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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Fund for Empowerment, *et al.*, Plaintiffs, v. City of Phoenix, *et al.*, Defendants. Freddy Brown, et al., Intervenor Defendants	Case No.: CV-22-02041-PHX-GMS **Intervenors' Reply in Support of Their Motion to Dismiss under 12(b)(6) and 12(b)(1) and in the Alternative to Abstain**

The Plaintiffs have filed a complaint seeking to have the Court enjoin the City of Phoenix from taking their property and from prosecuting them for sleeping on the streets of Phoenix if they have no other place to go. They allege that it is the policy of Phoenix to conduct raids on the unsheltered individuals living on the streets of Phoenix during which they allege the City steals and destroys these individuals' property. Plaintiffs also allege that Phoenix issues "mass criminal citations" during these raids Doc. 45, ¶52. Plaintiffs allege the citations are unconstitutional *as applied*. *Id.* p. 25:1-4. Plaintiffs assert the immediate need for the relief they seek because they allege the City was planning to

perform a raid of the area in Phoenix known as the "Zone" in response to the suit filed by Intervenors. *Id.* ¶¶ 51, 120-125. The City has now cleared the Zone and Plaintiffs' fears have been proven unfounded. Plaintiffs have brought no claim alleging that the City stole their or anyone else's property or that it issued mass citations to them or anyone else. The City did convince hundreds of individuals to accept shelter, at least temporarily, which is perhaps the first step in improving their situation.

Intervenors filed a Motion to Dismiss Plaintiffs' complaint for failure to state a claim and for lack of standing. Doc. 94. In the alternative, Intervenors asked the Court to abstain from hearing the case and to let the issues surrounding the Zone be resolved in the Arizona state courts. The Plaintiffs responded to the motion in part with ad hominem attacks on the Intervenors and non-sequitur claims regarding the homeless and homelessness in general. Doc. 129. In this reply, Intervenors will not respond to such claims, which do not constitute legal argument.

A few matters have arisen since the filing of Intervenors' Motion to Dismiss of which the Court can and should take judicial notice, and which affect the motion. First, the Intervenors have obtained a signed, final judgement from the Maricopa County Superior Court granting their request for an injunction against Phoenix and requiring Phoenix to abate the nuisance in the Zone. *See* Exhibit A. The request for abstention is therefore moot and hereby withdrawn; abstention deals only with ongoing proceedings, not final judgments. And no judgment of this Court can supersede or interfere with the State Court's final judgment. *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) ("[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in [the United States Supreme] Court."). Nor can the Plaintiffs collaterally attack that final, state-court judgment in this case, even though they were not a party to the state-court case; at best, they would have had to intervene in state court at the appellate stage. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (upholding dismissal of a lawsuit "by nonparties to the underlying litigation" when it was an "impermissible collateral attack . . . challenging a consent decree" in that

underlying case, and further noting that plaintiffs "failed to intervene for purposes of appeal" and therefore "they may not appeal from the consent decree approving that lawsuit's settlement"). In sum, to the extent the present lawsuit sought to interfere with state-court proceedings, Intervenors' request for abstention is moot, and Plaintiffs have no right to interfere with the state-court judgment.

Second, the "Zone" has been cleared of public encampments. The estimated 1,000 people living in tents have been removed and no suits for damages or for unconstitutional takings of property have been filed. This Court may take judicial notice of state-court filings and judgments. *Smith v. Duncan,* 297 F.3d 809, 815 (9th Cir. 2002) ("We may take judicial notice of the relevant state court documents[.]"). The State Court in the *Brown* litigation, in its final judgment, ordered the City of Phoenix to remove all the encampments from the Zone by November 4, 2023, and the City complied with that order. *See* Exhibit A; *see also* Exhibit B (parties' filings confirming Zone had been cleared). The Court must consider these documents at the 12(b)(1) stage if it appears the case has become moot. *See, e.g.*, *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) ("In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. The court need not presume the truthfulness of the plaintiff's allegations."); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) ("In examining a Rule 12(b)(1) motion, the district court is empowered to consider matters of fact which may be in dispute."); *Higgins v. Texas Dep't of Health Servs.*, 801 F. Supp. 2d 541, 547, 549-50, 554 (W.D. Tex. 2011) (dismissing a case as moot at 12(b)(1) stage on these grounds); *Mothership Fleet Coop. v. Ross*, 426 F. Supp. 3d 611, 617-19 (D. Alaska 2019) (same). In short, not only do plaintiffs lack standing for the reasons discussed below, now their claims are moot, too. This case should be dismissed.

Third, *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022) was amended to remove the "formula" language relied upon by Plaintiffs (see below).[1] The remainder

[1] Relatedly, on January 12, 2024, the United States Supreme Court granted certiorari and

of this reply focuses on this issue: because the Ninth Circuit eliminated the very language at the core of Plaintiffs' claim, the Plaintiffs have no more legs to stand on. They *must* as a result allege that the City's policies violate the rights of *involuntarily* unsheltered persons. Otherwise this Court must dismiss under 12(b)(6). And they must demonstrate—this Court need not accept their assertions as true—that they themselves are involuntarily unsheltered. Otherwise this Court must dismiss under 12(b)(1).

A. Eighth Amendment Claim

Intervenors moved to dismiss Plaintiffs' claim that the alleged police citations amounted to cruel and unusual punishment prohibited by the Eighth Amendment because their allegations did not include a claim that the City of Phoenix had criminalized them for being *involuntarily* unsheltered, necessitating dismissal under rule 12(b)(6). Additionally, Plaintiffs were not themselves involuntarily unsheltered and the case therefore also had to be dismissed under 12(b)(1).

1. 12(b)(6)

Plaintiffs' entire response to both the 12(b)(6) and 12(b)(1) claims is that they need not allege involuntariness because of a formula "established" by the *Grants Pass* decision: "The formula established in *Martin* is that the government cannot prosecute homeless people for sleeping in public if there 'is a greater number of homeless individuals in [a jurisdiction] than the number of available shelter spaces." Doc. 129 at 6 (quoting *Grants Pass*, 50 F.4th at 795 (citing *Martin*, 920 F.3d at 617)). Thus Plaintiffs argue that the "allegations in their First Amended Complaint are sufficient to state a claim under *Martin* and its progeny" because "Plaintiffs allege that the unsheltered population in Phoenix exceeds 3,000, while the City has only approximately 1,788 shelter beds." *Id.* In other words, relying on this formula language, Plaintiffs assert that because there is a greater number of unsheltered persons in Phoenix than there are shelter beds, it need not allege

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will hear an appeal of *Grants Pass*. Supreme Court Docket No. 23-146. It is likely that the Supreme Court will significantly alter if not completely overturn *Grants Pass*, in which case any relief this Court grants based on *Grants Pass* and its predecessor *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), will be subject to reversal.

involuntariness; the law presumes all unsheltered persons to be involuntarily homeless in these circumstances.

A few weeks after the date of their opposition brief, however, the Ninth Circuit amended the opinion to eliminate the very language on which they rely. *See Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023) (amended opinion) (eliminating that language), cert. granted sub nom. *Grants Pass, OR v. Johnson*, No. 23-175, 2024 WL 133820 (U.S. Jan. 12, 2024); *see also id.* at 938 (Smith, J., dissenting) ("The majority has now amended its opinion to remove this 'formula' language, and the opinion's body now quotes *Martin*'s statement that individuals are outside the purview of its holding if they 'have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but [they] choose not to use it.'"). Therefore, under the current state of the law, it is not enough to allege one is homeless. That status must be involuntary. As noted in Intervenors' motion to dismiss, there is not a single allegation that the City of Phoenix has targeted individuals who are involuntarily unsheltered. Plaintiffs have not responded to this argument for the simple reason that they relied on language in *Grants Pass* that is no longer the law. Their challenge must therefore fail.

Plaintiffs argue, however, that this Court cannot require them to establish involuntariness because doing so would also be barred by the law-of-the-case doctrine. Doc. 129 at 8:16-9:2. Plaintiffs state that the Court, in granting their preliminary injunction request, implicitly held that they need not allege that they were involuntarily to state a claim for violation of the Eighth Amendment. Intervenors disagree. The issue was not argued, not explicitly decided, and not a necessary implication of the Court's decision. Moreover, the law of the case doctrine has limited application to preliminary injunction ruling. For the same reason that "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), namely the "haste" with which such rulings are often issued, *id.*, those findings cannot be binding as law of the case in ruling on subsequent

motions. And even if law of the case did otherwise apply, Plaintiffs themselves recognize that it would be defeated by "intervening controlling authority," namely the modified *Grants Pass* opinion. *See* Doc. 129 at 9 n.6 (quoting *Minidoka Irrigation Dist. v. Department of Interior of U.S.*, 406 F.3d 567, 573 (9th Cir. 2005) for this proposition).

Most importantly of all, this Court *modified* its preliminary injunction based on the modified *Grants Pass* opinion. *See* Doc. 119. In the modified order, this Court removed precisely the formula language on which the Plaintiffs relied, and replaced it with the following injunction: the City is enjoined from "[e]nforcing the Camping and Sleeping Bans against **involuntarily** homeless persons for sleeping in public if there are no other public areas or appropriate shelters where those individuals can sleep." *Id.* at 3 (emphasis added). This Court has already recognized, in other words, that Plaintiffs must allege involuntariness. Thus, if law of the case applies at all, that supports Intervenors' argument that this case must now be dismissed.

2. 12(b)(1)

Even if their complaint does have allegations of involuntary homelessness (which Intervenors dispute, and which Plaintiffs claim they do not need), the Plaintiffs themselves would still have to be involuntarily unsheltered. But as Intervenors explained, two plaintiffs, Faith Kearns and Frank Urban, did not assert they were unsheltered. In their opposition, Plaintiffs do not dispute this; rather, they argue that they *might* become unsheltered in the future and cite a series of cases about the "transitory" nature of homelessness and how one need not be homeless to continue a legal challenge to a City's policies. Doc. 129 at 12 (quoting *Pottinger v. City of Miami*, 720 F. Supp. 955, 959 (S.D. Fla. 1989), and citing *Glover v. City of Laguna Beach*, 2017 WL 4457507, at *2 (C.D. Cal. June 23, 2017)). But in both cited cases, the plaintiffs had been homeless (that is, unsheltered) *at the time the complaint was filed*. *See Pottinger*, 720 F. Supp. at 959 ("At the time that the plaintiffs filed their complaint, the named plaintiffs were homeless and identifiable members of the proposed class."); *Glover*, 2017 WL 4457507 at *2 (same). In both cases, the courts held that their claims did not become *moot* merely because the

plaintiffs subsequently secured housing. *Pottinger*, 720 F. Supp. At 959 (holding claims were "capable of repetition yet evading review); *Glover*, 2017 WL 4457507 at *2 (rejecting argument that plaintiff's "claims are moot because he has recently retained permanent housing"). Neither case stands for the proposition that a plaintiff need not have standing *at the time the suit is filed*. Intervenors know of no case supporting such a radical proposition, which would contradict all of standing doctrine.

That leaves Fund for Empowerment (FFE) and Ronnie Massingille. As for FFE, Intervenors asserted that this organization has no members, and even if it did, none is unsheltered. Plaintiffs merely *assert without evidence* that FFE has members, some of whom are involuntarily unsheltered individuals. Doc. 129 at 15-16 (relying on the fact that the complaint "plainly indicated" that its "membership includes those who are unsheltered"). But that is not sufficient. Plaintiffs cannot simply waltz into federal court and claim they have standing to sue, when the other parties dispute that Plaintiffs are who they say they are.

As noted above, when the facts necessary for jurisdiction are challenged, the plaintiffs must give evidence of standing even at the 12(b)(1) stage. The Ninth Circuit has explained the procedure:

> In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. The court need not presume the truthfulness of the plaintiff's allegations. Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.

Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (quotation marks and citations omitted).

True, Plaintiffs produced a single affidavit by Elizabeth Venable asserting the organization has members, including unsheltered members. Doc. 2-1 at 10. But that is not

enough. It is black-letter law that an association must identify a named member. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (an organization must "establish[ ] that at least one **identified member** had suffered or would suffer harm") (emphasis added); *see also, e.g.*, *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 253 (6th Cir. 2018) (dismissing action "because the Association has not shown that any **named** member had standing") (emphasis added). And the organization's website says nothing at all about becoming a member. *See* https://fundforempowerment.org/, [https://perma.cc/W4TT-MXDD]. The website makes clear that FFE *serves* the unsheltered community. But that is different from being a dues-paying member.

At best, FFE is claiming standing to assert the rights of the third parties it serves. But it is also black-letter law that an organization cannot assert the constitutional rights of third parties. A party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). The only exception is if the third party "has a 'close' relationship with the person who possesses the right," and if "there is a 'hindrance' to the possessor's ability to protect his own interests." *Id.* at 130. Here there is no close relationship to any identified unsheltered individual. Nor would there be a hindrance to that person protecting his own interests—FFE's lawyers at the American Civil Liberties Union could just represent those individuals if they actually existed.[2]

That leaves Mr. Massingille. True, the complaint alleged that he is unsheltered. But Intervenors argued that there was no allegation that Mr. Massingille was *involuntarily* unsheltered. Once again Plaintiffs did not respond to this argument because they did not believe they had to do so; they believed that so long as there were more unsheltered individuals in Phoenix than shelter beds, it did not have to allege that Mr. Massingille was

[2] As for FFE's assertion that it has an organizational injury because it will have to "expend resources" to educate unsheltered individuals about their rights, Doc. 129 at 16, that is not a legally cognizable injury. Saying "if *x* happens, we will have more charity work to do," is not an allegation that *x* has caused one's organization injury.

involuntarily unsheltered. Plaintiffs wrote: "Plaintiffs are under no obligation – and Intervenors cite no authority – requiring Mr. Massingille to disclose further information about the conditions of his status at this early stage of the litigation." Doc. 129 at 13. That gives away the whole game; it is a concession that this case must be dismissed. A plaintiff must allege sufficient facts for standing. Now that the *Grants Pass* case has been clarified by eliminating the language at the core of Plaintiffs' theory, Mr. Massingille must allege that he is *involuntarily* unsheltered. There are no such allegations. In their opposition, Plaintiffs do no more than point out that Mr. Massingille is "chronically **unhoused**." *Id.* (emphasis added). But that is not the question. The question is if he is involuntarily *unsheltered*, namely, he does not have an adequate alternative space where he can live, even if he does not have a "house." There is no allegation whatsoever that the City's various shelter spaces have not been offered to him or that he could not acquire a spot in one of those shelter spaces.

B. Fourth Amendment Claim

Plaintiffs did not respond to Intervenors' arguments that Plaintiffs' Fourth Amendment claims are not subject to injunctive relief. Doc. 94 p.5:23-7:11. Plaintiffs implicitly admit in their Amended Complaint that the legal prohibitions on public camping in Phoenix as written are susceptible of legal enforcement, which is why they allege they are unconstitutional as applied. But Plaintiffs have not alleged an imminent threat to their constitutional rights and the courts cannot issue prospective restraints on law enforcement without such allegations. To seek injunctive relief, Plaintiff must "show that he has sustained or is immediately in danger of sustaining some direct injury . . . and the injury or threat of injury must be both 'real and immediate,' not 'conjectural" or "hypothetical.'" *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-02, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). In *Lyons*, the Supreme Court denied injunctive relief where the plaintiff did not sufficiently demonstrate a threat of future injury. Here Plaintiffs have not sufficiently demonstrated a threat of future injury. They are not in immediate threat of unlawful

seizures and they are not in immediate threat of having their property taken. As noted above, two of the plaintiffs have housing and face no immediate threat of any kind. Mr. Massingille claims to have occasionally lived in the Zone, but there is no more Zone.

The case should be dismissed.

RESPECTFULLY SUBMITTED this 7th day of February, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2024, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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