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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

MATS JARLSTROM, an individual,

Plaintiff,

v.

CITY OF BEAVERTON, an Oregon municipal corporation,

Defendant.

Case No. 3:14-cv-00783-AC

CITY'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

1. Jarlstrom does not Establish Subject Matter Jurisdiction Under the Standing Doctrine and the Federal Question Statute

When determining jurisdiction on a motion to dismiss for lack of jurisdiction, no presumptive truthfulness attaches to plaintiff's allegations. *Kingman Reef Atoll Investments, LLC v. U.S.*, 541 F3d 1189, 1195 (9th Cir. 2008). "The party who seeks to invoke the subject-matter jurisdiction of the court has the burden of establishing that such jurisdiction exists." *Handy v. Lane Cnty*, 937 FSupp2d 1297 (D.Ore. 2013).

(a) Jarlstrom does not Allege a Concrete and Particularized Injury

The first element of standing that Jarlstrom must, and cannot, establish is that he has an injury in fact, which is concrete and particularized. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130 (1992). The Supreme Court "repeatedly has rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-83, 102 S.Ct. 752 (1982). Standing is not established by allegations of an "abstract injury in nonobservance of the Constitution asserted by respondents as citizens." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n13, 94 S.Ct. 2925 (1974). "[T]he injury must affect plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n1. Jarlstrom's allegations are not personal to him.

Jarlstrom must allege "such a personal state in the outcome of the controversy as to assure that concrete adverseness" sharpens the issues "for illumination of difficult constitutional questions[.]" *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691 (1962). A concrete injury is required to present the factual context within which a decision can be made and assure that adjudication of constitutional matters is not undertaken unnecessarily. *Schlesinger*, 418 U.S. at 221. The political process, rather than the judicial process, is the appropriate place to seek a remedy for a general grievance. *Federal Elections Com'n v. Akins*, 524 U.S. 11, 23, 118 S.Ct. 1777 (1998).

In his response to the City's Motion to Dismiss, Jarlstrom specifies that he is alleging a substantive due process violation. (Pltf's Opp. to Mt. Dismiss, p. 9). "Substantive due process requires a 'careful description of the asserted fundamental liberty interest." *Raich v. Gonzales*, 500 F3d 850, 863 (9th Cir. 2007). Thus, Jarlstrom claims he has a concrete and particularized

injury in yellow light intervals. Neither the inadequate allegations in his Complaint, nor his attempt to bolster those allegations with his opposition to the City's Motion and Declaration in support allege a concrete and particularized injury. Without a specific factual context, any analysis would be nebulous – a far step from the concrete sharpness necessary for standing. Any constitutional adjudication is unnecessary, and indeed improper as substantive due process is already vague enough. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125, 112 S.Ct. 1061 (1992) (utmost care should be exercised in the area of substantive due process).

Jarlstrom claims he has devoted time to studying the timing of intersection timing and that he regularly drives through city intersections. (Jarlstrom Decl. ¶ 2-4). However, Jarlstrom is an electrical engineer, not a traffic engineer. *Id.* ¶1. He has not been in an accident, has not received a traffic ticket, and does not declare that he has even witnessed an accident. *Id.* Accordingly, there is no injury alleged, let alone a concrete and particularized one. Jarlstrom has no personal stake in any controversy; the Complaint, opposition to the City's Motion to Dismiss, and his Declaration in support reflect that there is no controversy. Rather, Jarlstrom contends appears merely to dislike red light cameras and stopping for yellow lights. Jarlstrom claims now that this is not a red light camera case. (Pltf's Opp. To Mt. Dismiss, p. 7). However, his Complaint at issue does allege red light cameras; it is only in his proposed Amended Complaint where he has deleted those allegations. (Compl. ¶ 10; Opp. To Mt. Dismiss, p. 2). Such a dispute is appropriate for the political, and not judicial, process.

(b) Jarlstrom's Allegations Show Only a Conjectural or Hypothetical Injury

To establish standing, a plaintiff's injury in fact must also be actual or imminent, not conjectural or hypothetical. *Maya v. Centex Corp.*, 658 F3d 1060, 1067 (9th Cir. 2011). That an injury may occur "someday" does not support a finding of an actual or imminent injury. *Lujan*,

504 U.S. at 564. "Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate . . . threat of *future* injury." *Church v. City of Huntsville*, 30 F3d 1332, 1337 (11th Cir. 1994) (emphasis in original). That a person has been stopped for a traffic violation before "does nothing to establish a real and immediate threat that he would be stopped for a traffic violation" in the future. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660 (1983).

Jarlstrom's allegations in his Complaint do not state any actual or imminent injury, and his opposition to the City's Motion and his Declaration show just how conjectural any injury may be. Jarlstrom states that he drives through the city 10 times or more per week and that he has studied traffic light intervals in the city for nine months. (Jarlstrom Decl. ¶¶ 2, 4). He alleges there is a credible threat of future injury. (Pltf's Opp. to Mt. Dismiss, p. 3). However, standing does not depend on a credible threat, but an *injury in fact* that is actual or imminent, and Jarlstrom's allegations show there is no real threat. Jarlstrom has driven through the City more than 300 times, by his Declaration, and has never been in nor apparently seen an accident at any of the intersections he claims present a "credible threat of future injury." *Id.* p.3. There is no injury here, and certainly not a real or imminent one.

(c) Because there is no Injury in Fact, it can be Neither Traceable to the City nor Redressed by a Favorable Decision

Jarlstrom does not establish the second and third standing requirements, traceability or redressability.

> "[T]here must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be 'likely' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision."

Lujan, 504 U.S. at 560-561 (citations and alterations omitted). "[T]he 'fairly traceable' and 'redressability' components for standing overlap...." *Washington Environmental Council v. Bellon*, 732 F3d 1131, 1146 (9th Cir. 2013).

Jarlstrom's alleged injury is that the yellow light duration is too short for a driver to safely proceed through an intersection. (Compl. ¶ 15). Any danger at any given intersection derives not from traffic control devices but from other motorists. As such, the danger of an accident is traceable to motor vehicle operators. Lastly, it is pure speculation that altering the yellow light intervals will make intersections safer. Currently, drivers run red lights, speed, and generally may not follow the rules of the road on a regular basis. *See e.g., In re Su*, 259 BR 909, 911 (B.A.P. 9th Cir. 2001) *aff'd,* 290 F3d 1140 (9th Cir. 2002). Even a favorable decision for Jarlstrom could not reduce these issues.

(d) Jarlstrom's Complaint Fails the Well-Pleaded Complaint Rule

While District Court is not restricted to the face of the pleadings when considering a motion to dismiss pursuant to FRCP 12(b)(1), *McCarthy v. U.S.*, 850 F2d 558, 560 (9th Cir. 1988), Jarlstrom seeks the Court's indulgence as he now, in opposition to the City's Motion to Dismiss, finally specifies that his Complaint is being brought pursuant to the Due Process Clause of the Fourteenth Amendment. (Pltf's Opp. to Mt. Dismiss, p. 8). These late alleged allegations still do not establish federal question jurisdiction pursuant to 28 USC § 1331.

"The presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425 (1987). As noted in the City's Motion to Dismiss, and as is plainly apparent from Jarlstrom's Complaint, only a violation of Oregon law

was alleged. (Def's Mt. Dismiss, p. 5; Compl. ¶ 9). Because no federal question is presented on the face of Jarlstrom's Complaint, the City's Motion to Dismiss should be granted.

2. Jarlstrom does not State a Substantive Due Process Violation

Jarlstrom, in his opposition to the City's Motion to Dismiss and not in his Complaint, expressly invokes substantive due process under the Fourteenth Amendment. (Pltf's Opp. to Mt. Dismiss, pp. 9-10). He mistakenly contends that the conduct need not be conscience shocking. *Id.* p. 10. "The Supreme Court has made it clear . . . that only official conduct that 'shocks the conscience' is cognizable as a due process violation." *Porter v. Osborn*, 546 F3d 1131, 1137 (9th Cir. 2008) quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S.Ct. 1708 (1998). Whether conduct is egregious enough to shock the conscience standard is determined by a showing of either deliberate indifference or purpose to cause harm. *Porter*, 546 F3d at 1137. Whether government conduct shocks the conscience under the State-Created Danger exception depends on whether the state acted with deliberate indifference to a known or obvious danger. *Henry A. v. Willden*, 678 F3d 991, 1002 (9th Cir. 2012).

Jarlstrom specifically states that the affirmative conduct that places him in a danger he would not otherwise have faced is the danger of stopping because of yellow light intervals. (Pltf's Opp. to Mt. Dismiss, p. 11). First, this does not establish any danger Jarlstrom would not otherwise face. Traffic dangers are prevalent in society. Traffic control devices exist to help manage that danger. Second, Jarlstrom now seeks to distinguish cases cited by the City by contending that he is not challenging red light cameras. (Pltf's Opp. to Mt. Dismiss, p. 13). This plainly ignores the allegations in his Complaint specifying red light camera intersections. (Compl. ¶ 10). Third, to find a claim here would be a gross expansion of substantive due

process. The City has not found any similar case expanding substantive due process to such circumstances.

Fourth, the state must create the danger and affirmatively place plaintiff in the way of it. *Campbell v. State of Washington Dept. of Social and Health Services*, 671 F3d 837, 847 (9th Cir. 2011). There is no state-created danger where the plaintiff is in no worse position. *Johnson v. City of Seattle*, 474 F3d 634, 641 (9th Cir. 2007). Nor is there any known danger here. *Kennedy v. City of Ridgefield*, 439 F3d 1055, 1064 (9th Cir. 2006) (actor must act with deliberate indifference to a known or obvious danger). As stated above, Jarlstrom has not alleged he has been in any accidents, he here merely invokes the specter of danger. Another case held that nine accidents on one specific road did not establish that the government should have known a curve in the road was dangerous. *Mattice By and Through Mattice v. U.S. Dept. of Interior*, 969 F2d 818, 823 (9th Cir. 1992) (no willful failure to guard against a dangerous condition under FTCA). Here, Jarlstrom does not identify *one* accident at any specific intersection. Jarlstrom is in the same position he has always been in.

The Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation." *DeShaney v. Winnebago Cnty Dept. of Social Services*, 489 U.S. 189, 202, 109 S.Ct. 998 (1989). The Constitution does not supplant tort law, and the Supreme Court has "rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S.Ct. 1708 (1998). The City's refusal to adjust its engineered yellow light intervals is not

affirmative conduct, and the danger of traffic collisions is prevented by the exercise of reasonable care as in a typical negligence tort.

Jarlstrom contends that the creation of the intervals in the first place is affirmative conduct creating the danger. (Pltf's Opp. to Mt. Dismiss, p. 11). However, "[t]he authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." *Cox v. State of New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762 (1941). Therefore, a substantive due process claim attacking that policy decision (to set traffic signals) in the first instance is not within the state-created danger exception. "A municipal act that neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights will violate substantive due process when it is shown that the action is not 'rationally related to a legitimate governmental purpose.'" *Richardson v. City and Cnty of Honolulu*, 124 F3d 1150, 1162 (9th Cir. 1997) *quoting Munoz v. Sullivan*, 930 F2d 1400, 1404 (9th Cir. 1991).

Here, the City's "act" in setting intervals is within its power to impose regulations and would violate due process only if held to not be rationally related to a legitimate government purpose. *See Gallison v. City of Portland*, 37 Or App 145, 149, 586 P2d 393 (1978) (design of traffic signals is discretionary City act). The City has rationally exercised it power to regulate its roads by determining the appropriate timing of its lights.

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CONCLUSION

Because Jarlstrom does not have standing, he did not plead a federal question in his Complaint, and he fails to state a claim under the Fourteenth Amendment, the City's Motion to Dismiss should be granted.

DATED this 17th day of July, 2014.

/s/ Gerald L. Warren
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