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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>DAVID W. FERNANDES,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>COMMISSIONER OF SOCIAL SECURITY,</p> <p>Defendant - Appellee.</p>

No. 10-15344

D.C. No. 1:08-cv-01775-DLB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Dennis L. Beck, Magistrate Judge, Presiding**

Submitted June 15, 2011***

Before: CANBY, O'SCANNLAIN, and FISHER, Circuit Judges.

David W. Fernandes appeals pro se from the district court's judgment

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The parties consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c).

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

dismissing for lack of subject matter jurisdiction his action against the Commissioner of Social Security. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Subia v. Comm'r of Soc. Sec.*, 264 F.3d 899, 901 (9th Cir. 2001). We affirm.

The district court properly dismissed Fernandes's action for lack of subject matter jurisdiction because Fernandes, through counsel, withdrew his request for a hearing before an administrative law judge and thus failed to exhaust his administrative remedies, and he failed to allege a colorable constitutional claim. *See id.* at 902-03.

Fernandes's remaining contentions are unpersuasive.

AFFIRMED.