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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

FREDDY BROWN et al.,

Plaintiffs,

v.

CITY OF PHOENIX, a body politic in the State of Arizona,

Defendant.

Case No.: CV2022-010439

Plaintiffs' Motion for Summary Judgment

Assigned to: Judge Scott Blaney

This case is ripe for summary judgment. Throughout this litigation, the City of Phoenix has not once challenged the substance of Plaintiffs' public nuisance claim. Not once has the City questioned Plaintiffs' evidence regarding conditions in their neighborhood ("The Zone"). The evidence shows, without contradiction or dispute, that the City of Phoenix controls the rights of way in the Zone, and those rights of way have effectively become a low-barrier shelter where unsheltered individuals have erected structures and encampments; where illegal drug use, public indecency, and other crime is rampant; and where trash and human urine and excreta flow on the streets and on Plaintiffs' properties, conducing to the presence of rodents, flies, and the transmission of disease.

Instead of challenging these conditions (which it cannot do), the City has raised

three defenses to Plaintiffs' public nuisance claim and their requests for relief. First, the City argued that this case presents a nonjusticiable political question, one of legislative and policy judgment. This Court rejected that defense by rejecting the City's motion to dismiss.

Second, the City has argued that it is not the cause of the nuisance because it does not operate the Central Arizona Shelter Services (CASS) or the Human Services Campus (HSC); however, the City has acknowledged that it controls, and decides who gets to erect structures on, the public rights of way in the Zone. Thus, there is no genuine issue of material fact: Plaintiffs do not dispute that the City does not operate CASS or HSC, and Defendant does not dispute that it controls who gets to stay on the rights of way. Whether that is cause sufficient for liability for public nuisance is a pure question of law. And in this regard, the Restatement (Second) of Torts provides that a "possessor of land upon which a third person carries on an activity that causes a nuisance is subject to liability for the nuisance if . . . he consents to the activity or fails to exercise reasonable care to prevent the nuisance." § 838.

Third and finally, the City has argued time and again that it cannot remove the encampments on its property in the Zone because doing so would violate *Martin v. City of Boise*. That, too, is a pure question of law, and there is therefore no genuine issue of material fact, neither for discovery nor for trial. The City cannot arrest people for sleeping in public at night if there are no available shelter beds for those particular individuals; no one disputes that. But the City can quickly build enough shelters of varying types to get people off the street; it merely chooses not to do so. The City can require unsheltered persons to remove their tents in the daytime; it chooses not to do so. The City can arrest people in the Zone for public illegal drug use; it chooses not to do so. The City can arrest people for public indecency and other crimes; it chooses not to do so. And the City can arrest people for defecating and urinating in public; it chooses not to do so.

Instead, the City, has a pollyannaish "all or nothing" mindset, seeking to "solve" homelessness once and for all. Thus, the City chooses not to invest in structured campgrounds or the enforcement of other criminal laws because doing so does not create

permanent shelters and does not solve this nation's housing crisis. With all due respect to the City, this suit is not about solving homelessness: it is about whether, in pursuing homelessness policies within its discretion, the City can *violate the law* by creating a public nuisance concentrated in a single neighborhood. It cannot. Plaintiffs therefore move for summary judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

"[S]ummary judgment should be granted when the evidence presents no genuine issue of material fact." *Orme Sch. v. Reeves*, 166 Ariz. 301, 305 (1990). Summary judgment should be denied only if "the facts are in dispute . . . or the evidence presented could lead 'reasonable minds' to draw different inferences therefrom." *Id.* at 306. If there is "a scintilla of evidence or a slight doubt" in favor of the nonmoving party, that is insufficient to deny the motion. *Id.* at 311. "Summary judgment is an appropriate vehicle for resolving disputes over the legal meaning or effect of facts or conduct not in dispute." *United California Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 280 (Ct. App. 1983). Put another way, summary judgment is appropriate "if parties agree as to operative facts and only dispute application of the law to these facts." *Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118 n.8 (Ct. App. 2008), as amended (Jan. 23, 2008). Here, the only questions remaining are legal, and therefore summary judgment is appropriate.

II. SUMMARY OF FACTUAL BACKGROUND

As described in Plaintiffs' separate statement of facts, there is no genuine question regarding any material fact in this case. Although in its Answer the City of Phoenix denies as a legal conclusion that there is a public nuisance in the Zone, not once in this litigation has the City questioned the conditions in the Zone—nor could it. The City has long recognized that there is in the Zone "a fluctuating level of encampments along the streets, defecation in public—sometimes on private property[—]litter and debris, public drug use, lewd acts, theft and other property and violent crimes," and that the "neighborhood impacts" of the unsheltered population in the Zone "far exceeds impacts faced by any other

neighborhood in Arizona." SOF ¶¶ 8-9. The City acknowledges that the Plaintiffs' neighborhood experiences "the largest concentration" of unsheltered individuals in Phoenix. *Id.* ¶ 10. As illuminated in the testimony and by the photographic evidence, conditions constitute an unsanitary "biohazard" as a result of human urine and excrement, drug paraphernalia such as syringes and needles, and uncontained and rotting trash; risk the transmission of disease through the presence of flies and rodents; are frequently offensive to the senses; and obstruct the free passage or use of public streets. *Id.* ¶¶ 12-16, 18-22. In addition, sewage and trash often end up in storm drains, which discharge in the waters of the state; unsheltered individuals frequently urinate and defecate on sidewalks as well as on industrial buildings; and drug use, physical assaults, indecent exposure, fires, and other crimes regularly occur. *Id.* ¶¶ 17, 23, 25-28.

As for causation, the City admits that it controls the rights of way in the Zone and that it can decide who stays and who goes—whether to approve or deny a permit and whether to require a permit at all. Indeed, the City denied a Plaintiff, on one hand, a permit to keep sculptures in the right of way in front of their property, while on the other welcoming encampments on the same right of way. *Id.* ¶¶ 32-34.

There is also no dispute that the City, within its breadth of discretion, has at its fingertips many alternative policy approaches to abate this nuisance. The City might enforce laws against drug and other public order crimes. The City might build additional shelters, or structured campgrounds, at places of its choosing. *Id.* ¶¶ 35-52. Instead, the City assiduously avoids any notion of criminal enforcement or other action that would "penalize" unsheltered persons through "the justice system or other means." *Id.* ¶ 8. The City simply eschews any and all efforts to abate this nuisance because it is singularly focused on the idealistic goal of solving homelessness itself.

Finally, no one disputes that the *City of Boise* decision limits the City's policy choices. The City has admitted in its Answer and in its February 13, 2023 response brief that enforcement in the Zone has decreased as a result of the *Boise* decision and the reason they do not remove the encampments is because of the City's (erroneous) interpretation of

the *Boise* decision. *Id.* ¶¶ 54-55. But the City's self-imposed limitations exponentially exceed any pronouncements of the Ninth Circuit; indeed, as noted, the City has limited itself to solutions that it believes will "solve" homelessness, and has refused to consider that its policies in the Zone are otherwise unlawful. The City does not deny that there are solutions—like structured campgrounds or enforcing other criminal prohibitions—that could be deployed to resolve the nuisance while complying with the *Boise* decision. The City frankly admits that it has made a policy decision not to create structured campgrounds because such campgrounds would not get the unsheltered into permanent shelters. *Id.* ¶¶ 38, 52. But no one denies that *refusing* to create structured campgrounds does not get these unsheltered people into shelters, either, and that the unsheltered population is not safe on the streets—as the City admitted, *id.* ¶¶ 39-40, and as this Court recognized in its denial of the City's motion to dismiss.

III. LEGAL ARGUMENT

Because there is no genuine issue of fact, this matter is ripe for summary judgment. First, the conditions in the Zone constitute a public nuisance under Arizona common and statutory law. The City has never questioned this conclusion. Second, a public nuisance is a condition, and therefore the City of Phoenix is liable to abate it even if it did not "cause" it; but, in any event, the City is the legal cause of the nuisance. Third, as briefed to this Court *ad nauseum*, the *Boise* decision does not preclude Plaintiffs' requested relief. Fourth, as this Court recognized in its denial of the City's motion to dismiss, if Plaintiffs are correct on the merits, then they are entitled to declaratory and injunctive relief. They are, moreover and as explained further below, entitled to special-action relief. Fifth, there is no genuine issue respecting their constitutional claims. This Court should grant summary judgment.

A. The Zone Constitutes a Public Nuisance

Arizona recognizes a common law nuisance claim, whether public, private, or both. *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Arizona*, 148 Ariz. 1, 7 (1985) (citing Restatement (Second) of Torts, 812 §§ B and D). *Armory Park* noted that a public nuisance is "an unreasonable interference with a right common to the general

public." *Id.* The *Armory Park* court upheld the granting of a preliminary injunction against a charitable institution that fed the indigent once a day. "We do not believe that the law allows the costs of a charitable enterprise to be visited in their entirety upon the residents of a single neighborhood." *Armory Park*, 148 Ariz. at 8.

City of Phoenix v. Johnson, 51 Ariz. 115 (1938), held that the City of Phoenix could be held liable for nuisances. "No matter how great may be the necessity of providing a sewer system for the city, it may not rightfully be done in such a manner as to maintain a nuisance." 51 Ariz. at 130. "We think it is a matter of which this court may take judicial notice that a sewer system for a city of the character of Phoenix can be maintained in such a manner that it will be neither a private nor a public nuisance. The expense may be great, and the vigilance required in the operation and maintenance may be incessant, but modern science teaches us that human care and ingenuity is sufficient for the situation." *Id.* at 126.

The Restatement (Second) of Torts, § 821B, provides additional clarity in determining what conditions constitute unreasonable interferences with rights common to the general public, which are therefore public nuisances. It provides:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation[.]

In light of the facts, over which there is no genuine dispute, there is no question that the encampments significantly and unreasonably interfere with the public health, public safety, public peace, public comfort, and public convenience. Not only that, but the presence of the encampments in the Zone, and the conditions they create, are "proscribed by" several statutes and ordinances.

A.R.S. Section 36-601 declares that "[a]ny place, condition or building that is controlled or operated by any governmental agency and that is not maintained in a sanitary

condition" is a "public nuisance[] dangerous to the public health." As indicated above, the City admits the streets and sidewalks are within its control, and admits they are not maintained in sanitary conditions.

ARS Section 36-601(1) declares that "[a]ny condition or place in populous areas that constitutes a breeding place for flies, rodents, mosquitoes and other insects that are capable of carrying and transmitting disease-causing organisms to any person or persons" is a "public nuisance[] dangerous to the public health." The uncontroverted evidence is that the City's streets and sidewalks in the Zone constitute a breeding place for flies and rodents, which are capable of transmitting disease.

ARS Section 36-601(5) declares "[a]ll sewage, human excreta, wastewater, garbage or other organic wastes deposited, stored, discharged or exposed so as to be a potential instrument or medium in the transmission of disease to or between any person or persons" to be a "public nuisance[] dangerous to the public health." The City concedes that streets and sidewalks in the Zone contain sewage, human excreta, and garbage that can transmit disease between persons. And ARS Section 36-601(13) declares "[s]pitting or urinating on sidewalks . . . or a building used for manufacturing or industrial purposes" to be a "public nuisance[] dangerous to the public health." The uncontroverted evidence shows numerous occasions of urination and defecation on Plaintiffs' manufacturing and industrial buildings.

ARS Section 49-201(32) prohibits the "discharge" of pollutants without a permit, and Section 49-201(12) defines "discharge" as "the direct or indirect addition of any pollutant to the waters of the state from a facility." The word "pollutant" is defined to include "fluids" "solid waste," "sewage, garbage, sewage sludge," "or any other liquid, solid, gaseous or hazardous substances." *Id.* § 49-201(35). The statute further defines "facility" as "any land, building, … area, source, activity or practice from which there is, or with reasonable probability may be, a discharge." *Id.* § 49-201(19). Again, the evidence elicited in this case proved the City's actions in maintaining encampments in the Zone lead to sewage and garbage discharging into the storm drains, which subsequently discharge into the waters of the state.

A.R.S. Section 13-2917(A)(1) defines a public nuisance as anything "injurious to health, indecent, [or] offensive to the senses." The evidence shows that conditions in the Zone are offensive to the senses. A.R.S. Section 13-2917(A)(1) further defines a public nuisance as any "obstruction to the free use of property that interferes with the comfortable enjoyment of life or property by an entire community or neighborhood or by a considerable number of persons." The record shows the obstruction of the free use of property within the meaning of the statute. And A.R.S. Section 13-2917(A)(2) provides that "[t]o unlawfully obstruct the free passage or use, in the customary manner, of any . . . public park, square, street or highway," is a public nuisance. The record shows that conditions in the Zone frequently obstruct the free passage or use of streets.

Additionally, the City is failing to enforce adequately various quality-of-life ordinances prohibiting loitering, disturbing the peace, drunken and disorderly conduct, prostitution, public urination and defecation, drug use, and obstructing streets, sidewalks, or other public grounds. Phoenix Municipal Code §§ 23-3, 6, 7, 8, 9, 28, 48, 48.01, 52(A)(3), 53, 84, 85.01. Further, the City has a policy of not enforcing prohibitions on loitering and congregating on public sidewalks, *id.* § 23-8, or lying and sleeping on sidewalks, *id.* § 48.01. The City of Phoenix is also violating A.R.S. § 9-499, which provides that a City "shall compel the owner, lessee or occupant of property to remove from the property and its contiguous sidewalks, streets and alleys any rubbish, trash, weeds or other accumulation of filth . . . that constitute a hazard to public health and safety."

In summary, the conditions in the Zone constitute a nuisance not only under Restatement of Torts Section 821B(2)(a) because they create unreasonable interferences with public health, safety, peace, comfort, and convenience, but also under Section 821B(2)(b) because they are proscribed by numerous statutes defining public nuisances. Again, the City does not challenge any of these conclusions. Its only defense in this respect has been to state that it is doing what it can to address homelessness. But that is not a defense that excuses the City's maintenance of a public nuisance.

B. Public nuisance is a condition; alternatively, the city is the cause of the

nuisance because it controls who gets to erect structures on the rights of way.

As for the City's causation defense, that has always been legally erroneous because a public nuisance is a *condition*. "[A] nuisance is a condition which represents an unreasonable interference with another person's use and enjoyment of his property." *Graber v. City of Peoria*, 156 Ariz. 553, 555 (Ct. App. 1988) (quoting jury instruction approvingly). "What constitutes an unreasonable interference with another person's use and enjoyment of his property is determined by the injury *caused by the condition and is not determined by the conduct of the party creating the condition*." *Id.* (emphasis added); *see generally* Thomas W. Merrill, *Is Public Nuisance a Tort?*, J. of Tort L., vol. 4:2, at 1, 16 (public nuisance generally "rests on maintaining an unlawful condition, not on any particular type of conduct"). Indeed, Arizona's statutes declare "[a]ny *place*, *condition* or building that is *controlled* or operated by any *governmental agency* and that is not maintained in a sanitary condition" to be a "public nuisance[] dangerous to the public health." A.R.S. § 36-601 (emphases added). And the City admits that it controls the rights-of-way in the Zone. SOF ¶¶ 32-34.

To make an analogy that Plaintiffs have made several times over the course of this litigation, think of a homeowner who leaves the country, only to return to find that encampments that create a nuisance in his neighborhood have been erected on his property in his absence. Perhaps the homeowner would not be liable because he was not in control of the situation. But once the homeowner returned—and certainly if the homeowner had always been there, and had invited the encampments—he most assuredly would be liable for the nuisance that is created by the *conditions on his property*. For the same reason, the City is liable here. To be sure, it could always be that some other actor has taken actions that directly lead to a condition elsewhere, and whose action is required to remove that condition, as was the case of the charity in *Armory Park*. Such causation is sufficient for liability, but it is not *necessary* for liability.

In fact, the Restatement of Torts, ***in two provisions that neither party in this litigation has previously cited***, establishes beyond doubt that Plaintiffs are correct. First,

Section 839 provides:

> A possessor of land is subject to liability for a nuisance caused while he is in possession by an abatable artificial condition on the land, if the nuisance is otherwise actionable, and
>
> (a) the possessor knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved, and
>
> (b) he knows or should know that it exists without the consent of those affected by it, and
>
> (c) he has failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect the affected persons against it.

Restatement (Second) of Torts § 839. Second, Section 838 provides:

> A possessor of land upon which a third person carries on an activity that causes a nuisance is subject to liability for the nuisance if it is otherwise actionable, and
>
> (a) the possessor knows or has reason to know that the activity is being carried on and that it is causing or will involve an unreasonable risk of causing the nuisance, and
>
> (b) he consents to the activity or fails to exercise reasonable care to prevent the nuisance.

Id. § 838. This is not a novel argument. It is well settled law. California has recognized that one can be liable for a nuisance *either* by "creat[ing]" the nuisance, *or* if the defendant "unreasonably fails to abate a nuisance when he is in possession of land" or "consents or unreasonably permits a third party to create a nuisance on the land." *Coppola v. Smith*, 935 F. Supp. 2d 993, 1018–19 (E.D. Cal. 2013). And in *Armory Park* the Arizona Supreme Court adopted the Second Restatement. *Armory Park*, 148 Ariz. at 7 (citing Restatement for what "constitute[s] a nuisance").

Furthermore, the City's interaction with one of the Plaintiffs, Phoenix Kitchens ("PK"), puts the lie to its causation defense. As indicated in the sworn affidavit of Mr. Aftergood and accompanying photographic evidence, the rights-of-way in front of their property had been previously occupied by unlawful encampments that the City refused to remove. Yet when PK installed sculptures on those same rights-of-way—preventing the encampments from returning—the City instructed PK to apply for a use permit, denied the permit, and then ordered PK to take the sculptures down. In its final notice, the City wrote

that PK was "in violation of Phoenix City Code Section 31-9(B)," which states that "it shall be unlawful for any person to temporarily or permanently place, construct, maintain, or install a minor encroachment in the public right-of-way." SOF ¶ 33.

In short, the City is the *cause* of the public nuisance in the Zone, plain and simple, because it is *choosing* which "encroachments" in the public rights-of-way to allow and which to disallow. When PK tried to follow state law—which requires that cities *compel* private property owners to keep their rights-of-way free of "rubbish, trash, weeds or other accumulation of filth, debris or dilapidated buildings that constitute a hazard to public health and safety," A.R.S. § 9-499(A)—the City sought to penalize them for doing so. In other words, the City has made a *choice* to allow on *its* public property one set of obstructions—homeless encampments—and not to allow *other* kinds of encroachments. That is an affirmative choice sufficient to establish causation if the condition itself were not enough.

C. City of Boise does not preclude Plaintiffs' claim.

Briefly: as described in numerous filings to this Court, *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), does not preclude summary judgment for Plaintiffs. That decision does not preempt Arizona's statutory nuisance law, Arizona's common law of nuisance, or the numerous city ordinances that Defendant is not currently enforcing. That decision simply does not require (or permit) the City of Phoenix to operate the Zone in a manner that creates a nuisance. It does not require that tents be given out at all, let alone during the daylight hours. And it does not require that the City of Phoenix allow public camping where it would create a public nuisance. "On the merits, the opinion holds only that municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment. Nothing in the opinion reaches beyond criminalizing the biologically essential need to sleep when there is no available shelter." *Martin*, 920 F.3d at 589 (Berzon, J., concurring in the denial of rehearing en 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.”).

The Ninth Circuit in the follow-on case of *Johnson v. City of Grants Pass* recognized, for example, that a “City may still ‘ban the use of tents in public parks.’” *Johnson v. City of Grants Pass*, 50 F.4th 787, 812 n. 34 (9th Cir. 2022). If the City may ban the use of tents in public parks, then it may ban the use of tents in a neighborhood where the concentration of the unsheltered population, as a result of services in the area, far exceeds the concentration elsewhere and thereby creates conditions of nuisance. Numerous district courts have held that “alternate outdoor space” would be sufficient under *Boise*. *Id.* at 812 n.33.

Plaintiffs have demonstrated that the City of Phoenix can easily abate the nuisance without running afoul of Ninth Circuit precedent for at least three reasons. First, the City could erect structured camping locations on vacant city lots as other cities have done. The City as made a *choice* not to invest in structure campgrounds because doing so “does not solve homelessness.” Respectfully, the City does not get to choose to violate the law. Second, when one of the Plaintiffs needed the encampments to be removed in front of their property to install a gas line, the City was able to find shelter for the relevant individuals who would accept it. SOF ¶ 55. This suggests there is far more the City can do to abate the nuisance than it is currently doing. Third, nothing in *Boise* or *Grants Pass* prevents the City from enforcing laws against public urination and defecation, public indecency, lewd acts, littering, drug use, and other crimes. Nothing in *Boise* or *Grants Pass* precludes the removal of tents from the Zone in daytime. If the City stepped up enforcement of these other crimes, and policed the erection of tents, it is possible that much of the nuisance will resolve without having to create structured campgrounds for the unsheltered population. The City therefore has multiple options at its disposal.

D. Plaintiffs are entitled to injunctive, declaratory, and special-action relief.

The City does not dispute that if it is responsible for the nuisance, Plaintiffs are entitled to injunctive relief to abate the nuisance. And for the reasons stated in the Court's denial of the City's motion to dismiss, Plaintiffs are also entitled to declaratory relief. Additionally, Plaintiffs are also entitled to special action relief. In its denial of the City's motion to dismiss, this Court held that Plaintiffs may be entitled to special action relief if they can show that the City abused its discretion. It is Plaintiffs' position that they are entitled to special action relief because the City has no discretion to violate the law. Because the City has no discretion to refuse to abate a public nuisance, *how* it exercises its discretion to abate that nuisance is ultimately something it can decide, so long as the nuisance is in fact abated.

Specifically, Plaintiffs are entitled to relief under both Arizona Rule of Special Action 3(a) *and* Arizona Rule of Special Action 3(b). Rule 3(a) authorizes special-action relief where "the defendant has failed to exercise discretion which [it] has a duty to exercise." And, as numerous authorities show, there is a duty to abate public nuisances, and particularly public obstructions on streets and sidewalks. "Mandamus will issue, in a proper case, to require municipal authorities to remove obstructions to streets which create a public nuisance." McQuillin Mun. Corp. § 51:24 (3d ed.); *see also, e.g.*, *Dunn v. Town of Gallup*, 29 P.2d 1053, 1055 (N.M. 1934) (observing that "successful resort has been had to mandamus to compel a municipal authority to proceed to the removal of curb pumps" when "the pumps in fact constituted a substantial interference with public uses of the streets"); *People v. Wood*, 10 P.2d 331, 332 (Colo. 1932) ("The city is authorized to establish and improve streets and sidewalks and prevent and remove obstructions therefrom. The execution of this power may be required as a public duty . . . and mandamus is the proper remedy."); *Green v. Miller*, 162 N.E. 593, 595 (N.Y. 1928) ("the court doubtless may by mandamus compel [an official] to do his duty" if that official is negligent in abating a public nuisance); *People ex rel. Meeker v. City of Casey*, 241 Ill. App. 91, 95 (Ill. App. Ct. 1926) (mandamus is proper "to effectuate the removal of the encroachments and obstructions . . . upon public streets"). And mandamus is even proper

to enforce certain quality-of-life ordinances, such as zoning ordinances. *Moerder v. City of Moscow*, 263 P.2d 993, 996 (Idaho 1953) ("Public officials may, under some circumstances, be compelled by writ of mandate to perform their official duties, although the details of such performance are left to their discretion," including "to enforce an ordinance of the city or village.").

Put simply, even if mandamus did not lie to order Defendant *how* to exercise its discretion, mandamus would still lie to command the Defendant *to* exercise that discretion. *See, e.g.*, *Harman v. City of Parsons*, 94 S.E. 135, 136 (W. Va. 1917) (a municipal official "may be compelled to exercise his discretion when he refuses to act at all," and mandamus is applicable "to compel a municipal council to perform its duty respecting the removal of obstructions from the streets"). Even *Sensing v. Harris*, the case upon which the City most relies, recognizes this critical distinction. *Harris* involved the refusal to enforce a prohibition on panhandling in front of one storeowner's business. This was a matter of enforcement discretion. The court recognized, however, that "there are situations where 'mandamus may be used to compel an officer, board or commission to take action even though such action is discretionary,'" although, to be sure, mandamus "cannot be used to require that such discretion be exercised in a particular manner." 172 P.3d at 859 (citing *Miceli v. Indus. Comm'n,* 135 Ariz. 71, 73 (1983); *Ariz. State Highway Comm' n v. Superior Court of Maricopa County,* 81 Ariz. 74, 77 (1956); *Yes on Prop 200 v. Napolitano,* 215 Ariz. 458, 465 (Ct. App. 2007)).

There was nothing in *Harris* suggesting that panhandling in front of one store constituted a public nuisance; here, in contrast, the conditions on City-owned lands and streets are patently nuisances under numerous Arizona statutory provisions and Arizona's common law. As the numerous cases cited above demonstrate, municipalities have nondiscretionary duties to *act* to abate such public nuisances. And the enforcement of certain quality-of-life ordinances might be necessary to abate the nuisance, in which case the rule that "generally" precludes courts from compelling officials to exercise their enforcement discretion, *see Harris*, 172 P.3d at 858 ("[l]aw enforcement activities . . . are

generally considered to be discretionary and not appropriate for mandamus relief" (emphasis added)), would not apply.

To put a sharper point on it, there are numerous statutes and ordinances that make this duty nondiscretionary. A.R.S. Section 9-499(A) provides that the City, "by ordinance, *shall compel* the owner, lessee or occupant of property to remove from the property and its contiguous sidewalks, streets and alleys any rubbish, trash, weeds or other accumulation of filth, debris or dilapidated buildings that constitute a hazard to public health and safety." A.R.S. Section 13-2917(D) provides that "[a]ny person who knowingly maintains or commits a public nuisance or who knowingly fails or refuses to perform any legal duty relating to the removal of a public nuisance is guilty of a class 2 misdemeanor." *See also id.* § 13-105(30) (defining "person," as the context requires, to include a "governmental authority"). And Phoenix Municipal Code Section 27-16 provides that "[t]he owner . . . of any land abutting a sidewalk, alley, or street *must* maintain the sidewalk, alley, or street free from . . . the accumulation of solid waste . . . and other conditions that present a health, fire, or safety hazard." Here, to repeat, there is solid waste, fires, and generally health and safety hazards. The City simply has no discretion. It must abate such a nuisance or must allow the property owners themselves to do so.

As noted, Rule 3(b) also applies; that provides for special action relief where "the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority." This applies because the City itself is maintaining the nuisance, and it is therefore the *City* that is acting unlawfully (as opposed to some other entity that is maintaining the public nuisance). Because the City is not merely refusing to exercise discretion to abate another entity's public nuisance, but rather has itself created (or maintained) the nuisance and has thus acted in excess of legal authority, it has violated Rule 3(b).

In summary, Plaintiffs do not argue merely that the City has abused its discretion, although its arguments can certainly be framed that way because the City abuses its discretion by refusing to act, or by acting unlawfully. Plaintiffs simply want to make clear

that they are not using the special action vehicle to order the City to abate the nuisance *in a certain way*. That is a matter for injunctive relief.

E. There are no factual issues respecting Plaintiffs' constitutional claims.

Plaintiffs' due process claim works as follows: (1) protection of the laws against private interference with private rights is a component of due process of law; and (2) the City, in maintaining the nuisance, has set in motion the conditions that lead to a lack of protection of the laws in Plaintiffs' neighborhood and therefore there is sufficient "state action" for liability under the Due Process Clause. Plaintiffs' equal privileges or immunities claim is related: (1) protection of the laws is a privilege and immunity of state citizenship; and (2) the City is denying *equal* protection of the laws to Plaintiffs by effectively allowing a high concentration of encampments in Plaintiffs' neighborhoods that it does not tolerate in other neighborhoods.

There is also no genuine issue of material fact respecting these claims. The City does not deny that the encampments are far worse in Plaintiffs' neighborhood than in any other neighborhood in Phoenix, and that this is a direct result of decreased enforcement of camping bans since the *Boise* decision. Nor does the City dispute what its own documents acknowledge: that the fluctuating levels of encampments in the Zone lead to "defecation in public—sometimes on private property[—]litter and debris, public drug use, lewd acts, theft and other property and violent crimes," against Plaintiffs and their other neighbors. In other words, the unsheltered population is invading Plaintiffs' life, liberty, and property rights, and not only is the City failing to supply protection of the laws against such private invasion of private right, but the City has *created the conditions* in which such private acts multiply. Thus, it has engaged in state action that violates due process by denying protection of the laws, *and* it has violated the state's equal privileges or immunities clause by concentrating that population and this denial of protection in Plaintiffs' neighborhood.

The only question is therefore whether Plaintiffs' legal claims are sound. And, as explained in their application for preliminary injunction and opposition to the City's motion to dismiss, they are. *See* App. for PI at 13-17; Opp. to MTD at 16-18. As explained,

the "protection of the laws" was a legal concept by which the government had to protect individuals against private interference with their exercise and enjoyment of rights; that is, the government had physically to protect individuals against acts of private violence and to supply judicial remedies and public enforcement against private persons who invaded rights. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."); *see also* Ilan Wurman, The Second Founding: An Introduction to the Fourteenth Amendment 36-47 (2020). Summarizing the research, cases, and early sources, two prominent scholars have written that the protection of the laws "entitles people . . . to equal *enforcement* of whatever state laws are on the books to protect their personal security." Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit 320 (2021); *id.* at 321 ("States have an affirmative duty to provide executive branch enforcement of laws protecting life, liberty, and property.").

Due process of law and protection of the laws (on this narrow understanding) are two sides of the same coin: because the government must supply protection of the laws, its failure to do so effects a deprivation of life, liberty, or property at the hands of private persons and without due process of law. Wurman, The Second Founding, supra at 134-36 & nn.45-48; *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119 (1866) (connecting deprivation of "due process of law" to a failure to supply the "protection of the law" against private action). And the court need not depart from federal precedents holding there is no affirmative duty to protect because the City of Phoenix has *created* a situation in which private individuals are routinely invading the rights of other individuals, and *then* failing to enforce the laws that would prevent such "individual invasion of individual rights."

As for Article 2, Section 13 of the State Constitution, that clause provides that "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation . . . privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." The purpose of this constitutional provision is "to preserve equality between

citizens and to secure equality of opportunity to all persons similarly situated." *Valley Nat. Bank of Phoenix v. Glover*, 62 Ariz. 538, 554 (1945). And, as explained in prior briefing, the protection of the laws was historically understood to be a privilege of citizenship. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (one of these fundamental privileges and immunities of citizenship is the right to "[p]rotection by the government" and "the enjoyment of life and liberty").

Therefore the City has violated Article 2, Section 13 of the Arizona Constitution by maintaining a concentration of unsheltered persons in Plaintiffs' neighborhood, with resulting private invasion of private rights. The City is therefore unequally providing "protection by the government" and for citizens' enjoyment and exercise of their rights to life, liberty, and property. *Cf. also Veach v. City of Phoenix*, 102 Ariz. 195, 196 (1967) ("A municipality has discretion, governed by the extent of need and other economic considerations, to determine what is a reasonable protection for each area—but this discretion cannot be arbitrary, and must be fairly and reasonably exercised.").

The Court should grant summary judgment on all of Plaintiffs' claims and enjoin the City of Phoenix to abate the public nuisance.

RESPECTFULLY SUBMITTED this 2nd day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2023, I electronically transmitted this document to the Clerk's Office using the AZTurbo System for filing, and on this same day, served a copy via electronic mail upon the following:

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