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7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 PATRICK STEPHEN DAVIS,
11 Plaintiff,
12 v.
13 STATE OF NEVADA ET AL.;
14 Defendants.

Case No.: **3:13-cv-00559-MMD-WGC**

MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM

15
16 COMES NOW, Defendants the State of Nevada, Nevada Board of Parole
17 Commissioners, Nevada Department of Public Safety, Nevada Division of Parole and
18 Probation, Connie Bisbee, James Wright, Bernard Curtis, Claudia Steiber, Natalie Wood,
19 Claudia Cole, Aaron Evans, James Gothan, James Sackett and Nevada Attorney General
20 Catherine Cortez Masto, by and through their attorneys, CATHERINE CORTEZ MASTO,
21 Attorney General, and LORI M. STORY, Deputy Attorney General, and hereby moves for
22 dismissal of Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

23 The Defendants' Motion to Dismiss is based on the above-referenced rule of civil
24 procedure, the attached Points and Authorities and all other papers and pleadings filed
25 therein. Defendants further move the Court to strike from the Complaint the Statement of
26 Facts contained therein as they are irrelevant, untimely and inflammatory.

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28 ///

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1 I. INTRODUCTION

2 Plaintiff Patrick S. Davis brings an action against the aforementioned Defendants
3 based on various directives and occurrences resulting from Plaintiff's status as a sex offender
4 subject to Lifetime Supervision. Plaintiffs alleges violations of The First, Fourth, Fifth, Sixth,
5 Eighth and Fourteenth Amendments. Complaint (ECF No.1) at 55-92. Plaintiff further claims
6 violations of 42 U.S.C. §§ 1981, 1985, 1986 and 1988 and state and federal law. Plaintiffs
7 seek monetary damages including compensatory, punitive and exemplary damages in an
8 amount of at least \$100,000.00 *Id.* at 93-113. Plaintiff also seeks declaratory and injunctive
9 relief. *Id.* at 114-115.

10 II. STATEMENT OF FACTS

11 On or about December 30, 2003, Plaintiff was charged with the Use of Internet to Lure
12 a Child in violation of NRS 201.560. He entered a guilty plea and was granted a suspended
13 sentence of sixteen to seventy-two months. Plaintiff was admitted to five years of probation
14 and required to submit to lifetime supervision by the Nevada State Department of Parole and
15 Probation. Complaint (ECF No. 1), p. 6.

16 On October 4, 2013, Plaintiff filed his Civil Rights Complaint Pursuant to 42 U.S.C §
17 1983 against Defendants. Complaint (ECF No.1). The Statement of Facts alleged by Plaintiff
18 is set out in "Examples." The lengthy narrative, which consists of some 55 pages, is
19 apparently not the substance of Plaintiff's claims, but has been provided as background for
20 the allegations set forth in the ten causes of action and the twenty claims for relief that make
21 up Plaintiff's complaint.¹ The acts set forth in the actual body of the Complaint's Causes of
22 Action to support the alleged Constitutional violations encompass a period of time from April
23 22, 2011, through August of 2013. The twenty claims for relief contain no supporting facts.

24 III. LEGAL STANDARD FOR MOTION TO DISMISS

25 In considering a motion to dismiss, all material allegations in the complaint are
26 accepted as true and are to be construed in the light most favorable to the non-moving party.

27 _____
28 ¹ Defendants object to any attempt by Plaintiff to employ these facts to support his claims for relief. All actions described in the Examples occurred before October 4, 2011, and would fall outside the statute of limitations imposed for § 1983 claims, as is discussed below.

1 *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). A dismissal under Federal Rule of
 2 Civil Procedure 12(b)(6) is essentially a ruling on a question of law. *North Star International v.*
 3 *Arizona Corp. Comm.*, 720 F.2d 578, 580 (9th Cir. 1983). For a defendant to succeed, it must
 4 appear to a certainty that a plaintiff will not be entitled to relief under any set of facts that could
 5 be proven under the allegations of the complaint. *Halet v. Wand International Co.*, 672 F.2d
 6 1305, 1309 (9th Cir. 1982). Dismissal can be based on the lack of a cognizable theory or the
 7 absence of sufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds,*
 8 *Inc.*, 749 F.2d 530, 533-534 (9th Cir. 1984).

9 Plaintiff's Complaint should be dismissed for failure to state a claim for the following
 10 reasons: 1) The State of Nevada, its agencies and Officials are immune from suit in federal
 11 court; 2) Plaintiff failed to state claims against Defendants Cortez- Masto, Bisbee, Wright and
 12 Curtis; 3) Plaintiff's claims against Defendants Evans, Gothan, Sackett, Steiber, Cole and
 13 Wood are barred by qualified immunity or by the statute of limitations; 4) Plaintiff failed to
 14 plead the necessary elements of an Equal Protection cause of action; 5) Plaintiff failed to
 15 plead the necessary elements of an Eighth Amendment Cruel and Unusual Punishment cause
 16 of action; 6) Plaintiff failed to plead the necessary elements of a claim under the First
 17 Amendment.

18 **IV. ARGUMENT**

19 **A. Section 1983 and Eleventh Amendment Immunity.**

20 Plaintiff has named defendants who should be dismissed from the complaint because
 21 they are not "persons" for purposes of 42 U.S.C. § 1983 or because they enjoy immunity from
 22 suit in federal court. Defendants seek dismissal of the State of Nevada, Nevada Attorney
 23 General Catherine Cortez Masto, the Nevada Board of Parole Commissioners, the Nevada
 24 Department of Public Safety and the Nevada Department of Parole and Probation as improper
 25 defendants in this action.

26 The requirements for relief under § 1983 are: (1) a violation of rights protected by the
 27 Constitution or created by federal statute, (2) proximately caused (3) by a person (4) acting
 28 under color of state law. *Crompton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). A plaintiff

1 must plead that the defendants acting under color of state law, deprived plaintiff of rights
2 secured by the Constitution or federal statutes. *Gibson v. United States*, 781 F.2d 1334, 1338
3 (9th Cir. 1986); see also *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

4 Plaintiff has named the State of Nevada, the Nevada Board of Parole Commissioners,
5 the Nevada Department of Public Safety and the Nevada Division of Parole and Probation as
6 defendants. These defendants are not “persons” for purposes of § 1983. See *Arizonans for*
7 *Official English v. Arizona*, 520 U.S. 43, 69, 117 S.Ct. 1055, 1069 (1997); *Will v. Mich. Dep’t of*
8 *State Police*, 491 U.S. 58, 68, 71, 109 S.Ct 2304, 23 (1989).

9 The Eleventh Amendment of the U.S. Constitution provides, “The Judicial power of the
10 United States shall not be construed to extend to any suit...against one of the United States
11 by Citizens of another State.” U.S. CONST. amend. XI. This type of protection has been
12 extended to protect a state from federal suits brought by its own citizens. *Edelman v. Jordan*,
13 415 U.S. 651, 662-63 (1974); *Pittman v. Oregon Employment Dep’t*, 509 F.3d 1065, 1071 (9th
14 Cir. 2001). A state may only be sued in federal court when the state has explicitly waived its
15 Eleventh Amendment immunity. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057 (1978).
16 The State of Nevada does not waive its immunity from suit conferred under the Eleventh
17 Amendment of the United States Constitution. NRS 41.031(3).

18 This immunity also bars suits against state agencies. See *P.R. Aqueduct & Sewer*
19 *Auth.v. Metchalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S.Ct. 684, 687 (1993); *Welch v. Texas*
20 *Dept. of Highways and Public Transportation*, 483 U.S. 468, 480, 107 S.Ct. 2941, 2949-2950
21 (1987) (plurality opinion) (Absent waiver, neither a State nor agencies acting under its control
22 may “be subject to suit in federal court.”); *Doe v. Lawrence Livermore Nat’l Lab.*, 131 F.3d
23 836, 839 (9th cir. 1997); *O’Grady-Sullivan v. State of Nevada*, 2011 WL 6301047 *3 (D.Nev.
24 2011) (Plaintiff’s § 1983 claims against the Nevada Department of Public Safety and the
25 Nevada Highway Patrol are dismissed because these are state agencies and state agencies
26 are not persons under § 1983).

27 Based on the Eleventh Amendment to the United States Constitution’s prohibition
28 against haling an unconsenting state or its agencies into federal court, the State of Nevada,

1 the Nevada Department of Public Safety, the Nevada Division of Parole and Probation, and
2 the Nevada Board of Parole Commissioners are entitled to dismissal from the action.

3 1. State Officials as Defendants – Official Capacity.

4 State officials sued in their official capacity for money damages are not persons for
5 purposes of § 1983. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n. 24, 117
6 S.Ct. 1055, 1069-1070 (1997); *Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007).
7 Naming a person in their official capacity is an alternative way of pleading an action against
8 the entity of which that person is an officer. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991);
9 *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099 (1985); see also *Holley v. Cal. Dep't*
10 *of Corr.*, 599 F.3d 1108, 111 (9th Cir. 2010 (treating suit against state officials in their official
11 capacities as a suit against the state of California).

12 During the time period of the facts alleged, Defendant Wright served as the Director of
13 the Department of Public Safety (DPS), and Defendant Curtis has served as the Chief of the
14 Division of Parole and Probation (P&P). Pursuant to NRS 213.1071(3), the Chief of P&P is
15 the chief Parole and Probation officer, and is appointed by the director of the DPS, pursuant to
16 NRS 213.1092(1). However, the Parole Board is appointed by the Governor and created
17 within the Department, pursuant to NRS 213.108(1)-(2). These defendants, therefore, act in
18 supervisory roles. Defendant Bisbee is the Chairman of the Nevada Board of Parole
19 Commissioners and she is appointed by the Governor. NRS 213.108(3).

20 Where a state official is named as a defendant in his or her official capacity, the official
21 is entitled to the same immunity as is afforded the agency which the official represents.
22 *Graham*, 473 U.S. at 166. Thus, Plaintiff is not entitled to obtain money damages from
23 Defendants Connie Bisbee, James Wright or Bernard Curtis in their capacity as
24 representatives of their various agencies – in their official capacity.

25 2. State Officials – Personal Capacity.

26 Where the official is named in his or her personal capacity, the official must have been
27 the proximate cause of the injury, because no state agency can be held liable under § 1983
28 on a *respondeat superior* theory. *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S.Ct. 1937

1 (2009); *Robertson v. Sichel*, 127 U.S. 507, 515–516, 8 S.Ct. 1286 (1888) (“A public officer or
 2 agent is not responsible for the misfeasances or position wrongs, or for the nonfeasances, or
 3 negligences, or omissions of duty, of the subagents or servants or other persons properly
 4 employed by or under him, in the discharge of his official duties”); see *Rizzo v. Goode*, 423
 5 U.S. 362, 365-66, 96 S.Ct. 598, 602 (1976) (The federal court has no legal power to “inject
 6 itself into the internal disciplinary affairs of [] state agenc[ies]). Thus, Plaintiff must allege direct
 7 personal involvement in the alleged wrongs before the official can be held responsible for
 8 them. He has not done so.

9 Mere knowledge of the acts is insufficient; the official must intend to violate Plaintiff’s
 10 rights to be held liable. *Iqbal*, 556 U.S. at 677, 129 S.Ct. 1929. In his complaint, Plaintiff
 11 alleges the actor defendants, i.e., Evans, Gothan, Sackett, Wood, Cole and Steiber, failed to
 12 follow policies and procedures in effecting his Lifetime Supervision and the arrest that
 13 occurred on September 7, 2011. Plaintiff does not claim any specific act or knowledge on the
 14 part of Defendants Bisbee, Curtis or Wright prior to or at the time that the wrongs are alleged
 15 to have occurred. Nowhere in the complaint has Plaintiff set forth independent actions taken
 16 by these officials. Rather, his single reference to Director Wright and Division Chief Curtis in
 17 the Eighth Cause of Action merely identify them as part of the DPS and the P&P in a bald
 18 assertion of conspiracy. Such bald, vague and conclusory allegations of official participation
 19 are not insufficient to overcome this motion to dismiss. *Ivey v. Bd. Of Regents of the Univ. of*
 20 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982); see also *Jones v. Cmty. Redev. Agency*, 733 F.2e
 21 646, 649 (9th Cir. 1984) (finding conclusory allegations, without factual support, insufficient to
 22 state a claim under § 1983). As for Catherine Cortez Masto, the Attorney General for the
 23 State of Nevada; she is not mentioned anywhere within the body of the complaint. These
 24 Defendants seek dismissal from the action.

25 **B. Qualified Immunity.**

26 Qualified Immunity shields government officials from civil damages liability unless the
 27 official violated a statutory or constitutional right that is clearly established at the time of the
 28 challenged conduct.” *Reichle v. Howard*, ____ U.S. ____, 132 S.Ct. 2088, 2093 (2012).

1 This is an immunity from suit, not a mere defense to liability. *Pearson v. Callahan*, 555 U.S.
2 223, 231, 129 S.Ct. 808, 815 (2009). It is designed to “ensure that ‘insubstantial claims’
3 against government officials [will] be resolved prior to discovery.” *Id.* quoting *Anderson v.*
4 *Creighton*, 483 U.S. 635, 640, n.2, 107 S.Ct. 3034 (1987).

5 Assessing whether an official is entitled to immunity is a two prong inquiry. Under the
6 first prong, the Court asks whether “[t]aken in the light most favorable to the party asserting
7 the injury, do the facts alleged show the officer’s conduct violated a constitutional right?”
8 *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151 (2001). Under the second prong we
9 examine whether the right was clearly established. *Id.* To be “clearly established, the contours
10 of the right must be sufficiently clear that a reasonable official would understand that what he
11 is doing violates the right. *Anderson*, 483 U.S. at 639, 107 S.Ct. 3034 (internal quotation
12 marks omitted). In other words, “existing precedent must have placed the statutory or
13 constitutional question beyond debate.” *Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S.Ct. 2074,
14 2083 (2011). The court may examine either prong first, considering the circumstances.
15 *Pearson v. Callahan*, 555 U.S. at 236, 129 S.Ct. 808.

16 Plaintiff complains that the Defendants violated his rights when they arrested him for
17 refusing to answer questions to be posed to him during a polygraph mandated by the
18 conditions of his Lifetime Supervision and for his blatant lack of cooperation in that process,
19 when they searched his residence and personal items in the common areas of the residence
20 without a search warrant and without “reasonable cause,” when they imposed a curfew on him
21 for Halloween in 2011, and when they directed him to cease his correspondence to the Parole
22 Board.

23 1. Arrest for Failure to Cooperate and Refusing to Take Polygraph – Second
24 Cause of Action.

25 Plaintiff alleges that his Fourth and Fifth Amendment rights were violated by
26 Defendants Sackett, Evans and Gothan when they refused to recognize his right to refuse to
27 incriminate himself and arrested him for a violation of the conditions of his Lifetime
28 Supervision.

1 According to the Complaint, Plaintiff was called to meet his supervising officer and to
 2 submit to a polygraph examination, as required by his Lifetime Supervision. When Plaintiff
 3 delayed the proceedings by raising objections and concerns about the questions to be asked,
 4 asserting his right to have counsel present during “questioning” and his statement that he
 5 intended to invoke his Fifth Amendment right to remain silent in response to several of the
 6 proposed questions, Defendants Sackett, Evans and Gothan terminated the examination and,
 7 exercising their discretion as supervising officers, directed Plaintiff to present himself to the
 8 main P&P office in Reno. Complaint (ECF No.1) p. 55-66. Plaintiff’s actions violated the
 9 conditions of Plaintiff’s Lifetime Supervision which require him to submit to a polygraph
 10 examination upon his supervising officer’s request. *Id.* at 58, lines 12-13. In addition, the
 11 Plaintiff is required to cooperate with his supervising officer at all times.

12 A Government official's conduct violates clearly established law when, at the time of the
 13 challenged conduct, “[t]he contours of [a] right [are] sufficiently clear” that every “reasonable
 14 official would have understood that what he is doing violates that right.” *Creighton*, 483 U.S. at
 15 640, 107 S.Ct. 3034 *see also Malley v. Briggs*, 475 U.S. 335, 344-45, 106 S. Ct. 1092, 1098
 16 (1986) (“[W]e hold that the same standard of objective reasonableness that we applied in the
 17 context of a suppression hearing in *Leon, supra*,² defines the qualified immunity accorded an
 18 officer whose request for a warrant allegedly caused an unconstitutional arrest.”).

19 When Defendants Evans and Gothan, with the approval of their supervising officers,
 20 Cole, Wood and Steiber, determined to arrest Plaintiff, their actions were taken in a good faith
 21 belief that they were entitled to make such an arrest under the conditions imposed on Plaintiff
 22 as part of his Lifetime Supervision. Defendants Evans, Gothan, Cole, Wood and Steiber are
 23 entitled to qualified immunity and the Second Cause of Action and all related claims for relief
 24 should be dismissed.

25 2. Interference with Right to Petition – Fourth Cause of Action.

26 Plaintiff contends that Defendant Evans and Defendant Wood violated his First and
 27 Fourteenth Amendment rights when they informed him he was not to “write any more letters to
 28

² *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984),

1 the Division of Parole and Probation concerning any issues that Plaintiff had with his
2 conditions, the polygraph, Policy and Procedure, or answer to any questions that he might
3 pose.” Complaint (ECF No.1), p. 72. Plaintiff acknowledges that the Parole Board advised
4 him that in order to ask the Parole Board to address his concerns or modify his conditions of
5 supervision he needed to enlist the support of his supervising officers. *Id.* at 73. The directive
6 to discontinue his correspondence to the Parole Board provided Plaintiff notice that
7 Defendants Evans and Woods did not support Plaintiff’s efforts for modification of his
8 conditions or other issues. Plaintiff has not shown that the Defendants’ decision to discourage
9 Plaintiff’s ongoing and contentious correspondence with the Parole Board violated his
10 Constitutional rights. The Defendants’ actions were reasonably taken in support of the
11 policies of the Parole Board and the Defendants’ discretionary decision to not support Plaintiff
12 in his correspondence was reasonably intended to effectively supervise Plaintiff. Defendants
13 Evans and Woods are entitled to qualified immunity on this cause of action. The Fourth
14 Cause of Action and all related claims for relief should be dismissed.

15 3. Curfew – Fifth Cause of Action

16 Plaintiff complains that Defendant Evans violated his and his family’s First, Fifth and
17 Fourteenth Amendment rights by imposing a curfew for him on October 31, 2011, preventing
18 him and his family from entertaining trick-or-treaters. According to the complaint, Defendant
19 Evans provided a written notice of curfew on October 11, 2011, which required Plaintiff to
20 refuse to “avoid contact with children, and not pass out candy or other Halloween treats.”
21 Complaint (ECF No.1), p. 74. He was required to “darken his house and otherwise
22 discourage trick-or-treaters” by marking his residence with a sign indicating ‘NO CANDY.’” *Id.*
23 Alternatively, Plaintiff alleges that he was advised that if other members of his household
24 intended to pass out candy, he was required to vacate his residence during the curfew time
25 and inform Evans of his location.

26 Plaintiff acknowledges that the conditions of his Lifetime Supervision prohibit him from
27 having contact with persons under the age of 18. Complaint (ECF No. 1), p. 75. The
28 condition is modified to prohibit contact in a “secluded environment unless another adult who

1 has never been convicted of an offense listed in NRS 179D.410 is present.” *Id.* Plaintiff
 2 asserts that the special curfew exceeded the condition and was unclear on many points.³ He
 3 contends the requirement to post a notice was mandating speech and that it was “arbitrary,
 4 motivated by political incentive in response to popular sentiment against [plaintiff] and other
 5 offenders and lends itself to discriminatory enforcement and suppression of the constitutional
 6 rights of Plaintiff and his family....” *Id.* at 77.

7 Defendant Evans is entitled to qualified immunity from this claim. His actions were in
 8 conformity with the intent and spirit of the conditions of Plaintiff’s Lifetime Supervision,
 9 particularly given the nature of the crime for which Plaintiff was convicted. Defendant Evans
 10 acted with a reasonable belief that his actions in limiting Plaintiff’s opportunities to interact
 11 inappropriately with young children were in line with the terms and intentions of the conditions
 12 of Plaintiff’s Lifetime Supervision. The curfew allowed an alternative for Plaintiff’s family to
 13 participate in the Halloween activities by directing him to make himself absent from the home.
 14 The curfew could not reasonably be construed to violate Plaintiff’s rights, as they exist
 15 following his conviction. *See Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir.1975) (en banc)
 16 (plurality opinion) (parolees and other conditional releases are not entitled to the full panoply
 17 of rights and protections possessed by the general public). This Cause of Action and all
 18 related claims for relief should be dismissed.

19 Additionally, in so far as Plaintiff is asserting the rights of others, such as his family, he
 20 has no standing to raise such claims. The issue of standing is discussed *infra*.

21 4. Search – Seventh Cause of Action.

22 Plaintiff acknowledges that he is a convicted sex offender subject to Lifetime
 23 Supervision by the Nevada Division of Parole and Probation pursuant to Nevada Revised
 24 Statute (NRS) §§ 213.1095(9) and 213.1096(3). Complaint (ECF No.1), p. 6, lines 12-17; p. 6,
 25 lines 19-21. The terms of the supervision were made clear to Plaintiff before his release from
 26 parole as required. *Palmer v. State*, 118 Nev. 823, 827, 59 P.3d 1192, 1194-95 (2002)

27 _____
 28 ³ Defendants contend that Plaintiff is merely picking nits with the vagueness argument of this claim, as the letter and defendant Evans’s instructions, as relayed by plaintiff in the complaint, were quite clear.

1 (“Before the expiration of a term of imprisonment, parole or probation, the sex offender
 2 receives written notice of the particular conditions of his lifetime supervision, as well as an
 3 explanation of those conditions from a parole and probation officer.”) Failure to abide by the
 4 conditions of lifetime supervision is a Category B felony punishable by a prison term of one to
 5 six years and a fine of up to \$5,000.00. NRS 213.1243(8).

6 Plaintiff’s conditions of Lifetime Supervision include the requirement that he permit the
 7 officers to search his residence and items found in the common areas of the residence when
 8 the officer discerns reasonable cause for a search. *Id.* at 84, lines 8-10. Given the alleged
 9 facts, Plaintiff has not stated a violation of his constitutional rights when Defendant Evans
 10 “searched” a cell phone found lying in the common area of Plaintiff’s residence to ensure that
 11 the phone was password protected, as required by Plaintiff’s conditions of supervision.
 12 Because of the conditions of his Lifetime Supervision, a search such as is described in the
 13 Seventh Cause of Action does not present a violation of Plaintiff’s constitutional rights.
 14 Defendant Evans is entitled to qualified immunity against this cause of action and any related
 15 claims for relief.

16 5. Search Policy – Eighth Cause of Action.

17 A policy that permits warrantless, suspicionless searches, as alleged in the Eighth
 18 Cause of Action, does not violate a parolee’s or probationer’s Fourth Amendment rights. See,
 19 *Samson v. California*, 547 U.S. 843, 857 (2006); *United States v. Betts*, 511 F.3d 872, 876 (9th
 20 Cir. 2007) (applying rule to people on supervised release). Thus, Plaintiff has not shown that
 21 Defendants DPS, P&P, Wright, Curtis, or Evans violated his Constitutional rights by
 22 implementing or following the policy which permitted such searches.⁴

23 Defendants were acting at all times in their capacity as Plaintiff’s supervising officers.
 24 In that capacity and guided by the conditions of Plaintiff’s Lifetime Supervision and existing
 25 case law, the Defendants had a reasonable belief that their actions did not violate a clearly
 26 established right. The Defendant’s actions in searching the phone and residence were done

27 _____
 28 ⁴ Plaintiff does not allege that the policy violates his rights, directly. Rather he alleges that the policy violates a
 condition of his Lifetime Supervision which were imposed by the NBPC. Complaint (ECF No. 1) P. 87, lines 12-
 15. He further alleges this violates state law.

1 with the reasonable belief that they were in compliance with their authority under the terms of
2 Plaintiff's Lifetime Supervision.

3 Moreover, the Eighth Cause of Action does not state a constitutional violation. Rather it
4 alleges a violation of state law. The Eighth Cause of Action and all related claims for relief
5 should be dismissed as the named Defendants are entitled to qualified immunity for their
6 actions.

7 **C. Statute of Limitations.**

8 The statute of limitations in a § 1983 suit is that provided by the State for personal-
9 injury torts. *Owens v. Okure*, 488 U.S. 235, 249-250, 109 S.Ct. 573 (1989); *see also Wallace*
10 *v. Kato*, 549 U.S. 384, 387, 197 S.Ct 1091 (2006); *Douglas v. Noell*, 567 F.3d 1103, 1109 (th
11 Cir. 2011. The statute of limitations for bringing a personal injury tort action in Nevada is two
12 years. *See Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989) (per curiam_ (citing NRS
13 11.190(4)(c), (e)).

14 In the First Cause of Action, Plaintiff alleges that his Fifth and Sixth Amendment rights
15 were violated by Defendants Evans, Sackett and Gothan during a polygraph proceeding which
16 was conducted on September 7, 2011.

17 The First Cause of Action and Claims for Relief 1, 2, 5, 6, 7, 8, 10, 11, 12 and 13 all
18 refer to acts that occurred on or before September 7, 2011, more than two years before the
19 filing of the instant lawsuit on October 4, 2013. These claims and allegations are, therefore,
20 untimely and should be dismissed.

21 **D. Standing.**

22 Plaintiff lacks standing to complain about injuries suffered only by others, *Singleton v.*
23 *Wulff*, 428 U.S. 106, 113, 96 S. Ct. 2868, 2874 (1976) (federal courts must hesitate before
24 resolving a controversy, even one within their constitutional power to resolve, on the basis of
25 the rights of third persons not parties to the litigation) *Barrows v. Jackson*, 346 U.S. 249, 255,
26 73 S.Ct. 1031, 1034 (1953); *see also Flast v. Cohen*, 392 U.S. 83, 99 n. 20, 88 S.Ct. 1942,
27 1952 (1968); *McGowan v. Maryland*, 366 U.S. 420, 429, 81 S.Ct. 1101, 1106, 6 L.Ed.2d 393
28 (1961). Neither does Plaintiff have standing to bring claims that are merely speculative.

1 *Aetna Life Insurance Co. of Hartford, Conn v. Haworth*, 300 U.S. 227, 240, 57 S.Ct 461, 463
2 (1937).

3 The United States Supreme Court has established that there are certain minimal
4 requirements that must be met before a party has standing to bring an action before the court.

5 First, the plaintiff must have suffered an “injury in fact”—an
6 invasion of a legally protected interest which is (a) concrete and
7 particularized, see [*Allen v. Wright*, 468 U.S. 737,765, 104 S.Ct.
8 3315, 3327 (1984)]; *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct.
9 2197, 2210, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405
10 U.S. 727, 740–741, n. 16, 92 S.Ct. 1361, 1368–1369, n. 16, 31
11 L.Ed.2d 636 (1972);¹ and (b) “actual or imminent, not ‘conjectural’
12 or ‘hypothetical,’ ” *Whitmore, supra*, 495 U.S., at 155, 110 S.Ct., at
13 1723 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct.
14 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be a
causal connection between the injury and the conduct complained
of—the injury has to be “fairly ... trace[able] to the challenged
action of the defendant, and not ... th[e] result [of] the independent
action of some third party not before the court.” *Simon v. Eastern
Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42, 96 S.Ct.
1917, 1926, 48 L.Ed.2d 450 (1976). Third, it must be “likely,” as
opposed to merely “speculative,” that the injury will be “redressed
by a favorable decision.” *Id.*, at 38, 43, 96 S.Ct., at 1924, 1926.

15 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992).

16 Plaintiff’s Seventh Cause of Action relates solely to an alleged search of his wife’s cell
17 phone “for the express purpose of checking to see if a password was present on the phone,”
18 Complaint (ECF No.1), p. 82, lines 8-10 and 14-15, and some. He has not and cannot assert
19 that his own rights have been violated where the cell phone allegedly searched without
20 permission belongs to another. Plaintiff acknowledges that his conditions of Lifetime
21 Supervision require that he submit to a “search of his person, property under [his] control, or
22 place of residence, by a Parole Officer, at any time, of the day or night without a warrant, upon
23 reasonable cause as ascertained by the Parole Officer.” Complaint (ECF No.1), p. 84, lines 8-
24 11. Plaintiff’s assertions on behalf of his wife and daughter, see e.g. *id.* at 84-85, are not
25 proper where he has expressly disavowed their desire to participate as parties in these
26 proceedings. *Id.* at 25, paragraph 134. The Seventh Cause of Action should be dismissed on
27 this basis.

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1 Plaintiff's Ninth Cause of Action claims a violation of his constitutional right to travel as
2 guaranteed by the First and Fourteenth Amendments based on the alleged prospective denial
3 of his request to be allowed to travel frequently for work. Plaintiff acknowledges that he is
4 required to seek permission to travel as one of his conditions of Lifetime Supervision.
5 Complaint (ECF No.1) p. 88, lines 20-21. He complains, however, that he was informed that
6 he would not be permitted to travel for work due to the negative outcome of his polygraph test
7 in 2009. He alleges that, as a result, his employer lost a project that it "would have been
8 awarded," but had declined to bid. *Id.* at 88. The speculative and prospective injuries of
9 which Plaintiff complains are not his injuries, but injuries that may be suffered by his employer.
10 Plaintiff lacks standing to complain about the injuries of another, *Barrows*, 346 U.S. at 255, 73
11 S.Ct. at 1034; *McGowan*, 366 U.S. at 429, 81 S.Ct. at 1106, particularly those that are
12 speculative. *Aetna Life Insurance Co. of Hartford, Conn.*, 300 U.S. at 240, 57 S.Ct at 463.
13 The Ninth Cause of Action and any related claims for relief should be dismissed.

14 **E. Equal Protection**

15 Plaintiff fails to state a claim that Defendants violated his constitutional rights with
16 respect to the Equal Protection Clause. "To state a claim under 42 U.S.C. § 1983 for a
17 violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show
18 that the defendants acted with an intent or purpose to discriminate against the plaintiff based
19 upon membership in a protected class." *Barren v. Harrington*, 152 F.3d 1193, 1194-1195 (9th
20 Cir. 1998) (citing *Washington v. Davis*, 426 U.S. 229, 239-40, 96 S.Ct. 2040, 48 L.Ed.2d 597
21 (1976); *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1112 (9th Cir.
22 1991); *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031, 1047
23 (9th Cir. 1998) (purposeful discrimination is an essential element of an equal protection
24 claim)).

25 Plaintiff's claims that the Defendants violated his right to equal protection of the law as
26 alleged in the Fifth and Sixth Causes of Action should be dismissed since Plaintiff has not
27 alleged, nor can he allege, that he is a member of a protected class. See *Barren*, 152 F.3d at
28 1193, 1195 (The Ninth Circuit upheld the District Court's dismissal of the plaintiff's § 1983

1 complaint because he did not demonstrate that he is a member of a protected class; in his
 2 third amended complaint, the plaintiff alleged that the defendants “denied the equal protection
 3 of the laws...when the defendants caused his brass slip requesting payment of a court
 4 ordered \$5 filing fee to be denied.”) Because Plaintiff has not shown he is a member of a
 5 protected class, Plaintiffs’ Equal Protection Clause claims, as set out in the Fifth and Sixth
 6 Causes of Action, and any related claims for relief should be dismissed against the
 7 Defendants, pursuant to Fed. R. Civ. P. 12(b)(6).

8 **F. Eighth Amendment**

9 The Eighth Amendment of the United States Constitution states, “Excessive bail shall
 10 not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
 11 U.S. CONST. amend. VIII. “[I]n certain limited circumstances the Constitution imposes upon
 12 the State affirmative duties of care and protection with respect to particular individuals.”
 13 *DeShaney v. Winnebago County Dep’t. of Social Services*, 489 U.S. 189, 198, 109 S.Ct. 998,
 14 1004, 103 L.Ed. 2d 249 (1989). The U.S. Supreme Court further elaborated on what states
 15 are required to do under the Eighth Amendment:

16 [W]hen the State takes a person into its custody and holds him
 17 there against his will, the Constitution imposes upon it a
 18 corresponding duty to assume some responsibility for his safety
 19 and general well-being. *See Youngberg v. Romeo*, 457 U.S. 307,
 20 317, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982)....The rationale
 21 for this principle is simple enough: when the State by the
 22 affirmative exercise of its power so restrains an individual’s liberty
 that it renders him unable to care for himself, and at the same time
 fails to provide for his basic human needs — e.g. food, clothing,
 shelter, medical care, and reasonable safety —it transgresses the
 substantive limits on state action set by the Eighth Amendment
 and the Due Process Clause.

23 *DeShaney*, 489 U.S. at 199-200, 109 S.Ct. at 1005 (citing *see Estelle v. Gamble*, 429 U.S. 97,
 24 103-104, 97 S.Ct. 285, 290-291, 50 L.Ed.2d 251 (1976); *Youngberg v. Romeo*, *supra*, 457
 25 U.S., at 315-316, 102 S.Ct., at 2457-2458).

26 In his Third Cause of Action, Plaintiff alleges his Eighth Amendment rights were
 27 violated when he was required to spend six hours at the Stewart Street P&P Offices while
 28 preparing for and discussing his scheduled polygraph. Complaint (ECF No. 1), p. 72, lines 13-

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1 16. Plaintiff fails to assert a claim under the Eighth Amendment because he offers no facts to
2 suggest that he was denied humane conditions while he was at the P&P offices. He provides
3 no facts that pertain to Plaintiff's food, clothing, shelter, medical care or reasonable safety
4 while in prison or otherwise detained. See, *DeShaney*, 489 U.S. at 199-200, 109 S.Ct. at
5 1005 (citing see *Estelle v. Gamble*, 429 U.S. at 103-104, 97 S.Ct. at 290-291; *Youngberg v.*
6 *Romeo*, 457 U.S. at 315-316, 102 S.Ct. at 2457-2458. Because Plaintiff failed to assert a
7 valid Eighth Amendment Cruel and Unusual Punishment cause of action, the Third Cause of
8 Action should be dismissed for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6).

9 **G. Right to Travel and Right to Redress**

10 Plaintiff alleges in his Tenth Cause of Action that Defendants have violated his First
11 and Fourteenth Amendment rights because his request to modify the condition of his Lifetime
12 Supervision limiting his right to travel was improperly denied. He argues the requirement that
13 he have the support of his supervising officer in such an appeal violates his right to redress.
14 He also argues that the "special policy" the supervising officers relied on in denying his travel
15 request was unconstitutional because it was not available for public review. Such a policy, he
16 argues, "lacks either a compelling or substantial legitimate governmental interest in regulating
17 free speech and association." Complaint (ECF No. 1), p. 91.

18 Plaintiff fails to state a claim for relief. The First Amendment guarantees citizens the
19 right to be free from laws concerning religion or the free exercise of religion, abridging the
20 freedom of speech, or the press and the right to peaceably assemble and to petition the
21 government for redress. U.S. Const. amend. I. The United States Supreme Court said:

22 We [have] held that '(t)he right to travel is a part of the 'liberty' of
23 which the citizen cannot be deprived without due process of law
24 under the Fifth Amendment.' See also *Aptheker v. Secretary of*
25 *State, supra*, 378 U.S. at 505—506, 84 S.Ct. at 1663. However,
the fact that a liberty cannot be inhibited without due process of
law does not mean that it can under no circumstances be inhibited.

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1 *Zemel v. Rusk*, 381 U.S. 1, 14, 85 S. Ct. 1271, 1279(1965) quoting *Kent v. Dulles*, 357 U.S.
 2 116, 125, 78 S.Ct. 1113, 1118 (1958). As previously argued, as a person subject to
 3 supervision by the P&P, Plaintiff's constitutional rights are significantly impinged in the
 4 interests of public safety. *Latta*, 521 F.2d at 249. Limitation on the travel rights of a convicted
 5 sex offender is logically related to an important government interest – protecting its citizens,
 6 particularly its children.

7 Where Plaintiff's right to travel was limited by the fact of his criminal conviction and
 8 resulting Lifetime Supervision, which was obtained by means of a proper criminal proceeding
 9 and guilty plea, he cannot now contend that he did not receive the process that was due
 10 before his rights were diminished. Neither can Plaintiff state a claim for a denial of his
 11 Constitutional right to travel based on the alleged imposition of a special or non-published
 12 policy or procedure implemented by P&P and the officers that are charged with his
 13 supervision. The Tenth Cause of Action and any related claims for relief should be dismissed
 14 for failure to state a claim for relief.

15 V. CONCLUSION

16 Based on the foregoing argument and authorities, the Court should dismiss the
 17 Complaint in its entirety. The State of Nevada, the Nevada Department of Public Safety, the
 18 Nevada Division of Parole and Probation, the Nevada Board of Parole Commissioners,
 19 Connie Bisbee, Bernard Curtis, Catherine Cortez Masto and James Wright are not persons
 20 subject to suit under § 1983 and they are immune from suit in federal court. Defendants
 21 Evans, Sackett, Gothan, Wood, Cole, and Steiber are entitled to qualified immunity in the
 22 discretionary performance of their duties in supervising Plaintiff.

23 Plaintiff brings claims that are too old or that he has no standing to raise. He has failed
 24 to state facts which entitled him to relief. Specifically, Defendants seek dismissal as follows:

25 The First Cause of Action and Claims for Relief 1, 2, 5-8, and 10-13 as untimely;

26 The Second, Fourth, Seventh and Eighth Causes of Action on the Defendants'
 27 entitlement to qualified immunity;

28 The Third, Fifth, Sixth and Tenth Causes of Action for failing to state a claim;

1 The Seventh and Ninth Causes of Action for lack of standing.

2 If the Court declines to dismiss the complaint in its entirety, Defendants request that the
3 Court strike the Statement of Facts from the Complaint, because it is irrelevant to the claims
4 raised, address a period of time outside the statute of limitations and are included merely to
5 cloud the issues and prejudice the Court.

6 DATED this 6th day of November, 2013.

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8 CATHERINE CORTEZ MASTO
Attorney General

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10 By: /s/ Lori M. Story
LORI M. STORY
Deputy Attorney General
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12 *Attorneys for Defendants*

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