FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORREST LEE JONES; RODRIGO RUBEN ESCARCEGA; DENNIS BARNES, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants*, v. KATHLEEN ALLISON,* Secretary of the California Department of Corrections and Rehabilitation, in her official capacity; RALPH DIAZ, in his individual capacity; SCOTT KERNAN, in his individual capacity; and JOHN DOES 1–10, in their individual and official capacities, *Defendants-Appellees.*	No. 20-15795 D.C. No. 4:19-cv-07814-JSW OPINION

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

* Kathleen Allison is substituted for her predecessor, Ralph Diaz, as Secretary of the California Department of Corrections and Rehabilitation for the claim brought against Mr. Diaz in his official capacity. *See* FED. R. APP. P. 43(c)(2).

Argued and Submitted February 1, 2021
San Francisco, California

Filed August 20, 2021

Before: Sandra S. Ikuta and Jacqueline H. Nguyen, Circuit Judges, and Richard K. Eaton,[**] Judge.

Opinion by Judge Eaton

SUMMARY[***]

Civil Rights

The panel affirmed the district court's dismissal of an action brought pursuant to 42 U.S.C. § 1983 alleging violations of plaintiffs' Fourteenth Amendment procedural and substantive due process rights for the time they spent incarcerated and ineligible for early parole considerations because of regulations adopted by executive officials of the California Department of Corrections and Rehabilitations.

In November 2016, California voters passed Proposition 57, which amended the California Constitution by adding Article I, Section 32 ("Section 32"). Section 32 granted eligibility for early parole consideration to state prison inmates convicted of nonviolent felonies who had completed

[**] Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the full term for their primary offense. Section 32 authorized the California Department of Corrections and Rehabilitations ("CDCR") to adopt implementing regulations. In 2017 and 2018, the CDCR adopted regulations ("Regulations") which excluded from early parole consideration nonviolent felony offenders sentenced to indeterminate sentences under California's Three Strikes Law. The California Court of Appeal subsequently found the Regulations to be inconsistent with Section 32. Thereafter, in 2019, the CDCR amended the Regulations to include, for early parole consideration, state prisoners serving indeterminate sentences for nonviolent third-strike offenses.

Plaintiffs are felony offenders previously sentenced under California's Three Strikes Law whose third strike was a nonviolent felony, and who became eligible for early parole under the 2019 Amendments. Plaintiffs brought suit for due process violations for the time they spent incarcerated and ineligible for early parole consideration because of the Regulations.

The panel first rejected plaintiffs' argument that defendants lacked authority to adopt the Regulations because the Regulations were ultimately determined to be unlawful. The panel held that defendants acted within the legislative sphere when they participated in the adoption of the Regulations. That the Regulations were later found to violate the California Constitution did not diminish defendants' authority to adopt the Regulations in the first place. The panel then held that defendant officials of the CDCR were performing a legislative function when they adopted the Regulations as directed by Section 32. Defendants were therefore entitled to legislative immunity from plaintiffs' § 1983 claims for damages.

COUNSEL

Ernest Galvan (argued), Michael W. Bien, and Rekha Arulanantham, Rosen Bien Galvan & Grunfeld LLP, San Francisco, California, for Plaintiffs-Appellants.

Cassandra J. Shryock (argued) and Jeffrey T. Fisher, Deputy Attorneys General; Misha D. Igra, Supervising Deputy Attorney General; Monica N. Anderson, Senior Assistant Attorney General; Office of the Attorney General, San Francisco, California; for Defendants-Appellees.

OPINION

EATON, Judge:

The issue before us is whether state executive officials of the California Department of Corrections and Rehabilitation (the "CDCR"),[1] are immune from claims brought under 42 U.S.C. § 1983 for damages stemming from the CDCR's adoption of regulations pursuant to the authority delegated to it by the California Constitution.

I

In November 2016, California voters passed Proposition 57, which amended the California Constitution by adding Article I, Section 32. *See* Cal. Const. art. I, § 32 ("Section 32"). Section 32 granted eligibility for early parole consideration to state prison inmates convicted of nonviolent

[1] The CDCR is the state administrative agency responsible for the operation of California's state prison and parole systems. *See* CAL. GOV'T CODE § 12838.5 (West 2021).

felonies who had completed the full term for their primary offense. *See id.* § 32(a)(1) ("Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense."). Section 32 authorized the CDCR to adopt implementing regulations: "The [CDCR] shall adopt regulations in furtherance of [Section 32's] provisions, and the Secretary of the [CDCR] shall certify that these regulations protect and enhance public safety." *See id.* § 32(b).

In 2017 and 2018, the CDCR adopted regulations (collectively, the "Regulations"), which excluded from early parole consideration nonviolent felony offenders sentenced to indeterminate sentences under California's Three Strikes Law.[2] In 2018, the California Court of Appeal found that the Regulations' exclusion of these offenders was inconsistent with Section 32. *See In re Edwards*, 237 Cal. Rptr. 3d 673, 682 (Ct. App. 2018) ("[The] CDCR's adopted regulations impermissibly circumscribe eligibility for Proposition 57 parole by barring relief for Edwards and other similarly

[2] As in effect from March 7, 1994 to November 6, 2012, California's Three Strikes Law provided that a criminal defendant convicted of two prior "serious" or "violent" felonies would receive an indeterminate twenty-five-years-to-life sentence if convicted of a third felony, even if that third felony was nonviolent. *See People v. Superior Ct. (Romero)*, 917 P.2d 628, 630–31 (Cal. 1996). On November 6, 2012, voters approved Proposition 36, which amended the Three Strikes Law to eliminate indeterminate sentences for a criminal defendant whose third felony was a nonserious or nonviolent crime. *See* 2012 Cal. Legis. Serv. A-36 (amending CAL. PENAL CODE §§ 667, 1170.12). As a result, since the new law took effect on November 7, 2012, criminal defendants receive an indeterminate twenty-five-years-to-life sentence only if their third felony is serious, violent, or part of an enumerated list of nonviolent or nonserious felony exceptions. *See People v. Valencia*, 397 P.3d 936, 942 (Cal. 2017).

situated inmates serving Three Strikes sentences for nonviolent offenses. The offending provisions of the adopted regulations are inconsistent with section 32 and therefore void.").

Thereafter, in 2019, the CDCR amended the Regulations to include, for early parole consideration, state prisoners serving indeterminate sentences for nonviolent third-strike offenses (the "Amendments"). *See* Cal. Code Regs. tit. 15, § 2449.30 (2019). In the Amendments, the CDCR set a deadline of December 31, 2021 by which to schedule parole consideration hearings for all of the previously excluded offenders. *See id.* § 2449.32(b).

Forrest Jones, Rodrigo Escarcega, and Dennis Barnes ("Plaintiffs") are felony offenders previously sentenced under California's Three Strikes Law whose "third strike" was a nonviolent felony, and who became eligible for early parole under the Amendments. Plaintiffs brought claims under 42 U.S.C. § 1983[3] on behalf of themselves, a class,

[3] In addition to their § 1983 claims, Plaintiffs alleged violations of California's Tom Bane Civil Rights Act and the California Constitution. They also brought a state law claim of false imprisonment. The District Court declined to extend supplemental jurisdiction to these state law claims. On appeal, Plaintiffs do not substantively challenge this decision.

and two subclasses,[4] against former and current CDCR officials ("Defendants").[5]

Plaintiffs asserted claims for damages against Defendants in their individual capacities. Specifically, Plaintiffs sought relief for alleged violations of their Fourteenth Amendment procedural and substantive due process rights for the time they spent incarcerated and ineligible for early parole consideration because of the unlawful Regulations.[6]

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[4] The "Eligibility Class" includes "all people who were serving an indeterminate life sentence for a nonviolent offense under California's Three Strikes Law on January 1, 2017, and whose 'full term of the primary offense' is scheduled to elapse on or before December 31, 2021."

The "Released Subclass" includes "all members of the Eligibility Class who have been released since January 1, 2017 and whose release was not caused by events that occurred between January 1, 2017 and January 1, 2019." In other words, it includes members of the Plaintiff class whose full term for their primary offense had ended before Proposition 57 was passed and have since been released from prison, but whose release might have been secured earlier had Defendants' Regulations not denied them access to parole consideration.

The "Injunctive Subclass" includes "all members of the Eligibility Class who have not yet received parole consideration since the effective date of the January 2019 regulations."

[5] Plaintiffs did not name the CDCR as a defendant.

[6] Plaintiffs also asserted a claim for injunctive relief against Defendants in their official capacities, alleging violations of Plaintiffs' Fourteenth Amendment procedural due process rights. Plaintiffs sought an injunction to compel Defendants to provide for an expedited date by which Plaintiffs' parole consideration hearings must be scheduled. Plaintiffs have forfeited this claim by failing to challenge its dismissal

On a Rule 12(b)(6) motion by Defendants, the District Court dismissed Plaintiffs' case with prejudice. It dismissed the claims for damages as barred by qualified immunity. Thereafter, Plaintiffs appealed.

Dismissals for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) are reviewed *de novo*. *See Palm v. L.A. Dep't of Water & Power*, 889 F.3d 1081, 1085 (9th Cir. 2018). Additionally, grants of immunity to government officials are reviewed *de novo*. *See Kaahumanu v. County of Maui*, 315 F.3d 1215, 1219 (9th Cir. 2003).

We may affirm a District Court's decision granting a motion to dismiss on any ground supported by the record. *See McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004) (explaining that the appeals court "may affirm on any ground supported by the record"). Here, we affirm the dismissal of Plaintiffs' claims for damages under the doctrine of legislative immunity.

II

A

Under the doctrine of legislative immunity, members of Congress and state legislators are entitled to absolute immunity from civil damages for their performance of lawmaking functions. *See Tenney v. Brandhove*, 341 U.S. 367, 376–77, 379 (1951) (finding that state legislators were absolutely immune from damages when acting within the "sphere of legitimate legislative activity"). Legislative immunity, however, is not limited to officials who are

on appeal. *See Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012) ("We review only issues which are argued specifically and distinctly in a party's opening brief.").

members of legislative bodies. *See Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) ("Absolute immunity flows not from rank or title or 'location within the Government,' but from the nature of the responsibilities of the individual official." (citation omitted) (quoting *Butz v. Economou*, 438 U.S. 478, 511 (1978))). "[O]fficials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998).

Thus, under this functional approach, the Supreme Court has held that legislative immunity does not depend on the actor so much as the functional nature of the act itself. *See id.* at 54–55 ("Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" (quoting *Tenney*, 341 U.S. at 376)).

We too have employed a functional approach in legislative immunity cases. In *Kaahumanu*, we considered whether local council-members were entitled to legislative immunity for their denial of a conditional land-use permit. *See* 315 F.3d at 1218–20. In holding that the members' decision was not functionally legislative in nature, we found that the denial of the permit did not bear the "hallmarks of traditional legislation," in part because the decision was made on an ad hoc basis affecting only a few individuals, rather than developing policy. *Id.* at 1223–24. This idea is also found in *Cinevision Corp. v. City of Burbank*, where we stated that a legislative function "involve[s] the formulation of policy 'as a defined and binding rule of conduct.'" 745 F.2d 560, 580 (9th Cir. 1984) (quoting *Yakus v. United States*, 321 U.S. 414, 424 (1944)).

Other circuits have held that officers, and indeed employees, of the executive branch of a state government may benefit from legislative immunity. *See, e.g.*, *Redwood*

Vill. P'ship v. Graham, 26 F.3d 839, 842 (8th Cir. 1994) (holding that "[state] executive officials are absolutely immune from suits for money damages under section 1983 for their promulgation of rules"); *see also, e.g.*, *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 82 (2d Cir. 2007) ("Legislative immunity shields from suit not only legislators, but also officials in the executive and judicial branches when they are acting 'in a legislative capacity.'" (quoting *Bogan*, 523 U.S. at 55)).

B

We first address Defendants' authority to adopt the Regulations—a threshold requirement for entitlement to legislative immunity. *See Schmidt v. Contra Costa County*, 693 F.3d 1122, 1132 (9th Cir. 2012). Plaintiffs argue that Defendants lacked such authority because the Regulations were ultimately determined to be unlawful. In Plaintiffs' view, "[t]he regulatory authority in Section 32(a)(2)(b) [is] for 'regulations in furtherance of these provisions,' not regulations to re-write these provisions to withhold them from persons the voters intended to benefit." Plaintiffs thus contend that the adoption of the particular Regulations was simply not authorized by Section 32, because the California Court of Appeal later found that the Regulations violated the California Constitution.

We reject this argument for the reason that an official's "authority to regulate" does not depend on whether a particular action yielded an enforceable or sustainable result. Rather, it exists where "officials 'act[ed] in the sphere of *legitimate* legislative activity.'" *Schmidt*, 693 F.3d at 1132 (alteration in original) (quoting *Tenney*, 341 U.S. at 376).

There can be little doubt that Defendants acted within the legislative sphere when they participated in the adoption of

the Regulations. The authority delegated to the CDCR was to "*adopt regulations* in furtherance of [Section 32's] provisions." Cal. Const. art. I, § 32(b) (emphasis added). This is precisely what Defendants did. Thus, they acted "within their . . . delegated legislative powers." *Schmidt*, 693 F.3d at 1132. That the Regulations were later found to violate the California Constitution does not diminish Defendants' authority to adopt the Regulations in the first place. In other words, Section 32's authorization placed Defendants' acts adopting the Regulations in "the sphere of legitimate legislative activity," no matter that provisions of the Regulations were later declared void.

Next, we consider whether Defendants performed a legislative function entitled to immunity. We conclude that they did. As the *Kaahumanu* Court observed, where an act is one that "effectuate[s] policy" rather than one taken for a limited "ad hoc" purpose, a finding of legislative immunity is favored. 315 F.3d at 1220. Here, Section 32 authorized Defendants to adopt regulations for the purpose of implementing policy, *i.e.*, the early parole eligibility of a wide class of nonviolent felony offenders, rather than for a limited, "ad hoc" purpose. *See, e.g.*, *Bateson v. Geisse*, 857 F.2d 1300, 1304 (9th Cir. 1988) ("[A]n act which applies generally to the community is a legislative one, while an act directed at one or a few individuals is an executive one." (alteration in original) (quoting *Cinevision*, 745 F.2d at 579)); *see also Kaahumanu*, 315 F.3d at 1222 (in accord).

Similarly, as in *Kaahumanu*, we look to the purpose and effect of the challenged acts when deciding whether they are legislative in nature. *See* 315 F.3d at 1220. The Regulations bear the hallmarks of laws that might have been enacted by a state legislature. As noted, by adopting them, Defendants created binding rules of conduct affecting a wide population

of individuals. *See Cinevision*, 745 F.2d at 580 ("[A legislative function] involve[s] the formulation of policy 'as a defined and binding rule of conduct.'" (quoting *Yakus*, 321 U.S. at 424)). Also, like typical legislation, the Regulations had "prospective implications that reach[ed] beyond the particular persons immediately impacted" and involved "the use of discretion" when acting pursuant to the delegation in Section 32. *Schmidt*, 693 F.3d at 1137; *see also Kaahumanu*, 315 F.3d at 1223 (finding that a "discretionary, policymaking decision" with far-reaching implications bears the "hallmarks of traditional legislation" (quoting *Bogan*, 523 U.S. at 55)).

Thus, Section 32's delegation authorized the CDCR to perform a legislative function, and the resulting Regulations themselves functioned as legislation. They bore the hallmarks of legislation—they were binding, policy-implementing rules that operated much as laws passed by a state legislature would. Accordingly, Defendants enjoy absolute immunity from Plaintiffs' claims for damages brought under § 1983.

III

Because Defendant officials of the CDCR were performing a legislative function when they adopted the Regulations as directed by Article I, Section 32 of the California Constitution, we find that they are entitled to legislative immunity from Plaintiffs' § 1983 claims for damages, and affirm the dismissal of these claims.

AFFIRMED.