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13 **SOUTHERN DISTRICT OF CALIFORNIA**

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 18 HIGGINS, SUZONNE KEITH,)
 19 GERALD STARK, ANNA STARK,)
 20 and DAVID WILSON, individually and)
 21 on behalf of themselves and all others)
 22 similarly situated,)

23 Plaintiffs,)

24 vs.)

25 CITY OF SAN DIEGO,)

26 Defendant.)

Case No.: 3:17-cv-02324-AJB-MSB

**PLAINTIFFS' MEMORANDUM
 OF POINTS AND AUTHORITIES
 IN SUPPORT OF *EX PARTE*
 MOTION FOR TEMPORARY
 RESTRAINING ORDER**

Judge: Hon. Anthony Battaglia

Date: Will be Determined by Court

Time: Will be Determined by Court

Courtroom: Will be Determined by Court

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1 **I. INTRODUCTION**

2 COVID-19 presents a public health pandemic unprecedented in modern
3 history that has resulted in the infection of hundreds of thousands and more than
4 57,000 deaths in the U.S. to date. Estimates are that as many as 240,000 people in
5 the U.S. could die, absent continued public health measures. The homeless,
6 including the named plaintiffs and putative class members (“Plaintiffs”) who live in
7 their vehicles, are among the most vulnerable. Feldman Decl. ¶¶ 10, 11, 16, 17, 27;
8 Frye Decl. ¶¶ 14, 15, 16, 26, 31. Many Plaintiffs have disabilities, including
9 underlying medical conditions such as COPD, chronic bronchitis, congestive heart
10 failure, asthma, diabetes, and a host of others, that according to the Centers for
11 Disease Control (“CDC”) render them especially susceptible to COVID-19.
12 Menasche Decl. ¶ 6, Ex. D.; Feldman Decl. ¶ 17; Frye Decl. ¶ 39. Plaintiffs’ ability
13 to practice social distancing and sheltering in place (as recommended by the CDC
14 and World Health Organization, and as required by local governments) largely
15 depends on keeping the only shelter they have—their vehicles.

16 Despite this critical need, the City continues to enforce the unconstitutional
17 OVO and VHO statutes during this pandemic, putting Plaintiffs at increased risk of
18 coming into contact with others and further spreading the disease in our community.
19 The City’s continued enforcement of these statutes puts Plaintiffs at risk of losing
20 their only viable shelter during this pandemic. Further complicating the situation,
21 the City is ejecting Plaintiffs from parking lots and areas of the city where they
22 would customarily park, thus denying them access to toilets, running water, showers
23 and proper sanitation available in those areas. And the City has kept closed one of
24 the two free RV wastewater disposal sites, further reducing Plaintiffs’ access to
25 necessary hygiene facilities. The City’s actions increase the risk of further
26 spreading the disease in our community, much like what happened during the
27 Hepatitis A outbreak in 2017.

28

1 During this health crisis, the City can prevent this increased risk to Plaintiffs
2 and our entire community by simply halting the enforcement of the VHO and OVO
3 statutes, at least until the crisis subsides (and more significantly, until the Court
4 determines the constitutionality of these ordinances). Otherwise, the City will
5 unnecessarily force Plaintiffs into the streets, into congregate shelters with
6 confirmed cases of COVID-19 (*see* Menasche Decl. ¶¶ 20, 22, Exs. P, R)), or into
7 crowded “safe lots” with limited sanitation and social distancing options, increasing
8 the risk of further spreading the disease.

9 To prevent this harm, Plaintiffs seek an emergency restraining order (TRO):

- 10 **1. Enjoining San Diego from enforcing or threatening to enforce**
- 11 **Municipal Code section 86.0137(f);**
- 12 **2. Enjoining San Diego from enforcing or threatening to enforce**
- 13 **Municipal Code section 86.0139(a);**
- 14 **3. Enjoining San Diego from ticketing, towing, or impounding vehicles**
- 15 **not posing an immediate threat to public safety; and**
- 16 **4. Ordering San Diego, to the fullest extent of the City’s authority and in**
- 17 **cooperation with San Diego County, to (a) reopen public parking lots,**
- 18 **bathrooms and RV waste disposal stations to people sheltering in**
- 19 **vehicles, (b) take sufficient steps to inform the public that bathrooms**
- 20 **and waste disposal stations are open and available for use, and (c) to**
- 21 **properly maintain those facilities.**

22
23 Plaintiffs also request expedited briefing of this motion for a TRO, in light of
24 the urgency posed by COVID-19.

25 **II. FACTUAL BACKGROUND**

26 **A. Plaintiffs are Vulnerable and Homeless, Many with Disabilities,** 27 **who Rely on their Vehicles for Safe Shelter**

28 Plaintiffs are homeless and rely on vehicles as their only form of viable
shelter. *See* Dkt. 14 (First Amended Complaint) ¶¶ 9-19; Wilson Decl. ¶ 2; Walsh

1 Decl. ¶ 2; Higgins Decl. ¶ 2; Hayward Decl. ¶ 2; Chatzky Decl. ¶ 2; Quinones Decl.
2 ¶ 2. Many suffer from various disabilities and are being forced to manage those
3 disabilities with limited resources during the COVID-19 pandemic. *See* Wilson
4 Decl. ¶ 2; Walsh Decl. ¶ 2; Higgins Decl. ¶ 2; Hayward Decl. ¶ 2; Chatzky Decl. ¶ 2
5 Quinones Decl. ¶ 2. And many are at higher risk of severe illness and death from
6 COVID-19 due to their disabling physical conditions and/or advanced age. Wilson
7 Decl. ¶ 4; Higgins Decl. ¶ 2; Hayward Decl. ¶ 2; Chatzky Decl. ¶ 2; Quinones Decl.
8 2.

9 The City's continued enforcement of the OVO and VHO, combined with
10 closure of facilities offering essential services to the homeless, parking lots, and
11 bathrooms in City parks has exacerbated Plaintiffs' difficulties in managing their
12 health and disabilities. Plaintiffs could previously charge their medical devices, cell
13 phones, or other communication devices critical to seeking medical help and
14 information at stores and restaurants. Mass business closures have made this
15 impossible. Hayward Decl. ¶ 3; Chatzky Decl. ¶ 7. Plaintiffs could previously
16 obtain prepared food from a number of sources, but must now rely more heavily on
17 packaged food. Those with RVs rely more on cooking and storing food in them due
18 to closure of restaurants and soup kitchens, and the increased risk of COVID-19
19 exposure inherent in procuring food. Chatzky Decl. ¶¶ 7-8; Walsh Decl. ¶¶ 3, 11.
20 Plaintiffs can no longer rely on gyms for showering and maintaining hygiene, and
21 available bathrooms are even harder to find. Wilson Decl. ¶ 6.

22 Congregate shelters have become even less viable than before the pandemic
23 because Plaintiffs' disabilities make them particularly vulnerable to COVID-19.
24 Wilson Decl. ¶¶ 3-4; Higgins Decl. ¶ 2; Hayward Decl. ¶ 2; Chatzky Decl. ¶ 2;
25 Quinones Decl. ¶¶ 3, 9; Fry Decl. ¶¶ 10, 11, 18-23. Shelter beds remain in short
26 supply as compared to the number of homeless (*see* Menasche Decl. ¶¶ 4, 20, Exs.
27 C, P), and present significant social distancing problems, even with extra spacing
28

1 between beds. Feldman Decl. ¶¶ 18, 30-33. Thus, it is imperative that Plaintiffs be
2 permitted to shelter in place in their vehicles. *See id.* at ¶¶ 27-29; Frye Decl. ¶¶ 10-
3 11, 31. Indeed, many other cities are *providing* trailers for individual use as a key
4 strategy in combating the spread of COVID-19 among the homeless. Feldman Decl.
5 at ¶ 28. Yet San Diego refuses to halt enforcement of its OVO and VHO to keep
6 Plaintiffs in their only available and comparatively safe vehicle shelters. Menasche
7 Decl. ¶¶ 9, 13, 16, 19, 23-27, Exs. G, K, O, S, T.

8
9 **B. The City Does Not Have Sufficient or Adequate Viable Alternatives
for Individuals who Live in their Vehicles**

10 The only available options for Plaintiffs in San Diego to avoid being ticketed
11 or towed are the City’s “safe lots,” congregate shelters, or hotel rooms. These
12 options are inadequate in number, less safe, lacking necessities, and/or could subject
13 Plaintiffs to other harms. First, there are not enough spaces in “safe lots.” The 2017
14 Point-in-Time Count conducted by the Regional Task Force on the Homeless, which
15 includes the City, counted over 800 homeless living in RVs and other vehicles in
16 San Diego County. ECF No. 26-2 (Biegler Decl., Ex. G) at 39. This far exceeds the
17 roughly 200 parking spaces in the three “safe lots” run by the City. Menasche Decl.
18 ¶ 24, Ex. T. And the “safe lots” are less effective for social distancing. Feldman
19 Decl. ¶¶ 30-31.

20 Second, congregate shelter spaces are the least safe option for Plaintiffs
21 because of the high risk of rapid disease transmission. Feldman Decl. ¶¶ 18, 31-33;
22 Frye Decl. ¶¶ 18-19. San Diego’s shelters have limited capacity and confirmed
23 cases of COVID-19 infections, e.g., at the Convention Center. Feldman Decl. ¶¶
24 32-33. Further, the capacity of homeless shelters in San Diego has likely been
25 reduced during the pandemic. Indeed, San Diego has transferred “all people” from
26 “bridge shelters” to the Convention Center, where it anticipates housing up to 1,500
27 people. *Id.* at ¶ 33 n.2.

1 Third, there are not enough hotel rooms. There appear to be 2,000 hotel
 2 rooms available county-wide for homeless people who meet an unspecified
 3 vulnerability threshold. The large majority are reserved for people with a confirmed
 4 COVID-19 diagnosis. Menasche Decl. ¶ 17, Ex. M. According to the City
 5 Attorney's office, anyone under 55, even with a medical condition that increases
 6 susceptibility to COVID-19, is not eligible for these rooms. Menasche Decl. ¶ 28,
 7 Ex. V. In short, the available indoor spaces for the homeless in the City appears
 8 insufficient to shelter the 5,082 homeless individuals counted in 2019. Menasche
 9 Decl. ¶ 3, Ex. B.

10 **C. The City has Refused to Halt Enforcement of the OVO and VHO**
 11 **During the Pandemic**

12 Despite this health emergency and the recommendations of its own City
 13 Council (*see* Menasche Decl. ¶ 9, Ex. G), San Diego has refused to follow Los
 14 Angeles's lead of halting VHO enforcement, citation, and arrest of people whose
 15 only shelter is their vehicle. Menasche Decl. ¶ 3, 7; Ex. A.¹ Instead, the City
 16 continues enforcement of its VHO and OVO ordinances by threatening arrests for
 17 vehicle habitation, and citing and towing vehicles used as shelter.² Hayward Decl. ¶
 18 5; Wilson Decl. ¶¶ 6, 15, Ex. C; Higgins Decl. ¶¶ 7-10, Exs. A-C; Menasche Decl.
 19 ¶¶ 9, 13, 16, 19, 23-27, Exs. G, K, O, S, T, U. People in RVs are still receiving
 20 OVO tickets, forcing some to leave the area to avoid more tickets and
 21

22 ¹ [https://www.dailynews.com/2020/04/14/deal-in-the-works-to-open-up-homeless-](https://www.dailynews.com/2020/04/14/deal-in-the-works-to-open-up-homeless-shelter-site-near-las-skid-row/)
 23 [shelter-site-near-las-skid-row/](https://www.dailynews.com/2020/04/14/deal-in-the-works-to-open-up-homeless-shelter-site-near-las-skid-row/), last visited April 30, 2020.

24 ² This City informed Plaintiffs' counsel on April 30, 2020 of a non-public April 10,
 25 2020 police directive limiting vehicle impoundment. Menasche Decl. ¶ 30, Ex. W.
 26 Mr. Quinones's vehicle was impounded on April 10, and Plaintiffs' counsel does not
 27 know whether it occurred before or after this directive allegedly went into place.
 28 The City's failure to inform plaintiffs of this policy, and its continued enforcement
 of the VHO and OVO in the form of ticketing and citing, constitute an independent
 threat to Plaintiffs' and community safety.

1 impoundment.³ This results in having to travel long distances to their medical
2 providers. Walsh Decl. ¶¶ 4, 6. In addition, the City has impounded vehicles used
3 as shelter, forcing people onto the streets, which increases the risk of exposure to
4 this deadly virus. Quinones Decl. ¶¶ 8, 10, 12, Exs. B, C.

5 CDC COVID-19 guidance warns against breaking up encampments to avoid
6 increasing the risk of spreading infectious disease unless private housing units are
7 available. Menasche Decl. ¶ 12, Ex. J. The same rationale applies to impounding
8 vehicles under the OVO and VHO, forcing people out of their vehicles and into the
9 streets or congregate shelters. Feldman Decl. ¶¶ 13, 14, 24, 25, 27-29; Frye Decl.
10 29.

11 Those with private vehicles, especially RVs with operating private toilets that
12 obviate the need to share bathrooms, are in a far better position to safely shelter in
13 place, maintain social distancing, and reduce the risk of spreading the disease as
14 compared to those in congregate shelters. Feldman Decl. ¶¶ 28-29; Frye Decl. ¶¶
15 19, 36. The UC Berkeley School of Public Health Community Action team,
16 comprised of medical practitioners, public health professionals and social scientists,
17 has advised that to address the needs of homeless individuals during COVID-19,
18 “ticketing and towing of cars needs to be suspended” and people who reside in their
19 vehicles need to be provided with support to safely shelter in place. *Id.* at ¶ 25, Ex.
20 B. Sources suggest that impounding vehicles and forcing people onto the streets is
21 dangerous during a pandemic. *Id.* at ¶¶ 14, 19, 24, 27-29. Those same sources
22 suggest that arrests for vehicle habitation are also ill-advised as jails have seen ever-
23 increasing infection rates. *Id.* at ¶ 31.

24 And because of the massive shut-down of City services and institutions,
25 Plaintiffs cannot contest the parking tickets they receive. Wilson Decl. ¶ 12. This
26 means more people may receive five or more tickets, increasing the risk of
27

28 ³ California Vehicle Code section 22651 provides discretion for the City to impound
a vehicle after five or more unpaid tickets.

1 impoundment and loss of their only form of shelter. Again, this results in more
 2 homeless people on the streets or facing the possibility of entering congregate
 3 settings with limited opportunities for social distancing.

4 **D. The City's Closure of Bathrooms and Other Facilities Endangers**
 5 **Plaintiffs' and the Public's Health**

6 According to the CDC, access to toilets and running water are essential during
 7 a pandemic. Menasche Decl. ¶ 12, Ex. J; *see also* Feldman Decl. ¶¶ 13, 16, 22, 28;
 8 Frye Decl. ¶¶ 14, 32. The fewer people who use a bathroom, the safer they are from
 9 spread of disease. Feldman Decl. ¶¶ 15, 30, 31. Indeed, running water from a
 10 faucet may be more effective in sanitizing hands as compared to typical
 11 handwashing stations. *Id.* at ¶¶ 28, 30.

12 Despite this guidance, the City has closed parks resulting in the eviction of
 13 approximately 200 people known to shelter in their vehicles in and around the beach
 14 parks, including at Mission Bay, Mission Beach, Fiesta Island and Ocean Beach.
 15 Wilson Decl. ¶ 6; Higgins Decl. ¶ 3; Menasche Decl. ¶ 15. At the same time, the
 16 City locked the bathrooms and closed its two free wastewater disposal stations for
 17 RVs, one located at Mission Bay Boat Launch and the second at the Mission Bay
 18 Visitor's Center.⁴ Menasche Decl. ¶ 16. The closed parking lots with signs,
 19 barricades, cones and yellow caution tape, guarded by the City's police and traffic
 20 officers, as well as the closing of Mission Bay Drive to parking has left many
 21 Plaintiffs without access to bathrooms and running water.⁵ Wilson Decl. ¶¶ 6-11,
 22 13-17, Exs. A-E; Higgins Decl. ¶¶ 3-5, 7-10, Exs. A-C; Hayward Decl. ¶ 3. As it
 23 did with the 2017 Hepatitis A outbreak, this lack of access to public bathrooms and
 24

25 _____
 26 ⁴ In responses to Plaintiffs' demands, one RV station has since been re-opened, and
 the park bathrooms appear now to be unlocked. Menasche Decl. ¶ 9

27 ⁵ As of the date of this filing, the City is partially reopening the Parks; however, the
 28 parking lots remain closed which continue to make it extremely difficult or
 impossible for many Plaintiffs to have regular access to the bathrooms in the parks
 while sheltering in place in their vehicles

1 running water may lead to increased spread of COVID-19 in San Diego. Feldman
2 Decl. ¶ 30-31; Frye Decl. ¶¶ 32-35.

3 **E. The City's Continued Enforcement of the OVO and VHO**
4 **Disproportionately Burdens People with Disabilities During this**
5 **Pandemic**

6 While Plaintiffs who shelter in vehicles suffer a greater risk of harm from the
7 City's policies, those with medical conditions that make them particularly
8 susceptible to serious complications and death from the COVID-19 virus are
9 particularly vulnerable. For example, Mr. Chatzky has sleep apnea, a respiratory
10 condition that requires he use a CPAP machine; Mr. Hayward has asthma; Mr.
11 Wilson has cancer, and is susceptible to skin infection and; Mr. Quinones' fiancé
12 has congestive heart failure. Chatzky Decl. ¶ 2; Hayward Decl. ¶ 2; Wilson Decl. ¶
13 2; Quinones Decl. ¶ 5. All these conditions are recognized by the CDC as
14 increasing the risk of complications and death from COVID-19. Menasche Decl. ¶
15 6, Ex. D. The risk for such individuals is compounded by the fact that a large
16 number of Plaintiffs are over 65 years old. In addition, studies show that people
17 experiencing homelessness have medical ages that exceed their biological age. Frye
18 Decl. ¶ 31. Thus, any policies that interfere with the ability of Plaintiffs with
19 conditions that put them at higher risk from COVID-19 to shelter in place in their
20 vehicles, to maintain social distancing, and to have access to fresh water and proper
21 sanitation, threaten increased irreparable harm.

22 **III. LEGAL STANDARD FOR A TRO**

23 The Court's analysis in deciding a TRO is substantially the same as its
24 analysis for a preliminary injunction. *Tachiquin v. HSBC Bank USA, Na'l As'n*,
25 No. 12CV2712 AJB (RBB), 2012 WL 12882887, at *1 (S.D. Cal. Nov. 8, 2012).
26 Plaintiffs must establish (1) a likelihood of success on the merits, (2) "irreparable
27 harm in the absence of preliminary relief," (3) "that the balance of equities tips in
28

1 [their] favor,” and (4) “an injunction is in the public interest.” *Winter v. Nat. Res.*
2 *Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

3 The Ninth Circuit applies a “sliding scale” that allows for preliminary relief if
4 the balance of hardships tips “sharply toward the plaintiff,” plaintiff shows
5 likelihood of irreparable injury, and the injunction is in the public interest, even if
6 there are serious questions on the merits. *Alliance for the Wild Rockies v. Cottrell*,
7 632 F.3d 1127, 1134-35 (9th Cir. 2011). The urgency of a TRO also “necessitates a
8 prompt determination and makes it difficult to obtain affidavits from persons who
9 would be competent to testify at trial.” *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d
10 1389, 1394 (9th Cir. 1984). Thus, Courts can “give even inadmissible evidence
11 some weight” in order to prevent irreparable harm.” *Id.*; *see also Johnson v.*
12 *Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009). In essence, the Court’s role is to
13 exercise its discretion in balancing the equities of the situation. *Id.*

14 **IV. ARGUMENT**

15 **A. Absent a TRO, Plaintiffs Will Suffer Serious Irreparable Harm**

16 Absent a temporary restraining order, Plaintiffs will suffer serious and
17 immediate irreparable harm. Irreparable harm has “traditionally [been] defined as
18 harm for which there is no adequate legal remedy, such as an award of damages.”
19 *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cr. 2014); *see also*
20 *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011) (a plaintiff
21 “need not prove that irreparable harm is certain or even nearly certain,” but must
22 demonstrate only a “likelihood” of irreparable harm). Here, the irreparable harm
23 from the City’s continued enforcement of the VHO and OVO is serious illness or
24 death from the increased risk of infection of COVID-19—for all San Diegans.
25

26 Absent the Court’s intervention, the City’s deprivation of Plaintiffs’ only
27 form of shelter and denial of access to essential services, such as sanitation and
28 running water, will force Plaintiffs into unsheltered streets or crowded, congregate

1 shelters or “safe lots.” As described above, this greatly increases the risk of
2 exposure to COVID-19, and the associated serious illness or even death. It should
3 be beyond doubt that no greater irreparable harm exists than death. *See Mitchell v.*
4 *City of Los Angeles*, 16-CV-01750 SJO (GJSx), ECF No. 51 at 10 (C.D. Cal Apr.
5 13, 2016) (granting *ex parte* TRO application to a group of homeless individuals,
6 finding that plaintiffs “may not survive without some of the essential property that
7 [was] confiscated” from them); *Wood v. County of Alameda*, No. C94 1557, 1995
8 WL 705139, at *16 (N.D. Cal. 1995) (“[T]he imminent loss of one’s home and
9 destitute financial circumstances are the type of truly extraordinary circumstances
10 which can cause sufficient irreparable injury...”).

11 The multiple declarations submitted in support this TRO provide further
12 evidence of the life-threatening irreparable harm to Plaintiffs that will take place if
13 the City continues enforcement of the VHO and OVO, and the denial of access to
14 basic sanitation because of the City’s closures. Wilson Decl. ¶¶ 5-7, 11; Walsh
15 Decl. ¶¶ 7-8; Higgins Decl. ¶¶ 5-6; Hayward Decl. ¶¶ 2, 5; Chatzky Decl. ¶¶ 5-6, 9;
16 Quinones Decl. ¶¶ 10, 14-15. Thus, the City’s continued enforcement must be
17 enjoined, at least until the pandemic is over.

18 **B. The Balance of Hardships Tips In Plaintiffs’ Favor**

19 No countervailing interest of the City outweighs the harm to Plaintiffs. They
20 are homeless, and many have underlying medical conditions that make them more
21 susceptible to COVID-19. The CDC has said that these populations are more
22 susceptible to the adverse effects, including death, of COVID-19.

23 It cannot be debated that nothing is more valuable than the opportunity to
24 save a human life. Indeed, the Ninth Circuit long “maintained that ‘[f]aced with []
25 a conflict between financial concerns and preventable human suffering, [the court
26 has] little difficulty concluding that the balance of hardships tips decidedly” toward
27 avoiding human suffering. *Harris v. Bd. of Supervisors, Los Angeles Cty.*, 366 F.3d
28 754, 766 (9th Cir. 2004) (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th

1 Cir.1983)). Thus, the balance of the hardships clearly tips sharply towards
2 Plaintiffs’ safety.

3 **C. A TRO is in the Public Interest**

4 COVID-19 is a deadly disease that has impacted millions of people. Instead
5 of taking measures to protect Plaintiffs, the City is recklessly placing Plaintiffs’
6 lives, especially those with disabilities (and by extension, the larger San Diego
7 Community) at greater risk. The City’s continued threats of ticketing, towing,
8 impounding of vehicles, and possible arrest under the VHO, as well as denying
9 Plaintiffs access to water and sanitation, increases the risk of exposure to COVID-
10 19, as described above.

11 The greater the number of cases of COVID-19 among Plaintiffs, the greater
12 the chance that it will increase in numbers among the larger community based on
13 everyday interactions, even as limited by stay-at-home orders. Thus, in order to
14 reduce the risk of widespread contamination among Plaintiffs, and in effect “flatten
15 the curve” of infection in San Diego, the public interest favors issuing a TRO to
16 enjoin enforcement of the OVO and VHO, at least until the pandemic is over.

17
18 **D. Plaintiffs Are Likely To Succeed On the Merits**

19 Given the grave nature of the potential harm to Plaintiffs, that the balance of
20 hardships favors Plaintiffs, and that a TRO is in the public interest given the
21 COVID-19 pandemic, the likelihood of success factor is substantially outweighed
22 by the other factors. Nonetheless, the likelihood of success further supports issuing
23 a TRO enjoining the City from continued enforcement of the OVO and VHO, and
24 requiring the reopening of public facilities.

25 **1. Plaintiffs are likely to succeed on the merits of their Due**
26 **Process Claim.**

27 Under the Substantive Due Process Clause of the Fourteenth Amendment, the
28 state deprives a person of a substantive due process right if “affirmatively place[s]

1 the plaintiff in a position of danger,” such as depriving individuals of the ability to
 2 shield themselves from the dangers of the outdoors, city streets, and, in this instance,
 3 from infection of COVID-19. *Wood v. Ostrander*, 879 F.2d 583,589 (9th Cir.
 4 1989); *Munger*, 227 F.3d at 1086; *Jeremiah v. Sutter Cty.*, 2018 WL 1367541, at *4
 5 (E.D. Cal. Mar. 16, 2018). Liability under substantive due process requires: (1)
 6 official state action that affirmatively places an individual in danger; and (2)
 7 deliberate indifference to that danger. *Kennedy v. city of Ridgefield*, 439 F.3d 1055,
 8 1062 (9th Cir. 2006). Deliberate indifference requires proof of (1) serious risk of
 9 harm, (2) defendant’s actual knowledge of that risk, and (3) defendant’s failure to
 10 take obvious steps to address that risk. *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir.
 11 1996).

12 Defendant’s continued enforcement of Municipal Code sections 86.0137(f)
 13 (the VHO) and 86.0139(a) (the OVO), through ticketing, arrests and/or vehicle
 14 impoundment by City police and parking enforcement agents, constitutes
 15 affirmative conduct by the City that puts Plaintiffs at serious risk of harm, especially
 16 as highlighted by the current COVID-19 pandemic. Defendant’s actions thus violate
 17 Plaintiffs’ Substantive Due Process rights and should be immediately enjoined.
 18

19 **a. The City’s continued ticketing, towing, and**
 20 **impounding vehicles under San Diego Muni. Code §§**
86.0137(f) and 86.0139(a) is affirmative conduct.

21 As confirmed by the supporting declarations, the City is ticketing and
 22 threatening to arrest Plaintiffs and impound Plaintiffs’ vehicles, leaving Plaintiffs
 23 unable to shield themselves from the dangers of the outdoors and city streets.
 24 Significantly, the City’s actions are depriving Plaintiffs’ best option for social
 25 distancing, increasing the risk that they will be exposed to and contract the deadly
 26 COVID-19 virus. In *Wood*, the Ninth Circuit found that the defendants’ act of
 27 impounding a vehicle and leaving the driver in a high-crime area at night was an
 28 “affirmative action” that violated plaintiff’s substantive due process rights. *Wood*,

1 879 F.2d at 589. Similarly here, the City’s refusal to suspend ticketing, towing, and
2 impounding of Plaintiffs’ vehicles affirmatively place Plaintiffs at a high risk of
3 disease and possible death.

4 Forcing Plaintiffs who shelter in their vehicles out of those vehicles and onto
5 the streets or into congregate shelters with limited sanitation including shared and
6 overcrowded bathrooms increases the risk Plaintiffs will contract COVID-19. Thus,
7 the City’s actions place Plaintiffs in a worse position than had the City not continued
8 to enforce these regulations during the current pandemic. Feldman Decl. ¶¶ 13, 14,
9 24, 25-29; Fry Decl. ¶¶ 11-13, 24, 27-28. In addition, the threat of enforcement
10 alone has caused some putative class members to leave the City, depriving them of
11 access to needed resources. Walsh Decl. ¶¶ 7-9; Frye Decl. ¶ 30.

12 **b. The City’s closure of parking lots, restriction of public**
13 **restrooms, and closure of rv waste disposal sites is**
14 **additional affirmative conduct.**

15 The City has taken other affirmative steps that interfere with Plaintiffs’ ability
16 to safely shelter in their vehicles, including restricting public bathroom and shower
17 access, closing multiple, large parking lots where Plaintiffs have previously parked
18 with significant spacing between vehicles and with access to public restrooms, and
19 limiting RV waste disposal access. The City has stationed police officers at the
20 beach and parking lots, and placed barricades throughout those locations, thus
21 deterring Plaintiffs from even attempting to use park bathrooms. These acts force
22 Plaintiffs into congregate shelter settings or crowded “safe lots,” where the risk of
23 exposure and infection to COVID-19 is heightened.

24 **c. The City’s affirmative conduct creates known or**
25 **obvious dangers to plaintiffs.**

26 As described above, the City’s actions deprive Plaintiffs of their safest option
27 for weathering the COVID-19 pandemic, and places them in increased danger. This
28 danger is known or should be obvious to the City. Indeed, the City Council

1 recognized this danger to public health when, on March 17, 2020, it passed a
2 resolution urging that the Mayor develop a strategy for issuing a moratorium on the
3 VHO and the 72-hour parking ordinance for the duration of the COVID-19
4 emergency. Menasche Decl. ¶ 9, Ex. G. Yet the City has implemented no such
5 moratorium.

6 The state need not actually create a danger in order to violate the Fourteenth
7 Amendment’s guarantee of substantive due process. Rather, there is a violation
8 where the state places an individual at greater risk of an already-existing danger.
9 *See Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997) (“The
10 critical distinction is not, as appellants allege, an indeterminate line between danger
11 creation and enhancement, but rather the stark one between state action and inaction
12 in placing an individual at risk.”) Although the City did not create the danger that is
13 COVID-19, the City’s actions (described above) increase the risks to Plaintiffs of
14 contracting the disease, or being vulnerable to complications, including death, from
15 contracting the disease. These actions are thus unconstitutional.

16 Courts have routinely held that involuntary exposure to the elements is a
17 “danger” under the substantive due process analysis. *See Munger*, 227 F.3d at 1089-
18 90 (holding district court erred in concluding defendant police officers had not
19 affirmatively placed an intoxicated man in danger when ejecting him from a bar late
20 at night with inadequate clothing for the cold climate); *see also Sanchez v. City of*
21 *Fresno*, 914 F. Supp. 2d 1079, 1099-1103 (E.D. Cal. 2012) (finding plaintiffs stated
22 substantive due process claim by alleging, in part, the city defendant had timed its
23 demolitions to occur at the onset of winter months and knew or reasonably should
24 have known that cold, freezing and wet weather conditions would threaten
25 plaintiff’s survival); *Cobine v. City of Eureka*, 2017 WL 1488464, at *5 (N.D. Cal.
26 Apr. 25, 2017) (acknowledging danger faced by homeless individuals who must
27 reside and sleep “on the street in unfamiliar areas, and without the support of the
28

1 community, render[ing] them vulnerable to assault, theft, harassment, and worse.”).

2 Similarly, involuntary exposure or increased risk of exposure to COVID-19 is
3 a clear danger. Indeed, courts have found state-created danger where public entities
4 have caused plaintiffs, outside of the custodial context, to be exposed to disease or
5 disease-causing agents. *See, e.g., In re Flint Water Cases*, No. 17-12942, 2020 WL
6 1822304, at *21 (E.D. Mich. Apr. 10, 2020) (finding bodily integrity Fourteenth
7 Amendment claim based on plaintiff’s contracting Legionnaire’s disease after Flint
8 switched its water source to the Flint River and knowingly ran the water through an
9 inadequate treatment plant); *Guertin v. State*, 912 F.3d 907, 935 (6th Cir. 2019),
10 *cert. denied sub nom. City of Flint, Michigan v. Guertin*, 140 S. Ct. 933, 205 L. Ed.
11 2d 522 (2020), and *cert. denied sub nom. Busch v. Guertin*, 140 S. Ct. 933, 205 L.
12 Ed. 2d 522 (2020) (upholding substantive due process claim based on Flint’s
13 provision of lead-contaminated water to residents: “In providing a tainted life-
14 necessity and falsely assuring the public about its potability, government officials
15 ‘strip[ped] the very essence of personhood’ from those who consumed the water.”).

16 Here, the dangers of increased exposure to COVID-19 are known or obvious
17 to the City and were recognized by City Council. Menasche Decl. ¶¶ 8, 9, 13, 14,
18 20, Exs. F, G, K, L, P. As Plaintiffs explained in the first Motion for a Preliminary
19 Injunction, the City has actual notice that there are hundreds of homeless persons
20 living in vehicles, who rely upon the vehicles as their only viable shelter. *See supra*,
21 Section II.B. The City is also aware that the number of homeless people exceed
22 current shelter spaces. *See id.* In other words, the City knows (or should know) that
23 many of the Plaintiffs will not have an adequate location to shelter in place during
24 the pandemic if the City impounds their vehicles or otherwise denies them the
25 ability to safely shelter in place in those vehicles.

26 Despite this knowledge, the City has cited Plaintiffs and threatened them with
27 arrest under the VHO during this pandemic. Hayward Decl. ¶ 5; Walsh Decl. ¶ 6;
28

1 Menasche Decl. ¶¶ 13, 16, Ex. K. The City has also ticketed Plaintiffs for overnight
2 parking of their RVs, and impounded vehicles used by Plaintiffs to shelter in place.
3 *Id.*; Quinones Decl. ¶ 8. Under the current circumstances, Plaintiffs’ vehicles are
4 the best option to allow them to maintain social distance, to manage the symptoms
5 of their disabilities, and store their medication, food, and bedding. *See* Feldman
6 Decl. ¶¶ 10, 11, 16, 17, 27.

7 The Ninth Circuit has used “common sense” to determine if a danger was
8 known and obvious to the defendant. *Wood*, 879 F.2d at 590. As shown above,
9 common sense dictates that the City’s actions of continued enforcement of the OVO
10 and VHO, and of closing public facilities, have placed Plaintiffs in increased danger
11 by reducing their ability to socially distance and to maintain proper hygiene.

12
13 **d. The City acts with deliberate indifference to the known
or obvious dangers to Plaintiffs.**

14 The City’s actions of continued enforcement of the OVO and VHO, and of
15 closing public facilities essential for hygiene, show deliberate indifference toward
16 the increased risks faced by Plaintiffs. The City knew of, or at a minimum, was
17 willfully blind, to the elevated risk Plaintiffs face. *See supra*, Section II.D-E. None
18 of the options that the City has currently proposed for Plaintiffs to legally shelter in
19 their vehicles, or for other available shelter are adequate. Those options all reduce
20 the ability to socially distance, and thus, expose Plaintiffs to increased risk from this
21 pandemic. Feldman Decl. ¶¶ 28-31; Frye Decl. ¶¶ 10, 18-23, 37-38. They would
22 also subject Plaintiffs to other forms of harm.

23
24 **2. Plaintiffs are likely to succeed on the merits of their ADA
and Section 504 claims.**

25
26 To establish a Title II claim under the ADA, Plaintiffs must show they are (1)
27 qualified individuals with disability who were (2) excluded from participation in or
28 denied the benefits of Defendant’s services, programs, or activities, or were

1 otherwise discriminated against by Defendant, (3) by reason of their disability.
2 *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir.
3 1997). The same requirements apply to claims under Section 504 of the
4 Rehabilitation Act (“Section 504”) with the additional requirement that the program
5 at issue receives federal financial assistance. 29 U.S.C. §794; *McGary v. City of*
6 *Portland*, 386 F.3d 1259, 1269 n.7 (9th Cir. 2004). Here, the Program is funded in
7 the part by the U.S. Department of Housing and Urban Development, so analysis of
8 the remaining elements of the Title II and Section 504 claims is identical.

9
10 Under the ADA, a disability is defined as a “physical or mental impairment
11 that substantially limits one or more of the major life activities,” such as caring for
12 oneself, concentrating, thinking and communicating. 42 U.S.C. §§ 12102(1),(2)(A);
13 29 C.F.R. § 1630.2(j)(3)(iii). Here, Plaintiffs are qualified individuals with
14 disabilities under the ADA because they live with mental and physical impairments
15 that limit their ability to work or adequately care for themselves. *See* Feldman Decl.
16 ¶ 17.

17 A plaintiff may establish a violation of the ADA under Title II and Section
18 504 if they were excluded from or denied “meaningful access to state services by
19 reason of their disability,” even if the program is facially neutral. *Crowder v.*
20 *Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996). Ninth Circuit authority holds that
21 facially neutral policies may violate the ADA when such policies unduly burden
22 disabled persons, even when such policies are consistently enforce. *See, e.g.,*
23 *Communities Actively Living Independent and Free v. City of Los Angeles*, 2011 WL
24 4595993, at *12 (C.D. Cal. Feb. 10, 2011) (holding that individuals with disabilities
25 experienced discrimination “by reason of disability” since they were
26 disproportionately vulnerable to harm in the event of a disaster and the city had
27 failed to address their unique needs by making reasonable accommodation). A
28 public entity is required to make reasonable accommodations to avoid

1 discriminating against persons with disabilities, unless it would be unduly
2 burdensome or would fundamentally alter the nature of the program it provides. 28
3 C.F.R. § 35.130(b)(7); *Cohen v. City of Culver City*, 754 F.3d 690,695 (9th Cir.
4 2014).

5 The City's policies regarding parking enforcement program and City public
6 parks during this pandemic disproportionately burden homeless people with
7 disabilities, especially those who are at higher risk of complications and death from
8 COVID-19. Furthermore, because of City policy, Plaintiffs with disabilities—in
9 particular those with physical conditions placing them in a high-risk category for
10 complications from COVID-19—are excluded from participation in and denied the
11 benefits of the City's program to prevent the spread of COVID-19.

12 The City claims that it will work on mitigation measures for all its residents,
13 including individuals who are experiencing homelessness. Yet the City instead
14 denies Plaintiffs with disabilities meaningful access by excluding them from
15 COVID-19 funded programs, carrying out policies and practices that interfere with
16 Plaintiffs' ability to mitigate the threat of infection by safely sheltering in place in
17 their vehicles.

18 For people with medical conditions that the CDC has identified as putting
19 them at high risk of complications or death from COVID-19, the consequences for
20 denying access may be serious. Menasche Decl. ¶ 6, Ex. D; Feldman Decl. ¶ 17.
21 For example, the City towed Patrick Quinones's motorhome from where he and his
22 fiancé were staying. Quinones Decl. ¶ 8. Both Mr. Quinones and his fiancé have
23 disabilities and are not able to stay at any of the congregate shelters due to his
24 fiancé's congestive heart failure that places him at higher risk for complications and
25 death from the COVID-19. Yet the City, despite knowing they had nowhere else to
26 go, towed away their shelter. The City left Mr. Quinones and his fiancé on the
27 street.
28

1 As another example of the City’s pattern and practice of denying access to
2 Plaintiffs with disabilities, Michael Walsh left San Diego entirely because he lives
3 in constant fear and anxiety of being ticketed or towed. Walsh Decl. ¶¶ 7-8. Mr.
4 Walsh is now further away from his healthcare providers, making it more difficult to
5 treat his disabilities.

6 In no instances were Plaintiffs with disabilities told about a process that
7 would allow them to seek reasonable accommodations for their needs during the
8 pandemic. The City, in its own data and through extensive briefing in this case, has
9 been made aware of the disproportionate number of homeless individuals who have
10 disabilities in San Diego. Yet the City has done virtually nothing to alleviate the
11 worsened plight facing homeless people with disabilities created by the City’s own
12 policies. *See supra*, Section II.A, E.

13 The City knows that disabled Plaintiffs are unable to access its shelters due to
14 their disabilities. The City is also aware of the overcrowding at the shelters, which
15 is why it opened up its 1,500-person Convention Center shelter to ease the burden of
16 its existing shelters. CDC guidelines explicitly instruct local governments not to
17 move people into congregate shelters from a location where they can more easily
18 socially distance. The City is further aware that conditions in “safe lots” may make
19 them particularly inaccessible to people with disabilities. Menasche Decl. ¶¶ 5, 24,
20 25, Ex. T; Wilson Decl. ¶ 3. Moreover, the State program from which the City
21 receives some of its COVID-19 funding in fact promotes the purchase of trailers to
22 house homeless individuals to allow them to isolate during the pandemic. *See*
23 Feldman Decl. ¶ 28. The City’s continued impoundment of Plaintiffs’ own RVs and
24 trailers makes no sense.

25
26 Plaintiffs’ request for accommodations to live in San Diego in their vehicles
27 does not alter the nature of the City’s ability to carry out its mitigation efforts for
28 COVID-19. Nor is it inconsistent with responsible management of the City’s

1 parking and park programs in the midst of a pandemic. Rather it is consistent with
2 the City's efforts to control the spread of this dangerous disease. The City has funds
3 to utilize to help with homeless individuals on the streets, and the cost for
4 individuals to remain self-isolating in their vehicles does not financially burden or
5 alter City programs.

6 Thus, by threatening to arrest Plaintiffs with disabilities, ticketing them, and
7 taking away or threatening to take away the only shelter that will allow them to
8 effectively socially distance during COVID-19, the City in fact puts these Plaintiffs
9 at greater risk of harm and disproportionately burdens them based on their
10 disabilities without justification.

11
12 **3. Plaintiffs are likely to succeed on the merits of their**
13 **constitutional claims.**

14 Finally, as shown in Plaintiffs' motion for a preliminary injunction, Plaintiffs
15 are likely to succeed in showing that the City's ordinances are unconstitutional.
16 This Court previously granted a preliminary injunction, enjoining the City from
17 enforcing the prior version of the VHO (the "Old VHO") because it was "both
18 vague on its face and . . . being arbitrarily enforced." *See* ECF No. 44 at 1. The
19 newly enacted VHO (the "New VHO"), which this Court recently permitted
20 Plaintiffs to add to their complaint (*see* ECF No. 133), is similarly vague and
21 continues to be arbitrarily enforced. While the New VHO provides examples of
22 "evidence of human habitation," it fails to provide any specification or standard as
23 to when such "evidence" amounts to use of a vehicle for "human habitation" versus
24 permitted uses. As such an ordinary person does not have fair notice of the
25 prohibited conduct. In addition, the New VHO, similar to the Old VHO, promotes
26 arbitrary and discriminatory enforcement against the homeless population because it
27 codifies the "Training Bulletin" previously provided to police officers for the
28 enforcement of the Old VHO without adequately informing or cabin-in the

1 discretion of law enforcement. As such, at least for the same reasons the Court
2 highlighted in its order granting Plaintiffs a preliminary injunction, the Court should
3 enjoin enforcement of the OVO and VHO, at least until the pandemic is over.

4 **V. A BOND IS NOT REQUIRED**

5 “Although Federal Rule of Civil Procedure 65(c) generally provides that a
6 preliminary injunction will not issue except upon the giving of security, it is not
7 required where plaintiffs are indigent or where considerations of public policy make
8 waiver of a bond appropriate.” *Miller v. Carlson*, 768 F. Supp. 1331, 1340 (N.D.
9 Cal. 1991) (citing, *inter alia*, *California ex rel. Van De Kamp v. Tahoe Regional*
10 *Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985), *modified*, 775 F.2d 998.)
11 As Plaintiffs are indigent, no bond should be required here.

12
13 **VI. CONCLUSION**

14 For the reasons described above, this Court, in the interest of avoiding
15 unnecessary illness and death in San Diego and to prevent the further spread of
16 COVID-19, should grant Plaintiff’s Motion for a Temporary Restraining Order.

17
18 Dated: April 30, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on April 30, 2020 to all counsel of record who are deemed to have consented to electronic service via the Court’s CM/ECF system per Civ LR 5.4(d). Any other counsel of record will be served by U.S. mail or hand delivery.

By: /s/ Ann E. Menasche
Ann E. Menasche

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