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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 **Memorandum of Points and Authorities in Support of Proposed Intervenors' Motion to Intervene**

The Proposed Intervenors[1] are property owners, business owners, and homeowners in the "Zone" in Phoenix: an area bounded by Seventh and Fifteenth Avenues and Washington Street and the railroad tracks south of Jackson Street. The Zone contains the largest homeless encampment in Arizona and possibly in the United States. They are also plaintiffs in *Brown et al. v. City of Phoenix* in Maricopa County Superior Court, CV2022-010439 ("*Brown* litigation"). For years, they have suffered harm to their property rights, personal safety, and economic interests as a result of the City of Phoenix (the "City") maintaining a public nuisance in the Zone. After several fruitless years of attempting to work with the City and other well-meaning groups to address the homeless encampment,

[1] Proposed Intervenors appeared as amicus curiae before this Court in this matter on December 14, 2022.

the Proposed Intervenors sued the City in August 2022 in Maricopa County Superior Court. Their suit sought declaratory and injunctive relief to require the City to abate the nuisance. Their complaint relied principally on state law, particularly *City of Phoenix v. Johnson*, 75 P.2d 30 (Ariz. 1938), and *Armory Park Neighborhood Ass'n v. Episcopal Community Services in Arizona*, 712 P.2d 914 (Ariz. 1985). *Johnson* held that the City was engaged in a public nuisance by operating a sewage treatment plant that, due to poor maintenance, was causing environmental pollution that harmed the plaintiffs; the court enjoined the City from doing so. *Armory Park* held that it is a public nuisance to provide services to indigent persons that invite them to loiter in an area of the city and commit crimes, threaten the safety of citizens, and cause pollution and property damage.

In March 2023, the Maricopa County Superior Court issued a preliminary injunction against the City, ordering it to cease maintaining a public nuisance in the Zone. In its defense, the City contended, in part, that it was limited by *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), from taking certain steps to abate the nuisance, although the City has never denied that *Martin* leaves it with plenty of options to abate the nuisance. Indeed, not only does that case *not* provide a blanket prohibition on the City's enforcing its longstanding ordinances against camping on, loitering on, or polluting city-owned or privately owned property, but the *Martin* court also expressly stated that it was *not* barring cities from criminalizing such conduct. *See* 920 F.3d at 617 n.8 ("Nor do we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside."). And the *Martin* court did not enjoin the City of Boise from enforcing its camping ordinance, but rather remanded the matter to the District Court to determine whether those particular plaintiffs qualified for an injunction based on *Boise*'s reasoning.

On November 30, 2022, four months after the state lawsuit was filed here—indeed, a month after the state court held a full evidentiary and legal hearing on the motion for preliminary injunction in that case—Plaintiffs Fund for Empowerment et al. filed this case. Notably, the City has *never* moved to dismiss this case or to stay proceedings, even though

it did seek to dismiss and to stay the *state* proceedings.[2] This is especially concerning given the questionable standing in this case. In *Boise*, two of the plaintiffs had been arrested and convicted under the challenged statutes. Here, none of the plaintiffs have been arrested. Their claim of standing is on far shakier grounds.

At the hearing in this Court on the Plaintiffs' motion for preliminary injunction, the Proposed Intervenors appeared as amicus curiae, filing a brief which cited the *Pullman* doctrine and other abstention doctrines and opposed the grant of the injunction. Simply put, Proposed Intervenors' position is that (a) *Martin* does not bar the City from taking actions to abate the public nuisance in the Zone, including by enforcing laws against camping subject only to the narrow limitations contained in *Boise*; and (b) the City is in fact required by state law to abate the public nuisance the City has created in the Zone. The Maricopa County Superior Court judge agreed with Proposed Intervenors on both counts in granting its preliminary injunction. The City of Phoenix began cleaning the Zone on May 10 in response to the Superior Court's injunction. It was successful: 33 individuals reportedly took the opportunity to accept shelter services.

Plaintiffs in this case, however, have sought in their pending Order to Show Cause to enjoin the City's attempt to comply with the Maricopa County Superior Court's injunction. If this Court were to grant Plaintiffs' motion, that will materially interfere with the City's accomplishing the tasks legally mandated by the Maricopa County Superior Court's injunction. Thus, the Proposed Intervenors interests are now threatened by this litigation and they seek to intervene. If granted intervention, they will argue that this Court should (a) stay all proceedings in this matter pursuant to various abstention doctrines, and/or (b) dismiss the case on the merits, due to the inadequacies in the Complaint and lack of standing of the Plaintiffs. Neither argument is or has ever been offered by the City in this matter.

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[2] Proposed Intervenors opposed that motion in the state court, observing that under the ordinary rules of federalism, this Court—not that court—would be required to abstain under, e.g., *R.R. Comm'n v. Pullman Co.,* 312 U.S. 496 (1941). On December 9, the state court agreed with the Proposed Intervenors and declined to stay the case.

I. INTERVENTION AS OF RIGHT SHOULD BE GRANTED

Rule 24(a) requires this Court to permit intervention to a party who (a) timely (b) claims a significantly protectable interest relating to the property or transaction that is the subject of the action, and (c) is so situated that disposing of the action may as a practical matter impair or impede that party's ability to protect its interests, (d) unless existing parties adequately represent such interests. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc) (citation omitted). Rule 24(a) must be construed "broadly in favor of proposed intervenors" and in light of the "liberal policy in favor of intervention." *Id.* at 1179 (quotation marks and citations omitted). This motion easily satisfies this test.

First, the motion is timely. The Court has only issued a temporary order so far, and no motion to dismiss the amended complaint has been filed. Also, unlike in the state lawsuit, no discovery has been conducted and no evidentiary hearings have been held. There is therefore no risk of prejudice to the existing parties. *See United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990) (setting forth test for determining timeliness). Additionally, Proposed Intervenors have always maintained that the relief they seek in state court is consistent with the Ninth Circuit's decision in *Boise*, and never sought to have the City violate the constitutional rights of the unsheltered. It is only with the pending Order to Show Cause that it has become clear to the Proposed Intervenors that the relief they seek in the state-court litigation—perfectly consistent with *Boise*—is being challenged in this case. They now have no choice but to intervene.

Second, the Proposed Intervenors have an interest relating to this legal dispute: those very interests are pending before the Maricopa County Superior Court in the *Brown* litigation. Courts construe the "interest" requirement of Rule 24(a) expansively. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 132-36 (1967). It "is primarily a practical guide to disposing of lawsuits by involving as many apparently

concerned persons as is compatible with efficiency and due process." *Wilderness Soc'y*, 630 F.3d at 1179. Thus, "[n]o specific legal or equitable interest need be established." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). Rather, an interest must merely be "protectable under some law," there must be some "relationship" between that interest and the claims at issue in the case. *Wilderness Soc'y*, 630 F.3d at 1179.

Here, the Proposed Intervenors obviously have legally protectible interests at stake—specifically, their interest in the existing state court injunction, as well as in the form of their personal safety, their private property, and their business and economic interests, all of which are being directly harmed by the City's maintenance of the public nuisance in the Zone. *Cf. Utahns for Better Transp. v. U.S. Dep't of Transp*., 295 F.3d at 1115 ("The threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest."). The unsheltered population that the City has encouraged to remain in the Zone commit an uncountable number of illegal acts every day that harm the Proposed Intervenors, including violent crimes, urinating and defecating on public and private property, discharging waste in violation of state environmental laws, setting fires (which often pose a major risk to public safety), and in some cases even committing homicide.[3] Even aside from those rights, the Proposed Intervenors have a right to the full and fair adjudicating of their nuisance claims in the ongoing state case, which this case will obviously affect.

Third, disposition of this action may significantly impair the Proposed Intervenors' ability to protect their interest. A decision from this Court barring the City from taking actions necessary to abate the public nuisance in the Zone would obstruct Proposed Intervenors' defense of their rights in the state case. Indeed, for the last several years the City has sought every possible excuse to avoid enforcing its legal and moral obligation to abate the nuisance in the Zone, including seeking a stay of the Maricopa County Superior

[3] *See Police Seeking Answers After Burned Body Found in Phoenix*, 12News.com, Dec. 2, 2022, https://perma.cc/ML6J-GAY3; *"It's Utterly Horrific:" Neighbors React to Dead Fetus Found Near Homeless Encampment in Phoenix*, 12News.com, Nov. 12, 2022, https://perma.cc/A5PB-Y7N5.

Court's injunction, to which that court responded by observing that the City had long "fail[ed] to address the issues in the Zone" and had an "apparent lack of intent to do so until faced with possible judicial intervention." Minute Order, *Brown v. City of Phoenix* No. CV 2022-010439 (Apr. 28, 2023).

Proposed Intervenors hope it is not the case but must anticipate that the City will continue to make any excuse to avoid enforcing the *Brown* injunction, and that the Order to Show Cause in this case will provide it with a rationale for doing so. As the Maricopa County Superior Court suggests, the City has repeatedly demonstrated its reluctance to take adequate steps to address this matter. The "impairment" requirement should be read "liberal[ly]" to permit intervention as of right. *Nuesse v. Camp*, 385 F.2d 694, 701 (D.D.C. 1967). A party whose rights "would be substantially affected in a practical sense . . . should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24(a)(2), Advisory Committee Note. Proposed Intervenors easily meet that requirement.

Finally, Proposed Intervenor's rights are not adequately protected by the City's defense here. To prevail on this prong of the test, the Proposed Intervenors are not required to show that the City's defense of this case would be positively detrimental to their interests, but only to make a "minimal" showing that the City's representation of their interests "'may be' inadequate." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).[4]

Where a private party seeks to intervene on the side of a government defendant, that party need only show that it has a "more narrow, parochial interest" in the matter which might not be adequately represented by the government. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995). Thus, in *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406 (9th Cir. 1996), a union in a dispute with a newspaper company led the City of Oakland to pass a resolution cancelling all subscriptions with the

[4] Whether representation may be inadequate has nothing to do with the quality of the existing defendants' attorneys—*see Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 529 (9th Cir. 1983) ("Rule 24 requires that we look to the adequacy or inadequacy of representation by 'existing parties' not counsel")—and Proposed Intervenors intend no aspersion against the City's counsel, with whom their relations have always been entirely professional.

company, thus giving the union increased leverage with the newspaper. *Id*. at 1409-11. The unions were allowed to intervene in a suit by the newspaper against the city over the constitutionality of this ordinance because the interests of the city and the union diverged: the city was defending the constitutionality of its ordinance, while the union's interest was in resolving the underlying labor dispute. *Id*. at 1411.

Inadequacy is obvious where the existing party and the intervening party do not share the same objective. *Arakaki,* 324 F.3d at 1086. That is the case here. The very reason the City and Proposed Intervenors are in dispute in the state case is that the City does not share the Proposed Intervenors' objective of abating the nuisance. But the inadequacy factor is heightened where there are "legitimate and reasonable concerns" that the government defendant will fail to raise "particular defenses," *Grutter v. Bollinger*, 188 F.3d 394, 401 (6th Cir. 1999), or is likely to settle a case in a manner adverse to the Proposed Intervenor. *See Mausolf v. Babbitt*, 85 F.3d 1295, 1302–03 (8th Cir. 1996). Here, there is not just a risk that the City will fail to raise valid defenses, but it has already done so. It has, for example, not moved to dismiss this case due to the inadequacies of the complaint, or to stay this case under *Pullman.* On the contrary, it did seek to stay the *state* case to allow these proceedings to go forward unimpeded, and has sought (in vain) to have the state case dismissed, *and* sought to stay the injunction in the state case. In any event the City's presentation of a full defense in this case is certainly hampered by its obligation to maintain a consistent position in the state case.

Intervention as a matter of right is therefore appropriate to ensure that the Proposed Intervenors' interests are adequately represented.

II. ALTERNATIVELY, PERMISSIVE INTERVENTION SHOULD BE GRANTED

Should this Court find that intervention by right is not warranted here, the Court should permit Proposed Intervenors to intervene under Rule 24(b)(1), which allows permissive intervention where a party has a claim ort defense that shares a common

question of law or fact with the existing lawsuit. That requirement is met here because much of this dispute concerns the application and interpretation of the *Martin* case and its limitations on the City's authority or obligation to abate the public nuisance in the Zone.

There is no risk that intervention here will prejudice any party or unduly delay this matter. *Cf.* Fed. R. Civ. P. 24(b)(3). The Proposed Intervenors have sought intervention at an early stage; there has been no discovery, no evidentiary hearings, and no other proceeding in this case such that granting intervention would disrupt the adjudication of this matter.

The motion should be granted, and Proposed Intervenors should be permitted to participate in this case as a defendant.

RESPECTFULLY SUBMITTED this 23rd day of May, 2023.

TULLY BAILEY LLP

/s/ *Stephen W. Tully*

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2023, 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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By: /s/ *Stephen W. Tully*