LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 16-5672-BRO (JEMx)**	Date	February 3, 2017
Title	**ANDREW L. KICKING HORSE MCCARTER V. SCOTT KERNAN ET AL.**		

LA16CV5672-BRO- Present: The Honorable	**BEVERLY REID O'CONNELL, United States District Judge**	
Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS)

ORDER RE DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT [37]

I. INTRODUCTION

Pending before the Court is Defendants Debra Asuncion, Scott Kernan, Erika Lake, Joseph Lazar, Beverly Russell, David Skaggs, and John Soto's ("Defendants") Motion to Dismiss Plaintiff's Complaint. (Dkt. No. 37 (hereinafter, "Motion" or "Mot.").) After considering the papers filed in support of and in opposition to the instant Motion, the Court deems these matters appropriate for resolution without oral argument of counsel. *See* Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the following reasons, Defendants' Motion is **GRANTED in part**.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Plaintiff Andrew "Kicking Horse" McCarter ("Plaintiff" or "McCarter") alleges he is a member of the federally recognized Indian tribe, Choctaw Nation of Oklahoma. (Dkt. No. 2 (hereinafter, "Compl.") ¶ 9.) He avers that he sincerely believes in and practices traditional Native American religion, including serving as an inmate leader of

Native American sweat lodge ceremonies at the Facility "A"[1] housing unit of California State Prison, Los Angeles County ("CSP-LAC"), where Plaintiff is currently incarcerated. (*Id.* ¶ 1.) According to Plaintiff, in years prior to October 2014, Plaintiff conducted sweat lodge ceremonies in a designated area that was sheltered from intrusion by other inmates (the "Prior Location"). (*Id.* ¶ 24.) This location met the requirements of conducting sweat lodge ceremonies. (*Id.*) As required by the CDCR Departmental Operations Manual ("DOM"), the sanctity of the sweat lodge area was observed and preserved. (*Id.*)

Plaintiff asserts that in 2013 Defendant Soto and other correctional employees proposed construction of a new medical infirmary building at the Prior Location. (Compl. ¶ 27.) Plaintiff claims he responded with a proposal to relocate the sweat lodge to an area enclosed by a tall razor-wire fence accessible only by correctional officers. (*Id.* ¶ 44.) Plaintiff contends that Defendants, expressing security concerns, refused to relocate the sweat lodge to Plaintiff's proposed area. (*Id.* ¶ 46.) Plaintiff maintains that because security control towers do not have complete view of this site, Plaintiff proposed installation of a security camera or assignment of a correctional officer to be posted outside of the sweat lodge during the ceremonies. (*Id.*)

According to Plaintiff, Defendants instead designated the sweat lodge relocation to an allegedly unsuitable area ("Current Location") of the Facility "A" recreational yard enclosed with four-foot high fencing. (Compl. ¶¶ 30, 31.) The Current Location is not oriented east-west, is located in the middle of a noisy recreational yard, and is almost completely unprotected from intrusions and potential desecrations from other areas of the yard. (*Id.* ¶ 30.) Since the relocation of the sweat lodge to the Current Location, the sweat lodge area has been repeatedly disturbed by instances such as: soccer balls entering the area; inmates jumping the sweat lodge area's fence to retrieve items; trash and a dead animal being placed in the sweat lodge; a fistfight; non-Native American inmates observing and commenting upon the ceremonies while standing next to the Current Location's fence; and, yard announcements from the P.A. system. (*Id.* ¶¶ 34, 35, 37, 40.) As a result of these intrusions, Plaintiff asserts that the area cannot be consecrated, nor

[1] Facility "A" houses inmates with exemplary records and provides them expanded opportunities for positive rehabilitation. (Compl. ¶ 18.)

can a sweat lodge be constructed at that location. (*Id.* ¶ 41.) The recreation yard is open for inmates' use from 9:00 a.m. to 3:15 p.m. on Monday, Wednesday, Friday, Saturday, and Sunday; and from 9:30 a.m. to 3:15 p.m. on Tuesdays and Thursdays. (*Id.* ¶ 32.) The sweat lodge ceremonies are scheduled to be conducted at Current Location on the first Wednesday of each month, between 9:00 a.m. and 3:00 p.m., and the third Saturday of each month from 9:00 a.m. to 3:00 p.m. (*Id.*)

B. Procedural Background

On July 29, 2016, Plaintiff filed his original Complaint in the Central District of California. (*See* Compl.) Plaintiff alleges three claims under 42 U.S.C. § 1983: (1) violation of the Religious Land Use & Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a) (the "RLUIPA Claim"); (2) violation of his First Amendment right to religious exercise (the "Free Exercise Claim"); and, (3) retaliation, in violation of his First Amendment right to free speech and to petition the government (the "Retaliation Claim").

On September 14, 2016, this Court ordered Defendants to file a pre-answer motion for summary judgment on the issue whether Plaintiff has exhausted administrative remedies. (Dkt. No. 23.) Defendants filed their pre-answer motion for partial summary judgment on September 26, 2016, (Dkt. No. 25), which the Court denied on December 1, 2016, (Dkt. No. 36). Additionally, the Court, *sua sponte*, granted summary judgment in favor of Plaintiff with respect to his exhaustion of administrative remedies for his claims. (*Id.*)

Defendants filed the instant Motion to Dismiss on January 3, 2017. (Mot.) Plaintiff opposed Defendants' Motion on January 13, 2017. (Dkt. No. 38 (hereinafter, "Opp'n").) On January 23, 2017, Defendants timely replied in support of their Motion. (Dkt. No. 39 (hereinafter, "Reply").)

III. LEGAL STANDARD

A. Rule 12(b)(1) Motion to Dismiss for Lack of Subject-Matter Jurisdiction

Under 28 U.S.C. § 1331, federal courts possess jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

A case "arises under" federal law if a plaintiff's "well-pleaded complaint establishes either that federal law creates the cause of action" or that the plaintiff's "right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 27–28 (1983). A court's subject matter jurisdiction may be challenged by a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) by a facial attack, based on the face of the complaint, or by a factual attack, based on extrinsic evidence brought before the court. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A "facial attack" contests the truth of the plaintiff's factual allegations, and a "factual attack" accepts allegations as truth but argues that they are "insufficient on their face." *Leite v. Crane Co.*, 749 F.3d 1117, 1121–22 (9th Cir. 2014). The party opposing the motion must present affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

"Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of article III of the federal Constitution." *Id.*

> Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'

Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 807–08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)). For a claim to be ripe, Plaintiff bears the burden of establishing standing by claiming to have suffered an injury in fact that is "concrete and particularized" and an "actual or imminent" invasion of a legally protected interest. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

"Standing is determined by the facts that exist at the time the complaint is filed." *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001). A claim is not ripe if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal citations

omitted). Ripeness is a constitutional requirement for jurisdiction and the Court must dismiss claims found to be unripe. *See United States v. Streich*, 560 F.3d 926, 931 (9th Cir. 2009).

B. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

Under Rule 8(a), a complaint must contain a "short and plain statement of the claim showing that the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a). If a complaint fails to do this, the defendant may move to dismiss it under Rule 12(b)(6). Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, there must be "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility'" that the plaintiff is entitled to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557).

In ruling on a motion to dismiss for failure to state a claim, courts should follow a two-pronged approach: first, the court must discount conclusory statements, which are not presumed to be true; and then, assuming any factual allegations are true, the court must determine "whether they plausibly give rise to entitlement to relief." *See id.* at 679; accord *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012). A court should consider the contents of the complaint and its attached exhibits, documents incorporated into the complaint by reference, and matters properly subject to judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23 (2007); *Lee*, 250 F.3d at 688.

Where a district court grants a motion to dismiss, it should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment."). Leave to amend, however, "is

properly denied . . . if amendment would be futile." *Carrico v. City & County of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).

When "defendants assert qualified immunity in a motion to dismiss under Rule 12(b)(6), dismissal is not appropriate unless we can determine, based on the complaint itself that qualified immunity applies." *O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016). "In determining immunity, we accept the allegations of respondent's complaint as true." *Kalina v. Fletcher*, 522 U.S. 118, 122 (1997) (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993)). "Dismissal is appropriate only where it appears beyond doubt that the plaintiff can prove no set of facts, …where the plaintiff's allegations if true, would not support personal liability because the defendant is entitled to immunity." *Fitzpatrick v. Gates*, 2001 WL 630534, *4 (C.D. Cal. April 18, 2001) (citing *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999)).

IV. DISCUSSION

Plaintiff alleges three causes of action against Defendants: (1) a violation of the RLUIPA by substantially burdening Plaintiff's exercise of his religion, (Compl. ¶¶ 61–64); (2) a violation of Plaintiff's First Amendment right to free exercise of his religion, (Compl. ¶¶ 65–67); and, (3) a violation of Plaintiff's First Amendment right to free speech and to petition the government, (Compl. ¶¶ 68–70).

Defendants move to dismiss Plaintiff's RLUIPA and Free Exercise Claims under Federal Rule of Civil Procedure 12(b)(1), arguing that Plaintiff's claims regarding Defendants' Current Location for the sweat lodge are not ripe because no sweat lodge presently exists there, and Plaintiff has not yet consecrated the Current Location's grounds. (Mot. at 1–2.) Additionally, Defendants maintain that all three of Plaintiff's causes of action fail to state claims for relief under Federal Rule of Civil Procedure 12(b)(6). (Mot. at 15, 18.) Finally, Defendants claim they are immune in their official capacity to claims for monetary damages, and that they are entitled to qualified immunity from Plaintiff's claims. (Mot. at 23.) The Court will address these issues in turn.

A. Whether the Court Has Subject-Matter Jurisdiction Over Plaintiff's RLUIPA Claim and Free Exercise Claim

Defendants claim that "Plaintiff's RLUIPA and First Amendment Free Exercise claims are not ripe for review and should thus be dismissed." (Mot. at 15.) A party may challenge the court's subject-matter jurisdiction with a Rule 12(b)(1) Motion to Dismiss by arguing that the plaintiff's claims are not ripe. *Streich*, 560 F.3d at 931. Defendants do not dispute the truth of Plaintiff's allegations, but instead make a "factual attack" on the Complaint, where they accept Plaintiff's allegations as truth but argue that Plaintiff's allegations are "insufficient on their face." *Leite*, 749 F.3d at 1121–22. For Plaintiff's claims to survive an evaluation of "ripeness," Plaintiff must show he claimed to have suffered an injury in fact that is "concrete and particularized [and an] actual or imminent . . . invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. As stated above, a claim is not ripe if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300 (internal citations omitted). The Complaint's allegations, which the Court assumes to be true in light of Defendants' facial attack, demonstrate that Plaintiff's RLUIPA and Free Exercise Claims are ripe for this Court's review.

Prospective constitutional rights violations are not actionable when it is not certain they will occur. *See United States v. Abbouchi*, 502 F.3d 850, 859 (9th Cir. 2007) (finding plaintiff's claim regarding a condition that the prisoner truthfully answer questions asked of him was unripe as it did not prospectively violate the prisoner's right against self-incrimination); *18 Unnamed John Smith Prisoners v. Meese*, 871 F.2d 881, 883 (9th Cir. 1989) (holding that the prospective "intolerable conditions" that would occur from double-bunking in the prison were speculative and did not constitute a ripe claim); *Glover v. Cate*, No. 2:10-CV-0430 KJM KJN, 2011 WL 2746093, at *8 (E.D. Cal. July 13, 2011) (finding the prisoner was only "eligible" to be housed with someone of a different race and therefore had not yet been forced to violate his beliefs on that issue, exhibiting no concrete injury to substantiate a ripe claim).

Defendants argue that because the Current Location has not yet been consecrated, and no sweat lodge has been constructed, Plaintiff's RLUIPA and Free Exercise Claims are unripe. (Mot. at 9–11.) Defendants also argue that Plaintiff has not sufficiently alleged that Defendants will fail to uphold CDCR Departmental Operations Manual section 101060.9 once the Current Location is consecrated; to make any such allegation amounts to mere speculation. (Mot. at 11.) According to Defendants, "Plaintiff makes no allegations that his religious practice is at present being burdened by the Current

Location." (Mot. at 14.) Further, Defendants claim that "[i]t is Plaintiff's refusal to use [the Current Location] based on his speculations about disruptions that may or may not happen that is preventing the sweat ceremonies from taking place." (Mot. at 15.)

However, Plaintiff responds that the Defendants have already taken the action that prevents Plaintiff from practicing his religion: Defendants have removed the prior sweat lodge and demand that Plaintiff use an unsuitable location instead. (Opp'n at 9–10.) Plaintiff alleges that the Current Location is inherently unsuitable for consecration in light of existing interferences. First, Plaintiff alleges that the Current Location does not allow the sweat lodge participants to traverse an east-west line as is required to properly perform the sweat lodge ceremony. (Compl. ¶ 21.) Second, the sweat lodge must be in a location protected from physical intrusions and negative energies, which can desecrate the space. (Compl. ¶ 21.) At present, the Current Location's four-foot fence does not adequately protect it from foreign objects such as recreation equipment and inmates. (Compl. ¶ 34.) Third, other inmates can stand near the perimeter of the Current Location and comment on the ceremonies as they occur. (Compl. ¶ 37.) Fourth, all inmates must sit when an alarm sounds or when an inmate is being transferred through the yard, both of which would disrupt a ceremony at the Current Location. (Compl. ¶ 40.) These reasons, among others, demonstrate that the Current Location, *presently*, is "an *inherently* unsuitable environment for meditation, prayer, ritual, and purification." (Compl. ¶ 30 (emphasis added).)

In light of the above, Defendants' argument that Plaintiff's allegations of past incursions on the Current Location and Plaintiff's refusal to practice at the site are based upon speculation of harm is imprecise. (*See* Mot. at 12.) Plaintiff alleges that the *existing* fencing, *ongoing* recreational activities, and other *presently occurring* interruptions prevent him from consecrating the space. (*See* Compl. ¶ 41.) Because Plaintiff alleges that his religious beliefs "prevent him from consecrating an inappropriate and unprotected Area that has been, and remains subject to, constant interruption, invasion, and desecration," (*id.*), Defendants' position that Plaintiff must first construct a sweat lodge before his claims may ripen is untenable.

In *Fuller v. Cate*, the magistrate judge found that the prisoner did not plead a ripe claim because prison procedures prohibiting him, an unmarried man, from conjugal visits to fulfill Islamic religious marriage duties did not exhibit a concrete injury. *Fuller v.*

Cate, No. CIV S-09-1139 JAM EF, 2011 WL 4594835, at *3 (E.D. Cal. Feb. 23, 2011), *subsequently aff'd*, 481 F. App'x 413 (9th Cir. 2012). Even if the possibility existed that the prisoner could get married, his religious exercise claim was not ripe until he actually married. *Id.* Unlike the plaintiff in *Fuller*, Plaintiff pleads that he is not only being prevented from possibly exercising his religion in the future; rather that the Current Location's set-up and surroundings are preventing him from engaging in a religious act: the consecration and construction of the sweat lodge. (*See* 41–42.) Thus, Plaintiff's RLUIPA and Free Exercise Claims present a controversy that is ripe for this Court's review. Accordingly, the Court **DENIES** Defendants' Motion on Rule 12(b)(1) grounds.

B. 12(b)(6) Failure to State A Claim

As stated above, a court should follow a two-pronged approach when analyzing a motion to dismiss for failure to state a claim. The court must first discount conclusory statements, and then, assuming any factual allegations are true, the court must determine "whether they plausibly give rise to entitlement to relief." *Iqbal*, 556 U.S. at 664. The Court will analyze each claim in turn.

1. Plaintiff's RLUIPA Claim

To state a RLUIPA claim, a plaintiff must show that the state has substantially burdened the plaintiff's religious practice. *Walker v. Beard*, 789 F.3d 1125, 1134 (9th Cir. 2015) ("To state a claim under RLUIPA, a prisoner must show that: (1) he takes part in a 'religious exercise,' and (2) the State's actions have substantially burdened that exercise.") (quoting *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008)); *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015); *Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005). "[A] prison policy that 'intentionally puts significant pressure on inmates . . . to abandon their religious beliefs . . . imposes a substantial burden on [the inmate's] religious practice.'" *Shakur*, 514 F.3d at 889 (quoting *Warsoldier*, 418 F.3d at 996).

Defendants claim that "Plaintiff fails to allege that his religious practice is and has been substantially burdened by the actions of Defendants." (Mot. at 16.) Additionally, Defendants maintain that Plaintiff fails to allege that Defendants presently permit sweat ceremonies to be interrupted or that Defendants are failing to protect the sweat lodge

ceremonies. (Mot. at 16–17.) According to Defendants, Plaintiff fails to show that Defendant coerced Plaintiff into acting contrary to his religious beliefs and fails to specifically allege how the site's orientation prevents Plaintiff from practicing his religion. (Mot. at 17–18.)

The Court disagrees; Plaintiff adequately alleges that Defendants' actions have substantially burdened the exercise of his religious practice. The Ninth Circuit has held that "an outright ban on a particular religious exercise is a substantial burden on that religious exercise." *Greene v. Solano Cty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008); *see also Phillips v. Ayers*, No. CV 07-2897-DDP SH, 2010 WL 1947015, at *8 (C.D. Cal. Jan. 14, 2010), *report and recommendation adopted*, No. CV 07-2897-DDP SH, 2010 WL 1947019 (C.D. Cal. May 12, 2010) ("[T]he ban on use of Facility D chapel substantially burdened [plaintiff's] exercise of religion by preventing him from attending Friday Jumah Prayer Service."); *Stavenjord v. Corr. Corp. of Am.*, No. CV09-0354-PHX-DGCLOA, 2010 WL 960413, at *8 (D. Ariz. Mar. 15, 2010) (finding that banning plaintiff from burning incense in his cell, regardless of the fact that he could meditate or pray, constituted a substantial burden on religious exercise). Plaintiff claims that Defendants failed to provide Plaintiff with any location to conduct the sweat lodge ceremonies for ten months. (Compl. ¶ 3.) And Plaintiff allegedly has been prevented from engaging in sweat lodge ceremonies for almost two years. (*Id.*) Also, Plaintiff's "religious beliefs prevent him from consecrating an inappropriate and unconsecrated Area . . . ." (Compl. ¶ 41.)

Moreover, in Section IV.A, *supra*, the Court referenced a number of issues that allegedly render the Current Location unsuitable for use as a sweat lodge.[2] Assuming that "the Area cannot be consecrated nor can a sweat lodge be constructed by Mr. McCarter at that location," (Compl. ¶ 41), Plaintiff has alleged specific facts demonstrating how Defendants have prevented him from practicing his religion for two years. Plaintiff alleges that he has attempted to use the Current Location, but its existing defects prevent Plaintiff and his Native American spiritual adviser from consecrating the

[2] Defendants argue that Plaintiff fails to cite religious authority that forbids Plaintiff from consecrating the site. (Mot. at 17.) Because Defendants present a facial attack on Plaintiff's Complaint, the Court assumes that the Complaint's allegations are true, even absent evidence of a "mandate" of Plaintiff's religion.

area. (Compl. ¶ 42.) By failing to find an acceptable location for a new sweat lodge before destroying the prior sweat lodge location, and by allegedly preventing Plaintiff from consecrating any suitable location for sweat lodge ceremonies, Plaintiff sufficiently alleges that Defendants have practically banned Plaintiff from exercising his religious beliefs. As such, Plaintiff has pleaded sufficient facts that "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 664. Thus, the Court **DENIES** Defendants' Motion with respect to Plaintiff's RLUIPA cause of action.

2. Plaintiff's Free Exercise Claim

Plaintiff also contends that Defendants violated his rights under the Free Exercise Clause of the First Amendment, applicable to the states through the Fourteenth Amendment. *See, e.g.*, *Virginia v. Black*, 538 U.S. 343, 358 (2003). Typically, a plaintiff adequately states a free exercise claim if: (1) "the claimant's proffered belief [is] sincerely held"; and, (2) "the claim [is] rooted in religious belief, not in purely secular philosophical concerns." *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) (internal quotation marks and citation omitted). Plaintiff satisfies the threshold requirements for a claim under the Free Exercise Clause: (1) Plaintiff alleges that he is Native American and a sincere believer of Native American religion; and, (2) Plaintiff conducts the "sacred and central sweat lodge ceremony," which is part of Native American religion. (Compl. ¶ 19.) Thus, Plaintiff alleges that he conducts a religious exercise for purposes of a claim under the Free Exercise Clause. This is further shown by the fact that Defendants do not dispute that Plaintiff's beliefs are sincerely held or that the dispute is not "religious in nature."

Although prisoners enjoy First Amendment protection, their rights under the Free Exercise Clause are limited by "institutional objectives and by the loss of freedom concomitant with incarceration." *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). A prisoner's Free Exercise Clause claim will thus fail if the defendants can show that the challenged action is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). In *Turner*, the Supreme Court articulated four factors that bear on whether a legitimate penological interest exists:

> (1) Whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;

> (2) Whether there are alternative means of exercising the right that remain open to prison inmates;
>
> (3) Whether accommodation of the asserted constitutional right will impact . . . guards and other inmates, and on the allocation of prison resources generally; and
>
> (4) Whether there is an absence of ready alternatives versus the existence of obvious, easy alternatives.

Shakur, 514 F.3d at 884 (internal citations and quotations omitted).

Defendants have not addressed these factors in their briefing nor can this Court "make a determination as to defendants' allegations on a motion to dismiss." *McMillian v. Terhune*, No. CV 10–2088 AG (FFM), 2011 WL 2669157, at *5 (C.D. Cal. Mar. 30, 2011) (finding that plaintiff sufficiently alleged a claim under the First Amendment to survive a motion to dismiss); *see also Evans*, 2009 WL 2578919, at *5 (rejecting defendants' argument that plaintiff failed to allege that any of the *Turner* factors weigh in his favor and finding that plaintiff "state[d] his First Amendment claim with enough detail to survive a motion to dismiss").

The Court therefore declines to analyze whether Plaintiff's allegations survive under the *Turner* factors until Defendants have answered Plaintiff's complaint or otherwise proffered evidence in this case (e.g., in a motion for summary judgment). The Court finds that Plaintiff sufficiently pleads his Free Exercise claim and accordingly **DENIES** Defendants' Motion to Dismiss with respect to Plaintiff's Free Exercise cause of action.

3. Plaintiff's Retaliation Claim

"Prisoners have a First Amendment right to file grievances against prison officials and to be free from retaliation for doing so." *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). "Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and

that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005). These elements do not need to be analyzed in order. *See Watison*, 668 F.3d at 1114–15. The plaintiff does not need direct evidence of retaliatory intent, rather an "allegation of a chronology of events from which retaliation can be inferred is sufficient to survive dismissal." *Id.* at 1114. Nonetheless, the Complaint must give Defendants "fair notice of the nature of the claim [and the] grounds on which the claim rests." *Li v. Kerry*, 710 F.3d 995 (9th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n. 3 (2007) (citation and quotes omitted)).

Plaintiff alleges that Defendants retaliated against him in response to filing a lawsuit, (Compl. ¶ 57.), which is a protected activity. Plaintiff also claims that Defendants obstructed his attempts to exhaust the administrative remedies by rejecting several rounds of his grievances for using the wrong form. (*See* Compl. ¶ 55–57.) Plaintiff also maintains that several rounds of grievances were rejected on trivial grounds, and such rejections were "intended solely to delay and obstruct his use of the grievance system, in retaliation for Mr. McCarter's attempts to petition the courts for redress." (Compl. ¶ 54.) Moreover, McCarter alleges that Defendants Kernan and Asuncion "were aware of and assented to the ongoing retaliation." (Compl. ¶ 70.)

Based on *Starr v. Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011), Plaintiff argues that it is sufficient to allege that Defendants Kernan and Asuncion *should have known* that Plaintiff's grievances were rejected for trivial reasons and that these rejections were in response to the complaint filed in *McCarter I*. (*See* Opp'n at 19–20.) Plaintiff's Complaint differs markedly from the complaint at issue in *Starr*. In *Starr*, the court ruled that the plaintiff's complaint satisfied Rule 8(a). *Starr*, 652 F.3d at 1217. The complaint in *Starr* included numerous, "detailed factual allegations." *Id.* at 1216. Also, the allegations plausibly suggested that the defendant knew or should have known of the plaintiff's allegations because the defendant was confronted with the issue on numerous occasions. *Id.*

Here, Plaintiff alleges that Defendants Kernan and Asuncion *should have known* that Plaintiff's grievances were rejected for trivial reasons; however, Plaintiff fails to adequately plead his Retaliation Claim at this time. Plaintiff's Complaint does not contain factual, non-conclusory allegations suggesting that Defendants retaliated against

Plaintiff *because of* the complaint filed in *McCarter I*. Plaintiff does not allege who denied Plaintiff's grievances. Plaintiff does not allege that the unknown officials who denied his grievances were aware of the complaint filed in *McCarter I*. Plaintiff's retaliation claim does not allege that Defendants Kernan and Asuncion knew of Plaintiff's denied grievances. Such facts are essential to satisfy the requirement that protected activity caused the defendant to take the adverse action.

Plaintiff's pleadings also fail to meet the standard set in *Watison*: Plaintiff fails to allege "a chronology of events from which retaliation can be inferred." *See Watison* at 1114. The only allegations indicative of a chronology express that: (1) "[Plaintiff's] attempts to file first-level grievances have been repeatedly rejected, often on trivial grounds, and in an apparent attempt to delay or frustrate his attempt to exhaust," (Compl. ¶ 54); and, (2) "[Defendants' choice not to inform Plaintiff] that he needed to include a Form 22 until they had rejected his grievances *three times* on other grounds suggests that officials are attempting to delay and frustrate [Plaintiff's] attempt to use the grievance process," (Compl. ¶ 56 (emphasis in original)). Plaintiff's allegations fail to adequately set out facts from which retaliatory intent can be inferred.

Discounting the Complaint's bare, conclusory allegations, the Court finds that Plaintiff fails to give Defendants fair notice of the basis for his Retaliation Claim. As such, the Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's First Amendment Retaliation Claim **with leave to amend**.[3]

C. Qualified Immunity

Qualified immunity is an affirmative defense, which protects government employees from liability for civil damages where the official's conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation omitted) (citing and quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The

[3] Because Plaintiff fails to adequately state his Retaliation Claim, the Court need not reach the issue whether Plaintiff's claim for injunctive relief related thereto is narrowly tailored. Similarly, at this time the Court need not resolve the parties dispute whether denying a prisoner's claim is sufficient to constitute an adverse action for purposes of a retaliation claim. (*See* Mot. at 20; Opp'n at 20.)

doctrine applies equally to mistakes of fact, mistakes of law, and mixed questions of law and fact. *Id.* (internal quotation omitted) (citing *Groh v. Ramirez*, 540 U.S. 551, 567 (2004)). "Because qualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.'" *Id.* (citing and quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). "Qualified immunity is only an immunity from a suit for money damages, and does not provide immunity from a suit seeking declaratory or injunctive relief." *Hydrick v. Hunter*, 669 F.3d 937, 939–40 (9th Cir. 2012).

When a government official asserts qualified immunity as the basis for a motion to dismiss, the court must consider: (1) whether the facts of the complaint sufficiently allege a violation of some statutory or constitutional right; and, (2) whether the right was "clearly established" at the time of the official's alleged misconduct. *Id.* at 232. District courts have discretion to decide which prong of the analysis to address first. *Id.* at 236. If the plaintiff fails to sufficiently allege a statutory or constitutional violation, or if the right was not clearly established, the court may properly dismiss the claim. *Id.* at 232; *see also Davis v. City of Las Vegas*, 478 F.3d 1048, 1053 (9th Cir. 2007) ("If we conclude that both of these inquiries are answered in the affirmative, the officer is not entitled to qualified immunity.").

The Supreme Court has held that "the defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery.'" *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (quoting *Mitchell*, 472 U.S. at 526). Accordingly, the resolution of a claim for qualified immunity is appropriate on a motion to dismiss. *Id.* The Supreme Court recently clarified the contours of a "clearly established" constitutional right for qualified immunity purposes. *See White v. Pauly*, — U.S. —, 137 S. Ct. 548 (2017).[4] In *White*,

[4] In *White*, an Officer White arrived on the scene after two fellow officers had engaged and surrounded the victim. See Id. at 2. Officer White assumed that the other officers properly identified themselves to the victim according to standard confrontation procedures. *See id.* at 5. Shortly after arriving on the scene, Officer White shot and killed the victim. *Id.* at 2. The Supreme Court considered the issue whether Officer White violated the victim's Fourth Amendment rights by failing to warn the victim himself.

the Court emphasized that "it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *Id*. at 4 (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 742 (2011)). As stated above, "[d]ismissal is appropriate only where it appears beyond doubt that the plaintiff can prove no set of facts, . . . where the plaintiff's allegations if true, would not support personal liability because the defendant is entitled to immunity." *Fitzpatrick*, 2001 WL 630534 at *4 (citing *Morley*, 175 F.3d at 759).

As a preliminary matter, Defendants argue that Plaintiff cannot seek compensatory damages against state officials in federal court. (Mot. at 23.) Plaintiffs concede that this is the case. (Opp'n at 23.) Thus, damages are not available against Defendants Soto, Russell, Asuncion, Lake, and Lazar in their official capacities. Nonetheless, Plaintiff seeks damages against Defendants Soto, Russell, Asuncion, lake, and Lazar in their individual capacities, which avoids this issue. (Opp'n at 23.)

1. Plaintiff Sufficiently Alleges That Defendants Violated Plaintiff's Rights Under the First Amendment and RLUIPA

As discussed above, Plaintiff sufficiently alleges RLUIPA and Free Exercise Claims against Defendants. *See* discussion *supra* Sections IV.B.1, IV.B.2. Accordingly, the Court finds that, for qualified immunity purposes, Plaintiff has sufficiently alleged that Defendants violated his constitutional rights.

2. Whether Plaintiff's Rights Were Clearly Established at the Time of Defendants' Alleged Misconduct

"A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v.*

Both the court of appeals and the Supreme Court "recognized that 'this case presents a unique set of facts and circumstances' in light of White's late arrival on the scene." *Id.* at 5 (quoting *Pauly v. White*, 814 F.3d 1060, 1077 (10th Cir. 2016)). Despite prior decisions that addressed excessive-force principles on a general level, the Supreme Court reversed the court of appeals and district courts' opinions because they "failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." *Id.* at 5.

Luna, 136 S. Ct. 305, 308 (2015) (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)) (internal quotation marks and alterations omitted). Whether the right was "clearly established" requires an inquiry "in light of the case's specific context, not as a broad general proposition." *Saucier*, 533 U.S. at 194. It is "well established . . . that government action places a substantial burden on an individual's right to free exercise of religion when it tends to coerce the individual to forego [his] sincerely held religious beliefs." *Jones*, 791 F.3d at 1033. Courts "do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *al–Kidd*, 563 U.S. at 741. "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Whether a right is "clearly established" should not be defined at a high level of generality. *White*, 137 S. Ct. at 552.

Defendants allegedly imposed a substantial burden upon Plaintiff's worship in sweat lodge ceremonies by their failure to preserve the prior sweat lodge location before designating a suitable alternative location. (Compl. ¶ 63.) *See Oliverez v. Albitre*, No. 1:09–CV–00352–LJO–SKO PC, 2012 WL 3778861, at *10 (E.D. Cal. Aug. 31, 2012), *report and recommendation adopted*, No. 1:09–CV–00352–LJO, 2012 WL 4433477 (E.D. Cal. Sept. 24, 2012) ("[T]he law governing the free exercise of religion was sufficiently clear that [defendant] would have been on notice that, in the absence of a reasonable relationship to a legitimate penological purpose, his conduct infringed upon [plaintiff's] free exercise rights."); *Greene*, 513 F.3d at 988 (concluding with "little difficulty" that "an outright ban on a particular religious exercise is a substantial burden on that religious exercise" under RLUIPA because "in light of RLUIPA, no longer can prison officials justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison") .

Defendants argue that a reasonable official in Defendants' position would not know that their conduct was violative of a clearly established right. (Mot. at 24.) Defendants also assert that they did not deny Plaintiff the opportunity to construct a sweat lodge for ritual ceremonies. (Mot. at 24.) Defendants overlook, however, Plaintiff's allegation that no sweat lodge existed at CSP-LAC for ten months. (*See* Compl. ¶ 3.) A reasonable official would know that it is unlawful to prevent a prisoner from practicing his or her religion for nearly a year.

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 16-5672-BRO (JEMx)**	Date	February 3, 2017
Title	**ANDREW L. KICKING HORSE MCCARTER V. SCOTT KERNAN ET AL.**		

Moreover, Defendants allegedly destroyed the suitable sweat lodge at the Prior Location to use it for other purposes. (Compl. ¶ 3.) The Current Location that Defendants ultimately designated for sweat lodge ceremonies is allegedly unsuitable for a myriad reasons. (*See* Opp'n at 4; *see generally* Compl.) Plaintiff alleges that he expressly informed Defendants of the Current Location's unsuitability for sweat lodge ceremonies. (*See* Compl. ¶¶ 41, 42, 44, 49.) Thus, the Complaint includes allegations that Defendants have had knowledge of their actions' burden upon Plaintiff's religious exercise, and nonetheless have continued to prevent Plaintiff from exercising his religious beliefs for nearly two years. (Compl. ¶ 3.) Additionally, Plaintiff highlights that the Federal Bureau of Prisons' administrative guidelines acknowledge that sweat lodge locations should provide as much privacy as possible given the circumstances. (*See* Opp'n at 2 n.1.) Defendants' alleged relocation of the sweat lodge from an isolated location directly into the recreation area's bustle without adequate protections from intrusions ignores the privacy which the Federal Bureau of Prisons guidelines emphasize.

Mindful of the Supreme Court's holding in *White*, which imposes a stricter, narrower evaluation for the "clearly established" nature of rights, the Court does not find that "plaintiff can prove no set of facts, . . . where the plaintiff's allegations if true, would not support personal liability because the defendant is entitled to immunity." *Fitzpatrick*, 2001 WL 630534 at *4 (citing *Morley*, 175 F.3d at 759). First, it is clearly established that all prisoners have a right to freely practice their sincerely held religious beliefs. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972).

Second, a number of the nation's state and federal prisons, including California prisons, provide Native American inmates with access to a sweat lodge. *See, e.g., Henderson v. Terhune*, 379 F.3d 709, 711 (9th Cir. 2004) (California state prisons permit sweat lodges); *Allen v. Toombs*, 827 F.2d 563, 565 n. 5 (9th Cir. 1987) (sweat lodge ceremony held once a week in Oregon state prison, but high security inmates not allowed to participate); *Brown v. Schuetzle*, 368 F. Supp. 2d 1009, 1012 (D.N.D. 2005) (sweat lodges have operated in North Dakota state prisons since 1978); *Runningbird v. Weber*, No. 03–4018–RHB, 2005 WL 1363927 at *1 (D.S.D. June 8, 2005) (sweat lodge ceremony provided in South Dakota state prison); *Greybuffalo v. Bertrand*, No. 03–C–559–C, 2004 U.S. Dist. LEXIS 22356 at *9 (W.D. Wis. November 1, 2004) (monthly sweat lodge ceremony available in Wisconsin state prison); *Crocker v. Durkin*, 159 F. Supp. 2d. 1258, 1264 (D. Kan. 2001) (sweat lodge available in Leavenworth U.S.

Penitentiary); *Indian Inmates of Nebraska Penitentiary v. Grammar*, 649 F. Supp. 1374, 1376 (D. Neb. 1986), aff'd, 831 F.2d 301 (8th Cir. 1987) (sweat lodge available in Nebraska state prison since 1976).

Third, appellate and district courts have previously determined that officers' prevention of prisoners' exercise of sweat lodge ceremonies may violate the Free Exercise Clause, and that defendant officers may not be entitled to qualified immunity in cases involving interference with sweat lodge ceremonies. *See, e.g., Youngbear v. Thalacker*, 174 F. Supp. 2d 902, 915 (N.D. Iowa 2001) (one-year delay in construction of a sweat lodge, when it could have been built promptly, violated inmates' free exercise rights); *Thomas v. Gunter*, 32 F.3d 1258, 1260–61 (8th Cir. 1994) (holding that officials were not entitled to qualified immunity when they prevented the plaintiff from daily access to a sweat lodge for prayer).[5] Similarly, in *Sousa v. Wegman*, a district court in this circuit found that defendant officers were not entitled to qualified immunity with respect to alleged infringement of Mexican Indian prisoners' rights "to exercise their sincerely held religious beliefs by engaging in [sweat lodge ceremonies] and possessing some religious items." *Sousa v. Wegman*, No. 1:11-CV-01754-LJO, 2015 WL 3991100, at *6 (E.D. Cal. June 30, 2015), *report and recommendation adopted*, No. 1:11-CV-01754-LJO, 2015 WL 5027585 (E.D. Cal. Aug. 14, 2015) (citations omitted).

"Dismissal is appropriate only where it appears beyond doubt that the plaintiff can prove no set of facts, . . . where the plaintiff's allegations if true, would not support personal liability because the defendant is entitled to immunity." *Fitzpatrick*, 2001 WL 630534 at *4 (citing *Morley*, 175 F.3d at 759). In light of the above, it is not "beyond doubt" that Plaintiff's allegations cannot support personal liability because the Defendants are entitled to qualified immunity. Thus, at this time the Court **DENIES** Defendants' Motion to dismiss Plaintiff's Complaint on qualified immunity grounds.

---

[5] Circuit courts, including the Ninth Circuit, have recognized the importance of sweat lodge ceremonies in certain Native American religions. *See Allen*, 827 F.2d at 565 n.5 (describing sweat lodge ceremony at Oregon penitentiary); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (taking judicial notice of "the central and fundamental role played by the Sacred Sweat Lodge in many Native American religions").

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 16-5672-BRO (JEMx)**	Date	February 3, 2017
Title	**ANDREW L. KICKING HORSE MCCARTER V. SCOTT KERNAN ET AL.**		

V. CONCLUSION

For the foregoing reasons, Defendants' Motion is **GRANTED in part**. Specifically, the Court **DISMISSES without prejudice** Plaintiff's Retaliation Claim. The Court **DENIES** Defendants' Motion with respect to Plaintiff's RLUIPA and Free Exercise Claims. The hearing scheduled for February 6, 2017 is hereby **VACATED**. Plaintiff shall file an amended complaint, if any, no later than Monday, February 27, 2017.

IT IS SO ORDERED.