No. 24-

IN THE

Supreme Court of the United States

GEOFFREY GRAY, *et al.*,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to correct the error of the Court of Appeals below, where the Court of Appeals, contrary to binding authority of this Court and contrary to the jurisprudence of other Circuit Courts of Appeal, applied a qualified-immunity affirmative defense to bar an *Ex Parte Young* claim for prospective injunctive relief against state officials in their official capacity? *Yes.*

2. To the extent that the Court of Appeals below went against the consensus holdings of other Courts of Appeals, by failing to give the plaintiffs below any opportunity to amend their complaint to cure the defects noted in its Memorandum Opinion, should this Court grant certiorari to bring the Ninth Circuit back into harmony with the rest of the federal judiciary on that point? *Yes.*

3. Should this Court grant certiorari to correct the error of the Court of Appeals below, where the Court of Appeals, contrary to binding authority of this Court, refused to consider precedent adduced by Petitioners for the first time on appeal in support of their argument against Respondents' qualified immunity affirmative defense? *Yes.*

PARTIES TO THE PROCEEDING

Petitioners are Geoffrey Gray, Aaron Miller, Adam Bogle, Andre Lyle, Benjamin Wheeler, Blaine Schiess, Bobby Dean, Bradley Sawaya, Casey Burns, Caitlyn Lomen-Carr, Christodoulos Paneris, Daniel Hjelmeseth, David Lawton, Deborah Fletcher, Donna Tegnell, Dylan Beckner, Eric Hansen, Gary Gordon, James Howard, Jana Crawford, Jay Sarver, Jeremy Birchfield, Jeremy Greene, Joe Degroat, John Winston, Jordan Longacre, Joseph Greene, Justin Cochran, Kerry Strawn, Larry Frostad, Lynn Nowels, Merriegrace La Pierre, Michael Brown, Michael Uribe, Michael Watkins, Nathan Kesler, Nicholas Auckland, Nicole Preziosi, Peter Duncan, Richard Ostrander, Robert Washabaugh, Rodney Pelham, Ronald Vessey, Ryan Eubank, Scott Schutt, Sean Morgan, Shane Taylor, Shasta Atkins, Sheri Ferguson, Sommer Beckner, Stacy Katyryniuk, Stephen Austin, Steve Turcott, Steve Walker, Terry Dunn, Todd Humphreys, Tyler Ratkie, Wendy Punch, William Dubose, Victoria Gardner. Petitioners (the "Employees") were the plaintiffs in the District Court and the appellants in the Court of Appeals.

Respondents are the Washington State Department of Transportation ("WSDOT"), along with its officials Roger Millar, Jeff Pelton, Mark Nitchman, and Kimberly Monroe Flaig (collectively, "Individual Respondents," and with WSDOT, the "Employers"). Respondents were the defendants in the District Court and the appellees in the Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

Apart from the proceedings directly on review in this case, there are no other directly related proceedings in any court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit affirming dismissal of their federal constitutional claims with prejudice and without leave to amend under Fed. R. Civ. P. 12(b)(6).

OPINIONS BELOW

The memorandum opinion of the Ninth Circuit Court of Appeals panel as to which certiorari is sought, Dkt. No. 43.1 in that appeal, has not been published in the Federal Reporter but can be found at 2024 WL 5001484 (the "Mem. Order"). The District Court's opinion from which appeal was taken, ECF No. 21 in that proceeding, can be found at 2023 WL 662223 ("Dismissal Order").

JURISDICTION

The Court of Appeals issued its judgment on January 22, 2025 (Mandate). Its Memorandum Opinion was issued on December 6, 2024. Its Order Denying Petitioners-Appellants' Petition for rehearing or *en banc* review was issued on January 14, 2025. The District Court had jurisdiction under 28 U.S.C. §§ 1331 & 1343The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under U.S. Const. Art. III, § 2, cl. 2, and 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

U.S. Const. amend XIV § 1: "No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case provides the Court with an opportunity to ensure that citizens may sue state officials for prospective injunctive relief, and more particularly, that state employees' may sue for reinstatement to enforce their rights to receive a fair hearing before termination of employment. In the appeal below, The Ninth Circuit Court of Appeals, badly mistook the law and demanded a further showing to contest qualified immunity to survive Fed.R.Civ.P. 12(b)(6) dismissal of the original complaint without leave to amend.

By so doing, the Court of Appeals contradicted decisions of this Court and other Courts of Appeal which make it clear that in an action against a state official for prospective injunctive relief, the defendant cannot raise a qualified immunity defense.

Review by this Court is all the more critical because the appeal arises in a context in which this Court has already had to provide guidance to the lower courts: to validate individuals' First Amendment right to Free Exercise of religion, despite alleged public-health regulation in response to the COVID-19 pandemic. That ongoing public health problem, and other emergencies to come in the future, tempt governments and government officials to indulge hostility to inconvenient religious exercise. "But," as this Court notably held, "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman*

Catholic Diocese v. Cuomo, 592 U.S. 14, 19, 141 S. Ct. 63, 68, 208 L.Ed.2d 206, 210 (2020). This case raises once more the specter of government overreach in the service of anti-religious animus, and of the lower federal courts' misapplication of the law to protect the officials at fault.

Here, the State accommodated 122 of the 132 (92.4%) secular exemptions and granted only 52 of 456 (11.4%) of religious exemptions. With this stark contrast in numbers, the lower courts should not prevent this case moving forward through discovery based on a qualified immunity defense raised dispositively in response to an initial complaint without leave to amend or oral argument. And the Ninth Circuit should not be permitted to avoid considering the issue because it wrongly found that rebuttal to the defense was forfeited at the district court level. Review is warranted and valuable to protect the fundamental right of Free Exercise and equal treatment without intolerance of religious beliefs.

II. STATEMENT OF THE CASE[1]

A. The Termination of Petitioners

In August 2021, Washington State Governor Inslee issued Proclamation #21-14. The Proclamation mandated

1. At this preliminary stage of review, to avoid an unnecessarily voluminous record, Petitioners are not submitting copies of the full District Court record and therefore do not include citations to that record in this Petition. The background facts of the case recited here are set forth in much the same form in Petitioners' appellate briefs to the Circuit Court, which cited to Petitioners' District Court Complaint, as is appropriate in an appeal from dismissal under Rule 12(b)(6).

COVID-19 vaccination for state employees, expressly subject to religious and medical anti-discrimination statutes to be applied by each state agency by their own procedures. The Employees, with two exceptions, each applied to their state agency employer, Defendant WSDOT, for religious exemptions (and/or in a few cases medical exemptions) from the mandate.[2] The two exceptions had **already been informed by WSDOT that application for religious exemption would be futile**. Each exemption request was nominally granted by WSDOT, implicitly recognizing that each of those religious-exemption Employees sincerely held a religious belief which conflicted with taking the COVID-19 vaccination. The apparent grant of relief, however, turned out to be illusory. Exemption was only the first step, because an exempt employee also had to be accommodated to maintain their livelihood. The agency's accommodation policy, however, was weaponized to force upon most religious-exemption employees, and not most secular-exemption employees, the Hobbesian choice of abandoning their religious beliefs and get vaccinated or lose continued public employment and livelihood. The Employers arbitrarily denied all of the Employees any accommodation for their religious beliefs.

2. Although the sincerity of the Employees' specific religious beliefs, and their conflict with COVID-19 vaccination are not at issue in this appeal, the Court may easily understand that many Christians object to the use of the available COVID-19 vaccines because, in the rush to bring those products to market, research and development used fetal stem cells; and many Christians object to the use of any vaccines at all, as hubristic interference with the creations and plan of Providence. It is also common knowledge that many employees throughout the country have raised such religious conflicts against COVID-19 vaccination and/or sought exemption due to medical contraindication, in the face of similar vaccination mandates and policies.

The Employers did this without allowing *Loudermill* hearings—or at best, allowing meetings where the outcome was predetermined and discussion of accommodation was shut down. Indeed, in this litigation, the Employers took the position that the Employees, contrary to the Employers' pre-litigation instructions, should have proposed and argued for accommodation in their exemption requests, and that, by 'failing' to do so, each Employee had forfeited their rights to be heard on that subject. As noted previously, Employers granted all the Employees' *exemption* requests, that was not the issue; rather the issue was the second step in the process –*accommodation* of the Employees' sincerely held religious beliefs which were the basis upon which their exemptions were approved. By collapsing those steps after the fact into a single opportunity to request relief, the Employers neatly trapped the Employees, denying them pretermination due process.

Accommodation against vaccination, to be clear, was perfectly feasible in each case without imposing any undue net burden on WSDOT. But the Employers refused to consider potential accommodations. They even went so far as to mischaracterize certain Employees' essential job duties, ignore other Employees' immediate supervisors' confirmation that the Employees' job duties allowed for potential accommodation, and mischaracterize the Proclamation as specifically forbidding certain potential accommodations. The Employers, in short, created and implemented an unwritten policy to carry out the Proclamation by making it as hard as possible to apply for exemption and accommodation.

Employees alleged a plausible claim that the Employers' accommodation policy and decisions were

either hostile to religion, in which case they violate the Employees' Free Exercise rights, or were not generally applicable because they treated religion-exemption employees differently and less favorably than employees who were exempt from vaccination for secular reasons, and, therefore, they are subject to strict scrutiny. The accommodation data alleged in the complaint and supported by materials attached thereto, merited at least the opportunity to pursue discovery as to the reasons for such a palpable difference in the number and percentage of accommodation denials for religious-exemption employees compared to secular-exemption employees. That, together with not allowing the Employees a meaningful pre-deprivation hearing as to whether their failure to comply with the vaccine mandate required they be terminated was sufficient to support their Free Exercise, Equal Protection, and Procedural Due Process Clause claims. In short, the Employees alleged that the Employers created and implemented a tacit policy to carry out the Proclamation by making it as hard as possible for religious-exemption employees to be accommodated, despite those employees' Constitutional rights.

Having thus set up the Employees for failure, the Employers then terminated Employees' continued public employment and livelihood for not complying with the vaccine mandate. Secular-exempt employees largely did not share the same fate

B. The District Court Litigation

After their wrongful terminations, Employees brought this action in the District Court for the Western District of Washington against the State agency and its Secretary

and others who concocted the agency's accommodation policy that had set in motion the events which led to the grossly disproportionate number of terminations for unaccommodated religious-exemption employees. The Employees are seeking relief pursuant to 42 U.S.C. §1983 for the alleged violations of their rights under the U.S. Constitution and pendent state-law claims. To avoid unnecessary expense and in the interest of judicial economy, rather than bringing 59 separate actions raising the same legal theories and centered on a common nexus of facts, the Employees joined their claims together in a single Complaint, akin to a mass constitutional tort action.

Instead of filing a responsive pleading to the complaint, the Employers moved for dismissal with prejudice under Rule 12(b)(6) and asserted that qualified immunity precluded litigation against the individual Defendants in their personal capacity and that sovereign immunity warded the State agency because it is not a person for purposes of 42 U.S.C. §1983. Without oral argument, the District Court granted the motion and dismissed all the federal constitutional claims with prejudice and without leave to amend and declined to exercise ancillary jurisdiction over the pendant state law claims. The Employees, in their response to the motion to dismiss, had asked for the court to at least grant them leave to amend their complaint (which had not yet been amended), to cure any alleged deficiencies by augmenting their factual allegations to overcome the reasons for dismissal. The district court found Employees did not specify whether their federal claims were being asserted against the individual defendants in their personal or official capacity, and dismissed all claims against them, personal or official capacity, based on qualified immunity.

It did so, despite Employees clarifying they were seeking the prospective injunctive relief of reinstatement, which would have necessarily been an official capacity claim against the individual State actors. Despite addressing this in its Dismissal Order, the District Court refused to allow amendment, erroneously finding that it would be futile.

C. Appellate Proceedings

The Employees appealed to the Ninth Circuit Court of Appeals. The Court of Appeals affirmed the District Court's decision in every particular. More specifically and most relevantly to this Petition:

The Court of Appeals considered the Employees' Procedural Due Process claim. It acknowledged that Employees' claim for "reinstatement is a legitimate request for prospective injunctive relief under the *Ex Parte Young* exception to sovereign immunity." Then, in patent error and **contrary to every decision this Court has issued distinguishing personal capacity and official capacity claims** and the immunities that can apply to each, it held that qualified immunity protected each individual Respondent from Employees' procedural Due Process claim whether they sought reinstatement or monetary relief. The Court of Appeals then held that the Employees' proposed amendments to clarify they were seeking prospective injunctive relief for reinstatement against the individual Defendants in their official capacity "do not cure the deficiencies in their challenges to qualified immunity."

The Court of Appeals also held that the Employees' claims for violation of rights under the Free Exercise

clause and the Equal Protection clause, and their substantive due process claim based on forced medical treatment were forfeited by a failure to brief those issues in the District Court. This is not accurate, as a glance at the District Court's Dismissal Order, at page 9, shows that the issue was in fact brought up and briefed by both sides in the District Court.[3] The District Court merely held that the Employees had not shown precedent which would indicate that the rights they sought to validate were clearly established.

The Employees moved for panel and *en banc* rehearing, a motion which was denied on January 14, 2025 without any further written rationale. This petition timely followed.

III. REASONS FOR GRANTING THE PETITION

A. Introduction to Argument—Implications of the Court of Appeals' Errors

On motion under Fed. R. Civ. P. 12(b)(6), the courts below were required to accept as true all well-pleaded allegations of the Complaint, and draw all inferences in the Employees' favor, to determine whether the Employees stated a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868, 884 (2009). ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

3. To avoid unnecessarily cluttering the record at this preliminary stage of review, Petitioners do not attach the parties' District Court briefs.

misconduct alleged.") No heightened pleading standard applies to the sort of claims brought by the Employees. *See Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993) (a federal court may not apply a standard "more stringent than the usual pleading requirements of Rule 8(a)" in "civil rights cases alleging municipal liability"); *and see Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (a "heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)"), quoted in *Johnson v. City of Shelby*, 574 U.S. 10, 11, 135 S. Ct. 346, 347, 190 L.Ed.2d 309, 309 (2014)

Therefore, for purposes of this Petition the following facts and reasonable inferences apply: First, all the Employees, except the two secular-exemption Employees, sincerely held religious beliefs that conflicted with their ability to comply with the newly required vaccine mandate. Second, the Employers adopted a policy that treated secular-exemption employees differently and more favorable than religious exemption employees. Third, there was no meaningful difference in perceived risk of transmitting the COVID-19 virus between an unvaccinated secular-exemption employee continuing their public employment and a religious-exemption employee continuing their public employment. Fourth, that the only difference between the class of religious-exemption employees from the class of secular-exemption employees was that the class of religious-exemption employees were adherents to religion and the secular-exemption employees were not. Fifth, that the individual Defendants' accommodation policy they crafted and

implemented by directing their subordinates to enforce when making accommodation decisions, treated the class of secular-exemption employees differently and more favorably than the class of religious-exemption employees, although the perceived risk of COVID-19 transmission was the same between all members of either class. Finally, the Employees were not provided a meaningful pre-deprivation hearing that was necessary to contest their discharge from continued public employment due to their vaccine mandate noncompliance.

The particular issue before this Court on this Petition, however, is narrower, at least at first glance. For whatever reason, the District Court did not consider the merits of Employees' constitutional claims and decided the federal claims based on qualified immunity. Following suit, the Ninth Circuit Court of Appeals did not consider the District Court's error by not applying binding precedent from this Court and, in a most circular fashion, resting on qualified immunity to affirm dismissal of prospective injunctive relief claims even though qualified immunity is inapplicable to these claims. The implications of these compounded and confused errors to follow this Court's precedence, has prevented these Employees from even discovering the reasons they were given the coercive Hobbesian choice of abandoning their religion and complying with the vaccine mandate while secular-exemption employees were not forced to make this grave decision to abandon their secular reasons and similarly comply with the vaccine mandate. While both the District Court and the Ninth Circuit Court of Appeals did so in summary and unpublished fashion, this Court should not permit government to obscure the reasons for what is seemingly disparate treatment and intolerance of religion.

For Employees, this was their livelihood. To them, it was one of the most crushing and personal affronts to their dignity as religious adherents they have ever experienced, first, by the State government they dutifully served during their working careers, and second, by the federal government's courts who they turned to for relief. Both governments never gave them a satisfactory answer as to why and the federal judicial system denied them the ability to discover the reason for themselves.

Additionally, this is an excellent springboard for the Court to decide, on full and complete briefing, the intersection between emergency action a State may take when presented with an unprecedented calamity such as the COVID-19 pandemic and constitutional rights, especially the Free Exercise of Religion embodied in the U.S. Constitution's First Amendment. Addressing the issue now will provide much needed guidance to State officials when the next unexpected calamity is upon us.

Even though the decisions are unpublished, they are still permitted to be cited in future briefings of similar issues. In fact, the District Court's order has already been cited 7 times (3 cases, 1 appellate brief, and 3 trial court documents) and the Ninth Circuit's memorandum opinion, just 4 months old, has been cited in another case that dismissed all federal claim times. If uncorrected, these unpublished decisions could take on a life of their own and lead other federal and state court into error by not limiting qualified immunity to monetary claims against government actors in their personal capacity. It also will eliminate the meaningful holding in *Loudermill* that requires a pre-deprivation hearing prior to terminating public employment, not only as to whether there are

grounds for termination, but also whether termination was necessary even if the grounds are undisputed. In fact, a recent District Court case cited the Ninth Circuit's Memorandum Order for this exact purpose when dismissing a similar Procedural Due, No. 3:24-CV-05081-TMC, 2025 WL 1031306, at *9 (W.D. Wash. Apr. 7, 2025).

To understand the depth of the Court of Appeals' mistakes, a little refresher is in order regarding the different immunities that are applicable to claims against State officials when they are sued in their personal capacity and when they are sued in their official capacity. As the Ninth Circuit's Memorandum Order makes clear, the differences are easily forgotten and overlooked. In sum, State officials sued in their official capacity may raise sovereign immunity, but they may not raise qualified immunity. State officials sued in their personal capacity may raise qualified immunity, but they may not raise sovereign immunity.

B. Immunity Doctrines and Leave to Amend

Government officials, when sued for their activities on the job, generally may take advantage of two immunity doctrines: sovereign immunity and qualified immunity.

1. Sovereign Immunity

The Eleventh Amendment excludes from "[t]he judicial power of the United States," any claims against states. U.S. Const. Amend. XI. States can waive that immunity, and Congress can abrogate it by statute, but such a statutory exception must be expressly and specifically stated. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S. Ct. 1868, 1872, 109 L.Ed.2d 264, 271

(1990); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L.Ed.2d 171, 179 (1985). In particular, 42 U.S.C. § 1983, normally the sole avenue through which constitutional claims can be brought, does not abrogate the States' Eleventh Amendment sovereign immunity to suit. *Quern v. Jordan*, 440 U.S. 332, 341, 99 S. Ct. 1139, 1145, 59 L.Ed.2d 358, 367 (1979). And the same applies to state officials, sued in their official capacity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L.Ed.2d 45, 58 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office…. As such, it is no different from a suit against the State itself.")

The most commonly seen exception to that doctrine is the *Ex Parte Young* rule: "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 491 U.S. at 71 n.10 (quoting *Ky.* v. *Graham*, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106, 87 L.Ed.2d 114, 122 (1985); and citing *Ex parte Young*, 209 U.S. 123, 159-160 (1908)). As the Court of Appeals acknowledged below, "'[r]einstatement is a legitimate request for prospective injunctive relief' under the *Ex parte Young* exception to sovereign immunity." Mem. Order at 4 (quoting *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 842 (9th Cir. 1997)).

2. Qualified Immunity.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages

insofar as their 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, 129 S. Ct. 808, 815, 172 L.Ed.2d 565, 573 (2009) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). This species of immunity has nothing to do with the State's sovereign rights—it is meant to serve "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* As that summary suggests, qualified immunity, like sovereign immunity, has an exception: it does not shield an official who "violated a clearly established constitutional right" of the plaintiff's. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 816, 172 L.Ed.2d 565, 573 (2009).

Equally important, "[q]ualified immunity does not bar § 1983 actions brought against defendants in their official capacity." *Cloaninger v. McDevitt*, 555 F.3d 324, 335 n.11 (4th Cir. 2009); and see *Goodman v. Harris County*, 571 F.3d 388, 396 (5th Cir. 2009) ("an analysis of Hickman's defense of qualified immunity is unnecessary. Qualified immunity is only applicable as a protective shield once a plaintiff has made out a claim against an official acting in his individual capacity.")

In short, sovereign immunity shields state officials from suit in their official capacity, unless the remedy sought is prospective injunctive relief; and qualified immunity shields state officials from suit in their individual capacity. Plainly, therefore, neither sovereign immunity nor qualified immunity shields a state official from suit in their official capacity for prospective injunctive relief.

a. The Court Of Appeals' error in applying immunity law.

Here, the Court of Appeals' decision confuses the two kinds of immunity. On the one hand, the Court of Appeals held, correctly: "[R]einstatement is a legitimate request for prospective injunctive relief" under the Ex parte Young exception to sovereign immunity. Mem. Order at 4 (quoting *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 842 (9th Cir. 1997)). That is to say, the Complaint can be amended to avoid a sovereign immunity bar, as to Petitioners' claims against the Individual Respondents. So far, so good.

Then, however, the Court of Appeals went astray, by holding:

> Even if an amended complaint could circumvent the Eleventh Amendment's restrictions on suit against the officials, Employees' claims would fail….. And the amendments Employees propose do not cure the deficiencies in their challenges to qualified immunity for procedural due process.

Mem. Order at 4–5. On that basis, the Court of Appeals held that the District Court had not abused its discretion by denying leave to amend the Complaint. This was error.

There is no question but that the courts "should freely give leave [to amend the complaint] when justice so requires." Fed. R. Civ. P. 15(a)(1). There is a consensus among the Courts of Appeal that based on this rule, it is generally an abuse of discretion to dismiss with prejudice

and without leave to amend, when the Complaint has not previously been amended, unless amendment would plainly be futile. E.g., *Cresci v. Mohawk Valley Cmty. Coll.*, 693 F. App'x 21, 25 (2d Cir. 2017); *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008); *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 573 (6th Cir. 2008); *Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC*, 950 F.3d 911, 919 (7th Cir. 2020); *Woldeab v. Dekalb Cty. Bd. of Educ.*, 885 F.3d 1289, 1291 (11th Cir. 2018). To the extent that the Court of Appeals' Memorandum Order below departs from that consensus, it conflicts with the cited Courts of Appeal and departs significantly from the usual course of judicial proceedings, and this Court should grant certiorari.

If, on the other hand, the Court of Appeals below misapplied the doctrine in favor of granting leave to amend, under the misapprehension that amendment would be futile, that, too, would contradict federal appellate holdings, and this Court should grant certiorari. As discussed *supra*, it is well established by this Court's precedent that qualified immunity applies only to claims against state officials in their individual capacity. Here, the Employees sought leave to amend their Complaint to make clear that they sought reinstatement, against the Individual Respondents in their official capacities. Therefore, the Court of Appeals' determination that amendment would have been futile because of those Respondents' qualified-immunity defense, runs square in the face of the appellate authority from other Circuits discussed *supra*. This contradiction between the implied position of the Ninth Circuit, and the other Courts of Appeal, calls for resolution by this Court.

Be it noted that as the law (discussed *supra*) currently stands, a plaintiff seeking to vindicate their constitutional rights against a State government must steer through an exceedingly narrow channel. If the claim is against State officials, in their individual capacity, it is increasingly likely to be barred by qualified immunity.[4] If the claim is against the State itself, it is almost certain to be blocked by sovereign immunity. If the claim is against State officials in their official capacity, and for damages, it is also very likely to be barred by sovereign immunity. **Only** if the claim is against State officials in their official capacity, and for prospective injunctive relief, will some plaintiffs be able to survive a motion to dismiss. If, as the Ninth Circuit now appears to hold, even that narrow road to relief may be blocked by qualified immunity, that will make it nearly impossible for the judiciary—at least in that Circuit—to step in to prevent unconstitutional abuses by the States. Respectfully, the judiciary should not paint itself into that corner. Only this Court can apply the turpentine necessary to prevent that outcome.

C. The Court of Appeals Erred by Refusing to Consider New Authority on Appeal against the Employers' Qualified Immunity Affirmative Defense.

Although a simple misreading of the record might not usually be a basis for certiorari, the Court of Appeals

4. "Increasingly" likely, because changes in technology, law, and culture make it less likely each year that there will be governing precedent squarely on point which preceded the institution of the qualified immunity doctrine itself, a doctrine which tends to prevent the creation of binding precedent clearly establishing a constitutional right in any new specific context.

went beyond misreading the record and mischaracterized a dearth of authority as a failure to rebut the qualified immunity defense at all, and therefore failed to consider additional, dispositive authority on appeal. The contrary governing authority from this Court on this point could not be more plain. In *Elder v. Holloway*, 510 U.S. 510, 512, 114 S. Ct. 1019, 1021, 127 L.Ed.2d 344, 349 (1994), the petitioner-plaintiff claimed injuries due to a wrongful arrest. "On appeal, the Ninth Circuit noticed precedent in point missed in the District Court.... [but] "Elder could not benefit from the rule reaffirmed in *Al-Azzawy*, the Court of Appeals believed, because that precedent had been unearthed too late." *Elder*, 510 U.S. at 513–14. The Court of Appeals concluded that "cases unmentioned in the District Court could not control on appeal." *Id.* at 514. This Court reversed that decision, because:

> The central purpose of affording public officials qualified immunity from suit is to protect them "from undue interference with their duties and from potentially disabling threats of liability." *Harlow* v. *Fitzgerald*, 457 U.S. at 806. The rule announced by the Ninth Circuit does not aid this objective because its operation is unpredictable in advance of the district court's adjudication. Nor does the rule further the interests on the other side of the balance: deterring public officials' unlawful actions and compensating victims of such conduct. Instead, it simply releases defendants because of shortages in counsel's or the court's legal research or briefing.

Id. at 514–15. Notably, this Court relieved the attorneys even of the responsibility to better their research on

appeal if the diligence of the appellate court itself found the precedent clearly establishing the right at issue. *Id.* at 513–14.

Here, the same Court of Appeals made the same error as in *Elder*: it construed a failure to find all relevant authority at the District Court level as forfeiture of the argument. As held in *Elder*, that approach unduly expands the qualified immunity doctrine and, in many cases, allows officials to abuse clearly-established constitutional rights with impunity, just as they did in this case.

This Court should accept certiorari on this issue and, on the full record, should reverse on this issue, requiring the Court of Appeals to consider *de novo* the qualified immunity defense in light of *all* relevant authority, so that the Employees can pursue their meritorious claims under the Free Exercise Clause and the Equal Protection Clause through discovery and trial on the merits. The question of whether disfavoring religious objections to COVID-19 regulation offends the Free Exercise and Equal Protection Clauses is not merely crucial to the Employees; it is an issue of national importance, *see Roman Catholic Diocese*, *supra*, and should be given a full airing in open court rather than being dismissed on a technicality.

IV. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 6, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3278
D.C. No. 3:23-cv-05418-DGE

GEOFFREY GRAY, *et al.*,

Plaintiffs-Appellants,

v.

WASHINGTON DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
David Estudillo, District Judge, Presiding

Argued and Submitted November 19, 2024
Seattle, Washington

Before: McKEOWN, H.A. THOMAS, and DESAI, Circuit Judges.

Appendix A

MEMORANDUM*

Geoffrey Gray and 59 other former employees (collectively, "Employees") of the Washington State Department of Transportation ("WSDOT") appeal from the district court's order dismissing, without leave to amend, Employees' federal constitutional claims against WSDOT and four of its officials. The court based its decision on WSDOT's sovereign immunity and the officials' qualified immunity. On appeal, Employees limit their claims to those arising under the Due Process Clause, the Equal Protection Clause, and the Free Exercise Clause.

We have jurisdiction under 28 U.S.C. § 1291. *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 870 (9th Cir. 2004). We review de novo a district court's dismissal based on qualified immunity. *Polanco v. Diaz*, 76 F.4th 918, 925 (9th Cir. 2023). We review for abuse of discretion a district court's denial of leave to amend. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 839 (9th Cir. 2020) (as amended). Denying leave to amend is proper when amendment would be futile. *Id.* at 845. We affirm.

To pierce the protections of qualified immunity, Employees must allege a violation of a constitutional right that was "clearly established" at the time of the action. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

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

Appendix A

Employees forfeited their challenges to the officials' qualified immunity arguments for the equal protection and free exercise claims. Employees failed to substantively contest the officials' assertions of qualified immunity in the district court. *See Hernandez v. Garland*, 47 F.4th 908, 916 (9th Cir. 2022) (explaining that issues that are not "specifically and distinctly" argued may be deemed forfeited); *Olea-Serefina v. Garland*, 34 F.4th 856, 867 (9th Cir. 2022) (noting that "purely conclusory" contentions "devoid of supporting factual detail or legal argument" may constitute forfeiture of the claims they purport to support).

The district court did not err in dismissing Employees' due process claims. Employees allege the infringement of multiple rights under the rubric of due process. At oral argument, Employees raised for the first time on appeal a right to bodily autonomy. But this right to bodily autonomy sounds in *substantive* due process, *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997), and Employees' other claims are predicated on *procedural* due process. Employees failed to make a substantive due process argument "sufficiently for the trial court to rule on it," *Tarpey v. United States*, 78 F.4th 1119, 1126 (9th Cir. 2023), and failed to raise the argument in their appellate briefs. The claim is thus forfeited.

Employees also assert procedural due process rights to notice and hearing procedures. Employees received notice of the vaccination policy, the exemption and accommodation decision, and the potential for termination,

and WSDOT offered Employees "pretermination opportunit[ies] to respond" via written submissions and meetings. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Even if *Loudermill* could be read as clearly established law with respect to the accommodation process, and we are doubtful that it can, Employees received as much notice and process as the law required. *Id.*

Finally, Employees assert a right to an impartial decisionmaker (or right to be free from "sham" or "pretext[ual]" proceedings). Where due process requires an opportunity to be heard, the proceeding must involve a decisionmaker who has not "prejudged" the issue. *See, e.g., Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995). But the officials are entitled to qualified immunity because the contours of the claimed right in the accommodations context were not clearly established or "sufficiently definite" such that a reasonable person in the shoes of one of the officials would have understood that their actions violated that right. *Martinez v. City of Clovis*, 943 F.3d 1260, 1275 (9th Cir. 2019) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778-79, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014)).

The district court did not abuse its discretion in denying leave to amend. Employees argued for leave to amend their complaint for two purposes: to seek relief in the form of reinstatement and to allege additional facts against the officials. "[R]einstatement is a legitimate request for prospective injunctive relief" under the *Ex parte Young* exception to sovereign immunity. *Doe v.*

Lawrence Livermore Nat'l Lab., 131 F.3d 836, 842 (9th Cir. 1997).

Even if an amended complaint could circumvent the Eleventh Amendment's restrictions on suit against the officials, Employees' claims would fail. Arguments forfeited in the district court—here, the substantive due process argument and the challenges to qualified immunity for free exercise and equal protection—are not considered upon review of a denial of leave to amend. *Orsay v. U.S. Dep't of Justice*, 289 F.3d 1125, 1136 n.5 (9th Cir. 2002), *abrogated on other grounds by Millbrook v. United States*, 569 U.S. 50, 133 S. Ct. 1441, 185 L. Ed. 2d 531 (2013). And the amendments Employees propose do not cure the deficiencies in their challenges to qualified immunity for procedural due process. Amendment also would be futile as to WSDOT, because the *Ex parte Young* exception applies only to state officials, not state agencies. *See Lawrence Livermore Nat'l Lab.*, 131 F.3d at 839.

We conclude that the district court properly dismissed Employees' claims and did not abuse its discretion in denying leave to amend.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA, FILED OCTOBER 11, 2023

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. 3:23-cv-05418-DGE

GEOFFREY GRAY *et al.*,

Plaintiffs,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION *et al.*,

Defendants.

ORDER GRANTING IN PART MOTION TO DISMISS (DKT. NO. 16)

I INTRODUCTION

This matter comes before the Court on Defendants' motion to dismiss. (Dkt. No. 16.) For the reasons discussed herein, the Court GRANTS Defendants' motion to dismiss Plaintiffs' federal claims and declines to exercise supplemental jurisdiction over Plaintiffs' state law claims. The Court DISMISSES Plaintiffs' state law claims without prejudice.

Appendix B

II BACKGROUND[1]

This instant matter is one of several recent cases challenging either the facial legality or the implementation of Washington's COVID-19 vaccine mandate for state employees.[2] Plaintiffs are 60 former state employees who worked for various agencies within the Washington State Department of Transportation ("WSDOT"). (Dkt. No. 1 at 2.) Nearly all Plaintiffs were terminated on or around October 18, 2021 for failure to comply with the State's COVID-19 vaccine mandate for state employees. (*See* Dkt. No. 1 at 7-23.) Most Plaintiffs sought either a religious or medical exemption from the vaccine requirement. (*Id.*) Plaintiffs otherwise share little in common with one another and worked in distinct roles for WSDOT such as Region Biologist, Oiler, Maintenance Technician, and Senior Secretary.

Governor Jay Inslee issued Proclamation 21-14 ("Proclamation") on August 9, 2021. (*Id.* at 40.) The

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1. For purposes of this motion, the Court takes all well-pleaded factual allegations as true.

2. *See, e.g.*, *Ahmann v. Wash. State Dep't of Transp.*, No. 2:23-CV-0140-TOR, 2023 U.S. Dist. LEXIS 131154, 2023 WL 4847336 (E.D. Wash. July 28, 2023); *Rolovich v. Wash. State Univ.*, No. 2:22-CV-0319-TOR, 2023 U.S. Dist. LEXIS 93926, 2023 WL 3733894 (E.D. Wash. May 30, 2023); *Pilz v. Inslee*, No. 3:21-CV-05735-BJR, 2022 U.S. Dist. LEXIS 95747, 2022 WL 1719172 (W.D. Wash. May 27, 2022); *Bacon v. Woodward*, No. 2:21-CV-0296-TOR, 2021 U.S. Dist. LEXIS 215778, 2021 WL 5183059 (E.D. Wash. Nov. 8, 2021); *Wise v. Inslee*, No. 2:21-CV-0288-TOR, 2021 U.S. Dist. LEXIS 205380, 2021 WL 4951571 (E.D. Wash. Oct. 25, 2021).

Proclamation, which was amended multiple times, required state employees to become fully vaccinated against COVID-19 and directed state agencies to provide religious and medical accommodations as required by the Washington Law Against Discrimination ("WLAD"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the Americans with Disabilities Act of 1990 ("ADA"). (*Id.* at 2, 40.) Plaintiffs assert that WSDOT and the Individual Defendants[3] refused to engage in the accommodation process anticipated by federal and state law and as directed by the Proclamation. (*Id.* at 41-45.) The Defendants approved almost every plaintiff's religious or medical exemption request,[4] but then allegedly denied each of these plaintiffs a reasonable accommodation. (*Id.* at 45.) According to Plaintiffs, "Defendants sent the exact same form letter to each Plaintiff notifying them that their exemption was approved but accommodation was denied. There was no discussion that took place after Plaintiffs sent requests for an exemption but before notification that they would be terminated." (*Id.*) While Plaintiffs were

3. The Individual Defendants are Roger Millar, Secretary of Transportation for WSDOT; Jeff Pelton, Human Resources Director for WSDOT; Kimberly Monroe Flaig, Deputy Human Resources Director for WSDOT; and Mark Nitchman, Staff Chief Engineer for WSDOT. Plaintiffs do not specify whether they are suing the Individual Defendants in their official or individual capacities.

4. Five plaintiffs (Stacy Katyryniuk, Nicholas Auckland, Rodney Pelham, Todd Humphreys, and Wendy Punch) did not submit an exemption request because they "were specifically told the process was futile." (*Id.* at 24.) Five other plaintiffs (Joe DeGroat, Ronald Vessey, Daniel Hjelmeseth, Todd Humphreys, and David Lawton) were forced into early retirement in lieu of termination. (*Id.*)

offered the possibility of reassignment (*see* Dkt. No. 1-2 at 3), Plaintiffs assert that "Plaintiffs who applied for a reassignment were universally either ignored, sent a form denial without consideration, or weren't even told about positions that were available." (Dkt. No. 1 at 80.) Some Plaintiffs were subsequently rehired to their same roles, but with a religious accommodation from the vaccine requirement. (*Id.* at 85-87.) Others were hired as outside contractors to perform "the same exact work" they did while employed for the State. (Dkt. No. 1 at 50.) Plaintiffs also assert that certain Defendants, such as Defendant Flaig, mocked, belittled, or otherwise showed hostility to those who refused to get vaccinated. (*See id.* at 35, 97.)

Plaintiffs filed suit on May 9, 2023. Plaintiffs' voluminous complaint contains a variety of allegations, but their primary claims can be distilled as follows. Plaintiffs allege that the Defendants violated WLAD under several theories such as failure to accommodate and disparate impact. (*Id.* at 98-99). Plaintiffs also claim the Defendants violated their right to privacy under the Washington Constitution (*id.* at 99), violated their procedural due process rights under the Fifth and Fourteenth Amendments and the Washington Constitution (*id.* at 102), violated the federal and state Equal Protection Clause (*id.* at 103, 115), deprived the Plaintiffs of religious freedom under the First Amendment (*id.* at 109) and the Washington Constitution (*id.* at 104), engaged in wage theft (*id.* 105), violated the federal and state Contracts Clause (*id.* at 106), engaged in arbitrary and capricious action (*id.* at 112), and engaged in tortious behavior in violation of public policy (*id.* at 113).

Appendix B

On June 30, 2023, Defendants moved to dismiss all claims for failure to state a claim. (Dkt. No. 16). Plaintiffs filed a response in opposition (Dkt. No. 18) and Defendants filed a timely reply (Dkt. No. 19).

III DISCUSSION

A. Legal Standard

Defendants move to dismiss Plaintiffs' claims for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

"Motions to dismiss brought under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under such a theory." *Clift v. United States Internal Revenue Serv.*, 214 F. Supp. 3d 1009, 1011 (W.D. Wash. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). While the Court must accept as true all well-pleaded factual allegations in the complaint, the Court need not accept conclusory legal assertions. *Id.*

B. Federal Constitutional Claims

a. Sovereign Immunity

Before addressing Plaintiffs' federal constitutional claims, the Court must address Defendants' argument that

Plaintiffs have failed to properly plead any constitutional claims against WSDOT. (*See* Dkt. No. 16 at 20-21.)

Defendants argue that Plaintiffs' federal constitutional claims against WSDOT fail because WSDOT is not a "person" for purposes of 42 U.S.C. § 1983 and cannot be sued for monetary damages. (*Id.* at 21.) Plaintiffs respond to this argument by conceding that their claims for damages against WSDOT fail but argue they can amend their complaint to seek reinstatement, a form of prospective relief available pursuant to *Ex Parte Young*. (Dkt. No. 18 at 28.) Defendants, in reply, point out that such an amendment would be futile as the *Ex Parte Young* exception does not apply to a state or state agencies. (Dkt. No. 19 at 9.)

The Court agrees with Defendants. While Plaintiffs' complaint only specifies that they are bringing one of their federal constitutional claims pursuant to 42 U.S.C. § 1983 (*see* Dkt. No. 1 at 109), "a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983." *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992). The Court therefore construes the rest of Plaintiffs' federal constitutional claims as brought pursuant to § 1983, *see also Khazali v. Wash.*, No. C23-0796JLR, 2023 U.S. Dist. LEXIS 99448, 2023 WL 3866767, at *1 (W.D. Wash. June 7, 2023). A state agency, however, is not a person for purposes of 42 U.S.C. § 1983, *see Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), and cannot be sued for constitutional violations unless they affirmatively waive their sovereign immunity. *Ex Parte Young* provides an exception to Eleventh Amendment sovereign immunity

and permits prospective injunctive and declaratory relief against state officials. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). "*Ex parte Young*, however, only provides an exception to Eleventh Amendment immunity when suit is brought against the officers themselves, rather than against the state or its agencies." *Am. C.L. Union of Nevada v. Nevada Comm'n on Jud. Discipline*, 156 F. App'x 933, 934 (9th Cir. 2005); *see also Jenkins v. Washington*, 46 F. Supp. 3d 1110, 1118 (W.D. Wash. 2014) (noting that the *Ex Parte Young* "exception applies only where a suit is maintained against a state official").

Plaintiffs do not argue that WSDOT waived its sovereign immunity and therefore fail to state a claim against WSDOT on all of their federal constitutional claims. Since it is clear to the Court that no amendment could resolve the fact that the State has not waived sovereign immunity, the Court DISMISSES Plaintiffs' federal constitutional claims against WSDOT without prejudice. *See Freeman v. Oakland Unified Sch. Dist.*, 179 F.3d 846, 847 (9th Cir. 1999)

b. Qualified Immunity

Defendants next assert that the Individual Defendants are entitled to qualified immunity for Plaintiffs' federal constitutional claims.

"Qualified immunity 'shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known.'" *Saved Mag. v. Spokane Police Dep't*, 19 F.4th 1193, 1198 (9th Cir. 2021) (quoting *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994)), *cert. denied*, 142 S. Ct. 2711, 212 L. Ed. 2d 780, (2022). Courts should use the "doctrine of qualified immunity to dispose of 'insubstantial claims at the earliest stage of litigation possible." *A.D. v. California Highway Patrol*, 712 F.3d 446, 456 (9th Cir. 2013).

To overcome an assertion of qualified immunity, a plaintiff must plead "facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). A court may exercise its discretion to decide which of these prongs to address first. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). "A right is 'clearly established' for purposes of the second prong of the qualified immunity analysis if, 'at the time of the challenged conduct, the contours of [the] right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 886 (9th Cir. 2022) (alteration in original) (quoting *Al-Kidd*, 563 U.S. at 741).

i. Free Exercise Claim

Defendants argue that the facts as alleged "do not plausibly support the inference that Plaintiffs were separated because of their religion." (Dkt. No. 16 at

25.) Instead, Defendants argue that Plaintiffs were terminated because of their failure to get vaccinated. Additionally, Defendants argue that "the Individual Defendants' implementation of the Proclamation does not violate a clearly established right." (*Id.* at 26.) Plaintiffs do not directly respond to Defendants' qualified immunity arguments.

Assuming without deciding that the Individual Defendants' behavior, as alleged, sufficed to impinge on the Plaintiffs' right to free exercise of their religion, Plaintiffs point to no case law indicating that Defendants' actions violated a clearly established right. Indeed, the caselaw suggests the opposite. *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25, 25 S. Ct. 358, 361, 49 L. Ed. 643 (1905) ("[T]he police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."); *Kheriaty v. Regents of the Univ. of Cal.*, No. 22-55001, 2022 U.S. App. LEXIS 32406, 2022 WL 17175070, at *1 (9th Cir. Nov. 23, 2022) (holding that plaintiff failed to put forward evidence to "establish a 'fundamental right' to be free from a vaccine mandate at a workplace"); *Schmidt v. City of Pasadena*, No. LACV2108769JAKJCX, 2023 U.S. Dist. LEXIS 115351, 2023 WL 4291440, at *10 (C.D. Cal. Mar. 8, 2023) ("The current caselaw supports the view that there is no fundamental right to be free of vaccination."). Other courts have also held that the State did not discriminatorily apply the Proclamation when it offered only the possibility of reassignment rather than a plaintiff's preferred accommodation to the vaccine

requirement. *See Wise v. Inslee*, No. 2:21-CV-0288-TOR, 2021 U.S. Dist. LEXIS 205380, 2021 WL 4951571, at *3 (E.D. Wash. Oct. 25, 2021) ("[M]any of the named Plaintiffs applied for and received an exemption based on their sincerely held religious beliefs. Plaintiffs cannot demonstrate a discriminatory application solely because they disagree with the availability of accommodations.") (internal citations omitted).

The Court therefore finds the Individual Defendants are entitled to qualified immunity as to Plaintiffs' Free Exercise claims and DISMISSES these claims with prejudice.

ii. Procedural Due Process Claim

Defendants also assert they are entitled to qualified immunity on Plaintiffs' procedural due process claim. (Dkt. No. 16 at 28.) Defendants argue that Plaintiffs' complaint fails to plausibly articulate how the Individual Defendants violated Plaintiffs' constitutional rights and that Plaintiffs fail to identify a clearly established right that the Individual Defendants should have known they were violating. (*Id.*)

Plaintiffs, in response, argue that Defendants failed to provide an opportunity for notice and to be heard prior to their termination. (Dkt. No. 18 at 29.) Plaintiffs further argue that since they were only dischargeable for cause they were entitled to their vested pensions and to "non-sham *Loudermill* hearings." (*Id.*) Finally, Plaintiffs argue that the Individual Defendants violated Plaintiffs'

clearly established right to privacy under the Washington constitution and that the Court should not look to federal law to determine what clearly established right was violated. (*Id.* at 32-34.)

The Individual Defendants are entitled to qualified immunity as Plaintiffs have failed to identify any right that was clearly established. Plaintiffs bizarrely argue that the Court should find that the Individual Defendants violated Plaintiffs' clearly established right to privacy under the Washington Constitution. However, federal qualified immunity "is a doctrine of *federal* common law and, as such, has no application to state law claims." *See Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009) (emphasis in original). Plaintiffs must assert that the Individual Defendants violated a clearly established federal right in order to surmount their qualified immunity defense. *See Lindsey v. Shalmy*, 29 F.3d 1382, 1384 (9th Cir. 1994) (noting that the doctrine of qualified immunity does not apply to "clearly established *federal* rights.") (emphasis added). The canon of constitutional avoidance has no applicability here.

Plaintiffs' focus on Washington state privacy law alone is enough to doom their argument that qualified immunity does not apply to their procedural due process claim. However, even were the Court to construe their brief as arguing that the Individual Defendants actions violated Plaintiffs' federal right to privacy, their argument would still fail. As Defendants point out, the federal right to privacy is based on substantive, not procedural, due process. *See Marsh v. Cnty. of San Diego*, 680 F.3d 1148,

1153 (9th Cir. 2012). Plaintiffs have therefore not pleaded that the Individual Defendants have violated a clearly established federal right.[5]

Plaintiffs argue they should instead be granted leave to amend their complaint should the Court find they have failed to adequately state their federal due process claim, but granting leave to amend this claim would be futile. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011). Plaintiffs have not adequately pled that any actions by the Individual Defendants violated their federal due process rights. As other courts have recognized, "when a policy is generally applicable, employees are not 'entitled to process above and beyond

5. Plaintiffs' repeated citations to *Loudermill* are also not sufficient to convince the Court that Plaintiffs had clearly established due process rights not to be terminated for failing to become fully vaccinated where the employer determined that a reasonable accommodation could not be made. "Qualified immunity is not meant to be analyzed in terms of a 'general constitutional guarantee,' but rather the application of general constitutional principles 'in a particular context.'" *Gordon v. Cnty. of Orange*, 6 F.4th 961, 969 (9th Cir. 2021). *Loudermill* involved two plaintiffs with distinct facts. First, Mr. Loudermill sued after he was terminated from a for-cause security guard position after his employer discovered he had previously been convicted of grand larceny. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 535, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). The other plaintiff, Mr. Donnelly, was a public sector bus mechanic who was fired after failing an eye exam and failed to retake the exam. *Id.* at 536. Neither of these cases involved the application of a vaccine requirement in the context of the greatest public health emergency in modern memory and the Court does not find that *Loudermill* clearly established that the Individual Defendants' actions violated Plaintiffs' constitutional rights.

the notice provided by the enactment and publication' of the policy itself." *Bacon*, 2021 U.S. Dist. LEXIS 215778, 2021 WL 5183059, at *3; *see also Pilz*, 2022 U.S. Dist. LEXIS 95747, 2022 WL 1719172, at *7 (finding adoption of Proclamation and notice of the vaccine requirement sufficient to provide procedural due process); *Harris v. Univ. of Massachusetts, Lowell*, 557 F. Supp. 3d 304, 312 (D. Mass. 2021) (finding university's adoption of COVID-19 vaccine mandate to provide sufficient notice and process to satisfy potential due process challenges); *Valdez v. Grisham*, 559 F. Supp. 3d 1161, 1178 (D.N.M. 2021) (finding procedural due process rights satisfied where state enacted general COVID-19 vaccine mandate that included a religious exemption provision and the mandate applied generally to all employees), *aff'd*, No. 21-2105, 2022 U.S. App. LEXIS 16330, 2022 WL 2129071 (10th Cir. June 14, 2022). Whether or not Plaintiffs' challenge to the State's religious accommodation exemption is an as applied challenge or a facial challenge is irrelevant because the enactment of the Proclamation itself was generally applicable and therefore provided all the procedural due process due to state employees. The Court is also not convinced that Plaintiffs can establish that the Individual Defendants violated a clearly established federal due process right.

Accordingly, the Individual Defendants are entitled to qualified immunity as to Plaintiffs' procedural due process claims and these claims are DISMISSED with prejudice.

iii. Equal Protection Claim

Defendants also assert they are entitled to qualified immunity as to Plaintiffs' Equal Protection Clause claims. (Dkt. No. 16 at 30.) Plaintiffs offer a one-line response to this assertion, noting that "Defendants' qualified-immunity defense to this claim fails for essentially the same reasons discussed *supra* as to Due Process." (Dkt. No. 18 at 38.) Plaintiffs fail to substantively rebut Defendants' qualified immunity argument and therefore concede they have merit. *See, e.g.*, *Brenda H. v. Comm'r of Soc. Sec.*, No. 2:19-CV-00108-DWC, 2019 U.S. Dist. LEXIS 119147, 2019 WL 13198863, at *1 (W.D. Wash. July 17, 2019); *see also Rice v. Providence Reg'l Med. Ctr. Everett*, No. C09-482 RSM, 2009 U.S. Dist. LEXIS 67414, 2009 WL 2342449, at *3 (W.D. Wash. July 28, 2009). Plaintiffs cite no case law indicating that the Individual Defendants' actions violated their clearly established federal rights under the Equal Protection Clause.[6]

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6. An equal protection claim is distinct from a procedural due process clause claim and caselaw clearly establishing a procedural due process right will rarely suffice in itself to establish an equal protection right. "To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). By contrast, to make out a procedural due process claim a plaintiff must establish "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; (3) lack of process." *Armstrong v. Reynolds*, 22 F.4th 1058, 1066 (9th Cir. 2022) (quoting *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993)).

Accordingly, the Court DISMISSES Plaintiffs' Equal Protection Clause claims against the Individual Defendants with prejudice.

iv. Contracts Clause Claim

Defendants raise a defense of qualified immunity as to Plaintiffs' Contracts Clause claims. (Dkt. No. 16 at 30-31.) Plaintiffs, in response, argue that *Eagan v. Spellman*, 90 Wn.2d 248, 581 P.2d 1038, 1042 (Wash. 1978) clearly established that the Individual Defendants' actions violated their rights under the Contracts Clause of the Constitution. (Dkt. No. 18 at 39.)

In assessing whether a Plaintiff has adequately stated a claim for a violation of the Contracts Clause, a court must determine "whether the state law [at issue] has 'operated as a substantial impairment of a contractual relationship.'" *Sveen v. Melin*, 584 U.S. 811, 138 S. Ct. 1815, 1821-22, 201 L. Ed. 2d 180 (2018) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978)). If the state law has substantially impaired a contractual relationship, the Court then determines "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id.* at 1822 (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983)).

Plaintiffs' briefing fails to address Defendants' argument that they have not alleged facts sufficient to meet the two-part test for a Contract Clause claim. (*See*

Dkt. No. 16 at 30-31.) The Court therefore finds Plaintiffs have failed to establish substantial impairment, *see Pilz*, 2022 U.S. Dist. LEXIS 95747, 2022 WL 1719172, at *6, and that the Individual Defendants are therefore entitled to qualified immunity. Additionally, even had Plaintiffs established a constitutional violation, they failed to show that Defendants violated a clearly established right. *Eagan*, the only case Plaintiffs cite for such a position, did not involve a Contracts Clause claim. Rather, the Washington Supreme Court addressed whether King County's changes to their mandatory retirement age were consistent with state law. *See Eagan*, 581 P.2d at, 1040-43.

Accordingly, the Court finds the Individual Defendants are entitled to qualified immunity and DISMISSES Plaintiffs' Contract Claims against them with prejudice.

v. Takings Claim

Finally, Defendants argue the Individual Defendants are entitled to qualified immunity for any Takings Claim brought by the Plaintiffs.[7] (Dkt. No. 16 at 31.) Plaintiffs do not respond to this argument and the Court considers the lack of response to be a concession of merit. *See Rice*, 2009 U.S. Dist. LEXIS 67414, 2009 WL 2342449, at *3.

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7. The Court also agrees that Plaintiffs may not bring a takings claim against the Individual Defendants in their individual capacity. *See Untalan v. Stanley*, No. 219CV07599ODWJEMX, 2020 U.S. Dist. LEXIS 191380, 2020 WL 6078474, at *9 (C.D. Cal. Oct. 15, 2020) (compiling cases where courts have found that "takings claim[s] cannot be brought against individuals sued in their personal capacities).

Plaintiffs do not point to any caselaw, and the Court is not aware of any, clearly establishing that either a state mandate for employees to obtain the COVID-19 vaccine or certain state employees' alleged policy of denying religious accommodations to the mandate constituted an unconstitutional taking.

The Court therefore DISMISSES Plaintiffs' Takings Claims with prejudice.

C. State Law Claims

Having dismissed all claims over which the Court has original jurisdiction, the Court declines to exercise jurisdiction over Plaintiffs' supplemental state law claims. *See* 28 U.S.C. § 1367(c)(3); *see also Ove v. Gwinn*, 264 F.3d 817, 826 (9th Cir. 2001) ("A court may decline to exercise supplemental jurisdiction over related state-law claims once it has 'dismissed all claims over which it has original jurisdiction.'"). The Court DISMISSES these claims without prejudice.

IV CONCLUSION

Accordingly, and having considered Defendants' motion (Dkt. No. 16), the briefing of the parties, and the remainder of the record, the Court finds and ORDERS as follows:

1. Defendants' motion to dismiss is GRANTED in part. Plaintiffs' federal constitutional claims against WSDOT are DISMISSED without

prejudice. Plaintiffs' federal constitutional claims against the Individual Defendants are DISMISSED with prejudice.

2. The Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims and DISMISSES these claims without prejudice.

Dated this 11th day of October 2023.

/s/ David G. Estudillo
David G. Estudillo
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA, FILED OCTOBER 11, 2023

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NUMBER. 3:23-cv-05418-DGE

GEOFFREY GRAY, *et al.*,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendant.

Filed October 11, 2023

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

Appendix C

THE COURT HAS ORDERED THAT

Defendants' motion to dismiss is GRANTED in part. Plaintiffs' federal constitutional claims against WSDOT are DISMISSED without prejudice. Plaintiffs' federal constitutional claims against the Individual Defendants are DISMISSED with prejudice. The Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims and DISMISSES these claims without prejudice.

Dated October 11, 2023.

Ravi Subramanian
Clerk of Court

s/Michael Williams
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 14, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3278

D.C. No. 3:23-cv-05418-DGE
Western District of Washington,
Tacoma

GEOFFREY GRAY; *et al.*,

Plaintiffs-Appellants,

v.

WASHINGTON DEPARTMENT
OF TRANSPORTATION; *et al.*,

Defendants-Appellees.

Filed January 14, 2025

ORDER

Before: McKEOWN, H.A. THOMAS, and DESAI, Circuit Judges.

The panel unanimously voted to deny the petition for panel rehearing. Judges Thomas and Desai voted to deny

the petition for rehearing en banc, and Judge McKeown recommended denial of the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc, and no judge of the court requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and rehearing en banc, Dkt. #44, is **DENIED**.