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

Friends of Papago Park (FOPP)

Plaintiff,

vs.

The City of Phoenix; The City Of Scottsdale;

Defendants.

Case No. CV20-02467 PHX-GMS

**DEFENDANT CITY OF
SCOTTSDALE’S AND
DEFENDANT CITY OF
PHOENIX’S JOINT MOTION
FOR PARTIAL
RECONSIDERATION OF
ORDER (DOC 20)**

Defendant City of Scottsdale (“Scottsdale”) joined by Defendant City of Phoenix, by and through the undersigned counsel, hereby files the following Motion for Partial Reconsideration of the Court’s Order filed July 9, 2021 (Doc 20). The City of Phoenix, joined by the City of Scottsdale (collectively, the “Cities”), moved to dismiss Plaintiffs’ Complaint including their claim under the Property Clause for lack of prudential standing because Plaintiffs sought to enforce the property rights of a third party: the United States. (ECF No. 10, Def. City of Phoenix’s Mot. to Dismiss at 8; ECF No. 11, Def. City of Scottsdale’s Mot. to Dismiss and Joinder in Def. City of Phoenix’s Mot. to Dismiss at 1.) The Court denied that part of the Cities’ motion by analogizing Plaintiffs’ Property Clause claim to the Tenth Amendment challenge at

1 issue in *Bond v. United States*, 564 U.S. 211 (2011) (“*Bond*”)—a decision that had not been
2 cited by any of the parties. (ECF. No. 20, Order Granting in Part and Denying in Part Mot. to
3 Dismiss (“Order”) at 4.)

4 The Cities respectfully seek reconsideration of that ruling because *Bond* does not apply
5 here. *Bond* held that an individual has standing to challenge a statute’s constitutional validity
6 on Tenth Amendment grounds because the Tenth Amendment protects not only the rights of
7 States, but also the rights of individuals. Thus, a party asserting a Tenth Amendment challenge
8 is not seeking to assert vicariously the interests of third parties (i.e., the States), but her own
9 interests protected directly by the Tenth Amendment. The Property Clause, by contrast, exists
10 solely to protect the federal government’s plenary proprietary rights in federal property. The
11 Cities have located no authority suggesting the Property Clause exists to protect individual rights
12 and none extending *Bond* to this inapposite constitutional context.

13 Plaintiffs’ claim in this case makes clear why *Bond*’s logic does not apply here. Plaintiffs
14 do not purport to assert any individual liberty interests in the pleadings. According to Plaintiffs,
15 the alleged constitutional interests at issue here are the federal government’s property interests
16 under what the complaint characterizes as the “Title Documents” for Papago Park. (ECF. No.
17 1, Compl. at 2.) As Plaintiffs concede, the federal government is aware of Plaintiffs’ legal
18 theories and *disagrees* with them.¹ (*See, e.g.*, Compl. at 8, 15; Compl, Ex. C at 61 (alleging that

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¹ The United States has presumably not sought to enforce the property rights at issue because, as Plaintiffs themselves allege, the federal government recognizes it has no property interest in the relevant portion of Papago Park. (*See, e.g.*, Compl. at 8, 15; Compl, Ex. C at 61.) But the Court need not, and should not, reach those issues in a case where third parties are seeking to assert the federal government’s rights (if any) in violation of the doctrine of prudential standing.

1 the Office of the Solicitor for the U.S. Department of the Interior informed Plaintiffs by email
2 that they “had no case”).) Plaintiffs seek to second-guess that decision, not to vindicate any
3 individual rights. Permitting Plaintiffs’ claim to proceed turns the Property Clause on its head
4 by allowing third parties to usurp the federal government’s plenary authority over its own
5 property—the very interest the Property Clause was intended to protect.

6 For these reasons, the Cities respectfully submit that the Court should reconsider its ruling
7 and dismiss Plaintiffs’ claim under the Property Clause for lack of prudential standing.

8 **A. Reconsideration is Warranted Because the Cities Did Not Have the**
9 **Opportunity to Address *Bond***

10 The Cities recognize that motions for reconsideration are generally disfavored and do not
11 lightly seek this relief. But the Cities respectfully submit that this motion is appropriate under
12 this District’s Local Rules, which provide for reconsideration upon a “showing of manifest error
13 or a showing of new facts or legal authority that could not have been brought to [the Court’s]
14 attention earlier with reasonable diligence.” L.R.Civ. 7.2(g).

15 In denying Defendants’ motion to dismiss Plaintiffs’ Property Clause claim, this Court
16 relied entirely on *Bond*, a decision that had not been cited or discussed by any party. The Cities
17 could not have anticipated the need to address *Bond* because it was not cited by Plaintiffs, it
18 concerns a claim under a different constitutional clause (the Tenth Amendment) not mentioned
19 in Plaintiffs’ Complaint, and it has not been extended to the Property Clause by any court prior
20 to this Court’s motion to dismiss ruling. To the contrary, as discussed below, every court that
21 has squarely addressed the issue of prudential standing in the Property Clause context has
22 concluded the doctrine applies and done so without addressing *Bond*. The Cities thus could not

1 have reasonably addressed *Bond* in their briefing and submit that reconsideration is appropriate
2 in these circumstances. *Cf. Cave Consulting Grp., Inc. v. OptumInsight, Inc.*, 2020 WL 127612,
3 at *5 (N.D. Cal. Jan. 10, 2020) (reconsideration warranted where court “acted *sua sponte* on an
4 issue *not* raised by the parties”).

5 At a minimum, this complicated issue of first impression merits thorough briefing by the
6 parties to ensure the Court has a robust opportunity to consider contrary arguments and
7 authority, which may cause the Court to reconsider the erroneous application of *Bond* in this
8 context.

9 **B. *Bond* Has No Application Here Because the Property Clause, Unlike the
10 Tenth Amendment, Does Not Protect Individual Liberty**

11 The holding of *Bond* turns on the Supreme Court’s recognition that the principles of
12 federalism enshrined in the Tenth Amendment serve the dual purposes of protecting *both* States’
13 rights *and* individual liberty interests. 564 U.S. at 220-21. In particular, the Tenth Amendment
14 “protects the liberty of all persons within a State by ensuring that laws enacted in excess of
15 delegated governmental power cannot direct or control their actions.” *Id.* at 222. Thus, “States
16 are not the sole intended beneficiaries” of the Tenth Amendment, and the federalism principles
17 underlying it are not “a matter of rights belonging only to the States” or “for the States alone to
18 vindicate”; rather, individual citizens have a “direct interest” in the individual liberties that the
19 Tenth Amendment protects. *Id.* Under this reasoning, the Court concluded that the criminal
20 defendant in *Bond*—who was challenging her statute of conviction on the ground that it
21 exceeded Congress’s authority in violation of the Tenth Amendment—was not vicariously
22 asserting the States’ interests, but rather *her own* individual liberty interests. *Id.* at 221-24.

1 In concluding that *Bond* supports Plaintiffs’ prudential standing in this litigation, the
2 Court reasoned that Plaintiffs’ claim similarly implicates federalism principles and, thus, that
3 Plaintiffs have a similar “direct interest” at stake. (Order at 4.) This application of *Bond* was
4 erroneous for two reasons.

5 *First*, the holding of *Bond* is limited to challenges under the Tenth Amendment. That
6 was the only claim at issue and the Supreme Court’s analysis of the implicated individual liberty
7 interests was tied to that specific constitutional context. By its terms, *Bond* does not address
8 other constitutional claims—as the Third Circuit recently recognized (in a decision subsequently
9 vacated by the Supreme Court). *See Bognet v. Sec’y Commonwealth of Pennsylvania*, 980 F.3d
10 336, 351 & n.6 (3d Cir. 2020), *cert. granted, judgment vacated sub nom. Bognet v.*
11 *Degraffenreid*, 2021 WL 1520777 (U.S. Apr. 19, 2021) (*Bond* concerned “the Tenth
12 Amendment and the reserved police powers” and “[t]here is no precedent for expanding *Bond*
13 beyond this context”).²

14 Plaintiffs’ property claim here arises not under the Tenth Amendment, but the Property
15 Clause.³ This distinction is key, because the Supreme Court has made clear that constitutional
16 “source” of the claim at issue is of “critical importance with respect to the prudential rules of
17 standing.” *Warth v. Seldin*, 422 U.S. 490, 500 (1975). The relevant standing question is whether
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20 ² The Supreme Court granted certiorari and vacated and remanded with instructions to dismiss the case
as moot. *Degraffenreid*, 2021 WL 1520777, at *1.

21 ³ The Cities recognize that *pro se* pleadings are construed liberally, but “Tenth Amendment,”
22 “federalism,” “separation of powers,” or “liberty” appear nowhere in the Complaint.

1 the specific “constitutional or statutory provision *on which the claim rests* properly can be
2 understood as granting persons in the plaintiff’s position a right to judicial relief.” *See id.*
3 (emphasis added). Thus, at a minimum, this Court must independently analyze whether *Bond*’s
4 rationale extends to the Property Clause to assess Plaintiffs’ prudential standing. It does not.

5 This leads to the *second* error: As explained above, the critical question in *Bond* was not
6 whether the clause at issue allocated power between federal and state governments (or whether
7 a potential federal-state power clash was implicated), but whether that allocation was *designed*
8 *to protect individual rights*. As its text and history show, the Property Clause was intended
9 solely to protect the federal government’s plenary proprietary rights—not individual liberty.

10 The Property Clause provides: “The Congress shall have Power to dispose of and make
11 all needful Rules and Regulations respecting the Territory or other Property belonging to the
12 United States.” U.S. Const. art. IV., § 3, cl. 2. Courts have held that this language grants
13 “plenary” power over federal property to the federal government. *See, e.g., Cal. Coastal*
14 *Comm’n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (“the Property Clause gives Congress
15 plenary power”); *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (Property Clause protects the
16 federal government’s right to use its own property “without limitation”); *Wyoming v. United*
17 *States*, 279 F.3d 1214, 1227 (10th Cir. 2002) (“Notably, Congress’ power in this regard is
18 plenary.” (quotation marks and citation omitted)).

19 This sweeping grant of authority exists not to vindicate *individual* liberty, but rather to
20 protect the federal government’s *proprietary* interests in its own property. The Supreme Court
21 has described the Property Clause as “[p]rimarily . . . a grant of power to the United States of

1 control over its property,” *Kansas v. Colorado*, 206 U.S. 46, 89 (1907), and has consistently
2 characterized the governmental interest created by the clause as proprietary in nature. “Congress
3 not only has a legislative power over the public domain, but it also exercises the powers of the
4 proprietor therein. Congress may deal with such lands precisely as an ordinary individual may
5 deal with farming property. It may sell or withhold them from sale.” *Alabama v. Texas*, 347
6 U.S. 272, 273-74 (1954) (quotation marks and citations omitted). *See also, e.g., Kleppe v. New*
7 *Mexico*, 426 U.S. 529, 540 (1976) (“Congress exercises the powers both of a proprietor and of
8 a legislature over the public domain” under the Property Clause, which imbues in Congress
9 “complete power . . . over particular public property entrusted to it”); *United States v. Midwest*
10 *Oil Co.*, 236 U.S. 459, 474-75 (1915) (same).⁴

11 Neither the Supreme Court nor any other case has suggested (let alone held) that the
12 Property Clause protects individual liberty interests. Given the purpose of the Property Clause,
13 such an interpretation would make little sense. If the federal government has “plenary” and
14 unlimited power over its property, then only the federal government can decide what to do with
15 that property and how to enforce those proprietary rights. Allowing private litigants to take a
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17 ⁴ The historical record indicates that the Property Clause was originally intended to resolve disputes
18 over the western territories and, specifically, to authorize Congress to re-enact the Northwest Ordinance
19 and establish federal authority over the territories. *See, e.g.,* Peter A. Appel, *The Power of Congress*
20 *“Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 Minn. L.
21 Rev. 1, 10-30 (Nov. 2001); Jeffrey M. Schmitt, *Limiting the Property Clause*, 20 Nev. L.J. 145, 154-57
22 (Fall 2019); *Schnapper v. Foley*, 667 F.2d 102, 116 (D.C. Cir. 1981) (“The intendment of article IV,
section 3, this court has held, was to preserve both federal claims and conflicting state claims to certain
portions of unsettled lands west of the Allegheny Mountains.” (quotation marks and citations omitted));
Edwards v. Carter, 580 F.2d 1055, 1059 (D.C. Cir. 1978). This confirms that the purpose of the Property
Clause was to protect the federal government’s proprietary rights in real property—like the property at
issue here—and had nothing to do with individual liberty.

1 different view of the federal government’s property rights, and to seek to enforce them in ways
2 the federal government has chosen *not* to do, would severely constrain the federal government’s
3 control over its property and leave it with less proprietary authority than a private individual has
4 over his or her own property. Whether or not to enforce a claimed property right—such as the
5 United States’ alleged rights under the Title Documents—is itself a core right of a property
6 owner. If a private party had deeded Papago Park to the city, that party would be entitled to
7 decide whether it had a basis to assert, and to what extent to assert, any of its alleged rights under
8 the Title Documents. Third party litigants—such as Plaintiffs—would have no say in such a
9 decision. Under the Property Clause, the federal government must enjoy at least the same
10 prerogative. *Alabama*, 347 U.S. at 272.

11 For this reason, courts have consistently held that private litigants do not have prudential
12 standing to assert claims under the Property Clause—including the only Court of Appeals to
13 address this issue, a decision that the Cities raised and relied on in their moving papers (*see* Mot.
14 to Dismiss at 8). *See The Wilderness Soc’y v. Kane Cnty., Utah*, 632 F.3d 1162, 1171 (10th Cir.
15 2011) (holding that plaintiff lacked prudential standing “to enforce the federal government’s
16 property rights”); *Las Vegas Dev. Grp., LLC v. Yfantis*, 173 F. Supp. 3d 1046, 1052 (D. Nev.
17 2016) (holding that plaintiffs lacked prudential standing to assert the government’s interests
18 under the Property Clause); *see also Kalorama Citizens Ass’n v. SunTrust Bank Co.*, 2020 WL
19 5653695, at *8 (D.D.C. Sept. 23, 2020); *Wells Fargo Bank, N.A. v. SFR Invs. Pool 1, LLC*, 2019
20 WL 919586, at *7 (D. Nev. Feb. 25, 2019); *JPMorgan Chase Bank, N.A. v. SFR Investments*
21 *Pool 1, LLC*, 200 F. Supp. 3d 1141, 1162-63 (D. Nev. 2016); *U.S. Bank, Nat’l Ass’n v. SFR*

1 *Invs. Pool I, LLC*, 2016 WL 1248704, at *2 (D. Nev. Mar. 28, 2016); *Freedom Mortg. Corp.*
2 *v. Las Vegas Dev. Grp., LLC*, 106 F. Supp. 3d 1174, 1180 (D. Nev. 2015). The Cities
3 respectfully submit that this Court should follow suit. When Plaintiffs' claim under the Property
4 Clause and *Bond* are construed correctly, these decisions—not *Bond*—are the pertinent and
5 persuasive authorities.

6 **II. CONCLUSION**

7 For the reasons above, the Cities respectfully request that the Court reconsider its ruling
8 and grant the Cities' motion to dismiss Plaintiffs' claim under the Property Clause for lack of
9 prudential standing as well.

10 **RESPECTFULLY SUBMITTED** this **23rd** day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2021, I electronically transmitted the attached document to the Clerk of the Court using the CM/ECF system, and which will be sent electronically to all registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent to those indicated as non-registered participants.

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