

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 24 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TAMIRA L. CALLENDER; TREY R.
CALLENDER,

Plaintiffs-Appellants,

v.

DEPARTMENT OF THE PROSECUTING
ATTORNEY FOR THE COUNTY OF
MAUI; MAUI POLICE DEPARTMENT;
EMLYN H. HIGA, individually and in his
official capacity; NICOLAI K.H. ARIGA,
individually and in his official capacity;
JOHN KALAMA, individually and in his
official capacity; WENDELL H. LOO,
individually and in his official capacity,

Defendants-Appellees,

No. 21-16053

D.C. No.

1:20-cv-00321-JAO-KJM

MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Jill Otake, District Judge, Presiding

Argued and Submitted October 12, 2022**

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

Honolulu, Hawaii

Before: SCHROEDER, RAWLINSON, and BRESS, Circuit Judges.

Tamira L. Callender and her son, Trey, appeal the district court’s dismissal of their § 1983 claims against Emlyn H. Higa, Nicolai K.H. Ariga, John Kalama, Wendell H. Loo, the Department of the Prosecuting Attorney for the County of Maui, and the Maui Police Department. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court’s dismissal under Federal Rule of Civil Procedure 12(b)(6). *Bonelli v. Grand Canyon Univ.*, 28 F.4th 948, 951 (9th Cir. 2022). We affirm.

1. The district court correctly determined that the Callenders’ § 1983 claims were time-barred. Section 1983 does not have its own statute of limitations, so courts borrow the personal-injury limitations period from state law, which in Hawaii is two years. *See Bird v. Dep’t of Hum. Servs.*, 935 F.3d 738, 743 (9th Cir. 2019) (per curiam); Haw. Rev. Stat. § 657-7.

The Callenders allege that the defendants began violating their constitutional rights in December 2016, but the Callenders did not bring suit until July 2020. The Callenders’ claims based on events that occurred after July 2018 and within two years of suit being filed—such as Higa’s provision of assistance to Tamira—do not amount to a violation of either Tamira or Trey’s constitutional rights.

The Callenders’ core claim arises from Higa’s alleged assault of Trey in

December 2016. But that event occurred more than two years before the Callenders filed suit. The continuing violations doctrine does not extend the statute of limitations for claims arising from the assault. That doctrine applies to hostile work environment claims and “class-wide pattern-or-practice claims,” *Bird*, 935 F.3d at 748, and to facial challenges to statutes that were initially enforced outside the limitations period and continued to be enforced within it. *Flynt v. Shimazu*, 940 F.3d 457, 462–63 (9th Cir. 2019). The continuing violations doctrine does not apply to “individualized claims” like these that are “otherwise time-barred.” *Bird*, 935 F.3d at 748.

Equitable tolling also does not apply. State law governs the tolling of the statute of limitations in a § 1983 case. *See Belanus v. Clark*, 796 F.3d 1021, 1025 (9th Cir. 2015). Hawaii courts apply equitable tolling when plaintiffs can demonstrate that they “pursu[ed] [their] right diligently,” but some “extraordinary circumstance stood in [their] way.” *Off. of Hawaiian Affs. v. State*, 133 P.3d 767, 789 (Haw. 2006). “Extraordinary circumstances are circumstances that are beyond the control of the complainant and make it impossible to file a complaint within the statute of limitations.” *Id.*

The Callenders have not pleaded any extraordinary circumstances sufficient to toll the limitations period before December 2018, when the statute of limitations otherwise expired for claims arising from the December 2016 assault. Although the

Callenders may have believed it was not in their interest to sue earlier, they were not prevented from bringing their claims in a timely manner. Nor have the Callenders alleged they were lulled into not filing a claim. *See Doherty v. Hartford Ins. Grp.*, 574 P.2d 132, 134–35 (Haw. 1978). The remaining acts that the Callenders point to either occurred after December 2018 (when the limitations period for the assault had already expired), or else plaintiffs have failed to allege when they occurred.

2. The district court did not err in denying leave to amend. A district court may deny leave to amend when amendment would “result in futility for lack of merit.” *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990). We review this determination de novo. *S.F. Herring Ass’n v. Dep’t of the Interior*, 946 F.3d 564, 575 (9th Cir. 2019). The new allegations in the proposed second amended complaint are not sufficient to overcome the statute of limitations problems detailed above. At oral argument, the Callenders contended that the proposed second amended complaint contains allegations of a cover-up that should toll the limitations period. But any allegations of a cover-up in the proposed second amended complaint are insufficiently detailed and conclusory, at best. Thus, the district court did not err in denying leave to amend.

AFFIRMED.