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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

RICHARD VILLAPANDO,  Plaintiff,  vs.  BEARD,  Defendant.	) 1:14cv00823 LJO DLB PC ) ) ) FINDINGS AND RECOMMENDATIONS ) REGARDING DEFENDANT’S MOTION TO ) DISMISS ) (Document 32) ) ) THIRTY-DAY DEADLINE )
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Plaintiff Richard Villapando (“Plaintiff”) is a California state prison inmate proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on May 30, 2014. Pursuant to Court order, he filed a First Amended Complaint (“FAC”) on August 13, 2014. The action is proceeding against Jeffrey Beard, Secretary of the California Department of Corrections and Rehabilitation, for violation of the First and Fourteenth Amendments, and the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”).

On January 14, 2015, Defendant filed the instant motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Plaintiff opposed the motion on February 2, 2015. After receiving an extension of time, Defendant filed his reply on February 16, 2015. The motion is suitable for decision pursuant to Local Rule 230(l).

1 **A. ALLEGATIONS IN FIRST AMENDED COMPLAINT**

2 Plaintiff is a Native American inmate who participates in the Native American Spiritual  
3 Circle (“NASC”). For decades, these inmates have been permitted to possess items that are  
4 essential to their daily cultural, ceremonial and spiritual beliefs and practices.

5 On October 19, 2012, the Division of Adult Services issued a memorandum that  
6 proposed a matrix for allowable religious property. The proposed matrix omitted previously  
7 approved items essential to the practice of Native American religious beliefs. The memo  
8 proposed a one-year “wear-out” period for items not on the list. There was no grandfather clause,  
9 even though grandfather-clause protection was offered for inmates who had non-religious items  
10 that were no longer approved (i.e., electric typewriters with memory and televisions with  
11 speakers).

12  
13 Plaintiff and other members of the NASC became aware of the memo in April 2013 when  
14 the chaplain denied their spiritual package orders.

15 As Plaintiff and other inmates were trying to obtain further information about the new  
16 proposed rules, they were told that as of October 19, 2013, staff would actively seek out,  
17 confiscate and destroy any religious property not included in the matrix. The inmates were also  
18 told that staff would target Native American inmates.

19 Also in April 2013, Plaintiff acquired a copy of the official Notice of Change to  
20 Regulations 13-01 (“NCR 13-01”), which had been implemented on February 15, 2013. NCR  
21 13-01 included a proposed matrix using the same language as the October 19, 2012, proposed  
22 matrix.

23  
24 In mid-August 2013, Plaintiff was informed that on July 1, 2013, CDCR changed the  
25 matrix to include beads and beading materials. However, the matrix did not include the  
26 leather/hide/skin essential to construct beaded items, components such as “earwire” needed to  
27 construct traditional earrings, or flutes, rattles and handdrums.

1 On October 18, 2013, the day before the original “wear-out” period set forth in the  
2 October 2012 memorandum was set to expire, CDCR issued a memo stating that further  
3 amendments to the matrix were expected, and that the matrix had not yet been approved. The  
4 CDCR memo also extended the wear-out period for 180 days after approval of the matrix.

5 On December 23, 2013, CDCR issued another memo indicating that the matrix had been  
6 approved and was in effect as of December 10, 2013. The memo also indicated that the wear-out  
7 date was extended to June 9, 2014. The Religious Personal Property Matrix was attached to the  
8 memo, but it did not include any additional religious items for the NASC.

9 Plaintiff alleges that Defendant Beard knew, or should have known, that “allowing and  
10 participating in the implementation of Notice to Change to Regulations 13-01, which disallows  
11 the possession and/or acquisition of previously approved religious artifacts and other items that  
12 are integral and central to [his] daily” Native American spiritual practice, would result in a  
13 violation of the First Amendment and RLUIPA. ECF No. 18, at 5. Plaintiff also alleges that  
14 NCR 13-01 is skewed to benefit conventional religions, in violation of the Fourteenth  
15 Amendment.  
16

17 For relief, Plaintiff asks that NCR 13-01 be deemed unconstitutional, and that Defendant  
18 be ordered to rescind or amend it.

19 **B. LEGAL STANDARD**

20 Federal courts are courts of limited jurisdiction. Kokkonen v. Guardian Life Ins. Co.,  
21 511 U.S. 375, 377 (1994). As a result, “[i]t is to be presumed that a cause lies outside this  
22 limited jurisdiction, and the burden of establishing the contrary rests on the party asserting  
23 jurisdiction.” Id. (citations omitted).

24 Under Federal Rule of Civil Procedure 12(b)(1), the plaintiff has the burden of  
25 establishing subject-matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of America, 511  
26 U.S. 375, 377 (1994). There are two types of Rule 12(b)(1) motions: (1) a facial attack on  
27 subject-matter jurisdiction based solely on the allegations made in the complaint, see Warren v.  
28

1 Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003); or (2) a factual attack on  
2 subject-matter jurisdiction that may be based on extrinsic evidence outside of the pleadings, see  
3 White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000).

4 In a facial attack such as this, the allegations in Plaintiff's complaint are taken as true and  
5 all reasonable inferences are drawn in his favor. Wolfe v. Strankman, 392 F.3d 358, 362 (9th  
6 Cir. 2004); Missouri v. Harris, --F.3d--, 2014 WL 4971473 (E.D. Cal. 2014). Further, the  
7 complaint must be construed liberally because Plaintiff is proceeding pro se. Id.

### 8 **C. DISCUSSION**

9 Defendant argues that it is clear from the face of Plaintiff's FAC that NCR 13-01 was not  
10 the operative regulation governing Plaintiff's religious property at the time he filed his  
11 complaint. Defendant therefore contends that Plaintiff lacks standing to seek declaratory and  
12 injunctive relief relating to the alleged unconstitutionality of NCR 13-01.  
13

#### 14 1. *Basis of Plaintiff's FAC*

15 Prior to determining the evolution of NCR 13-01, the Court must first determine the basis  
16 of Plaintiff's FAC. According to Defendant, Plaintiff's FAC is exclusively about the  
17 constitutionality of NCR 13-01 and seeks only declaratory and injunctive relief as to NCR 13-01.  
18

19 In opposing the motion, however, Plaintiff contends that Defendant mischaracterized  
20 "both the intent and the spirit of the complaint." ECF No. 33, at 2. Plaintiff believes that while  
21 NCR 13-01 is the "major point of reference," the claim of unconstitutionality pertains to the  
22 "cumulative and continuing injurious effect of the rules change. . . precipitated by NCR 13-01  
23 and including any and all later amendments and matrixes." ECF No. 33, at 2. Plaintiff contends  
24 that the FAC makes this clear by incorporating NCR 13-01, its proposed matrix, and each  
25 amendment to NCR 13-01, up to and including the final matrix approved by the Office of  
26 Administrative Law.<sup>1</sup> ECF No. 33, at 2.

27  
28 <sup>1</sup> Plaintiff cites to the exhibits attached to the FAC, including the October 19, 2012, memorandum, the official NCR 13-01 (effective February 21, 2013), an August 9, 2013, letter from California Indian Legal Services, the October 18, 2013, memorandum, and the December 23, 2013, memorandum.

1           Upon review of Plaintiff’s FAC and his requested relief, the Court finds that his FAC  
2 identifies NCR 13-01 as the only regulation at issue. While Plaintiff’s factual allegations include  
3 both the history of NCR 13-01 and the eventual adoption of the matrix that would replace the  
4 temporary matrix proposed by NCR 13-01, he specifically contends that Defendant Beard knew,  
5 or should have known, that “allowing and participating in the implementation of Notice to  
6 Change to Regulations 13-01” would result in a violation of the First Amendment and RLUIPA.  
7 ECF No. 18, at 5. Plaintiff also specifically alleges that NCR 13-01 is skewed to benefit  
8 conventional religions, in violation of the Fourteenth Amendment. Most importantly, Plaintiff’s  
9 requested relief deals exclusively with NCR 13-01. He asks that NCR 13-01 be deemed  
10 unconstitutional, and that Defendant be ordered to rescind or amend it.  
11

12           To the extent that Plaintiff intended to incorporate other regulations, his FAC does not  
13 satisfy Rule 8’s notice requirement. Pursuant to Rule 8(a), a complaint must contain “a short and  
14 plain statement of the claim showing that the pleader is entitled to relief...” Fed. R. Civ. Pro.  
15 8(a). “Such a statement must simply *give the defendant fair notice of what the plaintiff’s claim is*  
16 *and the grounds upon which it rests.*” Swierkiewicz v. Sorema, 534 U.S. 506, 512 (2002)  
17 (emphasis added).

18           2.       *Jurisdiction*

19           Having determined that Plaintiff’s FAC is exclusively about NCR 13-01, the Court must  
20 now determine whether Plaintiff has standing to challenge it. Defendant argues that NCR 13-01  
21 was replaced and superseded by a new matrix in December 2013. Indeed, Plaintiff attaches the  
22 December 23, 2013, memorandum to his FAC, which explains that the Religious Personal  
23 Property Matrix was approved and in effect as of December 10, 2013. This matrix *replaced* the  
24 matrix that went into temporary effect on February 21, 2013, as a result of NCR 13-01. ECF No.  
25 18, at 206. In other words, the matrix proposed by NCR 13-10 was temporarily in effect from  
26 February 2013 through December 2013, months before Plaintiff filed this action.  
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1 The result, therefore, is that at the time Plaintiff filed this action, an actual case or  
2 controversy did not exist to confer standing on Plaintiff. White v. Lee, 227 F.3d 1214, 1243 (9th  
3 Cir. 2000) (standing is determined and must exist when a lawsuit is commenced).

4 “[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the  
5 threshold requirement imposed by Article III of the Constitution by alleging an actual case or  
6 controversy.” City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (citations omitted);  
7 Human Life of Washington Inc. v. Brumsickle, 624 F.3d 990, 1000 (9th Cir. 2010); Chandler v.  
8 State Farm Mutual Auto. Ins. Co., 598 F.2d 1115, 1121-22 (9th Cir. 2010). This requires  
9 Plaintiff to demonstrate that he has standing to sue by showing (1) an injury-in-fact, (2)  
10 causation, and (3) a likelihood that the injury will be redressed by a decision in his favor.  
11 Human Life of Washington Inc., 624 F.3d at 1000 (citing Lujan v. Defenders of Wildlife, 504  
12 U.S. 555, 560 (1992)) (quotation marks omitted).

13  
14 As NCR 13-01 is no longer operative, Plaintiff cannot show a likelihood that his alleged  
15 injury would be redressed by a decision in his favor.

16 To avoid this result, Plaintiff attempts to argue that he was not aware of the incorporation  
17 into Title 15 until December 2014, when inmates received an updated copy of the regulation. He  
18 therefore suggests that at the time he filed this action, his complaint focused “on the only  
19 references known to him at the time. . .” ECF No. 33, at 4. However, Plaintiff’s incorrect  
20 understanding of the implementation of the regulations is irrelevant to whether he had standing  
21 to bring this action.

22 Plaintiff also argues that the December 23, 2013, memo does not refer to Title 15. It  
23 does, however, specifically say that the temporary matrix proposed by NCR 13-01 was *replaced*  
24 by the new matrix as of December 10, 2013. That the memo does not mention the ultimate  
25 incorporation into Title 15 is of no consequence.  
26

27 Finally, Plaintiff requests that he be permitted to amend if the Court grants the motion to  
28 dismiss. An amendment will not cure the standing issue, however, as Plaintiff must have had

1 standing when he commenced this action. White, 227 F.3d at 1243. The Court also notes that  
2 Plaintiff is not precluded from challenging the Title 15 regulation now in effect in a new action.

3 **D. FINDINGS AND RECOMMENDATION**

4 For these reasons, the Court RECOMMENDS that Defendant's motion to dismiss be  
5 GRANTED and that this action be DISMISSED WITHOUT PREJUDICE. The Court further  
6 recommends that the November 14, 2014, Findings and Recommendations that Plaintiff's  
7 motion for a temporary restraining order be denied be VACATED and that Plaintiff's motion be  
8 DENIED AS MOOT.<sup>2</sup>

9 These Findings and Recommendations are submitted to the United States District Judge  
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty (30) days  
11 after being served with these Findings and Recommendations, the parties may file written  
12 objections with the court. Such a document should be captioned "Objections to Magistrate  
13 Judge's Findings and Recommendations." A party may file a reply within fourteen (14) days of  
14 receiving objections. The parties are advised that failure to file objections within the specified  
15 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153,  
16 1157 (9th Cir. 1991).

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19 IT IS SO ORDERED.

20 Dated: February 22, 2015

21 /s/ Dennis L. Beck  
22 UNITED STATES MAGISTRATE JUDGE  
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28 <sup>2</sup> On November 14, 2014, the Court issued Findings and Recommendations to deny Plaintiff's October 8, 2014,  
motion for a temporary restraining order. Given the jurisdictional challenge, the Court did not adopt the Findings  
and Recommendations.