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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

KIN WAH KUNG,
Plaintiff,
vs.
EDMUND G. BROWN, et al.,
Defendants.

Case No.: 12-CV-00645 YGR
ORDER DISMISSING CASE WITH PREJUDICE

California's Uniform Bail and Penalty Schedules ("UBPS") set the amount for traffic fines levied in that state. In this civil action, pro se plaintiff Kin Wah Kung seeks a declaration that the UBPS violates Eighth Amendment's prohibition on excessive fines and bails, as well as a no-enforcement injunction. For the reasons set forth below, Mr. Kung's case is hereby **DISMISSED WITH PREJUDICE** for lack of standing.

The Court briefly reviews the relevant factual and procedural history. Mr. Kung brought the instant lawsuit after receiving a citation for an alleged red light infraction pursuant to California Vehicle Code § 21453(a). Mr. Kung pleaded not guilty and posted bail in the amount of \$446. The California Superior Court convicted him, and the amount of Mr. Kung's bail was applied to satisfy the fine for the infraction. Mr. Kung then appealed his conviction to the Superior Court's Appellate Division and, ultimately, succeeded in having his conviction reversed. (Dkt. No. 16 (Amended Complaint) ¶¶ 9-15.) The state refunded his \$446. (*Id.* ¶ 23.) Mr. Kung, in short, won his case.

Nevertheless, Mr. Kung continued to seek appellate review. He applied to every level of the California court system, including the California Supreme Court, in no fewer than four petitions

1 or applications. (*Id.* ¶¶ 16-22.) After overturning Mr. Kung's original conviction, however, the
2 California appellate courts summarily denied his requests. (*See id.*) Mr. Kung avers that the
3 California courts have "failed to react" to his Eighth Amendment arguments, necessitating, in his
4 view, this federal lawsuit. (*Id.* ¶ 24.)

5 On October 22, 2013, this Court ordered Mr. Kung to show cause why his case should not
6 be dismissed for lack of standing. (Dkt. No. 38 ("OSC").) The Court pointed out that, since the
7 state had refunded Mr. Kung's money, he appeared unable to satisfy the injury or redressability
8 requirements of Article III standing. (*Id.* at 2 (citing *San Diego Cnty. Gun Rights Comm. v. Reno*,
9 98 F.3d 1121, 1126 (9th Cir. 1996).) Further, the Court observed that, because Mr. Kung seeks
10 declaratory and injunctive relief only, he must demonstrate "a very significant possibility of future
11 harm," not merely past injury. *San Diego Cnty. Gun Rights Comm.*, 98 F.3d at 1126. The Court
12 advised Mr. Kung that he did not appear to have done so. (OSC at 2.) In deference to Mr. Kung's
13 pro se status, the Court gave Mr. Kung three weeks to file a written response to the OSC, and gave
14 the State one week to file a written reply. (*Id.*) The parties timely filed their briefs. (Dkt. Nos. 39
15 ("Kung Response"), 40.)

16 Having carefully considered the parties' submissions and the applicable law, the Court
17 concludes that Mr. Kung lacks standing and that his amended complaint therefore must be
18 dismissed. Mr. Kung's response to the OSC, though well-argued, does not remedy the standing
19 problems identified by the Court. The Court need not address every point made in Mr. Kung's brief
20 because the issue of future harm alone is dispositive. That is, even if the Court were to assume that
21 Mr. Kung satisfies all the other requirements for Article III standing, he still has not alleged facts
22 establishing a very significant possibility of future harm.

23 To make the required showing, it is not enough for Mr. Kung to allege "the mere existence
24 of a statute, which may or may not ever be applied to" him. *Action Apartment Ass'n, Inc. v. Santa*
25 *Monica Rent Control Bd.*, 509 F.3d 1020, 1027-28 (9th Cir. 2007) (quoting *Stoianoff v. State of*
26 *Mont.*, 695 F.2d 1214, 1223 (9th Cir.1983) (brackets omitted)). Neither is "[p]ast exposure to
27 harmful or illegal conduct" necessarily enough to "confer standing to seek injunctive relief if the
28 plaintiff does not continue to suffer adverse effects." *Mayfield v. United States*, 599 F.3d 964, 970

1 (9th Cir. 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)). "Nor does
2 speculation or 'subjective apprehension' about future harm support standing." *Id.* "Once a plaintiff
3 has been wronged, he is entitled to injunctive relief only if he can show that he faces a 'real or
4 immediate threat that he will again be wronged in a similar way.'" *Id.* (quoting *City of Los Angeles*
5 *v. Lyons*, 461 U.S. 95, 111 (1983) (ellipsis omitted)). That is, Mr. Kung must show at least "a
6 genuine threat of imminent prosecution under the challenged statute to establish a justiciable case
7 or controversy." *Washington Mercantile Ass'n v. Williams*, 733 F.2d 687, 688-89 (9th Cir. 1984)
8 (citing *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1974)). He is "not required to undergo
9 prosecution" to establish his standing, but his fear of future prosecution must rise above the merely
10 "imaginary or speculative." *Darring v. Kincheloe*, 783 F.2d 874, 877 (9th Cir. 1986). The key to
11 the inquiry is whether Mr. Kung can identify a specific, particular, and sufficiently imminent future
12 injury. *See Bras v. California Pub. Utilities Comm'n*, 59 F.3d 869, 873-74 (9th Cir. 1995).

13 Here, Mr. Kung argues that he suffers from a real possibility of future harm because he lives
14 in an area where Automatic Traffic Enforcement Systems ("ATES") are commonly used. (Kung
15 Response at 5-6.) Mr. Kung avers that he will "continue to suffer similar situations" due to the use
16 of ATES. The Court judicially notices the fact, generally known in this District, that municipalities
17 sometimes use automated cameras to photograph vehicles as they pass through a particular
18 intersection, purportedly against a red signal, and issue traffic citations based on those photographs.
19 Fed. R. Evid. 201(b)(1). ATES is apparently a system of this kind. Mr. Kung represents that he
20 lives in the city of Fremont, which is adjacent to the cities of Union City and Newark, and that at
21 the time he was cited, all three cities used ATES (though Union City has, according to Mr. Kung,
22 discontinued its use). Mr. Kung argues, in essence, that the use of ATES in his hometown and
23 neighboring cities, combined with the reasonable suspicion standard for traffic stops rooted in
24 *Terry v. Ohio*, 392 U.S. 1 (1968), makes it "reasonable to believe" that he will be subjected to
25 future traffic citations and thus to punishment under the Uniform Bail and Penalty Schedules.
26 (Kung Response at 6.)

27 That is not enough to establish Mr. Kung's standing to seek the declaratory and injunctive
28 relief he prays for here. The presence of ATES near Mr. Kung's home does not subject him to any

1 particular or specific threat of being fined under the UBPS. Nothing in the record suggests Mr.
2 Kung is any more likely to be cited through ATES than others passing through his community.
3 Even viewing the record most favorably to Mr. Kung, he manifestly is situated like every other
4 driver on the roads. His interest, therefore, is generalized, rather than specific and particular, and
5 insufficient to show that Mr. Kung bears "a personal stake, as opposed to [a] diffuse, collective
6 interest" in the litigation. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516-17 (9th Cir.
7 1992) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886-88 (1990); *Allen v. Wright*, 468 U.S.
8 737, 755 (1984)).

9 Further, the possibility that Mr. Kung may be required in the future to pay a fine or bail
10 imposed under the UBPS is merely conjectural and hypothetical. Mr. Kung represents that at the
11 time he received his initial traffic ticket, ATES was in use in his home city of Fremont, as well as
12 two neighboring communities, though one of those has since ceased to use it. Mr. Kung suggests
13 that ATES suffers from unidentified "defects," and imposes traffic citations without requiring
14 officers to "prov[e] anything." (Kung Response at 6.) Even taking those representations as true,
15 they do not add up to an "imminent" threat of prosecution. Simply living in an area where traffic
16 tickets are given out does not place Mr. Kung at imminent risk of receiving one. Mr. Kung might
17 receive a citation through ATES tomorrow, in a few years, or never again. Mr. Kung's risk of
18 future injury is only speculative.

19 Because Mr. Kung has not shown a genuine, imminent threat of future injury, he has not
20 established his standing to bring suit. Accordingly, pursuant to its OSC, the Court **DISMISSES** Mr.
21 Kung's amended complaint. Further, the dismissal is **WITH PREJUDICE**. Mr. Kung requests leave
22 to amend, but the Court perceives no set of plausible facts that would cure his standing defects.
23 Granting leave to amend would therefore be futile, and the Court declines to do so.¹


24 ¹ The Court acknowledges Mr. Kung's argument based on statements made by Defendant Edmund
25 G. "Jerry" Brown, the Governor of California, in the course of allowing California Assembly Bill
26 412 to become law without his signature. (Kung Response at 5; *id.* Ex. B.) In his comments, the
27 Governor expressed concern about the use of "penalty assessments" to fund projects whose costs, in
28 the Governor's view, "should not be borne by a narrow class of citizens," i.e., those who incur the
penalty. Mr. Kung appears to regard the Governor's comments as justifying his efforts in this
lawsuit, which would stop California from "execut[ing] laws that are clearly not in the interest of
the public," which Kung identifies as a "future harm" supporting his standing. (Kung Response at

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This Order terminates Case No. 12-cv-0645.

IT IS SO ORDERED.

Date: November 26, 2013


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

5.) The Court appreciates the strength of Mr. Kung's views on the policy issue of proper traffic enforcement and penalties. However, as a legal matter, his argument underscores the generalized nature of his interest in this litigation, which is, under the law, coextensive with that of the public at large. As such, Mr. Kung's concerns are better addressed through California's legislative processes than by this Court.