AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ARIZONA
Jared G. Keenan, State Bar No. 027068
Christine K. Wee, State Bar No. 028535
2712 N. 7th Street
Phoenix, Arizona 85006
Telephone: (602) 650-1854
E-Mail: jkeenan@acluaz.org
cwee@acluaz.org

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Leah Watson, admitted *pro hac vice*
Scout Katovich, admitted *pro hac vice*
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500
E-Mail: lwatson@aclu.org
skatovich@aclu.org

ZWILLINGER WULKAN PLC
Benjamin L. Rundall, State Bar No. 031661
Alexis Eisa, State Bar No. 038702
Lisa Bivens, State Bar No. 034075
2020 North Central Avenue, Suite 675
Phoenix, Arizona 85004
Telephone: (602) 962-2969
E-Mail: 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
Telephone: 202-346-4000
E-Mail: AndrewKim@goodwinlaw.com
CHayden@goodwinlaw.com
CGrier@goodwinlaw.com
MFuller@goodwinlaw.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Fund for Empowerment, et al.,

Plaintiffs,

vs.

City of Phoenix, et al.

Defendants.

No. CV-22-02041-PHX-GMS

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiffs filed this case in 2022 to end the unconstitutional raids of homeless encampments by the City of Phoenix. In the Third Amended Complaint (the "TAC"), they allege that the same unconstitutional practices identified at the time of filing continue today, despite the preliminary injunction including: the City's seizure and destruction of property without process; forced relocation of unhoused people to areas that are unprotected by shade or shelter; confiscation of survival equipment for heat relief; and the use of criminal and civil citations, and the imposition of fines, to restrict the areas that unhoused people can legally occupy. In short, the City has not stopped the practices that precipitated this lawsuit

and those practices, with one exception to a claim the Plaintiffs have already withdrawn, remain unconstitutional.[1] Instead, the City has expanded the scope of its unconstitutional practices with the closure of the Zone.

Plaintiffs,[2] who fear for their lives and livelihoods daily as a result of the City's raids, earnestly seek discovery that will corroborate their allegations and establish the basis for permanent injunctive relief and damages. The City has squandered time since the filing of this case with negotiating then refusing settlement; joinder with the Intervenors' baseless motion to dismiss; meritless attempts to relitigate the issuance of the preliminary injunction by requesting dissolution of provisions completely unaffected by the Ninth Circuit and Supreme Court's decisions in *Grants Pass*; and oppositions to Plaintiffs' requests to initiate discovery. Docs. 53, 56, 58, 60, 83, 94, 109, 119, 122, 124, 137, 160. The Defendants' Motion to Dismiss the TAC is simply the latest of stall tactic. First, the Defendants' arguments to dismiss Plaintiffs' Eighth Amendment excessive fines claim fall short, as they misrepresent Plaintiffs' allegations and attempt to improperly heighten well-established pleading standards. Second, Plaintiffs have adequately alleged their state-created danger claim because they have alleged that Defendants' knowing, affirmative actions of taking survival equipment and forced relocation in extreme heat with little notice put Plaintiffs at increased danger of heat-related illness and death. Third, the claims against Defendants Milne and Sullivan should not be dismissed because they are key players in proliferating the City's policies and procedures with regarding to the unhoused population.

Given Plaintiffs' well pleaded allegations in the TAC, this Court should deny Defendants' motion and allow discovery to proceed.

STATEMENT OF FACTS

As Plaintiffs have alleged and supported with sufficient evidence to warrant injunctive relief, the City of Phoenix (the "City") repeatedly seizes and destroys the

[1] Following the Supreme Court's decision in *Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024), Plaintiffs withdrew the Eighth Amendment cruel and unusual punishments claim.

[2] As used herein and as alleged in the TAC, "Plaintiffs" includes the named Plaintiffs in this lawsuit as well as those individuals served by FFE and FFE's members. *See* TAC ¶¶ 18-27.

property of unhoused people without a warrant, notice, or opportunity to be heard, as required by the Fourth and Fourteenth Amendments.[3] TAC ¶¶ 5, 8, 11, 19-23, 48, 52, 54-55, 86, 88, 105, 109, 115-17, 123-24, 126-27, 131, 137, 139, 141-42, 144, 147, 154, 156-67, 165-66, 203, 205, 213-238, 240-63. Additionally, despite its awareness of heat-related danger, the City pushes those who are unhoused from areas protected by shade or shelter and confiscates their survival equipment that could be used for heat relief, including tents, running afoul of the Fourteenth Amendment. TAC ¶¶ 3, 9-10, 54, 90-91, 105, 109, 117, 125, 128, 131, 134, 140, 145, 148-49, 155, 165, 184-85, 192-99, 290-309. The City does this by restricting where unhoused people can exist using criminal and civil citations, imposing onerous monetary fines in violation of the Eighth Amendment. TAC ¶¶ 4, 19-20, 23-24, 27, 42, 58-61, 64-73, 75-78, 81, 92-93, 97, 106, 110, 125, 130, 158-59, 167-68, 172-73, 177-78, 203, 265-288.

STANDARD OF REVIEW

To survive a motion to dismiss for failure to state a claim, a complaint need only state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Specific facts are not necessary; the statement need only give the defendant fair notice of what…the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). When reviewing a motion to dismiss a party's claims, the facts in the complaint should be "viewed in the light most favorable to Plaintiffs," *Moss v. Secret Service*, 572 F.3d 962, 967-68 (9th Cir. 2009), and "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. PLAINTIFFS ADEQUATELY ALLEGED AN EXCESSIVE FINES CLAIM (COUNT III).

A fine is unconstitutionally excessive when the amount "is grossly disproportional

[3] The City did not move to dismiss the property related claims.

to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The touchstone of an excessive fines claim is the principle of proportionality. *Id.* To assess the proportionality of a penalty, courts look to a non-exhaustive set of factors including "(1) the nature and extent of the underlying offense; (2) whether the underlying offense related to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of the harm caused by the offense." *Pimentel v. City of Los Angeles*, 974 F.3d 917, 921 (9th Cir. 2020). Based on these factors, the facts alleged in the TAC are more than adequate to support an excessive fines claim. *See* TAC ¶¶ 269-81.

Plaintiffs allege the City assesses up to $2,500 per violation against Plaintiffs for violations of the City's Camping Ban, Sleeping Ban, and Trespassing Bans (collectively, the "Bans"). *See* TAC ¶¶ 59-71. Specifically, Plaintiffs allege that, for each violation of these Bans, "a criminal fine is imposed by the City against the charged party as a routine matter of course and the payment of the fine is generally required to resolve the criminal matter." *Id.* ¶ 73. Plaintiffs further allege that the City imposes these fines "even though [Plaintiffs] lack culpability" because Plaintiffs have no choice other than to violate the Bans in order to carry out basic functions of human living, such as sleeping. *Id.* ¶ 75. In other words, the fines (and as-applied enforcement of the Bans generally) "serve no remedial purpose" other than to "deter unhoused individuals from residing in Phoenix." *Id.* ¶ 76. As a result, Plaintiffs allege that the fines are "grossly excessive and disproportional to the behavior for which Defendants are imposing these fines." *Id.* ¶ 278.

Here, Plaintiffs' have successfully pleaded an excessive fines claim under *Bajakajian*. The City does not argue otherwise in its Motion. Starting with the first *Bajakajian* factor, "the nature and extent of the underlying offense" of unhoused individuals sitting, sleeping, lying down, or camping outside is minimal. Indeed, the only harm caused by Plaintiffs doing so is simply their physical presence in an area such as a public sidewalk, street, or park—areas where the City does not want them to be.[4] *See,* TAC ¶¶ 152-159.

[4] When weighing the nature of the offense this Court should look at "the specific actions of the violator rather than by taking an abstract view of the violation." *Pimentel*, 974 F.3d at

Moreover, Plaintiffs' claims are not speculative and have been directly confirmed by the United States Department of Justice's Investigation (as alleged throughout the TAC) which found the City routinely cites unhoused residents even when they haven't committed a cognizable crime. *See* U.S. Dep't of Just., *Investigation of the City of Phoenix and the Phoenix Police Department* 47 (2024) ("[O]fficers cite or arrest homeless people for conduct that is plainly not a crime, such as sitting or lying down on public property or for 'trespassing' on private property when they are on a *public* sidewalk." (emphasis added)).

Turning to factors two and three, the City does not and cannot bootstrap the offenses proscribed by the Bans to other illegal activities. TAC ¶¶ 75-76, 273-76. And, looking to other penalties that may be imposed, violations of the Bans are already punishable by imprisonment up to six months. Phx. Ariz. City Code § 1-5; TAC ¶ 71. Accordingly, fines of up to $2,500 as alleged are disproportional to the offense of sitting, sleeping, or lying down outside in public spaces and are constitutionally excessive.

Without referencing the above factors, the City nevertheless argues Plaintiffs' allegations are insufficient to support an excessive fines claim because (1) "no one is exempt from fines by virtue of their unsheltered status," (2) their fines are minimal, and (3) Plaintiffs' claim lacks specificity and detail to be considered sufficiently pled. Mot. at 3-4. Plaintiff responds briefly to each argument below:

First, Plaintiffs do not assert that the Bans violate the Excessive Fines Clause because they allow for monetary penalties based on an individual's unhoused status; rather, the TAC alleges that the Bans violate the Eighth Amendment because they impose excessive fines of up to $2,500 per violation for a relatively minimal "offense" with little culpability. *See* TAC ¶ 268-70. This directly aligns with holdings in other cases, including *Grants Pass,* where the Supreme Court noted it was "not decid[ing] whether the Ordinance violate the Eight Amendment's Excessive Fines Clause." *Grants Pass*, 144 S. Ct. at 2242 (Sotomayor, J., dissenting); *see also Pimentel*, 974 F.3d at 924 (leaving open means-testing

---

923 (quoting *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197 (9th Cir. 1999) (cleaned up)).

approach to Excessive Fines Clause); *Bajakajian*, 524 U.S. at 340 n.15; *Timbs v. Indiana*, 586 U.S. 146, 151 (2019) ("[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear." (quoting 4 W. Blackstone, Commentaries on the Laws of England 272 (1769))). So, while the individual Plaintiffs' unhoused status *does* matter when it comes to their inability to pay fines, this fact merely demonstrates the fines for the Bans are grossly disproportionate to the prohibited conduct.

Second, the City's argument that the fines here are small-dollar fines similar to fines for traffic violations is misleading, immaterial, and ignores the *Bajakajian* factor analysis. Indeed, fines tied to sitting, sleeping, or lying down outside are wholly dissimilar from fines imposed to regulate safe driving in vehicles that can cause serious injury or death when driven dangerously. Traffic citations are a relatively minor and avoidable part of car ownership whereas even a modest fine attached to unavoidable conduct can prove an impossibility for an unhoused person. *See Bajakajian*, 524 U.S. at 336.

Third, the City's argument that Plaintiffs' allegations lack the requisite specificity also falls flat and unreasonably heightens Plaintiffs' pleading standards in a way that has not been found necessary by other courts. For example, the City insists that Plaintiffs must allege the date, time, and dollar of each fine for an excessive fines claim but provides no basis justifying this heightened pleading standard. *See Syed v. M-I, LLC*, 853 F.3d 492, 499 n.4 (9th Cir. 2017) ("at the Rule 12(b)(6) stage 'we presume that general allegations embrace those specific facts that are necessary to support a claim.'") (citing *Smith v. Pac. Properties and Dev. Corp*., 358 F.3d 1097, 1106 (9th Cir. 2004)). While the City may well have excuses to try and establish that fines imposed for the Bans are indeed proportional, the City's justifications for fines imposed by the Bans lie in discovery and summary judgment, not dismissal. Until then, no case law supports dismissal based on the City's argument for further specificity. *See Navarro v. City of Mountain View*, 2021 WL 5205598, at *4 (N.D. Cal. Nov. 9, 2021) (declining to decide excessive fines claim at 12(b)(6) phase "without the benefit of developed evidence" through discovery); *Calvary Chapel San Jose v. Cody*, 2022 WL 827116, at *12-13 (N.D. Cal. Mar. 18, 2022) (declining to decide

Excessive Fines claim on a motion to dismiss, given the "fact intensive" analysis required).

II. PLAINTIFFS ADEQUATELY ALLEGED A STATE-CREATED-DANGER CLAIM UNDER THE FOURTEENTH AMENDMNET

a. Legal standard

A state-created-danger claim under the Fourteenth Amendment requires (1) "affirmative conduct on the part of the state in placing the plaintiff in danger" and (2) that "the state acted with 'deliberate indifference' to a 'known or obvious danger.'" *Murguia v. Langdon*, 61 F.4th 1096, 1111 (9th Cir. 2023), *cert. denied sub nom. Tulare v. Murguia*, 144 S. Ct. 553, 217 L. Ed. 2d 295 (2024) (quoting *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011)). "Affirmative conduct" turns on whether a state actor "left the person in a situation that was more dangerous than the one in which they found him." *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000). It is action that exposes an individual to an increased risk of harm from third parties, the elements, or other factors outside the state actor's control. *See Murguia*, 61 F.4th at 1112 ("This court and other circuits have applied the state-created danger exception in situations where an officer ... separated the plaintiff from a third-party who may have offered assistance, or prevented other individuals from rendering assistance to the plaintiff."); *Munger*, 227 F.3d at 1087 (officers placed individual "in a more dangerous position than the one in which they found him" by evicting him from a "bar late at night when the outside temperatures were subfreezing").

Meanwhile, deliberate indifference is found when a state actor "disregard[s] a known or obvious consequence of [its] action." *Patel*, 648 F.3d at 974. While a defendant must "recognize[] the unreasonable risk and actually intend[] to expose the plaintiff to such risks without regard to the consequences to the plaintiff," *L.W. v. Grubbs*, 92 F.3d 894, 899 (9th Cir. 1996), the deliberate indifference standard "does not require *intent to cause harm* or knowledge of *certain* harm." *Murguia*, 61 F.4th at 1126 n.16 (noting state actor "need not know with certainty that the risk will materialize or intend for the plaintiff to face the risk.").

In the Ninth Circuit, "district courts have recognized that the clearing of homeless

encampments may present a state-created danger claim when residents are exposed to increased risk of significant harm due to its clearing." *Prado v. City of Berkeley*, 2024 WL 3697037, at *29 (N.D. Cal. Aug. 6, 2024). Courts have found "sweeping or clearing of encampments in extreme heat to be 'affirmative conduct' on the part of the City in placing Plaintiffs in danger," with "'deliberate indifference' to the 'known or obvious danger' of extreme heat." *Sacramento Homeless Union v. Cnty. of Sacramento*, 617 F. Supp. 3d 1179, 1193 (E.D. Cal. 2022) (cleaned up). In addition to increasing the risk of danger from extreme weather, sweeps may constitute a state-created danger where they separate unhoused people from necessary services, destroy survival items, and break up communities relied upon for safety. *See, e.g., Mary's Kitchen v. City of Orange*, 2021 WL 6103368, at *11 (C.D. Cal. Nov. 2, 2021) (finding proposal to evict service provider without transition plan that would "leave hundreds without the services needed to survive, particularly with upcoming strong winds and harsh winter rains and the ongoing pandemic" put "the unhoused people of Orange 'in a situation that was more dangerous than the one in which they found [them]'" in violation of the state-created-danger doctrine) (quoting *Munger*, 227 F.3d at 1086)); *Janosko v. City of Oakland*, 2023 WL 187499, at *3 (N.D. Cal. Jan. 13, 2023) ("Alleging that the government demolished an unhoused individual's shelter and property essential to protection from the elements including cold and freezing temperatures, rain, and other difficult physical conditions is sufficient to state a claim for state-created danger under the Fourteenth Amendment." (internal quotation marks omitted)); *Jeremiah v. Sutter Cnty.*, 2018 WL 1367541, at *5 (E.D. Cal. Mar. 16, 2018) (granting a temporary restraining order on state-created-danger claim challenging seizure of shelters and possessions which the County knew or should have known that Plaintiffs relied on to stay physically safe from the elements); *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1100, 1102 (E.D. Cal. 2012) (denying motion to dismiss state-created-danger claim alleging city destroyed unhoused plaintiffs' "shelter and property essential to protection from the elements" at "the onset of the winter months that would bring cold and freezing temperatures, rain, and other difficult physical conditions"); *Boyd v. City of San Rafael*,

2023 WL 6960368, at *21 (N.D. Cal. Oct. 19, 2023) (applying state-created-danger doctrine to enjoin enforcement of anti-camping ordinance that would break up large encampments, "destabilize[ing] the communal frameworks on which individuals rely for survival," and "plac[ing] Plaintiffs in danger of sexual and domestic violence, victimization as to crime, death due to drug overdose, and inability to access food, water, and shelter").

b. Plaintiffs Adequately Plead "Affirmative Conduct" and "Deliberate Indifference."

Here, Plaintiffs have plainly met their pleading standard by alleging the City regularly conducts raids during extreme heat and engages in three separate types of "affirmative conduct" during its raids that place Plaintiffs at increased risk of danger. TAC ¶ 10. First, by providing "mere minutes for people to gather their belongings and flee the area," Defendants' raids cause "stress and physical exertion" that is "dangerous in such high temperatures." *Id.* Second, Defendants increase the risk of heat-related illness and death by conducting raids that "target individuals in shaded areas, forcing them out of relatively cool areas to wander through the City in the direct sun." *Id.* Third, during its raids, Defendants destroy "survival equipment, like tents or tarps that provide some protection from the sun," which "increases unhoused individuals' exposure to dangerous temperatures." *Id.*

Furthermore, Defendants "know that unsheltered individuals, including Plaintiffs, individuals served by FFE, and FFE members, are at high risk for heat-related illness and death." *Id.* ¶ 295. They are acutely aware, through the City's participation in Maricopa County's yearly report on heat-related deaths and widespread reporting on the subject, that hundreds of individuals die in Phoenix from heat-related illness each year, and that the unsheltered population accounted for over half these deaths. *Id.* ¶¶ 3, 294. Despite knowing this risk, Defendants have a policy of conducting regular raids, regardless of the temperature, during which they cause dangerous stress and exertion by forcing unhoused individuals to quickly gather their belongings and wander from place to place in the hot sun, destroy heat-protective belongings like tents and shades, and force unsheltered individuals to move out of shaded areas. *Id.* ¶¶ 296-298. Defendants pursue this policy despite knowing

that the unhoused population outnumbers shelter beds by several thousands and that most people targeted by its raids have no access to indoor refuge from the heat. *See id.* ¶ 41.

c. Defendants Arguments to the Contrary Also Fail.

Starting with the veracity of Plaintiff' allegations, Defendants' motion to dismiss Plaintiffs' state-created-danger claim insinuates that the evolution of Plaintiffs' state-created-danger allegations since they filed suit in 2022 casts doubt on their claim. See Mot. at 5. Despite knowing Plaintiffs' allegations must be taken as true on a motion to dismiss, Defendants ironically ignore how they themselves created these changed conditions. For example, in 2023, the year the City ramped up its raids to clear the Zone, there was a 52% increase in heat-related deaths, the highest concentration of which took place in and around the Zone. See TAC ¶ 294 n.39, 2023 Heat Related Deaths Report, at 12 (interactive map showing that 85007 (zip code where CASS and surrounding Zone are located) and zip code directly west of the Zone had highest concentration of heat-related deaths in 2023).

Turning to Defendants' substantive arguments for dismissal—that the TAC does not contain allegations of affirmative conduct, nor facts showing deliberate indifference—these claims are equally unpersuasive and ignore Plaintiffs' well-pleaded allegations,

1. Defendants incorrectly limit the alleged "affirmative conduct."

First, contrary to their assertions, Defendants' affirmative conduct is not limited to only certain plaintiffs or to Defendants' cherry-picked allegations. Rather, the TAC adequately alleges that Defendants "systematically conduct raids it calls 'clean sweeps' of areas occupied by unsheltered individuals and those experiencing homelessness," TAC ¶ 46; that during these raids Defendants allow "unsheltered individuals (including Plaintiffs, those served by FFE, and its members) typically ... just minutes to gather their personal possessions and belongings," *id.* ¶ 51; and that they "commonly result in the loss and destruction of personal property ... necessary for survival, including tents [and] shades for heat relief," *id.* ¶ 54. All this despite knowing that there is inadequate shelter in the city and that exposure to and exertion in Phoenix's high temperatures regularly results in death. As other courts have concluded on similar facts, this plausibly alleges affirmative conduct that

"creates or exposes an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006); *see Langley v. City of San Luis Obispo,* 2022 WL 18585987, at *5 (C.D. Cal. Feb. 7, 2022) (denying motion to dismiss state-created-danger claim where complaint alleges that "because they lack other options for shelter, the City's sweeps and property seizures force homeless people 'to live exposed to the elements, without protection from cold, wind, and rain, jeopardizing their physical and mental health.'"); *Sanchez*, 914 F. Supp. 2d at 1100 (denying motion to dismiss claim that Defendants violated state-created-danger doctrine "by creating a policy and plan for the homeless plaintiffs that physically threatened their ability to live," including seizing and demolishing "shelter and property essential to protection from the elements" without adequate notice or opportunity to retrieve it); *Sacramento Homeless Union*, 617 F. Supp. 3d at 1193 ("In light of the 'stress, extreme fatigue and collapse' accompanying these sweeps ..., the Court finds that the City's sweeping or clearing of encampments in extreme heat to be 'affirmative conduct' on the part of the City in placing Plaintiffs in danger.").

The City does not—and cannot—contest that the TAC adequately alleges Defendants have subjected Plaintiffs FFE, Idrissa, Sissoho, and Moore to this affirmative conduct.[5] Further, the TAC alleges that Plaintiffs Massingille, Kearns, Urban, James, Carr, and Rich have each been subjected to the City's raids, during which the City has seized and destroyed their tents, shade, and other survival items, and forced them to quickly gather their belongings, leave areas with shade and services, and walk for hours under threat of

[5] *See* TAC ¶ 90 ("Since 2020, FFE has had to divert its resources to providing replacement safety items, such as tents and water, to individuals whose property was seized by the City during sweeps. FFE does this because unsheltered individuals may become ill if they do not have access to shade or water and are exposed to heat because of a sweep."); *id.* ¶¶ 103, 194-95, 199 (PPD used threats of citation and arrest on multiple occasions to force Plaintiff Idrissa to "walk[] for more than an hour," and continually leave shaded areas to "move into areas unprotected from sun and heat exposure"); *id.* ¶¶ 122-27, 131, 134 (on multiple occasions, PPD seized Plaintiff Sissoho's tent and other survival gear "without which it has been hard for Mr. Sissoho to protect himself from the sun and sweltering heat"); *id.* ¶¶ 137-49 (during raids, Defendants seized Plaintiff Moore's tent and shade for heat protection, making it difficult "to stay out of the direct sun" "caus[ing] him to feel faint and exhausted")

citation and arrest.[6] These allegations show that these Plaintiffs are also harmed by Defendants' policy and practice of consistently and indiscriminately raiding unhoused individuals, regardless of temperatures, putting them at increased risk of heat-related injuries.

The TAC thus alleges each Plaintiff's exposure to Defendants' raids, during which Defendants engage in "affirmative acts," including destruction of survival property and forcing unhoused people to quickly gather their belongings and wander the city, regardless of the weather, that "increased the danger [Plaintiffs'] faced." *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018). As other courts in this circuit have found, "[w]hen Plaintiffs' shelter and personal belongings are destroyed, and they have no safe shelter alternative nor means to protect themselves from the elements, the state has made plaintiffs[']conditions worse." *Prado*, 2024 WL 3697037, at *31. *See also Janosko*, 2023 WL 187499, at *3 ("Alleging that the government demolished an unhoused individual's shelter and property essential to protection from the elements including cold and freezing temperatures, rain, and other difficult physical conditions is sufficient to state a claim for state-created danger under the Fourteenth Amendment.").

Second, Defendants cannot escape accountability for knowingly placing Plaintiffs in danger by claiming that its raids did not "necessarily [take place] during the extreme heat." Mot. at 6. The TAC's allegations that Phoenix regularly experiences extremely high temperatures, including averaging over 100 degrees in the summer, and that Plaintiffs are subjected to Defendants' heat-exposing raids throughout the year, regardless of the

[6] *See* TAC ¶¶ 95-96, 171 (defendants' raids force Plaintiff James to quickly pack his belongings and move around the city under threat of citation); ¶¶ 100, 182-182 (countless times, PPD has forced Plaintiff Carr to move around the city for hours under threat of citation, never offering services, shelter, or resources, including while she "was trying to find a shaded area to sit down"); ¶¶ 104-05, 155, 156 (Plaintiff Kearns' tent and clothing taken during City's raids); ¶¶ 109, 165 (Plaintiff Urban's water, tent, clothing, and food taken during City's raids); ¶ 117 (Plaintiff Massingille's tent and clothes taken during City's raids); ¶¶ 209-10 (City regularly forces Plaintiff Rich to move, including in February 2024 when it forced him to leave the area near CASS, where many services are concentrated).

temperature, along with its allegations concerning specific instances in which Defendants' raids exposed Plaintiffs to sun and heat, suffice to support Plaintiffs' state-created-danger claim.[7] *See Langley*, 2022 WL 18585987, at *4 (dismissing "Defendant's arguments [that] raise numerous factual issues inappropriate for resolution on a motion to dismiss").

Third, Plaintiffs also need not allege "immediate heat-related issue[s]," to make out their claim. Mot. at 6. To be liable under the state-created-danger doctrine, "the state actor need only have created the particularized *risk* that plaintiff *might* suffer such injury." *Kennedy*, 439 F.3d at 1062 n.2 (emphasis added). Plaintiffs' TAC meets that standard, sufficiently alleging facts showing that the City's actions during its raids increase Plaintiffs' exposure to and exertion in dangerous heat, which creates an increased and foreseeable risk that Plaintiffs might experience heat-related illness and death. *See Jeremiah v. Sutter Cnty.*, 2018 WL 1367541, at *5 (E.D. Cal. Mar. 16, 2018) (finding "increased risk of harm" based on plaintiffs' "fear for safety without shelter, recent wind, rain, and cold weather," and past efforts by county "to remove essential needs"). Moreover, "[t]he Ninth Circuit has recognized a viable state-created danger claim where the plaintiff fears future harm and seeks prospective, injunctive relief." *Boyd*, 2023 WL 6960368, at *19 (citing *Morgan v. Gonzales*, 495 F.3d 1084, 1093 (9th Cir. 2007); *Wang v. Reno*, 81 F.3d 808, 818-19 (9th Cir. 1996)). Here, Plaintiffs seek injunctive relief to prevent the City from turning them into another number in Maricopa County's Heat Related Deaths Report. "There is no basis for the proposition that" they "must await a violation and injury and then sue for retrospective damages, rather than sue prospectively to prevent it." *Boyd*, 2023 WL 6960368, at *19 (citing cases granting prospective, injunctive relief to unhoused plaintiffs to prevent such

[7] Indeed, the Maricopa County Heat Related Deaths Report, described and cited in the TAC and to which the City contributed, shows that, for 232 days of 2023, temperatures were classified as posing some risk by the National Weather Service Heat Risk Category, and that, while the number of heat-related deaths spike in the summer months, they also regularly occur in spring and fall months, with some deaths even in winter. *See* TAC ¶ 294 n.39, 2023 Heat Related Deaths Report, at 8, 21. Despite their knowledge of the ubiquity of dangerously high temperatures, Defendants do nothing to mitigate the danger of heat-exposure created by their raids.

future harm from state-created danger).

2. Defendants' deliberate indifference arguments are unpersuasive.

In addition to adequately alleging "affirmative conduct," Plaintiffs' TAC also includes sufficient allegations to show that Defendants "disregard[ed] a known or obvious consequence of [their] action[s]" during raids, satisfying the deliberate indifference prong. *Patel*, 648 F.3d at 974. In addition to the obvious danger of being stranded outside without access to shade or protective materials in temperatures that regularly exceed 100 degrees, TAC ¶¶ 291-94, Plaintiffs allege that Defendants know that Plaintiffs and other unhoused people are "at high risk for heat-related illness and death," TAC ¶¶ 295, 3, 294, and "have nowhere else to go" to shelter from the heat "given the dearth of affordable housing and emergency shelter space" in the city, *id.* ¶ 7. Plaintiffs also allege that Defendants know that their actions during raids, including "removing unsheltered individuals from shaded areas and destroying items that provide them with protection from the sun, including tents and tarps, *id.* ¶ 296, as well as forcing them "to gather their belongings" and "move from shaded areas protected from the sun under threat of arrest and citation during extremely hot temperatures", *id.* ¶ 297, "increase those individuals' exposure to the sun and their risk of heat-related illness and death," *id.* ¶ 296. Despite knowing that their raids target a population at heightened risk of heat-related illness and death and that their actions during these raids increase that risk of danger, Defendants continue to regularly conduct these raids, regardless of the temperature, without offering shelter or services to mitigate this risk.[8]

[8] Defendants have been on notice of the harms caused by their raids—including the associated risk of heat-related danger—since Plaintiffs filed their initial Complaint in November 2022. Despite this knowledge, as alleged in Plaintiffs' TAC, Defendants have continued the same harmful policy and practice of raids. *See Prado,* WL 3697037, at *31 (allegations that "the City is aware that its sweeps are conducted with vague notice and in such a way that brutally destroys Plaintiffs' shelter," but "disruptive evictions and abatements have continued" show that City "knew or reasonably should have known that destroying Plaintiffs' survival gear such as tents, blankets, waterproof materials, medications, eyeglasses, wheelchairs, walkers, and canes, would create substantial risk to Plaintiff's ability to continue to survive."); *Boyd*, 2023 WL 6960368, at *21 ("With respect to the requirement that the City be determined to act with deliberate indifference, the harms to vulnerable campers described . . ., seem obvious. To the extent they were not apparent to

These allegations satisfy the deliberate indifference standard because they show that Defendants "were aware of the danger to the plaintiffs . . . and yet continued" their problematic course of conduct. *Hernandez*, 897 F.3d 1133 (finding allegations adequately pleaded deliberate indifference where officers stationed at rally "knew that protesters posed an immediate threat to the Attendees . . . and yet continued to direct the Attendees into the mob"). Numerous courts in this Circuit have also found deliberate indifference based on similar allegations. *See, e.g., Mary's Kitchen*, 2021 WL 6103368, at *11 ("Removal of critical services coupled with a lack of adequate alternatives supports an inference that the City has acted with deliberate indifference to the danger posed to the Individual Plaintiffs and other unhoused individual"); *Where Do We Go Berkeley v. Cal. Dep't of Transp. (Caltrans)*, 2021 WL 5964594, at *13 (N.D. Cal. Dec. 16, 2021) (denying motion to dismiss state-created danger claim because "if Defendants are moving forward with the closure of the encampments with knowledge that available housing options may not be viable and without sufficient attempt to address alternatives . . . a reasonable jury might well find Defendants to be deliberately indifferent"); *Jeremiah*, 2018 WL 1367541, at *5 (granting TRO preventing County from seizing plaintiffs' possessions; finding County "would knowingly place plaintiffs at increased risk of harm if it confiscates and seizes Plaintiffs' shelters and possessions," which it "should know [] plaintiffs rely on . . . to stay physically safe from the elements"); *Sacramento Homeless Union*, 617 F. Supp. 3d at 1193 ("plaintiff's allegations regarding a defendant municipality's efforts to confiscate and seize unhoused plaintiffs' shelters and possessions during extreme weather [a]re sufficient to establish the defendant could 'knowingly place the [unhoused] at increased risk of harm").[9]

---

the City, that risk has now been made clear by way of the declarations, reports, testimony, and other evidence presented in this litigation.").

[9] The City's knowledge of the harms caused by clearing encampments during extreme heat is also supported by its involvement as amicus in a Ninth Circuit appeal seeking to overturn a district court's then-expired TRO enjoining encampment sweeps during extreme heat. *See Sacramento Homeless Union v. Sacramento*, 23-16123, Dkt. 14 (9th Cir.) (filed Sept. 25, 2023). The district court decisions and record on appeal in that case included witness declarations and expert testimony detailing the harms caused by displacing unhoused people

The City ignores all these allegations and cases, arguing instead that the deliberate indifference standard is, essentially, impossible to meet – an "exceptionally high bar," Mot. at 7, arising only in "exceptionally egregious and unique circumstances," *id.* at 6. To support its gloss on the deliberate indifference legal standard, the City asserts that the Ninth Circuit has allowed only a "few" cases to "proceed to trial under a deliberate indifference theory." *Id.* As an initial matter, the standard for proceeding to trial is irrelevant to this motion to dismiss. And, regardless, deliberate indifference is a required element of all state-created-danger claims, so the City's assertion that a finding of deliberate indifference is exceptionally rare is inconsistent with the many cases denying motions to dismiss and granting preliminary relief in similar cases challenging raids, *see* pp. 13-15 *supra*, and the Ninth Circuit's pronouncement that "this circuit has held state officials liable, in a variety of circumstances, for their roles in creating or exposing individuals to danger they otherwise would not have faced." *Kennedy*, 439 F.3d at 1062.

While not among Defendants' "few" cases, the Ninth Circuit's first case recognizing the state-created danger doctrine, *Wood v. Ostrander*, 879 F.2d 583, 589–90 (9th Cir. 1989) is instructive as to deliberate indifference. There, the Court found a triable issue as to whether the defendant acted with deliberate indifference when he "arrested the driver [of plaintiff's car], impounded the car, and left [the plaintiff] by the side of the road at night in a high-crime area." *Id.* at 588. The Court held that a jury could find the defendant exhibited deliberate indifference if, for example, it found that he knew "the area where [the plaintiff] was stranded had the highest violent crime rate in the county outside the City of Tacoma," or that he failed to make "any inquiry at all as to [the plaintiff's] ability to get safely home" or "ignored her request for help," or simply because "the inherent danger facing a woman

---

during extreme heat. *See, e.g.*, *Sacramento Homeless Union*, 617 F. Supp. 3d at 1193 (describing "declarations detail[ing] heat-related mortality and morbidity deaths and illnesses from heat exposure"); *Sacramento Homeless Union v. Cnty. of Sacramento*, 2022 WL 4022093, at *4 (E.D. Cal. Sept. 2, 2022) (citing public health expert declaration stating that "Removed from shaded, relatively sun and heat-protected areas, unhoused, unsheltered persons are at extreme risk of dehydration, hyperthermia, heat stress, heat stroke and other heat-related conditions that may cause irreversible damage and possibly death.").

left alone at night in an unsafe area is a matter of common sense." *Id.* at 590. Here, too, whether because it is common sense that forcing a person into the direct sun without protective gear in 100-degree heat is dangerous, because the City knew through its participation in the Heat Related Deaths Report that unsheltered people are more vulnerable to heat-related illness, or because Defendants did not offer Plaintiffs "any assistance or information on services, resources, or shelters," during raids, *see* TAC ¶¶ 133, Plaintiffs' allegations describe "an assertion of government power which, ... tends to show a disregard for [Plaintiffs'] safety amounting to deliberate indifference." *Wood*, 879 F.2d at 588.

III. The Claims Against Defendants Milne and Sullivan Should Not Be Dismissed.

Because dismissal of local government officials named in their official capacity is not required when a municipal entity is also named, the Court should decline to do so here. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). In prior cases, Arizona entities have attempted to avoid accountability for municipal acts performed by local government officials by claiming the entity "is not liable for actions taken by…officers under a statutory mandate." *Donahoe v. Arpaio*, 2011 WL 5119008, at *6 (D. Ariz. Oct. 28, 2011); *see also Warren v. Penzone,* 2023 WL 7686666, at *12 (D. Ariz. Nov. 15, 2023) (reaffirming Arizona cases preventing vicarious liability against government entities for acts of official involving performance of "statutory duties"). Here, Defendant Milne (Director of the City's Office of Homeless Solutions) and Defendant Sullivan (Chief of the Phoenix Police Department) are key actors associated with the City's homelessness policies and implementation. If the City were to argue that Milne and Sullivan were performing their duties in accordance with a state statute, they would be necessary parties. Moreover, the City fails to point to any prejudicial effect by keeping Defendants Milne and Sullivan in the case in their official capacity. There is therefore no reason for this Court to exercise its discretion to dismiss these Defendants—particularly when Plaintiffs may later be prejudiced by their absence down their line.

CONCLUSION

For the foregoing reasons, the City's Motion should be denied in its entirety.

DATED this 23rd day of August, 2024.

By: */s/ Jared G. Keenan*
Jared G. Keenan
Christine K. Wee
2712 N. 7th Street
Phoenix, Arizona 85006

AMERICAN CIVIL LIBERTIES UNION OF ARIZONA

By: /s/ *Benjamin L. Rundall*
Benjamin L. Rundall
Alexis Eisa
Lisa Bivens
2020 North Central Ave., Suite 675
Phoenix, Arizona 85004-2556

ZWILLINGER WULKAN

By: /s/ *Leah Watson*
Leah Watson, *pro hac vice*
Scout Katovich, *pro hac vice*
125 Broad Street, 18th Floor
New York, New York 10004

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

By: /s/ *Collin M. Grier*
Andrew Kim, *pro hac vice*
Collin M. Grier, *pro hac vice*
Madeline Fuller, *pro hac vice*
1900 N Street, N.W.
Washington, D.C. 20036

Courtney L. Hayden, *pro hac vice*
100 Northern Ave.
Boston, MA 02210

GOODWIN PROCTER LLP

Attorneys for Plaintiffs