

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**April 19, 2023**

**FOR THE TENTH CIRCUIT**

**Christopher M. Wolpert**  
**Clerk of Court**

DONNA WASHINGTON,

Plaintiff - Appellant,

v.

OKLAHOMA STATE DEPARTMENT  
OF HUMAN SERVICES; NACISKA  
GILMORE; LATRESSA AVERY;  
CHARENE NOWICKI; MARGARET  
EAGLER; VANNESSA STINNETT;  
SCOTT WOODSON; ASHLEY  
DUGGER,

Defendants - Appellees.

No. 23-5015  
(D.C. No. 4:20-CV-00267-JWB-JFJ)  
(N.D. Okla.)

**ORDER AND JUDGMENT\***

Before **MATHESON, BRISCOE, and EID**, Circuit Judges.

Plaintiff Donna Washington, proceeding pro se, appeals the district court's dismissal without prejudice of her claims brought against Defendants for their alleged violations of Washington's civil rights and tortious conduct in removing Washington's

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\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

child from her custody. Exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM the dismissal of Washington’s claims without prejudice because they are barred by the Eleventh Amendment.

**I. BACKGROUND**

This case concerns the State of Oklahoma’s removal of Washington’s child from her home on June 15, 2018. Defendants include the Oklahoma State Department of Human Services (OKDHS) and multiple OKDHS Child Welfare Specialists, supervisors, case workers, and facilitators. According to Washington, Defendants submitted false statements to the state court, harassed Washington, maliciously prosecuted her, misused government power, and failed to intervene where necessary, all in a conspiracy to abduct her child and to bar her access to the child.

Proceeding pro se, Washington filed suit in the United States District Court for the Northern District of Oklahoma. Washington sued the named Defendants in their official capacities. She seeks only monetary damages, including legal fees, administrative costs (e.g., printing and mailing), the return of stolen funds, and reimbursement for property damage and missed work. In addition, she seeks over a million dollars in damages related to Defendants’ alleged intentional infliction of emotional distress, among other torts. She also seeks punitive damages.<sup>1</sup>

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<sup>1</sup> In 2018, Washington filed a lawsuit concerning the same events as her present suit. *See Washington v. Okla. State Dep’t of Hum. Servs.*, No. 18-CV-0674-CVE-FHM

Along with her complaint, Washington filed a motion to proceed *in forma pauperis* (IFP), which the district court granted. In its order granting leave to proceed IFP, the district court ordered Washington to submit completed summonses so that the district court could effectuate service. A month later, the summonses for each Defendant were returned unexecuted. The district court took no action on the case for nearly two years, all while Washington filed a motion to change venue and several motions to substitute service.

Then, in August 2022, the district court entered an order denying Washington’s motion to change venue for Washington’s failure to identify the district to which she sought transfer. The district court also ordered Washington “to show cause . . . why her complaint should not be dismissed on the basis that Defendants are entitled to Eleventh Amendment immunity.” ROA at 47 (capitalization removed). The district court explained that, upon review of Washington’s complaint, it appeared that she was barred from recovery because the Eleventh Amendment precluded her from seeking purely monetary relief from the state and its officials sued in their official capacities. The district court

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(N.D. Okla. Dec. 28, 2018), ECF No. 1. The district court dismissed her suit against OKDHS with prejudice for lack of subject-matter jurisdiction in consideration of the Eleventh Amendment and sovereign immunity. *See Washington v. Okla. State Dep’t of Hum. Servs.*, No. 18-CV-0674-CVE-FHM, 2019 WL 3069852, at \*3 (N.D. Okla. July 12, 2019), *vacated in part*, 802 F. App’x 419 (10th Cir. 2020). On appeal, we vacated the dismissal of the claims against OKDHS, but only to the extent that such claims were dismissed with prejudice. *Washington*, 802 F. App’x at 421 (“[T]he district court erred [only] in dismissing those claims with prejudice.”).

referenced Washington’s prior suit, which had been dismissed, in part, for the same reason. In a separate order, the district court referred Washington’s motions to substitute service to a magistrate judge for disposition.

A few weeks later, Washington submitted a response to the order to show cause. Upon consideration of Washington’s response, the district court dismissed her suit without prejudice for lack of subject-matter jurisdiction because the recovery sought from the named Defendants is barred by the Eleventh Amendment. Washington timely appealed.

## **II. STANDARD OF REVIEW**

The district court granted Washington leave to file her complaint IFP under 28 U.S.C. § 1915(e)(2). Section 1915(e)(2) requires a district court to dismiss any suits that “seek[] monetary relief against a defendant who is immune from such relief.” *See* 28 U.S.C. § 1915(e)(2)(B)(iii). “Our review of a dismissal based on sovereign immunity is de novo.” *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013). While it is the plaintiff’s burden to establish subject-matter jurisdiction, we construe the filings of a pro se party liberally. *See Merryfield v. Jordan*, 584 F.3d 923, 924 n.1 (10th Cir. 2009). However, “we do not assume the role of advocate, and [] pro se status does not relieve [a party of his or her] obligation to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure.” *Id.* (alterations and internal quotation marks omitted).

### **III. DISCUSSION**

On appeal, Washington purports to raise two issues. First, she argues that the district court erred in dismissing her suit for lack of subject-matter jurisdiction, which, according to Washington, deprived her of her First Amendment rights. Second, she argues that the district court engaged in judicial misconduct by dismissing her suit and, thereby, not allowing the case to be heard by a jury. Because the district court correctly determined that the Eleventh Amendment bars her suit, we affirm the district court's dismissal without prejudice.

#### **A. The Eleventh Amendment**

“The Eleventh Amendment renders the States [and their agencies] immune from ‘any suit in law or equity, commenced or prosecuted . . . by Citizens of another State, or by Citizens or Subjects of any Foreign State.’” *Tennessee v. Lane*, 541 U.S. 509, 517 (2004) (second alteration in original) (quoting U.S. Const. amend. XI); *see Collins v. Daniels*, 916 F.3d 1302, 1315 (10th Cir. 2019). The rule applies with equal force to suits brought against state officials in their official capacities “because ‘a suit against a state official in his or her official capacity . . . is no different than a suit against the State itself.’” *Muscogee (Creek) Nation v. Okla. Tax Comm’n*, 611 F.3d 1222, 1227 (10th Cir. 2010) (alteration in original) (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989)).

Sovereign immunity is not absolute. For example, “[a] State may waive its sovereign immunity at its pleasure, and in some circumstances Congress may abrogate it

by appropriate legislation.” *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253–54 (2011) (internal citation omitted). For Congress to limit sovereign immunity, its intent to do so must be “obvious from a clear legislative statement.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (internal quotation marks and citation omitted). “[Section] 1983 does not abrogate a state’s sovereign immunity.” *Muscogee (Creek) Nation*, 611 F.3d at 1227 (citing *Quern v. Jordan*, 440 U.S. 332, 338–40 (1979)).

Here, Washington’s § 1983 suit seeks monetary relief against OKDHS and seven OKDHS employees in their official capacities. Thus, sovereign immunity bars her suit unless an exception applies.

First, Washington argues that § 1983 abrogates sovereign immunity. It does not. *See id.* We explained this to Washington in her appeal from the dismissal of her first lawsuit. *Washington*, 802 F. App’x at 421 (“It is well-established that Congress did not abrogate the states’ Eleventh Amendment immunity when enacting § 1983.”).

Second, the district court correctly determined that the exception to sovereign immunity discussed in *Ex parte Young*, 209 U.S. 123 (1908), does not apply to Washington’s suit. “[U]nder [*Ex parte Young*], a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief.” *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012). To determine whether the *Ex parte Young* exception applies, the court “need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief

properly characterized as prospective.” *Id.* at 1167 (internal quotation marks and citation omitted). As the district court discussed, “[Washington] has failed to establish that this narrow exception applies.” ROA at 92. Her complaint seeks only monetary relief, and her briefing on appeal does not fare any better. Washington provides no discussion of *Ex parte Young* and makes only conclusory arguments that the district court “wrongfully ha[d] the defendants dismissed, on the basis of immunity.” *Aplt. Br.* at 7.

Washington writes that, in her first lawsuit, this court “previously determined the [district court] had erred in its ruling, to dismiss [her] claims against the defendants with prejudice in May of 2020.” *Id.* at 6. Washington seems to argue that the district court repeated its error by dismissing her present suit. However, in her previous case, we determined that the district court’s only error was dismissing the claims against OKDHS with prejudice. *Washington*, 802 F. App’x at 421. We did not conclude that the district court misapplied the Eleventh Amendment—in fact, just the opposite. *Id.* (“[T]he district court correctly held that in light of the Eleventh Amendment, it lacked subject-matter jurisdiction to hear the claims against OKDHS.”). Accordingly, the district court did not err in dismissing Washington’s suit for lack of subject-matter jurisdiction without prejudice.

### **B. Washington’s Other Arguments**

Washington makes four other arguments as to why the district court should be reversed. We reject each in turn.

First, Washington complains that Defendants were never served and never appeared in this case. It seems that Washington is aggrieved that the district court raised its Eleventh-Amendment concerns *sua sponte*. However, because Washington filed her suit IFP, the district court was permitted to screen her case and dismiss it *sua sponte* on Eleventh-Amendment grounds. *See* 28 U.S.C. § 1915(e)(2).

Second, Washington argues that the district court inappropriately referred her case to a magistrate judge. A district court may refer a non-dispositive matter to a magistrate judge so long as the district court “consider[s] timely objections and modif[ies] or set[s] aside any part of the order that is clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a). A district court may refer a dispositive matter to a magistrate judge, “without the parties’ consent,” so long as “[t]he district judge . . . determine[s] de novo any part of the magistrate judge’s disposition that has been properly objected to.” Fed. R. Civ. P. 72(b). In her appeal, Washington does not identify which matters, specifically, the district court improperly referred to a magistrate judge. And the district court entered the dispositive order that Washington now appeals. Accordingly, we cannot conclude that the district court violated any procedural rules regarding referrals to magistrate judges.

Third, Washington complains that the district court allowed her case to “go stagnant in court.” Aplt. Br. at 6. Washington is correct that her case did not receive the district court’s attention for some time (nearly two years). But she does not explain how this delay prejudiced her, especially considering that the district court dismissed her first lawsuit on the same grounds.

Finally, Washington states that she now wants her case to proceed under the Federal Torts Claims Act. Washington provides no discussion on this issue, and we will not consider it.

**IV. CONCLUSION**

For the foregoing reasons, we **AFFIRM** the district court's dismissal of Washington's complaint without prejudice. Finally, we **DENY** Washington's motion to appeal IFP.

Entered for the Court

Mary Beck Briscoe  
Circuit Judge