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Of Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MYNTORA AGUILAR, MICHELLE HESTER, & NICHOLAS SCHINDLER, Homeless Individuals On Hunnell & Clausen Roads, City of Bend, OR on Behalf of Themselves & Other Homeless Individuals on Hunnell & Clausen Roads & Eric Garrity, Bend Equity Project, All Pro Se

Plaintiffs,

vs.

ERIC KING, City Manager, City of Bend; MELANIE KEBLER, Mayor, City of Bend; MEGAN PERKINS, Mayor Pro Tem, ANTHONY BROADMAN, BARB CAMPBELL, ARIEL MENDEZ, MEGAN NORRIS, and MIKE RILEY, City Councilors, City of Bend;

Defendants.

No. 6:23-cv-01064-AA

DEFENDANTS' RESPONSE IN OPPOSITION TO APPLICATION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

The City of Bend City Attorney's Office files this response on behalf of all Defendants named above opposing the Plaintiffs' July 21 Complaint and application to the Court for a

temporary restraining order. The Plaintiffs here asked for the same relief in a matter filed in Deschutes County Circuit Court on July 12. On July 17, after hearings on July 14 and July 17, Deschutes County Circuit Court Presiding Judge Wells Ashby denied all relief and issued findings affirming that the City of Bend had followed its policies and code, including by extending all process to the Plaintiffs and others required by Title II of the Americans with Disabilities Act.

The Plaintiffs are here now seeking speedy relief because they did not get what they asked for in state court. Because the recent history and the state court's findings demonstrate that this Court should not hear this case or grant the requested relief, we will first offer the Procedural History before turning to issues such as jurisdiction and the absence of any basis for injunctive relief.

II. PROCEDURAL HISTORY

On July 12, 2023, Plaintiffs Aguilar, Hester, Schindler, and a local service provider filed in Deschutes County Circuit Court what they characterized as a motion for an emergency hearing seeking an injunction, declaratory judgment, and writ of mandamus (the "Deschutes County Action."). *See* Declaration of Mary A. Winters ("Winters Decl."), ¶ 2. Among other relief, the plaintiffs in that action requested that the state court issue an injunction requiring the City "cease and desist from the planned closure action at Hunnell/Clausen scheduled for July 17, 2023." The basis for the Deschutes County Action was a "belie[f]" the City would ignore several requests for reasonable accommodations filed by Plaintiffs Aguilar, Hester, and Schindler as well as approximately twenty other individuals residing in the area.

Plaintiffs in the Deschutes County Action acknowledged that the City had the authority to clean up Hunnell and Clausen Roads pursuant to its recently enacted Camping Code, Bend

Municipal Code 4.05 and 4.20, and that the City could establish reasonable time, place, and manner regulations for camping in the rights-of-way in the city. *See* Winters Decl., ¶ 7. Plaintiffs in the Deschutes County Action also acknowledged, as do the Plaintiffs in this action, that the City provided at least 27 days of notice to the individuals residing on Hunnell and Clausen Road prior to beginning the clean-up, significantly more time than is required under local, state, and federal law. Indeed, Plaintiffs were given notice the Camping Code would be effective beginning in March 2023 as early as December 2022, when the Camping Code was enacted.

The Deschutes County Action did not challenge the Camping Code or its application to the plaintiffs in that action. The plaintiffs did not challenge the City's authority to clean up the Hunnell and Clausen area or to require them and others to leave the roads during the cleanup. Rather, the plaintiffs alleged only an unsubstantiated "fear" that the City would "ignore" the interactive process required by the Americans with Disabilities Act and clean up the streets without providing reasonable accommodations, as required by law.

On July 17, 2023, after holding a hearing and considering a declaration of the City's Accessibility Manager[1], Presiding Judge Wells Ashby denied the request for a temporary restraining order and all other relief, and issued several findings from the bench. The court found that the City had not only a right, but a duty to manage its streets, and that the City had authority to implement regulations governing the time, place and manner that individuals may camp or otherwise reside on city streets. The court found that the City's Camping Code and its implementing policy did that, and that the regulations applied to Hunnell and Clausen Roads, the

[1] The City's response to the Plaintiffs' motion and an attached declaration are included as attachments to this filing. Considering the exigency and in the interest of providing this court with an efficient response to Plaintiffs' filing, much of the factual background of that state court filing is reproduced here. See Winters Decl., ¶ 3 and 4. Also included is Plaintiff Garrity's submission in the Deschutes County Action titled "Friend of the Court Affidavit in Support of Plaintiff's [sic] Petition for Emergency Hearing Seeking Injunction, Declaratory Judgement [sic] and Writ of Mandamus." *Id.*, ¶ 6

area in question. Judge Ashby found that the City had given proper notice under its code and policies of its intention to apply the code to Hunnell and Clausen roads, and had followed its code and policies.

Importantly, Judge Ashby also found that the City had met its obligations under Title II of the Americans with Disabilities Act, including by engaging in the required interactive process for reasonable modification requests and by giving the Plaintiffs Aguilar, Hester, and Schindler, and all other individuals who had requested accommodations under the ADA, an extra seven days to remain on Hunnell and Clausen before they would be required to leave. The court instructed the City to prepare an order. As far as the City is aware, the Plaintiffs have not filed a mandamus action or taken any other steps in state court challenging Judge Ashby's order.[2]

On July 18, the City submitted the proposed order reflecting the court's findings and denying all relief to the plaintiffs. *See* Winters Decl., ¶ 5. By July 19, all plaintiffs in the Deschutes County Action had been personally served with the proposed order. At the time of this filing, no objections have been received. The City anticipates submitting the order and proposed judgment dismissing the Deschutes County Action in its entirety, with prejudice, during the week of July 24, as soon as allowed by Oregon's Uniform Trial Court Rules. *See* Oregon Uniform Trial Court Rule 5.100(1)(c) (requiring the City to wait seven days before submitting the proposed order and judgment to Deschutes County Circuit Court for signature).

The City began its work to close and begin cleaning the Hunnell and Clausen area on the morning of July 18. City personnel and contractors began cleaning the area. Individuals who received extra time were allowed to remain and have remained, and none of their personal property has been taken. Local ingress and egress to the area has been maintained, but the City

[2] If Plaintiffs had sought to challenge the state court's denial of the TRO, the appropriate method would have been to file a writ of mandamus. *See State ex rel. Keisling v. Norblad,* 317 Or 615, 623 (1993).

will need to again close and limit access when it remobilizes personnel and contractors to resume operations on the morning of July 25.

The City became aware of the instant complaint on the afternoon of July 21 due to a request for comment from the media. The Complaint seeks the same relief that was denied in the Deschutes County Action and presents nearly identical claims and concerns. The main difference between the state and federal pleadings is that the Plaintiffs in the federal action are now recasting the issues as constitutional claims, and repackaging the modification issues raised in the Deschutes County Action to shift their emphasis to questions about their rights to an appeal. [3] Plaintiffs made these same claims and arguments during the Deschutes County Action and all have already been heard and rejected by Judge Ashby.

The filing names the City Manager and all seven members of the City Council as defendants, but does not name the City of Bend as a defendant. The City is not aware that any of the defendants have been served at the time of this writing.

III. ARGUMENT

A. There Is No Basis for *Ex Parte* Relief

The Court should deny Plaintiffs request for *ex parte* relief because they did not comply with Federal Rule of Civil Procedure 65 and because they waited 27 days to file their emergency request, and are thus responsible for creating the exigency they now claim justifies this extraordinary relief.

[3] Plaintiffs raised the same issue at both the July 14 and July 17 hearings in the Deschutes County Action, but continue to misunderstand the City of Bend's ADA complaint procedure. The procedure exists for individuals to make a complaint alleging discrimination on the basis of disabilities under Title II of the ADA. It is not for "appeals" of reasonable modification decisions. Under the procedure, a complaint is reviewed by the City's Accessibility Manager (here, the same individual who conducted the interactive processes and made the decisions to grant more time); if a complainant is dissatisfied with the Accessibility Manager's response to the complaint, they can appeal *that decision* to the City Manager. The City Manager's decision (or that of their designee) is final and binding. The City's Policy is available here: https://www.bendoregon.gov/government/departments/city-attorney/accessibility-ada-information/ada-nondiscrimination-policy/ada-504-grievance-procedure-complaint-form

First, the TRO should not issue because their application does not allege "specific facts in an affidavit or a verified complaint" and Plaintiffs did not certify in writing that they made any efforts to notify the City of their filing or why notice should not be required, as required by Rule 65. FRCP 65(b). Indeed, Plaintiffs did not attempt to contact the City Attorney's office or anyone at the City to give the City notice of the TRO before filing, and none of the Defendants in the action have been served, despite Plaintiffs' certification that they have submitted a copy of the Complaint to Bend City Hall, which as of the date of this filing, and to the best of the City Attorney's knowledge, they have not. The City Attorney only received a copy of the federal court filings on Saturday evening by email from a non-party. Plaintiffs claim in the Complaint that *pro se* litigants are not bound by any notice requirements because they are not lawyers. Federal district courts in the Ninth Circuit have held otherwise. *Egan v. Lonza Houston Inc*, *id; Gill v. Albers*, No. 15-cv-00173-JST, 2015 WL 12697713 (N.D. Cal. March 3, 2015). No extraordinary circumstances exist or have been claimed to justify excusing Plaintiffs from the requirement to provide reasonable notice.

Ex parte relief is also not available because Plaintiffs are not "without fault in creating the crisis that requires *ex parte* relief." *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F.Supp. 488, 492 (C.D. Cal. 1995); *see also id.* (examining whether the movant "create[ed] the crisis" and the party "failed to present requests when they should have"). The Complaint acknowledges that Plaintiffs had at least 27 days to file an application in this court for temporary or preliminary injunction relief after the first had notice of the clean up on Hunnell and Clausen Roads on June 20, 2023. However, instead of filing this action, Plaintiffs waited 23 days, until July 12, to file an action in state court. Plaintiffs then waited five more days after the holding in the Deschutes County Action to file this action. Plaintiffs give no explanation for: (1) filing in federal court

after losing in state court instead of filling a state mandamus action; (2) waiting five days after the court's ruling to file their federal case—giving the Court and the City only one business day to review and respond before the City's planned action and remobilization on July 25, 2023;or (3) not filing this federal action in the first instance closer in time to when initial notice of the clean-up was provided 27 days ago. While the City understands Plaintiffs are *pro se*, and as such are afforded some leniency, the exigency Plaintiffs now claim exists is a crisis of their own making. E*x parte* relief should be denied. *See also Marshall obo Pfeiffer v. General Motors/Corporation Service Co.*, Case No. 18-cv-2551-GPC-JLB, 2018 WL 5920037, at *2 (S.D. Cal. Nov. 13, 2018) (denying *pro se* application for TRO where plaintiffs waited one month after actual notice of foreclosure action to seek federal relief).

B. The Court Does Not Have Subject Matter Jurisdiction Because of the *Rooker-Feldman* Doctrine

Plaintiffs filed the instant federal court action effectively asking this Court to overturn the state court's denial of the same request Plaintiffs make here: stop the City from applying its code and authority because there are ADA issues yet to be resolved. Under the *Rooker-Feldman* doctrine, this Court lacks subject matter jurisdiction to exercise appellate review over the state court decision. *Rooker v. Fidelity Tr. Co.* 263 U.S. 413, 415–16 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 482–26 (1983).

"*Rooker-Feldman* . . . is a narrow doctrine, confined to cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Lance v. Dennis*, 546 U.S. 459, 464 (2006). The doctrine prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a *de facto* appeal from a state court

judgment, and that a federal lawsuit constitutes such a *de facto* appeal where claims raised in the federal court action are inextricably intertwined with the state court's decision such that the adjudication of the federal claims would undercut the state ruling. *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 859 (9th Cir. 2008). "[T]he doctrine applies to both final and interlocutory appeals from state court." *See Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1143 (9th Cir. 2018) (*citing Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1029 (9th Cir. 2001)).[4] *Rooker-Feldman* applies even where the challenge to the state court decision involves federal constitutional issues. *See id.* at 1143 (citations omitted).

Plaintiffs' attempt to unravel the state court judgment after their loss by recasting grievances as new constitutional claims cannot save them. *See Hackett v. Bank of New York Mellon*, No. 19-CV-00015-DKW-KJM, 2019 WL 3554689, at *4 (D. Haw. Aug. 5, 2019) ("While framed as constitutional, these claims likewise challenge the same Third Circuit Court rulings described above and meet the same fate.") (citing *Feldman*, 460 U.S. at 483 n.16). All of the alleged wrongs in Plaintiffs' Complaint have already been addressed in state court.

This action falls squarely within *Rooker-Feldman.* Plaintiffs assert the same claims and seek the same relief in this Court that was already denied a week ago in Deschutes County Circuit Court. Indeed, the crux of the Complaint is that Defendants are allegedly violating Plaintiffs rights "***pursuant to*** the Deschutes County court's [order]." Winters Decl. ¶ 2, Compl. ¶ 18 (emphasis added); *see also id.* ¶¶ 5, 9, 11–16 (alleging in detail the process and decision in the state court, including the rationale for the state court's conclusion that the City "had a right, even

[4] Other Ninth Circuit decisions have held that *Rooker-Feldman* does not apply to interlocutory appeals. *See Mothershed v. Justices of Supreme Ct.*, 410 F.3d 602, 604 fn 1 (9th Cir. 2005). However, federal district courts in the Ninth Circuit continue to cite to *Benavidez* for the proposition that a federal court does not have jurisdiction to hear a *de facto* appeal of a state court decision, even if that decision is not final. *See, e.g.*, *Javidi v. Sup. Ct.*, Case No. 21-cv-05393 SBA, 2022 WL 2439177, at *2–3 (N.D. Cal. July 5, 2022) (applying *Rooker-Feldman* to dismiss federal court action seeking to vacate a state court restraining order).

an obligation, to regulate its own streets."). Plaintiffs are now asking this Court to issue the same extraordinary relief the state court already considered and denied: to enjoin Defendants from enforcing the temporary closure and clearing of Hunnell/Clausen. *Cf.* Winters Decl., ¶ 2, Prayer for Relief *with* Compl., Prayer for Relief. *Rooker-Feldman* bars Plaintiffs' action because it effectively asks this Court to overturn the Deschutes County Circuit Court's ruling denying Plaintiffs' request for a TRO, and in doing so is inextricably linked with the Deschutes County Court proceedings. *See e.g., Reusser,* 525 F.3d at 859. The TRO should be denied and the Complaint dismissed with prejudice.

C. This Action is Barred by the Anti-Injunction Act and *Colorado River*

In the event the Court finds that *Rooker-Feldman* does not apply because the underlying state court judgement has not yet actually been signed—and therefore the state court action is still ongoing—this action is barred by both the Anti-Injunction Act and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).[5] *See Porter v. Vietnam Veterans of San Diego*, Case No. 20cv399-LAB (AHG), 2020 WL 1046887, at *2 (S.D. Cal. March 4, 2020) (dismissing pro se complaint filed by person experiencing houselessness where "[t]he facts are too sketchy to determine whether the state court's order became final" before the action was filed and holding, therefore, that the court would likely abstain under *Colorado River* "until the state court action is final."); *Smith v. ReconTrust Co., N.A.*, Case No. SACV 13-372-JST (MLGx), 2013 WL 12120068, at *1 (C.D. Cal. March 4, 2013) (denying *ex parte* application under *Colorado River* and Anti-Injunction Act where state court action was still ongoing).

[5] As the Supreme Court recognized in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005), *Rooker-Feldman* does not "override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions." To the extent there is a final judgment in the Deschutes County Action, this federal court claim would also be barred by claim preclusion.

1. Anti-Injunction Act

Under the Anti-Injunction Act, federal courts "may not grant an injunction to stay proceedings in State court…" 28 U.S.C. § 2283. The Act applies even when the injunction is directed to a litigant (ordering the litigant not to proceed further) instead of to the state court proceeding itself. *Atl. Coast Line R.R. Co. v. Bhd. Of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970); *Prudential Real Est. Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 879 (9th Cir. 2000).

Plaintiffs ask this Court to "enjoin[] Defendants from enforcing the clearing of Hunnel/Clausen on July 25th," Compl., Prayer for Relief. That request has already been made (and denied) in state court, and to the extent the state court order and judgment have not been signed, the state court proceeding is ongoing. This Court cannot issue an order effectively enjoining that proceeding by ordering the Defendants to take an action contrary to what was already ordered—and in this case specifically authorized—by a state court. *See, e.g.*, *Easterday Dairy, LLV v. Fall Line Capital, LLC*, Case No. 2:22-cv-01000-HL, 2022 WL 17104572, at *9 (D. Or. Nov. 22, 2022).

2. *Colorado River*

In addition to the Anti-Injunction Act's statutory bar, the Court should dismiss the action pursuant to *Colorado River*. Under *Colorado River*, "there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts." *Id.* At 817. In the interest of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive

disposition of litigation," a district court can dismiss or stay "a federal suit due to the presence of a concurrent state proceeding." *Id.* 817–18.

Building on Supreme Court precedent, the Ninth Circuit has developed eight factors to be considered in determining whether application of *Colorado River* is appropriate:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

R.R. St. & Co. Inc. v. Transp. Ins. Co., 656 F.3d 966, 978–79 (9th Cir. 2011).

The factors are not a "mechanical checklist" and should be applied "in a pragmatic, flexible manner with a view to the realities of the case at hand." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9–13, 21 (1983). "The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case." *Id.* at 16.

Factors 2, 3, 4, 6, 7, and 8, taken together, strongly counsel in favor of dismissal. The Plaintiffs, all *pro se* Central Oregon residents, three of whom are experiencing houselessness, would be significantly inconvenienced by having to travel or appear in a Eugene forum. In addition, Plaintiffs' claims have already been litigated in a state court proceeding where they all personally appeared. Judge Ashby, during the state court proceedings, specifically noted that he had reviewed all the submitted documents and gave all the Plaintiffs great latitude in raising their issues and presenting their arguments. Plaintiffs' claims were filed and heard prior to the instant action in a state forum that had jurisdiction to competently adjudicate the rights of Plaintiffs. Indeed, Plaintiffs decision to file this *de facto* appeal of the state court action is exactly the type of piecemeal litigation and forum shopping *Colorado River* is designed to protect against.

Finally, and perhaps most significantly, the state court proceedings will resolve, and already have resolved, all issues currently before this court.

To the extent Plaintiffs are displeased with the result in Deschutes County Circuit Court, they can seek a writ of mandamus from a higher state court. Filing a parallel action in federal court seeking the same relief in what is essentially the same case was not the proper procedure, and hearing the case can only undermine the decision already rendered in the Deschutes County Action.

D. Temporary Restraining Order Should Be Denied

If the court finds it has jurisdiction and decides to entertain Plaintiffs' request for a temporary injunction, the request should be denied because Plaintiffs cannot establish a likelihood of success on the merits or irreparable harm, and the balance of the interests favors the City.

1. Legal Standard

A TRO is an "extraordinary and drastic remedy." *Mazurek v. Armstrong*, 520 U.S. 986, 972 (1997). A TRO "should be restricted to serving [its] underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing [on the preliminary injunction application], and no longer." *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438–39 (1974). As the Ninth Circuit has emphasized, the circumstances justifying the issuance of an *ex parte* TRO are extremely limited. *See Reno Air Racing, Ass'n v. McCord* 452 F.3d 1126, 1131 (9th Cir. 2006) (citations omitted). Plaintiffs are not able to meet this extraordinary standard because they have not established that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a TRO is in the public interest. See *Jackson v.*

Gill, 2020 WL 4361639, at *2 (D. Or. June 10, 2020) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

2. Likelihood of Success on the Merits

Plaintiffs' complaint pleads no actual claims. The Complaint has a prayer for relief—the same prayer that was rejected in the Deschutes County Action—but the pleading doesn't add any additional facts that haven't been adjudicated in state court and doesn't plead any legal claims apart from their disagreement with the state court's denial of their TRO. Plaintiffs do not challenge the City's Camping Code. Rather, they include conclusory allegations of various constitutional violations arising out of the City's decision to temporarily close Hunnell and Clausen Roads and to apply the code's reasonable time, place, and manner regulations to the area. There are not facts pled to support any of these claims. And the reasonable time, place, and manner regulations in the City's Camping Code directly contradict what Plaintiffs are alleging.[6]

3. Irreparable Harm

Plaintiffs do not plead any irreparable harm if the clean-up continues as planned. The City's Camping Code does not ban camping in the City. The Camping Code allows people to use many of the City's public rights-of-way to camp for up to 24 hours in one location. The code allows people to use vehicles for shelter for up to three business days in one location almost

[6] The City questions whether Plaintiff Garrity has standing to bring this action, and asserts he does not. Garrity is not experiencing houselessness and does not reside on Hunnell and Clausen Roads. The Complaint alleges no potential harm to Garrity arising out of the clean-up action, nor could it. Rather, Garrity seeks to establish third-party standing based on his status as a "service provider" that has been "assisting the homeless on Hunnell/Clausen with meals and other services for several years." Compl. ¶ 1. There is no third-party standing doctrine that would allow Garrity to vindicate the rights of the houseless in federal court based solely on these allegations, especially since the directly injured parties—Plaintiffs Aguilar, Hester, and Schindler—are already plaintiffs. *Wedges/Ledges of Ca., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56 (9th Cir. 1994) (rejecting third-party standing where directly injured parties are joined in the suit). And, Garrity does not have organizational standing based on his affiliation with the Bend Equity Project because Bend Equity Project is not an alleged plaintiff and the Complaint does not allege Plaintiffs Aguilar, Hester, or Schindler are members. *See La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (refusing to find organizational standing where no plaintiffs made an attempt to allege organizational standing in their complaint).

everywhere in the city, essentially treating vehicles used for shelter the same as any other vehicles that are parked by allowing them to be in one location for the same period of time. Bend's Camping Code does not contain any criminal penalties, does not subject violators to the possibility of jail time, and applies to everyone equally, regardless of whether they do or do not have access to shelter. Rather, the City has worked with people to achieve compliance and has, on occasion, issued notices to move and removed and stored personal property in a manner consistent with federal and state law. Because Plaintiffs are entitled to camp elsewhere in the City without fear of penalty, and could even return to the Hunnell and Clausen area following the temporary closure, Plaintiffs will not suffer irreparable harm if the temporary restraining order is denied. *See Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019); *Johnson v. City of Grants Pass*, Nos 20-35752, 20-35881, 2023 WL 4382635 (9th Cir. July 5, 2023).

4. Balance of Hardships and Public Interest

The balance of hardships does not favor Plaintiffs and the application for temporary restraining order is not in the public interest. Hunnell and Clausen Roads have had restricted access by members for the public for over three years. The City undertook almost six months of public process in 2022 to enact a reasonable Camping Code, delayed application of the code for over three months, and then gave individuals residing on Hunnell and Clausen Roads an additional four months following the code's effective date to remove themselves from the area. The hardship on the City and its residents—including local businesses that have made significant investments in the area—is not outweighed by the requirement that Plaintiffs camp in another location while the street is temporarily closed to be cleaned. Plaintiffs simply cannot contend that the public interest allows themselves and others to be entitled to permanent residence on public streets in the Hunnell and Clausen area, or that the City can never regulate public streets in a way

that could require people to follow some rules. The final two TRO factors do not support the requested relief.

IV. CONCLUSION

For the foregoing reasons, the Court does not have subject matter jurisdiction over this action and should dismiss the complaint with prejudice and deny the TRO in its entirety, or, in the alternative, dismiss the action under the Anti-Injunction Act or *Colorado River*. However, if the Court finds it has jurisdiction over the Complaint, it should deny the request for *ex parte* relief as well as the TRO, give Plaintiffs the opportunity to serve the action on Defendants, and then proceed to screen the complaint pursuant to 28 USC § 1915 to determine IFP status.

If the Court grants the TRO, then because Plaintiff Garrity does not have standing and there are no class action allegations in the Complaint, let alone allegations meeting the standards of Rule 23, the temporary restraining order can and should only be made applicable to Plaintiffs Aguilar, Hester, and Schindler.

Respectfully submitted on this 23rd day of July 2023.

CITY OF BEND

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