

1 Eric M. Fraser, 027241  
2 Joshua D. Bendor, 031908  
3 Hayleigh S. Crawford, 032326  
4 OSBORN MALEDON, P.A.  
5 2929 North Central Avenue, Suite 2100  
6 Phoenix, Arizona 85012  
7 (602) 640-9000  
8 efraser@omlaw.com  
9 jbendor@omlaw.com  
10 hcrawford@omlaw.com

11 Attorneys for Defendant City of Phoenix

12 UNITED STATES DISTRICT COURT  
13 DISTRICT OF ARIZONA

14 Mark Brnovich, in his official capacity  
15 as Attorney General of Arizona; the  
16 State of Arizona; John Doe; Phoenix  
17 Law Enforcement Association  
18 (“PLEA”); and United Phoenix  
19 Firefighters Association Local 493,

20 Plaintiffs,

21 vs.

22 Joseph R. Biden in his official capacity  
23 as President of the United States, et al.,

24 Defendants.

No. CV-21-01568-MTL

**UNOPPOSED MOTION FOR  
LEAVE TO FILE SUR-REPLY TO  
PLAINTIFFS’ MOTION FOR  
PRELIMINARY INJUNCTION**

25 Defendant the City of Phoenix respectfully requests the Court’s leave to file a sur-  
26 reply responding to the new arguments and requests for relief made in Plaintiffs Phoenix  
27 Law Enforcement Association’s (“PLEA”) and United Phoenix Firefighters Association  
28 Local 493’s (“Local 493”) Reply to Phoenix’s Response to the Third Motion for  
Preliminary Injunction (Doc. 123).

Leave to file a short sur-reply is appropriate here, for several reasons. First, neither  
the operative complaint nor the preliminary injunction motion identified which claims



A PROFESSIONAL ASSOCIATION  
ATTORNEYS AT LAW

1 were being asserted against Phoenix. Plaintiffs identified those claims after Phoenix filed  
2 its response. *See* Doc. 128 (filed Dec. 17, 2021). Phoenix should have an opportunity to  
3 address the issues now that Plaintiffs have identified the claims asserted against Phoenix.

4 Second, the preliminary injunction motion did not mention the City of Phoenix at  
5 all, and Phoenix reasonably interpreted that to mean that Plaintiffs were not seeking  
6 injunctive relief against Phoenix. The reply mentions Phoenix for the first time.

7 Third, the requested relief has materially changed between the preliminary  
8 injunction motion and the reply. The proposed order accompanying the preliminary  
9 injunction motion (Doc. 72-1) sought relief that could not possibly apply to Phoenix  
10 because Phoenix was not engaged in any of the activities identified in the proposed order.  
11 The proposed order accompanying the reply (Doc. 123-2) seeks entirely new relief  
12 directed at Phoenix.

13 Phoenix should have an opportunity to respond to the new arguments and new  
14 requested relief contained in the reply. Phoenix therefore requests that the Court grant it  
15 leave to file a short sur-reply as shown in Exhibit A. Counsel for PLEA and Local 493  
16 have indicated that they do not oppose this motion.

17 DATED this 23rd day of December, 2021.

18 OSBORN MALEDON, P.A.

19  
20 By s/Hayleigh S. Crawford  
21 Eric M. Fraser  
22 Joshua D. Bendor  
23 Hayleigh S. Crawford  
24 2929 North Central Avenue, Ste. 2100  
25 Phoenix, Arizona 85012-2793

26 Attorneys for Defendant City of Phoenix  
27  
28

# **EXHIBIT A**

1 Eric M. Fraser, 027241  
2 Joshua D. Bendor, 031908  
3 Hayleigh S. Crawford, 032326  
4 OSBORN MALEDON, P.A.  
5 2929 North Central Avenue, Suite 2100  
6 Phoenix, Arizona 85012  
7 (602) 640-9000  
8 efraser@omlaw.com  
9 jbendor@omlaw.com  
10 hcrawford@omlaw.com

11 Attorneys for Defendant City of Phoenix

12 UNITED STATES DISTRICT COURT

13 DISTRICT OF ARIZONA

14 Mark Brnovich, in his official capacity  
15 as Attorney General of Arizona; the  
16 State of Arizona; John Doe; Phoenix  
17 Law Enforcement Association  
18 (“PLEA”); and United Phoenix  
19 Firefighters Association Local 493,

20 Plaintiffs,

21 vs.

22 Joseph R. Biden in his official capacity  
23 as President of the United States, et al.,

24 Defendants.

No. CV-21-01568-MTL

**DEFENDANT CITY OF PHOENIX’S  
SUR-REPLY TO PLAINTIFFS’  
MOTION FOR PRELIMINARY  
INJUNCTION**

25 Defendant the City of Phoenix hereby responds to the new arguments and requests  
26 for relief made for the first time in Plaintiffs Phoenix Law Enforcement Association’s and  
27 United Phoenix Firefighters Association Local 493’s Reply (Doc. 123) to Phoenix’s  
28 Response to Motion for Preliminary Injunction (Doc. 109).

**BACKGROUND**

On November 19, 2021, Plaintiffs Mark Brnovich, the State of Arizona, John Doe,  
Phoenix Law Enforcement Association (“PLEA”), and United Phoenix Firefighters



A PROFESSIONAL ASSOCIATION  
ATTORNEYS AT LAW

1 Association Local 493’s (“Local 493”) filed a Third Motion for Preliminary Injunction  
2 (Doc. 72) (the “PI Motion”). Plaintiffs seek injunctive relief based on three claims: the  
3 federal Procurement Act claim (Count I), the federal Procurement Policy Act claim  
4 (Count II), and the Anti-Commandeering claim (Count VI). Doc. 72 at 17-24.<sup>1</sup>

5 In its response (Doc. 109), Phoenix pointed out that the PI Motion does not discuss  
6 any claims against Phoenix and that the proposed order requests injunctive relief that does  
7 not apply to Phoenix. Phoenix therefore requested that the Court deny the PI Motion or,  
8 alternatively, exclude it from any injunction that may be granted against the federal  
9 defendants.

10 The State Plaintiffs (Brnovich, the State of Arizona, and John Doe) filed their reply  
11 in support of the PI Motion on December 8, 2021 (Doc. 112). Like the PI Motion, the  
12 State Plaintiffs’ reply focused exclusively on the federal defendants and did not ask the  
13 Court to enjoin Phoenix.

14 A week later, the Local Plaintiffs (PLEA and Local 493) filed a separate reply  
15 directed at Phoenix (Doc. 123) (the “Reply”), along with an amended form of proposed  
16 order (Doc. 123-2). The Reply requests, for the first time, that the Court grant the PI  
17 Motion against Phoenix as well. Doc. 123 at 2. Although the Local Plaintiffs describe  
18 Phoenix “as a relief defendant,” included in the complaint only because of its  
19 implementation of the federal government’s mandate, they nonetheless contend that the  
20 Court should include Phoenix in the injunction “because the requested relief would  
21 necessarily apply to it.” *Id.* On this basis, they propose the Court order that “Defendant  
22 City of Phoenix shall not impose any COVID-19 vaccination requirement on its  
23 employees.” Doc. 123-2 at 1, ¶ 5 (proposed order).

---

24  
25  
26 <sup>1</sup> The plaintiffs have since clarified that only Count 1 (federal Procurement Act), Count  
27 IV (due process), and Count VI (anti-commandeering) are asserted against the City of  
28 Phoenix. Doc. 128 at 2. The remaining claims are alleged against the federal defendants  
only.

**ARGUMENT**

1  
2 The Court should reject the plaintiffs’ belated attempt to add Phoenix to its PI  
3 Motion for at least two reasons.

4 **I. Plaintiffs cannot show a likelihood of success on the merits against Phoenix.**

5 First, Plaintiffs have made no attempt to establish that they are likely to succeed  
6 on the merits of their claims against Phoenix. *See Winter v. Nat. Res. Def. Council, Inc.*,  
7 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that  
8 he is likely to succeed on the merits”). The PI Motion relies on three claims, only two of  
9 which are asserted against Phoenix: the federal Procurement Act claim (Count I) and the  
10 Anti-Commandeering claim (Count VI). Doc. 72 at 17-24; Doc. 128 at 1. As discussed  
11 in Phoenix’s initial response, however, the PI Motion does not identify any Procurement  
12 Act provisions for which Phoenix could be held responsible here. Doc. 109 at 2-3. Nor  
13 does the PI Motion claim Phoenix has violated the Anti-Commandeering Doctrine, which  
14 prevents the federal government—not local municipalities—from commandeering state  
15 governments. *Id.*

16 The Reply is likewise silent regarding the merits of the claims against Phoenix.  
17 *See* Doc. 123. The Local Plaintiffs do not even attempt to show a likelihood of success.  
18 Instead, they contend that the Court should enjoin Phoenix because it might comply with  
19 the contactor mandate if the present nationwide injunction is lifted. Doc. 123 at 2.  
20 Hypothetical future conduct aside, Plaintiffs must still show a likelihood of success on  
21 the merits of their claims against Phoenix before they can obtain injunctive relief. They  
22 have not. They still have not shown how the federal Procurement Act or the Anti-  
23 Commandeering Doctrine could possibly apply to a municipality, let alone what actions  
24 Phoenix has taken that would violate them.

25 Moreover, Plaintiffs have stipulated that “they do not allege that Phoenix is liable  
26 under or has breached the duties alleged in Counts I, IV, or VI.” Doc. 128 at 2. This  
27 stipulation necessarily means that Plaintiffs cannot establish that they are likely to  
28 succeed on the merits. To succeed on the merits, Plaintiffs must show that they will

1 succeed on one or more of their claims against Phoenix in particular. But if Phoenix is  
2 not liable and has not breached the duties in the relevant claims, then the claims will not  
3 succeed and Plaintiffs can obtain no relief.

4 **II. The Declaratory Judgments Act does not permit relief against Phoenix as a**  
5 **“relief defendant.”**

6 Plaintiffs try to dodge their obligation to show a likelihood of success by  
7 contending that they assert claims against Phoenix “as a relief defendant only” under the  
8 Declaratory Judgments Act, 28 U.S.C. § 2201 (the “Act”). Doc. 128 at 2. Relying on  
9 *Standard Ins. Co. v. Saklad*, 127 F.3d 1179 (9th Cir. 1997) and *Hornish v. King Cnty.*,  
10 899 F.3d 680 (9th Cir. 2018), they claim that the Act allows them to name any party who  
11 would have standing to seek a federal remedy as a so-called “relief defendant.” Doc. 128  
12 at 2 (“the test for whether a defendant is a proper relief defendant under 28 U.S.C. § 2201  
13 is whether the court ‘would have jurisdiction had the declaratory relief defendant been a  
14 plaintiff seeking a federal remedy.’”).

15 But establishing jurisdiction for purposes of the Declaratory Judgments Act is not  
16 a substitute for establishing entitlement to substantive relief against Phoenix. Even if the  
17 Court has jurisdiction, Plaintiffs still must establish a claim against Phoenix to obtain  
18 relief. And here, Plaintiffs admit that “they do not allege that Phoenix is liable under or  
19 has breached the duties alleged in Counts I, IV, or VI.” Doc. 128 at 2. Describing  
20 Phoenix as a “relief defendant” under the Act does not change the fact that Plaintiffs do  
21 not—and cannot—establish a likelihood of the success on the merits of a claim against  
22 Phoenix. *See* Doc. 123 at 2; Doc. 128 at 2.

23 Neither of the cases cited by Plaintiffs show otherwise. Both *Standard Insurance*  
24 and *Hornish* concern jurisdiction under the Act. In fact, neither case uses the term “relief  
25 defendant.” Those words appear only when describing a “declaratory relief defendant”—  
26 i.e., the defendant in a declaratory relief action. *Standard Ins.*, 127 F.3d at 1181; *Hornish*,  
27 899 F.3d at 691 n.2 (quoting *Standard Insurance*).

28

1 Even if the Court could award relief against a party based solely on jurisdiction  
2 under 28 U.S.C. § 2201, however, Phoenix is not “properly named as a relief defendant”  
3 because it could not sue PLEA and Local 493 if the roles were reversed. *See* Doc. 128 at  
4 2. The jurisdictional test applied in *Standard Insurance* and *Hornish* is reciprocal. That  
5 is, if a declaratory judgment defendant would have standing to enforce its rights as a  
6 plaintiff in federal court *if the parties were switched*, jurisdiction is proper. *Standard Ins.*,  
7 127 F.3d at 1181 (“in a sense [the court] can reposition the parties in a declaratory relief  
8 action by asking whether [it] would have jurisdiction had the declaratory relief defendant  
9 been a plaintiff seeking a federal remedy”).

10 This reciprocal test makes sense. The Declaratory Judgments Act allows a party  
11 to seek judicial resolution of a dispute before committing an alleged breach or violation,  
12 without requiring it to “stand fast and await a lawsuit” by the other side. *Standard Ins.*,  
13 127 F.3d at 1181. Thus, confirming that a defendant could sue the plaintiff if the roles  
14 were reversed is a good shorthand test for jurisdiction under 28 U.S.C. § 2201.

15 In *Standard Insurance*, for example, the Ninth Circuit held that it had jurisdiction  
16 over a suit by Standard Insurance seeking a declaratory judgment against a beneficiary of  
17 an insured retirement plan (Saklad) because, “if Standard had refused to pay the benefits  
18 required by the terms of the [insured retirement] plan, Saklad could have brought an  
19 action to enforce payment.” *Id.* at 1181. Similarly, in *Hornish*, the court concluded that  
20 it had jurisdiction in a suit by private landowners seeking a declaration that “King County  
21 only acquired a surface easement for a hiking and biking trail with the possible  
22 reactivation of a railroad pursuant to the [federal] Trails Act.” 899 F.3d at 689. The court  
23 noted that King County had previously sued other private landowners claiming “that it  
24 had a legal right to the strip of land in question even if the original deed conveyed only  
25 an easement” under the Trails Act. *Id.* at 691 n.2.

26 Here, PLEA and Local 493 request a declaratory judgment regarding the validity  
27 of the Federal Contractor Mandate against Phoenix. The question, then, is whether  
28 Phoenix would have a federal claim against PLEA and Local 493 regarding the validity



1 of the Federal Contractor Mandate. It does not. Accordingly, Phoenix is not a proper  
2 defendant under the Ninth Circuit’s test for jurisdiction under 28 U.S.C. § 2201.

3 **III. Plaintiffs cannot request new relief for the first time on reply.**

4 Finally, Plaintiffs’ attempt to expand the requested injunction on reply is improper.  
5 Plaintiffs bear the burden of establishing a prima facie case for injunctive relief. *See*  
6 *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021). Having failed to make  
7 out a prima facie case in the PI Motion, Plaintiffs cannot correct that failure by introducing  
8 new issues and evidence in reply. *See, e.g., Goldberg v. Barreca*, 720 F. App’x. 877, 878  
9 (9th Cir. 2018) (party could not raise new arguments in reply to establish prima facie case  
10 for preliminary injunction); *Bazuaye v. I.N.S.*, 79 F.3d 118, 120 (9th Cir.1996) (“Issues  
11 raised for the first time in the reply brief are waived.”). The Court should therefore reject  
12 Plaintiffs’ last-minute attempt to expand the PI Motion to reach Phoenix.

13 **CONCLUSION**

14 The Court should deny the PI Motion against Phoenix. But if the Court does issue  
15 a preliminary injunction, the injunction should specify that it does not apply to Phoenix.

16 DATED this \_\_\_ day of December, 2021.

17 OSBORN MALEDON, P.A.

18  
19 By s/ \_\_\_\_\_

20 Eric M. Fraser  
21 Joshua D. Bendor  
22 Hayleigh S. Crawford  
23 2929 North Central Avenue, Ste. 2100  
24 Phoenix, Arizona 85012-2793

25  
26  
27 Attorneys for Defendant City of Phoenix  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Mark Brnovich, in his official capacity  
as Attorney General of Arizona; the  
State of Arizona; John Doe; Phoenix  
Law Enforcement Association  
("PLEA"); and United Phoenix  
Firefighters Association Local 493,

Plaintiffs,

vs.

Joseph R. Biden in his official capacity  
as President of the United States, et al.,

Defendants.

No. CV-21-01568-MTL

**[PROPOSED] ORDER**

Having considered Defendant the City of Phoenix's Unopposed Motion for Leave to File Sur-Reply to Plaintiffs' Motion for Preliminary Injunction, and good cause appearing,

IT IS HEREBY ORDERED granting the motion.