# MEMORANDUM

Date: June 13, 2022

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: Jan Lesher
County Administrator

Re: **City of Tucson Differential Water Rate Lawsuit Update**

On May 31, 2022, I provided you with the initial disclosure statements filed on behalf of both the City of Tucson and Pima County. Also provided was the City of Tucson motion to dismiss the equal protection claims in the County complaint alleging that the County lacks standing and capacity to assert claims of denial of equal protection under the United States and Arizona Constitutions. Please find attached the County response to this motion.

Our attorneys have also received 1,938 documents from the City of Tucson in response to the County's first set of requests for production, which I communicated to you on May 9.

Please let me know if you have any questions.

JKL/anc

Attachment

c: Carmine DeBonis, Jr., Deputy County Administrator for Public Works
Francisco García, MD, MPH, Deputy County Administrator for Health & Community Services and Chief Medical Officer

Brett W. Johnson (#021527)
Ian R. Joyce (#035806)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: 602.382.6000
Facsimile: 602.382.6070
E-Mail: bwjohnson@swlaw.com
ijoyce@swlaw.com

Jeffrey Willis (#004870)
Courtney L. Henson (#030825)
SNELL & WILMER L.L.P.
One South Church Ave., Suite 1500
Tucson, Arizona 85701-1630
Telephone: 520-882-1200
Facsimile: 520-884-1294
E-Mail: jwillis@swlaw.com
chenson@swlaw.com

*Attorneys for Plaintiff Pima County*



IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PIMA COUNTY, a body politic in the State of Arizona,

Plaintiff,

v.

CITY OF TUCSON, a municipal corporation of the State of Arizona, REGINA ROMERO, in her official capacity as the Mayor of Tucson, LANE SANTA CRUZ, in her official capacity as Tucson City Councilmember, PAUL CUNNINGHAM, in his official capacity as Tucson City Councilmember, KEVIN DAHL, in his official capacity as Tucson City Councilmember, NIKKI LEE, in her official capacity as Tucson City Councilmember, RICHARD FIMBRES, in his official capacity as Tucson City Councilmember, STEVE KOZACHIK, in his official capacity as Tucson City Councilmember, and MICHAEL ORTEGA, in his official capacity as Tucson City Manager,

Defendants.

No. CV2022-001141

**RESPONSE TO MOTION TO DISMISS COUNTS III AND IV**

**[Oral Argument Requested]**

Assigned to Hon. Randall Warner

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Plaintiff Pima County ("Pima" or "County") responds in opposition to Defendants' (collectively referred to as "Tucson" or "City") Motion to Dismiss Counts III and IV. Counts III and IV assert that Tucson Ordinance No. 11881 violates the 14th Amendment of the U.S Constitution and Article II, Section 13 of the Arizona Constitution (the "Equal Protection Clauses") because the Ordinance discriminates on the basis of race and against similarly situated rate payers. Yet, incredibly, in its Motion the City does *not* dispute that Ordinance No. 11881 actually discriminates on the basis of race or against similarly situated individuals. The City also does *not* attempt to tie this discrimination to any legitimate or compelling governmental interest. Instead, the City relies on prefatory technicalities, arguing that Pima County lacks standing to raise Counts III and IV, and that that even if Pima County had standing, Ordinance No. 11881 is somehow exempted from the Equal Protection Clauses. Neither argument is supported by the facts or the law.

First, the City's standing argument wrongly assumes that the County must rely on *parens patriae* to bring claims on behalf of unincorporated Pima County citizens. But both the U.S. and Arizona Supreme Courts have adopted so-called *jus tertii* standing, which allows a party to assert constitutional claims on behalf of third parties where the party itself has a suffered an "injury in fact" resulting from the illegal conduct; the party has a close relationship with the third party; and there exists "some hinderance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 410-411 (1991). Courts have applied *jus tertii* standing to allow government bodies—even those that cannot raise *parens patriae* claims—to assert equal protection claims on behalf of their citizens. *E. Liverpool v. Columbiana Cty. Budget Comm.*, 870 N.E.2d 705, 712 ¶¶ 22-25 (Ohio 2007).

All three *Powers* factors are met here. Pima County is one of the largest customers of the Tucson Water Department ("Tucson Water") and purchases water in unincorporated areas and therefore suffers an "injury in fact" resulting from Ordinance No. 11881's discriminatory rates. As the government for Pima County, Pima has a close relationship with citizens living in unincorporated areas to assert standing on their behalf—typically a

contractual or similar professional relationship is sufficient. Finally, the cost of litigation is a significant "hinderance" to unincorporated citizens raising equal protection claims.

Moreover, even if *jus tertii* standing is not appropriate here (and it is), the Court should nonetheless waive the standing requirement—which is not mandatory in Arizona—because this case involves a dispute between the "highest levels of State government" and potentially impacts hundreds of thousands of Pima County citizens. *Rios v. Symington*, 172 Ariz. 3, 5 (1992); *Goodyear Farms v. City of Avondale*, 148 Ariz. 216, 217 n. 1 (1986); *Fraternal Order of Police Lodge 2 v. Phoenix Employee Relations Bd.*, 133 Ariz. 126, 127 (1982).

Second, the City's argument that Ordinance No. 11881 is insulated from the Equal Protection Clauses relies exclusively on *Jung v. City of Phoenix*, 160 Ariz. 38 (1989). But to the extent that *Jung* implies that to state an equal protection claim a party must assert a law violates a "constitutional right" or that the government had a "duty" to the party, this statement has effectively been abrogated by more modern Arizona and U.S. Supreme Court precedent. Under modern precedent, all that is required to state an equal protection claim is that the government has established a classification that discriminates against similarly situated individuals, and that the classification fails one of the "tiers of scrutiny." *See Vong v. Aune,* 235 Ariz. 116, 122-23 ¶¶ 31, 32 (App. 2014) (setting out elements of an equal protection claim); *Big D Constr. Corp. v. Court of Appeals*, 163 Ariz. 560, 566 (1990) (establishing "tiers of scrutiny" equal protection analysis). Tucson does not dispute that the Complaint satisfies the modern test—*i.e.*, that Ordinance No. 11881 discriminates against similarly situated individuals and on the basis of race without any rational basis.

Even if *Jung* remains good law, it is distinguishable for several reasons—most notably, in *Jung* the City of Phoenix was acting as a water utility *only*. Here however, Tucson is *exploiting* its control over the region's water to pursue non-water related political goals, like increased annexation. Courts have long recognized that this kind of intentional discrimination is an equal protection violation.

For all these reasons, the Motion should be denied.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

## BACKGROUND

Pima County is one of the largest customers of Tucson Water and purchases water in unincorporated areas. [Compl. at ¶ 11.] Tucson Water has historically operated as a regional, rather than municipal, water supplier. [*Id.* at ¶¶ 25-40.] In January 2021, however, the City began taking steps to implement a "differential rate structure" that would impose higher water rates on certain Tucson Water customers living in unincorporated areas than those imposed on customers living in incorporated areas. [*Id.* at ¶¶ 41-59.] The City's reasoning for implementing differential rates was purely political: to force individuals living in unincorporated areas to vote for annexation. [*Id.* at ¶¶ 9, 76-80.]

Despite substantial pushback from the County and the community, on October 19, 2021, the City enacted Ordinance No. 11881, implementing a differential rate for customers in unincorporated areas. [*Id.* at ¶ 59.] The Ordinance exempts "lands placed into trust for a Native American tribal nation" from the differential rate. [*Id.* at ¶ 61.] The City has also entered into intergovernmental agreements with Tucson Unified School District ("TUSD") exempting them from the differential rates. [*Id.* at ¶ 72.] Because Ordinance No. 11881 only applies to "unincorporated" areas, incorporated municipalities outside of Tucson, like the City of South Tucson, the Town of Marana and the Town of Oro Valley, are also exempted. [*See id.* at ¶¶ 61, 64-65.] As a result, Tucson Water customers living within one hundred meters of each other are subject to dramatically different water rates. [*Id.* at ¶¶ 143-149.]

The City has espoused five justifications for Ordinance No. 11881: (1) differential rates are supported by the "cost of service" to unincorporated areas; (2) differential rates will increase annexation which will provide economic benefits to the region; (3) Tucson bears financial risks and liabilities not shared by the unincorporated county; (4) environmental sustainability and water conservation; (5) other Arizona municipal water providers have differential rates for unincorporated customers. [Compl. at ¶ 73.]

However, the City's "cost of service" studies (the "COSS"), which supposedly show that it is more expensive to deliver water to unincorporated areas, are rife with defects and are completely unreliable. [*See Id.* at ¶¶ 116-142.] For instance, the COSS utilized an

"equity-based investment approach" which assumes that Tucson Water has cost-based identified owners that are primarily responsible for all financial risk and therefore require some desired "rate of return." [*Id.* at ¶¶ 118-124, 127-132.] This is flawed because Tucson Water has no cost-based identified owners and because the set "rate of return" is a *policy* decision which does not reflect actual cost of service. [*Id.* at ¶¶ 121, 131.] As part of the "equity based investment approach," the COSS also classified customers in Native American tribal lands, TUSD campuses, and non-Tucson municipalities as "Inside City" customers, even though these customer groups do not reside in Tucson. [*Id.* at ¶¶ 123-124.] The COSS also blatantly ignored many factors tending to show that the cost of service to unincorporated areas is actually *lower* — like the fact that unincorporated customers largely subsidize Central Arizona Project water used by the City. [*Id.* at ¶ 125.] These issues with the COSS were explained to the City by County representatives. [*See id.* at ¶ 116.]

The City's remaining policy-based justifications also suffer from fatal flaws. Annexation: There is no evidence that differential rates will encourage annexation and even if it did, annexation would not increase economic benefits to the region. [*Id.* at ¶¶ 75-90.] Financial Burden: Tucson does not bear additional "financial risk" stemming from Tucson Water. The opposite is true—unincorporated customers subsidize in-city customers through property taxes and other services paid for by the County. [*Id.* at ¶¶ 91-105.] Environmental Sustainability and Water Conservation: Differential rates based on *location* rather than consumption do not promote water conservation or economic sustainability. [*Id.* at ¶¶ 106-115.] Other Municipal Practices: Tucson is not analogous to other municipalities because it serves as a regional, rather than municipal, water supplier and because there is no actual increased cost of service to unincorporated customers. [*Id.* at ¶ ¶ 139-142.] In addition to these facts, none of the City's policy justifications or the COSS provide any rationale or explanation as to why Native American tribal lands and TUSD campuses in unincorporated areas are exempted from differential rates. [*Id.* at ¶¶ 143-150.]

Tucson brought this action on December 17, 2021, seeking to enjoin Ordinance No. 11881. Pima filed an answer two months later, on February 14, 2022.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

## ARGUMENT

Arizona follows a notice pleading standard. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 6 (2008). "In determining if a complaint states a claim on which relief can be granted, courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts…" *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 9 (2012). Pima has easily satisfied this very low standard for Counts III and IV.

### I. The City Waived the Ability to File a Motion to Dismiss and Failed to Satisfy Rule 12's Meet and Confer Requirements.

To begin, the Court need not even address the merits of the City's Motion because the City has waived its right to file a Rule 12(b) Motion to Dismiss in the first place. "A motion asserting any [defense listed in Ariz. R. Civ. P. 12(b)] must be made *before* pleading if a responsive pleading is allowed." Ariz. R. Civ. P. 12(b) (emphasis added). Here, the City filed an Answer on February 14, 2022—three months before filing this Motion. Thus, even ignoring that the City's Motion was filed an incredible *five months* after the Complaint was filed on December 17, 2021, the City's Motion is untimely.

Tucson also failed to meet and confer with Pima before filing the Motion, as is required by Rule 12(j). This is an additional reason to deny it. *See* Ariz. R. Civ. P. 7.1(h).

### II. The County Has Standing to Assert Claims on Behalf of Its Citizens; Alternatively, the Standing Requirement Should Be Waived.

The City (at 2-4) first argues that the County lacks standing to raise Counts III or IV. Because the Arizona Constitution "does not require a party to assert an actual 'case or controversy,'" standing is a prudential, not mandatory, consideration in Arizona. *E.g.*, *Bennett v. Brownlow*, 211 Ariz. 193, 195 ¶ 14 (2005). Even when Arizona courts require a party to establish standing as a prudential matter, a plaintiff need only allege the defendant has caused it a "distinct and palpable injury." *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (holding that to establish standing under Article III of the U.S. Constitution a plaintiff must have suffered an injury fairly traceable to the defendants conduct which can be redressed by a favorable decision).

Here, the City does not (and cannot) dispute the County has suffered an injury resulting from Ordinance No. 11881, or that the County's injuries are traceable to the City's conduct, or that the County's injuries are redressable by a favorable judicial decision. Instead, the City asserts only that the County cannot assert an equal protection claim under the U.S. or Arizona Constitutions, and that the County cannot assert claims on behalf of Pima County citizens. The latter argument fails.[1]

### A. The County Has Standing to Raise Assert Unincorporated Citizens' Constitutional Claims Against the City.

In asserting that the County cannot raise equal protection claims on behalf of unincorporated citizens, the City (at 3-4) wrongly assumes that the *only* way for the County to raise claims on behalf of unincorporated citizens is by suing as *parens patriae*. But the Arizona and U.S. Supreme Courts have recognized a different type of third-party standing—so-called "*jus tertii*" standing—which permits a party to assert constitutional rights of third parties "provided three important criteria are satisfied." *Powers*, 499 U.S. at 410-411; *State v. B Bar Enter., Inc.* 133 Ariz. 99, 101 n. 2 (1982).[2] These three criteria are: (1) the litigant has an "injury in fact" giving it a sufficiently concrete interest in the outcome of the issue in dispute; (2) the litigant has a close relationship with the third party; and (3) there exists "some hinderance to the third party's ability to protect his or her own interests." *Powers*, 499 U.S. at 411; *see also B Bar Enter. Inc.*, 133 Ariz. at 101 n. 2 (holding that a party can has *jus tertii* standing where it has a "substantial relationship" to the third party; the third party is unable to assert the constitutional right; and the litigant party is injured). The U.S. Supreme Court has applied the *jus tertii* doctrine to allow litigants to assert 14th Amendment equal protection claims on behalf of third parties. *Craig v. Boren*, 429 U.S. 190, 193-196 (1976); *see also State v. Panos*, 239 Ariz. 116, 118 ¶ 7 (App. 2016) (holding that the effects of the federal and state equal protection clauses are essentially the same).

[1] The County does not dispute that it is not a "person" under either Equal Protection Clause.

[2] *See also e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984); *Rack Room Shoes v. U.S.* 718 F.3d 1370, 1375 (Fed. Cir. 2013).

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Although it does not appear that an Arizona court has addressed the issue, the Ohio Supreme Court in *E. Liverpool v. Columbiana Cty. Budget Comm.*, 870 N.E.2d 705 (Ohio 2007) held that a municipal corporation could raise equal protection claims on behalf of its citizens based on the *jus tertii* doctrine. There, the city of East Liverpool challenged two State laws that reduced East Liverpool's share of certain local government funds on both Federal and State equal protection grounds. *E. Liverpool*, 870 N.E.2d at 708-709 ¶¶ 2, 8. Notwithstanding that political subdivisions do not receive protection from the equal protection clauses in the U.S. or Ohio constitutions, the Ohio Supreme Court held that East Liverpool had standing under *Powers*. *Id.* at 712 ¶¶ 22-26. Regarding the first factor, "East Liverpool suffer[ed] a direct injury to its own treasury" resulting from the laws. *Id.* at 712 ¶ 23. "Second, there is a close relationship between East Liverpool and its citizens…" *Id.* at 712 ¶ 24. And "[t]hird, efforts by East Liverpool's citizens to assert their own claims have been hindered" because Ohio courts had held individuals lacked standing to challenge the challenged laws. *Id.* at 712 ¶ 25.

*E. Liverpool* is particularly persuasive here because, like with the Arizona Constitution, the "federal and Ohio equal-protection provisions are functionally equivalent and are to be construed and analyzed identically." *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 936 N.E.2d 944, 951 ¶ 17 (Ohio 2010) (cleaned up and internal citations and quotations omitted); *see also Panos*, 239 Ariz. at 118 ¶ 7.

As in *E. Liverpool*, all three *Powers* factors are present for Pima County to assert equal protection claims on behalf of Tucson Water customers in unincorporated areas. Injury: Pima County is a Tucson Water customer and purchases water in unincorporated areas. [*See* Compl. at ¶ 11]. Thus, Pima County suffers concrete financial injuries resulting from Ordinance No. 11881's discriminatory and arbitrary differential rates, which ratchet up the price to purchase water in unincorporated areas. *See Craig*, 429 U.S. at 194-195 (explaining that "economic injury" resulting from "statutory discrimination" satisfies standing requirements); *E. Liverpool*, 870 N.E.2d at 712 ¶ 23; *see also generally Aegis of Arizona L.L.C. v. Town of Marana*, 206 Ariz. 557, 562-63 ¶ 18 (App. 2003) (holding that

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

in order to establish standing a party must show "injury in fact, economic or otherwise" (internal quotation marks and citation omitted)). On this point, it is telling that the City has not argued that the County lacks standing to raise Counts I, II, or V—all of which attack the legality of Ordinance No. 11881.

Relationship: A close professional relationship is sufficient to establish the second *Powers* factor. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (holding that a planned parenthood official and a physician could bring constitutional claims against statute prohibiting contraception on behalf of contraceptive users with whom they had professional relationships); *Craig*, 429 U.S. at 455-56 (1976) (holding that a licensed beer vendor had standing to raise equal protection claims on behalf of a male customer in challenge to a statutory scheme allowing females to purchase alcohol at a younger age than males); *Dep't of Labor v. Triplett*, 494 U.S. 715, 720-721 (1990) (holding that an attorney may challenge an attorney's fees restriction by asserting the client's due process rights).

Pima County has a far closer "relationship" to Tucson Water customers living in unincorporated areas than in *Griswold*, *Craig*, or *Triplett*. Pima County is the government for all County residents, including those living in unincorporated areas that are adversely impacted by Ordinance No. 11881. *See E. Liverpool*, 870 N.E.2d at 712 ¶ 24. Further, the County "and its citizens have an interdependent interest in the [County's] treasury," which will be unfairly depleted if Ordinance No. 11881 stays in effect. *See id.* Should the County's equal protection claims fail, the equal protection rights of Tucson Water customers living in unincorporated areas will also "be 'diluted or adversely affected'" because Ordinance No. 11881's discriminatory regime would remain in place. *See Craig*, 429 U.S. at 455 (quoting *Griswold*, 381 U.S. at 481). There is a sufficiently close "relationship" here to assert *jus tertii* standing.

Hinderance: The third *Powers* factor is satisfied where the third party has "little incentive to set in motion the arduous process needed to vindicate" their rights due to the "small financial stake involved" and the "economic burdens of litigation." *Powers*, 499 U.S. at 414; *see also Rose v. Mitchell*, 443 U.S. 545, 558 (1979) (holding that a defendant had

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

standing to challenge racist grand jury selection because "[c]ivil actions" are "expensive to maintain and lengthy"). Here, the expense and time commitment of litigation far exceeds the increased rate unincorporated citizens pay under Ordinance No. 11881. This is particularly true given that any challenge to Ordinance No. 11881 may be limited to injunctive relief due to sovereign immunity. *See* A.R.S. § 12-820.01(A).

***

For all these reasons, Pima County has standing to assert the constitutional claims of Tucson Water customers living in unincorporated areas.

**B. <u>Alternatively, the Court Should Waive the Standing Requirement Because this Case Involves Issues of Great Public Importance.</u>**

In the alternative, the Court should waive the standing requirement. *See Bennett*, 211 Ariz. at 195 ¶ 14 (standing is a prudential, not mandatory, requirement). There is a well-established standing exception in Arizona for cases involving "critical public importance." *See State ex rel. Montgomery v. Mathis,* 231 Ariz. 103, 112 n. 7 (App. 2012); *Rios*, 172 Ariz. at 5; *Goodyear Farms*, 148 Ariz. at 217 n. 1; *Fraternal Order of Police Lodge 2*, 133 Ariz. at 127. The Arizona Supreme Court has held that challenges impacting "hundreds of thousands of people" are issues of great public importance. *Fraternal Order of Police Lodge* 2, 133 Ariz. at 127 ("The instant case presents a question … whether § 2.21 of PERB's rules and regulations is valid. The question is of great public importance to the hundreds of thousands of people living or working in Phoenix because PERB deals with all employees of that city."). The Court has applied the "great public importance" exception to cases involving equal protection challenges to state-wide statutes. *Goodyear Farms*, 148 Ariz. at 271 n. 1 (applying exception to allow property owners challenge law that allowed only property owners to initiate annexation votes). Cases involving "disputes at the highest level of state government" are also matters of "great public importance." *Rios*, 172 Ariz. at 5.

All the elements of *Rios*, *Goodyear Farms*, and *Fraternal Order of Police Lodge 2* are present in this case. With the select exception of customers on Native American tribal lands and TUSD campuses, Ordinance No. 11881 applies discriminatory rates to "hundreds

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

of thousands" of Tucson Water customers living in unincorporated Pima County.[3] [*See* Compl. at ¶¶ 60-72;] *Fraternal Order of Police Lodge 2*, 133 Ariz. at 127. This case also involves a dispute at the "highest level of state government"— Pima County against the City of Tucson. *See Rios*, 172 Ariz. at 5. The argument for waiving the standing requirement is particularly strong in this case because, unlike in cases like *Goodyear Farms* where it was questionable whether the plaintiff a suffered an injury resulting from the defendant's conduct, Pima is undisputedly injured by Ordinance No. 11881's discriminatory rates as a Tucson Water customer in unincorporated areas. *Cf. Goodyear Farms*, 148 Ariz. at 217.

Thus, even if Pima County lacks *jus tertii* standing, the Court should nonetheless waive the standing requirement here.

## III. Ordinance No. 11881 Can Be Challenged on Equal Protection Grounds.

Relying on *Jung v. City of Phoenix*, 160 Ariz. 38 (1989), the City next argues (at 4-6) that there is "no constitutional right to receive water at a particular rate" and that therefore there is no cause of action under the Equal Protection Clauses against Ordinance No. 11881. This argument fails at the outset because the City admitted in its Answer that the Equal Protection Clauses prohibit Tucson from enacting ordinances that discriminate against similarly situated individuals or on the basis of race, and therefore has waived the ability to argue otherwise in a Rule 12(b) motion to dismiss. [*See* Answer at ¶¶ 175, 189; Compl. at ¶¶ 179, 185;] *see also Standage v. Tarpey,* 8 Ariz. App. 342, 345 (1968) (rejecting defendants "belated" argument that the plaintiff had failed to comply with certain statutory prerequisites because the defendant had admitted the plaintiff complied with the statute in its answer); *Garland v. Fleischmann*, 831 P.2d 107, 111 (Utah 1992) ("If the defendant admits any fact or facts in its answer, it thereby waives proof of all facts thus admitted, and the issue to which such admissions relate must be determined in accordance with such admissions." (citation and quotation omitted)).

[3] Unincorporated Pima County had a population of approximately 365,643 in 2020. [*See* Compl. Ex. O at 1-2.]

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Even assuming the City has not waived this argument, it fails on the merits because: (1) in order to state an Equal Protection Claim a party need only show that the government has drawn a discriminatory classification that fails one of the "tiers of scrutiny"; (2) to the extent *Jung* states that a party must assert that a law burdens its "constitutional rights" in order to assert an equal protection claim, this position has been superseded by more recent equal protection cases; and (3) even if *Jung* remains good law (which is doubtful), it is factually and legally distinguishable.

**A. <u>The County Has Stated a Claim Under the Equal Protection Clauses.</u>**

The 14th Amendment to the United States Constitution provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Article II, Section 13 of the Arizona Constitution provides: "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." The effects of these provisions are "'essentially the same,' . . . each generally requiring the law treat all similarly situated persons alike." *Panos*, 239 Ariz. at 119 ¶ 8 (quoting *Lowery*, 230 Ariz. at 541 ¶ 13).

Arizona and Federal courts both evaluate equal protection under the "tiers of scrutiny" approach. *See e.g. Big D. Cons. Corp.*, 163 Ariz. at 566 (applying tiers of scrutiny analysis to claim under Article II, § 13); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (similar for the14th Amendment). "First, the party must show that it was treated differently than other people in [a] 'similarly situated' class." *Vong*, 235 Ariz. at 123 (alteration in original) (quoting *Aegis of Ariz., LLC*, 206 Ariz. at 570-71 ¶ 54). Second, the party must establish that the government classification violates the relevant "tier" of scrutiny. *Id.* Where a challenged government act impacts a suspect classification or fundamental rights, it is subject to "strict scrutiny" and will be upheld only if "it is necessary to promote a compelling state interest." *Big D. Const. Corp*, 163 Ariz. at 566. If the classification does not involve a fundamental right or a suspect class, it is subject to "rational basis" review

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

which requires only that the challenged action "be rationally and reasonably related to furthering some legitimate governmental interest." *Id.*

The City does not dispute that the Complaint has alleged sufficient facts to state an equal protection claim under the tiers of scrutiny analysis. Nor could it. There is no dispute that Ordinance No. 11881 creates a "classification" between customers living in unincorporated areas, on the one hand, and customers living in incorporated areas, Native American tribal lands, and TUSD campuses, on the other. [Compl. at ¶¶ 60-72.]

Tucson also does not dispute that Tucson Water customers in unincorporated areas, Native American tribal lands, TUSD campus, and incorporated areas are "similarly situated." This is evidenced by the facts that the City has historically served as a regional water provider [*Id.* at ¶¶ 25-40] and that there is no increase in the cost of service to provide water to unincorporated areas not exempted from Ordinance No. 11881 [*Id.* at ¶¶ 116-150].

Ordinance No. 11881 is also not rationally related to any legitimate governmental interest and is not necessary to promote a compelling government interest. The City's "policy" justifications for Ordinance No. 11881 do not justify imposing differential rates, and the City cannot show that the cost of service of water to unincorporated areas is higher than in exempted areas. [*Id.* at ¶¶ 73-142.] And the City's real motivation for implementing Ordinance No. 11881—to punish unincorporated citizens for voting against annexation—is not a "legitimate" or "compelling". [*See Id.* at ¶ 80;] *U.S Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

**B. <u>The Language the City Relies on From *Jung* Is No Longer Good Law</u>.**

Rather than arguing that the Complaint fails to allege sufficient facts to assert an equal protection claim, the City (at 4-6) makes the novel argument that, somehow, municipal water rate ordinances cannot be challenged on equal protection grounds. For support, the City places tremendous weight on the following language from *Jung*:

> We believe that any suggestion that the allegations of the complaint support a civil rights action must be corrected. Not every denial of a right conferred by state law involves a denial of equal protection. *See Snowden v. Hughes*,



Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

> 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944). The plaintiffs have no constitutional right to receive water at a particular rate. *City of Phoenix v. Kasun*, 54 Ariz. 470, 97 P.2d 210 (1939). The city, in providing water service to nonresidents, is acting in its proprietary capacity and, absent a statute, has no duty to provide water to the nonresidents. *Id.* If the city has violated a state statute in its charges for water provided to nonresidents, the plaintiffs' remedy is under state law, not under § 1983 of the Civil Rights Act.

*Jung*, 166 Ariz. at 39. To the extent that *Jung* holds a party must assert that a particular classification has impacted a "constitutional right" or that the government has violated some "duty," in order to raise an equal protection claim, this position reflects an outdated view of both Equal Protection Clauses.[4] As the discussion in Section III.A, *supra* makes clear, modern jurisprudence permits a litigant to challenge any discriminatory *classification* on equal protection grounds. *See Big D. Const.* 163 Ariz. at 566 ("When challenged under the equal protection provisions of article 2, § 13, the legality of a particular *classification* depends on its character, the individuals affected, and the asserted government purpose. (emphasis added)); *see also Armour v. City of Indianapolis*, 566 U.S. 673, 677-681 (2012) (evaluating a classification between homeowners that had paid certain debts and homeowners that had not paid under the 14th Amendment). While the "right" impacted by a particular discrimination classification is relevant to establish which "tier" of scrutiny applies, a party need not assert that a particular classification impacts a "constitutional right" to assert an equal protection claim.

Courts, including the Arizona Supreme Court, routinely review under the Equal Protection Clauses government classifications that do not burden a "constitutional right."[5]

[4] *Jung*'s reliance on *Snowden v. Hughes*, 321 U.S. 1 (1944) is evidence that *Jung* reflects an outdated view of the Equal Protection Clauses. *See Abrahamson v. Neitzel*, 109 F. Supp. 3d 1055, 1057 (W.D. Wis. 2015) (explaining that more recent Supreme Court cases have embraced a "more expansive" view of the interests protected by the 14th Amendment than *Snowden*).

[5] Notably, even before *Jung* or *Big D. Const. Corp.*, the Arizona Supreme Court held that discriminatory classifications that did not implicate "constitutional rights" violated Article II, Section 13. For instance, in *Killingsworth v. W. Way Motors*, Inc., 87 Ariz. 74 (1959), the Supreme Court invalidated a state law requiring dealers of new cars to own their buildings in fee simple, or lease buildings with space sufficient to display two or more vehicles, with the ostensible purpose of preventing fraud. *Killingsworth*, 87 Ariz. at 79-80.

Snell & Wilmer L.L.P. LAW OFFICES One Arizona Center, 400 E. Van Buren, Suite 1900 Phoenix, Arizona 85004-2202 602.382.6000

In *Big D Const. Corp. v. Ct. of Appeals*, 163 Ariz. 560 (1990), a contractor challenged on equal protection grounds a statute giving preference to certain types of contractors bidding on government projects. *Big D. Const. Corp.*, 163 Ariz. at 563. Although there is certainly no "constitutional right" to receive preference on a contract bid, the Arizona Supreme Court still evaluated the classification under rational basis review—it did not hold that the contractor had no "remedy" under Ariz. Const. art. II § 13. *See id.* at 566.

The U.S. Supreme Court has gone even further, holding that an individual can assert a so-called "class of one" equal protection claim as long as "the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000). In *Olech*, the plaintiff had simply alleged that the Village of Willowbrook required her to grant the Village a 33-foot easement, rather than the Village-standard 15-foot easement, in order to connect her home to the Village water supply. *Id.* at 563. Like with *Big D Const. Corp*, *Olech* plainly does not concern "constitutional right[s]" but yet still the U.S. Supreme Court held that the plaintiff had stated a claim under the 14th Amendment. *Id.* at 565 ("These allegations . . . are sufficient to state a claim for relief under traditional equal protection analysis.")

In short, *Jung*'s statement that an equal protection claim only lies where "constitutional right[s]" or governmental "dut[ies]" are at issue is no longer good law.[6]

**C. <u>Even If It Remains Good Law, *Jung* is factually and legally distinguishable.</u>**

*Jung* is also factually and legally distinguishable from this case.

<u>First</u>, *Jung* did not concern any allegations of race-based discrimination and therefore has no application to Count IV, Pima County's race-based discrimination claim.

---

In so doing, the Court explained the law had "no reasonable relationship . . . to the purpose sought to be achieved, the restriction [was] arbitrary, discriminatory, and unlawful." *Id*. at 80. That the Arizona Supreme Court had historically not required a party to show that a "constitutional right" or government "duty" was implicated in order to bring an equal protection claim is further evidence that the *Jung* holding is no longer good law.

[6] In the alternative, *Jung* could be construed as applying rational basis review to Phoenix's water ordinance. This construction would comport with modern equal protection analysis.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Courts have recognized that race-based discrimination in utility services is cognizable under the 14th Amendment's equal protection clause (and by extension, Article II, Section 13). *See Hawkins v. Town of Shaw*, 437 F. 2d 1286, 1289 , 1292 (5th Cir. 1971) (evaluating whether a town violated the 14th Amendment's equal protection clause where "[n]inety-seven percent of the homes not served by sanitary sewers are in black neighborhoods"); *First Ebenezer Baptist Church v. Consolidation Edison Co. of New York, Inc.*, 974 F. Supp. 283, 291-92 (S.D.N.Y. 1983) (analyzing challenge to allegedly racist electricity rates under traditional equal protection clause analysis).

Second, in *Jung*, the only allegation giving rise to the plaintiffs' claims was that "the City of Phoenix enacted an ordinance which doubled the water rates for those residing outside the geographical boundaries of the city." *Jung*, 160 Ariz. at 39. In other words, the plaintiffs sued the City in its utility capacity only. *See id.* ("The city, in providing water service to nonresidents, is acting in its proprietary capacity….to provide water to nonresidents"). Here however, Tucson is *not* simply acting in its role as a water utility. Rather, it is *exploiting* its role as regional water provider to promote the City's separate, non-water related, political goals: namely, increased annexation. [Compl. at ¶¶ 79-80.]

The difference between a municipal utility simply increasing prices for out-of-jurisdiction customers (as was the case in *Jung*) versus a municipality intentionally exploiting its control over a utility to discriminate against a disfavored group for political reasons (as is the case here) is highly material to the equal protection analysis. Intentional discrimination almost always gives rise to an equal protection claim, regardless of the "right" at issue. *See Olech*, 526 U.S. at 564-65.

The distinction between and intentional and non-intentional conduct is particularly relevant in the context of *Jung*. For one, *Jung* concerned a challenge under 42 U.S.C. § 1983 only. Federal courts have held that the "plaintiff in a § 1983 claim alleging an equal protection violation must prove that the defendant acted in a discriminatory manner *and that the discrimination was intentional*." *Vejo v. Portland Pub. Sch.*, 737 F. App'x 309, 311 (9th Cir. 2018) (emphasis added). Moreover, *Jung*'s holding appears based in part on the

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

supposed fact that the City of Phoenix had failed to fairly enforce statutory laws implicitly requiring reasonable rates. *See Jung*, 160 Ariz. at 39 ("If the city has violated a state statute in its charges for water provided to nonresidents, the plaintiffs' remedy is under state law, not under § 1983 of the Civil Rights Act."). Generally speaking, a party *can* bring equal protection challenges against officials that fail to equally enforce the law as long as the unequal enforcement is intentional. *See Snowden*, 321 U.S. at 8 ("The unlawful administration by state officers of a state statute fair on its face … is not a denial of equal protection *unless there is shown to be present in it an element of intentional or purposeful discrimination*." (emphasis added)). Thus, in finding in favor of the City of Phoenix, *Jung* was actually holding that there was no evidence of "intentional" discrimination based on the specific facts of that case—here however, there is such evidence.

Third, *Jung* concerned the U.S. Constitution only, whereas here the County brings claims under the 14th Amendment and Article II, Section 13. Although generally speaking both the U.S. and Arizona equal protection clauses are interpreted similarly, Arizona courts retain the right to "give such construction to [Arizona's] constitutional provisions as . . . logical and proper, notwithstanding their analogy to the Federal Constitution. . ." The "logical and proper" construction of Article II, Section 13 is that which is set forth in modern cases like *Big D. Const.* and its progeny.

Fourth, *Jung* premised its ruling in part on the notion that "[t]he city, in providing water service to nonresidents, is acting in its proprietary capacity and, absent a statute, has no duty to provide water to the nonresidents." *Jung*, 160 Ariz. at 39. After *Jung* was decided, however, the Arizona Legislature passed A.R.S. § 9-511.01(E) which requires "[a] municipality engaging in a domestic water or wastewater business" to charge "just and reasonable" rates. By engaging in the water business, and by servicing customers in unincorporated areas, Tucson now does have a "duty" to provide water to those customers at a reasonable, non-discriminatory, rate—a duty which it has failed to uphold.

Fifth, in holding that the plaintiffs in *Jung* failed to allege an equal protection claim, *Jung* implicitly determined that in-Phoenix customers were not "similarly situated" with

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

out-of-Phoenix customers. Had those two customer categories been similarly situated, the plaintiffs plainly would have had a cause of action under either Equal Protection Clause. *Crerand v. State*, 176 Ariz. 149, 151 (App. 1993) (holding that the Equal Protection Clauses "require that all persons subject to state legislation shall be treated alike under similar circumstances"); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (similar). Here, in comparison, the Complaint alleges that Tucson Water customers living in incorporated areas, Tucson Water customers on Native American tribal lands, TUSD campuses, and Tucson Water customers living in unincorporated areas *are* all similarly situated.

For these reasons, *Jung* is factually distinguishable here.

## CONCLUSION

The Court should deny the Motion. In the alternative, even if the Court determines that the County lacks standing, it should dismiss Counts III and IV without prejudice and allow the County to amend the Complaint to add an individual plaintiff.

DATED this 10th day of June, 2022.

SNELL & WILMER L.L.P.

By: /s/ *Brett W. Johnson*
Jeffrey Willis
Courtney L. Henson
One South Church Ave., Suite 1500
Tucson, Arizona 85701-1630

Brett W. Johnson
Ian R. Joyce
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

*Attorneys for Plaintiff Pima County*

The foregoing was electronically filed via TurboCourt this 10th day of June, 2022.

COPY of the foregoing e-mailed and e-served this same date to:

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Charles W. Wirken, Esq.
GUST ROSENFELD P.L.C.
One East Washington, Suite 1600
Phoenix, Arizona 85004
Email: cwirken@gustlaw.com

Michael G. Rankin, Esq.
Christopher Avery, Esq.
Tucson City Attorney's Office
Civil Division
Post Office Box 27210
Tucson, AZ 85726-7210
Email: mike.rankin@tucsonaz.gov
Email: Christopher.Avery@tucsonaz.gov

*Attorneys for Defendants*

*/s/ Tracy Hobbs*

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000