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

***Francis v. State of California*, No. 06-56048**

BERZON, Circuit Judge, dissenting.

I respectfully dissent. I would hold that it was an abuse of discretion not to allow Francis to amend her complaint.

Although this was the Fourth Amended Complaint, the prior complaint had properly alleged Takings and Eighth Amendment causes of action against the individual defendants, and had been upheld, not dismissed, with regard to the Equal Protection cause of action. Francis explained to the district court that the failure to include the individual defendants in the headings of the Takings and Eighth Amendment causes of action was a clerical error, and also pointed out, correctly, that the text of the Eighth Amendment claim included the individual defendants, although the heading did not. As to the Equal Protection cause of action, Francis had had no earlier opportunity to attempt to amend it, as it had been upheld in the face of defendants' earlier motion to dismiss.

Litigation should be resolved on the merits where possible. Here, there was no prejudice to the court or the other litigants. Francis had made clear from the outset of the litigation her intention to sue the individual defendants on the constitutional causes of action, and was not responsible for any delay in seeking to amend the Equal Protection cause of action. It was, therefore, an abuse of

discretion to dismiss the complaint with rather than without prejudice.

I respectfully dissent.