

1  
2  
3  
4  
5  
6  
7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
9

10 MARSHAWN GOVAN,

CASE NO. CV F 13-0547 LJO SMS

11 Plaintiff,

**ORDER TO DISMISS REMAINING CLAIM  
AND JUDGMENT**  
(Doc. 49.)

12  
13 vs.

14  
15 CITY OF CLOVIS, et al.,

16 Defendants.  
17

18  
19 **BACKGROUND**

20 Defendant City of Clovis ("City") seeks to dismiss as legally barred pro se plaintiff  
21 Marshawn Govan's ("Mr. Govan's") sole remaining equal protection challenge to the City's  
22 Sign Law.<sup>1</sup> Mr. Govan filed no timely papers to oppose dismissal of his equal protection  
23 claim. This Court considered the City's alternative F.R.Civ.P. 12 motions to dismiss on the  
24 record and VACATES the November 21, 2013 hearing, pursuant to Local Rule 230(g). For the  
25 reasons discussed below, this Court DISMISSES Mr. Govan's equal protection claim and in  
26

27 <sup>1</sup> The Sign Law is part of the City's ordinances, §1, Ord. 84-16, and will be referred to as the "Sign  
28 Law."

1 turn this action.

2 **BACKGROUND**<sup>2</sup>

3 **Mr. Govan's Use Of Sign Wavers**

4 Mr. Govan owns Liberty Tax Service which operates within the City's limits. Liberty  
5 Tax Service provides tax services during the January to April tax season.

6 Liberty Tax Service employs "wavers" who dress in Statue of Liberty or Uncle Sam  
7 costumes and wave small signs regarding tax services.

8 **Prohibited Signs**

9 Section 9.4.203 of the Sign Law prohibits:

10 1. "Moving signs" which have animation, including "moving, rotating" (section  
11 9.4.203(b)(2)) and "[s]igns which are portable" (section 9.4.203(c));

12 2. Signs "within public spaces," including "any public street, sidewalk, parking lot,  
13 or right-of-way" (section 9.4.203(e)(1)); and

14 3. "Temporary signs," including "affixing of signs of a miscellaneous character,  
15 visible from a public way" (section 9.4.203(e)(8)).

16 **Directional Signs**

17 The Sign Law regulates "directional signs" which "are needed by developers to a  
18 greater degree than other businesses because development project sales are ordinarily  
19 conducted for a relatively limited period of time for any particular location, that is, only until  
20 all units in the subdivision are sold." (Section 9.4.6101.) Directional signs offer "developers a  
21 means of providing directional signs to their projects, while minimizing confusion among  
22 prospective purchasers who wish to inspect development projects, while promoting traffic  
23 safety and reducing the visual blight of the present proliferation of signs." (Section 9.4.6102.)  
24 The Sign Law defines a directional sign as "any off-site standing, non-flashing sign which is  
25 designed, erected, and maintained to serve as a public convenience in directing pedestrian and  
26 vehicular traffic, but not used for the purpose of advertising use and activities on site." The

---

27  
28 <sup>2</sup> The factual background summarizes Mr. Govan's First Amended Complaint ("FAC") and other matters which this Court may consider.

1 Sign Law imposes requirements and restrictions (section 9.4.6110) for sign laws which require  
2 licensing (section 9.4.6107).

### 3 **Mr. Govan's Citations**

4 On January 29 and 30, 2013, Mr. Govan met with City officials to request a temporary  
5 permit for tax season.

6 On January 31, 2013 at 11:30 a.m., two City police officers approached Liberty Tax  
7 Service's sign waver and took photographs. At 1:12 p.m., a City police officer approached the  
8 sign waver and told him to put the sign down or be arrested.

9 On February 1, 2013 at 5 p.m., Mr. Govan was ticketed for Sign Law violations of  
10 animated signs, signs on public sidewalk, and temporary signs.

11 During the morning of February 2, 2013, Liberty Tax Service's manager observed a  
12 City patrol vehicle parked near the Liberty Tax Service office. Later that afternoon, a City  
13 police officer stopped Liberty Tax Service's sign waver, took his photograph, and asked if the  
14 sign waver was aware that he was "in violation of the code."

15 On February 4, 2013, the City maintained a police patrol vehicle in front of Liberty Tax  
16 Service's office.

17 On February 8, 2013, Mr. Govan was again ticketed for Sign Law violations of  
18 animated signs, signs on public sidewalk, and temporary signs.

19 On February 10, 2013, City police officers entered Liberty Tax Service's office and  
20 ticketed Mr. Govan for Sign Law violations of animated signs, signs on public sidewalk, and  
21 temporary signs.

22 On February 11, 2013, a City police officer approached Liberty Tax Service sign  
23 wavers, took their signs, and maintained a presence in the office during operations.

24 On February 13 and 16, 2013, Mr. Govan was ticketed for Sign Law violations of  
25 animated signs and temporary signs. The FAC notes that Mr. Govan's citations are numbered  
26 consecutively "because the sign code was not being enforced against any other."

27 The City Planning and Development Services issued a February 21, 2013 memo on  
28 sign code enforcement to note:

1 1. "The Clovis Police Department have [sic] been actively enforcing the Sign  
2 Ordinance in respect to temporary non-building mounted signs within specific target areas";  
3 and

4 2. "Mr. Govan continues to display his signs and stated during the meeting that the  
5 citations are a part of doing business."

6 On February 27, 2013, the City police maintained a patrol vehicle in front of Liberty  
7 Tax Service's office.

8 **Mr. Govan's Equal Protection Claim**

9 The FAC alleges that defendants have demoralized Mr. Govan's business "by  
10 defamation of character due to this constant harassment which has affected business  
11 productivity by intimidating [Liberty Tax Service] employees and clients with police  
12 presence." This Court's prior order dismissed all of the FAC's claims, except its (fifth) equal  
13 protection claim, which alleges:

14 1. The Sign Law "favors certain groups and organizations such has homebuilders,  
15 while simultaneously prohibiting the speech of other groups that would cause no more  
16 detriment to" the City's interests;

17 2. The City fails to "satisfy strict scrutiny as no compelling interests are satisfied  
18 by the Sign Code's favor of certain groups over another"; and

19 3. The Sign Law's "discriminatory provisions do no directly advance any  
20 legitimate governmental interest, or reach further than necessary to accomplish any alleged  
21 legitimate governmental objective."

22 **DISCUSSION**

23 The City seeks F.R.Civ.P. 12(b)(1) dismissal of the equal protection claim in that the  
24 Sign Law imposes no injury to Mr. Govan who thus lacks standing to pursue a claim a invoke  
25 this Court's subject matter jurisdiction. The City further seeks F.R.Civ.P. 12(b)(6) dismissal of  
26 the equal protection claim with the FAC's absence of facts that Mr. Govan was subjected to  
27 intentionally discriminating treatment.

28 ///

1 **F.R.Civ.P. 12(b)(1) Motion To Dismiss Standards**

2 If a plaintiff lacks standing, the plaintiff's action "should be dismissed" under  
3 F.R.Civ.P. 12(b)(1). *Cetacean Community v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004).

4 F.R.Civ.P. 12(b)(1) authorizes a motion to dismiss for lack of subject matter  
5 jurisdiction. Fundamentally, federal courts are of limited jurisdiction. *Kokkonen v. Guardian*  
6 *Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 341 (1994). A "court of the United States may not  
7 grant relief absent a constitutional or valid statutory grant of jurisdiction." *U.S. v. Bravo-Diaz*,  
8 312 F.3d 995, 997 (9<sup>th</sup> Cir. 2002). "A federal court is presumed to lack jurisdiction in a  
9 particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated*  
10 *Tribes*, 873 F. 2d 1221, 1225 (9<sup>th</sup> Cir. 1989). Limits on federal jurisdiction must neither be  
11 disregarded nor evaded. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98  
12 S.Ct. 2396 (1978). "When subject matter jurisdiction is challenged under Federal Rule of Civil  
13 Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the  
14 motion." *Tosco Corp. v. Communities for Better Environment*, 236 F.3d 495, 499 (9<sup>th</sup> Cir.  
15 2001).

16 Lack of subject matter jurisdiction "may be raised by a party, or by a court on its own  
17 initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v.*  
18 *Y&H Corp.*, 546 U.S. 500, 506, 126 S.Ct. 1235 (2006). F.R.Civ.P. 12(h)(3) instructs: "If the  
19 court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the  
20 action."

21 **Standing**

22 The constitutional requirements for standing emanate from Article III, section 2 of the  
23 United States Constitution, which grants federal courts jurisdiction over "cases" and  
24 "controversies." *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996). "It is the  
25 responsibility of the complainant clearly to allege facts demonstrating that he is a proper party  
26 to invoke judicial resolution of the dispute and exercise of the court's remedial powers."  
27 *Warth v. Seldin*, 430 U.S. 490, 518, 95 S.Ct. 2197 (1975). To invoke standing, a plaintiff must  
28 allege "(a) a particularized injury (b) concretely and demonstrably resulting from defendant's

1 action (c) which injury will be redressed by the remedies sought.” *Bowker v. Morton*, 541 F.2d  
2 1347, 1349 (9th Cir. 1976).

3 “At an irreducible minimum, Article III requires that the plaintiff show that he has  
4 personally suffered some actual or threatened injury as a result of defendant’s illegal conduct . .  
5 . and that the injury ‘fairly can be traced to the challenged action’ and ‘is likely to be redressed  
6 by a favorable decision.’” *Fair v. United States Envir. Protection Agency*, 795 F.2d 851, 853  
7 (9th Cir. 1986) (citation omitted; quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426  
8 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925 (1975) (standing is a constitutional limitation of  
9 federal court jurisdiction to actual cases or controversies and absent a showing of standing, an  
10 exercise of federal court power would be inconsistent with Article III limitations)). “Pecuniary  
11 injury is a sufficient basis for standing.” *Fair*, 795 F.2d at 853; see *Barlow v. Collins*, 397 U.S.  
12 159, 163-164, 90 S.Ct. 832, 835-836 (1970).

13 “A suit brought by a plaintiff without Article III standing is not a “case or controversy,”  
14 and “an Article III federal court therefore lacks subject matter jurisdiction over the suit.”  
15 *Cetacean Community*, 386 F.3d at 1174. The burden of establishing standing elements “falls  
16 upon the party asserting federal jurisdiction.” *Central Delta Water Agency v. United States*,  
17 306 F.3d 938, 947 (9th Cir. 2002). The standing elements are “not merely pleading  
18 requirements” but are an “indispensable part of the plaintiff’s case” and “must be supported at  
19 each stage of litigation in the same manner as any other essential element of the case.” *Central*  
20 *Delta*, 306 F.3d at 947.

21 The City challenges Mr. Govan's standing in the absence of FAC allegations that the  
22 Sign Law's directional sign provisions "have any relationship to the harms to Plaintiff alleged  
23 in the FAC regarding sign wavers." The City notes that directional signs are subject to the  
24 same prohibitions for which Mr. Govan was cited. The City continues that even in the absence  
25 of the directional sign provisions, Mr. Govan's "sign wavers would still be barred" under  
26 section 9.4.203. The City concludes that since Mr. Govan's sign wavers are prohibited under  
27 the Sign Law despite alleged unequal treatment in application of the directional sign provisions  
28 as compared to section 9.4.203, lack of redress for his alleged equal protection injury defeats

1 his standing and fails to invoke subject matter jurisdiction. *See Harp Advertising Illinois, Inc.*  
2 *v. Village of Chicago Ridge, Ill.*, 9 F.3d 1290, 1292 (7th Cir. 1993) ("An injunction against the  
3 portions of the sign and zoning codes that [plaintiff] has challenged would not let it erect the  
4 proposed sign; the village could block the sign simply by enforcing another, valid, ordinance  
5 already on the books").

6 The City is correct that to the extend the FAC seeks to challenge the directional sign  
7 provisions or to base an equal protection claim on them, Mr. Govan lacks an injury subject to  
8 redress to invoke this Court's jurisdiction.

9 **F.R.Civ.P. 12(b)(6) Motion To Dismiss Standards**

10 The City further seeks to dismiss the equal protection claim given the FAC's failure to  
11 allege facts to support strict scrutiny of Sign Law prohibitions.

12 A F.R.Civ.P. 12(b)(6) dismissal is proper where there is either a "lack of a cognizable  
13 legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory."  
14 *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990); *Graehling v. Village of*  
15 *Lombard, Ill.*, 58 F.3d 295, 297 (7<sup>th</sup> Cir. 1995). A F.R.Civ.P. 12(b)(6) motion "tests the legal  
16 sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9<sup>th</sup> Cir. 2001).

17 In addressing dismissal, a court must: (1) construe the complaint in the light most  
18 favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3)  
19 determine whether plaintiff can prove any set of facts to support a claim that would merit  
20 relief. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Nonetheless, a  
21 court is not required "to accept as true allegations that are merely conclusory, unwarranted  
22 deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litig.*, 536  
23 F.3d 1049, 1055 (9<sup>th</sup> Cir. 2008) (citation omitted). A court "need not assume the truth of legal  
24 conclusions cast in the form of factual allegations," *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d  
25 638, 643, n. 2 (9<sup>th</sup> Cir.1986), and must not "assume that the [plaintiff] can prove facts that it  
26 has not alleged or that the defendants have violated . . . laws in ways that have not been  
27 alleged." *Associated General Contractors of California, Inc. v. California State Council of*  
28

1 *Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897 (1983). A court need not permit an attempt to  
2 amend if “it is clear that the complaint could not be saved by an amendment.” *Livid Holdings*  
3 *Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9<sup>th</sup> Cir. 2005).

4 A plaintiff is obliged “to provide the ‘grounds’ of his ‘entitlement to relief’ [which]  
5 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause  
6 of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 127 S. Ct. 1955, 1964-65  
7 (2007) (internal citations omitted). Moreover, a court “will dismiss any claim that, even when  
8 construed in the light most favorable to plaintiff, fails to plead sufficiently all required  
9 elements of a cause of action.” *Student Loan Marketing Ass'n v. Hanes*, 181 F.R.D. 629, 634  
10 (S.D. Cal. 1998). In practice, a complaint “must contain either direct or inferential allegations  
11 respecting all the material elements necessary to sustain recovery under some viable legal  
12 theory.” *Twombly*, 550 U.S. at 562, 127 S.Ct. at 1969 (quoting *Car Carriers, Inc. v. Ford*  
13 *Motor Co.*, 745 F.2d 1101, 1106 (7<sup>th</sup> Cir. 1984)).

14 In *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009), the U.S. Supreme  
15 Court explained:

16 . . . a complaint must contain sufficient factual matter, accepted as true, to  
17 “state a claim to relief that is plausible on its face.” . . . A claim has facial plausibility  
18 when the plaintiff pleads factual content that allows the court to draw the reasonable  
19 inference that the defendant is liable for the misconduct alleged. . . . The plausibility  
20 standard is not akin to a “probability requirement,” but it asks for more than a sheer  
possibility that a defendant has acted unlawfully. (Citations omitted.)

21 After discussing *Iqbal*, the Ninth Circuit summarized: “In sum, for a complaint to  
22 survive [dismissal], the non-conclusory ‘factual content,’ and reasonable inferences from that  
23 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S.*  
24 *Secret Service*, 572 F.3d 962, 989 (9<sup>th</sup> Cir. 2009) (quoting *Iqbal*, 556 U.S. 662, 129 S.Ct. at  
25 1949).

26 The U.S. Supreme Court applies a “two-prong approach” to address dismissal:

27 First, the tenet that a court must accept as true all of the allegations contained in  
28 a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of



1 a cause of action, supported by mere conclusory statements, do not suffice. . . . Second,  
2 only a complaint that states a plausible claim for relief survives a motion to dismiss. . . .  
3 Determining whether a complaint states a plausible claim for relief will . . . be a  
4 context-specific task that requires the reviewing court to draw on its judicial experience  
5 and common sense. . . . But where the well-pleaded facts do not permit the court to  
6 infer more than the mere possibility of misconduct, the complaint has alleged – but it  
7 has not “show[n]” – “that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

8 In keeping with these principles a court considering a motion to dismiss can  
9 choose to begin by identifying pleadings that, because they are no more than  
10 conclusions, are not entitled to the assumption of truth. While legal conclusions can  
11 provide the framework of a complaint, they must be supported by factual allegations.  
12 When there are well-pleaded factual allegations, a court should assume their veracity  
13 and then determine whether they plausibly give rise to an entitlement to relief.

14 *Iqbal*, 556 U.S. 662, 129 S.Ct. at 1949-1950.

#### 15 Rational Basis

16 The City argues that the equal protection claim is subject to rational basis review in that  
17 Sign Law regulation of animated or moving signs is not based on content.

18 In reviewing the constitutionality of the ordinance, a court first determines "whether it  
19 impacts a fundamental right or targets a suspect class." *Yaodi Hu v. Village of Midlothian*, 631  
20 F.Supp.2d 990, 1007 (N.D. Ill. 2009) (citing *Eby–Brown Co., LLC v. Wisconsin Dep't of*  
21 *Agric.*, 295 F.3d 749, 754 (7th Cir.2002)). If no suspect class or fundamental right is involved,  
22 a court applies a rational basis test. *Hu*, 631 F.Supp.2d at 1007. An ordinance is upheld if the  
23 classification rationally relates to a “legitimate” interest. *Hu*, 631 F.Supp.2d at 1007 (citing  
24 *Greater Chicago Combine & Ctr. v. City of Chicago*, 431 F.3d 1065, 1072 (7th Cir.2005);  
25 *Eby–Brown*, 295 F.3d at 754). A plaintiff must “show that it is ‘wholly impossible’ to relate  
26 [the] governmental action to legitimate governmental objectives [.]” *Greater Chicago*  
27 *Combine*, 431 F.3d at 1072-1073. To show that the challenged classification is irrational, "the  
28 plaintiff must negate every conceivable basis that might support it, whether or not it has a  
foundation in the record." *Hu*, 631 F.Supp.2d at 1007 (citing *Turner v. Glickman*, 207 F.3d  
419, 424 (7th Cir.2000)).

The City argues that Mr. Govan is not a member of a protected class due to his

1 "commercial entity-based" equal protection claim. *See Outdoor Media Group, Inc. v. City of*  
2 *Beaumont*, 506 F.3d 895, 907 (9th Cir. 2007) ("Because billboard operators are not a protected  
3 class, the city's distinction between off-site and on-site advertisers is sustained if rationally  
4 related to a legitimate government interest"). The City contends that the Sign Law's directional  
5 sign provisions lack relationship to Mr. Govan's allegations or alleged harm to survive the  
6 rational basis test and to reflect the City's reasonable distinction "between the relative value of  
7 different categories of commercial speech." *See Metromedia, Inc. v. City of San Diego*, 453  
8 U.S. 490, 514, 101 S.Ct. 2882 (1981).

9 The City further argues that the Sign Law justifies distinctions among differing  
10 commercial speech to defeat an equal protection claim. The City notes that section 9.4.203  
11 addresses concerns in "high concentrated commercial areas" whereas the directional sign  
12 provisions address development projects "located in areas where streets and highways are  
13 newly constructed. Such thoroughfares are seldom shown on maps available to persons  
14 seeking to purchase new homes; and, consequently, developers use signs to aid such persons  
15 locating their subdivisions."

16 The Sign Law's directional sign provisions rationally relate to a legitimate interest to  
17 safely and efficiently direct the public to projects in newly developing areas. Section 9.4.203's  
18 animated and moving sign prohibitions rationally relate to public safety and promotion and  
19 enhancement of the City's character. The FAC lacks facts to demonstrate the Sign Law's  
20 impossibility to relate to legitimate governmental objectives and to negate conceivable bases to  
21 support the Sign Law. The equal protection claim is subject to dismissal.

22 **CONCLUSION, ORDER AND JUDGMENT**

23 For the reasons discussed above, this Court:

- 24 1. DISMISSES with prejudice the FAC's (fifth) equal protection claim; and  
25 2. DISMISSES with prejudice this action and all claims against the City and  
26 ENTERS this JUDGMENT in favor of defendant City of Clovis and against plaintiff  
27 Marshawn Govan. This JUDGMENT is subject to F.R.App.4(a)'s time limitations to file an  
28 appeal of this JUDGMENT; and

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

3. DIRECTS the clerk to close this action.

IT IS SO ORDERED.

Dated: November 12, 2013

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE