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12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF ARIZONA**

15 Fund for Empowerment, *et al.*,
16 Plaintiffs,
17 v.
18 City of Phoenix, *et al.*,
19 Defendants.

No. CV-22-02041-PHX-GMS

**PLAINTIFFS' REQUEST FOR
MODIFICATION OF
PRELIMINARY INJUNCTION AND
MOTION FOR ORDER TO SHOW
CAUSE**

21 Plaintiffs Fund for Empowerment, Faith Kearns, Frank Urban, and Ronnie
22 Massingille ("Plaintiffs"), by and through undersigned counsel, hereby move the Court to
23 issue an Order to Show Cause why Defendants City of Phoenix, Chief Jeri Williams,
24 Interim Chief Michael Sullivan ("Defendants") should not be held in civil contempt for
25 violating the preliminary injunction set forth in Doc. No. 32 ("Preliminary Injunction"),
26 entered by this Court on December 15, 2022. Plaintiffs also respectfully request that the
27 Court modify the Preliminary Injunction. These requests are necessitated by Defendants'
28 violation of this Court's Preliminary Injunction during a sweep that occurred in the Zone

1 on May 10, 2023, in addition to Defendants’ intent to continue with further sweeps as early
 2 as May 24, 2023. *See Exhibit 1 – City’s Notice of May 24, 2023 Sweep.* This motion is
 3 supported by the following memorandum of points and authorities. Pursuant to LR
 4 7.1(b)(2), this motion is accompanied by a proposed order to show cause.

5 MEMORANDUM OF POINTS AND AUTHORITIES

6 BACKGROUND

7 In December 2022, this Court granted a preliminary injunction enjoining Defendants
 8 from enforcing ordinances that criminalize homelessness, seizing property of the
 9 unsheltered without providing prior notice, and destroying said property without
 10 maintaining it in a secure location for a period of not less than 30 days. Importantly, this
 11 Court’s order allowed Defendants to continue “enhanced cleanups” in the Zone, which is
 12 an area in downtown Phoenix where approximately 1,000 unsheltered individuals reside,
 13 so long as they followed the HSC Enhanced Cleanup Plan (the “Plan”) they provided to the
 14 Court and promised to follow. *See* Doc. 34 at 2-3, 11-12, 18; Doc. 18-1 at 6; Doc. 2-1 at
 15 29-30.

16 On May 10, 2023, after Plaintiffs signed an agreement negotiated with the City that
 17 would have ensured constitutional compliance with unsheltered individuals’ rights during
 18 cleanups and displacements, Defendants moved forward with a sweep in the Zone on 9th
 19 Avenue between Washington and Jefferson Streets without counter-signing the agreement
 20 (the “May 10 Sweep”).¹ During the sweep on May 10, Defendants neither followed this

21
 22 ¹ Approximately two weeks prior to May 10, Rachel Milne, Director of the Office of
 23 Homeless Solutions (“Director Milne”) conducted a media tour indicating the City planned
 24 not just to “clean” the Zone as promised in December, but would rather dismantle the Zone
 25 “one block at a time.” *See* Juliette Rihl, *Phoenix Likely To Clear ‘The Zone’ Homeless*
 26 *Encampment Beginning in May*, AZCENTRAL (April 24, 2023, 10:23 AM),
 27 [https://www.azcentral.com/story/news/local/phoenix/2023/04/21/phoenix-homeless-](https://www.azcentral.com/story/news/local/phoenix/2023/04/21/phoenix-homeless-encampment-the-zone-being-cleared-following-judges-order/70136773007/)
 28 [encampment-the-zone-being-cleared-following-judges-order/70136773007/](https://www.azcentral.com/story/news/local/phoenix/2023/04/21/phoenix-homeless-encampment-the-zone-being-cleared-following-judges-order/70136773007/). Director
 Milne confirmed in these interviews people would be forced to leave the Zone and possibly
 put in vacant buildings or structured campgrounds. *Id.* These statements indicated an
 intention to force people to move en masse to spaces that do not constitute shelter
 (presumably under threat of criminal enforcement), rather than conduct individualized
 assessments in order to determine the availability of “practically available shelter”. *See*
 Gabe Cohen, *A Huge Homeless Camp Will Be Cleared After Neighbors Sued. What*
Happens to Its Vulnerable Residents Is an Open Question, CNN (May 8, 2023, 10:06 AM),
<https://www.cnn.com/2023/05/08/us/phoenix-homeless-encampment-the-zone/index.html>.

1 Court’s order, nor the HSC Enhanced Cleanup Plan. **Exhibit 3 – Declaration of Elizabeth**
2 **Venable, Exhibit 4 – Declaration of Ronnie Massingille, Exhibit 5 – Declaration of Eric**
3 **Elmore, Exhibit 5A – Photographs Taken by Eric Elmore, Exhibit 6 – Declaration of**
4 **Eric Brickley, and Exhibit 7 – Declaration of Doug Maloney.** Defendants seized and
5 destroyed the majority of unsheltered individuals’ personal belongings and property in this
6 area, did not tag any unattended property and leave it for seven days, were not seen storing
7 or marking collected items for storage, did not make individualized assessments before
8 coercing unsheltered individuals into limited and possibly unavailable shelter spaces, and
9 did not allow unsheltered individuals to return to the area that was cleaned, as their own
10 cleanup plan required. Put simply, Defendants’ unconstitutional behavior once again proves
11 why Plaintiffs’ motion to modify the Preliminary Injunction to prevent further sweeps in
12 the Zone should be granted until the City can ensure compliance with this Court’s order and
13 the constitutional rights of the unsheltered.

14 **ARGUMENT**

15 This Court “has the power to supervise compliance with an injunction and to modify
16 a preliminary injunction in consideration of new facts.” *State v. Trump*, 871 F.3d 646, 654
17 (9th Cir. 2017). The Court’s authority to revise its injunction is greater when earlier efforts
18 have failed to protect the rights of the parties. *See Brown v. Plata*, 563 U.S. 493, 516 (2011)
19 (“When a court attempts to remedy an entrenched constitutional violation through reform
20 of a complex institution . . . it may be necessary in the ordinary course to issue multiple
21 orders directing and adjusting ongoing remedial efforts.”). A party “seeking
22 modification...of an injunction bears the burden of establishing that a significant change in
23 facts or law warrants revision...of the injunction.” *Sharp v. Weston*, 233 F.3d 1166, 1170
24 (9th Cir. 2000). But in reviewing such new information, the Court simply “analyzes the
25 request for modification using traditional elements that must be established prior to the
26

27 _____
28 Director Milne further confirmed police would likely “enforce” the closure of areas in the
Zone where people were removed. *Id.*

1 issuance of injunctive relief.” *Padilla v. U.S. Immigr. & Customs Enf’t*, 387 F. Supp. 3d
2 1219, 1228 (W.D. Wash. 2019).²

3 This Court “may [also] wield its civil contempt powers...to coerce the defendant
4 into compliance with the court’s order.” *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d
5 623, 629 (9th Cir. 2016) (quoting *Int’l Union, UMWA v. Bagwell*, 512 U.S. 821, 827 (1994)).
6 While the party moving for civil contempt must do so with clear and convincing evidence,
7 “[i]ntent is irrelevant to a finding of civil contempt.” *Stone v. City & Cnty. of San Francisco*,
8 968 F.2d 850, 856 (9th Cir. 1992). Accordingly, “contempt need not be willful, and there is
9 no good faith exception to the requirement of obedience to a court order.” *In re Dual-Deck*
10 *Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993).

11 Here, the evidence warrants modification of the injunction to prevent further
12 sweeps/cleanings/displacements in the Zone until the City can ensure compliance with the
13 Court’s December 16 Order. And, to ensure the City complies with that Order, this Court
14 should sanction and issue fines for the City’s violation of the December 16 Order during
15 the May 10 Sweep.

16 **I. Defendants Destroyed Significant Amounts of Unsheltered Individuals’**
17 **Personal Property Without Adequate Process**

18 This Court’s preliminary injunction restrains Defendants from “seizing any property
19 of the unsheltered without providing prior notice at the property’s location that the property
20 will be seized...” Dkt. 34 at Pg. 19. The injunction also prohibits the destruction of property
21 without first maintaining it in a secure location for at least 30 days. *Id.* (“[a]bsent an
22 immediate threat to public health or safety, destroying said property without maintaining it
23 in a secure location for a period of less than 30 days.”). Further, if property is collected, the
24 injunction requires that the City provide a post-seizure notice adequately informing people
25 of how they can retrieve their property. *Id.* (“If property is seized pursuant to a belief that it
26

27 ² The elements reviewed are: (1) likelihood of success on the merits; (2) irreparable harm
28 in the absence of an injunction; (3) a balance of the equities which favors the moving party;
and, (4) the existence of a public interest which favors the injunction. *See Winter v. Natural*
Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

1 is abandoned or after the City provides notice that it intends to seize the property, the City,
2 its agents and employees, are further required to provide a notice at the location from which
3 the property was seized, calculated to be readily seen by any owner of the property
4 describing how and where to retrieve the property and the deadline for retrieving it”). With
5 these proscriptions in place, the Court allowed Defendants to conduct “cleanups” in the
6 Zone so long as they followed the Enhanced Cleanup Plan they provided to this Court.³
7 Doc. 34 at 18.

8 That plan included “an abandoned property procedure, which requires the City to tag
9 items left in the Zone during enhanced cleanings and leave them in place for seven days.”
10 Dkt. 34 at Pg. 3. The plan further required that the City store and maintain items for 30 days
11 that were not collected after that initial seven day waiting period.” *Id.* Importantly, the plan
12 also provides that a “safe place” will be created where unsheltered people can move their
13 belongings during the cleaning and that the City will “[a]ssist individuals after the cleanup
14 to move their belongings back.” Doc. 2-1 at 29. Here, the City neither followed the Court’s
15 Preliminary Injunction, nor its own Enhanced Cleanup Plan to ensure the property rights of
16 unhoused people were protected.

17 Observers also did not see the City mark any items as “abandoned” or “unattended”
18 or tag or place caution tape around any items. Ex. 3 at ¶¶ 24, 26; Ex. 5 at ¶ 9; Ex. 6 at ¶
19 7. One witness observed an unattended tent cleared of personal items which were scooped
20 up by an excavator and indiscriminately destroyed along with the tent. Ex. 6 at ¶ 6. Many
21 observers saw personal belongings and survival gear destroyed, including tents, tarps,
22 blankets, bedding, clothes, storage containers, bikes, a walker, coolers, and various
23 documents. Ex. 3 at ¶¶ 10-12, Ex. 5 at ¶¶ 6-8, Ex. 6 at ¶¶ 5-6. Pictures from the scene
24 show the City using dump trucks and excavators to destroy the belongings and property of
25 unsheltered individuals on the block. Ex. 5A. These moments captured on camera mirror

26 ³ Importantly, Plaintiffs distinguish between “cleanings” and “sweeps.” As discussed during
27 the December hearing, cleanings are designed to move individuals from an area so
28 Defendants can clean with the expectation these individuals will be allowed to move back.
Conversely, sweeps actively displace individuals from their location under threat of
sanction.

1 the concerns Plaintiffs raised in December about Defendants’ pattern and practice of
2 indiscriminately destroying the property of unsheltered people across the City.

3 Several witnesses who observed the May 10 sweep confirmed the City only allowed
4 unsheltered individuals offered shelter to keep two garbage bins worth of personal items
5 and belongings. Ex. 3 at ¶ 21, Ex. 5 at ¶ 13, Ex. 6 at ¶ 10, Ex. 7 at ¶ 10. Any remaining
6 items that could not fit in these bins were destroyed. Ex. 3 at ¶ 22, Ex. 5 at ¶ 14, Ex. 6 at ¶
7 10. Unsheltered people were presented with the impossible choice of either accepting
8 rarely-available shelter or keeping their property. The City’s notice of the May 10
9 “Enhanced Cleaning” also did not include this information, depriving them of adequate time
10 to devise solutions for their remaining belongings. **Ex. 2 – City’s Notice of May 10, 2023**
11 **Sweep.**⁴ According to observers at the scene, belongings and property left behind by
12 unsheltered individuals who accepted shelter were crushed by excavators and discarded in
13 a dump truck. Ex. 3 at ¶ 12, Ex. 5 at ¶ 8. The unsheltered people confronted with this
14 situation were understandably distraught, with some brought to tears. *Id.*

15 This significant evidence raised by Plaintiffs demonstrates Defendants have not
16 complied with this Court’s order and continue to engage in conduct that infringes the
17 constitutional rights of some of the most vulnerable individuals in the City. As Plaintiff
18 Ronnie Massingille notes, “[t]he few belongings you have when you’re unhoused are some
19 of the only things that make your life a little better and allow you to move yourself forward.
20 It’s so degrading to watch the City throw away your belongings and know you have no
21 control.” Ex. 4 at ¶¶ 11-12.

22 While the Court previously found that the Plaintiffs did not have a likelihood of
23 success on the merits of their Fourth and Fourteenth Amendment claim with respect to the
24 City’s prospective enhanced clean up policy, the actions of the City on May 10 now require
25 a different conclusion. Doc. 34 at 11. The Court cited *Miralle*, No. 18-cv-06823, 2018 WL

26 _____
27 ⁴ A phone number provided by the City on the notice of the May 10, 2023 for individuals
28 to call about property storage was also not working as of May 12, 2023. See **Exhibit 8 – Call to Property Pickup Number.**

1 6199929 (N.D. Cal. Nov. 28, 2018) and *Sullivan*, No. C17-06051, 2017 WL 4922614 (N.D.
2 Cal. Oct. 31, 2017) for the proposition that the City “intended” to conduct cleanups and tag,
3 collect, and store property pursuant to their written procedures. *Id.* at 11–13. At that point,
4 Plaintiffs were unable to establish the City “intends to violate this plan for cleanups in the
5 Zone.” *Id.* at 12. Now, it is clear the City has violated this plan and will continue to do so.

6 **II. The City Threatened Citation and Arrest Without First Ensuring Practically**
7 **Available Shelter**

8 The Court’s preliminary injunction “barred the City from enforcing the Camping and
9 Sleeping Bans against persons with no practical recourse to housing.” Doc. 34 at 7. This
10 prohibition recognized that “any enforcement” of these ordinances against individuals who
11 “practically cannot obtain shelter . . . effectively criminalize[s] conduct that is a
12 consequence of being homeless” in violation of the Eighth Amendment. *Id.* at 6. As the City
13 and this Court recognized, to comply with this constitutional restriction, the City “must
14 investigate the individual’s circumstances and determine if there is shelter space available.”
15 Doc. 34 at 7 (citing Doc. 18 at 11).

16 Yet, in executing its May 10 “cleaning,” the City repeatedly threatened unsheltered
17 people with citation and arrest, seemingly without first ensuring that unsheltered people had
18 practical access to appropriate shelter. These threats of criminal enforcement began with
19 the notice of the May 10 sweep, which contained a blanket warning that “[r]efusal to
20 permanently relocate may result in citation or arrest.” Ex. 2. With this statement in mind,
21 unsheltered people subject to the May 10 sweep understandably believed that if they did
22 not accept the shelter offered to them—regardless of whether it was “practically available”
23 in light of their individual circumstances—they would face criminal sanctions. Ex. 4 at ¶
24 21, Ex. 5 at ¶17. This belief was further reinforced by City workers and agents who told
25 unsheltered people and witnesses before and during the sweep that people living on the
26 block would face arrest or citation if they did not leave, regardless of whether they could
27 relocate to shelter. Ex. 4 at ¶ 21, Ex. 7 at ¶ 12. By way of these actions, the City made it
28 clear to the unsheltered people living on 9th Avenue between Washington and Jefferson

1 Streets that if they did not uproot their lives and move, even where their only choice was to
2 move down the block, they would be criminalized.

3 Numerous witnesses also confirmed that the City did not conduct individualized
4 assessments before offering shelter to people living at 9th Avenue between Washington and
5 Jefferson Streets. Ex. 3 at ¶ 20; Ex. 5 at ¶ 18. One witness spoke with people displaced by
6 the May 10 Sweep who were not offered shelter at all. Ex. 4 at ¶ 20. Additionally, some
7 accounts confirm those shelter spaces offered were inappropriate for the circumstances of
8 many of the displaced individuals, including because the shelters could not accommodate
9 their pets or disabilities. Ex. 3 at ¶¶ 16-19, Ex. 5 at ¶ 18. Moreover, there is reason to
10 believe that the unsheltered people displaced on May 10 outnumbered available shelter
11 spaces—whether appropriate for an individual’s needs or not. *See* City of Phoenix, General
12 Information Packet (Apr. 20, 2023)⁵ (indicating that, as of April 20, there were only 22
13 available shelter beds in Washington Relief Center and CASS, the two shelters offered by
14 the City on May 10); Ex. 4 at ¶ 20; Ex. 5 at ¶ 12.⁶

15 Simply put, the City’s May 10 sweep plainly stated threats of citation and arrest to
16 unsheltered people who had no viable indoor shelter option violate this Court’s injunction
17 and the Eighth Amendment. *Martin* is clear that “as long as there is no option of sleeping
18 indoors, the government cannot criminalize indigent, homeless people for sleeping
19 outdoors, on public property, on the false premise they had a choice in the matter.” 920 F.3d
20 at 617. And so long as the City does not have enough appropriate shelter, it cannot chase
21 unsheltered people from block to block with the threat of criminal sanctions. *See Anderson*
22 *v. City of Portland*, No. CIV 08-1447-AA, 2009 WL 2386056, at *4 (D. Or. July 31, 2009)

23
24 ⁵ <https://www.phoenix.gov/cityclerksite/City%20Council%20Meeting%20Files/4-20-23%20General%20Information%20Packet%20-%20Final.pdf>

25 ⁶ The City’s practice of offering shelter on the condition that individuals consent to
26 destruction or abandonment of their personal property also does not constitute practically
27 available shelter for Eighth Amendment purposes. *See Coal. on Homelessness v. City &*
28 *Cnty. of San Francisco*, No. 22-CV-05502-DMR, 2022 WL 17905114, at *22 (N.D. Cal.
Dec. 23, 2022) (finding defendants’ argument that enforcement was appropriate because
shelter was offered “unconvincing” where the “shelter offer came with the threat that their
survival belongings would be destroyed”).

1 (finding “enforcement of the anti-camping and temporary structure ordinances through the
2 threat of criminal sanctions” including move-along orders violated the Eighth Amendment);
3 *Coal. on Homelessness v. City & Cnty. of San Francisco*, No. 22-CV-05502-DMR, 2022
4 WL 17905114, at *21 (N.D. Cal. Dec. 23, 2022) (noting that the preliminary injunction
5 which applied *Martin v. City of Boise* enjoined “enforcing or threatening to enforce” laws
6 and ordinances at issue); *Cooley v. City of Los Angeles*, No. 218CV09053CASPLA, 2019
7 WL 3766554, at *6 (C.D. Cal. Aug. 5, 2019) (finding that allegations of threatening arrest
8 during a cleanup sufficiently stated a claim for interference by threats with the enjoyment
9 of constitutional rights). Indeed, a *Martin* claim alleging harm in the form of being subject
10 to the criminal process “may occur at citation, arrest, or even earlier.” *Phillips v. City of*
11 *Cincinnati*, 479 F.Supp.3d 611, 655 (2020) (emphasis added).

12 **III. Modification of the Injunction is Warranted and Necessary to Prevent** 13 **Further Constitutional Violations**

14 A preliminary injunction should be modified when the moving party presents new
15 evidence that sufficiently demonstrates (1) that there is a likelihood of success on the merits;
16 (2) that irreparable harm will result if the preliminary injunction is not issued; (3) that the
17 balance of hardships favors the moving party; and (4) that ordering a preliminary injunction
18 would be in the public interest. *Winter* 555 U.S. at 20; *Trump*, 871 F.3d 646, 654. Here,
19 Plaintiffs presented evidence that satisfies each of the above elements.

20 First, Plaintiffs’ evidence demonstrates a manifest violation of the Court’s order. The
21 indiscriminate destruction of unsheltered individuals’ property was plainly observed and
22 documented. Ex. 3 at ¶¶ 10-12, 21-22; Ex. 5 at ¶¶ 6-8, 13-14, Ex. 6 ¶¶ 5-6, 10. Likewise,
23 the unconstitutional threat of criminal enforcement for sleeping outside when no appropriate
24 indoor shelter was available was plainly posted in the City’s notice and confirmed by
25 numerous witnesses. Ex. 4 at ¶ 21, Ex. 5 at ¶ 17; Ex. 7 at ¶ 12. And these harms are likely
26 to occur again. Defendants already intend to conduct further sweeps in the Zone, starting
27 May 24, 2023. Indeed, as Director Milne has made obvious, despite insufficient shelter
28 space, the City intends to “accelerate” these sweeps because of collateral litigation in a state

1 court matter brought by private businesses.⁷ Preliminary injunction, *Brown, et al. v. City of*
2 *Phoenix*, No. CV 2022-010439 (Superior Ct. Of Ariz. Maricopa Cnty. Mar. 27, 2023).
3 While Plaintiffs here can certainly appreciate the City’s dilemma in meeting the demands
4 of the state court order, it cannot violate this Court’s order and the Constitution in that
5 compliance.

6 Additionally, the balance of hardships weighs in favor of Plaintiffs. Given that the
7 City only offered short-term shelter, it is foreseeable that the people displaced from this
8 sweep will end up back on the streets, only less equipped to survive because they were
9 required to get rid of essential survival items. Items destroyed by the City cannot easily be
10 replaced by individuals who are unsheltered. Ex. 4 at ¶¶ 7-14; Doc. 34 at 16 (recognizing
11 that by “taking a tent, an article of clothing, or bedding,” the City “may be taking everything
12 the person owns”). Tents, tarps, blankets, clothes, and other personal belongings are
13 essential survival items as Phoenix moves into the hottest months of the year. Destroying
14 these items not only creates a hardship but is not in the public interest. As the US
15 Interagency Council on Homelessness’s recent Federal Strategic Plan to Prevent and End
16 Homelessness explains, “[u]nless encampment closures are conducted in a coordinated,
17 humane, and solutions-oriented way that makes housing and supports adequately available,
18 these ‘out of sight, out of mind’ policies can lead to lost belongings and identification which
19 can set people back in their pathway to housing; breakdowns in connection with outreach
20 teams, health care facilities, and housing providers; increased interactions with the criminal
21 justice system; and significant traumatization—all of which can set people back in their
22 pathway to housing and disrupt the work of ending homelessness.”⁸ Accordingly, the
23

24 ⁷ Juliette Rihl, *Phoenix Likely To Clear ‘The Zone’ Homeless Encampment Beginning in*
25 *May*, azcentral (April 24, 2023, 10:23 AM),
26 <https://www.azcentral.com/story/news/local/phoenix/2023/04/21/phoenix-homeless-encampment-the-zone-being-cleared-following-judges-order/70136773007/>.

27 ⁸ US Interagency Council on Homelessness, *All in: The Federal Plan to Prevent and End*
28 *Homelessness* (December 2022),
https://www.usich.gov/All_In_The_Federal_Strategic_Plan_to_Prevent_and_End_Homelessness.pdf.

1 preliminary injunction should be modified to prevent the City from carrying out further
2 planned sweeps.

3 **CONCLUSION**

4 Based on the foregoing, Plaintiffs respectfully request the court issue an Order to
5 Show Cause and schedule an expedited hearing on their requests for a contempt finding
6 and for modification of the Preliminary Injunction. Plaintiffs also request Defendants be
7 enjoined from performing the May 24 Sweep until this matter can be heard.

8
9 DATED this 15th day of May, 2023.

10
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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2023, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to all CM/ECF Registrants.

/s/ Benjamin L. Rundall
Benjamin L. Rundall