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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Dexter Delbert Loring, Plaintiff, v. William Daly et al., Defendant	No.: CV 19-05133-PHX-JAT (JFM) **DEFENDANTS' MOTION TO DISMISS**

Pursuant to Fed. R. Civ. P. Rules 12(b)(1) and 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii), Defendants William Daly and Dean Lee ("Tribal Directors"), by and through undersigned counsel, hereby move the Court to dismiss Plaintiff's Complaint because: (1) the Court lacks subject matter jurisdiction (a) over Plaintiff's claims which are barred by tribal sovereign immunity, (b) over Plaintiff's claim under the Religious Land Use and Incarcerated Persons Act (RLUIPA), 42 U.S.C. § 2000cc–2000cc-5, because he lacks standing, and (c) over Plaintiff's claim for injunctive relief because he lacks standing; and (2) Plaintiff has failed to state a claim under 42 U.S.C.

§ 1983 ("Section 1983") because the Tribal Directors acted under tribal or Community law, not under color of state law as required to establish a Section 1983 claim. This Motion is supported by the following Memorandum of Points and Authorities, the Declaration of Director William Daly attached as Exhibit A, and all matters of record incorporated herein by this reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. Defendants, Salt River Department of Corrections Director Daly and Lieutenant Director Lee, are Government Officials of a Federally Recognized Sovereign Indian Tribe.

The Salt River Pima-Maricopa Indian Community (the "SRPMIC" or "Community") is a federally recognized sovereign Indian tribe. *See* 85 Fed. Reg. 5462 (January 30, 2020). "The Community has the inherent sovereign authority and sovereignty to regulate the conduct of persons and activities within its territory and jurisdiction." Section 1-6, SRPMIC Code of Ordinances (the "Tribal Code"); *see also* SRPMIC Const., art. VII, § 1 (c)(1) (noting the Community Council has the authority to govern the conduct of tribal members and visitors within the Community territory). As a federally recognized sovereign Indian tribe, the Community is entitled to tribal sovereign immunity, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991), which is preserved in the Tribal Code. *See e.g.*, Sec. 23-20, Tribal Code (noting that the "sovereign immunity of the Community, its divisions, agents, entities, instrumentalities, employees or officials" can only be

waived by the SRPMIC); *see also Drake v. Salt River Pima-Maricopa Indian Cmty.*, 411 F. Supp. 3d 513, 520 (D. Ariz. 2019).

Under the Community Constitution, the Council has the authority to establish Community government offices, law enforcement agencies and departments, and the Community Court. *See* SRPMIC Const., art. VII, § 1 (b)&(c). Prior to 1967, the Community corrections facility was managed by the U.S. Bureau of Indian Affairs (BIA). (*See* Daly Decl. ¶ 3).[1] In 1967, the Community assumed full control of the Law and Order Program, and on February 16, 2000, the Community Council established the Salt River Department of Corrections ("Salt River DOC") under Community Council Resolution. (*Id.* ¶ 4). The Salt River DOC Director and Lieutenant Director are delegated with full Community authority to operate the Salt River DOC and the corrections facility. (*Id.* at ¶¶ 4–8). The Salt River DOC is located within the Tribal Government Complex within the exterior boundaries of the Community's reservation. (*Id.* at ¶ 2).

B. Procedural Background

[1] The Court may take judicial notice of publicly available law and facts regarding the Community and rely on the Declaration of Director William Daly regarding the facts establishing tribal sovereign immunity without converting this Motion into a motion for summary judgment. *See Pistor v. Garcia,* 791 F.3d 1104, 1112 (9th Cir. 2015) ("[T]he declarations presented evidence going to the question of quasi-jurisdiction, and the district court was not bound to consider only the face of the complaint[.]"); *White v. Lee,* 227 F.3d 1214, 1242 (9th Cir. 2000); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) ("[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction."); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (judicial notice).

Plaintiff is a Native American man and Community member. (Doc. 8). On September 10, 2019, Plaintiff filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 while confined in the Salt River DOC facility. (Doc. 1). On November 13, 2019, the Court was informed that Plaintiff was "no longer in custody." (Doc. 7). On January 2, 2020, Plaintiff filed an Application to Proceed in District Court without Prepaying Fees or Costs, which the Court granted. (Docs. 11, 15).

On June 9, 2020, the Court dismissed Counts I through VII of the Complaint and ordered Tribal Directors to answer Plaintiff's remaining Count VIII, finding that "Plaintiff sufficiently alleges that Daly and Lee have denied him the ability to participate in the sweat lodge." (Doc. 17.) Specifically, the Court ordered Tribal Directors "to respond to Count VIII [1.] in their official capacities to the extent that Plaintiff seeks injunctive relief [and 2.] as in their individual capacities to the extent that Plaintiff seeks damages against them for violation of his First Amendment religious exercise rights." (*Id.*)

On August 17, 2020, Plaintiff notified the Court that he was released from Salt River DOC and relocated to a residential treatment facility in Peoria, Arizona. (Doc. 25). Plaintiff arrived at the residential treatment facility on July 12, 2020 and will remain in treatment for at least 180 days and up to a year (Docs. 24, 25).

C. <u>Plaintiff does not allege specifically how Tribal Directors substantially burdened his right to religious exercise or that any state action was involved</u>.

Plaintiff alleges that since October 2018, Plaintiff had asked an unidentified person why he "wasn't able to attend ceremonial sweat lodge." (Doc. 1). Plaintiff

claims to have "seen other inmates in attendance, except administrative segregated inmates" like himself who were "considered non-disciplinary but segregated do (sic) to circumstances w[ith] classification." (*Id.*) Plaintiff alleges that "certain staff have conveyed to [him] that they have suggested at least once a month for all inmates, so to have equality and fairness, Director Daly responded that this was not priority." (*Id.*) Plaintiff alleges that as of May 2019, Tribal Directors "haven't made effort to accommodate all inmates to practice ceremonial religion, as guaranteed in the Indian Tribal Rights Act and civil rights law." (*Id.*) "This has been an ongoing issue w[ith] inmates and staff." (*Id*.) Plaintiff alleges emotional and mental anguish as his injury. (*Id.*) Plaintiff seeks compensatory and punitive damages, and injunctive relief. (*Id*.)

II. THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION OVER A CLAIM BARRED BY TRIBAL SOVEREIGN IMMUNITY AND PLAINTIFF LACKS STANDING TO SUE UNDER RLUIPA AND FOR INJUNCTIVE RELIEF.

A plaintiff has the burden of establishing subject matter jurisdiction. *Chandler v. State Farm Mut. Auto. Ins. Co*., 598 F.3d 1115, 1122 (9th Cir. 2010). A defendant may seek dismissal where the court lacks subject matter jurisdiction over plaintiff's complaint. Fed. R. Civ. P. 12(b)(1). Where a court determines it lacks subject matter jurisdiction, the court "must dismiss the complaint in its entirety." *Arbaugh v. Y&H Corp*., 546 U.S. 500, 514 (2006).

A. The Court lacks subject matter jurisdiction over claims brought against Tribal Directors who are immune from an official capacity suit under tribal sovereign immunity.

Tribal sovereign immunity may bar a court's subject matter jurisdiction and is properly raised in a Rule 12(b)(1) motion to dismiss. *See Pistor v. Garcia*, 791 F.3d 1104, 1111–12 (9th Cir. 2015). Indian tribes enjoy common law immunity from suit under the doctrine of tribal sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 48, 58 (1978). Tribal sovereign immunity extends to the governmental activities of the tribe. *Kiowa Tribe of Oklahoma v. Manf. Tech. Inc.,* 523 U.S. 751, 760 (1998). Under the doctrine of tribal sovereign immunity, "an Indian tribe is only subject to suit where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754. A waiver of tribal sovereign immunity must be clear and "unequivocally expressed," *Martinez*, 436 U.S. at 59, and there is a strong presumption against a waiver of tribal sovereign immunity. *Sears v. Gila River Indian Community,* 2013 WL 5352990 *2 (D. Ariz. 2013) (*citing Kescoli v. Babbitt,* 101 F.3d 1304, 1310 (9th Cir. 1996)). A plaintiff bears the burden of demonstrating that sovereign immunity does not apply. *See Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987). If a plaintiff does not satisfy this burden, the lawsuit may not move forward because "[s]overeign immunity is jurisdictional in nature." *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989).

Tribal sovereign immunity protects tribal government employees from suit where the tribal employees are sued in their official capacities for conduct taken within the scope of their tribal authority. *See Pistor*, 791 F.3d at 1114–15 (citing *Maxwell v. County of San Diego,* 708 F.3d 1075, 1086 (9th Cir. 2013)). This is because "official capacity suits ultimately seek to hold the entity of which the officer is an agent liable,

rather than the official himself" and "generally represent [merely] another way of pleading an action against an entity of which an officer is an agent." *Pistor*, 791 F.3d at 1112 (citing *Kentucky v. Graham,* 473 U.S. 159, 165 (1985) (brackets in original)). Thus, a suit against a tribe's government employees "in their *official capacities* is a suit against the tribe [and] is barred by tribal sovereign immunity unless that immunity has been abrogated or waived*." Miller v. Wright*, 705 F.3d 919, 927–28 (9th Cir. 2013) (citing *Linneen v. Gila River Indian Community,* 276 F.3d 489, 492 (9th Cir. 2002)).

To determine whether a plaintiff has sued a defendant in their official capacity or in their individual capacity, courts use a "remedy-focused analysis." *See Pistor,* 791 F.3d at 1113 (applying the "remedy-focused analysis" developed in *Maxwell*). Generally, individual or "'[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of . . . law,' and that were taken in the course of his official duties." *Id.* at 1112, *citing Graham,* 473 U.S. at 165. Where a plaintiff claims an individual capacity suit but seeks damages from the public treasury or domain and not from the officers personally, the plaintiff has brought a "masked official capacity suit." *Id.* at 1113; *see e.g., Cook v. AVI Casino Enterprises, Inc.,* 548 F.3d 718, 727 (9th Cir. 2008) (plaintiffs' object was to reach the public treasury through the theory of *respondeat superior*); *Hardin v. White Mountain Apache Tribe,* 779 F.2d 476, 478 (9th Cir. 1985) (plaintiff ejected from reservation sought to interfere with tribe's internal governance by suing tribal council members for council ejection vote). The Ninth Circuit has cautioned that,

> In any suit against tribal officers, we must be sensitive to whether [1] "the judgment sought would expend itself on the public treasury or domain, or [2] interfere with the public administration, or [3] if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act."

Pistor, 791 F.3d at 1113 (*quoting Shermoen v. United States,* 982 F.2d 1312, 1320 (9th Cir. 1992)). Where plaintiff seeks a large amount of damages or to compel the non-party tribe to act, the court may find that a plaintiff intends to recover from the tribe. *See id.* at 1113–14 ("Given the limited relief sought, the tribal defendants have not shown that 'the judgment sought would expend itself on the [tribal] treasury or domain, or interfere with [tribal] administration, ... [or] restrain the [Tribe] from acting.'"). "Due to the essential nature and effect of the relief sought, the sovereign is [] the real, substantial party in interest" in masked official capacity suits. *Id.*

In this case, Plaintiff generally alleges that as an inmate at the Salt River DOC he was not able to go to the ceremonial sweat lodge due to *administrative* segregation. (Doc. 1). Plaintiff alleges that Defendant Daly has not attempted to accommodate inmate rights[2] to religious practice because it was not a *priority*. (Doc. 1).

First, the Community's sovereign immunity extends to Tribal Directors as tribal correctional department officers who, at all alleged times, were acting within the scope of their tribal authority. The Salt River DOC is a tribal governmental department under the authority and control of tribal employees Director Daly and Lieutenant Director

[2] Plaintiff alleges that Director Daly failed to accommodate the religious free exercise rights of *other* inmates, but Plaintiff cannot maintain a claim based on the rights of third parties. *See Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979) ("A plaintiff lacks standing . . . where [he] attempts to assert the legal interest of a third party.").

Lee. (*See* Daly Decl. ¶¶ 4, 8). Plaintiff makes a general allegation that Tribal Directors engaged in wrongful conduct regarding their official duties to administer department policies and priorities. The Community's sovereign immunity protects Tribal Directors as tribal government employees from official capacity suits absent Congressional authorization for suit or an express unequivocal waiver of immunity. *See e.g.*, Sec. 23-20, Tribal Code. Plaintiff has not alleged either Congressional authorization or a waiver by the Community that would provide subject matter jurisdiction for this claim in federal court.

Second, Plaintiff does not allege Tribal Directors acted in their individual capacities. Plaintiff does not allege Tribal Directors took an action outside of the scope of their tribal authority or that either held a personal animus. Plaintiff does not allege any ill-will and claims only that he was prevented from sweat lodge because of *administrative* segregation. Plaintiff does not allege any facts to support a claim against Tribal Directors in their individual or personal capacities.

It is also clear that Plaintiff brings only official capacity claims against Tribal Directors because any recovery will operate against the Community, not the individual Tribal Directors. Plaintiff requests relief in the amount of $2 million and "asks the Salt River [DOC] reform jail policy wherein all personel (sic) are held accountable to the fullness of discipline for acts against inmates." (Doc. 1). Although Plaintiff did not sue the Community or Salt River DOC directly, a judgment for $2 million in punitive damages would certainly expend itself on the Community's treasury and interfere with the Community's administration. Plaintiff's request for policy reform which seeks to

compel the *Community* and *its correctional facility* to change its policy demonstrates Plaintiff's attempt to reach the Community's domain. Plaintiff cannot claim this lawsuit is an individual capacity suit *and* also demand the Community change its policies. Plaintiff is suing Tribal Directors in their official capacities and the Court must dismiss the Complaint in its entirety for lack of subject matter jurisdiction.

B. The Court lacks subject matter jurisdiction because Plaintiff lacks standing under RLUIPA as Plaintiff was not confined in a federal or state facility and is no longer confined to Salt River DOC.

Plaintiff lacks standing under RLUIPA, 42 U.S.C. § 2000cc-2(a), because he was not incarcerated in a state or federal facility, § 2000cc-5(4), and he has been released from Salt River DOC. *See Hernandez v. Schriro*, 357 Fed. Appx. 747, 749 (9th Cir. 2009) (unpublished) (the issue of whether plaintiff's rights to sweat lodge ceremonies were violated under RLUIPA "become[s] moot if [p]laintiff is not properly retained in [prison confinement]."). Because Plaintiff was released from Salt River DOC, he is no longer subject to the administrative segregation policy that allegedly prevented him from exercising his religion and any RLUIPA claim is moot. *See Mauwee v. Donat*, 407 Fed. Appx. 105, 107 (9th Cir. 2010) (unpublished).

C. Plaintiff lacks standing to sue for injunctive relief as he is no longer confined to Salt River DOC and thus, the Court lacks subject matter jurisdiction.

Where a plaintiff lacks Article III standing to bring a claim for prospective relief, such as for an injunction, the court lacks subject matter jurisdiction and the claim for injunctive relief must be dismissed. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) ("Because standing and mootness both pertain to a federal court's subject-matter

jurisdiction under Article III, they are properly raised in a motion to dismiss under [Fed. R. Civ. P. Rule] 12(b)(1), not Rule 12(b)(6)."); *Chandler v. State Farm Mut. Auto. Ins. Co*., 598 F.3d 1115, 1122 (9th Cir. 2010) (citing *St. Clair v. City of Chico,* 880 F.2d 199, 201 (9th Cir. 1989) ("[S]tanding . . . pertain[s] to federal courts' subject matter jurisdiction [and is] properly raised in a Rule 12(b)(1) motion to dismiss.").

A plaintiff must allege an actual case or controversy to bring a claim in federal court by demonstrating that he "has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (noting the injury or threat of injury must be both real and immediate, and not hypothetical). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* (citing *O'Shea v. Littleton,* 414 U.S. 488, 495–96 (1974)). Even if a complaint presents an existing case or controversy, a plaintiff must show that injunctive relief is appropriate by alleging "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." *Id.* at 103. For injunctive relief, the "threatened injury must be *certainly impending* to constitute injury in fact" and "allegations of *possible* future injury are not sufficient." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (quotation omitted) (emphasis in original).

In *O'Shea*, plaintiffs sued select judges alleging that they had subjected plaintiffs to discriminatory enforcement of the criminal law. 414 U.S. at 490–91. The district court dismissed, and the court of appeals reversed. *Id.* at 492–93. The Supreme Court

reversed the appellate court holding that the complaint failed to allege a case or controversy. *Id.* at 493. The Supreme Court reasoned that future injury rested "on the likelihood that [plaintiffs] will again be arrested for and charged with violations of the criminal law" which was not "sufficiently real and immediate to show an existing controversy simply because they anticipate violating lawful criminal statutes and being tried for their offenses. . . ." *Id.* at 496–97. Like all citizens, plaintiffs are expected to "conduct their activities within the law and so avoid prosecution and conviction[.]" *Id.* at 497. "[A]ttempting to anticipate whether and when [plaintiffs] will be charged with crime . . . takes us into the area of speculation and conjecture" insufficient to confer standing. *Id.*; *see also Nelsen v. King County,* 895 F.2d 1248, 1252 (9th Cir. 1990).

In this case, the law restricts Plaintiff's recovery of money damages, *see* Section VI herein, and Plaintiff lacks standing to assert a claim for injunctive relief. Plaintiff does not allege a live case and controversy. Even if he had, the claimed injury or threat of injury is insufficient to justify injunctive relief. As discussed in *O'Shea,* even assuming Plaintiff's rights had been violated, past acts of misconduct do not alone provide a basis for this suit. Plaintiff would have to also show a real and present threat of repeated injury. He has not done so. Plaintiff merely "asks the Salt River [DOC] reform jail policy[.]" (Doc. 1). But Plaintiff is no longer confined in Salt River DOC. Plaintiff lives in a residential facility in Peoria and is scheduled to reside there for up to a year. (Doc. 24). Therefore, the policies of the Salt River DOC do not present a real or immediate threat of harm to Plaintiff. Plaintiff may argue that he has a "real and immediate" threat of injury because he will be arrested again and incarcerated on tribal

lands because he is a Community member. (*See* Doc. 8). But this hypothetical is as implausible as the allegations of future injury found inadequate in *O'Shea* and *Nelsen*. For these reasons, Plaintiff lacks standing to bring a claim for injunctive relief and the Court lacks subject matter jurisdiction.

III. PLAINTIFF FAILED TO STATE CLAIM FOR INJUNCTIVE RELIEF BECAUSE HIS REQUESTED POLICY REFORM IS NOT NARROWLY TAILORED TO ENSURE HIS PARTICIPATION IN SWEAT LODGE.

Even if Plaintiff had standing to sue for an injunction, Plaintiff's request is broad and does not address Plaintiff's alleged injury. A request for injunctive relief must be narrowly tailored to be no broader than necessary. *See Nat. Res. Def. Council v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007).[3] A narrowly tailored request for injunction must be related to the claim, *see e.g., Brinkman v. Schriro,* 2012 WL 12538560, at *3 (D. Ariz. 2012), and can only be enforced against the parties. *Price v. City of Stockton,* 390 F.3d 1105, 1117 (9th Cir. 2004) (courts cannot "determine the rights of persons not before the court."). Plaintiff's request for policy reform is not narrowly tailored to ensure that he will be permitted to participate in sweat lodge at Salt River DOC. Plaintiff requests Salt River DOC reform policies to hold correction department personnel accountable, subject to discipline, for acts against inmates. (Doc. 1). Tribal Directors could not as a practical matter satisfy such a broad request.

First, Plaintiff directs his request for policy reform toward the Salt River DOC. Salt River DOC is not a party. Second, an injunction ordering the Salt River DOC to reform disciplinary policies for all "acts against inmates" is impermissibly broad. (Doc.

[3] *See also,* 18 U.S.C. § 3626(a)(1)(A) (Prison Litigation Reform Act).

1). Plaintiff's requested injunction is overbroad because it is not limited to reforming policies that relate to inmate exercise of religion. *See Brinkman*, 2012 WL 12538560, at *3. Third, even if Plaintiff only sought an injunction against Tribal Directors and only requested reform of policies related to the "practice his religion," Plaintiff's request is also too broad to incorporate into a specific injunction order. *Id.* at *3–4. For these reasons, Plaintiff fails to state a claim for injunctive relief because his request for policy reform is not narrowly tailored to provide Plaintiff with appropriate relief.

IV. PLAINTIFF FAILED TO STATE A CLAIM UNDER 42 U.S.C. § 1983 FOR VIOLATION OF HIS EXERCISE OF RELIGION BASED ON TRIBAL CONDUCT WITHOUT ALLEGING STATE LAW WAS INVOLVED.

A "[Section] 1983 claim cannot be maintained against defendants who act under color of *tribal* rather than *state* law." *Pistor v. Garcia*, 791 F.3d 1104, 1114–15 (9th Cir. 2015) (emphasis added). The Ninth Circuit has "long recognized, 'actions under [S]ection 1983 cannot be maintained . . . for persons alleging a deprivation of constitutional rights under color of tribal law.'" *Id.*; *see also Bressi v. Ford,* 575 F.3d 891, 895 (9th Cir. 2009); *R.J. Williams Co. v. Fort Belknap Housing Authority,* 719 F.2d 979, 982 (9th Cir. 1983). A Section 1983 claim requires proof that: (1) defendants (2) acted under color of *state law* (3) to deprive him of federal rights, privileges or immunities, and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163–64 (9th Cir. 2005); *see Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989).

In *Evans*, plaintiffs sued city police officers and tribal officials in their individual capacities under Section 1983, alleging violations of their constitutional rights when

police officers, acting in dual capacities as BIA agents and executing tribal court orders, arrested plaintiffs under a city ordinance. 869 F.2d at 1343–44. The district court dismissed the suit under Rule 12(b)(6) for failure to state a claim, holding that the tribal officials and police officers possessed tribal sovereign immunity. *Id.* at 1345. The Ninth Circuit reversed noting that plaintiffs were arrested by *city* police officers acting under a *city* ordinance. *Id.* at 1348–49. The court agreed that a Section 1983 claim cannot be maintained against a defendant acting under color of tribal law, but that the plaintiffs had sufficiently alleged the tribal officials acted in concert with city police officers operating under color of *state* law. *See id.* at 1347–49; *see also Bressi,* 575 F.3d at 896–97 (holding that tribal officials acted under color of state law because they were state authorized to act on a highway and cited plaintiff under state law).

Evans and *Bressi* demonstrate why the claim here fails to state a claim for relief and should be dismissed under Fed. R. Civ. P. 12(b)(6). The plaintiffs in those cases: (1) sued tribal officials in their individual capacities, and (2) alleged that the tribal officials had acted under color of state law or in concert with state actors. Here, Plaintiff has not alleged any state action by Tribal Directors, or that Tribal Directors were acting in concert with state actors. Plaintiff alleges that he was not allowed to attend sweat lodge by tribal correction officials due to administrative segregation. Plaintiff does not allege any state law or policy was involved. Plaintiff was held at the Salt River DOC facility owned and operated by the Community and located within the Tribal Government Complex solely within the Community's reservation. (*See* Daly Decl. ¶¶ 2, 4). At all times, Tribal Directors were acting in their official tribal capacity

to operate and administer the correctional facility under tribal policies. The Tribal Directors administer the Salt River DOC under the laws of the Community, not the State of Arizona. *See Williams v. Lee*, 358 U.S. 217, 220 (1959) ("States have no power to regulate the affairs of Indians on a reservation."). Because Section 1983 does not apply to tribal officials acting under tribal law and because Plaintiff failed to allege any applicable state law or state action, Plaintiff failed to state a Section 1983 claim.

V. PLAINTIFF FAILED TO STATE A CLAIM UNDER THE FREE EXERCISE CLAUSE BECAUSE THE FIRST AMENDMENT DOES NOT APPLY TO TRIBAL DIRECTORS OR TO A CLAIM IN FEDERAL COURT UNDER THE INDIAN CIVIL RIGHTS ACT.

The Free Exercise Clause of the First Amendment and the Fourteenth Amendment do not apply to "the powers of local self-government enjoyed" by tribes and executed by its tribal government employees. *Martinez*, 436 U.S. at 56 nn. 5,7, *citing Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 135 (10th Cir. 1959). Congress has indeed imposed "certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment," under the Indian Civil Rights Act, 25 U.S.C. § 1303 ("ICRA"). *Martinez*, 436 U.S. at 57. However, a plaintiff must generally bring an ICRA claim in tribal court, *Id.* at 65–67, not in federal court.

Plaintiff is a Native American who at all alleged times was confined to the Community's correctional facility on the Community's reservation when he alleges Tribal Directors violated his right to free exercise of religion. As correctional department officials, Tribal Directors were acting under delegated Community

authority. Even if Plaintiff had an ICRA claim, Plaintiff could not bring an ICRA claim in federal court. A writ of habeas corpus is the exclusive means of federal court review under ICRA. *Id*. at 67. Plaintiff did not bring a habeas corpus claim seeking release from Salt River DOC custody. In fact, Plaintiff has been released and intends to reside in Peoria for up to a year. Thus, Plaintiff must pursue an ICRA claim in the Community's court. *See Evans*, 869 F.2d at 1347.

VI. TRIBAL DIRECTORS ARE IMMUNE FROM PLAINTIFF'S REQUEST FOR PUNITIVE AND COMPENSATORY DAMAGES.

Plaintiff cannot recover punitive damages or compensation for the *in forma pauperis* application fee from or Tribal Directors. (*See* Doc. 1). Plaintiff cannot recover monetary damages from Tribal Directors in their official capacities. (*See* Doc. 17). Plaintiff also has not alleged that Tribal Directors acted recklessly or with callous indifference to claim punitive damages or properly alleged a Section 1983 claim to claim compensatory damages. *See Smith v. Wade*, 461 U.S. 30, 56–58 (1983).

VII. CONCLUSION

The Court lacks subject matter jurisdiction over this case which is barred by tribal sovereign immunity and because Plaintiff lacks standing to sue for the relief requested including under RLUIPA. Plaintiff fails to state a claim under Section 1983 because Plaintiff fails to allege that Tribal Directors acted under color of state law. Plaintiff cannot correct the deficiencies in the Complaint. Accordingly, Tribal Directors respectfully request that the Court dismiss Plaintiff's Complaint in its entirety pursuant to Rules 12(b)(1), 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B)(ii).

RESPECTFULLY SUBMITTED this 30th day of September, 2020.

By __/s/ Glennas'ba Augborne Arents____
Eric N. Dahlstrom (#004680)
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ROTHSTEIN DONATELLI LLP

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE WITH LRCIV 12.1(c)

Pursuant to LRCiv 12.1 (c), I certify that prior to filing this Motion to Dismiss, I notified Plaintiff of the issues asserted in this Motion to Dismiss. I did not receive a response from Plaintiff and thus, I am unable to agree that the Complaint is curable in any part by an amendment.

DATED this 30th day of September, 2020.

By __/s/ Glennas'ba Augborne Arents_____
Eric N. Dahlstrom (#004680)
Glennas'ba Augborne Arents (#033703)
ROTHSTEIN DONATELLI LLP

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on the 30th day of September, 2020, I caused a true and correct copy

of the foregoing Motion to Dismiss to be filed electronically through the CM/ECF system, which caused all counsel of record to be served, as noted on the notice of electronic filing, and transmitted a copy via U.S. Mail to the following:

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Peoria, Arizona 85283

By /s/ Lenora P. Whippi