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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HORIZON CHRISTIAN SCHOOL, an Oregon nonprofit corporation; et al., Plaintiffs-Appellants, v. KATE BROWN, Governor, State of Oregon, Defendant-Appellee.	No. 21-35947 D.C. No. 3:20-cv-01345-MO MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted October 11, 2022
Portland, Oregon

Before: O'SCANNLAIN, PAEZ, and BENNETT, Circuit Judges.
Concurrence by Judge O'SCANNLAIN.

Plaintiffs are religious K-12 schools and parents of students attending such schools in Oregon ("Plaintiffs") who brought suit against Governor Kate Brown ("the State" or "Brown") in her official capacity after she issued a series of Executive Orders restricting in-person school instruction. The relevant orders

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

include Executive Order 20-20, issued on April 23, 2020, and Executive Order 20-29, issued on June 24, 2020. Executive Order 20-29 relied on guidance from the Oregon Department of Education and Oregon Health Authority to establish county-based metrics that determined when all schools could resume in-person instruction. The most recent guidance that Plaintiffs challenge was issued on September 8, 2020. Plaintiffs filed their First Amended Complaint on September 25, 2020, alleging a violation of their First Amendment rights, among other claims, and seeking injunctive and declaratory relief as well as damages.

Since then, all relevant orders have been rescinded. On December 23, 2020, Brown announced that the guidance for resuming in-person school instruction would become advisory on January 1, 2021. In March 2021, Brown issued Executive Order 21-06, which required all public schools to provide in-person instruction. On June 25, 2021, Brown issued Executive Order 21-15, which rescinded any remaining pandemic restrictions. Finally, Brown terminated the Covid-19 state of emergency in Oregon on April 1, 2022, which ended her statutory authority to impose pandemic restrictions.

The district court dismissed Plaintiffs' claims for injunctive and declaratory relief and damages, and denied as futile Plaintiffs' motion to

amend. We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, we affirm. *See Parents for Priv. v. Barr*, 949 F.3d 1210, 1221 (9th Cir. 2020); *Foster v. Carson.*, 347 F.3d 742, 745 (9th Cir. 2003); *Micomonaco v. Washington*, 45 F.3d 316, 319 (9th Cir. 1995).

1. Prospective declaratory and injunctive relief. Plaintiffs' claims for prospective declaratory and injunctive relief are moot under *Brach v. Newsom* (*Brach II*), 38 F.4th 6 (9th Cir. 2022) (en banc). As Plaintiffs acknowledge, there is "no longer any state order for the court to declare unconstitutional or to enjoin." *Id.* at 11. As described above, the Executive Orders that Plaintiffs challenge have long been rescinded. Schools have been able to operate in-person for nearly two years. Finally, Brown terminated the Covid-19 state of emergency in Oregon on April 1, 2022, which ended her statutory authority to impose pandemic restrictions.[1] These actions demonstrate that "the State has carried its burden of establishing there is no reasonable expectation the challenged conduct will recur," *id.* at 15, so neither the voluntary cessation nor the capable-of repetition-but-evading-review doctrines apply as exceptions to mootness. *See Brach II*, 38 F.4th

[1] This fact distinguishes this case from *Brach II*, where California's "Governor Newsom operated—and continues to operate—under [an] emergency order." 38 F.4th at 18 (Paez, J., dissenting). Thus, these claims are moot even under the dissent's theory in *Brach II*, which suggested that "one of the crucial factors in determining mootness in this scenario is whether the defendant retains the power to issue similar orders." *Id.* at 17.

at 12-15. Accordingly, we affirm the district court's dismissal of Plaintiffs' claims for prospective relief.

2. Nominal damages. Plaintiffs also seek nominal damages, which can sometimes save a case from mootness if the plaintiff "plead[s] a cognizable cause of action." *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021). But damages claims cannot be maintained against a state under the Eleventh Amendment and 42 U.S.C. § 1983. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68-69 (1997). Plaintiffs' First Amended Complaint clearly specifies that Brown is being sued "in her official capacity only." *See* First Amended Complaint at 1, *Horizon Christian School v. Oregon*, No. 3:20-cv-01345 (D. Or. Sept. 25, 2020) (Dkt. 17). Plaintiffs' argument that the "course of proceedings" shows they also sued Brown in her individual capacity is unavailing. This is not a case where "the complaint [does] not clearly specify whether officials are sued personally, in their official capacity, or both." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). The district court properly dismissed Plaintiffs' claim for nominal damages.

3. Leave to amend. The district court also did not err in denying leave to amend the complaint for futility. Even if Brown had been sued in her individual capacity, she would be entitled to qualified immunity. To determine whether qualified immunity applies, the court "asks, in the order it chooses, (1) whether the

alleged misconduct violated a constitutional right and (2) whether the right was clearly established at the time of the alleged misconduct." *Hernandez v. City of San Jose*, 897 F.3d 1125, 1132 (9th Cir. 2018) (cleaned up) (citation omitted). For Plaintiffs to prevail on their constitutional claims, they must show that it was clearly established at the time Brown imposed the restrictions that the restrictions on K-12 schools during a novel pandemic violated either the Free Exercise Clause or Plaintiffs' fundamental parental rights. Even assuming that a constitutional right was violated, Plaintiffs cannot do so.

To show that a right was clearly established, Plaintiffs must demonstrate the right was clear "in light of the specific context of the case, not as a broad general proposition." *Keates v. Koile*, 883 F.3d 1228, 1239 (9th Cir. 2018) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). Yet Plaintiffs cite no cases about school closures during a pandemic that were decided before the Covid-19 pandemic or while Oregon's schools remained closed. There is no clearly established parental right to in-person school instruction during a pandemic. *Cf. Brach v. Newsom ("Brach I")*, 6 F.4th 904, 925 (9th Cir., July 23, 2021) (newly identifying a fundamental parental right to in-person schooling in private schools), *reh'g en banc granted, opinion vacated*, 18 F.4th 1031 (9th Cir. 2021). As to Plaintiffs' free exercise claim, the caselaw about Covid-19 closures was far from established when Brown issued her orders in the summer of 2020. At that time, the emerging

caselaw largely indicated free exercise claims were unlikely to succeed, although the decisions often included vocal dissents.[2]

Plaintiffs' most analogous free exercise case is *Roman Catholic Diocese v. Cuomo*, but that case was not decided until November 25, 2020—*after* Brown issued the challenged orders, and only a month before the order was modified to allow private schools to open. 141 S. Ct. 63 (2020). Even if *Roman Catholic Diocese* enters into the qualified immunity determination, it did not clearly establish any law applicable here, since it focused on regulations that expressly "single[d] out houses of worship for especially harsh treatment," 141 S. Ct. at 66, while the order here applied to all "public schools and private schools" regardless of religion. The debate over pandemic closures and the Free Exercise Clause continued—and continues—even after *Roman Catholic Diocese* was decided.[3]

In sum, Plaintiffs cannot show that the law was "clearly established" as to

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[2] *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.) (denying injunctive relief over dissent); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.) (same); *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 730-31 (9th Cir. 2020) (finding it unlikely that plaintiffs would show the district court erred by holding they had not shown a likelihood of success on the merits); *id.* at 731 (O'Scannlain, J., dissenting).

[3] For example, in December 2020, we held that *Roman Catholic Diocese* compelled a finding that Nevada's restrictions on religious services would not survive strict scrutiny. *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1234 (9th Cir. 2020). But in *South Bay United Pentecostal Church v. Newsom*, we found that the plaintiffs were not likely to succeed on most of their free exercise claims. 985 F.3d 1128, 1142-51 (9th Cir. 2021).

the free exercise or parental rights claims at the time Brown issued her orders, and she would therefore be entitled to qualified immunity if she had been sued in her individual capacity. We accordingly affirm the district court's decision to dismiss the nominal damages claim and deny the motion to amend as futile.

AFFIRMED.

Horizon Christian v. Brown, No. 21-35947

O'SCANNLAIN, Circuit Judge, concurring:

I concur in the majority's memorandum disposition. I write separately to emphasize that, while Governor Brown is entitled to qualified immunity because the law was not clearly established, the parental right which Plaintiffs seek to defend merits constitutional protection. *See Brach v. Newsom*, 6 F.4th 904, 929 (9th Cir.) (Collins, J.) (arguing that the *Meyer-Pierce* right "of parents to direct the upbringing and education of children under their control" necessarily embraces "a right to choose in-person private-school instruction"), *reh'g en banc granted, opinion vacated*, 18 F.4th 1031 (9th Cir. 2021), *and on reh'g en banc*, 38 F.4th 6 (9th Cir. 2022) (finding claims moot). If no immunity applied, I would hold that the Governor's order impinged on a fundamental constitutional right and so was subject to constitutional scrutiny.