Justin S. Pierce (State Bar #022646)
Aaron D. Arnson (State Bar #031322)
Trish Stuhan (State Bar # 027218)
Stephen B. Coleman (State Bar #021715)
PIERCE COLEMAN PLLC
7730 East Greenway Road, Suite 105
Scottsdale, AZ 85260
Tel. (602) 772-5506
Fax (877) 772-1025
Justin@PierceColeman.com
Aaron@PierceColeman.com
Trish@PierceColeman.com
Steve@PierceColeman.com
Attorneys for Defendants

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 PLAINTIFFS' THIRD AMENDED COMPLAINT (Oral Argument Requested)

The Court has witnessed the curious evolution of Plaintiffs' claims since 2022. For example, Plaintiffs' state-created danger claim was, at first, that the City of Phoenix was actively shepherding and transporting unsheltered persons to unshaded areas in "the Zone." *See* Doc. 1 at ¶¶ 172-189; Doc. 45 at ¶¶ 185-202. Then, once "the Zone" was cleared and Plaintiffs had no possible factual basis for their claim, Plaintiffs alleged that the City was creating a danger by forcing unsheltered persons *out of* "the Zone" and out of their tents. *See* Doc. 145 at ¶¶ 120-135, 136-150, 179-187, 295-301; Doc. 159 at ¶¶ 119-134, 135-149, 180-187, 290-299. As another example, Plaintiffs first brought a claim

under the Eighth Amendment's cruel and unusual punishment clause. *See* Doc. 1 at ¶¶ 145-160; Doc. 45 at ¶¶ 158-173. Then, once Plaintiffs understood that the U.S. Supreme Court was likely to overturn the case law upon which their claim rested, they added a novel claim under the Eighth Amendment's excessive fines clause. *See* Doc. 145 at ¶¶ 261-277; Doc. 159 at ¶¶ 264-288. Plaintiffs have also named City staff as defendants, removed City staff as defendants, and changed the capacities in which they sued those defendants, seemingly willy nilly and with little or no explanation.

Plaintiffs are no closer to moving their case forward than they were at the outset. Defendants City of Phoenix, Rachel Milne, and Michael Sullivan (collectively, the "City") suggest that nearly two years' worth of legal maneuvering and misdirection is plenty. The City moves to dismiss the Third Amended Complaint (the "TAC") (Doc. 159) for failure to state a claim upon which relief can be granted.

First, Plaintiffs' Eighth Amendment claim for alleged imposition of excessive fines (Count Three) should be dismissed. Nothing in the Eighth Amendment's excessive fines clause or its interpretive case law exempts unsheltered people from being fined for violating criminal or civil laws. Rather, like everyone else, Plaintiffs would have to demonstrate gross disproportionality to prove their claims. Plaintiffs have failed to make this showing. Only two of the Plaintiffs allege that they were fined to begin with, and they provide no details about the alleged citations and resulting fines, precluding Count Three.

Second, Plaintiffs' Fourteenth Amendment claim for alleged "state-created danger" (Count Four) should be dismissed. The TAC lacks any showing of deliberate indifference or any affirmative acts sufficient to sustain the claim.

Third, all claims should be dismissed against Defendants Milne and Sullivan. Because the City of Phoenix is a named defendant and Milne and Sullivan are named in their official capacities only, Milne and Sullivan are redundant defendants.

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 claim for alleged excessive fines (Count Three) should be dismissed for failure to state a claim upon which relief can be granted.

Count Three takes issue with three City ordinances (which the TAC refers to as the camping, sleeping, and trespassing bans) and accompanying state statutes on Eighth Amendment grounds. Plaintiffs appear to allege that the imposition of fines for violation of these laws is unconstitutional in two respects: (1) that Plaintiffs' status as "unhoused [persons who] have nowhere else to go" make the imposition of fines unconstitutional, *see* Doc. 159 at ¶¶ 269-71, 273, 279-281; and (2) that the fines are grossly disproportional to the gravity of the offense, *see id.* at ¶¶ 265-268, 272.

Plaintiffs claim fails as a matter of law, in both respects. First, no one is exempt from fines by virtue of their unsheltered status. *See People of City of L.A. Who Are Un-Housed v. Garcetti*, No. LA CV 21-06003-DOC (KES), 2023 WL 8166940 (C.D. Cal. Nov. 21, 2023) (dismissing Plaintiffs' excessive fines claim with prejudice); *Stewart v. City of Carlsbad*, No. 23cv266-LL-MSB, 2024 WL 1298075 at *2-3 (S.D. Cal. Mar. 26, 2024) (imposition of fine against unhoused plaintiff did not violate Eighth Amendment's excessive fines clause as a matter of law). A persons unsheltered status (or any other status) is simply not part of the Eighth Amendment equation.

Presumably, Plaintiffs' argument is or was an extension of the Ninth Circuit's

holdings in *Martin v. City of Boise* and *Johnson v. City of Grants Pass*, which together held that held that the Eighth Amendment prohibits the imposition of criminal and civil penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot reasonably obtain shelter. But with the U.S. Supreme Court's recent decision, *Martin* and *Johnson* are no longer: on June 28, 2024, the Supreme Court held that the enforcement of generally applicable laws regulating camping on public property does *not* constitute cruel and unusual punishment under the Eighth Amendment, overruling *Martin* and *Johnson*. *See City of Grants Pass v. Johnson*, No. 23-175, 144 S. Ct. 2202, 2220-23 (2024). If a local government can enforce criminal and civil laws against public camping and sleeping, regardless of whether the person is unhoused, then the local government can choose how to enforce those laws, including the possibility of fines. In short, there is no constitutional exemption from fines for unsheltered people.

Second, Plaintiffs have failed to allege sufficient facts to survive dismissal. Plaintiffs vaguely allege that the City "is imposing fines" on them and include a host of unidentified persons for violations of City ordinances and state statutes. Doc. 159 ¶ 75. In fact, only Plaintiffs Kearns and Urban allege that they were actually "fined." *Id.* at ¶¶ 106, 110.[1] The TAC lacks any information about when Kearns or Urban were cited; where they were cited; or, critically, the dollar amount of any citation. This information is essential for an Eighth Amendment claim for excessive fines, which, as Plaintiffs note, requires showing that the fine is "grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 336–37 (1998). At a minimum, Plaintiffs Urban and Kearns should have been able to provide these details sometime within the last two years. They have not done so. The claim is legally and factually

[1] Four Plaintiffs allege that they were cited but do not allege that they were fined. *See* Doc. 159 at ¶¶ 19 (Massingille); 20, 130 (Sissoho); 24, 97, 172-74, 177-78 (James); 27 (Rich). Two allege that they were merely "threatened" with a citation. *See id.* at ¶¶ 25, 99, 100, 184, 186 (Carr); 102, 192, 194, 199 (Idrissa). One (Moore) is silent as to whether he was cited or even threatened with a citation, let alone fined.

deficient as a result and should be dismissed.

II. Plaintiffs' state-created danger doctrine claim (Count Four) 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 state-created danger theory for removing Plaintiffs and other unidentified individuals from shaded areas in "the Zone"; destroying items that provide them with protection from the sun, including tents and tarps; and threatening them with arrest or citations during extremely hot summer temperatures. *See* Doc. 159 at ¶¶ 119-134, 135-149, 180-187, 290-299.

Plaintiffs' 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.* (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).

For Plaintiffs Massingille, Kearns, Urban, James, Carr, and Rich, their claim fails on the first prong, because the TAC is devoid of *any* allegation of "affirmative conduct," such as removing these Plaintiffs from shaded areas or seizing tents during the heat, that exposed them to any heat-related danger.

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. 159 at ¶¶ 122-134 (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 ¶¶ 142-149 (Plaintiff Moore, 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 ¶¶ 192-194, 199 (Plaintiff Idrissa, alleging that in April 2024 he was twice asked to move from shaded areas).[2] Even if they have

[2] Plaintiff Idrissa also claims that in early 2024, a "friend" had to relocate from a shaded area to a park (presumably itself shaded area) but died from "sun/heat exposure." *Id.* at ¶¶ 196-198. This unnamed "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 or discuss

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 "actually intend[ed]" to expose these Plaintiffs to an 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. Nor do allegations newly added by Plaintiffs that the City was negligent in training or supervising its employees or in failing to adopt policies show such deliberate indifference. *See* Doc. 159. at ¶¶ 306-309. Absent allegations that would clear the exceptionally high bar to prove their state-created danger claim, Plaintiff's claim should be dismissed.

III. All claims should be dismissed as against Defendants Milne and Sullivan.

Milne and Sullivan are named as defendants in their official capacities. 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). Because the City is named as a defendant, and because Defendants Milne and Sullivan are named only in their official capacities, the Court should dismiss them as redundant defendants.

CONCLUSION

Plaintiffs have had four bites at the apple over nearly two years. In significant part, they still have not gotten it right. There should be no further opportunity for amendment or to expand or change the scope of their claims. For the reasons set forth herein, the City respectfully requests that the Court dismiss the TAC in part with prejudice.

---

a lack of other nearby shaded areas. The allegations related to this individual cannot save Plaintiffs' state-created danger claim.

RESPECTFULLY SUBMITTED this 26th day of July, 2024.

PIERCE COLEMAN PLLC

By /s/ Aaron D. Arnson
Justin S. Pierce
Aaron D. Arnson
Trish Stuhan
Stephen B. Coleman
7730 E. Greenway Road, Suite 105
Scottsdale, Arizona 85260
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 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:

American Civil Liberties Union Foundation of Arizona
Jared G. Keenan
Christine K. Wee
jkeenan@acluaz.org
cwee@acluaz.org

Snell & Wilmer, LLP
Edward J. Hermes
Deliah R. Cassidy
ehermes@swlaw.com
dcassidy@swlaw.com

Zwillinger Wulkan PLC
Benjamin L. Rundall
Alexis J. Eisa
Lisa Bivens
ben.rundall@zwfirm.com
alexis.eisa@zwfirm.com
lisa.bivens@zwfirm.com

GOODWIN PROCTER LLP
Andrew Kim, admitted pro hac vice
Courtney L. Hayden, admitted pro hac vice
Collin M. Grier, admitted pro hac vice
Madeline Fuller, admitted pro hac vice
1900 N Street, N.W.
Washington, D.C. 20036
AndrewKim@goodwinlaw.com
CHayden@goodwinlaw.com
CGrier@goodwinlaw.com
MFuller@goodwinlaw.com

Attorneys for Plaintiffs

Tully Bailey LLP
Stephen W. Tully
Michael Bailey
Ilan Wurman
stully@tullybailey.com
mbailey@tullybailey.com
ilan.wurman@asu.edu
Attorneys for Intervenors

By: /s/ Mary Walker