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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Puppies ‘N Love, a d/b/a of CPI, Inc., et al.,

No. CV-14-00073-PHX-DGC

10 Plaintiff,

PRELIMINARY INJUNCTION

11 v.

12 City of Phoenix, et al.,

13 Defendant.

14 Plaintiffs have filed a motion seeking a temporary restraining order and a
15 preliminary injunction. Doc. 11. The motion is fully briefed and the Court held a
16 hearing on March 27, 2014. For the reasons set forth below, the Court will grant the
17 motion and enter a preliminary injunction.

18 **I. Background.**

19 Plaintiffs Puppies ‘N Love and its owners Frank and Vicki Mineo instituted this
20 action on January 14, 2014. Plaintiffs challenge the constitutionality of Ordinance No.
21 G-5973 (“the Ordinance”), which the City of Phoenix adopted at a City Council meeting
22 on December 18, 2013. The Ordinance went into effect on January 17, 2014. Under the
23 Ordinance, Phoenix pet shops can sell only dogs purchased from an animal shelter, a
24 nonprofit humane society, or a nonprofit animal rescue organization. The Ordinance
25 prohibits pet shops from selling puppies purchased from any breeder. Violation of the
26 Ordinance is a criminal offense. The stated purpose of the Ordinance is to “target retail
27 outlets that drive the wholesale production of dogs in inhumane ‘puppy mills,’ while also
28 combating pet overpopulation and protecting consumers from the emotional and financial

1 hardships caused by unwitting purchases of a puppy mill puppy from a pet shop.”
2 Doc. 27 at 2. “Puppy mills” are inhumane dog breeding facilities where overcrowding,
3 poor sanitation, and inadequate veterinary care are rampant. “The irresponsible breeding
4 practices endemic to puppy mills . . . result in a host of hereditary and congenital diseases
5 common to puppy mill puppies.” *Id.*

6 Plaintiffs assert that they buy pure and specialty-breed puppies and sell them to
7 individual consumers in their stores. They assert that such puppies are not available for
8 them to purchase in sufficient numbers from shelters, humane societies, and animal
9 rescue organizations, making their business model nonviable under the Ordinance.
10 Plaintiffs claim that the Ordinance thus presents them with a Hobson’s choice: either
11 continue operating their business and incur criminal liability, or go out of business.

12 **II. Legal Standard.**

13 In order to obtain a preliminary injunction, Plaintiffs must establish that they are
14 likely to succeed on the merits, that they are likely to suffer irreparable harm in the
15 absence of preliminary relief, that the balance of equities tips in their favor, and that an
16 injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7,
17 20 (2008). The Ninth Circuit continues to analyze the four elements using a “sliding
18 scale” approach, in which “the elements of the preliminary injunction test are balanced,
19 so that a stronger showing of one element may offset a weaker showing of another.”
20 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Should
21 the moving party demonstrate a very high likelihood of injury, the likelihood of success
22 on the merits may be relaxed. An injunction may be granted when serious questions
23 going to the merits are raised and the balance of hardships tips sharply in the plaintiff’s
24 favor. *Wild Rockies*, 632 F.3d at 1135.

25 **III. Analysis.**

26 **A. Ripeness.**

27 Defendant City of Phoenix (“the City”) argues that Plaintiffs’ complaint does not
28 present a justiciable issue because the questions presented are not ripe for review.

1 Doc. 26 at 2. The City argues that because Plaintiffs have not received any letters, calls,
2 or visits from City authorities threatening them with prosecution, Plaintiffs have “jumped
3 forward into litigation on the speculation of future prosecution.” *Id.* at 3-4.

4 Ripeness is a question of timing designed to “prevent the courts, through
5 avoidance of premature adjudication, from entangling themselves in abstract
6 disagreements.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The role of
7 Article III courts is neither to issue advisory opinions nor to declare rights in hypothetical
8 cases, but to adjudicate live cases or controversies consistent with the powers granted the
9 judiciary in Article III of the Constitution. *See* U.S. Const. art. III. To determine whether
10 the ripeness requirement is satisfied, the Court must consider whether Plaintiffs face “a
11 realistic danger of sustaining a direct injury as a result of the statute’s operation or
12 enforcement,” or whether the alleged injury is too “imaginary” or “speculative” to
13 support jurisdiction. *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298
14 (1979).

15 The difference between an unripe, abstract question and a “case or controversy” is
16 “one of degree . . . and is not discernible by any precise test.” *Id.* at 297. Neither the
17 mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies
18 the ripeness requirement. *See San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121,
19 1126-27 (9th Cir. 1996). “When contesting the constitutionality of a criminal statute, it is
20 not necessary[, however,] that [the plaintiff] first expose himself to actual arrest or
21 prosecution to be entitled to challenge [the] statute that he claims deters the exercise of
22 his constitutional rights.” *Babbitt*, 442 U.S. at 298 (internal quotation marks and citation
23 omitted). “When the plaintiff has alleged an intention to engage in a course of conduct
24 arguably affected with a constitutional interest, but proscribed by a statute, and there
25 exists a credible threat of prosecution thereunder, he should not be required to await and
26 undergo a criminal prosecution as the sole means of seeking relief.” *Id.*

27 The Ninth Circuit looks to three factors in making this determination: (1) whether
28 the plaintiffs have articulated a “concrete plan” to violate the law in question, (2) whether

1 the prosecuting authorities have communicated a specific warning or threat to initiate
2 proceedings, or whether there is at least a credible threat of prosecution, and (3) the
3 history of past prosecution or enforcement under the challenged statute. *Reno*, 98 F.3d at
4 1126-28. Considering these factors, the Court finds that Plaintiffs' complaint presents
5 ripe questions for review.

6 First, Plaintiffs have a "concrete plan" to violate the Ordinance. Their entire
7 business – selling puppies from USDA-licensed Class A breeders and hobby breeders –
8 has been made unlawful by the Ordinance. Doc. 34 at 4. The conduct criminalized by
9 the Ordinance is not conduct in which Plaintiffs engage only occasionally; it is their core
10 business model.

11 Second, the City has not made a specific threat to initiate proceedings against
12 Plaintiffs, but neither has the City disavowed an intent to prosecute Plaintiffs under the
13 Ordinance. *Babbitt* found a similar refusal by the State of Arizona to "disavow[] any
14 intention" to prosecute under a newly passed law adequate to support a finding of
15 ripeness. 442 U.S. at 302. Plaintiffs openly admit that they engage in the very conduct
16 the Ordinance makes criminal – selling puppies acquired from breeders. As in *Babbitt*,
17 the Court finds that Plaintiffs are "not without some reason in fearing prosecution,"
18 making them and the City "sufficiently adverse" to satisfy the ripeness requirement. *Id.*

19 Third, the Ordinance is newly adopted. There is no history of past prosecution or
20 non-prosecution that could allay Plaintiffs' fear of criminal liability.

21 The Court concludes that Plaintiffs' fear of prosecution under the Ordinance is not
22 imaginary or speculative. Their business model has been made illegal, and their
23 challenge to the Ordinance is sufficiently ripe to come before the Court.

24 **B. Irreparable Harm.**

25 If enforcement of the Ordinance is not enjoined, Plaintiffs assert that they will go
26 out of business. Doc. 11 at 4. Because the loss of one's business carries more than
27 merely monetary consequences, it constitutes irreparable harm. *See Am. Trucking Ass'ns*
28 *v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009). Plaintiffs' business consists

1 almost entirely of acquiring pure and specialty-breed puppies and selling them to
2 individual consumers in the Phoenix area. Doc. 11-1 at 12. Under the Ordinance, the
3 only sources of puppies in Plaintiffs’ niche would be animal shelters, nonprofit humane
4 societies, and nonprofit animal rescue organizations. Plaintiffs have provided affidavits
5 asserting that these sources of puppies would not be adequate to provide Plaintiffs with a
6 sufficient number of healthy pure and specialty-breed puppies to sustain their store. *Id.*

7 At oral argument, the City asserted that Plaintiffs would not be irreparably harmed
8 because they could switch their business to selling puppies from shelters, nonprofit
9 humane societies, or nonprofit animal rescue organizations in conformity with the
10 Ordinance. The Humane Society of the United States has made the same assertion. *See*
11 Doc. 27 at 18. Plaintiffs have provided evidence, however, that they could not compete
12 on a for-profit basis with subsidized shelters and humane societies that provide the same
13 dogs for free or for a minimal price. Doc. 11-1 at 13. Plaintiffs credibly assert that their
14 only lawful choice under the Ordinance is to close the doors of Puppies ‘N Love and lay
15 off their employees. *Id.* The Court finds that Plaintiffs have shown a likelihood of
16 irreparable harm if the Ordinance is not enjoined.

17 **C. The Balance of Hardships Tips Sharply in Plaintiffs’ Favor.**

18 If the Court does not enjoin enforcement of the Ordinance against Plaintiffs,
19 Plaintiffs will lose their business. If the Court enjoins enforcement of the Ordinance
20 against them, Defendants assert that the City will be prevented from exercising its police
21 power to “protect consumers from the often unknown, expensive, and heartbreaking side-
22 effects associated with” puppy mills. Doc 27 at 18. But this concern is diminished
23 considerably by Plaintiffs’ evidence that they do not acquire dogs from puppy mills.
24 Defendants also assert that “other entities that supported the Ordinance’s passage will be
25 forced to continue devoting resources to monitoring the receipt and sale of animals in
26 Phoenix from puppy mills.” Doc. 27 at 18. This concern is diminished considerably by
27 the fact that Plaintiffs seek an injunction only with respect to their pet store, not all pet
28 stores.

1 Weighing the hardship to Plaintiffs if enforcement of the Ordinance against them
2 is not preliminarily enjoined (loss of their business) against the diminished concerns of
3 Defendants if enforcement against Plaintiffs is enjoined (an inability to prosecute a
4 business that is not supporting puppy mills), the Court finds that the balance of hardships
5 tips sharply in Plaintiffs' favor.

6 **D. Serious Questions.**

7 Because the Court has found that the balance of hardships tips sharply in
8 Plaintiffs' favor, Plaintiffs need not show that they are likely to succeed on the merits.
9 Instead, they can show that their complaint presents "serious questions going to the
10 merits." *Wild Rockies*, 632 F.3d at 1135. "For the purposes of injunctive relief, 'serious
11 questions' refers to questions which cannot be resolved one way or the other at the
12 hearing on the injunction and as to which the court perceives a need to preserve the status
13 quo lest one side prevent resolution of the questions or execution of any judgment by
14 altering the status quo." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th
15 Cir. 1988) (en banc). "Serious questions need not promise a certainty for success, nor
16 even present a probability of success, but must involve a 'fair chance of success on the
17 merits.'" *Id.* (quoting *Nat'l Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9th Cir.
18 1985)); see also *Bernhardt v. L.A. County*, 339 F.3d 920, 926-27 (9th Cir. 2003).

19 The briefing and oral argument confirm that serious questions are presented in this
20 case. Plaintiffs' Commerce Clause argument, although vigorously disputed, presents an
21 issue worthy of factual development and the Court's careful consideration. Plaintiffs
22 assert that the Ordinance discriminates against and imposes burdens on interstate
23 commerce that far outweigh local benefits. Plaintiffs have also raised credible equal
24 protection and special laws claims. The Court concludes that the status quo should be
25 maintained to permit resolution of these issues.

26 **E. Public Interest and Balance of the Equities.**

27 Defendants assert that a preliminary injunction is not in the public interest because
28 it would not show proper regard for the rightful independence of state governments in

1 carrying out their domestic policy. Doc. 26 at 17 (citing *Burford v. Sun Oil Co.*, 319 U.S.
2 315, 318 (1943)). The Court disagrees. Although due regard for the independence of the
3 City is surely warranted, countervailing public interests are also at stake. These include
4 interests served by the Commerce and Equal Protection Clauses of the United State
5 Constitution and the Special Laws provision of the Arizona Constitution. Those interests
6 can be served in this case only by preserving the status quo while the serious questions
7 raised by Plaintiffs' complaint are resolved. *See Sammartano v. First Judicial District*
8 *Court*, 303 F.3d 959, 974 (9th Cir. 2002). The Court finds that these public interests
9 offset each other and do not weigh against issuance of a preliminary injunction.

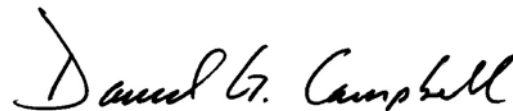
10 The final consideration – balance of the equities – has been addressed above in the
11 Court's consideration of the balance of hardships.

12 **IV. Conclusion.**

13 The Court concludes that Plaintiffs have presented justiciable questions for the
14 Court's consideration and have established the elements under *Wild Rockies* that entitle
15 them to preliminary relief.

16 **IT IS ORDERED** that Plaintiffs' motion for a preliminary injunction (Doc. 11) is
17 **granted**. Defendants are enjoined from enforcing Ordinance No. G-5973 against
18 Plaintiffs during the remainder of this litigation.

19 Dated this 2nd day of April, 2014.

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24 David G. Campbell
25 United States District Judge
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