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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 REBECCA FAUST,

9 Plaintiff,

v.

10 JAY INSLEE, et al.,

11 Defendants.

CASE NO. C20-5356 BHS

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS

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13 This matter comes before the Court on Defendants Jay Inslee and Annette Meyer's
14 motion to dismiss.¹ Dkt. 81. The Court has considered the briefings filed in support of
15 and in opposition to the motion and the remainder of the file and hereby grants the
16 motion for the reasons stated herein.
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20 ¹ Chris Liu, the Director of the Department of Enterprise Services ("DES") retired on
21 June 1, 2021. Annette Meyer is serving as Acting Director of DES and is automatically
22 substituted as a party under Federal Rule of Civil Procedure 25(d). Further, while Defendants
title their motion as one for summary judgment, they move to dismiss Faust's claims with
prejudice pursuant to Rule 12(b)(1) and Rule 12(b)(6). *See* Dkt. 81 at 1. The Court thus construes
Defendants' motion as a motion to dismiss.

1 **I. FACTUAL & PROCEDURAL BACKGROUND**

2 On May 28, 2020, Faust filed an amended complaint against Defendants alleging
3 that her constitutional rights have been violated by Inslee’s emergency proclamations and
4 the DES Director’s denial of her application to hold peaceful protests at the state capital.
5 Dkt. 28-1. On June 11, 2020, Defendants filed an amended motion to dismiss. Dkt. 37.
6 On August 19, 2020, the Court granted Defendants’ motion and granted Faust leave to
7 file an amended complaint. Dkt. 46. On August 28, 2020, Faust submitted an additional
8 pleading in response to the Court’s order, which the Court construed as her amended
9 complaint. Dkt. 48.

10 On September 10, 2020, Defendants filed their third motion to dismiss. Dkt. 49.
11 On September 28, 2020, Faust filed a motion for summary judgment. Dkt. 50. On
12 October 28, 2020, the Court granted Defendants’ motion and denied Faust’s motion, but
13 granted Faust leave to file an amended complaint. Dkt. 58. Specifically, the Court stated
14 “Faust shall file an amended complaint incorporating the new factual developments and
15 allegations no later than November 6, 2020. Failure to timely file an amended complaint
16 or otherwise respond will result in dismissal.” *Id.* at 4.

17 Rather than file an amended complaint, on November 5, 2020, Faust filed a notice
18 of appeal of the Court’s October 28 Order. Dkt. 60. On January 26, 2021, the Ninth
19 Circuit dismissed Faust’s appeal due to a lack of jurisdiction as the October 28 Order was
20 not final or appealable. Dkt. 63. The Ninth Circuit’s judgment took effect on February 17,
21 2021. Dkt. 64.
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1 On March 10, 2021, Defendants moved to dismiss pursuant to Rule 41(b) for
2 failure to comply with the Court’s October 28 Order. Dkt. 65. The Court denied the
3 motion, concluding that Faust complied with the October 28 Order by “otherwise
4 responding” through filing a notice of appeal by the November 6 deadline. Dkt. 68. The
5 Court further ordered Faust to file an amended complaint, as there was no operative
6 complaint as a result of her appeal. *Id.* at 3.

7 Faust timely filed a supplementary pleading, which the Court and Defendants
8 construed as her amended complaint, on May 28, 2021, suing Defendants in both their
9 individual and official capacities. Dkt. 69. She alleges that she seeks to hold a rally on
10 July 4, 2021. *Id.* at 8. Defendants aver DES granted Faust’s permit request and worked
11 with her to assist in preparations for the event. Dkt. 81 at 5; Dkt. 82, ¶¶ 8–11. Defendants
12 assert that Faust held her event without incident on July 4, 2021. Dkt. 81 at 85; Dkt. 82,
13 ¶¶ 11–12. It is additionally of note that on June 30, 2021, Washington State reopened,
14 and all sectors previously governed by Governor Inslee’s emergency COVID-19 plans
15 returned to usual capacity and operations.²

16 Faust also alleges in her complaint that she “intends to hold at least one rally on
17 the State Capital grounds, pending permit, and may choose to seek permit(s) for
18 additional event(s).” Dkt. 69 at 8. She does not specify any event other than the July 4,
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21 ² Wash. Off. of the Governor, *Washington Ready 2*,
22 <https://www.governor.wa.gov/sites/default/files/WashingtonReady.pdf>; *see also* Wash. Off. of
the Governor, *COVID-19 Reopening Guidance for Businesses and Workers*,
<https://www.governor.wa.gov/issues/issues/covid-19-resources/covid-19-reopening-guidance>.

1 2021 rally that occurred successfully. She seeks an injunction, declaratory judgment, and
2 monetary damages. *Id.* at 9–11.

3 On July 19, 2021, Defendants moved to dismiss Faust’s claims with prejudice,
4 arguing that her claims for injunctive relief are moot, that she lacks standing, and that
5 Defendants are entitled to qualified immunity for the claims against them in their
6 personal capacity. Dkt. 81. On August 9, 2021, Faust responded. Dkt. 84. On August 13,
7 2021, Defendants replied. Dkt. 85.

8 II. DISCUSSION

9 The case or controversy requirement of Article III demands dismissal when the
10 issues presented are no longer “live” or the parties lack a cognizable interest in the
11 outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). A case becomes moot when it
12 “loses its character as a present, live controversy of the kind that must exist” in order to
13 avoid “advisory opinions on abstract propositions of law.” *Cantrell v. City of Long*
14 *Beach*, 241 F.3d 674, 678 (9th Cir. 2001) (internal quotation omitted). If the activity
15 sought to be enjoined has already occurred and the court cannot undo what has already
16 been done, the action is moot and must be dismissed for lack of jurisdiction. *See*
17 *Bernhardt v. Cnty. of L.A.*, 279 F.3d 862, 871 (9th Cir. 2002).

18 The Court agrees with Defendants that this case is moot and must be dismissed
19 with prejudice. As to Faust’s claims and request for an injunction relating to the July 4,
20 2021 rally, Faust received a permit for the rally and successfully hosted the event. These
21 claims are moot because Faust already received the relief she sought—to hold a rally at
22 the State Capitol. Faust argues, however, that her case is not moot under the voluntary

1 cessation doctrine or the rule governing disputes that are capable of repetition yet
2 avoiding review. Dkt. 84 at 2.

3 A private defendant’s voluntary cessation of challenged conduct does not
4 necessarily render a case moot because, if the case were dismissed as moot, the defendant
5 would be free to resume the conduct. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Env’t*
6 *Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *United States v. W. T. Grant Co.*, 345 U.S.
7 629, 632–33 (1953). However, courts treat the voluntary cessation of challenged conduct
8 by government officials “with more solicitude . . . than similar action by private parties.”
9 *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) (internal
10 quotation omitted) (“[W]e presume the government is acting in good faith.”). “For this
11 reason, the repeal, amendment, or expiration of challenged legislation [or ordinances] is
12 generally enough to render a case moot and appropriate for dismissal.” *Bd. of Trustees of*
13 *Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019)
14 (collecting cases).

15 The voluntary cessation doctrine is inapplicable here because no restrictions on
16 outdoor events remain in place as of June 30, 2021. Faust fails to make any showing that
17 the Governor is “reasonably expected to reenact” the restrictions on outdoor events.³
18 *Glazing Health*, 941 F.3d at 1198; *see also Harborview Fellowship v. Inslee*, __ F. Supp.
19 3d __, 2021 WL 662390, at *5 (W.D. Wash. 2021).

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21 ³ The Court notes that the Governor has amended an emergency order as of September
22 13, 2021 to require facial coverings for large outdoor events with 500 or more individuals
regardless of vaccination status. *Washington Ready*, at 3. Faust did not challenge any similar
provision, and this implementation has no bearing on the Court’s analysis.

1 Faust’s argument that this case is capable of repetition, yet evading review fails for
2 similar reasons. This exception applies only in exceptional situations where “the
3 challenged action [is] in its duration too short to be fully litigated prior to cessation or
4 expiration” and “there [is] a reasonable expectation that the same complaining party
5 [will] be subject to the same action again.” *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)
6 (alterations in original; internal quotation omitted). Faust has not shown a reasonable
7 expectation that this controversy will recur given the statewide lifting of restrictions.
8 Furthermore, she has not shown that the challenged action (which is no longer in effect)
9 is too short in its duration to be fully litigated prior to cessation or expiration. Rather, the
10 procedural history of this case shows the opposite and that Faust has been able to litigate
11 her claims. This doctrine is inapplicable here.

12 The Court thus concludes that there is no active case or controversy—and
13 therefore subject matter jurisdiction—over Faust’s claims regarding the July 4, 2021
14 rally. *See Bernhardt*, 279 F.3d at 871. This claim is dismissed with prejudice as moot.

15 Faust also asserts that she may hold future events and seeks a general injunction
16 that she “not be penalized, prosecuted, discriminated against, retaliated against, or
17 otherwise ill-treated in any way for attending a rally, nor for attending private social
18 gatherings, during the term of the Governor’s proclamation(s).” Dkt. 69 at 10. This
19 assertion is speculative and does not clearly articulate a claim for prospective relief. The
20 Court has previously dismissed Faust’s claims for failing to state concrete plans for future
21 protests. *See* Dkts. 46, 58. Any possibility of future harm is speculative at best and cannot
22 overcome mootness. *See Lund v. Cowan*, 5 F.4th 964, 968–69 (9th Cir. 2021) (“Simply

1 put, speculative suppositions, far-fetched fears, or remote possibilities of recurrence
2 cannot overcome mootness.”). This claim is dismissed with prejudice as moot.

3 Because there is no active case or controversy, the Court does not have subject
4 matter jurisdiction over Faust’s claims. The Court will therefore not address Defendants’
5 alternative arguments that Faust lacks standing to bring her claims or that Defendants are
6 entitled to qualified immunity. *See* Dkt. 81 at 8–11. Further, the Court has already held
7 that it lacks jurisdiction to consider claims for monetary relief because the Eleventh
8 Amendment prohibits “federal courts from hearing suits brought by private citizens
9 against state governments without the state’s consent.” Dkt. 46 at 2 (quoting *MacEwen v.*
10 *Inslee*, C20-5423 BHS, 2020 WL 4261323, at *1 (W.D. Wash. July 24, 2020) (internal
11 quotation omitted)). In sum, the Court lacks jurisdiction over all of Faust’s claims.

12 III. ORDER

13 Therefore, it is hereby **ORDERED** that Defendants’ motion to dismiss, Dkt. 81, is
14 **GRANTED**.

15 The Clerk shall enter a JUDGMENT and close the case.

16 Dated this 21st day of September, 2021.

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BENJAMIN H. SETTLE
United States District Judge