

FILED: September 29, 2021

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CHESTER MOONEY, SHANNAN POZZI, and KEVIN RUBIO,
Petitioners,

v.

STATE OF OREGON, acting by and through the Oregon Health Authority,
and KATE BROWN, in her capacity as Governor and
Chief Executive of the Oregon Health Authority,
Respondents.

Oregon Health Authority

A174300

Argued and submitted on July 07, 2021.

Tyler D. Smith argued the cause for petitioners. Also on the briefs was Tyler Smith & Associates, P.C.

Michael A. Casper, Assistant Attorney General, argued the cause for respondents. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Lagesen, Presiding Judge, and Shorr, Judge, and Kamins, Judge.

LAGESEN, P. J.

Petition dismissed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by

1 LAGESEN, P. J.

2 On June 30, 2020, respondent, the Oregon Health Authority (OHA), issued
3 a document, effective July 1, 2020, entitled "Statewide Mask, Face Shield, Face Covering
4 Guidance." In it, the OHA spelled out what turned out to be the first round in the ever-
5 evolving face-covering guidance intended to protect Oregonians against the spread of the
6 lethal and ever-evolving COVID-19 virus. Believing the document to qualify as an
7 administrative rule, as that term is defined by ORS 183.310, petitioners brought this
8 proceeding under ORS 183.400, seeking to have the guidance invalidated. The OHA
9 responds that we lack jurisdiction over this proceeding for two reasons. First, the OHA
10 contends that the challenged guidance is not an administrative rule but "is instead part of
11 an executive order lawfully issued by the Governor pursuant to her emergency powers."
12 In support of this argument, the OHA notes that ORS 183.310(9)(e) excludes
13 "[e]xecutive orders of the Governor" from the definition of a rule. Second, the OHA
14 contends that this proceeding is moot because the guidance has since been superseded.
15 Although we question the former point, we agree that this proceeding is moot and must
16 be dismissed for that reason.

17 We assume without deciding that the guidance at issue is an administrative
18 rule as defined by ORS 183.310. On its face, it appears to fit comfortably within the
19 definition of a rule, at a minimum, as an "agency * * * statement of general applicability
20 that implements * * * or prescribes law or policy * * *." ORS 183.310(9). The guidance
21 also appears to have been issued by the director of the OHA and it prescribes a number of

1 required and recommended practices related to the use of masks or other face coverings.
2 And contrary to the OHA's suggestion that the guidance is not a rule but, instead, part of
3 an otherwise unreviewable executive order, there is nothing on the face of the guidance
4 or in the record supplied to us by the OHA (which contains only the guidance itself) that
5 would permit the conclusion that it is itself an unreviewable executive order of the
6 Governor. As petitioners point out, there is no indication that the guidance was filed with
7 the Secretary of State, as executive orders are required to be. *See* ORS 183.355(5).
8 Under these circumstances, the OHA's claim that the guidance is not a rule but, instead,
9 an executive order, rests largely on the arguments of counsel. Without more, there are
10 many reasons to question whether this guidance is, itself, an executive order (or part of an
11 executive order), as distinct from a rule promulgated under the authority of an executive
12 order. *See, e.g., Western States Petroleum Assn. v. EQC*, 296 Or App 298, 308-09, 439
13 P3d 459 (2019) (recognizing that the Administrative Procedures Act (APA) is not the
14 only source of law that governs the promulgation of administrative rules and reviewing
15 challenged rule for compliance with procedures external to the APA).

16 Nevertheless, the guidance has been superseded on multiple occasions by
17 subsequent guidance and, now, administrative rules. As it stands, mask *requirements* are
18 now governed by several administrative rules: OAR 333-019-1011; OAR 333-019-1015;
19 and OAR 333-019-1025, and the current OHA guidance, issued on August 27, 2021, is
20 limited to supplementing the rules with the OHA's additional, nonmandatory

1 recommendations.¹ In other words, in more ways than one, we no longer inhabit the
2 same world as we did at the time the OHA issued the guidance that petitioners have
3 challenged.

4 That means this rule-review proceeding is moot under our case law. We
5 long have held that the repeal or replacement of an administrative rule means an ORS
6 183.400 challenge seeking to invalidate the displaced rule is moot. *See Reid v. DCBS*,
7 235 Or App 397, 401, 232 P3d 994 (2010) (so holding); *see also Hay v. Dept. of*
8 *Transportation*, 301 Or 129, 133-34, 719 P2d 860 (1986) (expiration of rule mooted ORS
9 183.400 challenge to the rule). Although petitioners at oral argument urged us to
10 conclude that this case was not moot because of pending enforcement proceedings under
11 the now-supplanted guidance, we rejected a similar contention in *Reid*:

12 "At oral argument, petitioners maintained that the case was not moot
13 because the temporary rules have been applied to some disputed fee
14 agreements that have not been resolved. That fact is not in the record, and,
15 even if it were, nothing in the record discloses that *these petitioners* are
16 involved in such a dispute so that our resolution would have a practical
17 effect on *their* rights."

18 235 Or App at 401 (emphases in original). As was the case in *Reid*, the record before us
19 contains no evidence regarding any ongoing enforcement proceedings or how, if at all, it
20 would have a practical effect on these petitioners' rights to resolve the issues about the
21 validity of the prior guidance. Accordingly, as we did in *Reid*, we dismiss the petition.

¹ See https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/1e2288K_R.pdf
(last accessed Sept 8, 2021).

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Petition dismissed.