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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Fund for Empowerment, *et al.*,

Plaintiffs,

v.

City of Phoenix, *et al.*,

Defendants.

No. CV-22-02041-PHX-GMS

PLAINTIFFS' RESPONSE TO PROPOSED INTERVENORS' MOTION TO INTERVENE

Plaintiffs Fund for Empowerment, Faith Kearns, Frank Urban, and Ronnie Massingille ("Plaintiffs"), through undersigned counsel, hereby file this Response to Freddy Brown, Joel Coplin, Jo-Ann Coplin, Deborah Faillace, Karl Freund, Gallery 119, Michael Godbehere, Jordan Evan Greeman, Rozella Hector, Daniel Langmade , Dianne Langmade, Ian Likwarz, Matthew Lysiak, Michael Lysiak, Old Station Sub Shop, PBF Manufacturing Co. Inc., Phoenix Kitchens LLC, and Don Stockman, ("Proposed Intervenors") Motion to Intervene (the "Motion") filed May 23, 2023. The Court should deny the Motion.

The Motion reflects Proposed Intervenors' clear misunderstanding as to what is at issue in this case and erroneously conflates the constitutional claims here with their common law claims they brought against the City of Phoenix (the "City") in *Brown et al. v. City of Phoenix* in Maricopa County Superior Court, CV2022-010439. Consequently, Proposed Intervenors have no significant protectable interest and their request for permissive intervention should similarly be denied.

I. BACKGROUND ON PROPOSED INTERVENORS' ACTIONS IN THIS CASE AND THE *BROWN* CASE

On December 14, 2022, Proposed Intervenors filed a motion for leave to file an amicus brief in opposition to Plaintiffs' motion for a preliminary injunction. (Doc. 31). In that motion, Proposed Intervenors represented that their counsel had attended the Preliminary Injunction hearing held by this Court on December 14, and, based on that hearing, had identified a single "narrow issue" implicating Proposed Intervenors' interests, namely the proper interpretation of *Martin v. Boise* and its application to this case. *Id.* at 2; *see also* Doc. 31-2. Proposed Intervenors attached a letter to their motion, apparently sent *ex parte* to the Court, in which they explained "why they did not believe they had to intervene in this matter." Doc 31 at 1. In that letter, Proposed Intervenors asserted that "the relief plaintiffs are seeking in" this lawsuit "does not conflict with the relief we are seeking in state court, which requires neither cleaning sweeps nor the taking of personal property . . . ." Doc. 31-1 at 1. The letter also indicated that the Proposed Intervenors had attached briefing from the state court action "which w[ould] give the Court more background on the issues, including on federal abstention doctrines." *Id.* This briefing was not filed on the public docket in this case.

This Court granted Proposed Intervenors' motion for leave to file an amicus brief and, in the December 16 Preliminary Injunction Order, indicated in a footnote that the Court had considered the amicus brief and found that "it did not affect the disposition of Plaintiffs' Motion for Preliminary Injunction." Doc. 34 at 7 n.2.

On March 27, 2023, the Maricopa County Superior Court issued an Under Advisement Ruling (the "State Court Ruling") finding that the City was maintaining a public nuisance in the Zone and ordering the City to abate the nuisance. Ex 1 at 22. The State Court Ruling "recognize[d] that the City has discretion in how to comply with this Order and does not direct with specificity any of the myriad actions that would lead to compliance." *Id.* The State Court Ruling also addressed the City's argument that it faced a hardship because any abatement it undertakes in the Zone must comply with *Martin*. *Id.*at 19. The court rejected this argument, noting that *Martin* and its progeny do not "preclude municipalities from abating a nuisance, arresting violent offenders, enforcing laws against drugs and violence, or enforcing laws against biohazards and pollution of public waters." *Id.* at 20.

II. PROPOSED INTERVENORS HAVE NO RIGHT TO INTERVENTION NOR HAVE ESTABLISHED PERMISSIVE INTERVENTION IS WARRANTED IN THIS CASE

In the Ninth Circuit, a district court must permit a non-party to intervene pursuant to Rule 24(a)(2) only when it demonstrates that "(1) it has a significant protectable interest as to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately meet the applicant's interest." *Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.*, 54 F.4th 1078, 1086 (9th Cir. 2022). "A putative intervenor has the burden of establishing all four requirements," *id.* at 1086, and the "[f]ailure to satisfy any one of the requirements is fatal to the application," *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

As to the first factor, "at an irreducible minimum Rule 24(a)(2) requires that the asserted interest be protectable under some law and that there exist a relationship between the legally protected interest and the claims at issue. If these two core elements are not satisfied, a putative intervenor lacks any 'interest' under Rule 24(a)(2), full stop." *Id.* at 1088 (internal quotation marks and citation omitted).

Here, the Proposed Intervenors cannot satisfy the first requirement to demonstrate that they have a significant protectable interest in this action. Accordingly, the Proposed Intervenors' motion for intervention as of right should be denied, and the Court "need not reach the remaining elements." *Id.*

A. Proposed Intervenors' Asserted Interests Are Undermined by Their Prior Actions in this Case and the State Court Ruling

Proposed Intervenors' representations to this Court demonstrate that they have no cognizable interest in joining this lawsuit. Proposed Intervenors repeatedly assert that there is no conflict between the relief Plaintiffs seek here and their claims in the *Brown* case. *See* Doc. 31-1 at 1; Doc. 76-1 at 2 (recognizing that the City has "plenty of options to abate the nuisance" that have no conflict with *Martin*'s requirements).[1] The State Court Ruling's recognition of the discretion the City has in complying with its nuisance abatement order and the absence of conflict between this order and *Martin* provides further evidence that this lawsuit (and particularly the Order to Show Cause) poses no threat to Proposed Intervenors' "defense of their rights in the state case." *Id.* at 5; *see also* Ex. 1 at 20, 22.

B. The Motion is Untimely

Proposed Intervenors' course of action also demonstrates that their request to intervene is untimely. Over five months after this Court issued its Preliminary Injunction and almost two months since the State Court Ruling was issued, Proposed Intervenors have suddenly changed their minds about intervention. To justify this untimely motion, Proposed Intervenors assert, without explanation, that "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." Doc. 76-1 at 4. This unsupported assertion of timeliness is both inadequate and contradicted by the record. Plaintiffs' Order to Show Cause seeks an order finding that the City violated the Preliminary Injunction in conducting its May 10 sweep and modifying the Preliminary

[1] Proposed Intervenors assertions that their requested relief does not conflict with that of Plaintiffs', nor with *Martin*, also belie their claim that their interests are inadequately represented by the parties in this case.

Injunction "to prevent further sweeps/cleanings/displacements in the Zone until the City can ensure compliance with the Court's December 16 Order." Doc. 59 at 4. In other words, the only relief sought by Plaintiffs in their Order to Show Cause is compliance with the Preliminary Injunction that has been in place since December, and which was issued after consideration of Proposed Intervenors' interests and arguments.

Proposed Intervenors chose not to move to intervene while Plaintiffs' motion for preliminary injunction was pending because they recognized that the relief sought by Plaintiffs was not in conflict with their requested relief in the *Brown* case. Doc. 31-1 at 1. Instead, they submitted an amicus brief, which was considered by the Court in its Preliminary Injunction ruling. Plaintiffs' attempt to enforce that Preliminary Injunction changes none of this. Proposed Intervenors already presented their interests and arguments to the Court, they should not get a second bite at the apple.

Proposed Intervenors attempt to manufacture a new threat to their interests where none exists. In light of the constitutional deprivations during the May 10, 2023 sweep, Plaintiffs sought modification of the preliminary injunction to the planned May 24 sweep until the matter could be heard by the court. Plaintiffs did not seek to indefinitely suspend all sweeps and the Proposed Intervenors have not established any reason they have particular interest in the May 24 sweep continuing as scheduled.

C. Proposed Intervenors' Interests in *Brown* Are Not and Cannot Be Implicated in this Case About Constitutional Compliance

Proposed Intervenors conflate (and wrongfully equate) a preliminary finding in their favor under a common law public nuisance action with the constitutional rights of unsheltered residents in the Zone. But a private action arising under Arizona state law can *never* deprive unsheltered individuals of constitutional rights vested under the United States Constitution. So, while Proposed Intervenors say their lawsuit is not about divesting unsheltered individuals of their constitutional rights, they ask this Court to intervene for fear of an order "forbidding the City from taking actions that could help the abatement of the nuisance at issue in *Brown*." Doc. 76 at2. In other words, they ask this Court to ignore

the City's constitutional violations of unsheltered individuals' rights if it will in any way infringe on an "abatement" of the Zone by July (currently occupied by nearly 1,000 people).

Yet, even setting aside that Proposed Intervenors ask this Court to ignore Plaintiffs' rights here, they also misconstrue the state court's order giving rise to their proclaimed right to "abate" the nuisance at issue in the Zone. The state court did not authorize (nor could it) a violation of unsheltered individuals' constitutional rights in the Zone in order to provide relief for Proposed Intervenors. The preliminary injunction in *Brown* does not authorize the destruction of unhoused people's property absent notice and an opportunity to be heard, as required by the Fourteenth Amendment. Similarly, it does not overrule *Martin*'s prohibition, under the Eighth Amendment, on "the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." 920 F.3d at 616. Rather, the Court commanded the City to "devise and carry out **as soon as practicable** a plan" that would remove tents from public rights of way, clean up biohazardous materials, and enforce laws to ensure public order.[2] While the City is required to report to the state court before a July 10, 2023 bench trial steps it has taken to comply with its order, the state court recognized the "City has discretion in how to comply with this Order and does not direct with specificity any of the myriad actions that would lead to compliance."

Put simply, while Proposed Intervenors were awarded an order commanding the City to act, they have no right to dictate ***how*** the City must act to abate the nuisance. And certainly, the City cannot act in a way that is unconstitutional. The notion that the City must either comply with the preliminary injunction in *Brown* to abate the public nuisance or the preliminary injunction in *FFE* to protect the constitutional rights of unhoused people is a false dichotomy. But, even assuming, *arguendo*, that the preliminary ruling in *Brown* somehow calls for the immediate removal of all unsheltered individuals from the Zone by July 2023 (which it does not), such a ruling would clearly be in violation of this Court's

[2] Plaintiffs have never opposed lawful cleanings in the Zone which would also address Proposed Intervenors' concerns.

order and severely threaten the constitutional rights of unsheltered individuals given the City's repeated failures to meet the requirements of *Martin*. The Supreme Court "long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).[3]

D. Defendants Adequately Represent Any Alleged Interest Regardless of Proposed Intervenors' Opinions About Defendants' Litigation Strategy

Proposed Intervenors bear the burden of establishing inadequate representation. *Cal. Dep't of Toxic Substances Control*, 54 F.4th at 1086. Defendants—the City and its officials—are a governmental body, and "a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), abrogated on other grounds by *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)). In cases like this "[w]here official policies and practices are challenged, it seems unlikely that anyone could be better situated to defend than the governmental department involved and its officers." *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976). This is especially so here where the governmental unit is not a state or national body that is required to represent a broader view; Defendants are a local city required to represent the more narrow "local and individual interests." *Forest Conservation Council*, 66 F.3d at 1499.

i. Proposed Intervenors' Mischaracterize the Record in this Case and Its Asserted Defenses Otherwise Lack Merit

Proposed Intervenors apparently recognized this fatal flaw and so the Motion attempts to satisfy Rule 24's adequate representation requirement by pointing out that they disagree with Defendants litigation strategy. Doc 76 at 2–3, 6–7. Namely, they take issue with Defendants failure to move to dismiss this case, move to stay this case pursuant to

[3] Moreover, the appropriate remedy for any harm proposed intervenors believe might be caused by the City's failure to comply with the state court's order under a common law public nuisance claim is money damages in that action – not intervention in this case to force the City to do something it cannot do.

abstention doctrines, or ask the Court to interpret *Martin* the way Proposed Intervenors do. Mot. at 6–7. Not only is this a legally baseless argument under Rule 24, but it's also factually incorrect. Defendants asserted numerous of affirmative defenses in their Answer to Plaintiffs' First Amended Complaint including failure to state a claim and "any other matter constituting an avoidance or affirmative defense, as set forth in Rules 8(c) and 12 of the Federal Rules of Civil Procedure." Doc. 50 at 8–9. Furthermore, Proposed Intervenors' abstention arguments are both disingenuous and baseless. First, while Proposed Intervenors argue that they should be permitted to intervene in order to present abstention arguments and its interpretation of *Martin*, *see* Doc. 76.1 at 3, 7, it admits that it already presented such abstention arguments to the Court in its amicus curiae filings, *id.* at 3. Those arguments were considered by this Court and found to have no effect on the disposition of the Preliminary Injunction.

Second, *Pullman* abstention—the only form of abstention mentioned by Proposed Intervenors—is inapplicable here.[4] The Court *only* has discretion to abstain under *Pullman* when the following three factors are met: "(1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the proper resolution of the possible determinative issue of state law is uncertain." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 783–84 (9th Cir. 2014) (citation omitted). None are met here.

The first prong is not met because the constitutional rights of unsheltered individuals is not an area that federal courts decline to enter. Federal courts regularly adjudicate claims that city laws, policies, and practices intended to address homelessness and sanitation infringe on the rights of unsheltered individuals. *See e.g.*, *Lavan v. City of Los Angeles*, 693

[4] In a similar case, involving allegations that a city's practices relating to unsheltered individuals violated the Eighth Amendment under *Martin v. Boise*, the Southern District of Ohio declined to abstain based on the fact that an injunction banning homeless encampments had been entered in a state court proceeding. *See Phillips v. City of Cincinnati*, No. 1:18-CV-541, 2020 WL 4698800 (S.D. Ohio Aug. 13, 2020).

F.3d 1022, 1024 (9th Cir. 2012) (addressing Fourth and Fourteenth Amendment rights of unsheltered individuals when state actors destroy their property during sweeps); *Kincaid v. City of Fresno*, No. 06-CV-1445, 2006 WL 3542732, at *37 (E.D. Cal. Dec. 8, 2006) (same); *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) (finding that City's issuance of citations for sleeping in public when no alternatives existed violated Eighth Amendment rights of unsheltered individuals); *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022) (same).

The second prong is also not met because resolution of the state law issues in *Brown* would not moot or narrow Plaintiffs' constitutional claims here. "The Ninth Circuit has consistently found this requirement satisfied where a favorable decision on a state law claim would provide plaintiff with some or all of the relief he seeks." *Lomma v. Connors*, 539 F. Supp. 3d 1094, 1102 (D. Haw. 2021) (citation omitted). A favorable decision for the *Brown* Plaintiffs declaring that the Zone constitutes a public nuisance and ordering the City to abate that public nuisance, does nothing to moot or change Plaintiffs' claims.

Finally, the third prong, uncertain resolution of a possibly determinative state law issue, is also not met here. First, the state law issues in *Brown*—whether the City created or maintained a public nuisance in the Zone and whether its alleged failure to enforce certain laws in and around the Zone violates the state constitution—are not possibly determinative of this case. Nor are the legal issues uncertain (as made clear by the State Court Ruling). "An outcome is not 'doubtful' or 'uncertain' just because it turns on the facts of the particular case." *Pearl Inv. Co. v. City & Cnty. of San Francisco*, 774 F.2d 1460, 1464 (9th Cir. 1985); *see also Los Angeles All. for Survival v. City of Los Angeles*, 987 F. Supp. 819, 825 (C.D. Cal. 1997), aff'd, 224 F.3d 1076 (9th Cir. 2000) ("because the Ordinance challenged here is not ambiguous and because the controlling precedents do not conflict, this case does not present an unclear issue of state law, and *Pullman* abstention is inappropriate"). Proposed Intervenors simply cannot satisfy their burden under Rule 24 simply because Defendants (understandably) chose not to waste time reasserting arguments the Court found meritless back in 2022.

Even putting aside the Motion's factual inaccuracies, "mere[] differences in [litigation] strategy . . . are not enough to justify intervention as a matter of right." *United States v. City of Los Angeles*, 288 F.3d 391, 402–03 (9th Cir. 2002). Proposed Intervenors concede as much in the Motion with citation to binding Ninth Circuit authority. Mot. at 4 n. 4 ("Whether representation may be inadequate has nothing to do with the quality of the existing defendants' attorneys.").

ii. Defendants Adequately Represent Proposed Intervenors Because They Both Want the Defendants to Continue Conducting Sweeps Unconstitutional

Additionally, where the intervenor shares an objective with an existing party, another presumption of adequate representation arises, *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997), and differences in litigation strategy fail to overcome that presumption. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). While Proposed Intervenors and Defendants may have diverging objectives in the State Nuisance Case, their objectives in this case squarely align.[5] Unfortunately for Plaintiffs and the City's unhoused population, Defendants and Proposed Intervenors want Defendants want to continue conducting sweeps in a manner that runs afoul to the United States Constitution in the name of health, safety, and property. Doc. 18 at 12–15; Doc. 76 at 5. The Court should not, and Rule 24 does not permit, intervention to assert an interest in unconstitutional acts already represented by Defendants simply because Proposed Intervenors are unhappy with Defendants litigation strategy and think they can do a better job.

E. Permissive Intervention Should Also Be Denied

Proposed Intervenors' request for permissive intervention under Rule 24(b)(1) should also be denied. None of Proposed Intervenors' claims in the *Brown* lawsuit share a

[5] Proposed Intervenors cite *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1409–11 (9th Cir. 1996) for the assertion that their State Nuisance Case may serve as the basis for intervention in an unrelated dispute. Doc. 76 at 6–7. A quick gloss over the decision easily refutes this as the Ninth Circuit explicitly stated it was not addressing the district court's decision to permit intervention. *Alameda*, 95 F.3d at 1412 n. 8.

common question of law or fact with this action. Proposed Intervenors' state court lawsuit alleges claims for declaratory relief that the Zone constitutes a public nuisance and that the City's actions violate Article 2, Section 4 of the Arizona State Constitution (deprivation of liberty and property without due process) and Article 2, Section 13 of the Arizona State Constitution (equal treatment of similarly situated citizens) and claims for mandamus and injunctive relief. *See* Ex 2 (*Brown* complaint). None of these claims share common questions of law or fact with Plaintiffs' claims concerning the City's seizure and destruction of unhoused people's property without adequate notice. Nor do the Proposed Intervenors' claims turn in any way on the question of whether the City's practice of issuing citations under its sleeping and camping ban violates *Martin*. Indeed, Proposed Intervenors assert—and the State Court Ruling confirms—that there is no conflict between *Martin* and the relief it seeks. The Court should exercise its broad discretion to deny Proposed Intervenors' alternative request for permissive intervention. *See Canatella v. California*, 404 F.3d 1106, 1117 (9th Cir. 2005) ("Even if an applicant satisfies [the] threshold requirements, the district court has discretion to deny permissive intervention.") (alteration in original) (citation omitted).

CONCLUSION

Proposed Intervenors misunderstand the basic differences between the claims here and the claims in the State Nuisance Case and therefore claim a protectable interest that is simply not at stake in this action. Accordingly, Plaintiffs' respectfully request that this Court deny the Motion.

DATED this 25th day of May, 2023.

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