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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Fund for Empowerment, *et al.*,

Plaintiffs,

v.

City of Phoenix, *et al.*,

Defendants.

Case No: 2:22-cv-02041-PHX-GMS

DEFENDANTS' MOTION TO DISMISS IN PART
(Oral Argument Requested)

The Second Amended Complaint (the "SAC") (Doc. 145) is Plaintiffs' third attempt to adequately plead claims to avoid dismissal. Plaintiffs have, in significant part, failed to do so. Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants City of Phoenix, Rachel Milne, and Michael Sullivan (collectively, the "City") move to dismiss Plaintiff's lawsuit in part, for the following reasons.

First, Plaintiffs did not file a notice of constitutional question with respect to their newly expanded challenge to the constitutionality of Arizona's trespassing statute (precluding Counts Three and Four). Second, Plaintiffs failed to state a claim for any

alleged excessive fines; indeed, they failed to state that *any* monetary fine was actually imposed against any of the named Plaintiffs (precluding Count Four). Third, Plaintiffs failed to state a claim for any "state-created danger," as the SAC lacks any showing of deliberate indifference or any affirmative acts sufficient to sustain the claim (precluding Count Six). Fourth, Plaintiffs' "*Monell*" claim is nothing more than a restated and duplicative version of their Section 1983 claim (precluding Count Five). Finally, all claims should be dismissed against Defendants Milne and Sullivan pursuant to Fed. R. Civ. P. 12(b)(4), because Plaintiffs failed to effectuate service of process on them individually and failed to plead any facts to establish individual liability for their official conduct.

ARGUMENT

Every complaint must include enough facts to, at a minimum, "give the defendant fair notice of what the… claim is and the grounds upon which it rests." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007); Fed. R. Civ. P. 8. The complaint must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (internal quotations omitted). To survive a motion to dismiss, Plaintiffs must plead a plausible claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Although the Court must assume all factual allegations in the Complaint as true and view them in a light most favorable to the nonmoving party, the Court need not accept legal conclusions as true. *Id.* at 678.

I. Plaintiffs' Eighth Amendment claims for alleged cruel and unusual punishment (Count Three) and excessive fines (Count Four) should be dismissed for failure to file a notice of constitutional question.

Plaintiffs' Eighth Amendment claims for alleged cruel and unusual punishment (Count Three) and excessive fines (Count Four) should be dismissed for failure to file a notice of constitutional question, as required by Rule 5.1(a), with respect to the challenge to the constitutionality of Arizona's trespassing statute, A.R.S. § 13-1502. The Rule states:

> (a) A party that files a pleading… drawing into question the constitutionality of a… state statute must promptly:
>
> > (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:…
> >
> > > (B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity;

Fed. R. Civ. P. 5.1(a)(1)(B). The purpose of the notice is to "ensure that the attorney general is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation." *See* Fed. R. Civ. P. 5.1, 2006 Advisory Committee Notes.

The SAC challenges what it refers to as the "Trespassing Bans," Phoenix City Code § 23-85.01 and A.R.S. § 13-1501 *et seq*. (Doc. 145 ¶ 56) Plaintiffs allege that the Trespassing Bans—including the state statute—cannot be constitutionally applied as against involuntarily homeless persons. (Doc. 145 ¶¶ 65-66, 74, 76-77, 251-260, 265-277)[1] Having called a state statute's constitutionality into question, Rule 5.1 obligated Plaintiffs to file and serve a notice of constitutional question promptly. To date, Plaintiffs have filed no such notice. Counts Three and Four should therefore be dismissed as to any claims as to the constitutionality of A.R.S. § 13-1502.

II. Plaintiffs' Eighth Amendment claim for alleged excessive fines (Count Four) should be dismissed for failure to state a claim upon which relief can be granted.

In addition to the previously pled Eighth Amendment cruel and unusual punishment claim, the SAC fashions a novel claim in Count Four: that *Martin v. City of Boise* and *Johnson v. City of Grants Pass*, which together prohibit local governments from enforcing criminal and civil restrictions on public camping and sleeping unless the

[1] The SAC skips from paragraph 67 directly to paragraph 74. The City uses the paragraph numbering as it appears in the SAC.

person has access to adequate temporary shelter, means that municipalities are further prohibited from imposing fines on unsheltered individuals.

In the first place, Plaintiffs have failed to allege any facts as to any of the Plaintiffs that would survive dismissal. Plaintiffs allege, in the vaguest of language, that the City "is imposing fines" on them and a host of unidentified "others" for violations of various ordinances. (Doc. 145 ¶ 74) The SAC is bereft of any information about the specific offense(s) for which Plaintiffs were cited; when or where they were cited; or any allegations to support their conclusory statements that they were involuntarily homeless at the time of the citation. Critically, they also fail to note the dollar amount of any citation. The failure to plead such information (including any actual "fine") bars Plaintiffs' Eighth Amendment "excessive fine" claim.

Further, and setting aside these pleading deficiencies, Plaintiffs apparently rely on the *Boise* and *Grants Pass* line of cases to assert a novel claim: that a court may declare and preliminarily enjoin the enforcement of *any* criminal or civil penalties for violation of trespass and camping laws as per se "excessive" in violation of the Eighth Amendment. This is a gross misapplication of the law. An Eighth Amendment excessive fines claim requires a showing of gross disproportionality, which is a high bar under federal jurisprudence. *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (finding no Eighth Amendment violation for two consecutive 25 years to life sentences for stealing $150 of video tapes under "third strike" conviction). Aside from the fact that, in this case, there is no allegation that Plaintiffs suffered any of these penalties (or any penalty, period) allowed by State law,[2] the laws and ordinances Plaintiffs implicate in their SAC are generally classified as misdemeanor offenses under Arizona law with maximum penalties

[2] As a practical manner, municipal courts commonly offer diversion programs and community courts to provide homeless individuals resources in lieu of prosecution and/or defer criminal penalties or fines. *See e.g.*, Phoenix Community Court Creates Alternative Legal Solutions for People Experiencing Homelessness, City of Phx. (Jan. 26, 2024 at 6:00 PM), https://www.phoenix.gov/newsroom/city-manager/2999.

of six months in jail, 36 months' probation, and a fine of not more than $2,500.00. A.R.S. §§ 13-707 and 802; Phx. City Code § 1-5.[3] These penalties are not, on their face, the "exceedingly rare" and "extreme" penalties warranting Eighth Amendment protections under existing caselaw. *See Harmelin v. Michigan*, 501 U.S. 957, 963 (1991). They are certainly not penalties that, under Plaintiffs' apparent proposed extension of the Ninth Circuit's jurisprudence, can be preliminary enjoined wholesale. Any other result would be untenable, as the act of defining penalties for crimes involves a substantial penological judgment that is properly within the province of the Legislature. *See, e.g., Harmelin*, 501 U.S. at 962 (generally, "the length of the sentence actually imposed is purely a matter of legislative prerogative"); *Rummel v. Estelle*, 445 U.S. 263, 272–276 (1980) (noting that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.").

In short, absent a showing of unconstitutional application, there is no per se claim that any state-imposed fine violates the Eighth Amendment's prohibition on excessive fines. Plaintiffs have failed to meet this high bar, Count Four should be dismissed.

III. Plaintiffs' state-created danger doctrine claim (Count Six) should be dismissed for failure to state a claim upon which relief can be granted.

In previous versions of their complaint, Plaintiffs claimed that the City intentionally directed unsheltered persons to the area of Downtown Phoenix that Plaintiffs call "the Zone," allegedly giving rise to municipal liability for a "state-created danger." With the City's elimination of "the Zone," Plaintiffs now claim liability under a

[3] Specifically, the camping and sleeping ordinances in Phoenix City Code §§ 23-30 and 23-48.01 are punishable under the Code's general penalty clause in § 1-5 as a Class One misdemeanor. Arizona's trespassing laws, which Plaintiffs cite as "A.R.S. § 13-1501 *et seq*.", range from Class One to Three misdemeanors, with limited exceptions for individuals entering or remaining unlawfully in a critical public service facility, mutilating/desecrating religious symbols, and entering in or on a residential structure. *See* A.R.S. § 13-1502 (class 3 misdemeanor penalties); 13-1503 (class 2 misdemeanor penalties); 13-1504 (class 1 misdemeanor penalties with class 5 and 6 felony classifications based on these specific circumstances).

state-created danger theory for removing Plaintiffs and other unidentified individuals from shaded areas; destroying items that provide them with protection from the sun and heat, including tents and tarps; and threatening them with arrest or citation during extremely hot summer temperatures. (*See* Doc. 145 ¶¶ 291-301)

Plaintiffs' state-created danger claim fails as a matter of law. Some courts, including the Ninth Circuit, have recognized the "state-created danger" doctrine as an exception to the "general rule" that "[a] state is not liable for its omissions" and that "the Fourteenth Amendment's Due Process Clause generally does not confer any affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests." *See Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971, 974 (9th Cir. 2011) (citations omitted). To prove a Fourteenth Amendment claim for state-created danger, a plaintiff must show: (1) "affirmative conduct on the part of the state placing the plaintiff in danger"; and (2) "deliberate indifference to a known or obvious danger." *Id.* at 974 (cleaned up).

The Ninth Circuit has defined the contours of the second prong, "deliberate indifference," which is "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *See id.* The standard to prove deliberate indifference is "even higher than gross negligence," in that it "requires a culpable mental state"—*i.e.*, "[t]he state actor must recognize an unreasonable risk and *actually intend* to expose the plaintiff to such risks without regard to the consequences to the plaintiff." *Id.* (cleaned up) (emphasis added). Stated differently, to show deliberate indifference, the plaintiff must show that the state actor "knows that something *is* going to happen but ignores the risk and exposes [the plaintiff] to it." *Id.* (emphasis in original) (citation omitted).

The few cases that the Ninth Circuit has allowed to proceed to trial under a deliberate-indifference theory arose in exceptionally egregious and unique circumstances—for example, when a decedent was in grave need of medical care, but the

police canceled a request for paramedics, locked the decedent in his house, and left, resulting in death. *Penilla v. City of Huntington Park,* 115 F.3d 707, 711 (9th Cir. 1997)). The small handful of other cases have arisen in similarly egregious circumstances. *See Patel*, 648 F.3d at 974-75 (discussing two additional cases). Moreover, courts within the Ninth Circuit have applied the "state-created danger" doctrine in cases of extreme weather only where public employees have, by affirmative conduct, exposed persons to extreme weather in such a manner as to cause foreseeable harm or injury that they otherwise would not have faced. *See e.g., Munger v. City of Glasgow Police Dept.*, 227 F.3d 1082 (9th Cir. 2000) (police ejected an intoxicated person from a bar into subfreezing temperatures wearing only a t-shirt and jeans who subsequently died from exposure).

For Plaintiffs Massingille, Kearns, Urban, James, Carr, and Rich, their claim fails on the first prong. The SAC is devoid of *any* allegation of "affirmative conduct," such as removing these Plaintiffs from shaded areas or seizing shade structures that exposed them to heat-related danger. The words "heat," "sun," or any similar terms do not appear anywhere in the allegations related to these Plaintiffs' experiences.

The remaining three individual Plaintiffs all allege that their tents were taken or that they were forced to move from a shaded area, albeit not necessarily during the extreme heat that forms the basis for their state-created danger claim, and without allegation that they suffered any immediate heat-related issue as a result. (*See* Doc. 145 at ¶¶ 123-135 (Plaintiff Sisoho, alleging his tent was taken during a raid in November 2022 and again in October 2023 and stating that "it has been hard" and he is "worried" about the increasing heat); *Id.* at ¶¶ 143-150 (Plaintiff Drywood, alleging that in March 2024 his tent was taken and that it has been "difficult for him to stay out of the direct sun" and that he has felt "faint and exhausted"); *Id.* at ¶¶ 191-193, 198 (Plaintiff Idrissa, alleging

that in April 2024 he was twice asked to move from shaded areas).[4] Even assuming that they have alleged "affirmative conduct" that satisfies the first prong of the inquiry, these allegations fall far short of showing "deliberate indifference." Nothing in these allegations shows that the City or any individual defendant "actually intend[ed]" to expose these Plaintiffs to unreasonable risk of heat exposure, or knew such exposure "*is* going to happen" but ignored the risk, anyway. *See Patel*, 648 F.3d at 974-75.

There is no allegation in the SAC showing any affirmative act by any City employee to cause increased danger to Plaintiffs, nor any specific allegation of lack of available shelter or shaded area amidst encampment cleanups in extreme heat, which could possibly rise to the high-level of action required for a state-created danger. Indeed, there is no showing that any individual removed from any encampment was actually subjected to any increased danger due to heat. The argument that the Fourteenth Amendment bars clearing encampments based on broad allegations that Plaintiffs may have been moved to a less shady area, even assuming this is true for purposes of this Motion, falls far below what the Fourth Amendment protects as a matter of law.[5]

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[4] Plaintiff Idrissa also claims that in early 2024, a "friend" of his had to relocate from a shaded area to a park (presumably itself shaded area) but died from "sun/heat exposure." *Id.* at ¶¶ 195-197. This unnamed and unidentified "friend" is not a plaintiff in this case nor an identified member of FFE. Further, the complaint does not identify who required this person to move. The allegations related to this individual are not allegations that would save the state-created danger claim.

[5] The enforcement of generally applicable codes governing public health and welfare and use of public property, or otherwise constitutional remediation of homeless encampments, is not sufficient state action to cause a state-created danger, particularly as local governments do not and cannot control the weather, and there is no allegation of any fact that would cause danger to any Plaintiff that they would not have otherwise faced. *See, e.g., Berry v. Hennepin County*, 2022 WL 3579747 at *9 (D. Minn, August 19, 2022 ("Defendants contend that they conducted encampment sweeps to remedy health and safety risks posed by the encampments related to inclement weather and transmission of COVID-19. Both inclement weather and the COVID-19 pandemic, although dangerous, were not created by the state. Any claim advanced by Plaintiffs under the federal state-created danger doctrine, therefore, necessarily fails.").

Moreover, although a state-created danger theory may apply in situations involving unreasonable exposure of persons to extreme temperatures, it must be kept in mind that "[c]ourts are instructed to resist the temptation to augment the substantive reach of the Fourteenth Amendment, 'particularly if it requires redefining the category of rights deemed to be fundamental,'" and "[t]here is no fundamental right to housing." *Sanchez v. City of Fresno*, 914 F. Supp.2d 1079, 1101 (E.D. Cal. 2012) (citing *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) and *Lindsey v. Normet*, 405 U.S. 56, 92 (1972)).

Absent allegations that would clear the exceptionally high bar to prove a state-created danger claim, including affirmative acts to create or expose any of the individual Plaintiffs to an actual, particularized injury that they would not have otherwise faced, that was foreseeable to the City and which the City was deliberately indifferent to, Plaintiffs' claims should be dismissed. It cannot be disputed that homeless encampments are not "safe" places for the unsheltered and the SAC fails to show any action by the City to place individuals in a more dangerous condition than the one in which they were found.

IV. Count Five should be dismissed as duplicative of Plaintiffs' Section 1983 Claims.

Count Five of the SAC alleges a claim styled as "Municipal Liability under *Monell*." (Doc. 145 at p. 35). There is no such thing as a freestanding "*Monell*" claim. Barring some violation of an identified constitutional right pursuant to some policy, practice, or custom, there is no municipal liability under 42 U.S.C. § 1983. *See Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (citing *Monell v. Dep't of Soc. Servs. of the City of New York,* 436 U.S. 658, 694 (1978)). Plaintiffs' purported "*Monell*" claim is merely a restatement and duplicative of their Section 1983 claims as already stated in the SAC and should therefore be dismissed.

V. All claims should be dismissed as against Defendants Milne and Sullivan, in both their individual and official capacities.

The SAC's caption purports to name Office of Homeless Solutions Director Rachel Milne and Interim Police Chief Michael Sullivan in both their individual and

official capacities. In the first place, the SAC alleges nothing about what Defendants Milne or Sullivan *did* in their capacities as individual citizens such that they themselves should be named defendants. It is, frankly, disturbing that Plaintiffs would sue two City officials—and seek damages against them personally, no less—with literally no factual allegations about what their conduct such that they should be held liable for allegedly violating Plaintiffs' constitutional rights.

Even setting aside this dearth of factual allegations, the claims against Defendants Milne and Sullivan should be dismissed for lack of service. Sued here for the first time in their individual capacities, Plaintiffs never effectuated service of process on Defendants Milne or Sullivan, compelling dismissal as a legal matter. *See* Fed. R. Civ. P. 12(b)(4); *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1995) (citing *Jackson v. Hayakawa,* 682 F.2d 1344, 1348 (9th Cir. 1982) (stating that in context of a Section 1983 claim, "new service within the statute of limitations is necessary in order to satisfy the due process requirement of notice when there is to be a change in the status of defendants.").[6] Defendants Milne and Sullivan should also be dismissed as official and personal capacity defendants, as a claim against a municipal officer is redundant when the municipality itself is named. *See Ctr. for Bio-Ethical Reform v. L.A. Cnty. Sheriff Dept.*, 533 F.3d 780, 799 (9th Cir. 2008) (stating that "[a]n official capacity suit against a municipal officer is equivalent to a suit against the entity" and "[w]hen both a municipal officer and a local government entity are named, and the officer is named only in an official capacity, the court may dismiss the officer as a redundant defendant.") (citation omitted).

/ / /

[6] Notwithstanding the caption, the SAC seems to indicate that Plaintiffs may not have meant to sue Defendants Milne and Sullivan individually, anyway. (*See* Doc. 145 ¶¶ 27, 29 ("Chief Sullivan is named herein in his official capacity.") ("Defendant Milne is named herein in her official capacity."). The City raised this inconsistency with Plaintiffs' counsel shortly after the SAC was filed but received no substantive response.

CONCLUSION

For the reasons set forth herein, the City respectfully requests that the Court dismiss the SAC in part.

RESPECTFULLY SUBMITTED this 28th day of May, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2024, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and caused a copy to be emailed to the following:

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