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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' REPLY IN SUPPORT OF MOTION TO DISSOLVE PRELIMINARY INJUNCTION ORDER

Plaintiffs concede that, after the U.S. Supreme Court's decision in *City of Grants Pass v. Johnson*, there is no legal basis to continue Provision 1 of the Court's Order regarding enforcement of City ordinances. *See* Doc. 164 at 2. Solely at issue is whether the Court should dissolve Provisions 2 and 3 of the Order. Plaintiffs contend that the Court should leave Provisions 2 and 3 of the Order in place both because the purported "evidence" "plainly shows" that the City's alleged destruction of property is ongoing and because the "voluntary cessation" doctrine cuts against dissolution. Plaintiffs are wrong in both respects.

ARGUMENT

I. THE "EVIDENCE" OF ALLEGED ONGOING VIOLATIONS IS NOT SUFFICIENT TO DEFEAT THE CITY'S MOTION TO DISSOLVE.

Plaintiffs argue that because the City's alleged seizure and destruction of personal property is ongoing, Provisions 2 and 3 of the Order should remain intact. *See* Doc. 164 at 5. The purported "evidence" upon which Plaintiffs rely comes from two sources: (1) allegations in the Third Amended Complaint and (2) the Department of Justice's report (the "DOJ report") into the City's police practices.

A. Allegations in the Complaint Are Not Evidence.

Plaintiffs first point to the experiences of Plaintiffs Sissoho, Moore, and Rich, who have allegedly "personally experienced" the City seizing and destroying their property. *See* Doc. 164 at 2. But allegations in a complaint are, of course, not evidence. *See* 2949 Procedure on an Application for a Preliminary Injunction, 11A Fed. Prac. & Proc. Civ. § 2949 (3d ed.) ("Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to support or oppose a motion for a preliminary injunction."); *Davis v. Avvo, Inc.*, No. C11-1571RSM, 2012 WL 1067640, at *7 (W.D. Wash. Mar. 28, 2012) ("A complaint is not evidence."); *see also Rodrigues v. Ryan*, No. CV1608272PHXDGCESW, 2017 WL 5068468, at *3 (D. Ariz. Nov. 3, 2017), *aff'd*, 718 F. App'x 577 (9th Cir. 2018) ("A motion for preliminary injunction, including the

likelihood of irreparable injury, must be supported by evidence that goes beyond the unverified allegations of the pleadings.") (cleaned up).

Rather, a complaint's allegations are exactly that: alleged incidents that must be proven by a trial on the merits and scrutinized under cross-examination before a fact finder, not simply taken at face value. Furthermore, if Plaintiffs truly possessed "evidence" that the City improperly confiscated property belonging to Plaintiffs Sissoho, Moore, and/or Rich, then they could and should have submitted an affidavit or declaration on behalf of those individuals, as the Court suggested months ago. *See* Doc. 160-1 at 19.

B. The "Findings" in the DOJ Report Are Not Reliable Evidence that the Court Should Consider.

Plaintiffs also rely on the DOJ report as "evidence" of ongoing conduct that would warrant continuing the injunction. Plaintiffs' reliance on the DOJ report is misplaced, for at least three reasons.

First, the DOJ report is unreliable hearsay evidence. "While it is within the discretion of the [Court] to accept [ ] hearsay for purposes of deciding whether to issue [a] preliminary injunction, the Court will only do so if the movant provides some basis for accepting the proffered hearsay as reliable." *See Overstreet ex rel. National Labor Relations Board v. Western Professional Hockey League*, 2009 WL 2905554, at *5 (D. Ariz. Sept. 4, 2009) (cleaned up); *Delphon Indus., LLC v. Int'l Test Sols. Inc.*, No. 11-CV-1338-PSG, 2011 WL 4915792, at *4 (N.D. Cal. Oct. 17, 2011) (noting that although the court may consider hearsay at the preliminary injunction stage, the court may assign it less weight as it is less reliable). Much of the information in the report about the seizure and disposal of homeless individuals' properties contains statements without supporting evidence. For example, the report states, "Until 2022, [the City] routinely destroyed property without adequate notice or process during clean-ups at the Zone. And throughout the City, they continue to destroy property during clean-ups organized through the Phoenix CARES program, or during officers' day-to-day encounters with homeless

people." U.S. Dep't of Justice, *Investigation of the City of Phoenix and the Phoenix Police Department* 50 (2024), https://www.justice.gov/crt/media/1355866/dl?inline. Yet the report does not provide any evidence of the City "continuing" to destroy property during cleanups in 2023 beyond vague, conclusory hearsay statements.

Second, the DOJ report is unreliable under even the most permissive construction of the evidentiary rules. A document prepared by an outside agency entirely behind closed doors—where the subject of the investigation had no part in the process, no opportunity to review or respond to documents, and no opportunity to provide counterpoints in response to witness interviews—is not reliable evidence to support continuing a preliminary injunction. *Cf. Hayden Royal LLC v. Hoyt*, No. CV-20-02388-PHX-JJT, 2021 WL 2637501, at *7 (D. Ariz. Jan. 22, 2021) (noting that even though the threshold for the admissibility of evidence at the preliminary injunction stage is lower, the court should still scrutinize the reliability of "evidence when it has not been subjected to testing through cross-examination.").

To the extent Plaintiffs suggest that the Court take judicial notice of the DOJ report, "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018); *Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d 1224, 1234 (E.D. Cal. 2003) (while it is proper to take judicial notice of the existence of public or quasi-public documents, "[t]o the extent their contents are in dispute, such matters of controversy are not appropriate subjects for judicial notice.").

In *Whitfield v. Riley*, the court recently encountered a similar request to take judicial notice of a DOJ Report. 2021 U.S. Dist. LEXIS 166500, *8–9 (E.D.La. April 21, 2021), attached as **Exhibit 1**. In rejecting the request, the court held that judicial notice normally applies to "self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities." *Id.* (quoting *Wooden v. Mo. Pac. R.R. Co.*, 862

F.2d 560, 563 (5th Cir. 1989) (internal quotations omitted). Rather than addressing a banality, the *Whitfield* court noted that "the facts in the DOJ Report are hotly disputed and strike to the heart of the case itself…The Court would commit grave error indeed to stamp as conclusive the entirety of an extensive report covering a wide variety of topics, some with undisclosed sources." *Id*. at 9. In addition, the court held that "the facts in the DOJ Report cannot be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Id*. Next, the court found that "[i]t is also improper to take judicial notice of mixed questions of fact and law…The DOJ Report is replete with legal conclusions based upon the observations of the investigators which makes it an inappropriate candidate for judicial notice." *Id*. at *10. The court also rejected the claim that judicial notice was appropriate simply because the report was prepared by a federal agency, noting that:

> Here, there has been no showing of the indisputability of the DOJ Report and its mere status as a report of a federal agency is insufficient to overcome this evidentiary foundation. Simply put, the entirety of the DOJ Report does not amount to the kind of self-evident truths that no reasonable person could question, or truisms that approach platitudes or banalities, as would warrant judicial notice.

Id. at *11; *see also Sloatman v. Housewright*, No. 221CV08235WLHMAA, 2023 WL 8852375, at *4 (C.D. Cal. Nov. 17, 2023) (the court could grant the "request to take judicial notice of the existence and authenticity of the DOJ report, but not the validity or accuracy of its contents."). Finally, the court noted that:

> The sources underlying the DOJ Report might provide the proper support for Whitefield's Monell claim if presented in a fashion to allow them to be tested in the adversarial process, but the DOJ Report, as a secondhand account, absent adequate corroborating support, would dangerously mislead the jury which could inappropriately rely on the DOJ's conclusions without having the benefit of weighing the sources it relied upon. As such, the probative value of the DOJ Report is also substantially outweighed by the danger of unfair prejudice.

Whitfield v. Riley, 2021 U.S. Dist. LEXIS 166500, at *8.

Similarly, in *In re Papa John's Emple. & Franchisee Emple. Antitrust Litig*., the

court also rejected a request to take judicial notice of the contents of a DOJ report. 2019 U.S. Dist. LEXIS 181298, *17–18 (W.D. Ky. Oct. 21, 2019), attached as **Exhibit 2**. The court held that "[t]he Court will not, however, abdicate its duty to apply the law to the facts of this case by blindly deferring to DOJ's analysis of distinct factual scenarios." *Id.*; *see Jordan v. Brumfield*, 687 Fed. Appx. 408, 416 (5th Cir. 2017) (affirming district court's refusal to take judicial notice of the DOJ's report on alleged unconstitutional policing as the report, itself, cannot establish a pattern of repeated conduct); *Barrios-Barrios v. Clipps*, 825 F.Supp.2d 730, 751 (E.D.La. Oct. 20, 2011) (noting that the DOJ report "generically found deficiencies," but failed to establish a pattern of similar violations and failed to show specifically identifiable constitutional deficiencies).

The *Whitfield*, *In Re Papa John's Emple*, and *Jordan* courts' reasoning applies with equal force here. The DOJ report's conclusions are in dispute, relate to a non-party, are mixed issues of law and fact, and are broadly meant to establish a pattern and practice, not to point to specific incidents. This Court should exercise its own independent duty to apply the law to the facts of this case by analyzing the actual evidence before it.

Third, even if the Court considers the DOJ report as evidence (which it should not), the report does not support the Plaintiffs' contention of ongoing constitutional violations. The DOJ report states that "***Until 2022***, [the City] routinely destroyed property without adequate notice or process during clean-ups at the Zone"; "But from October 2020 ***to January 2022***, the City's 'clean-up operations' in the Zone routinely resulted in constitutional violations"; "Until ***January 2022***, the City posted no signs to explain the frequency or duration of the clean-ups"; "At the end of ***December 2022***, the City created a protocol for impounding and storing property during cleanups." DOJ report at 50–51 (emphasis added). The report repeatedly indicates that the City's alleged constitutional violations occurred until, at the latest, December 2022.[1] *See id.* The report lacks specific

[1] Many of the alleged constitutional violations in the report occurred before this lawsuit was filed. *See* Doc. 1 (the Complaint was filed on November 30, 2022).

and reliable allegations of constitutional violations within the last year and a half.[2] Thus, the DOJ report does not support Plaintiffs' claim that the alleged harm is ongoing because the report contains no evidence or allegation of continuing harm.

The bottom line is that since the preliminary injunction was issued in December 2022, Plaintiffs have failed to produce reliable evidence to justify maintaining the injunction. The Court should grant the City's motion accordingly.

II. THE COURT SHOULD APPLY THE NINTH CIRCUIT'S SIGNIFICANT CHANGE IN FACTS OR LAW STANDARD.

The City has shown that significant changes in fact and law warrant its dissolution. A district court can always modify or overturn a preliminary injunction while it remains interlocutory. *See Credit Suisse First Bos. Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005). "Because injunctive relief is drafted in light of what the court believes will be the future course of events, ... a court must never ignore significant changes in the law or circumstances underlying an injunction lest the decree be turned into an instrument of wrong." *Salazar v. Buono*, 559 U.S. 700, 714–15 (2010) (citation and internal quotation marks omitted).

When determining whether a preliminary injunction should be dissolved, the Ninth Circuit looks to whether there has been a "significant change" in facts or law. *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). "A district court has 'wide discretion' to dissolve, modify, or reconsider a preliminary injunction based on a change in factual or legal circumstances." *Latimore v. County of Contra Costa*, 77 F.3d 489 (9th Cir. 1996) (unpublished) (quoting *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647

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[2] The DOJ Report makes an unsupported assertion by claiming that even after the new policies were in place, the DOJ found instances of constitutional violations. DOJ report at 52. If the DOJ had evidence of such violations following the issuance of the City-wide policy, it presumably would have specified these incidents. But the report does not provide such evidence. Instead, the report repeatedly references only alleged constitutional violations that occurred between October 2020 and December 2022.

(1961)); *see also Index Newspapers LLC v. City of Portland*, No. 3:20-CV-1035-SI, 2022 WL 72124, at *3 (D. Or. Jan. 7, 2022); *Ctr. for Biological Diversity v. Salazar*, No. CV 07-0038-PHX-MHM, 2010 WL 3924069, at *2 (D. Ariz. Sept. 30, 2010) ("A significant change is one that pertains to the underlying reasons for the injunction.") (citation omitted).

Significant changes in both law and fact warrant the dissolution of the preliminary injunction. First, and not disputed by Plaintiffs, is the Supreme Court's decision in *City of Grants Pass v. Johnson*, which justifies eliminating Provision 1 of the preliminary injunction. *See* Doc. 164 at 2. Second, there have been significant factual changes related to the *underlying reasons* for this Court's preliminary injunction, justifying the dissolution of Provisions 2 and 3.

The *Index Newspapers* case provides a valuable example for understanding why the factual changes in this matter are sufficient to warrant dissolving the preliminary injunction. In that case, the court entered a preliminary injunction against the federal government to prevent federal officers from arresting or using physical force against journalists during protests in Portland, Oregon, and from seizing the journalist's equipment, among other actions. 2022 WL 72124, at *3. The government moved to dissolve the preliminary injunction, arguing that the number and size of the protests had significantly decreased, which resulted in substantially reduced federal response to the protests. *Id.* at *6. The court agreed, finding that the frequency of the protests had decreased from nightly to sporadic and that no out-of-state federal officers remained stationed in Portland. *Id.* Moreover, the court noted that the issuance of the preliminary injunction was significantly influenced by the sheer presence of out-of-state officers in Portland. *Id.*

Similarly, here, there have been significant factual changes in Phoenix that address the Court's reasoning for granting the preliminary injunction. As detailed at length in the City's motion, the Court expressed concern about the City's lack of a ***city-wide policy*** for

managing the storage and disposal of homeless individuals' property during cleanups outside "the Zone"; the City's methods for determining "abandoned property"; and notice to homeless individuals before cleanups occurred. Doc. 160 at 5–6. The facts have now changed: since the issuance of the preliminary injunction, the City has implemented a constitutionally compliant City-wide policy for conducting cleanups. Doc. 80-1 at Exs. 1 and 2 to Decl. of Rachel Milne. The City has also refined its procedures for determining whether property is abandoned and provides adequate notice to homeless individuals before cleanups occur. Doc. 80-1 at Ex. 3 to Decl. of Jeremy Huntoon; Decl. of Sheila D. Harris at ¶ 8, 10, 16. Thus, similar to the court in *Index Newspapers*, which dissolved the injunction once the defendants addressed the court's initial concerns, the City has resolved all of this Court's concerns through (1) the creation of a city-wide policy for storage and removal of homeless persons' personal belongings, (2) providing adequate notice before seizing personal property, and (3) developing processes to determine whether property is truly abandoned.[3] *See* Doc. 34 at 3, 9–10, 13–14. As a result, the Court's reasons for granting the preliminary injunction have been remedied by new facts, and the preliminary injunction is no longer necessary.

III. THE VOLUNTARY CESSATION DOCTRINE IS GENERALLY APPLIED MORE LIBERALLY TO PUBLIC ACTORS.

Plaintiffs' reliance on the "voluntary cessation doctrine" is also misplaced. First, this doctrine is typically (although, admittedly, not always) applied in the context of mooting an entire claim, not when the courts consider whether a preliminary injunction should be dissolved. *See, e.g.*, *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d

[3] The City recognizes that the basis for the preliminary injunction was not solely related to cleanups within the Zone. However, many of the allegations in this matter pertain to actions allegedly taken by the City during cleanups of the Zone. Drawing on the reasoning in *Index Newspapers*, where the court found that significant decreases in protests reduced the opportunity for harm, eliminating the Zone similarly minimizes the likelihood of future violations. *See* 2022 WL 72124, at *6.

1147, 1152 (9th Cir. 2019) ("[T]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.") (internal citation omitted); *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1039 (9th Cir. 2018) (same); *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (same). The City neither seeks nor intends to pursue a declaration of mootness of any claim, including a future claim for prospective injunctive relief. Rather, the City contends that given the scant reliable evidence presented, taken with the City's change in policy, there is no basis to continue the preliminary injunction.

Setting this aside, Plaintiffs overlook the fact that, in general, courts apply the otherwise high standard for voluntary cessation more loosely when the defendant is a government actor, with a rebuttable presumption that the objectionable behavior will not reoccur. *Bd. of Trustees of Glazing Health & Welfare Tr.*, 941 F.3d at 1198 ("However, we treat the voluntary cessation of challenged conduct by government officials with more solicitude ... than similar action by private parties.") (internal quotations omitted); *see also Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("The government's change in policy presents a special circumstance in the world of mootness…we presume the government is acting in good faith."); *Supervisor of Elections in Palm Beach,* 382 F.3d 1276, 1283 (11th Cir. 2004) (rebuttable presumption justified as to government actors).[4]

The City, a governmental entity, should be afforded the presumption that conduct will not reoccur. This is based on its intentional development of policies and procedures to prevent violations of constitutional rights, with no foreseeable reason for

[4] The Ninth Circuit has rejected the idea of substantial deference to the government in the context of a defendant's challenge on mootness grounds, which is not the City's position here. *Brach v. Newsom*, 38 F.4th 6, 12 (9th Cir. 2022). The Ninth Circuit still presumes that the government is acting in good faith. *Id.*

these measures to be substantively altered (i.e., *permanent*). *See White v. Lee,* 227 F.3d 1214, 1243 (9th Cir. 2000) (holding that a permanent change in HUD's policy with respect to Fair Housing Act investigations was sufficient to render plaintiff's claim moot). The City has no reason to disregard its own policies. *See* 13A Wright, Miller & Cooper, Federal Practice and Procedure § 3533.7, at 351 (2d ed. 1984) ("Courts are more likely to trust public defendants to honor a professed commitment to changed ways").

Plaintiffs' blanket assertions that the City could immediately abandon its policy once the injunction is dissolved, Doc. 164 at 7, without more, is insufficient to continue a preliminary injunction. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 (9th Cir. 2013) (Although "a plaintiff does not have to await the consummation of threatened injury to obtain preventive relief," they must demonstrate that based on their course of conduct, there is a realistic danger that harm will materialize). If Plaintiffs wanted to rebut this presumption, they must present evidence that the City continues to violate its policy after its enactment. They have attempted to do so in their Response; however, as detailed in Section I, Plaintiffs have not provided any reliable, concrete evidence of constitutional violations occurring after the implementation of the new City-wide policies and have not provided sufficient grounds to rebut the presumption.

Furthermore, the cases cited by Plaintiffs to support their argument for applying voluntary cessation are not like the situation in Phoenix. *See, e.g.*, *Fikre*, 904 F.3d at 1039 (holding that a case was not moot because the FBI's decision to remove the plaintiff from the no-fly list was "an individualized determination untethered to any explanation or change in policy, much less an abiding change in policy"); *Bell v. City of Boise*, 709 F.3d 890, 900–01 (9th Cir. 2013) (holding that a case was not moot where "the authority to establish policy for the Boise Police Department is vested entirely in the Chief of Police," that official's *unilateral* order did not moot case). Because, here, the City has adopted a City-wide policy that *all* City staff must follow. Doc. 80-1 at

Decl. of Rachel Milne ¶ 5. The City is requesting the Court to dissolve the injunction.

CONCLUSION

Plaintiffs have presented scant and unreliable evidence of ongoing constitutional violations. The Court should not consider the allegations in the Third Amended Complaint or the DOJ report in making its decision. Given the lack of such evidence, a continued injunction cannot be justified. Based on the demonstrated change in facts and law, the Court should grant the City's Motion to Dissolve the Preliminary Injunction Order.

RESPECTFULLY SUBMITTED this 8th day of August, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 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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