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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

**DECLARATION OF SHENOA L.  
PAYNE**

I, Shenoa L. Payne, being sworn, say:

1. I am one of the attorneys for plaintiff in this case and make this declaration based on my personal knowledge.

2. Attached as Exhibit A is a true copy of the Transcript of the Proceedings before Judge Acosta on Defendant's Motion to Dismiss and Plaintiff's Motion for Leave to File First Amended Complaint, dated August 25, 2014.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 10th day of September, 2014.

/s/ Shenoa L. Payne  
Shenoa L. Payne

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

MATS JARLSTROM, an individual,	)	
	)	
Plaintiff,	)	Case No. 3:14-cv-00783-AC
	)	
v.	)	
	)	
CITY OF BEAVERTON, an Oregon	)	August 25, 2014
municipal corporation,	)	
	)	
Defendant.	)	Portland, Oregon
	)	

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MOTION HEARING  
TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOHN V. ACOSTA  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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1 TRANSCRIPT OF PROCEEDINGS

2 DEPUTY COURTROOM CLERK: All rise.

3 THE COURT: Good morning.

4 MR. HAGLUND: Good morning, Your Honor.

5 MS. PAYNE: Good morning.

6 THE COURT: All right. We're here on the record

7 on defendant's motion to dismiss and plaintiff's motion to

8 amend. Defendant's motion is docket number 11. Plaintiff's

9 motion is docket number 16.

10 Mr. Haglund, it seems to me, looking at the briefs and

11 the cases, there has to be an immediate threat of harm.

12 Now, in a -- in isolation, that phrase is subject to

13 interpretation, certainly; but as the cases have defined its

14 borders, the definition seems to exclude the harm that the

15 plaintiff describes these intersections present.

16 So why don't you address that first.

17 MR. HAGLUND: Certainly, Your Honor. In fact, the

18 courts have been pretty clear that when you look at

19 immediate threat of imminent harm, that those words are

20 really a far cry from the actual standard applied. And I'd

21 call your -- I'll point out, first, that the defendants in

22 their reply, make the point -- and I quote from their reply

23 brief -- standing -- it's along the lines of what you said,

24 too, Your Honor -- standing does not depend on a credible

25 threat, but on injury, in fact, that is actual or imminent,

1 and Jarlstrom's allegations show that there is no real  
2 threat. However, the -- if you look at the Ninth Circuit  
3 case in the environmental -- in *NRDC v. EPA*, which came down  
4 late last year --

5 THE COURT: Right.

6 MR. HAGLUND: -- and it's consistent with a great  
7 body of environmental cases. It's a case where, Your Honor,  
8 the EPA was proposing to register two pesticides.

9 THE COURT: Right.

10 MR. HAGLUND: And the -- ultimately, you have a  
11 very similar situation. There was only what the court  
12 characterized as a probabilistic harm that the children of  
13 the members of NRDC would be exposed to textiles that were  
14 treated with these two pesticides, and the Court made it  
15 really clear that standing based upon -- in this instance it  
16 was a potential exposure to certain pesticides in clothing.  
17 Here, Mr. Jarlstrom has made some pretty detailed  
18 allegations, at least in our amended complaint, about the  
19 potential exposure to the risk of injury or death transiting  
20 Beaverton intersections with yellow light intervals that are  
21 too short.

22 And in the *NRDC* case the Ninth Circuit held that where  
23 there's a credible threat of a probabilistic harm,  
24 Your Honor, the actual or imminent injury test is met. And  
25 I'd like to just quote their precise language. In *NRDC* they

1 say, quote, We have consistently held that an injury is  
2 actual or imminent, quoting that phrase, where there is a  
3 credible threat that a probabilistic harm will materialize.

4 And I think that the *NRDC* case -- and then there's a  
5 whole host of environmental cases where environmentalists  
6 will allege in their complaints that their members visit a  
7 national forest, and if the thinning is too aggressive, it's  
8 going to have an impact on the nature of their experience.

9 It's -- here we have, I think, a case that's very much  
10 controlled by *NRDC v. EPA*, because here we have the same  
11 kind of probabilistic, and you can argue, somewhat remote  
12 harm that these parents were -- of -- these *NRDC* parents  
13 were complaining their children would be exposed to, because  
14 they wouldn't be able to, with much precision, figure out  
15 whether some of the clothing they bought happened to have  
16 these pesticides.

17 THE COURT: Is there a difference, though, between  
18 *NRDC*, the facts, and the facts of this case, in this sense:  
19 In *NRDC*, the source of the harm at issue were pesticides,  
20 which have been or were proven to be toxic? Now, we can  
21 debate whether and to what extent the exposure to the  
22 pesticide is needed -- I mean, how long, how much, over what  
23 period of time -- but there seemed to be no dispute in that  
24 case that the source of the harm at issue, in fact, was  
25 proven to be harmful.

1 In your case, you have an intersection which has not  
2 proven to be harmful. What we have are the plaintiff's own  
3 calculations based on data acquired over an approximate  
4 nine-month period about the intervals of the yellow-to-red  
5 light sequence. But there's nothing in his complaint and  
6 nothing in any of the materials that's been filed that  
7 indicates that these intersections he's studied have a  
8 higher incidence of accidents either vehicle-to-vehicle or  
9 vehicle-to-pedestrian or vehicle-to-cyclist. It is only  
10 theory. There's no actual data that the source of the harm  
11 has actually been proved to cause harm.

12 MR. HAGLUND: Well, Your Honor, I would make two  
13 points. First, I don't believe that at the motion to  
14 dismiss stage one has to have proof, and I don't think that  
15 was the situation in the *NRDC* case where they --

16 THE COURT: This is different, though. Sorry to  
17 interrupt, Mr. Haglund.

18 MR. HAGLUND: Sure.

19 THE COURT: But if we're going to talk about it, I  
20 think we need to talk about it -- well, I was going to say  
21 correctly, but let me say this: We're not talking about  
22 whether factual plausibility, under *Twombly* and *Iqbal*, is  
23 satisfied as -- is the typical motion to dismiss analysis.  
24 You have a standing issue here. That sort of shifts the  
25 focus from whether you've got enough facts to state a



1 plausible claim, to whether you have standing.

2       And now what you -- now what has happened is the  
3 parties have submitted material in support or in opposition  
4 to this motion. I have to look at the facts, and there  
5 aren't any facts, either alleged in the complaint or  
6 provided with any of the materials the plaintiff has filed,  
7 to show that the intersections studied actually have  
8 experienced a higher incidence of accidents that then has  
9 been causally connected to the shortened interval that the  
10 plaintiff claims is improper, incorrect, dangerous,  
11 whatever. Much unlike pesticides, which, in the *NRDC* case,  
12 I think there was no dispute. Pesticides are bad if exposed  
13 over a period of time or whatever. But there was no issue  
14 about the source of that being a possible harm.

15       MR. HAGLUND: Well, I have a little trouble with  
16 the distinction. I agree with pesticides there's no  
17 question there's harm, but I think it is also true that  
18 there's no question that if one is struck by an automobile,  
19 either as a pedestrian or a passenger or as a driver, that  
20 there's serious risk of injury or harm.

21       And I point out that in the proposed amended complaint  
22 we actually allege in paragraph 18, in our proposed amended  
23 complaint, that the short duration of the yellow light  
24 intervals is the direct cause of a significant number of  
25 accidents at signal light intersections within the city of

1 Beaverton.

2 THE COURT: But that's a conclusory allegation.  
3 There's no allegation, for example, that says during the  
4 period studied the number of accidents at this intersection  
5 exceeded by 50 percent or 20 percent or were a certain  
6 number compared to the average of comparable intersections.  
7 There's nothing like that. And I am required to take --  
8 well, actually not. In a typical motion to dismiss case,  
9 under *Twombly* and *Iqbal*, well pleaded allegations are taken  
10 as true, unless they're conclusory. But here you don't get  
11 that benefit. And there's nothing in any of the material  
12 submitted to -- here's -- here's the ultimate point:  
13 Nothing to move the facts alleged into the realm under even  
14 the *NRDC* case where that credible threat can be either  
15 properly alleged or reasonably inferred based on the  
16 allegations. It's simply numbers on a page, theoretical,  
17 that have not been proved through any actual incidents. And  
18 that's my concern.

19 MR. HAGLUND: Well, Your Honor, I beg to differ  
20 with you in one respect.

21 THE COURT: Okay.

22 MR. HAGLUND: You're indicating that for purposes  
23 of the inquiry into standing here that you -- the Court is  
24 not required to take as true all of the allegations in our  
25 complaint and to give those allegations all the inferences

1 that could be given in favor of the plaintiff. And I would  
2 refer Your Honor to the Ninth Circuit case of *Maya v. Centex*  
3 *Corporation*, 2011, which cites to the Supreme Court case of  
4 *Warth v. Seldin*, and I'm quoting it: For purposes of ruling  
5 on a motion to dismiss for want of standing, both the trial  
6 and reviewing courts must accept as true all material  
7 allegations of the complaint and must construe the complaint  
8 in favor of the complaining party.

9 So the fact that Mr. Jarlstrom, who's a very capable  
10 engineer, as reflected in the exhibit that he personally  
11 prepared, that's attached to the complaint, and if you look  
12 at the more detailed allegations in the amended complaint,  
13 which I believe is appropriate, given the stage of -- early  
14 stage of this case --

15 THE COURT: Right.

16 MR. HAGLUND: -- I think we meet the test where  
17 you have to take those allegations as true.

18 I don't think that it's a proper distinction to -- to  
19 look at NRDC and say the pesticides' potential exposure,  
20 which is, you know, arguably hypothetical, remote,  
21 conjectural, but, you know, definitely could happen and met  
22 the probabilistic test that is -- I think the bar is really  
23 quite low for standing in the United States and in the Ninth  
24 Circuit, and I don't think that -- that you can really  
25 differentiate -- where we have allegations that these light

1 intervals are too short and they expose the plaintiff to the  
2 risk -- imminent risk of injury or death and that there are  
3 more accidents, as noted in paragraph 19. I think we meet  
4 the test, Your Honor. Especially where everything has to be  
5 taken as true at this stage, plus reasonable inferences.

6 THE COURT: Is it your position that the  
7 allegation of more accidents at these intersections is not a  
8 conclusory allegation?

9 MR. HAGLUND: No. I do -- we do take that  
10 position, Your Honor, because we -- unfortunately, discovery  
11 has been stayed. We're confident that once we get access to  
12 the accident data that the City has, we'll be able to  
13 provide substantial proof of our position.

14 THE COURT: If that were the standard, *Twombly* and  
15 *Iqbal* would be irrelevant, because you could file a lawsuit,  
16 make allegations, very generally, of "the defendant was  
17 negligent; the product is defective; the doctor committed  
18 malpractice," and then immediately move to discovery to try  
19 to prove up those.

20 *Twombly* and *Iqbal* requires, precisely, to avoid, in  
21 part, unnecessary expense in discovery. It requires  
22 pleading plausible claims. And that's why I ask, if -- if  
23 you're going to rely on the motion to dismiss standard, I  
24 can't ignore *Twombly* and *Iqbal*. And those cases are clear  
25 that conclusory allegations need not be accepted as true.

1 They have to be well pleaded.

2 If you're going to disagree that on a standing  
3 challenge the standard is no different than the whole  
4 standard has to be taken into account and there's certainly  
5 no allegations in the complaint that the plaintiff actually  
6 did experience an accident, did receive a ticket, did have a  
7 remiss experience. There's nothing there. It's simply a  
8 conclusory allegation there were more accidents here, but no  
9 specific allegations to demonstrate two things: That there  
10 were more allegation -- sorry, there were more accidents,  
11 and those accidents were causally connected to the shorter  
12 lights.

13 MR. HAGLUND: Well, Your Honor, I'm sure we can  
14 make even more specific allegations along those lines, but  
15 we do not -- I would concede that paragraph 19 does not go  
16 into that level of detail. I wouldn't characterize it as a  
17 completely conclusory paragraph, but I would acknowledge  
18 here that it does not have that level of specificity.

19 THE COURT: All right. Thank you.

20 MR. HAGLUND: If we're allowed to amend, we can  
21 address that.

22 THE COURT: Okay. Thank you.

23 So, Mr. Warren, how does one distinguish *NRDC* from the  
24 facts here?

25 MR. WARREN: Your Honor, I believe that *NRDC* is

1 part of the cases that talk about the capable of repetition  
2 doctrine. I think that -- because, as the Court said, the  
3 pesticides have been proven to cause harm. And they -- they  
4 cite in their materials that all they have to do is show a  
5 threat -- a credible threat of future injury. And that's  
6 part of that coin of "capable repetition" for the standing  
7 doctrine where there'd been a past injury or facts that  
8 would show something that would cause an injury, perhaps,  
9 that -- that -- then the standing may have a relaxed show of  
10 credible threat of future injury -- injury standard.

11 A case that came out two weeks ago in the Ninth Circuit  
12 was *Coons v. Lew*, and I just have the Westlaw cite for it,  
13 Your Honor. It's 2014 WL3866475. It was filed on  
14 August 7th. There was two orthopedic surgeons challenging  
15 the Affordable Care Act, and they alleged substantive due  
16 process grounds and all that, but the Court said -- with  
17 regard to standing, said "We've repeatedly reiterated that  
18 threatened injury must be certainly impending to constitute  
19 injury in fact and that allegations of possible future  
20 injury are not sufficient."

21 And that, we believe, is the standard that the Court  
22 needs to apply for the standing in this case; that the *NRDC*  
23 cases and the *City of Los Angeles v. Lyons* case that they  
24 relied upon is a situation where there's been a prior  
25 injury -- the chokeholds in the LA case -- and then you have

1 to show there's a credible threat of future injury.

2 In this case we agree with the way the Court seems to  
3 be headed; that the, you know, facts here, at best, show a  
4 generalized threat of harm, and that case of -- the Supreme  
5 Court case of Warth -- I think this is in my brief -- *Warth*,  
6 *W-A-R-T-H, v. Seldin, S-E-L-D-I-N*, 422 U.S. 409. It's a  
7 1975 case. But it was a zoning and land ordinance case  
8 where low income and moderate income people might have been  
9 affected, and the Court had a generalized grievance of --  
10 that might apply to a large class of citizens doesn't result  
11 in standing.

12 And that's, at best, what they have is -- there's been  
13 no particularized injury alleged to Mr. Jarlstrom, even in  
14 the future materials they don't, so we think they fall back  
15 to it's not a "capable of repetition" type standing issue.  
16 It's an injury in fact. And it's not a certainly impending  
17 injury sufficient to constitute standing.

18 THE COURT: Well, let's talk about the capable of  
19 repetition.

20 One thing the complaint does seem adequately to allege  
21 is these yellow lights consistently cycle to red on a  
22 shortened interval. It's not that they occasionally happen,  
23 but all of a sudden you're going to an intersection you've  
24 gone through for the last three or six months, used to a  
25 particular light cycle, and all of a sudden the light cycles

1 from yellow to red in half the time that it normally does.

2 What the complaint alleges, I think, with -- at least  
3 on this piece, sufficient specificity, is it's always doing  
4 this and the interval is too short and apparently too short  
5 under the plaintiff's reading of vehicle code or whatever  
6 other regulations apply.

7 Why doesn't that meet the "capable of repetition"  
8 requirement?

9 MR. WARREN: Well, there's been no injury. In all  
10 the "capable of repetition" cases, the LA chokeholds, the  
11 gentleman had been choked upon the traffic stop. In the  
12 *Ibrahim* case the person was on the no-fly list and had been  
13 prevented from coming back to the United States. There had  
14 been an actual injury in those cases.

15 In this case, Mr. Jarlstrom doesn't allege any injury  
16 at all.

17 THE COURT: So two things: First, there has to  
18 actually have been an injury?

19 MR. WARREN: Yes, Your Honor.

20 THE COURT: Is that how you read the cases?

21 MR. WARREN: Yes, sir.

22 THE COURT: How do we square that with *NRDC*?

23 MR. WARREN: As the Court --

24 THE COURT: Because there were -- now, I might  
25 misrecollect the facts, but I don't recall there being any



1 actual past injury to any of the plaintiffs or their  
2 members -- to the plaintiff or any of its members in that  
3 case.

4 MR. WARREN: And I can't recall exactly the facts  
5 either, Your Honor, but my recollection is that that -- it's  
6 what the Court said: Pesticides are a known -- known to  
7 cause injury and have caused injury. And I guess maybe  
8 that's how it would fit in the "capable of repetition."  
9 It's a known carcinogen or whatever. And therefore the  
10 standing may have been -- still not relaxed to the point  
11 that they have -- we don't believe have made it, but the bar  
12 might be a little lower in those cases where you've got the  
13 carcinogen, or whatever, the pesticide activity.

14 But in the cases that are real clear about the "capable  
15 of repetition" doctrine, you know, the incredible threat of  
16 future injury does require that there have been an injury.  
17 And Mr. Jarlstrom doesn't have any injury.

18 And, like I cited in the *Coons v. Lew*, it has to be  
19 certainly impending to constitute an injury in fact, and  
20 merely alleging -- we don't believe that others have had  
21 accidents at the intersection makes it impending to  
22 Mr. Jarlstrom, who's the plaintiff.

23 THE COURT: Well, let's go back to *NRDC*. If our  
24 assumption is correct that past injury to others was the  
25 basis for finding pesticides harmful and therefore capable

1 of repetition going forward, wouldn't that suggest that  
2 Mr. Jarlstrom himself doesn't actually have to have been  
3 involved in an intersection collision there as long as  
4 others were?

5 MR. WARREN: Well, Your Honor, I would like to  
6 submit a subsequent brief if it were -- a supplemental brief  
7 that would help the Court, because I don't have that case in  
8 front of me, and I would like to review the facts and the  
9 distinction for standing purposes and analyzing whether they  
10 had standing in this case or not. And certainly in the  
11 constitutional claim they allege is a state-created danger.  
12 I don't know how you even get that with the facts that they  
13 have that they somehow have been put in danger. That's --  
14 that should be on standing. But I prefer to submit a  
15 supplemental memorandum, if the Court wants me to  
16 distinguish that case.

17 THE COURT: All right. Thank you.

18 Mr. Haglund, anything else on standing?

19 MR. HAGLUND: Well, I just would point out that I  
20 do have the *NRDC* case, and I reviewed it carefully before  
21 this argument. There's nothing in it to suggest that you  
22 have to have an actual injury to the plaintiff. The key is  
23 a very low bar and injury is actual or imminent where  
24 there's a credible threat that a probabilistic harm will  
25 materialize. And that's the quote from the case.

1           And there was absolutely no -- I know the facts of  
2 NRDC. There was nothing in the record there indicating that  
3 any one of the children of the NRDC parents -- the NRDC  
4 members who were the plaintiffs -- that there had been any  
5 contact yet with any textile that conveyed this  
6 conditionally registered pesticide.

7           THE COURT: All right. So let's talk about --  
8 let's move from standing to federal question.

9           We have a stoplight at a city intersection that the  
10 plaintiff alleges cycles too quickly from yellow to red.  
11 What's the federal right implicated by that, Mr. Haglund?

12           MR. HAGLUND: We made it very clear in our papers,  
13 Your Honor, that the federal right is that if the City of  
14 Beaverton, which has had the opportunity to consider whether  
15 or not to correct this problem, it's made the considered  
16 choice not to address this problem and, as a result, has put  
17 the plaintiff in risk of potential injury or death  
18 transiting these intersections.

19           And we cite the case law that makes it very clear that  
20 in that sort of situation you meet one of the exceptions  
21 that allows you to assert this as a Section 1983 claim and a  
22 violation of substantive due process.

23           The LA chokehold case is an example of -- well, in that  
24 case, actually, standing was not found, because there it was  
25 just too -- the probabilistic harm standard was not met.

1 But there are multiple cases that we cited in our papers,  
2 where, if -- if the City makes a particular decision, then  
3 it is -- that puts the plaintiff at -- in imminent danger,  
4 then the Section 1983 claim will lie.

5 One case that is a recent case, that -- we didn't cite  
6 it for this proposition, but it helps address your point,  
7 Your Honor, and that is the case in this district that came  
8 down last year. It's the *Hammel v. Tri-Met* case that we  
9 cited in our opposition for other reasons, but it gets to  
10 your point. That's the case -- the very unfortunate  
11 situation where the Tri-Met bus driver hit five people  
12 making that --

13 THE COURT: Right.

14 MR. HAGLUND: -- I think it was a left-hand turn.

15 THE COURT: Yes.

16 MR. HAGLUND: And the Court found there that the  
17 deliberate -- actual deliberation test was met, and the  
18 statement by Judge Mosman there -- and I quote -- is in such  
19 cases the Court will find a substantive due process  
20 violation if the state actor consciously disregards a  
21 substantial risk of serious harm. And we -- you don't have  
22 to have a federal actor.

23 It's -- there are -- I've handled a number of Section  
24 1983 cases that don't involve federal actors.

25 THE COURT: They don't have to involve federal

1 actors. They can involve state actors, but there still has  
2 to be a federal right that's infringed.

3 MR. HAGLUND: Right. As we point out in our  
4 papers, I think, very clearly, if a state government -- in  
5 this case, the City of Beaverton makes the considered choice  
6 that it did here, to not change these light intervals after  
7 Mr. Jarlstrom has made -- we -- our proposed amended  
8 complaint goes into more detail on this -- the number of  
9 times he's been before the counsel, the data that he's  
10 provided to them.

11 THE COURT: I saw all that.

12 MR. HAGLUND: You saw all that?

13 THE COURT: Yes.

14 MR. HAGLUND: Where they make that considered  
15 choice, they fall. And then the only other item we have to  
16 demonstrate is that it does give -- that we have -- we meet  
17 the standing test that there's this imminent risk of -- that  
18 there's a credible threat of serious harm to our client.

19 THE COURT: All right. Thank you.

20 Mr. Warren?

21 MR. WARREN: Your Honor, I guess they have to meet  
22 the test that it shocks the conscious of this Court in order  
23 to get the substantive due process, and I don't see how the  
24 facts in this case would rise to that level. The fact is  
25 the City's looked at the state law and looked at the

1 analysis that Mr. Jarlstrom has provided, and they disagree.  
2 So there's a disagreement that might be resolved at the  
3 state legislature, but the local political body is not  
4 convinced that Mr. Jarlstrom's data is correct.

5 So is that the type of conduct that shocks this Court's  
6 conscious? We don't think it is. And as they acknowledge  
7 in one of their footnotes, nobody has found a case along  
8 these lines that would suggest that a state-created danger,  
9 which apparently is the 14th Amendment, substantive due  
10 process provision they relied upon, that they could be  
11 expanded this far. And we don't believe that it should be a  
12 federal claim.

13 THE COURT: Not expanded this far because it's not  
14 the type of danger or for some other reason?

15 MR. WARREN: Well, typically, in the substantive  
16 due process you have some -- some actor, state acting color  
17 of law, who's placed a person in greater danger than what  
18 they otherwise have found themselves in.

19 And the danger, then, results in some actual injury,  
20 and, I mean, I'm very familiar with all the substantive due  
21 process cases, because it comes up quite a bit in all the  
22 police cases that I defend, and you have the cases of the --  
23 where 911 is called and they -- the gentleman, instead of  
24 police allowing the medics to come in, they put him inside  
25 the house, they lock it up and call off the ambulance, and

1 he dies during the night. There was a danger created by the  
2 conduct of what they did.

3 In this case the City believes they're following state  
4 law. They believe the timing is accurate, and they haven't  
5 created any danger greater to him than they believe they  
6 have anybody else. They put traffic lights in and they  
7 control them in the manner they do for safety reasons. And  
8 so how that can then be turned to creating some danger just  
9 doesn't seem to fit in any federal question or any  
10 substantive due process case that I've seen.

11 THE COURT: That seems more -- because, as you  
12 point out, the parties have a dispute. But that seems more  
13 to the merits of the underlying disagreement between the  
14 sides.

15 What I'm looking at is -- I'll use the phrase that  
16 you've used, and I know the plaintiff has disagreed with the  
17 applicability of this, but let's use "shocks the conscious."  
18 When I look at that, because this is a motion to dismiss --  
19 a motion to dismiss, isn't -- isn't my assessment to be  
20 based on what's well pleaded in the complaint? And what's  
21 pleaded in the complaint is you have a yellow light that  
22 cycles faster to red than state law or regulations permit.  
23 And if that happens, the chances of vehicles colliding in  
24 that intersection logically increase, and the City knows  
25 that, and they're not doing anything to change it. So I'm

1 not opining on the merits. I'm just looking at the  
2 allegations, because that's where we are at this stage.

3 How does the City's knowledge of the possibility of  
4 increased accidents at this intersection and not changing  
5 the light intervals, how does that not meet the "shocks the  
6 conscious" tests at this stage?

7 MR. WARREN: Well, then I think anything can meet  
8 the "shocks the conscious" test, because they haven't  
9 established that the City of Beaverton was presented with  
10 all these statistics showing accidents happening as a direct  
11 result of the timing that they allege is incorrect, which,  
12 again, we dispute. That does get to the merits. I agree.  
13 They talked a little bit about the merits. I'm just  
14 presenting that to the Court.

15 I understand it's not relevant to your analysis, but  
16 the "shocks of conscious" standard when they haven't alleged  
17 that the City of Beaverton was presented with all this data  
18 and accidents at this intersection and, yet, they've  
19 deliberately ignored that. And, therefore, he has an injury  
20 or he has a credible threat of future harm if that's what  
21 the Court thinks the test is. Then maybe that is enough to  
22 shock the conscious.

23 But there's a disconnect between his conclusory  
24 language and anything that's been presented to the City to  
25 show they've been deliberately indifferent. He even alleges



1 he went there and presented testimony and they disagreed.  
2 All he's shown is that there's a disagreement in the timing  
3 that should govern that light and what the motor vehicle  
4 code says.

5 If we get to the merits, ultimately, you know, we'll  
6 get to those other things I brought up. But the fact is at  
7 this stage there's some step missing before it ought to  
8 shock this Court's conscious. And that is what the City of  
9 Beaverton actually was told about actual accidents. Not  
10 just because they allege it's -- there's a chance, or  
11 whatever the language they use in paragraph 18, significant  
12 accidents. He didn't turn around and say "we presented all  
13 that data and they've done nothing to it with that, so  
14 therefore they're deliberately indifferent to the harm that  
15 I'm facing."

16 So it seems they're missing a step before it ought to  
17 shock conscious of the federal court.

18 THE COURT: All right. Thank you.

19 Mr. Haglund, anything else on that?

20 MR. HAGLUND: Your Honor, I would just add that  
21 the key case law we cite for purposes of this being a  
22 legitimate Section 1983 claim is the -- it's on pages 10 and  
23 11 of our opposition, where we note that the Fourteenth  
24 Amendment, in a number of cases holds that citizens are  
25 protected against unjustified intrusions on personal safety.

1 And although a state actor does not have a constitutional  
2 duty to protect parties from harm from third parties, there  
3 are two exceptions to that general rule. The special  
4 relationship exception, which is not applicable here, and  
5 the danger creation exception, which is what we contend does  
6 apply here. And the only other point I'd make is the  
7 "shocks the conscious" standard has been determined to be  
8 equivalent to the deliberate indifference test, which in  
9 multiple cases you see the courts concluding that if the  
10 state actor has had the chance to reconsider or step back  
11 from a decision previously made and then refuses to do so,  
12 that that is a deliberate decision by them and can qualify  
13 for the deliberate indifference, provided you also have the  
14 danger creation exception met, which we think we do here.

15 THE COURT: The danger that exists, exists, in  
16 part, because of the presence of vehicles on the road;  
17 correct?

18 MR. HAGLUND: Yes.

19 THE COURT: All right. I know this is a little  
20 bit silly, but, you know, humor me. If nobody drove through  
21 that intersection, it wouldn't matter how quickly the light  
22 cycles went from yellow to red. People just don't drive  
23 through it; right? I know that's extreme, but, I mean --

24 MR. HAGLUND: I do not disagree with that.

25 THE COURT: You have to have the cars --

1 MR. HAGLUND: Right.

2 THE COURT: -- to create the danger.

3 It's not just the light and it's not just the cars.  
4 It's both. Would you agree?

5 MR. HAGLUND: Yes.

6 THE COURT: The fact that third parties, members  
7 of the public driving vehicles through the intersection,  
8 contribute to the danger, does that make a difference or  
9 does that not make a difference with respect to the creation  
10 of the danger exception.

11 MR. HAGLUND: I don't think it makes a difference.  
12 What we have here is a situation where -- the City of  
13 Beaverton, like every municipality in the state of Oregon,  
14 has to make its own decisions about how to time its yellow  
15 light intervals. If they're done in a way that's  
16 fundamentally done outside the zone of what the best and  
17 safest practices will be, which will prove, ultimately, then  
18 when they take on the duty to control intersections as part  
19 of their police power, for the benefits of their citizens  
20 and keeping those intersections as safe as reasonably  
21 possible, when they don't meet the test of the best  
22 practice, they are exposing their citizens to an increased  
23 risk of danger of injury or death. We think that squarely  
24 falls within this danger creation exception.

25 They are -- the fact that they are acting to control

1 third-party behavior, namely folks driving through or  
2 walking across intersections, is -- is appropriate; but  
3 it -- if they deliberately make a decision that they won't  
4 step back from doing it wrong and it does create danger, as  
5 alleged in our complaint, we're entitled to proceed further.  
6 And if we prove up our case down the road, we'll be entitled  
7 to injunctive relief.

8 THE COURT: All right. Thank you.

9 All right. Those are the questions I had. I will let  
10 each of you add whatever in addition you have to say that  
11 you haven't had a chance to say in response to my questions.

12 Mr. Warren, it's your motion, at least on the motion to  
13 dismiss, so go ahead.

14 MR. WARREN: Did you say add anything that I want  
15 to say at this point?

16 THE COURT: Anything you haven't had a chance to  
17 say yet. Keep in mind I've read everything.

18 MR. WARREN: Yeah. No, Your Honor. The only  
19 thing. I don't know if it -- is the Court just addressing  
20 the first motion now? The motion to dismiss?

21 THE COURT: Yeah. Giving you a chance to add  
22 anything else you want to add on the motion to dismiss?

23 MR. WARREN: No, Your Honor.

24 THE COURT: Okay. On the motion to dismiss,  
25 Mr. Haglund?

1 MR. HAGLUND: Your Honor, we've made all our  
2 points.

3 THE COURT: All right. What about on the motion  
4 to amend? Anything else?

5 MR. HAGLUND: No. I think the standard is clear  
6 that at this stage of the case leave should be freely given  
7 to amend a complaint. In this district, my experience is  
8 that at this stage that motion should absolutely be granted.  
9 So we'll rest on our papers.

10 THE COURT: All right. Mr. Warren, anything on  
11 the motion to amend?

12 MR. WARREN: Well, Your Honor, I think we made the  
13 point, but there is another case on it. The legal basis for  
14 the cause of action is tenuous, as we ask the Court to find,  
15 the futility would support denying the motion to amend.  
16 Futility alone, you wouldn't have to add -- look at all the  
17 other factors. And that's *Morongo Band of Mission Indians*  
18 *v. Rose*, Ninth Circuit, 1990 case, 893 F2d 1074. We did  
19 cite a similar case in our materials, but that one actually  
20 says that principle where the legal basis for the cause of  
21 action is tenuous, futility supports refusal to grant leave  
22 to amend.

23 THE COURT: Thank you. All right. Thank you very  
24 much. The arguments were helpful. I'll take it under  
25 advisement.

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MR. HAGLUND: Thank you, Your Honor.

MR. WARREN: Thank you.

(Hearing concluded.)

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C E R T I F I C A T E

MATS JARLSTROM, an individual,	)	
	)	
Plaintiff,	)	Case No. 3:14-cv-00783-AC
	)	
v.	)	
	)	
CITY OF BEAVERTON, an Oregon	)	
municipal corporation,	)	
	)	
Defendant.	)	

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MOTION HEARING

August 25, 2014

I certify, by signing below, that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Erwin, CSR, RMR, RDR, CRR

Official Court Reporter

Date: September 5, 2014

/

/s/Jill [1] 29/20

**1**

10 [1] 23/22  
 1000 [1] 2/16  
 1074 [1] 27/18  
 11 [2] 3/8 23/23  
 14th [1] 20/9  
 16 [1] 3/9  
 1777 [2] 2/3 2/7  
 18 [2] 7/22 23/11  
 19 [2] 10/3 11/15  
 1975 [1] 13/7  
 1983 [4] 17/21 18/4 18/24 23/22  
 1990 [1] 27/18

**2**

20 percent [1] 8/5  
 200 [2] 2/3 2/7  
 2011 [1] 9/3  
 2014 [4] 1/7 12/13 29/12 29/21  
 25 [2] 1/7 29/12

**3**

301 [1] 2/16  
 326-8191 [1] 2/17  
 3:14-cv-00783-AC [2] 1/5 29/4

**4**

409 [1] 13/6  
 422 [1] 13/6

**5**

50 percent [1] 8/5  
 503 [1] 2/17

**7**

7th [1] 12/14

**8**

8191 [1] 2/17  
 893 [1] 27/18

**9**

901 [1] 2/11  
 911 [1] 20/23  
 97201 [2] 2/4 2/8  
 97204 [1] 2/17  
 97301 [1] 2/11

**A**

able [2] 5/14 10/12  
 about [14] 4/18 6/4 6/19 6/20 6/21 7/14  
 12/1 13/18 15/14 17/7 22/13 23/9 25/14  
 27/3  
 above [1] 29/16  
 above-entitled [1] 29/16  
 absolutely [2] 17/1 27/8  
 AC [2] 1/5 29/4  
 accept [1] 9/6  
 accepted [1] 10/25  
 access [1] 10/11  
 accident [2] 10/12 11/6  
 accidents [15]  
 account [1] 11/4  
 accurate [1] 21/4  
 acknowledge [2] 11/17 20/6  
 ACOSTA [1] 1/15  
 acquired [1] 6/3  
 across [1] 26/2  
 Act [1] 12/15  
 acting [2] 20/16 25/25  
 action [2] 27/14 27/21

activity [1] 15/13  
 actor [5] 18/20 18/22 20/16 24/1 24/10  
 actors [3] 18/24 19/1 19/1  
 actual [13] 3/20 3/25 4/24 5/2 6/10 8/17  
 14/14 15/1 16/22 16/23 18/17 20/19  
 23/9  
 actually [10] 6/11 7/7 7/22 8/8 11/5  
 14/18 16/2 17/24 23/9 27/19  
 add [6] 23/20 26/10 26/14 26/21 26/22  
 27/16  
 addition [1] 26/10  
 address [4] 3/16 11/21 17/16 18/6  
 addressing [1] 26/19  
 adequately [1] 13/20  
 advisement [1] 27/25  
 affected [1] 13/9  
 Affordable [1] 12/15  
 after [1] 19/6  
 again [1] 22/12  
 against [1] 23/25  
 aggressive [1] 5/7  
 ago [1] 12/11  
 agree [4] 7/16 13/2 22/12 25/4  
 ahead [1] 26/13  
 all [32]  
 allegation [6] 8/2 8/3 10/7 10/8 11/8  
 11/10  
 allegations [17]  
 allege [7] 5/6 7/22 13/20 14/15 16/11  
 22/11 23/10  
 alleged [7] 7/5 8/13 8/15 12/15 13/13  
 22/16 26/5  
 alleges [3] 14/2 17/10 22/25  
 alleging [1] 15/20  
 allowed [1] 11/20  
 allowing [1] 20/24  
 allows [1] 17/21  
 alone [1] 27/16  
 along [3] 3/23 11/14 20/7  
 also [2] 7/17 24/13  
 although [1] 24/1  
 always [1] 14/3  
 am [1] 8/7  
 ambulance [1] 20/25  
 amend [7] 3/8 11/20 27/4 27/7 27/11  
 27/15 27/22  
 amended [5] 4/18 7/21 7/22 9/12 19/7  
 Amendment [2] 20/9 23/24  
 analysis [3] 6/23 20/1 22/15  
 analyzing [1] 16/9  
 Angeles [1] 12/23  
 another [1] 27/13  
 any [16]  
 anybody [1] 21/6  
 anything [10] 16/18 21/25 22/7 22/24  
 23/19 26/14 26/16 26/22 27/4 27/10  
 apparently [2] 14/4 20/9  
 APPEARANCES [1] 2/1  
 applicability [1] 21/17  
 applicable [1] 24/4  
 applied [1] 3/20  
 apply [4] 12/22 13/10 14/6 24/6  
 appropriate [2] 9/13 26/2  
 approximate [1] 6/3  
 are [20]  
 aren't [1] 7/5  
 arguably [1] 9/20  
 argue [1] 5/11  
 argument [1] 16/21  
 arguments [1] 27/24  
 around [1] 23/12  
 as [29]  
 ask [2] 10/22 27/14  
 assert [1] 17/21  
 assessment [1] 21/19

assumption [1] 15/24  
 attached [1] 9/11  
 August [3] 1/7 12/14 29/12  
 August 7th [1] 12/14  
 automobile [1] 7/18  
 Avenue [1] 2/16  
 average [1] 8/6  
 avoid [1] 10/20

**B**

back [5] 13/14 14/13 15/23 24/10 26/4  
 bad [1] 7/12  
 Band [1] 27/17  
 bar [3] 9/22 15/11 16/23  
 based [4] 4/15 6/3 8/15 21/20  
 basis [3] 15/25 27/13 27/20  
 be [32]  
 BEAVERTON [10] 1/7 4/20 8/1 17/14  
 19/5 22/9 22/17 23/9 25/13 29/6  
 because [16]  
 been [26]  
 before [5] 1/15 16/20 19/9 23/7 23/16  
 beg [1] 8/19  
 behavior [1] 26/1  
 being [3] 7/14 14/25 23/21  
 believe [9] 6/13 9/13 11/25 12/21 15/11  
 15/20 20/11 21/4 21/5  
 believes [1] 21/3  
 below [1] 29/14  
 benefit [1] 8/11  
 benefits [1] 25/19  
 best [4] 13/3 13/12 25/16 25/21  
 between [3] 5/17 21/13 22/23  
 bit [3] 20/21 22/13 24/20  
 body [2] 4/7 20/3  
 borders [1] 3/14  
 both [2] 9/5 25/4  
 bought [1] 5/15  
 brief [4] 3/23 13/5 16/6 16/6  
 briefs [1] 3/10  
 brought [1] 23/6  
 bus [1] 18/11

**C**

calculations [1] 6/3  
 call [2] 3/21 20/25  
 called [1] 20/23  
 came [3] 4/3 12/11 18/7  
 can [10] 5/11 5/20 8/14 9/24 11/13  
 11/20 19/1 21/8 22/7 24/12  
 can't [2] 10/24 15/4  
 capable [10] 9/9 12/1 12/6 13/15 13/18  
 14/7 14/10 15/8 15/14 15/25  
 Capitol [1] 2/11  
 carcinogen [2] 15/9 15/13  
 Care [1] 12/15  
 carefully [1] 16/20  
 cars [2] 24/25 25/3  
 case [53]  
 cases [20]  
 causally [2] 7/9 11/11  
 cause [8] 6/11 7/24 12/3 12/8 15/7  
 27/14 27/20 29/16  
 caused [1] 15/7  
 Centex [1] 9/2  
 certain [2] 4/16 8/5  
 certainly [7] 3/13 3/17 11/4 12/18 13/16  
 15/19 16/10  
 certified [3] 2/13 2/15 29/18  
 certify [1] 29/14  
 challenge [1] 11/3  
 challenging [1] 12/14  
 chance [5] 23/10 24/10 26/11 26/16  
 26/21  
 chances [1] 21/23

Ex. A



**C**

change [2] 19/6 21/25  
 changing [1] 22/4  
 characterize [1] 11/16  
 characterized [1] 4/12  
 children [3] 4/12 5/13 17/3  
 choice [3] 17/16 19/5 19/15  
 choked [1] 14/11  
 chokehold [1] 17/23  
 chokeholds [2] 12/25 14/10  
 Circuit [6] 4/2 4/22 9/2 9/24 12/11 27/18  
 cite [6] 12/4 12/12 17/19 18/5 23/21  
 27/19  
 cited [3] 15/18 18/1 18/9  
 cites [1] 9/3  
 citizens [4] 13/10 23/24 25/19 25/22  
 city [16]  
 City's [2] 19/25 22/3  
 claim [6] 7/1 16/11 17/21 18/4 20/12  
 23/22  
 claims [2] 7/10 10/22  
 class [1] 13/10  
 clear [7] 3/18 4/15 10/24 15/14 17/12  
 17/19 27/5  
 clearly [1] 19/4  
 client [1] 19/18  
 clothing [2] 4/16 5/15  
 code [2] 14/5 23/4  
 coin [1] 12/6  
 colliding [1] 21/23  
 collision [1] 16/3  
 color [1] 20/16  
 come [1] 20/24  
 comes [1] 20/21  
 coming [1] 14/13  
 committed [1] 10/17  
 comparable [1] 8/6  
 compared [1] 8/6  
 complaining [2] 5/13 9/8  
 complaint [18]  
 complaints [1] 5/6  
 completely [1] 11/17  
 concede [1] 11/15  
 concern [1] 8/18  
 concluded [1] 28/3  
 concluding [1] 24/9  
 conclusory [7] 8/2 8/10 10/8 10/25 11/8  
 11/17 22/23  
 conditionally [1] 17/6  
 conduct [2] 20/5 21/2  
 confident [1] 10/11  
 conformed [1] 29/17  
 conjectural [1] 9/21  
 connected [2] 7/9 11/11  
 conscious [10] 19/22 20/6 21/17 22/6  
 22/8 22/16 22/22 23/8 23/17 24/7  
 consciously [1] 18/20  
 consider [1] 17/14  
 considered [3] 17/15 19/5 19/14  
 consistent [1] 4/6  
 consistently [2] 5/1 13/21  
 constitute [3] 12/18 13/17 15/19  
 constitutional [2] 16/11 24/1  
 construe [1] 9/7  
 contact [1] 17/5  
 contend [1] 24/5  
 contribute [1] 25/8  
 control [3] 21/7 25/18 25/25  
 controlled [1] 5/10  
 conveyed [1] 17/5  
 convinced [1] 20/4  
 Coons [2] 12/12 15/18  
 corporation [3] 1/8 9/3 29/6  
 correct [5] 15/24 17/15 20/4 24/17 29/15

correctly [1] 6/21  
 could [4] 9/1 9/21 10/15 20/10  
 counsel [1] 19/9  
 court [26]  
 Court's [2] 20/5 23/8  
 Courthouse [1] 21/16  
 courts [3] 3/18 9/6 24/9  
 create [2] 25/2 26/4  
 created [4] 16/11 20/8 21/1 21/5  
 creating [1] 21/8  
 creation [4] 24/5 24/14 25/9 25/24  
 credible [10] 3/24 4/23 5/3 8/14 12/5  
 12/10 13/1 16/24 19/18 22/20  
 CRR [2] 2/13 29/20  
 cry [1] 3/20  
 CSR [2] 2/13 29/20  
 cv [2] 1/5 29/4  
 cycle [2] 13/21 13/25  
 cycles [4] 13/25 17/10 21/22 24/22  
 cyclist [1] 6/9

**D**

danger [19]  
 dangerous [1] 7/10  
 data [7] 6/3 6/10 10/12 19/9 20/4 22/17  
 23/13  
 Date [1] 29/21  
 death [4] 4/19 10/2 17/17 25/23  
 debate [1] 5/21  
 decision [4] 18/2 24/11 24/12 26/3  
 decisions [1] 25/14  
 defective [1] 10/17  
 defend [1] 20/22  
 defendant [4] 1/9 2/10 10/16 29/7  
 defendant's [2] 3/7 3/8  
 defendants [1] 3/21  
 defined [1] 3/13  
 definitely [1] 9/21  
 definition [1] 3/14  
 deliberate [4] 18/17 24/8 24/12 24/13  
 deliberately [4] 22/19 22/25 23/14 26/3  
 deliberation [1] 18/17  
 demonstrate [2] 11/9 19/16  
 denying [1] 27/15  
 depend [1] 3/24  
 describes [1] 3/15  
 detail [2] 11/16 19/8  
 detailed [2] 4/17 9/12  
 determined [1] 24/7  
 did [7] 11/6 11/6 11/6 19/6 21/2 26/14  
 27/18  
 didn't [2] 18/5 23/12  
 dies [1] 21/1  
 differ [1] 8/19  
 difference [4] 5/17 25/8 25/9 25/11  
 different [2] 6/16 11/3  
 differentiate [1] 9/25  
 digitally [1] 29/17  
 Diplomat [1] 21/14  
 direct [2] 7/24 22/10  
 disagree [3] 11/2 20/1 24/24  
 disagreed [2] 21/16 23/1  
 disagreement [3] 20/2 21/13 23/2  
 disconnect [1] 22/23  
 discovery [3] 10/10 10/18 10/21  
 dismiss [12] 3/7 6/14 6/23 8/8 9/5 10/23  
 21/18 21/19 26/13 26/20 26/22 26/24  
 dispute [4] 5/23 7/12 21/12 22/12  
 disregards [1] 18/20  
 distinction [3] 7/16 9/18 16/9  
 distinguish [2] 11/23 16/16  
 district [6] 1/1 1/2 1/16 2/16 18/7 27/7  
 DIVISION [1] 1/3  
 do [10] 10/9 10/9 11/15 12/4 14/22  
 16/20 21/7 24/11 24/14 24/24

docket [2] 3/8 3/9  
 doctor [1] 10/17  
 doctrine [3] 12/2 12/7 15/15  
 does [16]  
 doesn't [6] 13/10 14/7 14/15 15/17 16/2  
 21/9  
 doing [3] 14/3 21/25 26/4  
 don't [22]  
 done [3] 23/13 25/15 25/16  
 down [3] 4/3 18/8 26/6  
 drive [1] 24/22  
 driver [2] 7/19 18/11  
 driving [2] 25/7 26/1  
 drove [1] 24/20  
 due [8] 12/15 17/22 18/19 19/23 20/9  
 20/16 20/20 21/10  
 duration [1] 7/23  
 during [2] 8/3 21/1  
 duty [2] 24/2 25/18

**E**

each [1] 26/10  
 early [1] 9/13  
 either [5] 6/8 7/5 7/19 8/14 15/5  
 else [5] 16/18 21/6 23/19 26/22 27/4  
 engineer [1] 9/10  
 enough [2] 6/25 22/21  
 entitled [3] 26/5 26/6 29/16  
 environmental [3] 4/3 4/7 5/5  
 environmentalists [1] 5/5  
 EPA [3] 4/3 4/8 5/10  
 equivalent [1] 24/8  
 Erwin [2] 2/13 29/20  
 Especially [1] 10/4  
 established [1] 22/9  
 even [5] 8/13 11/14 13/13 16/12 22/25  
 every [1] 25/13  
 everything [2] 10/4 26/17  
 exactly [1] 15/4  
 example [2] 8/3 17/23  
 exceeded [1] 8/5  
 exception [5] 24/4 24/5 24/14 25/10  
 25/24  
 exceptions [2] 17/20 24/3  
 exclude [1] 3/14  
 exhibit [1] 9/10  
 exists [2] 24/15 24/15  
 expanded [2] 20/11 20/13  
 expense [1] 10/21  
 experience [4] 5/8 11/6 11/7 27/7  
 experienced [1] 7/8  
 expose [1] 10/1  
 exposed [3] 4/13 5/13 7/12  
 exposing [1] 25/22  
 exposure [4] 4/16 4/19 5/21 9/19  
 extent [1] 5/21  
 extreme [1] 24/23

**F**

F2d [1] 27/18  
 facing [1] 23/15  
 fact [11] 3/17 3/25 5/24 9/9 12/19 13/16  
 15/19 19/24 23/6 25/6 25/25  
 factors [1] 27/17  
 facts [15]  
 factual [1] 6/22  
 fall [2] 13/14 19/15  
 falls [1] 25/24  
 familiar [1] 20/20  
 far [3] 3/20 20/11 20/13  
 faster [1] 21/22  
 favor [2] 9/1 9/8  
 FEDERAL [10] 17/8 17/11 17/13 18/22  
 18/24 18/25 19/2 20/12 21/9 23/17  
 figure [1] 5/14

**F**

file [1] 10/15  
 filed [3] 6/6 7/6 12/13  
 find [2] 18/19 27/14  
 finding [1] 15/25  
 first [5] 3/16 3/21 6/13 14/17 26/20  
 fit [2] 15/8 21/9  
 five [1] 18/11  
 fly [1] 14/12  
 focus [1] 6/25  
 folks [1] 26/1  
 following [1] 21/3  
 footnotes [1] 20/7  
 foregoing [1] 29/14  
 forest [1] 5/7  
 forward [1] 16/1  
 found [4] 17/24 18/16 20/7 20/18  
 Fourteenth [1] 23/23  
 freely [1] 27/6  
 front [1] 16/8  
 fundamentally [1] 25/16  
 further [1] 26/5  
 futility [3] 27/15 27/16 27/21  
 future [7] 12/5 12/10 12/19 13/1 13/14  
 15/16 22/20

**G**

general [1] 24/3  
 generalized [2] 13/4 13/9  
 generally [1] 10/16  
 gentleman [2] 14/11 20/23  
 GERALD [2] 2/10 2/10  
 get [7] 8/10 10/11 16/12 19/23 22/12  
 23/5 23/6  
 gets [1] 18/9  
 give [2] 8/25 19/16  
 given [3] 9/1 9/13 27/6  
 Giving [1] 26/21  
 go [3] 11/15 15/23 26/13  
 goes [1] 19/8  
 going [7] 5/8 6/19 6/20 10/23 11/2 13/23  
 16/1  
 gone [1] 13/24  
 Good [3] 3/3 3/4 3/5  
 got [2] 6/25 15/12  
 govern [1] 23/3  
 government [1] 19/4  
 grant [1] 27/21  
 granted [1] 27/8  
 great [1] 4/6  
 greater [2] 20/17 21/5  
 grievance [1] 13/9  
 grounds [1] 12/16  
 guess [2] 15/7 19/21

**H**

had [12] 13/9 14/11 14/12 14/13 15/20  
 16/10 17/4 17/14 24/10 26/9 26/11  
 26/16  
 HAGLUND [9] 2/2 2/2 2/6 3/10 6/17  
 16/18 17/11 23/19 26/25  
 half [1] 14/1  
 Hammel [1] 18/8  
 hand [1] 18/14  
 handled [1] 18/23  
 happen [2] 9/21 13/22  
 happened [2] 5/15 7/2  
 happening [1] 22/10  
 happens [1] 21/23  
 harm [23]  
 harmful [3] 5/25 6/2 15/25  
 has [26]  
 have [68]  
 haven't [5] 21/4 22/8 22/16 26/11 26/16

he [7] 9/10 21/1 22/19 22/20 22/25 23/1  
 23/12  
 he's [4] 6/7 19/9 19/9 23/2  
 headed [1] 13/3  
 HEARING [3] 1/13 28/3 29/11  
 held [2] 4/22 5/1  
 help [1] 16/7  
 helpful [1] 27/24  
 helps [1] 18/6  
 here [16]  
 here's [2] 8/12 8/12  
 higher [2] 6/8 7/8  
 him [2] 20/24 21/5  
 himself [1] 16/2  
 his [2] 6/5 22/23  
 hit [1] 18/11  
 holds [1] 23/24  
 Honor [25]  
 HONORABLE [1] 11/15  
 host [1] 5/5  
 house [1] 20/25  
 how [13] 5/22 5/22 11/23 14/20 14/22  
 15/8 16/12 19/23 21/8 22/3 22/5 24/21  
 25/14  
 However [1] 4/2  
 humor [1] 24/20  
 hypothetical [1] 9/20

**I**

I'd [3] 3/20 4/25 24/6  
 I'll [3] 3/21 21/15 27/24  
 I'm [8] 9/4 11/13 20/20 21/15 21/25 22/1  
 22/13 23/15  
 I've [3] 18/23 21/10 26/17  
 Ibrahim [1] 14/12  
 ignore [1] 10/24  
 ignored [1] 22/19  
 immediate [2] 3/11 3/19  
 immediately [1] 10/18  
 imminent [8] 3/19 3/25 4/24 5/2 10/2  
 16/23 18/3 19/17  
 impact [1] 5/8  
 impending [4] 12/18 13/16 15/19 15/21  
 implicated [1] 17/11  
 improper [1] 7/10  
 incidence [2] 6/8 7/8  
 incidents [1] 8/17  
 income [2] 13/8 13/8  
 incorrect [2] 7/10 22/11  
 increase [1] 21/24  
 increased [2] 22/4 25/22  
 incredible [1] 15/15  
 Indians [1] 27/17  
 indicates [1] 6/7  
 indicating [2] 8/22 17/2  
 indifference [2] 24/8 24/13  
 indifferent [2] 22/25 23/14  
 individual [2] 1/4 29/3  
 inferences [2] 8/25 10/5  
 inferred [1] 8/15  
 infringed [1] 19/2  
 injunctive [1] 26/7  
 injury [37]  
 inquiry [1] 8/23  
 inside [1] 20/24  
 instance [1] 4/15  
 instead [1] 20/23  
 interpretation [1] 3/13  
 interrupt [1] 6/17  
 intersection [11] 6/1 8/4 13/23 15/21  
 16/3 17/9 21/24 22/4 22/18 24/21 25/7  
 intersections [11] 3/15 4/20 6/7 7/7 7/25  
 8/6 10/7 17/18 25/18 25/20 26/2  
 interval [3] 7/9 13/22 14/4  
 intervals [7] 4/20 6/4 7/24 10/1 19/6

22/5 25/15  
 intrusions [1] 23/25  
 involve [3] 18/24 18/25 19/1  
 involved [1] 16/3  
 Iqbal [5] 6/22 8/9 10/15 10/20 10/24  
 irrelevant [1] 10/15  
 is [85]  
 isn't [2] 21/19 21/19  
 isolation [1] 3/12  
 issue [5] 5/19 5/24 6/24 7/13 13/15  
 it [52]  
 it's [28]  
 item [1] 19/15  
 its [4] 3/13 15/2 25/14 25/14

**J**

Jarlstrom [9] 4/17 9/9 13/13 14/15 15/17  
 15/22 16/2 19/7 20/1  
 Jarlstrom's [2] 4/1 20/4  
 JARLSTROM,an [2] 1/4 29/3  
 Jill [2] 2/13 29/20  
 JOHN [1] 1/15  
 JUDGE [2] 1/16 18/18  
 just [13] 4/25 12/12 16/19 17/25 21/8  
 22/1 22/13 23/10 23/20 24/22 25/3 25/3  
 26/19

**K**

Keep [1] 26/17  
 keeping [1] 25/20  
 Kelley [2] 2/2 2/6  
 key [2] 16/22 23/21  
 kind [1] 5/11  
 know [12] 9/20 9/21 13/3 15/15 16/12  
 17/1 21/16 23/5 24/19 24/20 24/23  
 26/19  
 knowledge [1] 22/3  
 known [3] 15/6 15/6 15/9  
 knows [1] 21/24

**L**

LA [3] 12/25 14/10 17/23  
 land [1] 13/7  
 language [3] 4/25 22/24 23/11  
 large [1] 13/10  
 last [3] 4/4 13/24 18/8  
 late [1] 4/4  
 law [7] 2/10 17/19 19/25 20/17 21/4  
 21/22 23/21  
 lawsuit [1] 10/15  
 least [3] 4/18 14/2 26/12  
 leave [2] 27/6 27/21  
 left [1] 18/14  
 left-hand [1] 18/14  
 legal [2] 27/13 27/20  
 legislature [1] 20/3  
 legitimate [1] 23/22  
 let [2] 6/21 26/9  
 let's [5] 13/18 15/23 17/7 17/8 21/17  
 level [3] 11/16 11/18 19/24  
 Lew [2] 12/12 15/18  
 lie [1] 18/4  
 light [14] 4/20 6/5 7/23 7/25 9/25 13/25  
 13/25 19/6 21/21 22/5 23/3 24/21 25/3  
 25/15  
 lights [3] 11/12 13/21 21/6  
 like [6] 4/25 8/7 15/18 16/5 16/8 25/13  
 lines [3] 3/23 11/14 20/8  
 list [1] 14/12  
 little [4] 7/15 15/12 22/13 24/19  
 LLP [2] 2/2 2/6  
 local [1] 20/3  
 lock [1] 20/25  
 logically [1] 21/24  
 long [2] 5/22 16/3

**L**

look [7] 3/18 4/2 7/4 9/11 9/19 21/18  
27/16  
looked [2] 19/25 19/25  
looking [3] 3/10 21/15 22/1  
Los [1] 12/23  
low [3] 9/23 13/8 16/23  
lower [1] 15/12  
Lyons [1] 12/23

**M**

made [9] 4/14 4/17 15/11 17/12 17/15  
19/7 24/11 27/1 27/12  
MAGISTRATE [1] 1/16  
make [10] 3/22 6/12 10/16 11/14 19/14  
24/6 25/8 25/9 25/14 26/3  
makes [5] 15/21 17/19 18/2 19/5 25/11  
making [1] 18/12  
malpractice [1] 10/18  
manner [1] 21/7  
Market [2] 2/3 2/7  
material [3] 7/3 8/11 9/6  
materialize [2] 5/3 16/25  
materials [5] 6/6 7/6 12/4 13/14 27/19  
MATS [2] 1/4 29/3  
matter [1] 24/21  
may [2] 12/9 15/10  
Maya [1] 9/2  
maybe [2] 15/7 22/21  
me [5] 3/10 6/21 16/8 16/15 24/20  
mean [3] 5/22 20/20 24/23  
medics [1] 20/24  
meet [9] 9/16 10/3 14/7 17/20 19/16  
19/21 22/5 22/7 25/21  
members [6] 4/13 5/6 15/2 15/2 17/4  
25/6  
memorandum [1] 16/15  
merely [1] 15/20  
Merit [1] 2/14  
merits [5] 21/13 22/1 22/12 22/13 23/5  
met [7] 4/24 9/21 17/25 18/8 18/11  
18/17 24/14  
MICHAEL [1] 2/2  
might [5] 13/8 13/10 14/24 15/12 20/2  
mind [1] 26/17  
misrecollect [1] 14/25  
missing [2] 23/7 23/16  
Mission [1] 27/17  
moderate [1] 13/8  
month [1] 6/4  
months [1] 13/24  
more [10] 9/12 10/3 10/7 11/8 11/10  
11/10 11/14 19/8 21/11 21/12  
morning [3] 3/3 3/4 3/5  
Morongo [1] 27/17  
Mosman [1] 18/18  
motion [24]  
motor [1] 23/3  
move [3] 8/13 10/18 17/8  
Mr [11] 3/10 4/17 6/17 9/9 15/17 16/18  
17/11 19/7 20/1 20/4 23/19  
Mr. [9] 11/23 13/13 14/15 15/22 16/2  
19/20 26/12 26/25 27/10  
Mr. Haglund [1] 26/25  
Mr. Jarlstrom [4] 13/13 14/15 15/22 16/2  
Mr. Warren [4] 11/23 19/20 26/12 27/10  
much [5] 5/9 5/14 5/22 7/11 27/24  
multiple [2] 18/1 24/9  
municipal [2] 1/8 29/6  
municipality [1] 25/13  
must [3] 9/6 9/7 12/18  
my [6] 8/18 13/5 15/5 21/19 26/11 27/7

**N**

namely [1] 26/1

national [1] 5/7  
nature [1] 5/8  
NE [1] 2/11  
need [2] 6/20 10/25  
needed [1] 5/22  
needs [1] 12/22  
negligent [1] 10/17  
night [1] 21/1  
nine [1] 6/4  
nine-month [1] 6/4  
Ninth [6] 4/2 4/22 9/2 9/23 12/11 27/18  
no [21]  
no-fly [1] 14/12  
nobody [2] 20/7 24/20  
normally [1] 14/1  
not [38]  
note [1] 23/23  
noted [1] 10/3  
nothing [9] 6/5 6/6 8/7 8/11 8/13 11/7  
16/21 17/2 23/13  
now [6] 3/12 5/20 7/2 7/2 14/24 26/20  
NRDC [22]  
number [8] 3/8 3/9 7/24 8/4 8/6 18/23  
19/8 23/24  
numbers [1] 8/16

**O**

occasionally [1] 13/22  
off [1] 20/25  
Office [1] 2/10  
Official [1] 29/21  
Okay [3] 8/21 11/22 26/24  
once [1] 10/11  
one [10] 6/14 7/18 8/20 11/23 13/20  
17/3 17/20 18/5 20/7 27/19  
only [5] 4/11 6/9 19/15 24/6 26/18  
opining [1] 22/1  
opportunity [1] 17/14  
opposition [3] 7/3 18/9 23/23  
order [1] 19/22  
ordinance [1] 13/7  
OREGON [5] 1/2 1/7 1/9 25/13 29/6  
original [1] 29/17  
orthopedic [1] 12/14  
other [7] 14/6 18/9 19/15 20/14 23/6  
24/6 27/17  
others [3] 15/20 15/24 16/4  
otherwise [1] 20/18  
ought [2] 23/7 23/16  
our [17]  
out [7] 3/21 5/14 7/21 12/11 16/19 19/3  
21/12  
outside [1] 25/16  
over [3] 5/22 6/3 7/13  
own [2] 6/2 25/14

**P**

page [1] 8/16  
pages [1] 23/22  
papers [4] 17/12 18/1 19/4 27/9  
paragraph [5] 7/22 10/3 11/15 11/17  
23/11  
parents [3] 5/12 5/12 17/3  
part [5] 10/21 12/1 12/6 24/16 25/18  
particular [2] 13/25 18/2  
particularized [1] 13/13  
parties [5] 7/3 21/12 24/2 24/2 25/6  
party [2] 9/8 26/1  
passenger [1] 7/19  
past [3] 12/7 15/1 15/24  
PAYNE [1] 2/6  
pedestrian [2] 6/9 7/19  
people [3] 13/8 18/11 24/22  
percent [2] 8/5 8/5  
perhaps [1] 12/8

period [4] 5/23 6/4 7/13 8/4  
permit [1] 21/22  
person [2] 14/12 20/17  
personal [1] 23/25  
personally [1] 9/10  
pesticide [3] 5/22 15/13 17/6  
pesticides [11] 4/8 4/14 4/16 5/16 5/19  
7/11 7/12 7/16 12/3 15/6 15/25  
pesticides' [1] 9/19  
phrase [3] 3/12 5/2 21/15  
piece [1] 14/3  
placed [1] 20/17  
plaintiff [17]  
plaintiffs [4] 3/7 3/8 6/2 14/5  
plaintiffs [2] 15/1 17/4  
plausibility [1] 6/22  
plausible [2] 7/1 10/22  
pleaded [4] 8/9 11/1 21/20 21/21  
pleading [1] 10/22  
plus [1] 10/5  
point [13] 3/21 3/22 7/21 8/12 15/10  
16/19 18/6 18/10 19/3 21/12 24/6 26/15  
27/13  
points [2] 6/13 27/2  
police [3] 20/22 20/24 25/19  
political [1] 20/3  
PORTLAND [5] 1/3 1/9 2/4 2/8 2/17  
position [3] 10/6 10/10 10/13  
possibility [1] 22/3  
possible [3] 7/14 12/19 25/21  
potential [4] 4/16 4/19 9/19 17/17  
power [1] 25/19  
practice [1] 25/22  
practices [1] 25/17  
precise [1] 4/25  
precisely [1] 10/20  
precision [1] 5/14  
prefer [1] 16/14  
prepared [1] 9/11  
presence [1] 24/16  
present [1] 3/15  
presented [5] 22/9 22/17 22/24 23/1  
23/12  
presenting [1] 22/14  
pretty [2] 3/18 4/17  
prevented [1] 14/13  
previously [1] 24/11  
principle [1] 27/20  
prior [1] 12/24  
probabilistic [7] 4/12 4/23 5/3 5/11 9/22  
16/24 17/25  
problem [2] 17/15 17/16  
proceed [1] 26/5  
proceedings [3] 1/14 3/1 29/15  
process [8] 12/16 17/22 18/19 19/23  
20/10 20/16 20/21 21/10  
product [1] 10/17  
proof [2] 6/14 10/13  
proper [1] 9/18  
properly [1] 8/15  
proposed [3] 7/21 7/22 19/7  
proposing [1] 4/8  
proposition [1] 18/6  
protect [1] 24/2  
protected [1] 23/25  
prove [3] 10/19 25/17 26/6  
proved [2] 6/11 8/17  
proven [4] 5/20 5/25 6/2 12/3  
provide [1] 10/13  
provided [4] 7/6 19/10 20/1 24/13  
provision [1] 20/10  
public [1] 25/7  
purposes [4] 8/22 9/4 16/9 23/21  
put [4] 16/13 17/16 20/24 21/6  
puts [1] 18/3

**Q**

qualify [1] 24/12  
 question [4] 7/17 7/18 17/8 21/9  
 questions [2] 26/9 26/11  
 quickly [2] 17/10 24/21  
 quite [2] 9/23 20/21  
 quote [5] 3/22 4/25 5/1 16/25 18/18  
 quoting [2] 5/2 9/4

**R**

RDR [2] 2/13 29/20  
 read [2] 14/20 26/17  
 reading [1] 14/5  
 real [2] 4/1 15/14  
 really [4] 3/20 4/15 9/22 9/24  
 realm [1] 8/13  
 Realtime [1] 2/15  
 reason [1] 20/14  
 reasonable [1] 10/5  
 reasonably [2] 8/15 25/20  
 reasons [2] 18/9 21/7  
 recall [2] 14/25 15/4  
 receive [1] 11/6  
 recent [1] 18/5  
 recollection [1] 15/5  
 reconsider [1] 24/10  
 record [3] 3/6 17/2 29/15  
 red [6] 6/4 13/21 14/1 17/10 21/22 24/22  
 refer [1] 9/2  
 reflected [1] 9/10  
 refusal [1] 27/21  
 refuses [1] 24/11  
 regard [1] 12/17  
 register [1] 4/8  
 registered [3] 2/14 2/14 17/6  
 regulations [2] 14/6 21/22  
 reiterated [1] 12/17  
 relationship [1] 24/4  
 relaxed [2] 12/9 15/10  
 relevant [1] 22/15  
 relied [2] 12/24 20/10  
 relief [1] 26/7  
 rely [1] 10/23  
 remiss [1] 11/7  
 remote [2] 5/11 9/20  
 repeatedly [1] 12/17  
 repetition [9] 12/1 12/6 13/15 13/19 14/7  
 14/10 15/8 15/15 16/1  
 reply [2] 3/22 3/22  
 REPORTER [6] 2/13 2/13 2/14 2/14 2/15  
 29/21  
 require [1] 15/16  
 required [2] 8/7 8/24  
 requirement [1] 14/8  
 requires [2] 10/20 10/21  
 resolved [1] 20/2  
 respect [2] 8/20 25/9  
 response [1] 26/11  
 rest [1] 27/9  
 result [3] 13/10 17/16 22/11  
 results [1] 20/19  
 review [1] 16/8  
 reviewed [1] 16/20  
 reviewing [1] 9/6  
 right [22]  
 rise [2] 3/2 19/24  
 risk [8] 4/19 7/20 10/2 10/2 17/17 18/21  
 19/17 25/23  
 RMR [2] 2/13 29/20  
 road [2] 24/16 26/6  
 Room [1] 2/16  
 Rose [1] 27/18  
 rule [1] 24/3  
 ruling [1] 9/4

**S**

S-E-L-D-I-N [1] 13/6  
 safe [1] 25/20  
 safest [1] 25/17  
 safety [2] 21/7 23/25  
 said [5] 3/23 12/2 12/16 12/17 15/6  
 Salem [1] 2/11  
 same [1] 5/10  
 satisfied [1] 6/23  
 saw [2] 19/11 19/12  
 say [10] 5/1 6/20 6/21 9/19 23/12 26/10  
 26/11 26/14 26/15 26/17  
 says [3] 8/3 23/4 27/20  
 Section [4] 17/21 18/4 18/23 23/22  
 see [2] 19/23 24/9  
 seem [2] 13/20 21/9  
 seemed [1] 5/23  
 seems [6] 3/10 3/14 13/2 21/11 21/12  
 23/16  
 seen [1] 21/10  
 Seldin [2] 9/4 13/6  
 sense [1] 5/18  
 September [1] 29/21  
 sequence [1] 6/5  
 serious [3] 7/20 18/21 19/18  
 SHENOA [1] 2/6  
 shifts [1] 6/24  
 shock [3] 22/22 23/8 23/17  
 shocks [7] 19/22 20/5 21/17 22/5 22/8  
 22/16 24/7  
 short [5] 4/21 7/23 10/1 14/4 14/4  
 shortened [2] 7/9 13/22  
 shorter [1] 11/11  
 Shorthand [1] 2/13  
 should [5] 16/14 20/11 23/3 27/6 27/8  
 show [8] 4/1 7/7 12/4 12/8 12/9 13/1  
 13/3 22/25  
 showing [1] 22/10  
 shown [1] 23/2  
 sides [1] 21/14  
 signal [1] 7/25  
 signature [3] 29/17 29/17 29/18  
 signed [1] 29/17  
 significant [2] 7/24 23/11  
 signing [1] 29/14  
 silly [1] 24/20  
 similar [2] 4/11 27/19  
 simply [2] 8/16 11/7  
 sir [1] 14/21  
 situation [6] 4/11 6/15 12/24 17/20  
 18/11 25/12  
 six [1] 13/24  
 so [15]  
 some [8] 4/17 5/15 20/14 20/16 20/16  
 20/19 21/8 23/7  
 somehow [1] 16/13  
 something [1] 12/8  
 somewhat [1] 5/11  
 sorry [2] 6/16 11/10  
 sort [2] 6/24 17/20  
 source [4] 5/19 5/24 6/10 7/14  
 special [1] 24/3  
 specific [2] 11/9 11/14  
 specificity [2] 11/18 14/3  
 square [1] 14/22  
 squarely [1] 25/23  
 stage [9] 6/14 9/13 9/14 10/5 22/2 22/6  
 23/7 27/6 27/8  
 standard [11] 3/20 10/14 10/23 11/3  
 11/4 12/10 12/21 17/25 22/16 24/7 27/5  
 standing [24]  
 state [14] 6/25 16/11 18/20 19/1 19/4  
 19/25 20/3 20/8 20/16 21/3 21/22 24/1  
 24/10 25/13

state-created [2] 16/11 20/8  
 statement [1] 18/18  
 STATES [5] 1/1 1/16 2/16 9/23 14/13  
 statistics [1] 22/10  
 stayed [1] 10/11  
 step [4] 23/7 23/16 24/10 26/4  
 still [2] 15/10 19/1  
 stop [1] 14/11  
 stoplight [1] 17/9  
 Street [3] 2/3 2/7 2/11  
 struck [1] 7/18  
 studied [3] 6/7 7/7 8/4  
 subject [1] 3/12  
 submit [2] 16/6 16/14  
 submitted [2] 7/3 8/12  
 subsequent [1] 16/6  
 substantial [2] 10/13 18/21  
 substantive [8] 12/15 17/22 18/19 19/23  
 20/9 20/15 20/20 21/10  
 such [1] 18/18  
 sudden [2] 13/23 13/25  
 sufficient [3] 12/20 13/17 14/3  
 suggest [3] 16/1 16/21 20/8  
 Suite [2] 2/3 2/7  
 supplemental [2] 16/6 16/15  
 support [2] 7/3 27/15  
 supports [1] 27/21  
 Supreme [2] 9/3 13/4  
 sure [2] 6/18 11/13  
 surgeons [1] 12/14  
 SW [3] 2/3 2/7 2/16

**T**

take [6] 8/7 8/24 9/17 10/9 25/18 27/24  
 taken [3] 8/9 10/5 11/4  
 talk [5] 6/19 6/20 12/1 13/18 17/7  
 talked [1] 22/13  
 talking [1] 6/21  
 tenuous [2] 27/14 27/21  
 test [11] 4/24 9/16 9/22 10/4 18/17  
 19/17 19/22 22/8 22/21 24/8 25/21  
 testimony [1] 23/1  
 tests [1] 22/6  
 textile [1] 17/5  
 textiles [1] 4/13  
 than [4] 11/3 20/17 21/5 21/22  
 Thank [10] 11/19 11/22 16/17 19/19  
 23/18 26/8 27/23 27/23 28/1 28/2  
 that [204]  
 that's [19]  
 their [13] 3/22 3/22 4/25 5/6 5/6 5/8 5/13  
 12/4 15/1 20/7 25/19 25/19 25/22  
 them [3] 19/10 21/7 24/12  
 themselves [1] 20/18  
 then [14] 5/4 7/8 10/18 12/9 12/25 18/2  
 18/4 19/15 20/19 21/8 22/7 22/21 24/11  
 25/17  
 theoretical [1] 8/16  
 theory [1] 6/10  
 there [35]  
 there'd [1] 12/7  
 there's [26]  
 therefore [4] 15/9 15/25 22/19 23/14  
 these [13] 3/15 4/14 5/12 5/12 5/16 6/7  
 9/25 10/7 13/21 17/18 19/6 20/8 22/10  
 they [55]  
 they're [6] 8/10 21/3 21/25 23/14 23/16  
 25/15  
 they've [3] 22/18 22/25 23/13  
 thing [2] 13/20 26/19  
 things [3] 11/9 14/17 23/6  
 think [24]  
 thinks [1] 22/21  
 thinning [1] 5/7  
 third [4] 2/16 24/2 25/6 26/1

**T**

third-party [1] 26/1  
 this [48]  
 those [12] 3/19 8/25 9/17 10/19 10/24  
 11/11 11/14 14/14 15/12 23/6 25/20  
 26/9  
 though [2] 5/17 6/16  
 threat [16]  
 threatened [1] 12/18  
 three [1] 13/24  
 through [6] 8/17 13/24 24/20 24/23 25/7  
 26/1  
 ticket [1] 11/6  
 time [4] 5/23 7/13 14/1 25/14  
 times [1] 19/9  
 timing [3] 21/4 22/11 23/2  
 told [1] 23/9  
 too [8] 3/24 4/21 5/7 10/1 14/4 14/4  
 17/10 17/25  
 toxic [1] 5/20  
 traffic [2] 14/11 21/6  
 transcript [4] 1/14 3/1 29/15 29/16  
 transiting [2] 4/19 17/18  
 treated [1] 4/14  
 Tri [2] 18/8 18/11  
 Tri-Met [2] 18/8 18/11  
 trial [1] 9/5  
 trouble [1] 7/15  
 true [8] 7/17 8/10 8/24 9/6 9/17 10/5  
 10/25 29/15  
 try [1] 10/18  
 turn [2] 18/14 23/12  
 turned [1] 21/8  
 two [8] 4/8 4/14 6/12 11/9 12/11 12/14  
 14/17 24/3  
 Twombly [5] 6/22 8/9 10/14 10/20 10/24  
 type [3] 13/15 20/5 20/14  
 typical [2] 6/23 8/8  
 typically [1] 20/15

**U**

U.S [1] 13/6  
 ultimate [1] 8/12  
 ultimately [3] 4/10 23/5 25/17  
 under [5] 6/22 8/9 8/13 14/5 27/24  
 underlying [1] 21/13  
 understand [1] 22/15  
 unfortunate [1] 18/10  
 unfortunately [1] 10/10  
 UNITED [5] 1/1 1/16 2/16 9/23 14/13  
 unjustified [1] 23/25  
 unless [1] 8/10  
 unlike [1] 7/11  
 unnecessary [1] 10/21  
 up [5] 10/19 20/21 20/25 23/6 26/6  
 upon [4] 4/15 12/24 14/11 20/10  
 use [3] 21/15 21/17 23/11  
 used [2] 13/24 21/16

**V**

vehicle [6] 6/8 6/8 6/9 6/9 14/5 23/3  
 vehicle-to-cyclist [1] 6/9  
 vehicle-to-pedestrian [1] 6/9  
 vehicle-to-vehicle [1] 6/8  
 vehicles [3] 21/23 24/16 25/7  
 very [11] 4/11 5/9 9/9 10/16 16/23 17/12  
 17/19 18/10 19/4 20/20 27/23  
 violation [2] 17/22 18/20  
 visit [1] 5/6

**W**

W-A-R-T-H [1] 13/6  
 walking [1] 26/2  
 want [3] 9/5 26/14 26/22

wants [1] 16/15  
 WARREN [6] 2/10 2/10 11/23 19/20  
 26/12 27/10  
 Warth [3] 9/4 13/5 13/5  
 was [26]  
 way [2] 13/2 25/15  
 we [51]  
 we'll [4] 10/12 23/5 26/6 27/9  
 we're [6] 3/6 6/19 6/21 10/11 11/20 26/5  
 we've [2] 12/17 27/1  
 weeks [1] 12/11  
 well [18]  
 went [2] 23/1 24/22  
 were [16]  
 Westlaw [1] 12/12  
 what [20]  
 what's [3] 17/11 21/20 21/20  
 whatever [7] 7/11 7/13 14/5 15/9 15/13  
 23/11 26/10  
 when [5] 3/18 21/18 22/16 25/18 25/21  
 where [22]  
 whether [7] 5/15 5/21 6/22 6/25 7/1 16/9  
 17/14  
 which [15]  
 who [1] 17/4  
 who's [3] 9/9 15/22 20/17  
 whole [2] 5/5 11/3  
 why [3] 3/16 10/22 14/7  
 will [8] 5/3 5/6 16/24 18/4 18/19 25/17  
 25/17 26/9  
 within [2] 7/25 25/24  
 without [1] 29/16  
 WL3866475 [1] 12/13  
 won't [1] 26/3  
 words [1] 3/19  
 would [19]  
 wouldn't [5] 5/14 11/16 16/1 24/21  
 27/16  
 wrong [1] 26/4

**Y**

Yeah [2] 26/18 26/21  
 year [2] 4/4 18/8  
 yellow [9] 4/20 6/4 7/23 13/21 14/1  
 17/10 21/21 24/22 25/14  
 yellow-to-red [1] 6/4  
 Yes [6] 14/19 14/21 18/15 19/13 24/18  
 25/5  
 yet [3] 17/5 22/18 26/17  
 you [57]  
 you're [4] 8/22 10/23 11/2 13/23  
 you've [4] 6/25 13/23 15/12 21/16  
 your [32]  
 Your Honor [2] 4/24 18/7

**Z**

zone [1] 25/16  
 zoning [1] 13/7

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September, 2014, I served the foregoing

**DECLARATION OF SHENOA L. PAYNE**, on the following:

Gerald L. Warren  
Law office of Gerald Warren  
901 Capitol Street, NE  
Salem OR 97301  
Attorney for Defendant

by the following indicated method(s):

- by **mail** with the United States Post Office at Portland, Oregon in a sealed first-class postage prepaid envelope.
- by **email**.
- by **hand delivery**.
- by overnight mail.
- by **facsimile**.
- by the court's Cm/ECF system.

/s/ Shenoa L. Payne  
Shenoa L. Payne, OSB No. 084392

**Pamela Vanderheiden**

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**District of Oregon**

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**Document Number:** 34

**Docket Text:**

**Declaration of Shenoa Payne . Filed by Mats Jarlstrom. (Related document(s): Objection[32].) (Attachments: # (1) Exhibit A) (Haglund, Michael)**

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