No.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOUSING IS A HUMAN RIGHTS, DUANE NICHOLS
Petitioners/Plaintiffs

v.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

CITY OF SAN CLEMENTE

Real Party in Interest/Defendants

URGENCY MOTION UNDER CIRCUIT RULE 27-3

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA IN

CASE NO. CACD Case No. 8:19-cv-00388 PA KES

CAROL A. SOBEL SBN 84483
LAW OFFICE OF CAROL A. SOBEL
725 Arizona Avenue, Ste 300
Santa Monica, ca 90401
T. 310 393 3055
E carolsobellaw@gmail.com

PAUL L. HOFFMAN SBN 71244
SCHONBRUN, SEPLOW, HARRIS & HOFFMAN
11543 Olympic Boulevard
Los Angeles, California
T. 310 396-0731
E. hoffpaul@aol.com

Attorneys for Petitioners/Plaintiffs

CIRCUIT RULE 27-3 CERTIFICATE

The counsel for the parties are as follows:

Plaintiffs/Petitioners:

Carol A. Sobel SBN 84483
Law Office of Carol A. Sobel
725 Arizona Avenue, Suite 300
Santa Monica, CA 90401
t. 310 393 3055
e. carolsobel@aol.com

Paul L. Hoffman SBN 71244
Schonbrun, Seplow, Harris & Hoffman
11543 Olympic Boulevard
Los Angeles, CA 90064
t. 310 396 0731
e. hoffpaul@aol.com

Defendant/Real Party in Interest:

Yaakov M. Roth (pro hac vice)
yroth@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Telephone: +1.202.879.3939

Robert A. Naeve (SBN 106095)
rnaeve@jonesday.com
Richard J. Grabowski (SBN125666)
rgrabowski@jonesday.com
John A. Vogt (SBN 198677)
javogt@jonesday.com
JONES DAY
3161 Michelson Drive, Suite 800
Irvine, CA 92612.4408
Telephone: +1.949.851.3939

Counsel for Defendant were notified of this motion by email on July 26, 2018 at approximately 8:50 a.m. PST. Yaakov Roth, Counsel for Defendant City of San Clemente, has advised that the Defendant opposes the motion.

Service will be done via the district court's CM/ECF system. The district court will be served at:

kamilla_sali-suleyman@cacd.uscourts.gov.

URGENCY MOTION FOR A WRIT OF MANDAMUS

Pursuant to Circuit Rule 27-3, Plaintiffs/Petitioners, file an Urgency Motion seeking a writ of mandamus, pursuant to Circuit Rule 21-1, directing the lower court to enter an order enjoining, in whole or in part, the "Urgency Ordinance" passed by Defendant/Real Party, criminalizing unsheltered homeless people camping other than at the "designated" site.

All grounds set forth in the Urgency Motion were presented below.

The designated site imposes severe disability barriers for Plaintiffs and is only accessed by climbing two-tenths of a mile up a steep hill to the sole entrance, 20-feet above flat land. Plaintiffs also raised inhumane camp conditions: toilets overflowing with human waste, no potable water, no shade, and no food.

The district court denied a Request for a Temporary Restraining Order and cautioned against further emergency relief requests. Plaintiffs' health and safety is at risk at this site where their only choice is to be there each night or face arrest simply because they are homeless in a City that has not a single shelter bed available. For the reasons stated below, mandamus is appropriate and necessary.

Dated: July 26, 2019 Respectfully submitted,

ELDER LAW & DISABILITY RIGHTS CENTER
LAW OFFICE OF CAROL A. SOBEL
SCHONBRUN DESIMONE HARRIS & HOFFMAN

/s/ Carol A. Sobel
By: CAROL A. SOBEL
Attorneys for Plaintiffs/Petitioners

I. OPINION BELOW

On July 5, 2019, the Honorable Percy Anderson, United States District Judge for the Central District of California - Western Division, entered an Order denying Petitioners' request for a Temporary Restraining Order. The Order is set forth at the Excerpt of Record: 1 and incorporated by reference. Plaintiffs challenged a recently enacted law criminalizing homelessness as violative of Fourteenth Amendment substantive due process rights and the Americans with Disabilities Act.

The opinion of the lower court is based on clear errors of law and a clearly erroneous assessment of the evidence. The district court applied the incorrect analysis to Plaintiffs' disability claim, holding that the site was not subject to the ADA, an argument rejected by this Court in *Kirola v. City and County of S.F.*, 860 F.3d 1164 (9th Cir. 2017). There, as here, the lower court held that real property is a "facility" within the meaning of the ADA and that Plaintiffs correctly argued violations of "feature-specific" guidelines absent "facility-specific" guidelines that applied. *Id.* at 1179.[1] The error below is even more egregious because the court reasoned that a single ADA-compliant porta-potty somehow satisfied ADA requirements at a site that is only accessed by climbing .2 of a mile up a steep hill. ER:5 (Op. p.5).

[1] The lower court relied on *Townsend v. Quasim*, 328 F.3d 511, 518 (9th Cir. 2003), for the rule that "entities are required only to make reasonable changes in existing policies in order to accommodate individuals' disabilities." *Townsend*, about the extent of long-term care services, is of little import when the result of not accommodating disabilities is endangerment or jail, as here. ER:7 (Op. p.7).

II. STATEMENT OF FACTS

Plaintiffs are homeless persons, many with serious co-existing disabilities that substantially limit their ability to see, walk and climb. Defendant City of San Clemente ("City"), with not a single indoor shelter bed for approximately 100 unhoused persons, recently enacted an "Urgency Ordinance," criminalizing camping in the City other than one site at the sewage plant. ER:44-61.

The City passed this law in late May after the amended decision issued in *Martin v. City of Boise,* 920 F.3d 584 (9th Cir. 2019). In June, the City passed another law, banning tents during the day at the site even though there is no shade. This site was previously deemed unfit for human habitation and not compliant with state law requiring homeless shelters to be located close to basic services. *See* ER:42 (TRO Ex.1). Plaintiffs challenged the law as violative of their rights because they must camp at this site - with no potable water, no shade, no adequate sanitation and no access to food - or face arrest. They also challenged the law as violative of the ADA.

III. STATEMENT OF ISSUES PRESENTED

The issues presented are as follows:

1. Whether a City may enact a criminal law restricting homeless individuals, including disabled individuals, to a designated campsite in a City with no shelter beds where the site is only accessible by climbing .2 of a mile up a hill to the access point.

2. Whether, apart from the disability access issues, a City may require,

under threat of arrest, homeless individuals to camp at a site that, by acts of the City, exposes them to the elements without protection, lacks adequate sanitation, potable water, shade, or access to food.

3. Whether the district court erred in denying the requested relief on the grounds that Plaintiffs did not cite "a single case in which an anti-camping ordinance has been enjoined as a result of the Due Process Clause and ADA arguments[,]" where no prior case has presented or addressed this question. ER:8 (Op. p. 8).

4. Whether, in light of this Court's decision in *Kirola v. City and County of S.F.*, 860 F.3d 1164, 1179 (9th Cir. 2017), the district court erred in finding that Plaintiffs' disability claims failed because they focused on "feature-specific" violations and did not identify a specific "facility-specific" ADA guideline that was violated. ER:5 (Op. p.5 and fn.3)

IV. STATEMENT OF RELIEF SOUGHT

Plaintiffs seek a writ of mandamus, directing the lower court to enter an order requiring Respondents to select a different designated site that does not impose the same safety and disability hazards as are present and unavoidable at the current designated campsite.

V. REASONS FOR GRANTING THE PETITION

The district court rejected Plaintiffs' claims below, ruling, in part, that Plaintiffs cited no case that enjoined an anti-camping ordinance on the basis of a Fourteenth

Amendment due process violation or an ADA violation. ER:8 (Op. p.8). That is true as all of the cases since *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), including *Martin*, decided only an Eighth Amendment claim where camping was banned entirely and citations and arrests had already occurred.[2] That the City took a different but equally egregious approach to criminalizing homelessness post-*Martin* does not mean that Plaintiffs did not state a claim under the Fourteenth Amendment or the ADA. There is no law precisely like this one, before or after *Martin*, that tells unsheltered disabled people they must sleep at an unsanitary site, accessed only by climbing a steep hill, or go to jail. The lack of a similar case is not determinative. *Hope v. Pelzer*, 536 U.S. 730 (2002).

Plaintiffs' claims are not unexpected. "People with disabilities are disproportionately represented among all people experiencing homelessness and, ... it is estimated that on any given day nearly one-quarter (24%) of individuals experiencing homelessness ... are people with disabilities who met the federal definition of experiencing chronic homelessness."[3] In 2017, nationwide, 69% of

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[2] Plaintiffs' counsel here was also counsel on *Jones v. City of Los Angeles*. *Jones* presented two claims for relief: the Eighth Amendment and a Fourteenth Amendment "right to shelter" argument. A review of the Amended Complaint filed in the *Boise* case reveals that no State-created Danger or ADA claim was brought in that case, either.

[3] "Homelessness in America: Focus on Chronic Homelessness Among People with Disabilities," U.S. Interagency Council on Homelessness, Aug. 2018. https://www.usich.gov/resources/uploads/asset_library/Homelessness-in-America-Focus-on-chronic.pdf

"individuals with disabilities who experience chronic homelessness were staying in unsheltered locations ... rather than in emergency shelters[.]" *Id.* at p.2.

Plaintiffs presented a strong case for emergency relief. The effect of the City's actions on disabled homeless persons, in particular, compels extraordinary mandamus.

A. The District Court Erred in Finding No Ada Violation

The lower court focused first on the disability claim, holding that Petitioners failed to show the ADA applied to the site, or violation of a specific disability rule.

1. The campsite is a "facility" subject to the ADA

Plaintiffs showed that the camp is a "facility" subject to the Americans with Disabilities Act ("ADA"). ER:27-28 (TRO Memorandum ("TRO") at pp. 10-11), citing 28 C.F.R. § 35.104; *Fortyune v. City of Lomita*, 766 F.3d 1098, 1102-1103 and fn. 3 (9th Cir. 2004); and *Kirola v. City and Cty. of S.F.*, 860 F.3d 1164, 1179 (9th Cir. 2017). The term "facilities" to all "sites, ... roads, walks, passageways ... or other real ... property." 28 C.F.R. §35.104 (edits supplied). Title II of the ADA applies to all "services, programs, or a activities of a public entity[.]" TRO at p.12, citing 42 U.S.C. §12132. All facilities must "be 'readily accessible to and usable by individuals with disabilities.' 28 C.F.R. § 35.151(a)(1)." *Kirola*, 860 F.3d at 1176.

The court below made the same error as in *Kirola*, holding that there was no evidence that ADAAG compliance applied to this facility based on the belief that there had to be "facility-specific sections in the ADA guidelines." *Id.* at 1178-79. The proper focus is on "feature-specific requirements" of access to the camp because, not

surprisingly, no ADA section sets out rules for sites for homeless persons and no prior case addressed a "facility" on top of a hill with limited disability access. *Id.* at 1180.

2. Plaintiffs are "qualified" individuals with disabilities

Plaintiffs are "qualified" individuals with significant disabilities who face serious barriers accessing and at the only site in the City where they may camp without being arrested. ER:88-89, 93, 100, 132, 135, 139-141 (Gustafson Decl. ¶¶ 4-5, Ponce Decl. ¶¶ 2-4, Nichols Decl. ¶15, Brown Decl. ¶¶ 2-3, Riley Decl. ¶¶1-2,5), O'Malley Decl. ¶¶3,8,16. When the Temporary Restraining Order was filed, 20% of those at the camp, or seeking to stay there, attested to these substantial barriers. The district court ignored this evidence, emphasizing that there was no evidence on the "grade of the hill or any other information indicating that the hill is subject to or violative of the ADA's design guidelines." ER:5 (Op. p.5, n. 3).

Plaintiffs did not introduce specific evidence of the incline rise allowed by the ADA, but they were not required to. They provided ample evidence that accessing the camp was, at best, grueling for some, even with assistive mobility devices, and impossible for others.[4] ER:89-90, 93, 100-101, 135, 139, 141 (Gustafson ¶¶6-9; Ponce ¶5; Nichols ¶15,20; Riley ¶5; O'Malley ¶¶3,16). In addition to citing relevant statutes, cases and their declarations, Plaintiffs submitted the declaration of Allysa Scheyer, who tracked the path to the camp from the street below the hill and also from Pico Park, the closest parking location to the camp. Pico Park has access to clean bathrooms

[4] The shortest distance is .2 of a mile, or 1,056 feet from Camino Real to the campsite entrance on Avenida Pico. ER:109 (Scheyer Decl. ¶11).

and disability parking, although no overnight parking is allowed. Ms. Scheyer attested to a 20 to 26-foot elevation, depending upon which point she started from to reach the camp. ER:106-109 (Scheyer Decl. at ¶¶7-11 and Exhibits A, B).

The district court agreed with Defendant that ADA requirements were met just by putting an ADA-compliant porta-potty at the camp and credited the clean bathrooms at Pico Park as somehow excusing the intolerable sanitation conditions at the campsite.[5] ER:5-6 (Op. pp.5-6). Petitioners explained the difficulty for disabled persons to reach Pico Park. They attested that the only way to do so was to cross a four-lane road against traffic and hope they were not struck by cars. ER:99 (Nichols ¶13).[6] They took this risk because their disabilities made it difficult, if not impossible, to get to the park by walking further up the hill to a pedestrian cross-walk. *Id.*

Despite Petitioners' unrefuted evidence, the district court concluded that the City had taken steps to reduce the adverse impact of conditions at the camp. No

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[5] Faced with evidence of toilets overflowing with, and the stench of, human excrement, the lower court opined that "the City has provided two portable toilets and a hand wash station. One of the toilets is ADA accessible. ... The contractor has not informed the City that they should increase the frequency of that service." ER:5 (Op. at p.5). That is an inadequate response given unrefuted evidence that the contractor services the toilets by washing excrement on to the campsite and leaving it there. ER:98-99 (Nichols Decl. ¶¶ 8-9).

[6] The Court accepted, without evidence and an opportunity to refute, Defendant's assertion that a "named plaintiff" refused a bed at a Veterans' Affairs facility and "returned to the campground." ER:6 (Op. p.6) Mr. Nichols is the "named plaintiff." He recently began the process to upgrade his discharge. Currently, he does not qualify for VA housing or medical services. He was only offered to add his name on a lengthy waiting list for a shelter in another County.

evidence supported this result. Even if the City brought in potable water since there is none at this site, and even if it added another porta-potty and stopped cleaning them by leaving water with feces on site, the camp would still not be ADA compliant.

Short of leveling the hillside or adding an elevator, an incline with a height of more than 20 feet at the camp entrance violates the ADA. The City can find a site without these barriers, or suspend the law while there are no available shelter beds. The "Urgency Ordinance" leaves an already vulnerable population at imminent risk.[7]

B. The District Court Erred in Finding No Fourteenth Amendment Violation

Plaintiffs alleged that forcing them to the site under threat of arrest is a state-created danger, violating Fourteenth Amendment substantive due process rights because of the conditions at the camp. Previously the location of the City's animal shelter, the site is in the San Clemente Sewer Plant City Corporation Yard.[8] In 2014, the City Planning Commission rejected the site for a shelter based, in part, on its geologic instability. "[B]ecause the site was deemed too hazardous to house animals,

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[7] The district court noted with approval the "mutually-beneficial negotiated settlement" in *Orange County Catholic Worker v. County of Los Angeles,* Case No. 18-0155 DOC JDE (C.D. Cal. 2019), and suggested a similar approach here. ER: 1 (Op. at p.3). Petitioners' counsel are counsel in the *Catholic Worker* case, which resulted in an unprecedented regional settlement on July 23, 2019 for Northern and Central Orange County. At the hearing, Board of Supervisors Chair Bartlett stated that the County was ready to work with the defendants in this matter when and if they were ready to "step up to the plate" and create some shelter capacity. Transcript of July 23, 2019: p. 10, l. 1-10 [Dkt. 320].

[8] *See* http://www.san-clemente.org/home/showdocument?id=24929

it seems to follow that it would be too hazardous for the homeless as well." ER:79 (Remarks of Comm. Ruehlin, Planning Commission Minutes, May 7, 2014).

There is inadequate sanitation, no shade, no potable water and no electricity at the site, so there is no way to get out of the heat, store medications or charge a cell phone, and no easy way for disabled persons to get to a place where electricity is available since they face the hill on return. ER:98-99 (Nichols ¶¶9-12). The lack of potable water is critical and walking down the hill to get water is difficult for the disabled Plaintiffs. ER:99 (Nichols Decl. ¶10). A cell phone is a lifeline to supportive services, medical treatment and emergency care. ER:99 (Nichols Decl. ¶11).

Within a few days of the camp opening, the two porta-potties were full of human waste. Plaintiffs submitted substantial evidence of this health crisis, including photographs taken on three days in one week. ER: 98-99, 118, 120, 122, 125, 130, 132-133, 151-152, 162,164 (Nichols Decl. ¶¶8-9; Sobel Decl. ¶3, Ex. A and B; Weitzman Decl. ¶5, Ex. B; Brown Decl. ¶¶4,6; Mikulec Decl. ¶¶9-11, Ex. E-G). The stench of the toilets is strong, as are noxious fumes from the sewage plant. ER:98-100; 111 (Nichols Decl. ¶¶8,14; Scheyer Decl. ¶15).

The right to shelter is a basic human need. *Helling v. McKinney*, 509 U.S. 25, 32 (1993). Repeatedly, this Court has held that "[i]nvoluntary exposure to the elements" by affirmative government action is a danger under Fourteenth Amendment substantive due process analysis, *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1089-90 (9th Cir. 2000), because it "'creates or exposes an individual to a danger which he or

she would not otherwise have faced.'" *Henry A. v. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012) (internal citation omitted) (bracketed edits supplied). Here, the City knew of "(1) an unusually serious risk of harm, … (2) [had] actual knowledge of (or, at least, willful blindness to) that elevated risk, and (3) ... fail[ed] to take obvious steps to address that known, serious risk." *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996) (edits supplied).

Plaintiffs presented evidence of an increased risk of hyperthermia. *See* https://ephtracking.cdc.gov/show ClimateChangeExtremeHeat.action. ER:24-27 (TRO pp.7-10). This is common sense. *Hope v. Pelzer*, 536 U.S. at 734-35; *id.* at 738, citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). Previously, Plaintiffs had access to shade and water. ER:98,152-153 (Nichols ¶9; Mikulec ¶12). Now, the risk of heat-related illnesses is far greater at the site. Moreover, the City's laws create serious health risks for those like Plaintiffs Nichols and Ponce, who cannot tolerate exposure to sustained heat because of their various medical conditions and medications. ER: 93, 100-101 (Ponce ¶3; Nichols ¶¶16-18).

Both federal and California OSHA agencies recognize that serious illness and death may result from prolonged exposure to heat and humidity without shade and water. For this reason, OSHA mandates preventive measures in extreme heat. *See e.g.,* http://osha.gov/SLTC/heatillness/heat_index, and Heat Illness Prevention Regulation Amendments published in the California Code of Regulations, Title 8, Section 3395. These include requiring shade even before the temperature reaches 80 degrees

Farenheit. *Id.* at p.4. "Shade is not adequate when heat in the area of shade defeats the purpose of the shade, which is to allow the body to cool" and require "access to potable drinking water" that is "fresh, pure, [and] suitably cool[.]" *Id.* at p. 3. Heat illness can progress rapidly and is an emergency. *Id.* at p.6. The City's library, more than a mile from the camp, is identified as a cooling center, but it is not easily reached and, when it closes, Petitioners still must climb the hill.

VI. THE STANDARD OF REVIEW ON A WRIT OF MANDAMUS

The Court has "authority to issue a writ of mandamus under the 'All Writs Act.' 28 U.S.C. § 1651. *Cohen v. U.S. Dist. Court*, 586 F.3d 703, 708 (9th Cir. 2009). The Circuit applies five factors to assess whether mandamus relief is appropriate:

> *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977), ... established five guidelines to guide the inquiry whether mandamus is appropriate in a given case: whether (1) the petitioner has no other adequate means, such as a direct appeal, to obtain the desired relief; (2) the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems or issues of first impression. *Id.* at 654-655.

Stanley v. Chappell, 764 F.3d 990, 996 (9th Cir. 2014).

"The factors serve as guidelines, a point of departure for our analysis of the propriety of mandamus relief." *Admiral Ins. Co. v. U.S. Dist. Court* 881 F.2d 1486, 1492 (9th Cir. 1989). "[R]arely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable." *Baumann*, 557 F.2d at 655; *see also*. *Burlington Northern & Santa Fe Ry. Co. v. U.S.*

Dist. Court, 408 F.3d 1142, 1146 (9th Cir. 2005) (same). Only "the absence of the third factor, clear error, is dispositive." *Id.* The only inapt guideline here is the fourth: "oft repeated error or manifests persistent disregard of the federal rules." *Bauman*, 557 F.2d at 655. "[I]t is difficult to envision a case that involves both an oft-repeated error as well as an issue of first impression." *Valley Broad. Co. v. United States Dist. Court*, 798 F.2d 1289, 1292 n.3 (9th Cir. 1986).

VII. PETITIONERS MEET THE REQUIREMENTS FOR MANDAMUS

A. The City's Ordinances Criminalizing Homelessness

1. The Urgency Ordinance

On May 21, 2019, the City Council approved Urgency Ordinance No. 1673, relocating homeless persons to the "Designated Camping Area." The measure recited the "risk of death and injury [to homeless individuals] due to natural disasters ..., exposure to weather, lack of adequate sanitation and debris services, and other conditions detrimental to their health and safety," stressing harm to unhoused individuals from "unsanitary conditions." ER:44-45. The "Designated Camping Area" is "the sole public area in the City available for camping purposes by those persons experiencing homelessness or otherwise unable to obtain shelter." ER:51(Sec. 4). On May 24, 2019, the City began enforcing the ban.

2. The Community Safety Plan Standard Operating Procedures

With the Urgency Ordinance, the City posted a list of rules for the site. ER:65 (TRO Ex. 3). While most are like those at shelters – no violence, weapons, or drugs -

they also ban tents during the day. *Id.* On June 4, 2019, the Council added the "Transitional Camp" rules to the Municipal Code as misdemeanors. SCMC §1.16.010.

3. Other Applicable Ordinances and Regulations

The City also outlaws parking overnight at a City park and living in a vehicle.

a. The ban on overnight use of a park

SCMC §9.12.060H,"Municipal parks and trails," provides that:

> No vehicle will remain parked in any City park parking lot past the posted curfew set forth in this section, or said vehicle shall be removed pursuant to California Vehicle Code Section 22651 sub.(n).

b. The ban on camping or living in a vehicle

SCMC §9.04.100 - "Trailers, Mobilehomes, etc.—Occupancy Outside Mobilehome Parks," provides that:

> Except as provided in Title 17, no person shall occupy or use any mobilehome, trailer, camp car, vehicle or other conveyance, tent or temporary structure of any kind as a dwelling or for living or sleeping purposes upon any public or private property within the city, except within a mobilehome park or campground ... operating under a license or other permit from the city, or operating under jurisdiction of the state.

B. Petitioners Have No Other Means to Obtain the Desired Relief

Plaintiffs must climb a steep incline to access the only place where they may camp without arrest, next to the sewage plant with no running water, no food, no sanitation and no shade. If they leave to get basic needs, they face the hill to return.

C. Petitioners Will Be Damaged In A Way Not Correctable on Appeal

Petitioners' harm is substantial, irreparable and continuing. They submitted strong evidence of their disabilities and the barriers at this site. A 20-feet high access

point reached after .2 of a mile is like a third-story entrance to a building with 9-feet ceilings. They detailed the impact of exposure to the sun and heat, the unsanitary conditions at the camp and the choice between crossing a four-lane roadway, risking their safety, or foregoing clean bathrooms.[9]

D. The District Court's Order Rests on a Clear Error Law

1. The district court incorrectly concluded Plaintiffs failed to demonstrate that the campsite is subject to the ADA

The district court incorrectly found that Petitioners failed to identify a specific disability provision violated by the accessibility issues at the camp. Petitioners cited the same provisions this Court applied in *Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164 (9th Cir. 2017). ER:28 (TRO at p.11). *Kirola* recognized that Title II of the Americans with Disabilities Act (ADA) applies to all public properties, including parks and real property. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.S. § 12132. ADA "regulations define 'facility' broadly to include all or any portion of ... sites, ... roads, walks, passageways, parking lots, or other real ... property[.] 28 C.F.R. § 35.104." *Id.* at 1169 n.1.

[9] The district court stated it would take 6 minutes to get to the park based on the Scheyer Declaration. She is able-bodied, runs three to four times a week and took 6 minutes to walk .2 of a mile to the camp entry from the flat land below. She began sweating almost at once from the heat and the climb. ER:106-107 (Scheyer Decl. ¶¶7-8). At this rate, it would take about 30 minutes to walk a mile.

Kirola held it was erroneous to fail to apply the ADA to"public rights-of-way, parks, and playground facilities" was erroneous. *Id.* at 1179. Just because "there are no facility-specific requirements for parks, [does not mean] then parks need not comply with ADAAG [ADA Accessibility Guidelines] at all." *Id.* at 1180 (edit supplied). "No provision excludes application to public rights-of-way, parks, or playgrounds. Instead, ADAAG uses the broad phrase "all areas." *Id.* Here, too, "all areas" includes the camp and the public right-of-way, the only access to the site.

Moreover, as in *Kirola*, even if the ADAAG did not apply to existing properties such as rights-of-way and parks, "[p]ublic entities would not suddenly find themselves free to ignore access concerns when altering or building new rights-of-way, parks, and playgrounds. The requirements of 28 C.F.R. § 35.151 would still apply, holding public entities to the 'readily accessible [] and usable' standard. Id. § 35.151(a)." *Id.*

Unlike *Kirola*, where disabled persons could access some of San Francisco's recreational facilities, Petitioners have no alternative here. There is only one right-of-way, up a steep hill to the only access to the only place in the City where homeless individuals may sleep at night without arrest. The City may not put disabled homeless people in jail because it has selected a non-ADA compliant location for its campsite.

The district court also accepted the City's representation that it provides transportation for those requiring assistance as adequate to overcome the disability access claims. ER: (Op. at p.6). However, what the City did not tell the Court is that it only offers a ride to move homeless individuals to the site initially but no

transportation is provided after that. Every time Plaintiffs leave the site to get food, services or other necessities, they are on their own to get down and back up the hill.

Stephen Gustafson attested to this access barrier. He uses a cart for mobility because of his disability. ER:90 (Gustafson ¶9). It is extremely painful for him walk up the hill because of his multiple disabilities. ER:90-91 (Gustafson ¶¶9-10). When he went to the grocery store more than a mile away from the camp, he was unable to get back to the site before night because of his disability and slept outside, fearful of arrest. ER:89-90 (Gustafson ¶¶6-7). Mr. Nichols, with multiple co-existing disabilities, cannot get up the hill without repeatedly stopping to rest. ER:100 (Nichols ¶15). Ms. Ponce and Mr. O'Malley cannot access the camp because they cannot walk up the hill and there is no parking at the site or overnight parking close enough to walk to the camp. ER: 93-94, 141, 155-156, 167, 169, 171, 173 (Ponce ¶¶5,7; O'Malley ¶16; Mikulec ¶¶18-20 and Ex. M,N,P,Q). So, while it is true that Petitioners may leave the camp during the day, they must climb the hill to return and avoid arrest.

E. The Decision Below Raises New and Important Issues of Firt Impression

On April 1, 2019, the amended opinion issued in *Martin v. City of Boise,* 920 F.3d 584 (9th Cir. 2019). The Court noted it was not holding "that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible." *Id.* at n. 8 (emphasis in original). The Court cautioned that "[w]hether some other

ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to 'live out the universal and unavoidable consequences of being human' in the way the ordinance prescribes." *Id.*, quoting *Jones*, 444 F.3d at 1123. *Martin* cannot mean that a City may punish homeless persons for the inability to "live out the universal and unavoidable consequences of being human" where there are grave health, safety and disability issues. 920 F.3d at 617 n.8.

F. Absent Immediate Relief Petitioners Will Be Irreparably Harmed

"The standard for injury in fact [under the ADA] is whether a plaintiff has encountered at least one barrier that interfered with her access to the particular public facility and whether she intends to return or is deterred from returning to that facility." *Kirola,* 860 F.3d at 1175 (brackets supplied). Petitioners met this standard, showing "at least one barrier that interfered with acess" and intent to return to the site, while three attested deterence because of disabilities. ER: 89, 93-94, 101, 132, 135-136, 139-141 (Gustafson ¶6; Ponce ¶¶4-7; Nichols ¶20; Brown ¶ 4; Riley ¶¶3,5 O'Malley ¶7,8,16). They also showed redressability. "Through a properly framed injunction, the district court can ensure that the City alters or removes the access barriers [Petitioners] encountered. As a result, they would "personally would benefit in a tangible way from the court's intervention." *Kirola,* 860 F.3d at 1175.

Kirola held that, while some of the City's parks and rights-of-way had significant access barriers, others did not, so Kirola could use much of these public resources. This Court also noted extensive mobility assistance with government-provided vans to

transport disabled residents. None of that exists here. After the initial transport to this site, Plaintiffs are on their own to climb the hill daily. Their allegations are far more dire than in *Kirola* and go to basic daily existence and avoidance of arrest.

As in *Kirola*, the lower court "was free to fashion a different and narrower injunction, so long as the injunction is 'no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.' *United States v. AMC Entm't, Inc*., 549 F.3d 760, 775 (9th Cir. 2008) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979))." *Id.* at 1176.

VIII. CONCLUSION

Petitioners, including significantly disabled homeless persons, showed that the campsite violates the ADA and the Fourteenth Amendment. Absent emergency relief, they will continue to suffer serious, immediate and irreparable harm.

Dated: July 26, 2019 Respectfully submitted,

ELDER LAW & DISABILITY RIGHTS CENTER
LAW OFFICE OF CAROL A. SOBEL
SCHONBRUN, SEPLOW, HARRIS & HOFFMAN

/s/ Carol A. Sobel
By: CAROL A. SOBEL
Attorneys for Plaintiffs/Petitioners

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26-1, Plaintiffs/Petitioners inform the Court that there is no Corporation that is a party to this matter.

Dated: July 26, 2019

/s/ Carol A. Sobel

By: CAROL A. SOBEL

STATEMENT OF RELATED CASES

Plaintiffs/Petitioners are unaware of any related cases.

Dated: July 26, 2019

/s/ Carol A. Sobel
By: CAROL A. SOBEL

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the page limit of Ninth Circuit Rule 21-2(c) because the motion does not exceed 30 pages, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using WordPerfect in a proportionally spaced typeface, 14-point Times Roman.

Dated: July 26, 2019

/s/ Carol A. Sobel
By: CAROL A. SOBEL
Attorneys for Plaintiffs/Petitioners

CERTIFICATE OF SERVICE

The undersigned certifies that, on this date, I served the foregoing document and the by filing a true and correct copy of the document in the District Court's Electronic Court Filing ("ECF") system.

Dated: July 26, 2019

/s/ Carol A. Sobel
By: CAROL A. SOBEL
Attorneys for Plaintiffs/Petitioners

OPINION BELOW

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SA CV 19-388 PA (JDEx)	Date	July 5, 2019
Title	Housing is a Human Right Orange County, et al. v. County of Orange, et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Kamilla Sali-Suleyman	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is an Ex Parte Application for Temporary Restraining Order ("TRO Application") filed by plaintiffs Housing is a Human Right Orange County ("HHROC"), Orange County Catholic Worker, Emergency Shelter Coalition, Bruce Stroebel, Duane Nichols, and Darren James (collectively "Plaintiffs") (Docket No. 69). Through the TRO Application, Plaintiffs seek to enjoin enforcement of an anti-camping law enacted by defendant City of San Clemente. Plaintiffs do not, in this TRO Application, seek relief against any of the other co-defendants named in the First Amended Complaint ("1st AC").[1/] Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.

I. Factual and Procedural Background

Plaintiffs, several organizations dedicated to the provision of services for persons experiencing homelessness, along with several unhoused individuals on behalf of themselves and a putative class of "[a]ll persons who are experiencing homelessness in South County and are unable to access a shelter offering a reasonable accommodation for their disabilities, if any," commenced this action on February 27, 2019. Plaintiffs filed their 1st AC on May 13, 2019. The 1st AC asserts a variety of legal theories pursuant to both federal and state statutory and constitutional law. Specifically, the 1st AC asserts claims against certain municipalities located in the southern portion of Orange County, and Orange County itself, for: (1) violations of the Eighth and Fourteenth Amendments pursuant to 42 U.S.C. § 1983 against all defendants; (2) violations of the First and Fourth Amendments pursuant to 42 U.S.C. § 1983 against all defendants; (3) violations of the Due Process Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983 against all defendants; (4) liability pursuant to California Civil Code section

[1/] The other defendants named in the 1st AC are Orange County, City of Irvine, City of Aliso Viejo, City of Dana Point, and City of San Juan Capistrano (the Court will refer to these municipalities and San Clemente collectively as "Defendants").

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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815.6 for violating the Fourteenth Amendment, California Government Code Section 65583, Article I, section 7 of the California Constitution, and California Civil Code section 52.1 against all defendants; (5) violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12132 & 12133 against all defendants; (6) violations of California Civil Code section 52.1; (7) violations of the Due Process Clauses of the Fifth and Fourteenth Amendments pursuant to 42 U.S.C. § 1983 and Article I, section 7 of the California Constitution by plaintiff Darren James against San Clemente; (8) violation of California Government Code section 11135 against all defendants; and (9) declaratory and injunctive relief pursuant to California Code of Civil Procedure section 526a against all defendants.

In the 1st AC, Plaintiffs seek injunctive and declaratory relief to prevent Defendants from citing or arresting individuals for "quality of life" violations, including but not limited to camping, property, and loitering laws applicable in public places. The 1st AC also seeks damages for the individual plaintiffs and attorneys' fees. This action is a companion case to a series of cases pending before United States District Judge David O. Carter involving both Orange County and a number of the municipalities located in the northern part of the County. Both this action and those pending with Judge Carter concern municipal efforts to address the growing population of homeless individuals within the community. Those efforts, and in particular the enforcement of anti-camping ordinances in some municipalities, are subject to the Ninth Circuit's recent opinion in Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019).

In City of Boise, the Ninth Circuit concluded that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." Id. at 616. The Ninth Circuit stated that "just as the state may not criminalize the state of being 'homeless in public places,' the state may not 'criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets.'" Id. at 617 (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006), vacated, 505 F.3d 1006 (2007)). The Ninth Circuit clarified, however, that its "holding is a narrow one" and "'we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.'" Id. (quoting Jones, 444 F.3d at 1138). As the Ninth Circuit panel explained:

> Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance

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> prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible. See Jones, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the "universal and unavoidable consequences of being human" in the way the ordinance prescribes. Id. at 1136.

Id. at 617 n.8. According to the Ninth Circuit, "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." Id. at 617.[2/]

This Court would like to take a moment to recognize the extraordinary efforts and dogged determination of Judge Carter in fostering the conditions in which many communities and stakeholders have achieved a mutually-beneficial negotiated settlement that appears to provide far greater benefits to all sides than are usually achieved through protracted litigation. The entire Central District of California, and all of its Judges, owe an enormous debt of gratitude to Judge Carter for his tireless efforts. If this litigation takes a different path, nobody should view any such differences as a rejection of Judge Carter's approach or legal analysis. This action involves different parties and facts than those pending before Judge Carter. As the experienced litigators involved here know, litigation can take on a life of its own, and while trials can sometimes declare winners and losers, litigation frequently does a poor job of resolving complex societal problems. This Court hopes that the parties before it can learn and benefit from the example set by Judge Carter and the parties appearing before him.

In February 2018, the San Clemente City Council adopted as part of the City's municipal code an "anti-camping" ordinance. The anti-camping ordinance provided:

> Except as otherwise provided by this code or by resolution of the City Council, it is unlawful [for] any person to engage in camping:
> A. Upon any land or easement owned, operated, or managed by the City;

[2/] According to the Supreme Court's website, the City of Boise has sought and obtained an extension of time to file a petition for a writ of certiorari.

> B. Upon any land for which the . . . Zoning, the General Plan, or a specific plan designates as private open space and prohibits camping; and
>
> C. Upon any land designated by the Fire Chief as a fire risk area. Fire risk areas include, but, are not limited to, areas in or near a very high fire hazard severity zone identified by the City or by the California Department of Forestry and Fire Protections, areas in or near a wildland-urban interface, and areas in or near to a heightened fire rating by the Orange County Fire Authority.

San Clemente Municipal Code ("SCMC") § 8.86.010. The SCMC defines "camping" to mean "to pitch or occupy camp facilities or to use camp paraphernalia," defines "camp facilities" to include "tents, huts, or other temporary shelters," and defines "camp paraphernalia" to include "tarpaulins, cots, beds, sleeping bags, hammocks, non-City designated cooking facilities, or similar equipment." Id.

Following the Ninth Circuit's issuance of its initial opinion in City of Boise in September 2018, San Clemente enacted an ordinance in March 2019 providing:

> Absent exigent circumstances relating to immediate threats to the public health, safety, or welfare, the provisions of this chapter will not be enforced against indigent homeless persons sitting, lying, or sleeping on public property when no alternative shelter is available in accordance with the holding in Martin v. City of Boise, (9th Cir. 2018) 902 F.3d 1031.

SCMC § 8.86.040. According to the City, in the months after it stopped enforcing the anti-camping ordinance, 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. The City states that these campsites created impediments on public rights of way that resulted in a grievance filed by a person with a disability who was unable to use the public sidewalk. The City and residents also observed public defecation, urination, and other unsanitary conditions at and near public facilities. The City also expressed concern about an increase in fire safety hazards, destruction of landscaping at the Metrolink station and other locations, and impaired access for residents, tourists, and first responders in some areas.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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In response to these concerns, the San Clemente City Council unanimously enacted, on May 21, 2019, an "urgency ordinance" to modify the City's anti-camping ordinance. According to the urgency ordinance:

> Section 3. The City Council hereby finds pursuant to SCMC Section 8.86.040 that "exigent circumstances relating to immediate threats to the public health, safety, or welfare" require enforcement against all persons (including indigent homeless persons) of the provisions of SCMC Chapter 8.86 (prohibiting camping on public property), except that such enforcement shall not be brought against persons camping on public property designated for such purposes pursuant to Section 4 of this Ordinance.
>
> Section 4. That the City property designated in Attachment 1 hereto is hereby made available as the sole public area in the City available for camping purposes by those persons experiencing homelessness or otherwise unable to obtain shelter.
>
> Section 5. Under the direction of the City Manager, the City may adopt rules and regulations for the occupancy, use, and operation of the camping area and conduct therein and shall circulate and post said rules and regulations at the area.

(Docket 72-2, Ex. 3.) Through the urgency ordinance, the City designated an approximately 0.31 acre portion of vacant lot adjacent to the City's water reclamation plant as a "temporary campground" at which unhoused individuals could camp without risk of violating the anti-camping ordinance. The City relocated individuals without homes to the temporary campground on May 24, 2019.

In their TRO Application, Plaintiffs seek to enjoin enforcement of the urgency ordinance. Such an injunction would, under City of Boise, allow homeless individuals to again camp within at least some locations of the City unless those without homes had access to sufficient shelter space. According to Plaintiffs, this injunctive relief is necessary because the temporary campground, which is a barren lot without shade or water, poses a health hazard to the homeless individuals located there. Plaintiffs also contend that the hill on which the temporary campground sits presents challenges to those with mobility limitations,[3/] there is no accessible parking, and the sanitation is inadequate. At least with respect to the sanitation conditions at the temporary campground, the City has provided two portable toilets and a hand wash station. One

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[3/] Plaintiffs have not provided the Court with any evidence concerning the grade of the hill or any other information indicating that the hill is subject to or violative of the ADA's design guidelines.

of the toilets is ADA accessible. Although Plaintiffs have supported their TRO Application with photographs of the portable toilets that show overflowing sewage and extremely unsanitary conditions, the City states that it has arranged for a contractor to service the portable toilets every two days and the contractor has not informed the City that they should increase the frequency of that service. Plaintiffs also contend that the site is not suitable because the City previously deemed the location seismically unsafe to locate either a permanent shelter for those experiencing homelessness or the City's animal shelter. The City responds, however, that although the location is unfit for a building, its use as a temporary campground does not pose a seismic hazard.

The City has also arranged for security at the site 24 hours each day. Public bathrooms, cooking areas, and potable water are available at the public park across the street from the temporary campground. It takes approximately six minutes to walk from the temporary campground to those facilities. The City provides canine crates for those with pets and makes storage containers available. The City estimates that approximately 36 individuals camp at the site each night and there is space for additional individuals. The site receives donated food and water. The City coordinates with Mercy House to provide mobile outreach services, including relocation services and arranging for medical and mental health care. When the Orange County Sheriff's Department locates individuals camping in unauthorized locations within the City, the individuals are referred to the temporary campground. The City provides transportation to the temporary campground for those requiring assistance. As the City emphasizes in its Opposition to the TRO Application, nobody is required to stay in the temporary campground during the heat of the day. The site is intended as a place for people to camp legally at night. At least one of the named plaintiffs has apparently refused a bed at a Department of Veterans Affairs ("VA") housing facility and returned to the temporary campground.

II. Legal Standard

The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." Id. The Ninth Circuit employs a "sliding scale" approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this "sliding scale," a preliminary injunction may issue "when a plaintiff demonstrates . . . that serious questions going

to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," as long as the other two Winter factors have also been met. Id. (internal citations omitted). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L. Ed. 2d 162 (1997).

III. Analysis

Although their 1st AC includes a claim brought under the Eighth Amendment like that at issue in City of Boise, Plaintiffs have not relied on their Eighth Amendment claim in their TRO Application. Instead, according to Plaintiffs, the Court should issue an injunction preventing enforcement of the anti-camping ordinance because the conditions at and location of the temporary campground fail to satisfy the requirements of the ADA and violate the Fourteenth Amendment due process rights of the homeless individuals residing at the temporary campground.

"[T]he Fourteenth Amendment's Due Process Clause generally does not confer any affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests." Patel v. Kent Sch. Dist., 648 F.3d 965, 971 (9th Cir. 2011). One exception to this rule is "when the state affirmatively places the plaintiff in danger by acting with 'deliberate indifference' to a known or obvious danger' (the state-created danger exception)." Id. at 971-72. "Deliberate indifference is a 'stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.'" Id. at 974 (quoting Bryan Cty. v. Brown, 520 U.S. 397, 410, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)). According to the Ninth Circuit, the deliberate indifference standard is satisfied when "the defendant knows that something is going to happen but ignores the risk and exposes someone to it." L.W. v. Grubbs, 92 F.3d 894, 900 (9th Cir. 1996). The state-created danger "exception applies only where there is 'affirmative conduct on the part of the state in placing the plaintiff in danger.'" Patel, 648 F.3d at 974 (quoting Munger v. City of Glasgow, 227 F.3d 1082, 1086 (9th Cir. 2000)).

The ADA does not impose upon a municipality an obligation "to create new programs that provide heretofore unprovided services to assist disabled persons. . . . Nor, ordinarily, must public entities make modifications that would fundamentally alter existing programs and services administered pursuant to policies that do not facially discriminate against the disabled." Townsend v. Quasim, 328 F.3d 511, 518 (9th Cir. 2003). Instead, "entities are required only to make reasonable changes in existing policies in order to accommodate individuals' disabilities." Id.

While the plaintiffs who successfully obtained injunctive relief in Judge Carter's case and the Ninth Circuit panel in City of Boise both grounded their analyses on the Eighth Amendment, Plaintiffs here have not sought an injunction on that basis. (See Docket No. 16 in Case No. SA CV 18-155 DOC (JDEx).) The Court notes that Plaintiffs have not cited to a single case in which an anti-camping ordinance has been enjoined as a result of the Due Process Clause and ADA arguments upon which Plaintiffs rely in their TRO Application.

In applying the preliminary injunction standard to Plaintiffs' application for an injunction to prevent San Clemente from enforcing its anti-camping ordinance, and the legal claims on which Plaintiffs rely, the Court concludes that Plaintiffs have made a weak showing of likelihood of success on the merits of their Due Process Clause claim. See Cobine v. City of Eureka, 250 F. Supp. 3d 423, 433 (N.D. Cal. 2017) (dismissing with leave to amend a Due Process Clause claim brought by plaintiffs who failed to satisfactorily allege deliberate indifference where homeless individuals were removed from one area but permitted to sleep in a City-owned parking lot or offered temporary emergency shelter). Plaintiffs have not sufficiently established that the City has taken the type of affirmative steps to place an individual in a known and likely danger to satisfy the deliberate indifference standard. Additionally, the difficulties the homeless individuals camping at the temporary campground may face are largely identical to those they would face while camping elsewhere in the City. See id. ("In the absence of particular allegations that the state action put the Plaintiffs in an inherently dangerous situation, the Court is bound to find that the generalized dangers of living on the street preexisted Plaintiffs' relocation . . . .").

Some of the evidence in support of Plaintiffs' ADA claim presents a marginally stronger likelihood of success on the merits that at least some Plaintiffs may qualify for reasonable accommodations. Crucially, however, even if Plaintiffs had established a greater likelihood of success on both the Due Process Clause and ADA claims than they have, the Court would nevertheless conclude that the facts presented in the TRO Application would not justify the injunctive relief they seek because the irreparable harm, balance of equities, and public interest factors do not support an injunction preventing San Clemente from enforcing its anti-camping ordinance. Enjoining the enforcement of San Clemente's anti-camping ordinance would not prevent homeless individuals living in San Clemente from suffering most if not all of the same harms they might be exposed to while camping at locations other than the temporary campground. The injunction Plaintiffs seek therefore would not prevent the harm they seek to avoid.

The balance of equities and public interest also do not favor Plaintiffs. As the Ninth Circuit has noted, when a municipality enacts an ordinance, a court's consideration of the public interest is "constrained." Golden Gate Restaurant Ass'n v. City & Cty. of San Francisco, 512

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F.3d 1112, 1126 (9th Cir. 2008); see also id. at 1126-27 ("[O]ur consideration of the public interest is constrained in this case, for the responsible public officials in San Francisco have already considered that interest. Their conclusion is manifested in the Ordinance that is the subject of this appeal. The San Francisco Board of Supervisors passed it unanimously, and the mayor signed it. We are not sure on what basis a court could conclude that the public interest is not served by an ordinance adopted in such a fashion.") (citations omitted). The Court does not reach this conclusion without understanding that marginalized people like those without homes are at heightened risk of being victimized by what the majority believes is in the "public interest," but given the weakness of the constitutional claim asserted in Plaintiffs' TRO Application, the Court has no such concerns at this preliminary stage. See id. ("Perhaps [a court could override the public interest reflected through the adoption of an ordinance] if it were obvious that the Ordinance was unconstitutional . . . ."). In the absence of a strong constitutional claim, and because whatever ADA claims Plaintiffs may have could be remedied through far less disruptive reasonable accommodations than the injunction Plaintiffs seek, the Court concludes that the balance of equities and public interest weigh heavily in favor of denying the TRO Application. This conclusion is further supported by the legitimate public safety concerns identified in the factual findings the San Clemente City Council adopted when it enacted the urgency ordinance.

Conclusion

For all of the foregoing reasons, the Court denies Plaintiffs' TRO Application. Plaintiffs have not made a strong showing of a likelihood of success on the merits of either of the claims upon which they rely in their TRO Application. Nor have they established under the Ninth Circuit's alternative "sliding scale" approach, that Plaintiffs have raised "serious questions" or that the balance of hardships tip sharply in their favor. Finally, the Court concludes that Plaintiffs have not established that the irreparable harm, balance of equities, and public interest factors weigh in favor of issuing the injunctive relief they seek. The Court denies the City's request for an award of the attorneys' fees it expended in responding to the TRO Application.

Because this litigation is still at its initial stages, the Court takes this opportunity to note that it would be a shame if the decisions and conduct of the parties resulted in protracted and expensive litigation. Should that happen, it could cause Defendants to direct their limited resources to a team of attorneys rather than to the social services that could benefit the entire community. The Court therefore hopes that the parties will take steps to resolve their disputes in a cooperative manner. San Clemente has, encouragingly, expressed a willingness to work with Plaintiffs to address at least some of the concerns raised in the TRO Application regarding the

conditions at the temporary campground.[4/] To support this more collaborative approach, the Court orders all of the parties in this action to meet and confer prior to the filing of all applications and motions. Unlike Local Rule 7-3, which exempts applications and motions for injunctive relief from the conference of counsel requirements, the parties in this action shall contact opposing counsel to discuss thoroughly, preferably in person, the substance of all contemplated applications and motions and any potential resolution. The Court will not consider any future applications or motions, whether for injunctive relief or otherwise, if the parties have not first engaged in such a conference, or establish good cause for their inability to do so.

The Court additionally cautions the parties to avoid unnecessarily resorting to the use of ex parte applications. To justify ex parte relief, "the evidence must show that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regularly noticed motion procedures." Mission Power Eng'g Co. v. Continental Cas. Co., 883 F. Supp. 488, 492 (C.D. Cal. 1995). Particularly given the complexities of this action, and the fact that the Central District is currently operating with eight judicial vacancies, the filing of ex parte applications without sufficient justification unnecessarily taxes the Court's very limited resources. Moreover, the nuances and importance of the competing valid public policy interests presented in this action deserve more time and attention than the expedited nature ex parte applications provide. The Court will not be rushed into making a bad decision just because one of the parties desires an expedited briefing schedule. In the future, the Court will not hesitate to deny an ex parte application if a party fails to justify why it should "go to the head of the line in front of all other litigants and receive special treatment." Id. Finally, the parties should certainly not use or time the filing of ex parte applications to unnecessarily increase the burden on the responding party, particularly when the moving party knows that the responding party is preparing a filing. See Central District's Civility and Professionalism Guidelines ("We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.").

IT IS SO ORDERED.

[4/] The Court urges the parties to meet and confer regarding the sanitary conditions at the temporary campground, other potential improvements to the site, and the rules the City has adopted governing the conduct of those residing there.