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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,<sup>1</sup> and Adetokunbo Omishakin, Director of the California Department of Transportation ("Defendant"). See Compl., ECF No. 1. Plaintiff

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<sup>1</sup> 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.<sup>2</sup>

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

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27 <sup>2</sup> 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.

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9 III. ORDER

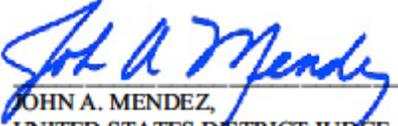
10 For the reasons set forth above, Defendant's motion for  
11 judgment on the pleadings is granted. Plaintiff lacks standing to  
12 pursue its claims and the suit is dismissed without prejudice.  
13 See Fleck & Assocs., Inc. v. City of Phoenix, 471 F.3d 1100,  
14 1106-07 (9th Cir. 2006) (holding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

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JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE