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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NATIONAL LABOR RELATIONS BOARD, Plaintiff, v. STATE OF OREGON, Defendant.	Case No. 6:20-CV-00203-MK DEFENDANT'S MOTION TO DISMISS

LR 7-1 certification

Counsel for the State of Oregon certifies that she conferred by telephone with counsel for the National Labor Relations Board about the subject of this motion, but the parties were unable to resolve the dispute.

MOTION

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), respectively, the State of Oregon moves to dismiss the National Labor Relations Board's ("NLRB") complaint for lack of subject

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matter jurisdiction and for failure to state a claim for relief. This motion is supported by the following memorandum of law.

MEMORANDUM

I. Summary of Argument

NLRB's claim seeking a declaration that an Oregon statute is invalid should be dismissed because the Court lacks subject matter jurisdiction or, alternatively, because NLRB fails to state a claim for relief. NLRB challenges the validity of an Oregon statute, ORS 659.780-85, that provides a private right of action to employees whose employers take adverse action against them for refusing to participate in a meeting called to discuss the employer's religious or political views. NLRB lacks standing because it has not alleged—and cannot prove—that the causation and redressability elements of the standing test are met. No action by the State could cause or could have caused any injury to NLRB because the State has no authority to enforce the statute NLRB challenges. The Oregon statute is privately—not publicly—enforceable. In addition, for the same reason, a declaratory judgment would not redress any injury allegedly suffered by NLRB. Because the State does not enforce the Oregon statute, a declaratory judgment would have no impact on operations or activities of the State and the judgment would effectively be an advisory opinion. Because NLRB cannot establish standing, its claim should be dismissed.

Alternatively, NLRB's claim should be dismissed for failure to state a claim because it asserts the Oregon statute is facially invalid but cannot meet the test for facial invalidity. Because the statute has a "plainly legitimate sweep," regardless of whether a hypothetical as-applied challenge might be successful, it cannot prevail on its facial challenge. NLRB's jurisdiction—as well as its preemption claim—is limited to the labor context. Yet, the Oregon statute NLRB challenges is not so limited. It applies to protect employees from mandatory participation in other political and religious meetings as well. It has a "plainly legitimate sweep"

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and, for that reason, it is not subject to facial challenge.

II. Background

In 2009, the Oregon Legislative Assembly enacted a statute that provides a private right of action to employees under specific circumstances. ORS 659.780-85 makes it unlawful for employers to take adverse employment actions against employees if the employees refuse to attend an employer-sponsored meeting called primarily to espouse the employer's political or religious beliefs. By statutory definition, political beliefs include beliefs about whether or not to join a union. ORS 659.780(1), (4), (5). The statute provides a private right of action to employees whose employers violate the statute. ORS 659.785(2). The statute also requires employers to post notices in the workplace of employee rights under the statute. ORS 659.785(3).

Eleven years after the Oregon legislature enacted the statute, NLRB filed suit seeking a declaratory judgment that the statute is invalid as to employers subject to the National Labor Relations Act ("NLRA"). NLRB asserts the Oregon statute is preempted by the NLRA.

III. Argument

A. Legal standards under Fed. R. Civ. P. 12(b)(1) and (b)(6).

A challenge to subject matter jurisdiction under Rule 12(b)(1) can be either a facial attack on the sufficiency of the complaint or a factual attack on the substance of the jurisdictional allegations. *See, e.g., HRPT Properties Trust v. Lingle*, 775 F. Supp. 2d 1036, 1041 (D. Hi. 2011). In a facial attack, the court considers the sufficiency of the allegations in the complaint. *Savage v. Glendale Union High School, Dist. No. 205*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003). In a factual attack, the court may "rely on affidavits or any other evidence properly before the court." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

A motion to dismiss under Rule 12(b)(6) is a challenge to the sufficiency of the complaint. "To survive a motion to dismiss, a complaint must contain sufficient factual matter,

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accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id*. Legal conclusions, as opposed to factual allegations, are not entitled to the presumption of truth. *Id*.

B. The Court lacks subject matter jurisdiction over NLRB's claim.

NLRB's claim should be dismissed under Fed. R. Civ. P. 12(b)(1) because NLRB cannot meet Article III standing requirements. A plaintiff must satisfy three elements to have standing to pursue a claim in federal court. First, the plaintiff must have suffered an "injury in fact," meaning a "violation of a protected interest that is (a) 'concrete and particularized,' and (b) 'actual or imminent.'" *Mayfield v. U.S.*, 599 F.3d 964, 969 (9th Cir. 2010) (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Second, the plaintiff's injury must have been caused by the defendant's conduct. *Id.* Third, the plaintiff must demonstrate "a likelihood that the injury will be 'redressed by a favorable decision.'" *Id (quoting Simon v. E. Kentucky Welfare Rights Org.,* 426 U.S. 26, 43 (1976)). Plaintiff cannot meet these standing requirements here.[1]

1. Plaintiff lacks standing because the State did not—nor could it—cause its alleged injury.

NLRB cannot show that any action by the State caused its alleged injury. That is true because the State does not enforce the statute NLRB challenges. The statute on its face is *privately* enforceable by employees but not publicly enforceable by the State. *See* ORS 659.785(2) ("An aggrieved employee may bring a civil action to enforce this section. . . ."). Authorities overwhelmingly hold under these circumstances that standing to pursue a claim against public officials and entities is lacking. In 2010, Associated Oregon Industries challenged

[1] NLRB cannot prove any of the elements of standing. The State addresses only the second and third elements of standing in this motion, however, because the NLRB's deficiencies on those elements are so clear that the Court need not address the injury element. The State's decision not to address the injury-in-fact element in this motion is not a concession that NLRB has suffered injury. NLRB has not suffered any injury, in part because its claim is substantively meritless. In short, nothing in ORS 659.785 conflicts with or interferes with the Congressional purpose underlying the NLRA.

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the very same Oregon statute that NLRB challenges here by filing suit against the Commissioner of the Bureau of Labor and Industries ("BOLI") for injunctive relief and a declaration. *See Associated Oregon Industries v. Avakian*, 2010 WL 1838661 (D. Or. 2010). Judge Mosman concluded that Commissioner Avakian's lack of authority to enforce the statute undermined standing: "[P]laintiffs lack standing because they cannot show their injuries are, or ever will be, fairly traceable to the Commissioner." *Id.* at *3. That NLRB named the State in this case rather than the commissioner of BOLI does not change the result. The State does not enforce the statute; private plaintiffs do. Because the State lacks authority to enforce the statute, no action by the State can cause any injury to NLRB.

Ninth Circuit authority is consistent; that court held that a case was not justiciable under similar circumstances. In *Southern Pacific Transp. Co. v. Brown*, 651 F.2d 613 (9th Cir. 1980), railroads filed suit against the Oregon Attorney General to enjoin the enforcement of a statute that the Attorney General had no authority to enforce. The railroads did not name as defendants district attorneys who had enforcement authority. The Ninth Circuit held that the Attorney General's statutory authority to advise and direct the district attorneys was not a close enough connection to any injury because district attorneys were not bound by the Attorney General's advice.

Multiple other circuits and district courts have reached similar conclusions in cases in which plaintiffs sued state officials challenging the constitutionality of statutes. Both the Fifth and the Eleventh Circuits have issued *en banc* decisions holding that standing was lacking because the plaintiffs' injuries were not caused by state officials who had no authority to enforce the challenged statutes. In *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (*en banc*), the court considered a constitutional challenge to a Louisiana statute that created a private right of action against physicians who perform abortions. Clinics and physicians who perform abortions in Louisiana filed suit against the Governor and Attorney General of Louisiana. In response to the three-judge panel's argument that the statute was self-enforcing, the court concluded, "the panel

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confuses the *statute's* immediate coercive effect on the plaintiffs with any coercive effect that might be applied by the *defendants*—that is, the Governor and the Attorney General." *Id.* at 426. The court considered it to be a "long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute," citing *Muskrat v. United States*, 219 U.S. 346 (1911). *Id.*

Similarly, in *Lewis v. Governor of Alabama*, 944 F.3d 1287 (11th Cir. 2019), the *en banc* Eleventh Circuit concluded that employees whose wages were less than required under a city ordinance lacked standing in a suit brought against the Alabama Attorney General to challenge a state law that had the effect of voiding the city ordinance. The court concluded that the employees' injuries were not traceable to the Attorney General's conduct, and therefore standing was lacking, because "the Act itself. . . doesn't require (or even contemplate) 'enforcement' by anyone, let alone the Attorney General" and because "the Attorney General didn't do (or fail to do) anything that contributed to plaintiff's harm." *Id.* at 1299, 1301. *See also Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952 (8th Cir. 2015) (holding plaintiff lacked standing to sue Governor and Attorney General to invalidate state statute that provided only for private enforcement because plaintiff's "injury is 'fairly traceable' only to the private civil litigants who may seek damages under the Act and thereby enforce the statute against the companies"); *Nova Health Systems v. Gandy*, 416 F.3d 1149 (10th Cir. 2005) (holding plaintiff lacked standing to challenge constitutionality of statute where "the defendants in this case are not charged with enforcing [the statute] on Oklahoma's behalf"); *Hope Clinic v. Ryan*, 249 F.3d 603 (7th Cir. 2001) (holding that plaintiffs lacked standing to challenge state law that authorizes private suits where the defendant public officials do not enforce that state law); *American Freedom Defense Initiative v. Lynch*, 217 F. Supp. 3d 100, 105 (D.D.C. 2016) ("Defendant's lack of enforcement authority is fatal to Plaintiffs' standing to bring this action[.]"); *Sullo & Bobbitt, PLLC v. Abbott*, 2012 WL 2796794 (N.D. Tex. 2012) (holding standing is lacking because "[t]he Attorney General is powerless to enforce the Civil Barratry Statute against the

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plaintiffs and cannot cause them injury through the statute"); *Women's Health Clinic v. State*, 825 So.2d 1208 (La. 2002) (holding the case not justiciable because "[t]he statute contains no provision authorizing the State or any of its agencies or officers to enforce, or take any action on, the provisions of the statute").

Under the above-described authorities, NLRB's complaint reveals that it lacks standing to sue the State because its alleged injury is traceable only to private actions under the statute, not any State action. NLRB does not assert that the State has taken, or could take, some enforcement action. Rather, NLRB suggests that the very existence of the statute means that some employers, now and in the future, "may be forced to choose" between violating the Oregon law by forcing their employees to hear anti-labor speech and not violating it by making employee attendance at anti-labor meetings voluntary. Complaint, ¶ 20. But as in the above described cases, that "choice" is not the result of any enforcement activity by the State. A contrary conclusion confuses the statute's coercive effect with any coercive effect applied by the State or any State actors themselves.

Nor does NLRB's reference in its complaint to the Oregon Deputy Attorney General's letter suffice to satisfy the causation element. NLRB alleges that it corresponded about its preemption claim with the Deputy Attorney General who allegedly responded by stating "that his office will take all steps to defend the Oregon statute." Complaint, ¶ 21. Assuming that allegation to be true, defending the constitutionality of the challenged statute has not and will not cause any injury to NLRB. In any case, NLRB cannot rely on the State's defense of the case it filed to satisfy its standing requirements. Nothing in the NLRB's allegations is sufficient to support the causation element of standing.

Notably, nothing in the complaint suggests that anything has changed in Oregon since Judge Mosman dismissed Associated Oregon Industries' action in 2010. In *Associated Oregon Industries v. Avakian*, 2010 WL 1838661 (D. Or. 2010), the Commissioner of BOLI was named as the defendant. There, the court noted that "the Commissioner explicitly disavowed, through

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his own declaration under oath and through counsel in open court, any authority or intention to enforce ORS 659.785." *Id.* at *2. NLRB alleges no facts that suggest anything has changed.

For all these reasons, NLRB cannot demonstrate the causation element of standing. For that reason alone, jurisdiction is lacking and the complaint should be dismissed.

2. Plaintiff lacks standing because a declaratory judgment will not redress its alleged injury.

Jurisdiction is also absent in this case for the independently sufficient reason that NLRB cannot satisfy the third prong of the standing test. There is no "likelihood that the injury will be 'redressed by a favorable decision.'" *Mayfield*, 599 F.3d at 969. Because the challenged statute does not provide the State with any enforcement power, the issuance of a declaratory judgment here will have no binding effect on anyone and will have no impact on the operation or work of any agency or official of the State of Oregon.

Courts have held that redressability is an insurmountable obstacle to standing in these circumstances. In *Okpalobi*, described above, the *en banc* Fifth Circuit concluded that the plaintiffs failed to prove redressability because the defendants had no authority to act under the challenged statute:

> The governor and the attorney general have no power to redress the asserted injuries. In fact, under Act 825, no state official has any duty or ability to do *anything*. The defendants have no authority to prevent a private plaintiff from invoking the statute in a civil suit. Nor do the defendants have any authority under the laws of Louisiana to order what cases the judiciary of Louisiana may hear or not hear. Because these defendants have no powers to redress the injuries alleged, the plaintiffs have no case or controversy with these defendants that will permit them to maintain this action in federal court.

244 F.3d at 427. Similarly, in *Lewis*, the *en banc* Eleventh Circuit held that a declaratory judgment that the challenged statute is unconstitutional would not redress the plaintiffs' injuries. 944 F.3d at 1301-05. The court explained that the relief requested would not constrain the employers subject to private suits under the ordinance because they are not parties to those suits. And it would not constrain the state courts either: "Nor, for that matter, would a federal-court

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judgment declaring Act No 2016-18 invalid be binding on Alabama courts—which, presumably, would be tasked with deciding the vast majority of cases brought by employees against their employers under the Birmingham ordinance." *Id*. at 1302. The Eighth Circuit reached the same conclusion in *Digital Recognition Network*, 803 F.3d at 958-59. That court explained that a declaratory judgment would not redress the plaintiff's injury:

> [I]t must be *the effect of the court's judgment on the defendant* that redresses the plaintiff's injury, whether directly or indirectly. . . Private litigants with rights to enforce the Act would not be the subject of any relief in this action, and any judgment would not oblige private litigants to refrain from proceeding under the Act.

803 F.3d at 958. The Eighth Circuit also rejected the argument that a federal court declaratory judgment binds state courts in Arkansas: "Arkansas courts are not bound by federal law to accept the decision of an inferior federal court on the meaning of the federal Constitution." Id. at 959 (citing *Johnson v. Williams*, 568 U.S. 289 (2013)).

The same reasoning applies to bar NLRB's suit here. NLRB seeks a declaratory judgment against the State that an Oregon statute is invalid. But the State has no role in the statute's enforcement. Nothing the State does will change as a result of any declaration the Court were to enter in this case. A declaration would not bind any employees who file suit under the challenged statutes because they are not parties to this case. Nor would it bind the state courts that will likely resolve any employee claims under the statutes. *See Johnson v. Williams*, 568 U.S. 289, 305 (2013) (holding that decisions of lower federal courts do not bind state courts and "disagreeing with the lower federal courts is not the same as ignoring federal law"). Any declaration entered in this case will be nothing more than an advisory opinion. Federal courts, of course, lack the power to issue advisory opinions. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). Because a declaratory judgment would redress no

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injury, even if one existed, NLRB lacks standing to pursue its claim. The claim should be dismissed because the Court lacks subject matter jurisdiction.

C. NLRB's facial constitutional challenge fails because the statute has a plainly legitimate sweep.

NLRB's claim also fails under Fed. R. Civ. P. 12(b)(6). NLRB fails to state a claim because it seeks to declare an Oregon statute facially invalid, but it cannot establish the required threshold of facial invalidity. Facial constitutional challenges are disfavored. *See Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 450 (2008). Under *United States v. Salerno*, 481 U.S. 739 (1987), facial challenges fail unless "no set of circumstances exists under which the Act would be valid." In other words, to be facially invalid under that rule, the law must be "unconstitutional in all of its applications." *Washington State Grange*, 552 U.S. at 449. The Supreme Court has also indicated that, at a minimum, "a facial challenge must fail where the statute has 'a plainly legitimate sweep.'" *Id*. NLRB's challenge fails here because the Oregon statute has a plainly legitimate sweep.

NLRB's complaint seeks a declaration that the Oregon statute is invalid "as to employers subject to the NLRA." Complaint, *prayer*, ¶ 1. NLRB challenges the statute not as to a specific employer's employment action or meeting but, instead, facially as to all employers subject to the federal statute. NLRB's jurisdiction—and the conflict it alleges exists between federal and state law—is exclusive to labor law matters. But the challenged Oregon statute applies much more broadly than just to labor law matters.

The Oregon statute provides a private right of action for employees who suffer adverse employment actions as the result of refusing to participate in a mandatory employer meeting to discuss the employer's views about political or religious matters. But NLRB has no claim to jurisdiction over mandatory employer meetings outside the union election context. For example, the statute would provide a private right of action to an employee fired for refusing to attend an employer-sponsored political rally. And it would provide a right of action to an employee

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demoted for refusing to attend an employer-sponsored prayer gathering. The Oregon statute is clearly valid and not preempted by NLRA in these situations. It has a plainly legitimate sweep. For this reason, as well, NLRB's claim fails and must be dismissed.

IV. Conclusion

For all the above reasons, the State's motion should be granted and NLRB's complaint should be dismissed.

DATED April __7__, 2020.

Respectfully submitted,

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