

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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| JUSTIN SANCHEZ, <i>Plaintiff-Appellant,</i> v. LOS ANGELES DEPARTMENT OF TRANSPORTATION; CITY OF LOS ANGELES, <i>Defendants-Appellees.</i> |
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No. 21-55285

D.C. No.
2:20-cv-05044-
DMG-AFM

OPINION

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted March 8, 2022
Pasadena, California

Filed May 23, 2022

Before: Kim McLane Wardlaw and Andrew D. Hurwitz,
Circuit Judges, and Lee H. Rosenthal,* District Judge.

Opinion by Judge Hurwitz

* The Honorable Lee H. Rosenthal, Chief United States District
Judge for the Southern District of Texas, sitting by designation.

SUMMARY**

Civil Rights

The panel affirmed the district court's order dismissing, for failure to state a claim, an action brought by an e-scooter user alleging that the City of Los Angeles' e-scooter permitting program, which requires e-scooter companies to disclose real-time location data for every device, violates the Fourth Amendment and California law.

As a condition of getting a permit, the Los Angeles Department of Transportation ("LADOT") required e-scooter operators to provide vehicle location data through an application programming interface called Mobility Data Specification ("MDS"). Used in conjunction with the operators' smartphone applications, MDS automatically compiles real-time data on each e-scooter's location by collecting the start and end points and times of each ride taken.

The complaint alleged that the MDS protocols provide the location of e-scooters with Orwellian precision. A City therefore allegedly could easily use MDS data in conjunction with other information to identify trips by individuals to sensitive locations. Because the location data could be preserved in accordance with LADOT data-retention policies, plaintiff alleged that the City could travel back in time to retrace a rider's whereabouts.

^{**} This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel first held that plaintiff's complaint alleged facts giving rise to Article III standing and therefore the panel rejected LADOT's assertion that the complaint was beyond the panel's constitutional purview because it was premised on a hypothetical invasion of privacy that might never occur. Drawing all reasonable inferences in favor of plaintiff as it was required to do at the Fed. R. Civ. P. 12(b)(6) stage, the proper reading of the complaint was that plaintiff alleged that the collection of the MDS location data itself—without more—violated his constitutional rights.

The panel concluded that the third-party doctrine, which provides that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties, foreclosed plaintiff's claim of a reasonable expectation of privacy over the MDS data.

Focusing first on "voluntary exposure," the panel had little difficulty finding that plaintiff knowingly and voluntarily disclosed location data to the e-scooter operators. Unlike a cell phone user, whose device provides location information by dint of its operation, without any affirmative act on the part of the user, plaintiff affirmatively chose to disclose location data to e-scooter operators each time he rented a device. Having voluntarily conveyed his location to the operator in the ordinary course of business, plaintiff could not assert a reasonable expectation of privacy.

The panel next determined that the nature of MDS location data indicated a diminished expectation of privacy. The data only discloses the location of an e-scooter owned by the operator and typically rerented to a new user after each individual trip. It was thus quite different than the information generated by a cell phone, which identifies the location of a particular user virtually continuously. The

panel declined the invitation to conclude that LADOT's collection of anonymous data about traffic movements was somehow rendered a search because it may be used in the future (in connection with other non-private material) to reveal an individual's previous locations. Because the third-party doctrine squarely applied to plaintiff's voluntary agreement to provide location data to the e-scooter operators, the collection of that data by LADOT was not a search and did not violate the Fourth Amendment or the California Constitution.

The panel affirmed the district court's dismissal of plaintiff's claim under the California Electronic Communications Privacy Act ("CalECPA") on the grounds that the statute did not provide plaintiff with authorization to bring an independent action to enforce its provisions.

Finally, the panel held that the district court did not err in dismissing the complaint without leave to amend. Because plaintiff had no reasonable expectation of privacy over the MDS location data, no additional facts could possibly have cured the deficiency with his constitutional claims. And, because the court rightly found that the CalECPA did not create a private right of action, dismissal of the statutory claim was also not error.

COUNSEL

Mohammad Tajsar (argued), ACLU Foundation of Southern California, Los Angeles, California; Jacob A. Snow, ACLU Foundation of Northern California, San Francisco, California; Jennifer Lynch and Hannah Zhao, Electronic Frontier Foundation, San Francisco, California; Douglas E. Mirell and Timothy J. Toohey, Greenberg Glusker Fields

Claman & Machtinger LLP, Los Angeles, California; for Plaintiff-Appellant.

Jonathan H. Eisenman (argued) and Jeffrey L. Goss, Deputy City Attorneys; Blithe S. Bock, Managing Assistant City Attorney; Scott Marcus, Chief Assistant City Attorney; Kathleen A. Kenealy, Chief Deputy City Attorney; Michael N. Feuer, City Attorney; Office of the City Attorney, Los Angeles, California; for Defendants-Appellees.

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