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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HOUSING IS A HUMAN RIGHT ORANGE COUNTY, et al., Plaintiffs, v. THE COUNTY OF ORANGE, et al., Defendants.	Case No. 8:19-cv-00388-PA Honorable Percy Anderson **CITY OF SAN CLEMENTE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' *EX PARTE* MOTION FOR A TEMPORARY RESTRAINING ORDER**

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INTRODUCTION

Plaintiffs' *ex parte* TRO application is procedurally abusive and substantively groundless. The Court should deny the application and order Plaintiffs to reimburse the City of San Clemente ("the City") for its costs and legal fees.

Procedurally, Plaintiffs' application is deficient in multiple respects. Although they notified defense counsel of their intent to seek *ex parte* relief, Plaintiffs refused to identify: (i) the factual grounds for their motion; (ii) the individual Plaintiffs allegedly harmed by the City's conduct; or (iii) the relief that they intended to request. And, they rebuffed the City's repeated offers to discuss and work to resolve particular concerns about the designated campsite. Moreover, Plaintiffs have not explained—to the City or to this Court—why they filed a TRO application now, on an emergency basis, even though the campsite has been operating for *five weeks*. That appears to have been a tactical decision: Plaintiffs threatened to file this same motion in May, but then chose instead to file a baseless motion to disqualify defense counsel. Only after that gambit failed, and the City advised that it would move to dismiss the Amended Complaint on July 1, 2019, did Plaintiffs rush to file this application before then. The Court should not tolerate this abuse of its processes and waste of its time.

Substantively, the application borders on the frivolous. As a temporary means of alleviating a host of health, safety, environmental, and related problems associated with homeless encampments, the City enacted an ordinance limiting camping on public property to a designated zone. The City provides security, ADA-compliant restrooms, and outreach services at the site. While Plaintiffs and their declarants (all but one of whom are not even parties to this case and are therefore irrelevant) press a laundry-list of complaints about the site—everything from insufficient toilet paper, to lack of electrical outlets to charge phones, to lack of nearby parking for volunteers who deliver food and water to them—none of this comes anywhere close to violating the Constitution or the Americans with Disabilities Act ("ADA"). And it certainly does not justify the extraordinary remedy of an *ex parte* TRO.

FACTUAL BACKGROUND

The City's Anti-Camping Ordinances. The City's core anti-camping law is found in Chapter 8.86 of the San Clemente Municipal Code. "Camping" is defined there to mean "to pitch or occupy camp facilities or to use camp paraphernalia"; the latter phrases are, in turn, defined to include "tents, huts, or other temporary shelters," and "tarpaulins, cots, beds, sleeping bags, hammocks, non-City designated cooking facilities, or similar equipment." SCMC § 8.86.010.[1] Under the Code, camping on any City-owned or City-operated land is "unlawful." *Id.*

Following the Ninth Circuit's decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), the City Council enacted an ordinance codifying that decision. *See* SCMC § 8.86.040. *See* RJN, Ex. 2. Under that ordinance, the anti-camping law "will not be enforced against indigent homeless persons sitting, lying, or sleeping on public property when no alternative shelter is available," unless there are "exigent circumstances relating to immediate threats to the public health, safety, or welfare." *Id.*

The Encampments. In April-May 2019, an increasing number of homeless individuals set up tents and campsites near the San Clemente Metrolink station and other public facilities in the North Beach neighborhood. This led to a number of problems observed by City staff and City residents, including:

- Impediments to public rights of way, leading to a grievance filed by a disabled resident who was unable to use the public sidewalk;
- Interference with electrical boxes and other utilities, which present a risk of danger to the homeless population and others;
- Public defecation and urination, and other unsanitary conditions, at and near the public facilities;

[1] For the Court's reference, a copy of this ordinance is attached as Exhibit 1 to the Request for Judicial Notice ("RJN") filed in support of the City's motion to dismiss. *See* Dkt. No. 72-2.

- An increase in fire safety hazards associated with camping in open space and other wildland areas as summer approaches;
- Dangers posed by the exposure of confused or disoriented individuals to railroad tracks;
- Complaints about the impact of the encampments on access to, and use of, public infrastructure and facilities by residents and tourists;
- Destruction of landscaping at the train station and the Ole Hanson Beach Club, a historic landmark which the City recently renovated;
- Impairment of access for emergency and other first responders; and
- Conflicts between homeless individuals and third parties who are upset about the above disruptions.

The Urgency Ordinance. At a meeting on May 21, 2019, the San Clemente City Council considered a staff report that detailed these concerns, and then voted unanimously to adopt an "Urgency Ordinance" to address them. *See* Dkt. 69-1, Ex. 2 (staff report and ordinance text); *see also* RJN Ex. 3 (copy of Emergency Ordinance).

The Urgency Ordinance began by reciting several pages of findings relating to the homeless crisis in Orange County, the steps that San Clemente has taken toward addressing that crisis, and the various health, safety, environmental, and other policy concerns associated with the recent growth of homeless encampments in the City and North Beach in particular. *See id.* Based on those findings, the Ordinance provided that the City's anti-camping ordinances would now be enforced "against all persons (including indigent homeless persons)," *except* that "enforcement shall not be brought against persons camping on public property designated for such purposes pursuant to Section 4 of this Ordinance." *Id.* § 3. Section 4 then designated a City-owned lot as "the sole public area in the City available for camping purposes by those persons experiencing homelessness or otherwise unable to obtain shelter." *Id.* § 4. The City Manager is authorized to adopt rules for use of the camping site. *Id.* § 5.

The City worked to prepare the designated site—a roughly half-acre lot located at 380 Avenida Pico—in time for the Memorial Day weekend. The City contracted for a decomposed granite floor covering, lighting and fencing, and ADA-compliant bathroom facilities for the homeless population to use while at the site. *See* Decl. of Erik Sund ("Sund Decl.") ¶¶ 2, 5. The City also provides security, including cameras and a security guard. *Id*., ¶¶ 2, 6. In addition, City staff have coordinated with Mercy House—a homeless-outreach service provider—to make regular visits to the site to offer various social services, including medical care and long-term housing that may be available. *Id*., ¶¶ 10-11.

On May 24, 2019, after giving homeless individuals in the vicinity 24 hours' notice, the City and its contract law-enforcement personnel cleared the encampments at North Beach, inviting the individuals who had been living there to relocate to the lot and providing transportation for anyone unable to access it on their own. *Id*., ¶ 3. The clearing operation was successful, and the camping zone presently hosts approximately 36 individuals per night. *Id*., ¶ 7. Contrary to Plaintiffs' claims, the site is not full; nor does it have a "waiting list." *Id*. The declaration of Michael O'Malley—which Plaintiffs' submit in claiming otherwise—*is more than a month old* (thus underscoring the utter lack of exigent circumstances to support the extraordinary relief that Plaintiffs seek).

Homeless individuals, including one of Plaintiffs' declarants (Steve Gustafson), told the media they were happy about the new designated camping site. Mr. Gustafson was quoted in the press as saying: "I'm so glad they gave us that lot." Erika Ritchie, *Homeless at San Clemente's North Beach Relocated to City Lot, as Legal Motion Is Filed To Remove Judge from Related Lawsuit*, OC REGISTER, May 24, 2019. He told another reporter: "That's a good place to go. As far as I'm concerned, it's the best thing that I could expect." Jessica De Nova, *San Clemente Locals Cheer as Homeless Leave North Beach*, ABC-7, May 24, 2019.

Plaintiffs' Motion. The day after the enactment of the Urgency Ordinance, Plaintiffs' counsel wrote to the City Attorney, objecting that the enforcement of that Ordinance would "violate the Eighth Amendment." *See* Declaration of Jacob Roth ("Roth Decl."), Ex. A (letter). She threatened to seek an immediate TRO from then-presiding Judge David Carter. *Id.* The City's special counsel responded the next day, explaining why such a motion would be baseless. *Id.*, Ex. B (response letter).

Instead of filing the threatened TRO application, Plaintiffs moved on May 29, 2019, to disqualify the City's counsel, Jones Day. *See* Dkt. 51. Their notice of motion included an internal comment, embedded into the document, stating "we should file this after the TRO." *Id*. at 1. Evidently, however, Plaintiffs changed their tactics, and chose to seek Jones Day's disqualification while holding back on their TRO. On June 13, 2019, Judge Selna denied Plaintiffs' motion to disqualify, explaining that its "essential premise" was "flawed." *See* Dkt. 62. Shortly thereafter, following Judge Carter's recusal, the case was reassigned to this Court.

The following week, the City's counsel requested a conference, pursuant to the Local Rules, to discuss the City's anticipated motion to dismiss Plaintiffs' Amended Complaint. That conference occurred on June 21, 2019. Roth Decl., ¶ 5. At the conclusion of that conference, Plaintiffs agreed to advise the City within a week if they wanted to seek leave to further amend their Complaint in light of the deficiencies the City had identified. *Id*., Ex. C (email chain). At the end of the week, however, Plaintiffs' counsel responded that they had not had time to make a decision. *Id*. The City thus advised that it would move to dismiss as early as July 1, 2019. *Id*.

Just over one hour after the City indicated its intent to proceed with a motion to dismiss, Plaintiffs' counsel gave "notice" of their intent to seek *ex parte* relief "based on the conditions at the campsite." *Id*., Ex. D (email chain). In response, the City requested more detail about the basis for the application and the supposed need for emergency relief. *Id.* But Plaintiffs' counsel would say only that the designated site has "multi[p]le disability accessibility issues" and "is not accessible." *Id.*

Thereafter, the City's counsel again requested specifics, and suggested a phone call "so that we can better understand what the accessibility issues are and who they are impacting." *Id.* Counsel further made clear that the City "may well be willing to address particular accessibility issues that are brought to its attention," and therefore urged Plaintiffs to discuss the matter in an effort to reach voluntary resolution before rushing to seek emergency relief from the Court. *Id.*

More than 24 hours later, Plaintiffs' counsel responded, but again refused to say anything more than the following conclusory assertion: "The site does not accommodate disabilities, among other problems. It is unsafe for a variety of reasons." *Id.* The City's counsel responded, again offering to make himself available to discuss the issues, and requesting the following information: "(1) what exactly are the conditions that are allegedly impeding access to disabled persons; (2) who are the Plaintiffs who are impacted by these conditions, and how; and (3) what is the precise relief that you expect to seek from Judge Anderson." *Id.*

In her response, Plaintiffs' counsel refused to answer the questions. *Id.* She stated that the affected persons are "all putative class members subject to the site," and that the grounds for the motion are "a myriad of problems," but "[w]e are not going to list here everything we believe is wrong with the site." The only specific example she gave was that "a person needs to climb a hill" to reach the site. *Id.* With that, Plaintiffs' counsel declared that Plaintiffs "intend to move forward." *Id.*

The City's counsel promptly responded:

> Respectfully, Carol, we don't think it complies with the Local Rules or the Standing Order to notify us that you intend to seek a TRO without explaining the specific grounds for the motion or the relief sought, let alone why you think there is a current emergency that warrants extraordinary relief, more than a month after the site opened. At this point, all I know is that you object that the site is on a hill, but have not identified a single individual who has been unable to access the site as a result (probably because, as I explained, the City has offered to transport

> anyone who has trouble reaching the site). Candidly, we view your threatened motion as a plain abuse of the ex parte procedures, and will seek appropriate sanctions from Judge Anderson, including our fees for responding to the motion.

Id. Plaintiffs then proceeded to file their application. *See* Dkts. 69-71, 73.

LEGAL STANDARD

An application for a TRO is evaluated under the same standard as a request for a preliminary injunction. *E.g.*, *Gordon v. US Bank Nat'l Ass'n*, No. CV 18-100075, 2019 WL 1785443, at *1 (C.D. Cal. Feb. 14, 2019). Thus, a plaintiff "must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tip in his favor, and (4) that an injunction is in the public interest." *See Toyo Tire Holdings of Americas Inc. v. Continental Tire N. Am., Inc.*, 609 F.3d 975, 982 (9th Cir. 2010).

A TRO is an '"extraordinary remedy."' *NML Capital, Ltd. v. Spaceport Sys. Int'l*, 788 F. Supp. 2d 1111, 1125 (C.D. Cal. 2011) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). It is "never awarded as of right," and may only be granted "upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22, 24. And "[e]x parte motions" for such relief, in particular, "are rarely justified"—rather, they are "abuse[d]" in this District and "detract[] from a fundamental purpose of the adversary system" by denying courts "the best possible presentation" of each side's case. *Mission Power Eng'g Co. v. Continental Cas. Co.*, 883 F. Supp. 488, 489-91 (C.D. Cal. 1995).

ARGUMENT

Plaintiffs' *ex parte* application represents a procedural abuse. They engaged in gamesmanship by waiting for five weeks—until the eve of the City's motion to dismiss—to file the motion. And they refused to discuss their grounds for relief in good faith before demanding emergency relief from this Court. This is exactly the "misuse of ex parte applications" that this Court's Standing Order warns against.

1 Moreover, Plaintiffs cannot satisfy any of the elements of the TRO standard.
2 As demonstrated in the City's pending motion to dismiss, their claims are baseless,
3 and neither the Constitution nor the ADA requires the City to provide the services
4 Plaintiffs demand. And the public interest—represented by the unanimous vote and
5 extensive findings of the City Council—overwhelmingly cuts against a TRO.

6 **I. PLAINTIFFS' APPLICATION IS AN ABUSE OF THE *EX PARTE* PROCEDURES**

7 This Court has warned against the improper use of *ex parte* applications, which
8 are "inherently unfair" and "pose a threat to the administration of justice." *Mission*
9 *Power*, 883 F. Supp. at 490. They should be used exclusively for situations in which
10 the moving party's "cause will be irreparably prejudiced if the underlying motion is
11 heard according to regular noticed motion procedures," and only where "the moving
12 party is without fault in creating the crisis that requires ex parte relief." *Id.* at 492.
13 Here, Plaintiffs have abused the *ex parte* procedures in at least three respects.

14 *First*, they have made no showing of extraordinary need for urgent relief.
15 While the five homeless declarants (only three of whom say they use the camping
16 site, and only one of whom is a Plaintiff) object to a variety of conditions at the site,
17 *e.g.*, allegedly inadequate servicing of the public restrooms and the quarter-mile walk
18 to sources of drinking water, none identifies any threat of immediate or irreparable
19 harm. Notably, the declarants residing at the site have been there for weeks.

20 *Second*, if there were some urgency, Plaintiffs exacerbated it by waiting
21 *five weeks* to seek relief. As set forth above, Plaintiffs' counsel threatened to seek a
22 TRO as early as May 22, 2019, two days before the designated campsite opened, and
23 some of their declarations (like those from Steven Riley and William Brown) date
24 from that period. But instead of proceeding with that motion, Plaintiffs waited to see
25 the outcome of the City's motion to recuse Judge Carter. They waited to see if they
26 could engineer disqualification of the City's counsel. They waited to hear the City's
27 summary, at a Local Rule 7-3 conference, of its motion to dismiss. Not until
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June 29, 2019—five weeks after the site opened—did Plaintiffs renew their TRO threat. And the bulk of their application consists of complaints that could have been raised from the outset—such as the location of the site, lack of shade, and lack of parking. Plaintiffs cannot credibly claim that the Judge must "drop all other work" to address their motion, *Mission Power*, 883 F. Supp. at 490, after this pattern of gamesmanship and delay. "At a minimum, Plaintiff[s'] delay in seeking injunctive relief establishes that there is no 'emergency' justifying relief from this Court's regular motion requirements." *Runway Beauty, Inc. v. Runway Magazine, Inc.*, 2009 WL 10682033, at *2 (C.D. Cal. 2009) (Anderson, J). It also "weighs against granting a temporary restraining order." *Id.*

Third, Plaintiffs refused to engage with the City to discuss voluntary resolution of their concerns, in violation of Local Rule 7-3. As set forth above, defense counsel repeatedly requested that Plaintiffs provide basic detail about their application, such as the factual grounds, the affected parties, and the relief sought. And, counsel urged a telephone conference to discuss these matters, because the City may well be willing to address particular issues brought to its attention. For example, the City might have been willing to grant exemptions from the rule requiring tents to be removed during the day for individuals presenting a legitimate medical need. Yet, Plaintiffs' counsel refused to "list here everything we believe is wrong with the site," and in fact listed nothing beyond the fact that the site is situated on a hill. *See* Roth Decl. Ex. D. *See Bavly v. A2 Productions, LLC*, 2019 WL 1883907, at *2 (C.D. Cal. 2019) (Anderson, J.) (warning parties "to avoid unnecessarily resorting to the use of ex parte applications").

As explained below, Plaintiffs' motion is also groundless in substance, and it should be denied for that reason. As a sanction for misuse of the *ex parte* procedures, however, the Court should order Plaintiffs to reimburse the City for the costs and fees necessitated by the expedited response to their application.

II. PLAINTIFFS' APPLICATION IS SUBSTANTIVELY GROUNDLESS

As a substantive matter, Plaintiffs claim a right to relief under the Due Process Clause of the Fourteenth Amendment and under the ADA. They have not shown a likelihood of success on the merits under either theory. To the contrary, it is clear that the City did not "create" the danger of heatstroke for individuals without shelter, and nothing in the ADA mandates the provision of phone-charging stations, drinking water, or trauma counselors at the designated campsite. Moreover, as explained below, only one named Plaintiff actually uses the campsite—and he has no standing to challenge its conditions, because he has *declined* available indoor shelter.

A. Fourteenth Amendment. Plaintiffs argue that the Urgency Ordinance constitutes a "state-created danger" that violates their due process rights, principally because the lack of shade exposes them to risk of heatstroke and hyperthermia. Dkt. 69-1 ("TRO Mem.") at 6-10. This argument fails because the City did not "create" the danger posed by the heat, and because homeless individuals are free to seek shade elsewhere in the City during the daytime hours.

The "state-created danger" rule holds a City liable if its action '"affirmatively place[s] the plaintiff in a position of danger,' that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006) (quoting *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 197, 201 (1989)). The relevant question is whether the defendant "left the person in a situation that was more dangerous than the one in which they found him." *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000). And, the doctrine "applies only where the state acts with deliberate indifference to a known or obvious danger." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011). Deliberate indifference is a "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 410 (1997).

Plaintiffs do not assert a viable claim—let alone a meritorious one—under this constitutional doctrine. The City obviously has not affirmatively created the danger posed by the heat. Nor has the City exposed homeless individuals to that danger by *allowing* them to lawfully camp on certain public property. Rather, this danger exists because the homeless lack shelter, which was just as true before the Urgency Ordinance as it is now. *See Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 433 (N.D. Cal. 2017) (dismissing state-created danger claim because "generalized dangers of living on the street preexisted Plaintiffs' relocation"). To accept Plaintiffs' theory would be tantamount to imposing an affirmative constitutional duty on the City to provide shelter for everyone within its borders. There is no such duty.

Importantly, nothing requires Plaintiffs or any homeless people to stay in the designated campsite during the heat of the day. The site is designed and intended as a place where the homeless may sleep *at night*. They are free to leave during the day and seek shade elsewhere, such as Pico Park across the street or at the beach, where Plaintiffs say the City allows shade structures during the day (TRO Mem. at 8).

In addition to complaining about lack of shade, Plaintiffs claim that the site is "unfit for human or animal habitation." TRO Mem. at 1. This appears to refer to the fact that the camping site is "partially located in 'Seismic Liquefaction' and 'Seismic Landslide' areas." Dkt. 69-1, Ex. 1 (planning commission report). That is why a *permanent structure* (like the animal services shelter) may not be appropriate for the site. There is no such risk to tents or campsites. *See* Sund Decl. ¶ 8.

B. ADA. Under the heading of disability discrimination, Plaintiffs raise a smorgasbord of complaints about the campsite. Their arguments are meritless.

At the outset, it is important to observe that only one declarant in support of Plaintiffs' motion—Duane Nichols—is a named Plaintiff in this litigation. The other declarants are not parties to this case, and therefore cannot seek relief. To be sure, Plaintiffs filed this suit as a putative class action, but no class has yet been certified; the Court cannot issue a TRO unless a named Plaintiff is entitled to one. *See Zepeda*

v. United States INS, 753 F.2d 719, 728 n.1 (9th Cir. 1983) (explaining this point). Anticipating this flaw, Plaintiffs argue that "an injunction may extend beyond the named plaintiffs 'if such breadth is necessary to give prevailing parties the relief to which they are entitled.'" TRO Mem. at 21 (quoting *Easyriders Freedom FIGHT v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996)). But that just proves the point: The Court can only act as "necessary" to give the "parties" appropriate relief. Thus, the Court cannot and should not look beyond Nichols' non-entitlement to relief.

Moreover, although Nichols does not mention this in his declaration, he was recently offered transitional indoor housing in Long Beach through the VA—and he declined it. Sund Decl., ¶ 12. Having refused an offer of indoor shelter, Nichols has no standing to complain about any conditions at the campsite, which is designed only for those who have no alternative shelter available to them. Put another way, any harm that Nichols claims to be facing at the campsite is the result of his own, voluntary choices—not the City's actions—and is therefore not a basis for injunctive relief. These points alone are sufficient to dispose of Plaintiffs' ADA claims, since there is no Plaintiff with standing to invoke the statutory protections. That said, all of the complaints also fail on their own terms.

Plaintiffs repeatedly analogize to cases involving prisons. *See* TRO Mem. at 9, 16, 18, 19. But when the State imprisons an individual, the Eighth Amendment is triggered and so "prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The designated camping zone is not a prison; it is a piece of public land on which the City has authorized those without shelter to sleep. By doing so, the City has not assumed responsibility for providing food, water, shelter, medical care, or other needs of the homeless population. For that reason, most of Plaintiffs' complaints fundamentally miss the mark: The City has no duty to provide homeless individuals with drinking water, or electricity, or qualified personnel with "training on trauma-informed care." TRO Mem. at 16, 18. Nothing in the ADA requires the provision

of these affirmative services. *See Alexander v. Choate*, 469 U.S. 287, 301 (1985) (explaining that ADA does not require government to provide additional services or "alter th[e] definition of the benefit being offered"); *Townsend v. Quasim*, 328 F.3d 511, 518 (9th Cir. 2003) ("[P]ublic entities are not required to create new programs that provide heretofore unprovided services to assist disabled persons.").

To be sure, the ADA may require the City to make the site *equally available* to disabled individuals. But no Plaintiff has demonstrated exclusion from the site—or the lack of "meaningful access" to its benefits, *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996)—on account of disability. Again, the only Plaintiff who has filed a declaration in support of the TRO is Nichols, and while he complains that certain services are *not* provided at the site, it is clear from his declaration that he has been afforded full access to the services that *are* provided by the City. Accordingly, Nichols has no likelihood of success on his ADA claim.

Moreover, even if a barrier to accessibility existed, the remedy would be a reasonable accommodation for the disabled individual—not closure of the site or an injunction against the Ordinance. Plaintiffs have not asked for any accommodations, however; and their counsel refused to discuss the matter with the City's counsel before filing this motion. Doing so would not have been futile, as the City has been willing to address disability-access issues brought to its attention. For example, while Plaintiffs argue that the location of the site (on a hill) makes it hard to access, the Sheriff does not cite or arrest anyone for camping in public without first calling the City to arrange for transportation to the site if the individual needs assistance to get there. Sund Decl. ¶ 12; *see also* Gustafson Decl. ¶ 2 (explaining he was "offered a ride ... to the new camping location"). That is more than sufficient accommodation for anyone whose disability makes it unfeasible to otherwise access the site.[2]

[2] Moreover, Plaintiffs do not actually show that the route is too steep as a legal matter under the ADA's Accessibility Guidelines. *See, e.g.*, *Guerra v. W. L.A. Coll.*, 2018 WL 4026452, at *6 (C.D. Cal. 2018) (explaining in detail how these guidelines regulate the maximum slope and cross-slope of an accessible route under the ADA).

Many of Plaintiffs' complaints are also misleading or false. For example, while Nichols has "difficulty walking" (Nichols Decl. ¶ 10), he does not mention in his declaration that he "uses a tricycle for mobility assistance" (Dkt. 17 ("Am. Compl.") ¶ 88). Plaintiffs complain about the lack of drinking water, but they admit that water is available at Pico Park, literally "across the street from the camp" and by their own account less than a 6-minute walk. TRO Mem. at 4; Scheyer Decl. ¶ 11. They also omit that cases of drinking water are frequently donated and are available to the campers. *See* Sund Decl. ¶ 9. The two portable bathrooms are serviced every two days by a professional provider, which has not recommended more frequent service. *Id.*, ¶ 5.[3] And while Plaintiffs imply that the campsite is full and turning people away (TRO Mem. at 6), the declaration that they cite in support was executed *over a month ago*. The site is not at capacity, and is not turning anyone away. Sund Decl., ¶¶ 5, 7. And, if that was a legitimate basis for emergency relief, why did Plaintiffs wait over a month to raise it?

In short, Plaintiffs and other homeless individuals may wish that the City had chosen a different spot for the designated campsite or that the City offered additional services to the campers, but they have not established any viable legal claims under the Constitution or the ADA. And they certainly have not shown anything to warrant the extraordinary remedy of an *ex parte* TRO invalidating the Urgency Ordinance.

III. THE PUBLIC INTEREST AND BALANCE OF HARMS CUT AGAINST A TRO

The public interest and balance of equities counsel strongly against a TRO. "'[C]ourts should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

[3] Notably, the ADA does "not prohibit isolated or temporary interruptions in access or service due to maintenance or repairs." 28 C.F.R. § 36.211(b); *see Sharp v. Capitol City Brewing Co., LLC*, 680 F. Supp. 2d 51 (D.D.C. 2010) (denying ADA claim where toilet-paper dispenser was empty on "one instance," as ADA regulations "grant the Restaurant a reasonable amount of time" "to 'maintain' the ADA-compliant toilet-paper dispenser").

1 In assessing whether a TRO would serve the public interest, courts must "give due
2 weight to the serious consideration of the public interest … that has already been
3 undertaken" by the officials "who unanimously passed the [ordinance] that [is] the
4 subject" of the challenge. *Id*. at 1140. When local officials "unanimously" adopt an
5 ordinance, they have "already considered" the public interest and necessarily found
6 that the enacted measure advances it—and a court is "constrained" from overriding
7 that judgment. *Golden Gate Restaurant Ass'n v. City & Cty. of San Francisco*, 512
8 F.3d 1112, 1126-27 (9th Cir. 2008). Indeed, "[w]e are not sure on what basis a court
9 could conclude that the public interest is *not* served by an ordinance adopted in such
10 a fashion." *Id*. at 1127 (emphasis added).

11 The Urgency Ordinance adopted by San Clemente represents the City
12 Council's unanimous judgment—supported by extensive, detailed findings—that a
13 designated camping zone serves the public interest. As the Council found, a central
14 site will protect the homeless from the risk of death or injury; reduce physical conflict
15 between homeless persons and other people; and provide a safe, sanitary, and private
16 environment for the homeless to reside. The Council also found that the designated
17 zone will promote public safety at the Metrolink station and other public facilities,
18 especially with "the great increase of tourists, vacationers, and visitors anticipated
19 after Memorial Day"; preserve sidewalk access for disabled persons (which, unlike
20 Plaintiffs' complaints, is a genuine ADA issue); protect against the risk of fire; reduce
21 health hazards caused by public defecation and urination; and prevent further damage
22 to historical landmarks and City property.

23 These are (obviously) legitimate public interests, and there is no question that
24 the City has every right to enact a lawful ordinance that, in its judgment, advances
25 them. *See*, *e.g.*, *One World One Family Now v. City & Cty. of Honolulu*, 76 F.3d
26 1009, 1013 (9th Cir. 1996) (cities have "a substantial interest in assuring safe and
27 convenient circulation on their streets"; "protecting the aesthetic appearance of their
28 communities"; and "maintaining the orderly movement of pedestrians on . . . crowded

sidewalks"); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) ("[a] city's efforts to protect public health and safety are clearly within its police powers").

That judgment must be respected, *see Golden Gate*, 512 F.3d at 1226-27, and it means that the public interest and the balancing of equities favor letting the City enforce its Urgency Ordinance. *Nickler v. Cty. of Clark*, 648 F. App'x 601, 605 (9th Cir. 2016) ("The public interest favors giving deference to those concerned about public safety in [public areas]. And, the balance of equities also favors concerns of public safety ...."). Indeed, given the City's express findings that the Ordinance is "immediately necessary" to ensure public health and safety, "[t]his case may present a situation in which otherwise avoidable human suffering results from the issuance of the [TRO]." *Stormans*, 586 F.3d at 1140; *cf. Golden Gate*, 512 F.3d at 1126 (balance of hardships "tips sharply in favor" of a party whose "injuries include preventable human suffering"); *One World*, 76 F.3d at 1013 (emphasizing "deference due to the city council's determinations of necessity").

CONCLUSION

Plaintiffs' request for a TRO should be denied. In light of their abuse of the *ex parte* procedures, the Court should order Plaintiffs to reimburse the City's fees and costs incurred in connection with responding to this application.

Dated: July 1, 2019

JONES DAY

By:
John A. Vogt

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