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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.: CV-22-02041-PHX-GMS

**Amicus Brief in Opposition to  
Plaintiffs' Request for Preliminary  
Injunction**

The Brown Amici are property-, business-, and home-owners in the “Zone” an area located between 7<sup>th</sup> and 15<sup>th</sup> Avenues and Van Buren and Grant Streets and are plaintiffs in *Brown et al. v. City of Phoenix* in Maricopa County Superior Court, CV2022-010439 (“Brown litigation”). They are seeking to force the City of Phoenix to abate the nuisance the City has created in the “Zone” in part by failing to enforce its existing laws.

At today’s hearing, the Court indicated that it was inclined to issue a preliminary injunction to the effect that the City of Phoenix cannot criminally cite any individual for violating prohibitions on public camping (Phoenix City Code §§ 23-30(A), 23-48.01) without an “individualized assessment as to whether” the individual is “voluntarily homeless.” Both the Plaintiffs and Defendants did not challenge the Court on this proposal, and the hearing proceeded to focus on the way the City handles cleaning and property.

1 Amici strongly oppose the injunction being considered by the Court for two reasons.  
2 First, this Court has no authority to issue an injunction that merely tells the parties to follow  
3 the law. There must be some indication that a violation of the law is actually *occurring*,  
4 otherwise the success-on-the-merits prong of the preliminary injunction standard is not  
5 satisfied and the Court would be issuing nothing but an advisory opinion, in violation of  
6 Article III. Here, there was no evidence whatsoever that anyone has been criminally cited  
7 without such an individualized determination. There is simply nothing to enjoin.

8 But even more importantly from Amici’s perspective, any such injunction would  
9 be opaque and almost certainly get the law wrong. It is not at all clear what “voluntarily  
10 homeless” means. Even if that term were clear, nothing in *Martin v. City of Boise* requires  
11 “voluntary homelessness” to enforce camping prohibitions even if there are insufficient  
12 shelter beds available throughout the City. The *Boise* case makes abundantly clear that  
13 nothing in the opinion requires a City to allow public camping *anywhere* at *any time* in *any*  
14 condition. As Amici explained in their complaint in the Brown litigation:

15 Importantly, the Ninth Circuit decision in *Martin v. City of Boise* does not  
16 preempt Arizona’s statutory nuisance law, Arizona’s common law of  
17 nuisance, or the numerous city ordinances that Defendant is not currently  
18 enforcing. That decision simply does not require (or permit) the City of  
19 Phoenix to operate the Zone in a manner that creates a nuisance. It does not  
20 require that tents be given out at all, let alone during the daylight hours. And  
21 it does not require that the City of Phoenix allow public camping where it  
22 would create a public nuisance. “On the merits, the opinion holds only that  
23 municipal ordinances that criminalize sleeping, sitting, or lying in *all* public  
24 spaces, when *no* alternative sleeping space is available, violate the Eighth  
25 Amendment. Nothing in the opinion reaches beyond criminalizing the  
26 biologically essential need to sleep when there is no available shelter.”  
27 *Martin*, 920 F.3d at 589 (Berzon, J., concurring in the denial of rehearing en  
28 banc); *see also id.* at 617 n.8 (majority opinion) (“Nor do we suggest that a  
jurisdiction with insufficient shelter can *never* criminalize the act of sleeping  
outside. **Even where shelter is unavailable, an ordinance prohibiting  
sitting, lying, or sleeping outside at particular times or in particular  
locations might well be constitutionally permissible. So, too, might an  
ordinance barring the obstruction of public rights of way or the erection  
of certain structures.**”).

In other words, even if someone is *involuntarily* homeless, the *Boise* decision still

1 allows the City to issue criminal citations *if* they have somewhere else to go at night—for  
2 example structured campgrounds. And even if there are insufficient beds for the entire  
3 unsheltered population, the City may still issue criminal citations to particular individuals  
4 if there is a bed available for that individual, but he refuses to take it. Thus, the City can  
5 absolutely issue criminal citations under *Boise* if an unsheltered individual has somewhere  
6 else to go—for example to a structured campground, or if a bed opens up that night—even  
7 if they are “involuntarily” homeless and even if there are insufficient beds for all  
8 unsheltered persons.

9 An injunction along the lines of the Court’s suggestion today would both get the  
10 law wrong and potentially interfere with relief Amici seek in the Brown litigation. The  
11 Court should not issue it.

12 RESPECTFULLY SUBMITTED this 14th day of December 2022.

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14 **TULLY BAILEY LLP**

15 /s/ Stephen W. Tully

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 14, 2022, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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