’ actions.*” *Mendia v. Garcia*, 768 F.3d
9 1009, 1013 (9th Cir. 2014) (first emphasis in original, second emphasis added).

10 Plaintiffs cannot plausibly allege that CDCR has *motivated*—nor is currently motivating—incarcerated, transgender
11 individuals to sexually harass and assault Plaintiffs, nor that CDCR is substantially likely to motivate these
12 individuals in the future. Such an allegation is not only absent in Plaintiffs’ Complaint but is untethered from S.B.
13 132. This claim therefore also fails on Article III traceability grounds.

14 ¹⁵ Here, because Defendants factually attack Plaintiffs’ free expression claim, the Court may review the standing
15 declarations brought by Romero, Johnson, and Gonzalez, as discussed in the section denying Defendants’ Motion to
16 Strike above. Only Tomiekia Johnson’s declaration pertains to Plaintiffs’ free expression claim, wherein she states
17 that: “It is my understanding that because of my work for CDCR as an inmate, that I fall under SB 132’s
18 requirements to use so-called ‘preferred pronouns.’ Requiring me to call men ‘she or her’ violates my right to use
19 common sense language to describe what I see and to speak freely about the problems I see happening from housing
20 men with women.” (Ex. C, Johnson Decl., Doc. 36-3 at ¶ 9.)

21 First, Plaintiffs have failed to establish that merely working during their imprisonment means that they are bound by
22 the requirements of Penal Code section 2606. Indeed, such a conclusion leads to absurd results. For example, they are
23 not entitled to determine the housing of inmates, to search them, to evaluate their health needs or determine their
24 management or security needs. Thus, the suggestion that complying with Penal Code section 2700, which “requires
25 every able-bodied prisoner imprisoned in any state prison” to work entitles the inmates to the privileges or imposes
26 on them the obligations of the regulations imposed on the CDCR and its employees is unsupported by law or factual
27 allegations, rather than mere conclusions or suppositions.

28 In any event, it is well-established that “[t]he self-censorship door to standing does not open for every plaintiff,” *Cal.*
Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1095 (9th Cir. 2003), and “self-censorship alone is insufficient to
show injury.” *Lopez*, 630 F.3d at 792 (citations omitted). “Mere allegations of a subjective ‘chill’ are not an
adequate substitute for a claim of specific present objective harm or a threat of specific future harm.” *Id.* (cleaned
up) (internal quotation marks and citation omitted). Instead, the Court’s inquiry focuses on “the credibility of the
threat that the challenged law will be enforced against” the plaintiff. *Id.* (citation omitted).

“Where a plaintiff has refrained from engaging in expressive activity for fear of prosecution under the challenged
[regulation], such self-censorship is a constitutionally sufficient injury as long as it is based on an actual and well-
founded fear that the challenged statute will be enforced.” *Porter v. Martinez*, 68 F.4th 429, 437 (9th Cir. 2023). In
assessing a claimed threat of enforcement, the Court looks to three factors: “(1) whether the plaintiffs have articulated
a ‘concrete plan’ to violate the law in question, (2) whether the prosecuting authorities have communicated a specific
warning or threat to initiate enforcement proceedings, and (3) the history of past prosecution or enforcement under
the challenged [regulation].” *Id.* (cleaned up) (footnote and citation omitted). “Bare allegations that a plaintiff’s
speech has been chilled by the challenged statute are insufficient to establish a reasonable fear of prosecution.”
Wolfson v. Brammer, 616 F.3d 1045, 1062 (9th Cir. 2010) (citation omitted).

The difficulty in assessing Johnson’s alleged self-censorship injury lies in the fact that she has not alleged nor
declared that CDCR has in fact compelled her speech, nor threatens to do so. Furthermore, while Plaintiffs’
Complaint alleges that Plaintiffs “are all compelled by S.B. 132 to use words and language in a manner that suggests
adherence to beliefs the speaker may not share,” (Doc. 1 at ¶ 115), the Court may disregard allegations contradicted
by Johnson’s own declaration. *Sprewell v. Golden Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

Thus, it appears that Plaintiffs lack a “concrete plan” to make the same or similar remarks regarding gender pronouns

- 1 (9) S.B. 132 has violated the Establishment Clause of the First
 2 Amendment “by requiring prison housing placements between men’s
 3 and women’s facilities to be made,” and by imposing a “faith-based
 4 belief system,” which “compel[s] [Plaintiffs] to profess adherence”;¹⁶
- 5 (10) Romero and Chandler both allege their rights to religious exercise are
 6 violated by sharing housing with transgender women; and
- 7 (11) “S.B. 132 [] treats inmates differently on the basis of ‘gender
 8 identity’ or ‘transgender status’ causing disadvantage to inmates who
 9 have no ‘gender identity’ or whose ‘gender identity’ is not one of the
 10 identities favored under the statute,” in alleged violation of the Equal
 11 Protection Clause. This is because “S.B. 132 converts women’s
 12 correctional facilities into mixed-sex facilities, with no corresponding
 13 conversion of men’s facilities, imposing on women on the basis of sex
 14 a significant disadvantage and burden in the form of serving prison
 15 time without the benefit of rehabilitating in a single-sex
 16 environment.”¹⁷

17 and identity in the future, CDCR has not allegedly compelled Johnson’s speech, nor punished her for restraining from
 18 using inmates’ preferred gender pronouns, Johnson has not expressed that she intends to violate the law, CDCR has
 19 not threatened punishment, and Plaintiffs have not provided “the enforcement history of [S.B. 132] [to] corroborate[]
 20 a genuine threat.” *Wolfson*, 616 F.3d at 1062 (citation omitted). Like *Wolfson*, then, Johnson “can have no
 21 well-founded fear that [s]he will be prosecuted for violating” S.B. 132. *Id.* at 1063.

22 ¹⁶ Plaintiffs complain that S.B. 132 incorporates in the definition of “transgender,” those who identify as “two-spirit
 23 and mahu.” (Doc. 1 at ¶ 23.) However, Plaintiffs also complain that S.B. 132 “does not define ‘men,’ ‘women,’
 24 ‘male,’ ‘female,’ ‘gender,’ or ‘gender identity,’ yet uses all of those terms in tautological attempts to define other
 25 terms such as ‘transgender[.]’” (Doc. 1 at ¶ 22.) To the contrary, the basis of Plaintiffs’ Complaint is *not* the text of
 26 S.B. 132, but instead, the California Legislative Counsel’s Digest. *See* CAL. LEGIS. COUNSEL’S DIGEST, 2020 Cal.
 27 Legis. Serv. Ch. 182 (S.B. 132) (Cal. Sept. 26, 2020).

28 To begin, it is now well-established that a plaintiff may not complain about a government-sponsored event or law
 that contains a religious theme. *City of Ocala v. Rojas*, 143 S. Ct. 764, 764 (2023) (Gorsuch, J.) *in approval of*
denying cert. (“This Court has never endorsed the notion that an ‘offended observer’ may bring an Establishment
 Clause claim.”); *id.* at 765 (“Moving forward, I expect lower courts will recognize that offended observer standing
 has no more foundation in the law than the *Lemon* test that inspired it.”); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S.
 507, 535 (2022) (“Nor does the Clause compel the government to purge from the public sphere anything an objective
 observer could reasonably infer endorses or partakes of the religious.”) (internal quotation marks and citation
 omitted). At least one Justice views the “offended observer” injury as a part of Article III standing. *Rojas*, 143 S. Ct.
 at 764–65.

Thus, Plaintiffs cannot complain that S.B. 132’s legislative history took into account “two-spirit” and “mahu”
 individuals because it makes them uncomfortable. And, as a matter of law, the Court cannot plausibly determine that
 transgenderism is a religion, *Edmo v. Corizon, Inc.*, 935 F.3d 757, 768 (9th Cir. 2020), nor have Plaintiffs alleged that
 “two spirit” and “mahu” are religions. (Doc. 1 at ¶ 23.) Therefore, as a matter of both subject-matter jurisdiction,
 and for the purposes of plausibly alleging a claim, this injury and cause of action have no merit.

¹⁷ Like many of Plaintiffs’ aforementioned allegations, this allegation rests on the alleged unlawfulness of S.B. 132
 itself, and not on the alleged unlawful conduct performed by *Defendant*. *Dep’t of Educ. v. Brown*, 600 U.S. 551, 561
 (2023) (“Second, the plaintiff’s injury must *be fairly traceable to the challenged action of the defendant*, meaning
 that there must be a causal connection between the injury *and the conduct complained of.*”) (emphases added);
O’Handley v. Weber, 62 F.4th 1145, 1161 (9th Cir. 2023) (alleged injury must be “fairly traceable *to the challenged*
conduct of the defendant”) (emphasis added).

1
2 (Doc. 1 at ¶¶ 4, 42–48, 69–72, 82–84, 90, 95, 100, 103.)

3 For each federal constitutional claim, Plaintiffs request a declaratory judgment that S.B.
4 132 violates the Eighth, First, and Fourteenth Amendments to the U.S. Constitution. (Doc. 1 at
5 20–26.) Plaintiffs also request the Court issue a permanent injunction to “enjoin[] Defendants
6 from enforcing or implementing S.B. 132.” (*Id.* at ¶ 141.) In their opposition to the motion to
7 dismiss, Plaintiffs state that their injuries are redressable via “restoring pre-SB 132 status quo[.]”
8 (Doc. 36 at 15 (parentheticals omitted).) Similarly, in their opposition to the motion to strike,
9 Plaintiffs reiterate that their injuries would be redressed through their “requested relief” of
10 “return[ing] to status quo prior to SB 132, where male inmates were housed in women’s prisons
11 only on a case-by-case basis involving objective factors relevant to women’s safety, which factors
12 are ‘off the table’ under SB 132.” (Doc. 41 at 7.)

13 There are several issues plaguing the Court’s ability to redress Plaintiffs’ grievances. To
14 begin, the Court’s issuance of a declaration that the government is violating the Constitution
15 “alone is not substantially likely to mitigate the plaintiffs’ asserted concrete injuries. A
16 declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by
17 itself to remediate their alleged injuries absent further court action.” *Juliana*, 947 F.3d at 1170
18 (citations omitted); *see also Haaland*, 599 U.S. at 294 (“It is a federal court’s judgment, not its
19 opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates
20 redressability.”). The crux of Plaintiffs’ requested remedy is a permanent injunction enjoining
21 CDCR and its officials from further implementing and enforcing S.B. 132—*i.e.*, prohibiting
22 CDCR staff and inmates from addressing incarcerated individuals who are “transgender,

23
24 _____
25 Regardless, Plaintiffs still fail to adequately allege an equal protection injury. S.B. 132, Cal. Penal Code § 2606(a)
26 allows “individual[s] incarcerated by [CDCR] who [are] transgender, nonbinary, or intersex, regardless of anatomy,
27 shall . . . [to] [b]e housed at a correctional facility designated for men or women based on the individual’s
28 preference[.]” Cal. Penal Code § 2606(a)(3). While “[u]neven enforcement can pose an equal protection issue,”
O’Handley, 62 F.4th at 1164 (citation omitted), the crux of Plaintiffs’ alleged equal protection injuries—that
cisgender, male correctional facilities have not received as many transgender inmates as women’s facilities—does
not plausibly allege an equal protection injury incurred *at the hands of CDCR*. Not only is this absent in Plaintiffs’
Complaint for the purposes of standing, but as a matter of law, it is also implausible when the plain text of S.B. 132
places that decision at the hands of inmates themselves—not the Government. That the law is “susceptible to uneven
enforcement” is insufficient to confer standing. *Kumar v. Koester*, No. 2:22-cv-07550-RGK-MAA, 2023 WL
4781492, at *3 (C.D. Cal. July 25, 2023) (awaiting publication).

1 nonbinary, or intersex . . . in a manner consistent with the incarcerated individual’s gender
2 identity,” and prohibiting CDCR from housing such individuals in correctional facilities based on
3 their preference. Cal. Penal Code §§ 2606(a)(1), (3).

4 There are two fatal flaws concerning this requested injunction. First, it would require the
5 Court to order CDCR officials to identify, locate, and remove potentially over two dozen¹⁸
6 transgender, intersex, and nonbinary individuals from California prisons (Doc. 1 at ¶ 39).
7 Not only is it “beyond the power of an Article III court to order, design, supervise, or implement
8 the plaintiffs’ [suggested] remedial plan,” which would inevitably “require a host of complex
9 policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and
10 legislative branches,” *Juliana*, 947 F.3d at 1171, but this is also not what Plaintiffs’ Complaint
11 requests. They request the Court enjoin CDCR and its officials from *further* enforcing or
12 implementing S.B. 132. (*See* Doc. 1 at ¶ 141.) Even if the Court granted this relief, it would only
13 stop further inflow of gender-nonconforming incarcerated individuals; those who CDCR has
14 already housed in CCWF would remain. (Doc. 32 at 18 (“An injunction against implementing the
15 specific policy contained in SB 132 would do nothing to change CDCR’s obligations to maintain
16 a similar policy . . . and thus would do nothing to remedy Plaintiff[s]’ alleged injuries.”).)

17 Moreover, the Court is not convinced that life in these prisons “pre-SB 132” would
18 redress Plaintiffs’ complaints. As Plaintiffs admit, California Code of Regulations, Title 15,
19 § 3269 (2017) allowed transgender inmates and inmates with symptoms of gender dysphoria to be
20 referred to a classification committee for a determination of appropriate housing at a designated
21 institution. CAL. CODE REGS. tit. 15, § 3269(g) (2017); (Doc. 41 at 7.) This regulation existed at
22 least three years prior to the enactment of S.B. 132 and allowed for transgender inmates to be
23 housed with cisgender, female inmates. *Id.* at §§ 3269(g), 3375(b) (2017).

24 In other words, the remedial scheme laid out in §§ 3269(g) and 3375(b)¹⁹ directly

25 _____
26 ¹⁸ At the time Plaintiffs filed their opposition brief, they represented that there were at least two dozen of such
27 transfers into CIW and CCWF. (Doc. 1 at ¶ 39.) In their Opposition, however, Plaintiffs represent that there are at
28 least 300 of such individuals housed in women’s correctional facilities. (Doc. 36 at 26.) Regardless, the number of
incarcerated gender non-conforming individuals is certainly high.

¹⁹ Now located at CAL. CODE REGS. tit. 15, § 3269(h) (2022–23) and § 3375, respectively.

1 undermines Plaintiffs’ arguments that by restoring California’s women’s correctional facilities to
2 their housing arrangements pre-S.B. 132, cisgender and transgender inmates would live in
3 separate housing facilities. Indeed, Plaintiffs do not seek to enjoin *these* provisions of the
4 California Code of Regulations, and such regulations would still exist if the Court issued
5 Plaintiffs their requested injunction. Thus, Defendants correctly point out that “regardless of the
6 outcome of this suit, transgender women will continue to be housed in women’s facilities.” (Doc.
7 15-1 at 19.)

8 Furthermore, it is entirely unclear how either a declaration or permanent injunction would
9 redress Plaintiffs complaint regarding CDCR’s alleged responses to their administrative
10 grievances. Even if the Court granted Plaintiffs’ request for a declaration and injunction, the
11 Court lacks power to oversee and prohibit CDCR officials, staff, or even Plaintiffs from referring
12 to gender-nonconforming individuals by their preferred gender identity, if they so choose.
13 *Juliana*, 947 F.3d at 1171–72.²⁰ “[E]ven under such a scenario, the plaintiffs’ request for a
14 remedial plan would subsequently require the judiciary to pass judgment on the sufficiency of the
15 government’s response to the order, which necessarily would entail a broad range of
16 policymaking. And inevitably, this kind of plan will demand action not only by the Executive,
17 but also by Congress.” *Id.* at 1172.

18 Accordingly, the Court determines that it cannot likely redress Plaintiffs’ asserted injuries,
19 even in the face of a favorable outcome. Such requested relief exceeds the power of an Article III
20 court, invades the province of the other branches of government, and in the face of pre-existing
21 California Code of Regulations provisions, would not guarantee that gender non-conforming
22 individuals live separate and apart from cisgender, female inmates, as Plaintiffs request. Also,
23 CDCR staff, Plaintiffs, and other prisoners may still choose to call such individuals by their
24 preferred gender pronouns, honorifics, and gender identities.²¹ For this reason, in addition to

25 ²⁰ Alternatively, the Court *could* enjoin CDCR officials from requiring inmates refer to each other by their preferred
26 gender pronouns, but as footnote 15 explains, Plaintiffs have not proffered a ripe injury of self-censorship.

27 ²¹ Indeed, such a ruling from this Court could constitute a prior restraint on speech. *Twitter, Inc. v. Garland*, 61 F.4th
28 686, 702–03 (9th Cir. 2023) (“In First Amendment law, a prior restraint is an order forbidding certain
communications when issued in advance of the time that such communications are occur.”) (internal quotation marks

1 issues of abandonment and immunity, the Court must **GRANT** Defendants’ motion to dismiss.
2 Defendants’ Request for Judicial Notice (Doc. 15-2) is accordingly **DENIED AS MOOT**.

3 *v. 42 U.S.C. § 1983*

4 Finally, the Court notes that it must grant Defendants’ motion to dismiss for failure to
5 state a claim because Plaintiffs have failed to bring their claims pursuant to 42 U.S.C. § 1983.
6 (*See generally* Doc. 1.) As recited throughout this order, Plaintiffs are state prisoners who have
7 sued state officials and a state agency *directly* for alleged federal and state constitutional
8 violations. In *Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016), however, the Ninth Circuit
9 held “that a § 1983 action *is the exclusive vehicle* for claims brought by state prisoners that are
10 not within the core of habeas corpus.” (emphasis added); *id.* at 930 (“§ 1983 is the exclusive
11 remedy for state prisoner claims that do not lie at the core of habeas.”). By failing to bring their
12 constitutional claims against Defendants pursuant to 42 U.S.C. § 1983, Plaintiffs have improperly
13 brought this civil rights action. This serves as yet another basis to grant Defendants’ motion.

14 C. Leave to Amend

15 Courts have broad discretion to grant leave to amend a complaint. *Nguyen v. Endologix,*
16 *Inc.*, 962 F.3d 405, 420 (9th Cir. 2020). In determining whether a plaintiff should be granted
17 leave to amend, courts consider “the presence or absence of undue delay, bad faith, dilatory
18 motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the
19 opposing party and futility of the proposed amendment.” *Kroessler v. CVS Health Corp.*, 977
20 F.3d 803, 814–15 (9th Cir. 2020) (internal quotation marks and citation omitted). Generally, Rule
21 15 advises that “[t]he court should freely give leave when justice so requires.” Fed. R. Civ. P.
22 15(a)(2). Indeed, “[i]t is the black-letter law that a district court must give plaintiffs at least one
23 chance to amend a deficient complaint,” unless there is “a clear showing that amendment would
24 be futile.” *Barke v. Banks*, 25 F.4th 714, 721 (9th Cir. 2022) (internal quotation marks and
25 citation omitted).

26 Granting leave to amend is futile, however, when the defendant enjoys sovereign

27 _____
28 and citation omitted). “[T]he government usually may not impose [such] prior restraints on speech,” *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022) (citation omitted), as all restraints on speech are presumptively unconstitutional. *Twitter*, 61 F.4th at 703.

1 immunity. *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, 80 F.4th 943, 955–56 (9th Cir.
2 2023) (“As the *Ex parte Young* exception does not apply, any amendment would be futile.”);
3 *Portnoy v. California*, 821 F. App’x 848, 848 (9th Cir. 2020) (amendment affirmed as futile
4 because defendant enjoyed Eleventh Amendment immunity). Similarly, amendment is futile
5 when the Court cannot redress Plaintiff’s claims. *See Temple of 1001 Buddhas v. City of*
6 *Fremont*, 588 F. Supp. 3d 1010, 1020 (N.D. Cal. 2022) (denying leave to amend claims where
7 Plaintiff’s injury was not redressable); *see also Huang v. Small Bus. Admin.*, No. 22-cv-03363-
8 BLF, 2023 WL 3028087, at *5 (N.D. Cal. Apr. 19, 2023) (denying leave to amend, in part,
9 because of “the fact that the lack of redressability could not be cured”). For claims that the
10 plaintiff may redress, the Court must grant the plaintiff leave to amend if it dismisses the first
11 complaint for lack of Article III standing. *Bolden-Harge v. Office of Cal. State Controller*, 63
12 F.4th 1215, 1221 n.1 (9th Cir. 2023).

13 Here, the Court determines not only that CDCR enjoys immunity under the Eleventh
14 Amendment, but also that most of Plaintiffs’ claims are not redressable under the bounds of
15 Article III. As such, the Court **DENIES** Plaintiffs leave to amend their Complaint against CDCR,
16 and for claims that the Court cannot redress. In light of this opinion, Plaintiffs may file an
17 amended Complaint against only the state official defendants.

18 **VI. CONCLUSION**

19 Based upon the foregoing, the Court **ORDERS**:

- 20 (1) Defendants’ Motion to Strike Plaintiffs’ Declarations (Doc. 38), which the Court
21 treats as an Objection to Plaintiffs’ Exhibits, is **DENIED**.
- 22 (2) Defendants’ Motion to File Redacted Exhibits to Thissen Declaration (Doc. 15-6)
23 is **DENIED AS MOOT**.
- 24 (3) Defendants’ Motion to Dismiss (Doc. 15) is **GRANTED with leave to amend** as
25 to only the individual defendants and **without leave to amend** as to the California
26 Department of Corrections and Rehabilitations.
- 27 (4) Defendants’ Request for Judicial Notice of Matters and Records in Support of
28 Motion to Dismiss (Doc. 15-2) is **DENIED AS MOOT**.

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(5) **Within 21 days**, Plaintiffs may file an amended complaint or a notice of dismissal. Failure to timely file either document will result in dismissal of Plaintiffs' case with prejudice pursuant to Rule 41(b).²²

IT IS SO ORDERED.

Dated: **May 14, 2024**


UNITED STATES DISTRICT JUDGE

²² See *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1063–65 (9th Cir. 2004) (stating that a plaintiff's failure to take any action in response to a court's ultimatum to the plaintiff to either amend their complaint or to indicate to the court that it will not do so "is properly met with the sanction of a Rule 41(b) dismissal").