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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NORCAL OUTDOOR MEDIA, LLC,

Plaintiff,

v.

XAVIER BECERRA, in his
official capacity as the
Attorney General of
California, ADETOKUNBO
OMISHAKIN, in his official
capacity as Director of the
California Department of
Transportation,

Defendants.

No. 2:19-cv-02338-JAM-DB

**ORDER GRANTING DEFENDANT'S
MOTION FOR JUDGMENT ON THE
PLEADINGS**

This case centers on the California Outdoor Advertising Act ("OAA"), Cal. Bus. & Prof. Code § 5200 et seq. NorCal Outdoor Media, LLC ("Plaintiff") originally brought this suit against Xavier Becerra, California's Attorney General,¹ and Adetokunbo Omishakin, Director of the California Department of Transportation ("Defendant"). See Compl., ECF No. 1. Plaintiff

¹ Xavier Becerra was voluntarily dismissed by Plaintiff as a defendant on January 30, 2020. See Notice of Voluntary Dismissal, ECF No. 6.

1 alleges the OAA unconstitutionally infringes on its freedom of
2 speech by regulating the display of signs within 660 feet of the
3 right-of-way of any interstate or primary highway in California.
4 Id. Plaintiff seeks declaratory and injunctive relief. Id.
5 Defendant moves for judgment on the pleadings. Mot. for J. on
6 Plead. ("Mot."), ECF No. 21-2.

7 For the reasons set forth below, the Court GRANTS
8 Defendant's motion.²

9
10 I. FACTUAL AND PROCEDURAL BACKGROUND

11 The OAA regulates the placement of certain billboards and
12 highways within the state. See Cal. Bus. & Prof. Code § 5200 et
13 seq. Among other things, the OAA regulates the display of signs
14 within 660 feet, and visible from, the right-of-way of any
15 interstate or primary highway in California. Compl. ¶ 14. Some
16 of its provisions restrict the content of displays. See Compl.
17 ¶ 17(a)-(d). The California Department of Transportation
18 ("CalTrans") is the OAA's permitting and regulatory authority.
19 Id. Defendant, as director of CalTrans, has the authority to
20 enforce the OAA and its associated regulations. See Cal. Bus. &
21 Prof. Code § 5250.

22 The OAA requires individuals to receive a permit from
23 CalTrans before displaying a billboard along an interstate
24 highway. See id. § 5350; see also Cal. Code Regs. tit. 4, § 2422
25 (setting forth the permit application process). An applicant
26

27 ² This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for October 13, 2020.

1 seeking a permit from CalTrans must "offer written evidence" that
2 "the city or county with land use jurisdiction over the property
3 upon which the location is situated have consented to the placing
4 of the advertising display." Cal. Bus. & Prof. Code § 5354(a).
5 Applicants who are denied a permit have the right to appeal. See
6 Cal. Code Regs. tit. 4, § 2422(c). The OAA contains several
7 exemptions to the permitting requirement. See Compl. ¶ 16.

8 When CalTrans determines that a permanently placed billboard
9 violates the statute—including if a billboard is being displayed
10 without the necessary permit—it can issue a violation notice,
11 which triggers an administrative process through which the
12 alleged violator can contest the alleged violation. See Cal.
13 Code Regs. tit. 4, §§ 2241-42. At the conclusion of this
14 process, an individual who is found to have displayed an
15 advertising billboard without a permit is subject to civil
16 penalties. See Cal. Bus. & Prof. Code § 5485(b).

17 Plaintiff was hired to construct a large billboard in Tracy,
18 California on a parcel of land located at 10837 West Clover Road.
19 Compl. ¶ 6. Sometime in 2019, it constructed the double-sided,
20 thirty-two-square foot billboard within 660 feet of a right-of-
21 way leading onto Interstate 205 ("I-205"). Compl. ¶¶ 7-9. The
22 billboard is visible from I-205 and reads "Trump 2020" on each
23 side. Compl. ¶¶ 8-9. The billboard allegedly conforms with all
24 applicable building standards and engineering requirements.
25 Compl. ¶ 10. However, Plaintiff did not apply for the outdoor
26 advertising permits required by the OAA prior to constructing the
27 billboard. Compl. ¶¶ 28-29.

28 On November 11, 2019, Plaintiff filed its complaint against

1 Defendant alleging the OAA's exemptions and restrictions violate
2 its free speech and equal protection rights under the United
3 States and California Constitutions. See Compl. ¶¶ 33-38, 43-48.
4 Defendant now moves for judgment on the pleadings, arguing
5 Plaintiff lacks standing and failed to state cognizable claims
6 under either the First and Fourteenth Amendments to the United
7 States Constitution or the California Constitution's equivalent
8 provisions. See generally Mot. Defendant further argues the
9 Court should decline to exercise supplemental jurisdiction over
10 the state law claims and the prayer for monetary damages violates
11 the Eleventh Amendment to the United States Constitution and
12 California's Government Claims Act. Id. Plaintiff opposes the
13 motion. Opp'n, ECF No. 22.

14
15 II. OPINION

16 A. Judicial Notice

17 Defendant requests that the Court take judicial notice
18 of eight matters. See Req. for Jud. Notice ("RJN"), ECF
19 Nos. 21, 23-1. Plaintiff does not oppose this request.

20 Rule 201 of the Federal Rules of Evidence allows a
21 court to take judicial notice of an adjudicative fact that
22 is "not subject to reasonable dispute," because it (1) "is
23 generally known within the trial court's territorial
24 jurisdiction"; or (2) "can be accurately and readily
25 determined from sources whose accuracy cannot reasonably be
26 questioned." Fed. R. Evid. 201(a)-(b). This includes
27 "undisputed matters of public record" Harris v.
28 Cnty. of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012). All

1 the matters identified in Defendant's judicial notice
2 request are matters of public record. Accordingly,
3 Defendant's request for judicial notice is GRANTED.

4 B. Standing

5 Standing consists "of two related components: the
6 constitutional requirements of Article III and nonconstitutional
7 prudential considerations." Franchise Tax Bd. of Calif. v. Alcan
8 Aluminum LTD., 493 U.S. 331, 335 (1990). With regard to Article
9 III, "standing is an essential and unchanging part of the case-
10 or-controversy requirement" Lujan v. Defs. of Wildlife,
11 504 U.S. 555, 560 (1992). Standing is therefore a "threshold
12 question" in "determining the power of the court to entertain the
13 suit." Warth, 422 U.S. at 498. To establish standing, a
14 "plaintiff must have (1) suffered an injury in fact, (2) that is
15 fairly traceable to the challenged conduct of the defendant, and
16 (3) that is likely to be redressed by a favorable judicial
17 decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016),
18 as revised (May 24, 2016). At the pleading stage "[i]t is the
19 responsibility of the complainant clearly to allege facts
20 demonstrating that he is a proper party to invoke judicial
21 resolution of the dispute and the exercise of the court's
22 remedial powers." Warth, 422 U.S. at 518.

23 For Plaintiff to have standing, it must first establish an
24 injury in fact. To do so, Plaintiff must show it suffered "an
25 invasion of a legally protected interest" that is "concrete and
26 particularized" and "actual or imminent, not conjectural or
27 hypothetical." Lujan, 504 U.S., at 560-61. A concrete injury
28 to the plaintiff must actually exist. Spokeo, 136 S. Ct., at

1 1548 (citations omitted). An “[a]bstract injury is not enough.”
2 City of L.A. v. Lyons, 461 U.S. 95, 101 (1983). “The plaintiff
3 must show that he has sustained or is immediately in danger of
4 sustaining some direct injury as the result of the challenged
5 official conduct” Id. at 101-02 (internal quotation
6 marks and citations omitted). Moreover, to be particularized,
7 the injury “must affect the plaintiff in a personal and
8 individual way.” Id. (internal quotation marks and citations
9 omitted). The injury-in-fact test “requires that the party
10 seeking review be himself among the injured.” Sierra Club v.
11 Morton, 405 U.S. 727, 734-35 (1972).

12 The prudential requirements of the standing doctrine
13 require that “the plaintiff generally must assert his own legal
14 rights and interests, and cannot rest his claim to relief on the
15 legal rights or interests of third parties.” (internal
16 quotation marks and citation omitted). Alcan Aluminum, 493 U.S.
17 at 336. However, “when a plaintiff states an overbreadth claim
18 under the First Amendment,” the prudential standing doctrine is
19 suspended “because of the special nature of the risk to
20 expressive rights.” Get Outdoors II, LLC v. City of San Diego,
21 Cal., 506 F.3d 886 (9th Cir. 2007). The lawsuit is allowed “to
22 proceed on the basis of a judicial prediction or assumption that
23 the statute’s very existence may cause others not before the
24 court to refrain from constitutionally protected speech or
25 expression.” Id. (internal quotation marks and citation
26 omitted). Nonetheless, even when an overbreadth claim is
27 raised, courts ask “whether the plaintiff has suffered an injury
28 in fact and can satisfactorily frame the issues on behalf of

1 these non-parties.” Id.

2 C. Analysis

3 Allegations as to the OAA’s unconstitutionality are found
4 throughout Plaintiff’s complaint. Plaintiff alleges the OAA is
5 unconstitutional both facially and as applied to it because the
6 act: (1) includes “underinclusive” content- and speaker-based
7 exemptions (in other words, its restrictions are overbroad);
8 (2) compels speech; (3) provides the State with unfettered
9 discretion to deny speech; (4) lacks a cognizable statement and
10 purpose; and (5) contains a substitution clause that
11 inadequately protects First Amendment rights. Compl. ¶ 15.
12 Because of these purportedly unconstitutional defects, Plaintiff
13 believes it was “not required to apply for a permit prior to
14 constructing the [billboard]” and that “it would have been
15 futile [] to apply for [one], as the application would have been
16 rejected based on the content of the [billboard’s speech].”
17 Compl. ¶¶ 28–29. The Court disagrees.

18 Evidence of an injury, is nowhere to be found in
19 Plaintiff’s complaint. Plaintiff does not allege to have sought
20 the consent of the City of Tracy or San Joaquin County to
21 construct the billboard. And Plaintiff did not apply for an
22 outdoor advertising permit from CalTrans before going ahead with
23 the construction. Compl. ¶¶ 28–29. Thus, Plaintiff was never
24 denied a permit. Which means that Plaintiff was never told the
25 reason for the denial, nor given the opportunity to appeal it.
26 This also means that Plaintiff does not know whether the appeal
27 would have been successful or whether it would have resulted in
28 civil penalties.

1 Get Outdoors II is instructive here. There, an advertising
2 company filed several applications for billboard permits with
3 the City of San Diego. Get Outdoors II, 506 F.3d at 889. The
4 city denied all the permit applications pursuant to a provision
5 of its municipal code which prohibits new signs bearing off-site
6 messages. Id. In addition, the city explained that each permit
7 application was missing key documents and that the proposed
8 billboards violated size and height restrictions. Id. at 890.
9 In response, the advertising company filed suit, arguing that
10 the city's billboard regulations were unconstitutional under the
11 First and Fourteenth Amendments because they favor commercial
12 over noncommercial speech and some types of noncommercial speech
13 over others; that its own rights were violated by the ban on
14 off-site messages and the size and height restrictions; and that
15 the permitting process was an invalid prior restraint. Id.

16 The Ninth Circuit found that the advertising company only
17 had standing to challenge the provisions that were applied to
18 it. Get Outdoors II, 506 F.3d at 892. It lacked standing to
19 challenge the entire sign ordinance. Id. It could not
20 "leverage its injuries under certain, specific provisions to
21 state an injury under the sign ordinance generally." Id.; see
22 also Covenant Media of South Carolina, LLC v. City of North
23 Charleston, 493 F.3d 421, 429 (4th Cir. 2007) (holding a
24 billboard company's standing to challenge the permit procedure
25 "does not provide it with a passport to explore the
26 constitutionality of every provision of the Sign Regulation").
27 Thus, the advertising company had standing to challenge the
28 provisions that were invoked against it but could not challenge

1 the provisions that were not.

2 The key difference between Get Outdoors II and the case at
3 hand is that, here, Plaintiff never sought a permit. Thus, no
4 provision of the OAA was invoked or applied against it.
5 CalTrans did not deny Plaintiff's permit application because it
6 ran afoul of the OAA by not obtaining county approval or because
7 it did not abide by any of the OAA's content, size, or location
8 requirements. Thus, Plaintiff has not alleged it suffered an
9 invasion of a legally protected interest that is either concrete
10 and particularized or actual and imminent. See Lujan, 504 U.S.,
11 at 560-61. Instead, Plaintiff's injury is a purely hypothetical
12 one. Id. Federal courts cannot issue advisory opinions in
13 hypothetical cases. Thomas v. Anchorage Equal Rights Comm'n,
14 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (The court's "role
15 is neither to issue advisory opinions nor to declare rights in
16 hypothetical cases, but to adjudicate live cases or
17 controversies consistent with the powers granted the judiciary
18 in Article III of the Constitution.").

19 Over a month after Plaintiff filed its complaint, San
20 Joaquin County recorded a Notice of Code Violation against the
21 parcel located at 10837 West Clover Road. See Notice of Code
22 Violation, Ex. 3 to RJN. The notice states that the property
23 owner is in violation of California Building Code § 105.1 for
24 constructing a billboard without a permit. Id. The owner of
25 the parcel was notified of the violation on September 10, 2019,
26 about a month before Plaintiff filed its complaint. Id. These
27 facts are irrelevant. Plaintiff did not include this violation
28 in the complaint, nor did it attempt to amend the complaint once

1 the violation was recorded. Moreover, the citation was not
2 issued or recorded by CalTrans pursuant to the OAA. Plaintiff
3 was instead cited by San Joaquin County, pursuant to a section
4 of the California Building Code. This citation, and any
5 enforcement action that results from it, are separate and apart
6 from Defendant and his ability to enforce the OAA and its
7 associated regulations.

8
9 III. ORDER

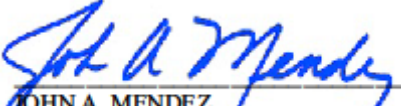
10 For the reasons set forth above, Defendant's motion for
11 judgment on the pleadings is granted. Plaintiff lacks standing to
12 pursue its claims and the suit is dismissed without prejudice.
13 See Fleck & Assocs., Inc. v. City of Phoenix, 471 F.3d 1100,
14 1106-07 (9th Cir. 2006) (holding that dismissal for lack of
15 standing should be without prejudice).

16 Because Plaintiff lacks standing, this Court need not
17 address whether Plaintiff's claims are ripe or whether Plaintiff
18 adequately stated a claim under Rule 12(b). Id. at 1102
19 ("Because [the plaintiff] lacked standing . . . the district
20 court lacked subject matter jurisdiction and should have
21 dismissed the complaint on that ground alone.").

22 Plaintiff shall file its amended complaint within twenty
23 days of the date of this Order. Defendant's responsive pleading
24 will be due within twenty days thereafter.

25 IT IS SO ORDERED.

26 Dated: December 21, 2020

27
28

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE