The Honorable Kymberly K. Evanson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABRAHAM FLAXMAN and AMY HAGOPIAN, individually and for a proposed class, Plaintiffs, v. BOB FERGUSON, in his official capacity as the Attorney General of the State of Washington, and KATE REYNOLDS, in her official capacity as Executive Director of the Executive Ethics Board of the State of Washington, Defendants.	NO. 2:23-cv-01581-KKE DEFENDANTS' MOTION TO DISMISS NOTE ON MOTION CALENDAR: DECEMBER 1, 2023 Without Oral Argument

I. INTRODUCTION

Like all other state employees, University of Washington professors are subject to the Ethics in Public Service Act, RCW 42.52. In Washington, our state employees' ethical obligations are fundamental to preserving trust in a government that derives its power directly from the people. As our Legislature has declared, state employees "hold a public trust that obligates them, in a special way, to honesty and integrity in fulfilling the responsibilities to which they are appointed. Paramount in that trust is the principle that public office . . . may not be used for personal gain or private advantage." RCW 42.52.900. The Ethics in Public Service Act holds all state employees to the same high standards.

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Here, the named Plaintiffs are two UW professors who are currently subject to investigations under the Ethics in Public Service Act for allegedly using their state-issued email accounts for private gain, and who object to the Act's application to them. Rather than raise their objections within the context of their cases currently pending before the Executive Ethics Board (EEB, or the Board) and then seeking judicial review in state court as required, they instead seek to circumvent the process entirely by asking this Court to impose an unspecified injunction before their pending cases have even been adjudicated. Their Complaint is procedurally improper and, in any event, lacks merit.

As court after court has held in rejecting lawsuits just like this one as unripe, parties under investigation or subject to civil enforcement actions cannot use the courts to stymie those proceedings, particularly when the subjects have an effective alternative means to raise their objections. *See, e.g.*, *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 781 (9th Cir. 2000); *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016); *Ammex, Inc. v. Cox*, 351 F.3d 697 (6th Cir. 2003). And, just like those lawsuits, Plaintiffs' Complaint is unripe because the EEB's investigation and enforcement proceedings are still ongoing. The EEB has not reached any final enforcement decision; further factual development and procedures are still necessary; and the EEB would be prejudiced by having to litigate issues overlapping with its ongoing proceedings.

Further, even if Plaintiffs' claims were ripe for consideration, the *Younger* abstention doctrine requires this Court to abstain from exercising jurisdiction, as the EEB's investigation is an ongoing civil enforcement proceeding implicating critical state interests. Indeed, this Court previously dismissed a nearly identical lawsuit on *Younger* abstention grounds. *See Samples v. Washington State Executive Ethics Bd.*, No. C12-5418 BHS, 2012 WL 5285202, at *1 (W.D. Wash. Oct. 25, 2012). Just like the plaintiffs in that lawsuit, Plaintiffs in this suit are free to raise their First Amendment claims in state court, but any action by this Court to effectively enjoin the state proceedings would violate the important principles set forth in *Younger*.

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Finally, even if this Court were to reach the merits of Plaintiffs' case, their Complaint fails to state a plausible claim upon which relief can be granted. While Plaintiffs do not allege any specific cause of action in their complaint—or even specify what injunctive or declaratory relief in particular they are seeking—it ultimately makes no difference. Simply put: Washington's prohibition against State employees using State resources for private gain very comfortably passes muster under the First Amendment. And, Plaintiffs have no reasonable expectation of privacy, much less any privacy interest secured by the First Amendment, in their state-issued email accounts. Plaintiffs' Complaint should be dismissed.

II. BACKGROUND

A. The Executive Ethics Board

The EEB is responsible for enforcing the Ethics in Public Service Act "with respect to institutions of higher education" and "higher education faculty." RCW 42.52.360. When the Board receives a complaint alleging an ethical violation, the Board conducts an investigation to determine whether there is "reasonable cause" to believe a violation has occurred. RCW 42.52.420. If the Board determines there is "reasonable cause," the Board is required to hold a hearing and take testimony. RCW 42.42.430. If the Board finds by a preponderance of the evidence that a violation occurred, it is required to issue an order stating its findings of fact, conclusions of law, and any enforcement action it is taking. *Id.*

Washington's Administrative Procedure Act (WAPA) applies to any order by the Board concluding that an ethics violation has occurred. *See* RCW 42.52.440 (citing RCW 34.05). Pursuant to the WAPA, individuals sanctioned by the Board may seek judicial review in state court, where they may raise any constitutional or other challenges to the validity of Board's order or the proceedings. *See id.* In other words, under the WAPA, anyone who is the subject of an order by the Board finding an ethics violation has a short and direct path to obtaining judicial review of that order. *Id.*

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B. The Plaintiffs' Complaint

The named Plaintiffs are two UW professors who request unspecified injunctive and declaratory relief relating to their ongoing state proceedings before the EEB. Compl. ¶ 4. Both Plaintiffs have matters currently pending before the Board related to allegations that each of them separately misused state resources (specifically, their UW-issued email addresses and a UW-hosted listserv) to solicit funds for striking workers, in violation of RCW 42.52.160 ("No . . . state employee may employ or use any . . . property under the . . . employee's official control or direction . . . for the private benefit or gain of . . . another."). Professor Flaxman's pending matter stems from a complaint alleging he used his UW-issued email address to distribute to a UW-hosted listserv an email containing links taking the recipient directly to a website advocating in favor of a union strike and soliciting donations for a strike fund. *Id.* ¶¶ 81–89, Ex. 3. Professor Flaxman was also previously investigated for a complaint that he used his UW email and listserv for improper political campaigning, but that complaint was dismissed by the Board. Compl. ¶¶ 48–63. Similarly, Professor Hagopian's pending matter relates to a complaint alleging she used her UW-issued email address to distribute to a UW-hosted listserv an email containing links taking the recipient directly to a website soliciting donations for a union strike fund. *See* Compl. ¶¶ 64–80, Ex. 2.

Plaintiffs' complaint does not include any specific prayer for relief or cause of action, and it is unclear what precise injunctive or declaratory relief they are seeking. At a minimum, they appear to be asking this Court to issue some form of injunction to terminate the EEB's investigation and adjudication of their ongoing cases. Plaintiffs have opted not to comply with the relevant statutory framework providing for direct state judicial review of final EEB orders, however, and have instead filed suit in this Court before the EEB has even completed adjudicating their individual cases.

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III. ARGUMENT

A. Legal Standard

Dismissal under Federal Rule of Civil Procedure 12(b)(1) is required where a federal court lacks jurisdiction. In the context of a Rule 12(b)(1) motion to dismiss, "[t]he party asserting federal subject matter jurisdiction bears the burden of proving its existence." *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). The doctrine of ripeness is a means by which federal courts may dispose of matters that are premature for review because the plaintiffs' purported injury is too speculative and may never occur. *See id.* (citing Erwin Chemerinski, *Federal Jurisdiction* § 2.3.1 (5th ed. 2007)). "Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss." *See id.* (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)). Similarly, motions to dismiss based on *Younger* abstention are considered under Rule 12(b)(1), as federal courts abstain from exercising jurisdiction and dismiss certain cases involving important and ongoing state matters. *See Younger v. Harris*, 401 U.S. 37, 50-54 (1971); *see also* 5B Charles Alan Wright & Arthur R. Miller *Fed. Prac. & Proc. Civ.* § 1350 at 96-100 (3d. ed. 2009) (motion for abstention treated under the analytical framework of Rule 12(b)(1)).

In the alternative, if the Court deems Plaintiffs' claims ripe for adjudication *and* declines to abstain pursuant to *Younger*, dismissal is appropriate under Rule 12(b)(6), as Plaintiffs have failed to state any plausible claim for relief. On a Rule 12(b)(6) motion to dismiss, courts accept as true all factual allegations in the complaint but are "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint may be dismissed under Rule 12(b)(6) for lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988). Importantly, "[t]he pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action." *Twombly*, 550 US. at 555 (cleaned

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up). On the merits, Plaintiffs' complaint fails to meet this basic threshold requirement and should be dismissed.

B. Plaintiffs' Claims Are Not Ripe

The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (cleaned up). "[I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967). Constitutional issues raise particular ripeness concerns, as federal courts "cannot decide constitutional questions in a vacuum." *Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007); *see also Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) ("[P]articularly where constitutional issues are concerned, problems such as the inadequacy of the record, or ambiguity in the record, will make a case unfit for adjudication on the merits.") (cleaned up).

Ripeness has both "constitutional and prudential" components. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1173 (9th Cir. 2022). Plaintiffs' claims are unripe under both prongs. Plaintiffs (i) fail to allege any cognizable injury with concreteness and particularity, making this case constitutionally unripe; and they (ii) seek to enjoin non-final agency action that is contingent upon future factual developments, making this case prudentially unripe.

1. Plaintiffs' suit is not constitutionally ripe

"[T]he constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003). "Whether framed as an issue of standing or ripeness," a party must show "'an invasion of a legally protected interest that is (a) concrete and particularized[,] and (b) actual or imminent,

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not conjectural or hypothetical.'" *Twitter*, 56 F.4th at 1173 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "A concrete injury need not be tangible but 'must actually exist.'" *Id.* at 1175 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)). Plaintiffs cannot establish injury in fact by vague insinuations that the EEB's investigation *might* chill their protected speech, that the EEB's review of their emails—which are public records—violates their academic freedom, or any of their other half-baked assertions of harm. *See* Compl. ¶ 93.

A party's "naked assertion" that its speech was chilled is insufficient to establish injury. *Id.* at 1174–75. The Ninth Circuit's recent decision in *Twitter v. Paxton* is instructive here. There, Twitter sought to enjoin the Texas Attorney General from investigating Twitter's content-moderation policies and enforcing a civil investigative demand (CID). *Id.* at 1172. Twitter alleged the investigation was unlawful retaliation for protected speech. *Id.* The Ninth Circuit held that Twitter's case was not ripe.[1] *Id.* at 1173. Specifically, Twitter's assertions that the CID and investigation "impeded" its ability to "freely make its own decisions," "chill[ed] Twitter's speech," and "forced [the company] to weigh the consequence[s] of a burdensome investigation" when making decisions, taken individually or collectively, did not satisfy Article III. *Id.* at 1175. To the contrary, Twitter's assertions were "vague" and referred only to "a general possibility of retaliation." *Id.* An employee's sworn testimony that he believed the investigation would result in "significant diminishment of the willingness of Twitter employees to speak candidly and freely in internal content moderation decisions" was likewise insufficient: the "highly speculative" statements did not show the "[civil investigative demand] has actually chilled employees' speech or Twitter's content moderation decisions; the employee only claims that it would 'if the CID and investigation were allowed to proceed.'" *Id.* (quoting *Spokeo*, 578 U.S. at 340).

[1] The Ninth Circuit initially affirmed dismissal on prudential ripeness grounds. *Twitter, Inc. v. Paxton*, 26 F.4th 1119 (9th Cir. 2022). On reconsideration, it found Twitter's claims were not ripe on constitutional grounds. *Twitter*, 56 F.4th at 1173.

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Here, as in *Twitter v. Paxton*, Plaintiffs' Complaint makes no concrete allegation that they have been punished for their speech or that the EEB's investigation has actually chilled their speech. For example, Plaintiffs assert that "[t]he EEB's practice in setting penalties contravenes the 'excessive Fines' clause of the Eighth Amendment and chills academic discussions on the 'Faculty Issues and Concerns' mailing list" and says "[t]he EEB has applied these practices to plaintiffs." Compl. ¶¶ 46–47. But their Complaint offers no specific allegations of chilling and admits that the EEB has *not actually issued any fine against either Plaintiff*. Compl. ¶¶ 63, 80, 89. The lack of any current finding or any fine against either Plaintiff is particularly notable, given that Plaintiffs' "common questions of law and fact" appear to be based entirely on speculation that the EEB will issue a hypothetical fine that is theoretically disproportionate to whatever hypothetical violation it might find potentially took place. *See, e.g.*, Compl. ¶ 92 (alleging that one "common question of law and fact" is whether the "practice of the EEB to impose significant monetary penalties for forwarding an email to the 'Faculty Issues and Concerns' mailing list when the forwarded email contains an inconsequential solicitation for contributions deprive[s] plaintiffs of First Amendment rights?"). The Plaintiffs' references to such issues are entirely speculative and cannot support any plausible cause of action.

Plaintiffs fare no better in claiming an injury based on the EEB's allegedly "overbroad" review of their emails. Compl. ¶ 44. As state employees, Plaintiffs' emails are public records, subject to disclosure under Washington's Public Records Act, with only limited exceptions. RCW 42.56.010(3), RCW 42.56.070; *see also* WAC 292-110-010(4) ("**No expectation of privacy.** . . . Electronic records are reproducible and therefore cannot be considered private. Such records may be subject to disclosure under the Public Records Act[.]"). Given that any member of the public can request and obtain their emails, with limited exceptions, Plaintiffs cannot claim an injury based on the EEB's review of their emails.

Finally, Plaintiffs try to save their claim by vaguely asserting that some of their emails may be subject to protection against public disclosure under FERPA. Compl. ¶ 43. Although it

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is unclear whether any of Plaintiffs' emails actually fall within FERPA, which guards against the public disclosure of *students*' personal identifying information and educational records, that factual question is largely irrelevant, as Plaintiffs significantly misstate the scope and nature of the statute. As an initial matter, the United States Supreme Court has plainly held that FERPA's non-disclosure provisions do not give rise to any private right of action. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) ("[T]here is no question that FERPA's nondisclosure provisions fail to confer enforceable rights."). As the Supreme Court has explained, "FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions." *See id.* at 290; *see also Smith v. Tacoma Sch. Dist.*, 476 F. Supp. 3d 1112, 1136 (W.D. Wash. 2020) (citing *Gonzaga* and concluding that plaintiff "has no private right of action to remedy an alleged FERPA violation"). And, even if Plaintiffs could hypothetically assert FERPA as a basis for seeking injunctive relief, they would lack standing to do so—any inappropriate public disclosure of FERPA-protected information would constitute a potential injury, if any, to the student, not to Plaintiffs. Of course, Plaintiffs do not even allege in their complaint that such a public disclosure has actually happened or is likely to happen. Instead, Plaintiffs allege a purely hypothetical injury to a non-party based on a statute that does not give rise to a private right of action. Plaintiffs' claims fall far short of establishing standing, demonstrating an actual injury, or stating a plausible claim for relief, and their Complaint should be dismissed.

2. Plaintiffs' suit is not prudentially ripe

Even if Plaintiffs could allege a plausible Article III injury, their claims would still be subject to dismissal on prudential ripeness grounds. *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000). Prudential ripeness turns on consideration of two factors: (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of

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withholding court consideration." *Ass'n of Irritated Residents v. EPA*, 10 F.4th 937, 944 (9th Cir. 2021) (citation omitted).

Courts considering exactly these types of suits by parties seeking to terminate ongoing investigations routinely dismiss the suits on prudential ripeness grounds. *See, e.g.*, *Ass'n of Am. Med. Colls.*, 217 F.3d at 781 ("[U]ncertainties" in whether an investigation will result in findings or enforcement "render plaintiffs' action unfit for judicial resolution at this time."); *Google*, 822 F.3d at 228 ("[N]either the issuance of the non-self-executing administrative subpoena nor the possibility of some future enforcement action created an imminent threat of irreparable injury ripe for adjudication."); *Ammex*, 351 F.3d at 709 ("Enforcement of the [Michigan Consumer Protect Act] against [Plaintiff] is . . . tentative and subject to agency reconsideration"); *Cmty. Mental Health Servs. of Belmont v. Mental Health & Recovery Bd. Serving Belmont, Harrison & Monroe Cntys.*, 150 F. App'x 389, 397–98 (6th Cir. 2005) ("Without knowledge of what that form [any enforcement action] will be, this court does not have the concrete context necessary for judicial review."); *Univ. of Med. & Dentistry of New Jersey v. Corrigan*, 347 F.3d 57, 69 (3d Cir. 2003) (holding action to enjoin an investigation was not ripe because "an investigation is the beginning of a process that may or may not lead to an ultimate enforcement action"); *Portland Gen. Elec. Co. v. Myers*, No. Civ. 03-CV-1641-HA, 2004 WL 1722215, at *2 (D. Or. 2004); *Tex. State Troopers Ass'n*, No. A-13-CA-974-SS, 2014 WL 12479651, at *3 (W.D. Texas April 16, 2014); *CBA Pharma, Inc. v. Harvey*, No. 3:21-CV-00014-GFVT, 2022 WL 983143, at *3 (E.D. Ky. Mar. 30, 2022), *aff'd sub nom. CBA Pharma, Inc. v. Perry*, No. 22- 5358, 2023 WL 129240 (6th Cir. Jan. 9, 2023). This case is no different.

As to the first ripeness factor, "[a] claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (citation omitted). Plaintiffs concede they do not facially challenge any aspect of the Ethics in Public Service Act. Compl. ¶ 27. Instead, they appear to challenge primarily two ongoing EEB matters.

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Id. ¶¶ 64–89.[2] But as they admit, those matters are ongoing. Compl. ¶¶ 80, 89. Neither Plaintiff has been found to violate the Ethics in Public Service Act, and neither has been subject to any fine. There is no final agency action to challenge. *See Ass'n of Am. Med. Colls.*, 217 F.3d at 781 ("An investigation, even one conducted with an eye to enforcement, is quintessentially non-final as a form of agency action."); *CBA Pharma*, 2022 WL 983143, at *3 ("The investigation in this matter has not concluded, which means that the Department has not even decided whether it will, in fact, take any action[.]"). Instead, Plaintiffs ask this Court to declare unconstitutional two ongoing state investigations and enjoin hypothetical future enforcement actions that may never come to pass. This is a paradigmatically unripe claim; the Court should reject their attempt to end-run an ongoing EEB proceeding before it has reached any conclusion.

To meet the second ripeness requirement, Plaintiffs must show that withholding judicial review would lead to "[d]irect and immediate hardship" that will require "an immediate and significant change in the plaintiff['s] conduct of their affairs with serious penalties attached to noncompliance." *Stormans*, 586 F.3d at 1126 (cleaned up). For the same reason they cannot establish injury, however, Plaintiffs also cannot establish hardship. *Tex. State Troopers Ass'n*, 2014 WL 12479651, at *3 ("Plaintiffs cannot establish hardship because they have not alleged their conduct has changed, or will change, in any way as a result of the Attorney General's conduct."). Moreover, Plaintiffs have alternative means to protect themselves: to the extent the EEB ultimately does find against them following the completion of an adjudicative process, Washington's Administrative Procedure Act provides Plaintiffs with a short and direct path to challenge the EEB's findings in superior court, where they may raise any constitutional arguments they deem appropriate. *See* RCW 34.05.570(4)(c).

[2] The Plaintiffs' Complaint also contains allegations about a third EEB investigation that "terminated . . . in favor of Dr. Flaxman." Compl. ¶¶ 48–63. To the extent Plaintiffs feel aggrieved about how that matter was handled, the matter is closed, and there is no further relief this Court can provide them. Any claim based on that investigation is therefore moot. *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012, 1015 (9th Cir. 1989).

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Finally, courts also consider the hardship to the defendant resulting from having to litigate unripe claims. *See, e.g.*, *Colwell v. Dep't of Health & Hum. Servs.*, 558 F.3d 1112, 1129 (9th Cir. 2009); *Thomas*, 220 F.3d at 1142. Here, the Plaintiffs' lawsuit seeks to force the EEB to justify its ongoing investigations and proceedings, and to litigate issues substantially overlapping with the substance of its investigations, before it has even had an opportunity to make final enforcement decisions. Litigating Plaintiffs' case would require the EEB to reveal and justify its ongoing fact-finding and decision-making to both the investigative target and the public or suffer the disadvantage of "being forced to defend [the investigation] in a vacuum . . . ." *Thomas*, 220 F.3d at 1142. Moreover, allowing cases like this to proceed in federal court will make every EEB investigation susceptible to collateral attack—an untenable result. This Court should dismiss Plaintiffs' complaint on prudential ripeness grounds.

C. Even if Plaintiffs' Suit Were Justiciable, *Younger v. Harris* Requires Abstention

Even if this Court were to determine that Plaintiffs' claims are justiciable, the abstention principles set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny mandate that the Court should nevertheless abstain from exercising jurisdiction. The *Younger* abstention doctrine requires federal courts to abstain from hearing federal claims for relief from various state proceedings, including civil enforcement proceedings. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013) (citing *Younger*, 401 U.S. at 43–44). These principles reflect comity and federalism interests, ensuring that federal courts do not interfere with ongoing state proceedings. *See Younger*, 401 U.S. at 43 (recognizing "a desire to permit state courts to try state cases free from interference by federal courts"); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (*Younger* "and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.").

Whether *Younger* abstention is required does not depend on the specific allegations in a particular case but instead on whether the state proceeding at issue falls within the general class

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of state enforcement actions. *See Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 737-38 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2796 (2021) (rejecting plaintiff's invitation to probe into "the State's true motive in bringing the case," explaining, "[a] federal-court inquiry into why a state attorney general chose to pursue a particular case, or into the thoroughness of the State's pre-filing investigation, would be entirely at odds with *Younger*'s purpose of leaving state governments 'free to perform their separate functions in their separate ways.'") (citation omitted). "*Younger* abstention applies to state civil proceedings when the proceeding: (1) is ongoing, (2) constitutes a quasi-criminal enforcement action, (3) implicates an important state interest, and (4) allows litigants to raise a federal challenge." *Citizens for Free Speech, LLC v. Cnty. of Alameda*, 953 F.3d 655, 657 (9th Cir. 2020) (citation omitted).

In nearly identical circumstances, this Court previously addressed *Younger* abstention in *Samples v. Washington State Executive Ethics Board* and concluded that *Younger* required dismissal of "a civil rights complaint against the [Washington Executive Ethics] Board alleging violations of Plaintiffs' rights to Freedom of Speech" related to the Board's ongoing enforcement proceedings. *Samples*, 2012 WL 5285202, at *1. Here, as in *Samples*, each of the *Younger* factors is easily met, and action by this Court would effectively enjoin the EEB's ongoing investigations and proceedings. The Court should dismiss the complaint.

1. The EEB's cases are "ongoing"

Younger applies to ongoing state civil enforcement actions. As the Ninth Circuit made clear in *Citizens for Free Speech*, "civil enforcement proceedings initiated by the state 'to sanction the federal plaintiff . . . for some wrongful act,' *including investigations* 'often culminating in the filing of a formal complaint or charges,'" meet the "ongoing proceeding" requirement for *Younger* abstention. 953 F.3d at 657 (emphasis added) (quoting *Sprint*, 571 U.S. at 79–80).

Here, Plaintiffs' complaint makes clear that the EEB civil enforcement actions at issue are "ongoing." *See* Compl. ¶ 80 (noting that Professor Hagopian's case is "now awaiting a public

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hearing before the EEB"), ¶ 89 (noting that Professor Flaxman's matter before the EEB "remains pending"); *see also Samples*, 2012 WL 5285202, at *2 ("[T]he Court finds that the state proceeding is ongoing."); *San Jose Silicon Valley Chamber of Com. Pol. Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008) ("The state-initiated proceeding in this case-the Elections Commission's investigation of Plaintiffs' activities is ongoing."); *Alsager v. Bd. of Osteopathic Med. & Surgery*, 945 F. Supp. 2d 1190, 1195 (W.D. Wash. 2013) ("The Board's investigation of Plaintiff's conduct constitutes a state initiated 'ongoing proceeding' for the purposes of *Younger* abstention.") (citation omitted). Under *Younger*, the EEB's currently pending civil enforcement actions against Plaintiffs plainly satisfy the "ongoing proceeding" factor.

2. The pending EEB matters are civil enforcement actions

Second, the EEB's ongoing investigations of Plaintiffs for violations of the Ethics in Public Service Act fall squarely within the type of civil enforcement proceeding to which *Younger* applies. *See Sprint*, 571 U.S. at 70 (limiting *Younger* abstention to three categories of cases, including "certain civil enforcement proceedings") (quotations omitted). In *Sprint*, the Supreme Court explained that *Younger* applies to those civil enforcement proceedings "akin to a criminal prosecution" in "important respects." *Id.* at 79 (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)). Such actions are: (1) "characteristically initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act"; (2) "a state actor is routinely a party to the state proceeding and often initiates the action"; (3) "[i]nvestigations are commonly involved"; and (4) the investigation "often culminat[es] in the filing of a formal complaint or charges." *Id.* at 79-80; *see also Samples*, 2012 WL 5285202 at *3 (dismissing complaint for injunctive relief against EEB and concluding that the second *Younger* factor was "easily met" by ongoing enforcement proceedings). These factors are clearly satisfied here:

(1) EEB proceedings are initiated to investigate and sanction potential violations of the Ethics in Public Service Act, *see* RCW 42.52.420;

(2) EEB proceedings are overseen by the EEB, which may request assistance from the Attorney General's Office or a prosecuting attorney to perform the investigation or prosecute the charges in a public hearing; *see* RCW 42.52.470, et seq.;

(3) EEB proceedings necessarily involve preliminary investigations to determine whether there is "reasonable cause" to believe an ethical violation may have occurred, *see* RCW 42.52.420; and

(4) If the EEB finds "reasonable cause," the matter then proceeds as a quasi-judicial enforcement process, including a public hearing at which testimony may be taken and where the subject may choose to present evidence and argument against the charges, *see* RCW 42.52.530.

As the above processes demonstrate, and as this Court previously held in *Samples*, 2012 WL 5285202 at *3, the EEB's ongoing civil enforcement proceedings plainly meet the second factor under *Younger*.

3. The EEB's investigation and enforcement processes implicate compelling state interests

Third, "[p]roceedings necessary for the vindication of important state policies . . . evidence the state's substantial interest in the litigation." *Middlesex Cnty. Ethics Comm.*, 457 U.S. at 432. "The importance of the interest is measured by considering its significance broadly, rather than by focusing on the state's interest in the resolution of an individual case." *Baffert v. Cal. Horse Racing Bd.,* 332 F.3d 613, 618 (9th Cir. 2003). "Where the state is in an enforcement posture in the state proceedings, the important state interest requirement is easily satisfied, as the state's vital interest in carrying out its executive functions is presumptively at stake." *Potrero Hills Landfill, Inc. v. Cnty. of Solano,* 657 F.3d 876, 883–884 (9th Cir. 2011) (citations omitted).

Here, as in *Samples*, "the 'important state interest' requirement is easily satisfied."

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Samples, 2012 WL 5285202, at *2. In passing the Ethics in Public Service Act, the Legislature declared that "[e]thics in government are the foundation on which the structure of government rests." RCW 42.52.900. Indeed, the Legislature has made clear that ensuring public employment "not be used for personal gain or private advantage" is of "[p]aramount" importance to the State. *Id.* The EEB's interest in enforcing the Ethics in Public Service Act is thus unquestionably an important state interest. Accordingly, the third element of *Younger* abstention is satisfied.[3]

4. Plaintiffs are able to raise their federal constitutional issues in state proceedings under the statutory framework governing challenges to EEB orders

Fourth, as this Court has previously held in nearly identical circumstances, Plaintiffs have ample opportunity to raise their federal constitutional challenges to the EEB proceedings in state court. *Samples*, 2012 WL 5285202, at *2. Although Plaintiffs may not be able to raise their constitutional challenges directly in the EEB proceedings themselves, "it is sufficient … that constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 629 (1986).[4] In this case, the Ethics in Public Service Act provides for direct judicial review in state court of any EEB orders finding an ethics violation. *See* RCW 42.52.440 (stating that "reconsideration or judicial review of an ethics board's order that a violation [ ] has occurred shall be governed by" the Washington APA, RCW 34.05 (emphasis added)). Further, Washington's Administrative Procedure Act "establishes the exclusive means of judicial review

[3] In *Samples*, the court summarily rejected "Plaintiffs' attempt to distinguish this case on the basis that they are not challenging the Board's 'ability to enforce ethics rules in general,' they 'are only seeking to enjoin two specific acts by the Board.'" *Samples*, 2012 WL 5285202, at *2. Such an argument would be even less persuasive here, because it appears that Plaintiffs are, in fact, challenging the Board's authority to enforce ethics rules vis-à-vis public employees' use of their state-issued emails.

[4] Agencies are not empowered to determine the constitutionality of laws they enforce. *Bare v. Gorton*, 84 Wn.2d 380, 382-83, 526 P.2d 379 (1974). Nevertheless, courts require the exhaustion of administrative remedies for an "as applied" challenge to the constitutionality of the law, in order to allow the agency to develop the facts necessary to adjudicate the constitutional claim. *Harrington v. Spokane Cnty.*, 128 Wn. App. 202, 209, 114 P.3d 1233 (2005).

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of agency action," including an EEB ruling. RCW 34.05.510. Thus, should Plaintiffs receive an adverse ruling before the EEB, the APA plainly provides them with the opportunity to seek relief in state court, where they are free to argue that any EEB "action is … [u]nconstitutional" or otherwise unlawful. RCW 34.05.570.

"*Younger* abstention routinely applies even when important rights are at stake," including alleged constitutional violations. *Bristol-Myers*, 979 F.3d at 738. In *Younger* itself, the Court held "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Id.* (quoting *Younger*, 401 U.S. at 51). As the *Younger* court observed, while any alleged chilling of First Amendment rights could be cured "by an injunction that would prohibit any prosecution," that would lead to the states being "stripped of all power to prosecute even the socially dangerous and constitutionally unprotected conduct . . . ." 401 U.S. at 51.

Here, it is "abundantly clear" that Plaintiffs have an "opportunity to present [their] federal claims to a competent state tribunal" and, consequently, "no more is required to invoke *Younger* abstention." *J.&W. Seligman & Co. Inc. v. Spitzer*, No. 05 Civ. 7781(KMW), 2007 WL 2822208, at *6–7 (S.D.N.Y. Sept. 27, 2007) (quoting *Juidice v. Vail*, 430 U.S. 327, 337 (1977)). Indeed, allowing the present lawsuit to proceed beyond a motion to dismiss—let alone enjoining or interfering with the EEB's ongoing civil enforcement actions—would offend *Younger*'s core purpose of protecting comity between the states and the federal government. *See Middlesex*, 457 U.S. at 431 ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights."). Accordingly, the fourth *Younger* requirement is satisfied.

5. Granting Plaintiffs' request would effectively enjoin the EEB's investigations and civil enforcement proceedings

Finally, the Court must consider "whether the federal action would effectively enjoin the state proceedings." *Citizens for Free Speech*, 953 F.3d at 657. The Ninth Circuit derived this

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final element from the recognition that "interference is undoubtedly the reason for *Younger* restraint, or the end result to be avoided." *Gilbertson v. Albright*, 381 F.3d 965, 976–77 (9th Cir. 2004). Direct interference is not required, only "that which would have the same practical effect on the state proceeding as a formal injunction." *Id.* at 977–78. The analysis applies equally to requests for declaratory relief as requests for injunctive relief, because "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid." *Samuels v. Mackell*, 401 U.S. 66, 72 (1971).

Here, although Plaintiffs chose to file their complaint without including any specific cause of action or prayer for relief, their ultimate goal is clear: having this Court halt the State's efforts to enforce the Ethics in Public Service Act against them and other similarly situated UW professors. Such a request, however, is exactly the sort of demand that strikes "at the core of the comity concern that animates *Younger*." *Gilbertson*, 381 F.3d at 976. Because the relief Plaintiffs appear to seek would interfere with the EEB's ongoing investigation and impair its ability to enforce the Ethics in Public Service Act, the final *Younger* requirement is undoubtedly satisfied. *Samples*, 2012 WL 5285202, at *3; *Wash. Ass'n of Realtors v. Wash. State Pub. Disclosure Comm'n*, No. C09-5030RJB, 2009 WL 10726078, at *8 (W.D. Wash. May 19, 2009) (abstaining where "federal court action would enjoin the proceeding or have the practical effect of doing so") (cleaned up). In recognition of the important principles set forth in *Younger* and its progeny, this Court should abstain from exercising jurisdiction over Plaintiffs' claims.

D. Plaintiffs Have Failed to State a Plausible Claim for Relief

Even if the Court (1) determines that Plaintiffs' claims are ripe for adjudication, and (2) declines to abstain from exercising jurisdiction under the principles set forth in *Younger*, dismissal is still warranted under Rule 12(b)(6), as Plaintiffs fail to state a plausible claim for relief. *See Twombly*, 550 US. at 555.

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1. Plaintiffs' complaint does not allege any causes of action or request any specified relief

Plaintiffs' complaint is unique in that, although they appear to be asking this Court to issue some form of declaratory and injunctive relief, nowhere in their complaint do they explain what specifically that relief is. Federal Rule of Civil Procedure 8 requires Plaintiffs to include in their complaint "a short and plain statement of the claim showing that the pleader is entitled to relief [and] a demand for the relief sought…." *See* Fed. R. Civ. P. 8(a)(2), (3). A complaint may be dismissed under Rule 12(b)(6) for lack of a cognizable legal theory. *Balistreri*, 901 F.2d at 699. Importantly, "[t]he pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (quoting 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1216 (pp. 235–36 (3d ed. 2004) (internal marks omitted)).

Here, Plaintiffs have failed to include *any* specific claim for relief, much less a legally cognizable one. It is not the job of the Court or defendants to guess at the precise contours of the injunctive and declaratory relief Plaintiffs are seeking or whether the facts alleged in their complaint may support such a request. In short, Plaintiffs' complaint fails under the most basic threshold pleading requirements set forth in the federal rules and should be dismissed.

2. The EEB's investigation of Plaintiffs' emails does not violate Plaintiffs' First Amendment rights

Even if the Court were to deem Plaintiffs' claims ripe for adjudication, decline abstention, *and* proceed to consider Plaintiffs' vague request for unspecified injunctive and declaratory relief on the merits, the Complaint still must be dismissed for failure to state a plausible claim for relief, as Plaintiffs wrongly mistake their state-issued email addresses and state-hosted email listserv as "public forums." *See, e.g.*, Compl. ¶ 88 (alleging that the state-hosted UW listserv is a "public forum"). Plaintiffs' mistaken understanding is fatal to their claims, as the State's reasonable prohibitions against state employees using for private gain their

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state-issued email addresses and listservs—all *non*-public forums—easily pass muster under the First Amendment. *See* RCW 42.52.160.

The constitution allows the regulation of protected speech in certain circumstances. *U. S. v. Grace*, 461 U.S. 171, 177–78 (1983). For example, in a *nonpublic* forum, speech may be restricted if "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). And "[t]he Government, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Grace*, 461 U.S. at 178 (quotation omitted).

In *Knudsen v. Washington State Executive Ethics Board*, a Washington state court considered a nearly identical First Amendment case brought by a college professor challenging the EEB's civil enforcement action based on the professor's use of her university-issued email address for private benefit. 156 Wn. App. 852, 863–66, 235 P.3d 835 (2010). Importantly, the court rejected the plaintiff's contention that her state-issued college email address constituted a public forum. *Id.* Instead, the court held that the school's "email system [is] a nonpublic forum," explaining that "State email systems, including the system involved here, exist to facilitate communications for purpose of state business." *Id.* As the court explained, "the school's internal mail or computer systems [are] nonpublic forums, even though members of the public could communicate with school employees using these systems, because members of the public do not have in-person access to the computers or e-mail accounts." *Id.* As a result, the court held that the Board's application of RCW 42.52.160's prohibition against using state resources for private gain was reasonable, viewpoint neutral, and entirely permissible under the First Amendment. *Id.*

Here, Plaintiffs' vague complaint appears to allege that various statutes and EEB practices are prohibited based on the mistaken argument that Plaintiffs' state-issued email addresses and university-hosted listserv constitute public forums. Just as in *Knudsen*, however,

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the Plaintiffs' university email addresses and listserv are *not* public forums,[5] and the State's reasonable, viewpoint neutral prohibitions against using such resources for private gain, *see, e.g.*, RCW 42.52.160, comfortably meet the requirements for such restrictions under the First Amendment.

Finally, the Plaintiffs' Complaint also appears to be based on a fundamentally mistaken belief that they possess a constitutionally protected privacy interest in their state-issued email accounts. *See* Compl. ¶ 42–44 (alleging that the EEB's "unfettered examination of faculty email infringes on plaintiffs' right to privacy in these communications," "interferes with the right to academic freedom protected by the First Amendment," and generally "deprives plaintiffs and other subscribers of the mailing list of their First Amendment rights"). Plaintiffs' contentions, however, have no basis whatsoever in law, as Plaintiffs have no reasonable expectation of privacy in their state-issued email accounts, much less any privacy interest secured by the constitution. *See, e.g.*, WAC 292-110-010(4) ("**No expectation of privacy.** . . . Electronic records are reproducible and therefore cannot be considered private."). Plaintiffs' constitutional argument fails at the most basic level, and their complaint should be dismissed.

E. The Court Should Award the State Attorney Fees

42 U.S.C. § 1988(b) authorizes the Court to award the prevailing party in an action brought pursuant to § 1983 its reasonable attorney fees and costs where the action is "unreasonable, frivolous, meritless, or vexatious." *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir. 1994) (quoting *Roberts v. Spalding*, 783 F.2d 867, 874 (9th Cir. 1986)). An action is frivolous when the result is obvious or the plaintiff's claims are wholly without merit. *Id.* Here, Washington law provides Plaintiffs a clear and well-established means for obtaining state judicial review of their cases in the event the EEB ultimately issues any finding against them.

[5] It is notable that at the same time Plaintiffs contend the "Faculty Issues and Concerns" email listserv constitutes a "public forum," they also allege that they, as "moderators" of the forum, must first approve the content of any message "before it can be electronically transmitted by email to persons who have subscribed to the list." *See* Compl. ¶ 13.

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Ignoring such basic, fundamental legal principles, however, they have instead chosen to file their premature complaint in an inappropriate forum without even waiting for their ongoing administrative cases to be adjudicated in the first instance. As the foregoing demonstrates, Plaintiffs' claims are an obviously improper effort to end-run the State's administrative and judicial processes and are wholly without merit. The State respectfully requests its reasonable attorney fees and costs in bringing this motion.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiffs' Complaint in its entirety and award the State its fees and costs in defending this action.

DATED this 9th day of November 2023.

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I certify that this document contains 7197 words, in accordance with LCR 7(e)(3).

DECLARATION OF SERVICE

I declare that on this day I caused this document be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 9th day of November 2023, at Seattle, Washington.

/s/ Nathan K. Bays
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