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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, vs. CITY OF PHOENIX, a body politic in the State of Arizona, Defendants,	Case No. CV2022-010439 **AMICUS BRIEF IN SUPPORT OF PLAINTIFFS AND IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND MOTION FOR EXPEDITED HEARING** (Assigned to The Honorable Alison Bachus)

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

The motion for preliminary injunction should be granted not only because the "Zone" is obviously a public nuisance—not only because it attracts and even encourages dangerous criminal behavior, littering, and panhandling, which were the bases of the nuisance claim in *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs*., 148 Ariz. 1 (1985), but also because it constitutes an environmental nuisance under Arizona statutes.

ARGUMENT

I. The City is maintaining a serious environmental nuisance in violation of state law.

Even aside from the problems of violent crime and vagrancy referenced in Plaintiff's complaint, the City's maintenance of the Zone constitutes a public nuisance because it causes daily violations of Arizona's environmental laws. These statutes plainly

[1] The identity and interest of amici curiae is set forth in the accompanying motion for leave to file.

forbid the City from creating or maintaining the Zone because it is illegal for a government entity to allow or encourage people to emit pollutants in the manner that is currently going on there.

First, A.R.S. § 49-263 makes it unlawful to "[d]ischarge" a pollutant without a permit, or to "[f]ail to monitor, sample or report discharges" of pollutants for which such a permit is required. Section 49-201 applies this prohibition not only to private parties but to any "political subdivision of this state." A "discharge" is defined as "the direct *or indirect* addition of any pollutant to the waters of the state from a facility," and the word "pollutant" is defined as "*fluids*, contaminants, toxic wastes, toxic pollutants, dredged spoil, *solid waste*, substances and chemicals, pesticides, herbicides, fertilizers and other agricultural chemicals, incinerator residue, *sewage, garbage*, sewage sludge, … biological materials … or any other liquid, solid, gaseous or hazardous substances." *Id.* (emphasis added). The statute also defines "facility" as "any land, building, … *area, source, activity or practice* from which there is, *or with reasonable probability may be*, a discharge." *Id.* (emphasis added).

In other words, it is illegal for the City to maintain a facility—which includes any "activity or practice"—from which there is "or with reasonable probability may be" even the "indirect" placement of a pollutant into the state's waters. And "waters" is defined as including not only rivers and streams, but also "irrigation systems, drainage systems and other bodies or accumulations of … public or private water situated wholly … in … the state." *Id.*

As the Complaint makes clear, individuals living in the Zone engage in public urination and defecation there. This human waste is a biological hazard which—particularly during Monsoon Season—enters the waters of the state due to runoff. Although there appear to be no Arizona-specific precedents relating to this question, Sections 49-201 and -263 are modeled after the federal Clean Water Act, and federal cases interpreting that Act have observed that "the most common way by which pollutants reach the surface waters is through improper 'land application,'" because "when waste is excessively or improperly land-applied, the nutrients contained in the waste become

pollutants that can and often do run off into adjacent waterways or leach into soil and ground water." *Waterkeeper All., Inc. v. U.S. EPA*, 399 F.3d 486, 494 (2d Cir. 2005). Indeed, the Second Circuit held in *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), that waste deposited onto dry land could become a "pollutant" "discharged" from a "point source"[2] into the "waters of the United States" when water caused that waste to percolate into waterways. And in *United States v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005), the Tenth Circuit found that where pollutants were flushed down a toilet, entered a storm drain, and thereby ended up in a water of the United States, the action violated the Clean Water Act. *Id.* at 1280–81.[3]

Property owners in the area of the Zone report frequently encountering human waste there. *See, e.g.*, Justin Lum, *Crimes of "The Zone": Theft, Assaults, Drugs, Unsanitary Conditions Plague Area of Downtown Phoenix Tent City*, FoxNews.com (Sept. 15, 2022).[4] Although the City added ten toilets to the area months ago, *see* Katya Schwenk, *Phoenix's Largest Homeless Encampment Has Sparked a Lawsuit. What Now,?* Phoenix New Times (Aug. 17, 2022),[5] this is obviously inadequate for an area that is estimated to include more than 1,000 people.

II. The City is responsible for the nuisance.

Causation for nuisance under Arizona law is a broad concept: liability only requires a "showing of a causal connection between [the City's] activity and harm to [the Plaintiffs]." *Armory Park* , 148 Ariz. at 7. In *Armory Park*, it was the defendant's "act of offering free meals which 'set in motion' the forces resulting in the injuries to the … residents." *Id*. Here, the City's actions of refusing to enforce laws relating to pollution, vagrancy, and other crimes, has set in motion the creation and expansion of the Zone and

[2] Stormwater runoff is typically not considered a pollutant from a point-source under federal law, *see* Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Point Source" Element of the Clean Water Act Offense*, 45 Envtl. L. Rep. News & Analysis 11129, 11132 (2015), but the Arizona statute contains no "point source" element.

[3] The southern boundary of the Zone is a mere 2.2 miles from the Salt River.

[4] https://www.fox10phoenix.com/news/crimes-zone-theft-assaults-drugs-unsanitary-conditions-plague-downtown-phoenix-tent-city

[5] https://www.phoenixnewtimes.com/news/phoenixs-largest-homeless-encampment-sparks-lawsuit-14213947

the resulting harm to the Plaintiffs. Thus, although an "otherwise innocent party who builds or installs a conduit or structure for an unrelated purpose which happens to affect the distribution of contamination released by someone else" is not typically liable for the resulting nuisance, *Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 675 (9th Cir. 2011), the City's actions here are not otherwise innocent and its dereliction is far worse than merely passivity which happens to affect the distribution of contamination. As Plaintiffs have alleged, the City has *actively* established, maintained, expanded, and operated the Zone, knowing of the pollution that is going on.

In *City of Phoenix v. Johnson*, 51 Ariz. 115 (1938), the plaintiffs were private landowners who sued the City for maintaining a sewer system on its property which was "so inefficient and out of repair" that it "frequently [broke] down and [became] totally useless," resulting in discharges into the Salt River. *Id*. at 120. This created "foul and nauseating smells" and other problems which rendered the plaintiffs' property "uninhabitable and unmarketable." *Id.* at 120, 122. The court found in favor of the plaintiffs. "Neither an individual nor a municipal corporation has the right to maintain a nuisance without being responsible … therefor," it said. "While it is true that a sewer system is, indeed, a vital necessity for the maintenance of health in any large municipality, even that necessity does not authorize the municipality to injure the person or property of another without responsibility." *Id*. at 130.

A similar situation exists here. As in *Armory Park*, the City has engaged in acts and culpable omissions that have set in motion the harms to the Plaintiffs by essentially inviting approximately 1,000 people to reside on the streets of their neighborhood, in a state of vagrancy, engaging in foreseeable acts of pollution. And, as in *Johnson*, the City's "careless[ness] and neglig[ence]" in maintaining this area, *id.* at 120, have resulted in harms to the Plaintiffs for which the City is responsible.

III. The Plaintiffs may allege violations of state environmental law as a basis for their nuisance cause of action.

The fact that A.R.S. § 49-201 et seq. gives the Director of the Department of Environmental Quality the power to enforce state laws against pollution does not deprive Plaintiffs of standing to bring their public nuisance claim based on pollution. Pollution is a quintessential public nuisance, *see, e.g., Johnson, supra*, and the statute expressly preserves the right of a plaintiff to seek redress for a nuisance, including harms caused by violations of state environmental laws. *See* A.R.S. § 49-206 ("This chapter shall not be construed to abridge or alter causes of action or remedies under the common law … [or] to estop any person… from exercising their rights … [to] supress[] nuisances … due to discharges."). It is blackletter nuisance law that the violation of a statute can serve as evidence of the defendant engaging in a nuisance. *See, e.g., State ex rel. Miller v. Anthony*, 647 N.E.2d 1368, 1374 (Ohio 1995) ("evidence that felony violations of [statute] chronically occur on a parcel of property … is sufficient to establish that a nuisance exists on such property."); *Moretti v. C.S. Realty Co*., 82 A.2d 608, 613 (R.I. 1951) ("The duty of complying with the building law was on the defendant and its continued violation of that law could be reasonably found to be a nuisance."); *Biber v. O'Brien*, 32 P.2d 425, 427 (Cal. App. 1934) ("if an act or thing is done or maintained in violation of law it may constitute a nuisance."). Although there are no reported Arizona cases on the question, other states typically allow plaintiffs to allege that a government entity's actions that contradict environmental statutes can serve as the basis for a nuisance claim. *See, e.g., Miotke v. City of Spokane*, 678 P.2d 803 (Wash. 1984); *Cnty. of L.A. v. City of Downey*, No. B238386, 2013 WL 1808556 (Cal. App. Apr. 30, 2013). The Plaintiffs therefore may allege, as evidence of their public nuisance claim, that the City's conduct violates state environmental laws, including A.R.S. § 49-201 et seq.[6]

[6] The court of appeals' recent decision in *City of Flagstaff v. Desert Mountain Energy Corp.*, No. 1 CA-CV 21-0168, 2022 WL 869624 (Ariz. App. Mar. 24, 2022), is not to the contrary. There, the court of appeals held that a party may not sue a violator directly for failing to obtain a legally required discharge permit, *id.* at *3 ¶ 20, but went on to observe that the plaintiff in that case had *not* brought a nuisance cause of action—a question the court therefore reserved. *Id.* at *5 ¶ 26.

CONCLUSION

The injunction should be *granted.*

RESPECTFULLY SUBMITTED this 4th day of October, 2022.

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CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 4th day of October, 2022, with a copy delivered via the ECF system to:

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