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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

PLAINTIFF'S OBJECTIONS TO FINDINGS AND RECOMMENDATION

I. INTRODUCTION.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2), plaintiff objects to the Findings and Recommendation issued by Judge Acosta on August 26, 2014. *See* Findings and Recommendation, Dkt No. 27 (Aug. 26, 2014) (F&R). Judge Acosta recommended that defendant City of Beaverton's motion to dismiss should be granted, plaintiff Mats Jarlstrom's motion to amend the complaint should be denied, and the case should be dismissed with prejudice. Plaintiff objects to specific portions of the F&R, as explained in detail below.

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II. PROCEDURAL BACKGROUND.

On May 13, 2014, Mr. Jarlstrom brought this action against the City of Beaverton under 42 U.S.C. § 1983 alleging that the City's yellow light intervals at signalized intersections were too short to provide sufficient time for drivers to stop safely and to drive safely through the intersection when the yellow light illuminates, exposing plaintiff to a serious risk of death when attempting to cross the intersection as a pedestrian or in a vehicle. Compl., Dkt No. 1 (May 13, 2014) ¶¶ 1, 9.

Defendant moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that plaintiff lacked standing, failed to allege a federal claim, and failed to plead facts sufficient to state a claim. Def.'s Mot. to Dismiss and Mem. of Law, Dkt No. 11 (Jun. 16, 2014) (Def.'s Mot. Dismiss). Plaintiff opposed the motion, arguing that plaintiff (1) had standing because he adequately alleged a credible threat of future injury and (2) stated a federal claim for relief under 42 U.S.C. § 1983 under the state-created danger exception. Pl.'s Mem. in Opp'n. to Def.'s Mot. to Dismiss, Dkt No. 14 (Jul. 3, 2014) (Pl.'s Opp'n.). Judge Acosta stayed discovery pending the outcome of defendant's motion to dismiss. Order Granting Def.'s Mot. to Stay Discovery, Dkt No. 17 (Jul. 3, 2014).

Mr. Jarlstrom also moved for leave to amend his Complaint. Pl.'s Mot. for Leave to File First Am. Compl., Dkt. No. 16 (July 3, 2014). The City opposed plaintiff's motion, arguing that it was brought in bad faith and the amendments were futile. Def.'s Opp'n to Pl.'s Mot. for Leave to File Am. Compl., Dkt. No. 21 (July 17, 2014).

Oral Argument on both motions was held before Judge Acosta on August 25, 2014. The next day, Judge Acosta issued Findings and Recommendation granting defendant's motion to

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dismiss, denying plaintiff's motion to amend the complaint, and dismissing plaintiff's case with prejudice.

III. LEGAL STANDARD.

Under the Federal Magistrates Act, the court may "accept, reject or modify, in whole or in part, the findings and recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). When a party files objections to a magistrate's findings and recommendations, as the plaintiff has done here, "the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3). "De novo review" means that the court "do[es] not defer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below." *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009) (internal citations omitted).

IV. ARGUMENT.

A. Judge Acosta Erred in Granting Defendant's Motion to Dismiss Plaintiff's Complaint.

1. Judge Acosta applied an incorrect legal standard.

Judge Acosta determined that "the court need not presume the truthfulness of the allegations in the Complaint," because the City's jurisdictional challenge to Mr. Jarlstrom's complaint was "factual," rather than "facial." F&R at 4. However, the City's jurisdictional challenge to the Complaint was *facial*, not factual. Therefore, Judge Acosta was required to apply the motion to dismiss standard under Fed. R. Civ. P. 12(b)(6).

Under Rule 12(b)(1), a defendant may challenge the plaintiff's jurisdictional allegations in one of two ways. A "facial" attack accepts the truth of the plaintiff's allegations but asserts that they "are insufficient on their face to invoke federal jurisdiction." *Leite v. Crane Co.*, 749

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F3d 1117, 1121 (9th Cir. 2014) (internal citation omitted). The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6). Accepting as true plaintiff's allegations and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction. *Id.*

A "factual" attack, on the other hand, "contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings." *Id.* "*When the defendant raises a factual attack*, the plaintiff must support her jurisdictional allegations with competent proof . . . under the same evidentiary standard that governs in the summary judgment context." *Id.* (internal citation omitted; emphasis added).

Here, the City's challenge was a *facial* one, not a factual one. All of the City's arguments focused on the insufficiency of Mr. Jarlstrom's allegations on the face of his complaint. *See* Def.'s Mot. Dismiss at 3 (Plaintiff "fails to allege . . . any actual injury."); *id.* ("Nowhere does Jarlstrom allege that he has been in an accident"); *id.* ("Jarlstrom does not allege any injury he suffered, he merely hypothesizes about some possible future injury"); *id.* at 4 (Jarlstrom "alleges only conjectural injury"); *id.* ("At no time is there any allegation that he has been harmed"). At no time did the City contest the truth of Mr. Jarlstrom's standing allegations or introduce any evidence outside of the pleadings to do so. Therefore, the City's challenge was a *facial* one, not a factual one, and Mr. Jarlstrom was not required to support his jurisdictional allegations with competent proof.

Nonetheless, Judge Acosta determined that, because *Mr. Jarlstrom* filed a declaration in opposition to the City's motion, and because the court considered the declaration, the City's challenge was converted from a facial to a factual challenge. F&R at 6. There is no authority for

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such a proposition. Rather, it is the *challenger* to subject matter jurisdiction that determines whether the attack is facial or factual, not the plaintiff. *See Leite*, 749 F.3d at 1121; *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Hence, Judge Acosta was required to apply the motion to dismiss standard under Rule 12(b)(6) and he erred in failing to do so.[1]

Judge Acosta's failure to apply the correct legal standard affected his ultimate determination that Mr. Jarlstrom failed to adequately meet the requirements of standing. For example, Judge Acosta determined that Mr. Jarlstrom's allegations failed to show a credible threat of injury because he "failed to *establish* that the short yellow-light intervals present any increased risk or danger to himself, or others." F&R at 10 (emphasis added). However, Mr. Jarlstrom is not required to *prove* his allegations at the motion to dismiss stage of the litigation. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 n. 8 (2007) (when complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder); *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1160 (9th Cir. 2007) (question presented is whether complaint is sufficient to survive motion to dismiss, not whether alleged facts will ultimately prove accurate).

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[1] At no point did defendant argue, nor did Judge Acosta assert during oral argument, that the submission of plaintiff's declaration (and the court's consideration of it) somehow prevents the court from taking the allegations in the complaint as true. Def.'s Mot. Dismiss; Decl. of Shenoa L. Payne (Payne Decl.), Ex. A at 6:24-25, 7:1 (Judge Acosta noting that motion to dismiss standard did not apply because "You have a standing issue."). Had such an argument been raised, plaintiff could have responded to it. *See Slockish v. U.S. Federal Highway Admin*, 682 F. Supp. 2d 1178, 1186 (D. Or. 2010) (noting that because the defendant did not raise the particular standing argument in its motion to dismiss, the plaintiff did not have an opportunity to respond to it). Mr. Jarlstrom also could have offered to withdraw his declaration from the court's consideration had he known it would have the effect of changing the legal standard.

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This Court should reject Judge Acosta's Findings and Recommendation and apply the correct legal standard in reviewing the City's motion to dismiss *de novo*.

2. Judge Acosta erred in determining that plaintiff failed to adequately plead the injury-in-fact prong of standing.

Judge Acosta determined that Mr. Jarlstrom failed to adequately plead the injury-in-fact prong of standing. F&R at 6-13. Here, Mr. Jarlstrom seeks only injunctive relief. Compl. at 5. Therefore, Mr. Jarlstrom can establish standing under Article III by showing a credible threat of future injury. *Ibraham v. Dep't of Homeland Sec.*, 669 F.3d 983, 992 (9th Cir. 2012).

Judge Acosta determined that plaintiff did not show a credible threat of future injury in this case because "Jarlstrom failed to allege he is realistically threatened with a certainly impending injury unique to him." F&R at 14. In reaching that conclusion, Judge Acosta reasoned that (1) he would have to assume that a driver is violating the traffic laws to make the serious injury alleged by Mr. Jarlstrom likely; (2) Mr. Jarlstrom failed to establish that the yellow-light intervals presented any increased risk or danger; (3) the absence of any allegation that the yellow-light intervals caused accidents in the past undermines his argument that a credible threat of injury exists; and (4) Mr. Jarlstrom raised only a generalized grievance. Plaintiff addresses each of those assumptions in turn.

a. *No illegal conduct is necessary for the alleged injuries to occur.*

Judge Acosta relied on the Oregon Vehicle Code to conclude that "the court would have to assume that a driver is violating the traffic laws to make the serious injury alleged by Jarlstrom likely, something it is not allowed to do." *Id.* at 9. According to Judge Acosta:

> Here, Jarlstrom alleges the short yellow-light intervals expose him to serious risk of physical injury because he, as a pedestrian, or driver or passenger in a vehicle, might enter an intersection with a green light and collide with a

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vehicle entering the intersection with a yellow light but insufficient time to travel through the intersection. This scenario assumes that the driver entering the intersection on the yellow light did so without regard to the possibility of cross-traffic in the intersection, in violation of Or. Rev. Stat. 811.260(4), which provides:

> A driver facing a steady circular yellow signal light is thereby warned that the related right of way is being terminated and that a red or flashing red light will be shown immediately. A driver facing the light shall stop at a clearly marked stop line, but if none, shall stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, then before entering the intersection. If a driver cannot stop in safety, the driver may drive cautiously through the intersection.

Jarlstrom does not allege that a driver entering an intersection on a green light, just before the light turns yellow, does not have sufficient time to travel through the intersection before the light turns red. Therefore, the driver at issue enters the intersection on a yellow light and must, under Oregon law, drive cautiously through the intersection. A driver complying with the law would be aware of any traffic entering the intersection in front of him and would, in all likelihood, avoid a collision. Only a driver who is violating the law by entering the intersection on a yellow light, without caution and without regarding to possible cross traffic entering the intersection ahead of him, would be likely to collide with such cross traffic.

Additionally, as noted by the City, the driver would also be in violation of Or. Rev. Stat. 811.100(1)(c), which provides: "[a] person commits the offense of violating the basic speed rule if the person drives a vehicle upon a highway at a speed greater than is reasonable and prudent, having due regard to . . . [t]he hazard at intersections."

Finally, Jarlstrom's scenario assumes that a driver entering the intersection on a newly-green light would do so in violation of Or. Rev. Stat. 811.260(1), which requires a driver facing a green light to "yield the right of way to other vehicles within the intersection at the time the green light is shown." Accordingly, the court would have to assume that a driver is violating the traffic laws to make the serious injury alleged by Jarlstrom likely, something it is is not allowed to do.[2]

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[2] Plaintiff notes that the arguments in relation to Or. Rev. Stat. 811.260(4) and Or. Rev. Stat. 811.260(1) were neither raised by defendant in its motion to dismiss nor by Judge Acosta at oral argument. *See* Def.'s Mot. Dismiss at 8-9 (noting that a driver must not violate the speed

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Judge Acosta's analysis suffers from several flaws. First, he focuses only on the allegations in Mr. Jarlstrom's complaint pertaining to *vehicle to vehicle* collisions, and completely ignores Mr. Jarlstrom's allegations regarding risk to Mr. Jarlstrom as a *pedestrian*. *See* Compl. ¶¶ 1, 12, 13. Because a pedestrian has the right of way, *see* Or. Rev. Stat. 811.028, and is not subject to Or. Rev. Stat. 811.260(1), Judge Acosta's conclusion that Jarlstrom's scenario "assumes that a driver entering the intersection on a newly-green light would do so in violation of Or. Rev. Stat. 811.260(1)," is simply incorrect.[3]

Judge Acosta also ignores allegations in Mr. Jarlstrom's complaint that a driver proceeding through a signalized intersection on a yellow light would be driving through the intersection in compliance with both Or. Rev. Stat. 811.260(4) *and* Or. Rev. Stat. 811.100(1)(c). Mr. Jarlstrom's complaint alleges that the short yellow light intervals expose Mr. Jarlstrom, as a pedestrian, to a serious risk of physical injury or death because he may be entering the intersection as a pedestrian "before a vehicle *attempting to safely drive through an intersection* during the yellow light interval has sufficient time to accomplish that transit." *Id.* ¶ 12. Driving *safely* through an intersection is not materially distinguishable from driving *cautiously* through an intersection. A driver who is attempting to drive safely through an intersection also will not

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law, but not invoking any other statute of the Oregon Vehicle Code); Payne Decl., Ex. A at 3-17 (no mention of issue during portion of oral argument on standing). Plaintiff should have had an opportunity to respond to those contentions before they became a basis for dismissal of his case, especially when the case was dismissed with prejudice. *Slockish*, 682 F. Supp. 2dat 1186.

[3] Although one could argue that an individual is violating the Oregon Vehicle Code by "failing to stop and remain stopped for a pedestrian" when the pedestrian is in a crosswalk pursuant to Or. Rev. Stat. 811.028(1)(a), as explained below, the pedestrian will step into the crosswalk at a point when the vehicle is too close to the crosswalk for the driver to have adequate reaction time to stop, no matter how cautious the driver is being. Neither individual will be violating the law and it is the City – not the driver or the pedestrian – that is responsible for preventing this situation.

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be driving at a "speed that is greater than is reasonable and prudent, having due regard to . . . [t]he hazard at intersections." Or. Rev. Stat. 811.100(1)(c). Thus, Mr. Jarlstrom's allegations, when viewed under the correct legal standard, adequately allege that the driver is complying with Oregon law and Judge Acosta erred in assuming otherwise.

Mr. Jarlstrom alleged detailed facts to support this scenario in paragraph 13 of his Complaint and Exhibit A. The "critical stopping distance" on the diagram is the "start reference" line and is 141 feet away from the intersection. That line refers to the *critical point* from the intersection's entry point where a car both *can and cannot* stop safely. Thus this critical stopping distance is then both the *minimum safe* stopping distance *and* the *maximum unsafe* stopping distance for a given approach speed. In the diagram the car is traveling at a constant 30 mph (44 ft./s) speed which is both the design speed and the posted speed limit for this approach. On Exhibit A, the critical stopping distance is 141 feet based on the Institute for Traffic Engineering (ITE) "one safe stopping distance" values for the driver reaction time and nonemergency deceleration rate used for the design of the yellow change interval. If the car is at or closer to the intersection than the critical stopping distance when the driver faces the yellow light the driver cannot stop safely before the "Stop Bar – Intersection Entry Point." A car can only stop safely (*i.e.* not decelerating harder than the safe ITE value) at the "Stop Bar – Intersection Entry Point" if the driver is at or farther from the critical stopping distance. If the driver cannot stop safely, the driver *must* proceed through the intersection.

As a comparison to the 141 feet critical stopping distance, the diagram also includes two emergency stopping distances for a car based on maximum deceleration rates using friction between the car's tires and the roadway for wet and dry payment. A car can emergency stop

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using friction on dry pavement in 94 feet and on wet pavement the car can emergency stop in 130 feet. If the car proceeds through the intersection at the constant 30 mph (44 ft./s) he will travel the 141 feet critical distance in the same time as the minimum yellow phase time of 3.2 seconds and enter the intersection exactly when the light turns red. At 3.7 seconds the driver has traveled another 22 feet in .5 seconds at the constant 30 mph speed and is just inside the intersection when the pedestrian walk signal turns on as illustrated by the fourth vehicle in the diagram. The driver will reach the crosswalk with the pedestrian at 5.0 seconds and 219 feet (as illustrated in the diagram) , meaning the driver has less than 1.3 seconds and/or 56 feet to react, break, and stop the car. But at 30 mph, the emergency stopping distance is 94 feet (on dry pavement) (illustrated by the second car in the diagram) which makes a 56 feet stopping distance impossible to avoid the pedestrian.

The situation in Exhibit A does not improve if a driver *slows down*. That is so because if the driver is traveling at 30 mph and faces the yellow light at or closer to the intersection than the critical stopping distance and he slows down before entering the intersection the yellow light will transfer to red before the driver has reached the intersection's entry point and thus the driver will violate the red light. The reason can be understood from Exhibit A – the minimum yellow phase time is the *exact* time it takes to travel the critical stopping distance at the *constant 30 mph design speed*. Therefore, if the driver is slowing before entering the intersection the driver will cover less distance during the yellow phase time, thus reaching the intersection too late.[4] Hence, the driver running the red light is still in the intersection, meaning that there is even a greater risk

[4] The TIME bar on the bottom of the graph in Exhibit A states "(Only for 30 mph)." The time it takes to clear the intersection is effected by the constant speed – *i.e.*, it takes longer for a vehicle traveling at a constant speed slower than 30 mph to clear the intersection.

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of cross traffic or a pedestrian entering the intersection at a point where the driver is still in the intersection.[5] The risk in that situation is inherent. *This is the very purpose of and necessity for proper timing of traffic control devices. See* Or. Rev. Stat. 810.260(1)(a) (requiring the Oregon Department of Transportation, in adopting standards for the installation, operation and use of traffic signals, to consider the impact of traffic control signal operating devices on "safety").[6]

It is also axiomatic that, if a driver cannot physically stop before hitting a pedestrian as described in the above scenario, other dangerous scenarios are highly probable – *i.e.* the driver is likely to swerve in order to avoid hitting the pedestrian. Therefore, both the driver that proceeded cautiously through the intersection *and third party drivers* will be at risk of a vehicle-to-vehicle collision when that driver swerves to avoid the pedestrian. Mr. Jarlstrom would be at risk of injury as a pedestrian, a driver attempting to avoid hitting the pedestrian, or as a third party who could be hit by the driver attempting to avoid hitting the pedestrian.

Therefore, Judge Acosta erred in assuming that a driver would have to violate the traffic laws to make the serious injury alleged by Mr. Jarlstrom "likely."

b. *Natural Resources Defense Council* dictates the outcome of this case.

Because Judge Acosta relied on the premise that illegal conduct was necessary for harm to occur, he determined that Mr. Jarlstrom's standing allegations were more akin to *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) than *Natural Res. Def. Council v. United States Envtl.*

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[5] Mr. Jarlstrom explains this concept more adequately in his declaration, submitted in consideration of his argument that he should have been allowed to amend his complaint. *See* discussion *infra* Part IV(B).

[6] Although Or. Rev. Stat. 810.260 governs ODOT's conduct, it supports the proposition that local government bodies, such as the City of Beaverton, should also consider safety in the installation, operating and use of traffic control single operating devices.

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Prot. Agency, 735 F.3d 873 (9th Cir. 2013). In *Natural Resources*, the Ninth Circuit held that the plaintiff's allegations that the defendant's actions in conditionally registering two pesticides for use exposed its members' children to a credible threat of injury sufficient to establish standing. 735 F.3d at 879. The defendant had conditionally registered two pesticides with the EPA that it sought to apply to manufactured textiles such as clothing, blankets, and carpet. *Id.* at 875. Conditional registrations are granted only if the Administrator of the EPA determines that use of a pesticide during an initial defined period "will not cause any unreasonable adverse effect on the environment and that use of the pesticide is in the public interest." *Id* at 876. The plaintiffs challenged the assumptions used and the calculations performed by the EPA in determining that the aggregate exposure measure did not indicate that the pesticides posed an unreasonable risk to consumers. *Id.* at 877. The EPA argued that NRDC's members did not face an injury that was "actual or imminent" as opposed to "conjectural or hypothetical." The Ninth Circuit disagreed, reasoning that

> EPA's decision to conditionally register [the pesticides] increases the threat of future harm to NRDC's members. Absent EPA's authorization, there is roughly no chance that the children of NRDC members will be exposed to [the pesticides]. Conditional registration of the product *increases the odds of exposure*. As with many Article III standing cases, the threatened harm "is by nature probabilistic."
> . . . .
>
> NRDC has carried its burden to demonstrate that there is a "credible threat" that its members' children will be exposed to [the pesticides] as a consequence of the EPA's decision to conditionally register the product. The ubiquity of textiles and the lack of public information concerning the chemical treatments applied to them during the manufacturing process would combine to make it *nearly impossible for NRDC members to eliminate [the pesticides] from their children's lives* . . . .

Id. at 878 (emphases added).

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Despite the similarities in *Natural Resources* and this case, Judge Acosta distinguished *Natural Resources* on the following basis:

> The key distinction between *Natural Resources* and Jarlstrom's circumstances is the generally accepted premise that exposure to the pesticide, a toxic product, presented an increased risk of danger to children.[FN 2]
>
> FN 2. While the amount of exposure expected by the defendant's actions and the risk resulting therefrom were at issue, the parties did not dispute the underlying premise that exposure to the toxic product, a pesticide that required registration with the Environment Protection Agency, could cause unreasonable adverse effects on human health or the environment. *Natural Res.*, 735 F.3d at 875.
>
> Unlike the plaintiff in *Natural Resources*, Jarlstrom has *failed to establish that the short yellow-light intervals present any increased risk or danger to himself, or others.* Accordingly, Jarlstrom's inability to avoid the short yellow-light interval intersections does not establish a credible threat that he is being exposed to actual or imminent harm.

F&R at 10 (emphasis added).

Judge Acosta's analysis is incorrect for two reasons: First, it assumes that there was no dispute as to the dangerousness of the product in *Natural Resources* and, second, it requires Mr. Jarlstrom to prove that the yellow lights are dangerous. However, contrary to Judge Acosta's statement that "the parties did not dispute the underlying premise that exposure to the toxic product could cause unreasonable adverse effects to human health," the very dispute in *Natural Resources* was whether the pesticides at issue would cause an "unreasonable adverse effect on the environment." *Id.* at 876. The EPA said they would not and conditionally registered them. The plaintiffs disagreed and alleged that they would and that the EPA erred in conditionally registering them. *Id.* at 877. It was far from undisputed that the pesticides were dangerous or would increase the risk of danger. More importantly, the Ninth Circuit in *Natural Resources* did not require the plaintiffs to prove that the pesticides *were dangerous*. The Court instead held that

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a plaintiff is only required to show that the "*purported* injury is 'actual or imminent.'" *Id.* at 879 (emphasis added). Thus, by requiring plaintiff to *establish* that the yellow lights are dangerous at this point in the process, Judge Acosta erred.

c. *Mr. Jarlstrom is not required to allege that the yellow lights have already caused injury.*

Judge Acosta also determined that Mr. Jarlstrom's failure to allege the short-yellow light intervals have caused accidents in the past undermines Mr. Jarlstrom's argument that credible threat of such injury exists. *Id.*

Judge Acosta relies on *Stubbs v. Goldschmidt*, No. Civ. 04-6029-AA, 2004 WL 1490323, *7 (D. Or. Jun. 29, 2004), a case involving threat of prosecution. However, there is a long line of cases that state that one of three elements that a plaintiff must demonstrate to establish ripeness or standing in "threat of prosecution" cases is "a history of past prosecution or enforcement under the challenged statute." *See Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1140 (9th Cir. 1999). That principle is limited and unique to threat of prosecution cases, and simply does not extend to general standing jurisprudence. *See San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F3d 1163, 1173 (9th Cir. 2011) (noting that the pre-enforcement analysis for standing and ripeness in *Thomas* did not apply because the plaintiffs were not the target of enforcement).

The Ninth Circuit has confirmed time and again that a concrete *risk* of harm is sufficient for injury in fact. *Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004) (the relevant inquiry is not whether there *has been* a breach of the Resource Conservation and Recovery Act by the County, but whether defendant's actions have caused "reasonable concern" of injury to the plaintiffs); *Central Delta Water Agency v. United States*, 306 F.3d 938, 948-50 (9th Cir. 2002) (a

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credible threat of harm is sufficient to constitute actual injury for standing purposes); *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002) (holding that a plaintiff who is threatened with harm in the future by existing or imminently threatened non-compliance with the Americans with Disabilities Act suffers "imminent injury."). A plaintiff need not wait until he or she suffers physical harm to sue, as that would eliminate the claims of those "directly threatened but not yet [damaged]." *Harris v. Board of Supervisors, Los Angeles County*, 366 F.3d 754, 762 (2014). Judge Acosta erred in determining that Mr. Jarlstrom was required to plead past injuries to meet the injury-in-fact requirement.

d. *Mr. Jarlstrom's allegations do not constitute a generalized grievance.*

Finally, Judge Acosta determined that Mr. Jarlstrom fails to allege injury "unique to him." Dismissal of Mr. Jarlstrom's complaint for lack of standing on this basis was improper for two reasons. First, a generalized grievance is one that applies when the plaintiff alleges a grievance shared by a "large number of Americans." *See Federal Election Com'n v. Akins*, 524 U.S. 11, 23 (1998); *see also Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 901 (9th Cir. 2011) (allegations that government engaged in dragnet eavesdropping of American citizens raised possibility of generalized grievance because injury "held in common by all members of the public"); *Covington*, 358 F.3d at 651 (Gould, J., concurring) (ozone degradation raised possibility of generalized grievance because constituted a threat of widespread or even global injury). Here, Mr. Jarlstrom limits his allegations of injury to signalized intersections within the City of Beaverton. Compl. ¶¶ 1, 9, 15. Although not unique to him, such injury is not shared by American citizens at large or all members of the public, and is hardly of the breadth of those cases applying the generalized grievance principle.

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Second, even if Mr. Jarlstrom's allegations were of the breadth to constitute a generalized injury, generalized injuries do not bar standing, however widespread, if the injury is concrete and particularized. *Akins*, 524 U.S. at 24-25; *Covington*, 358 F.3d at 651-52 (Gould, J. concurring). Judge Acosta determined that Mr. Jarlstrom's injury was "abstract and indefinite" because he failed to allege had "has suffered an injury." F&R at 13. As explained above, Mr. Jarlstrom is not required to allege past harm, only a credible threat of future harm. *See Covington*, 358 F.3d at 652 (Gould, J., concurring) (explaining that a credible threat of future injury is "concrete" for such purposes).

3. Judge Acosta was incorrect in concluding that plaintiff failed to meet the causal connection and redressability requirements of standing.

In its motion to dismiss, the City argued that *because* Mr. Jarlstrom had not met the injury-in-fact requirement, he also failed to meet the other two requirements of standing – causation and redressability. Def.'s Mot. Dismiss at 3; *see also* City's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss (Def.'s Reply) at 4-5. Judge Acosta agreed, determining that the threat was not caused by the City, but by the "unlawful" driving practices of those driving through intersection. F&R at 14. For the same reason, Judge Acosta determined that the Complaint fails to establish that the remedy sought by Mr. Jarlstrom would alleviate his alleged injury. *Id.*

As described above, Judge Acosta erred in determining that there was no injury in fact and, in particular, that any injury is caused by "unlawful driving practices of those driving through intersections." Thus, his conclusions as to causation and redressability are also incorrect.

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B. Judge Acosta Erred in Dismissing Plaintiff's Case with Prejudice.

Judge Acosta erred in dismissing plaintiff's action with prejudice. "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . ." Fed. R. Civ. P. 15(a); *Albrecht v. Lund*, 845 F.2d 193, 195, *as amended*, 856 F.2d 111 (9th Cir. 1988). A motion to dismiss is not a "responsive pleading." *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984). Neither the filing nor granting of a motion to dismiss terminates the right to amend, and a motion for leave to amend (though unnecessary) must be granted if filed. *Breier v. N. Cal. Bowling Proprietors' Ass'n*, 316 F.2d 787, 789 (9th Cir. 1963). Hence, Judge Acosta erred in denying plaintiff's right to amend as a matter of course.

The only exception to the above rule is if a complaint "cannot under any conceivable state of facts be amended" to establish standing – *i.e.* any further amendment would be futile. *Id.*; *Albrecht*, 845 F.2d at 195. Under a futility analysis, "[d]ismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by any amendment." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (quoting *Krainski v. Nevada ex rel. Bd. of Regents of NV. System of Higher Educ.*, 616 F.3d 963, 972 (9th Cir. 2010)). Leave to amend should be granted "if it appears at all possible that the plaintiff can correct the defect." *Breier*, 316 F.2d at 790.

The court should consider whether it can "conceive of additional facts that could, if formally alleged" cure the deficiencies. *Corinthian Colleges*, 655 F.3d at 995; *see also Scott v. Eversole Mortuary*, 522 F.2d 1110, 1116 (9th Cir. 1975). A court abuses its discretion when it dismisses a complaint with prejudice without considering whether additional facts could cure any deficiencies. *Corinthian Colleges*, 655 F.3d at 996. If the complaint's allegations are

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insufficient to confer standing, "[o]ften a plaintiff will be able to amend its complaint to cure standing deficiencies." *Byrd v. Guess*, 137 F.3d 1126, 1131 (9th Cir. 1998).[7]

Here, Judge Acosta dismissed the complaint without considering whether *any* additional facts could cure the deficiencies he identified. Although Judge Acosta determined that the allegations *in the proposed First Amended Complaint* were futile because they would not alter his analysis or the outcome, F&R at 16, he failed to make the requisite determination that the complaint could not be saved "by *any* amendment."[8] *Corinthian Colleges*, 655 F.3d at 995 (emphasis added). Judge Acosta therefore erred in dismissing the complaint with prejudice.

Although, as outlined above, plaintiff disagrees with the deficiencies identified by Judge Acosta, there are additional facts that could, if formally alleged, cure the identified deficiencies. For example, Judge Acosta determined that the fact that "the absence of any allegation that short yellow-light intervals have resulted in injury ultimately prevents him from satisfying the injury-in-fact requirement" and that "the absence of allegations or evidence of [accidents occurring at the short yellow-light interval intersections] necessitates a finding that the threat perceived by Jarlstrom is not actual or imminent." F&R at 10, 11. It is conceivable, however, that Mr. Jarlstrom could amend his complaint to add allegations that accidents occurred at the short

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[7] Courts often find that "futility" exists only after a plaintiff has made multiple attempts to cure deficiencies identified by the court. *See, e.g.*, *Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1136 (N.D. Cal. 2014) (dismissing with prejudice after the plaintiff failed to cure the deficiencies as to standing *identified by the court* in *three* amended complaints). Here, plaintiff proposed an amended complaint before the court identified any deficiencies.

[8] Judge Acosta also erred in determining that the allegations in the proposed First Amended Complaint were futile. Those allegations were sufficient for all the reasons that the allegations in the original Complaint were sufficient.

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yellow-light interval intersections as a direct result of the shortened timing.[9] Such evidence is particularly conceivable where studies have shown that properly timed yellow-light intervals may reduce pedestrian injuries as much as 37% and overall crashes resulting in injuries roughly 12%. Decl. of Mats Jarlstrom (Jarlstrom Decl.) ¶ 9 & Ex 2 at 3.

In addition, Judge Acosta determined that Mr. Jarlstrom failed to plead a credible threat of future injury because "the court would have to assume that a driver is violating the traffic laws to make the serious injury alleged by Jarlstrom likely." F&R at 9. As explained above, Mr. Jarlstrom's complaint contains allegations that if taken as true dispute that conclusion. However, Mr. Jarlstrom could allege even more detailed facts that would dispute that assumption.

For example, Mr. Jarlstrom explains in detail in his declaration that driving with caution cannot mean slowing down, because a driver who drives slower than the posted speed limit of 30 mph will actually *increase* the danger to pedestrians, the driver, and drivers of other vehicles. Jarlstrom Decl. ¶ 22. That is so, because a driver who either decelerates or drives slower than the speed limit takes longer to clear the intersection after the light has changed from yellow to red and the pedestrian will have traveled farther into the roadway at the time the vehicle is reaching the intersection's exit with the pedestrian in the crosswalk. *Id.* ¶¶ 16-21. Despite driving slower, even a cautious driver cannot physically stop in time to avoid hitting a pedestrian once the pedestrian enters into the crosswalk, due to the short distance the vehicle is away from the pedestrian at the time the pedestrian enters the crosswalk. *Id.* ¶¶ 18-19. With the current yellow-light timing in the City of Beaverton's intersections, a driver could have to drive slower

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[9] At oral argument, plaintiff's counsel informed the court that if plaintiff were allowed to amend, he could address the court's concern regarding any conclusory allegations that the timing of the yellow light had caused more accidents. Payne Decl., Ex. A at 11:2-21.

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than half the speed limit (for example, 12.5 mph in a 30mph speed zone as demonstrated in Exhibit A) to have adequate reaction and stopping distance to avoid hitting a pedestrian. However, driving slower than half the speed limit is neither "safe" nor "cautious." *Id.* ¶ 20. Furthermore, because drivers – even those who exercise the utmost "caution" – cannot physically stop in time to avoid hitting a pedestrian, it is likely such drivers will use other methods to avoid the contact with the pedestrian, such as swerving. *Id.* ¶¶ 18, 23. A driver that swerves will put that driver – and drivers of other vehicles in the vicinity – in danger of a vehicle-to-vehicle collision. *Id.* ¶ 23. If Mr. Jarlstrom had the opportunity to allege the additional facts contained in his declaration, he would be able to dispute that driving "cautiously through the intersection" in compliance with Or. Rev. Stat. 811.206(4), somehow prevents the injury alleged in Mr. Jarlstrom's complaint.

Because it is conceivable that Mr. Jarlstrom could allege additional facts that would cure the deficiencies in Mr. Jarlstrom's complaint, Judge Acosta erred in dismissing his complaint with prejudice.

V. CONCLUSION.

For the reasons stated above, plaintiff respectfully requests that this Court reject the Findings and Recommendation in their entirety.

DATED this 10th day of September, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September, 2014, I served the foregoing **PLAINTIFF'S OBJECTIONS TO FINDINGS AND RECOMMENDATION,** 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):

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☒ by the court's Cm/ECF system.

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