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16 ** C.D. California admission application forthcoming*

17 **UNITED STATES DISTRICT COURT**

18 **CENTRAL DISTRICT OF CALIFORNIA**

19 RICHARD HART et al., individually
and on behalf of all others similarly
20 situated,
21 Plaintiffs,
22
23 v.
24 STEPHANIE CLENDENIN, Director
of California Department of State
25 Hospitals, in her official capacity et al.,
26
27 Defendants.

Case No. 5:20-cv-1559-JGB-SHK

**PLAINTIFFS’ NOTICE OF *EX PARTE*
APPLICATION AND *EX PARTE*
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND ORDER TO
SHOW CAUSE RE: PRELIMINARY
INJUNCTION; MEMORANDUM IN
SUPPORT**

Date: TBD
Time: TBD
Judge: Hon. Jesus G. Bernal
Courtroom: 7D

1 **PLAINTIFFS’ NOTICE OF *EX PARTE* APPLICATION AND *EX PARTE***
2 **APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO**
3 **SHOW CAUSE RE: PRELIMINARY INJUNCTION**

4 TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF
5 RECORD HEREIN:

6 **PLEASE TAKE NOTICE** that Plaintiffs Ervin Longstreet, Aldo Hernandez,
7 Charles Gluck, and Graham Waldrop (“Plaintiffs”), individually and on behalf of all
8 others similarly situated, apply, *ex parte*, for a temporary restraining order (“TRO”) and
9 an order to show cause (“OSC”) re preliminary injunction against Defendants Stephanie
10 Clendenin, in her official capacity as Director of California Department of State
11 Hospitals (“DSH”), and Janine Wallace, in her official capacity as Executive Director of
12 Patton State Hospital (“Defendants”), enjoining Plaintiffs from continuing to violate
13 Plaintiffs’ rights under the Fourteenth Amendment Due Process Clause and Title II of the
14 Americans with Disabilities Act (“ADA”).

15 Specifically, Plaintiffs request that the Court issue a TRO and OSC re
16 preliminary injunction in the form of the proposed order submitted concurrently with
17 this *ex parte* application. The *ex parte* application is made pursuant to 17 U.S.C.
18 § 502(a), Federal Rule of Civil Procedure 65, and Local Rule 65.

19 This *ex parte* application is based upon this Notice, the Memorandum of Points
20 and Authorities, the declarations filed herewith, all accompanying exhibits, the
21 Motion for Class Certification, filed concurrently, all filings in this matter, the
22 Proposed Order, which is being lodged in accordance with Local Rule 7-20, and any
23 and all evidence, argument, or other matters that may be presented at hearing.

24 The extreme danger that Plaintiffs and the proposed class now face necessitates
25 expedited relief in the form of a TRO and provisional class certification. In the past
26 two weeks, 113 patients have tested positive for COVID-19. Eighty-nine of these
27 patients tested positive for COVID-19 in the last seven days. Three of the named
28 plaintiffs in this lawsuit tested positive for COVID-19 since the status conference on

1 December 7, 2020. Numerous putative class members have also tested positive for
2 COVID-19 within the last week, and at least 11 DSH-Patton patients have required
3 acute hospitalization due to severe COVID-19 symptoms. Critical action is required
4 now.

5 This application is made following the conference of counsel pursuant to L.R. 7-3.
6 On December 4, 2020, Plaintiffs’ counsel met and conferred telephonically with
7 Defendants’ counsel during which they discussed the substance of Plaintiffs’ motions for
8 class certification and for expedited relief as either a motion for preliminary injunction or
9 a temporary restraining order. Plaintiffs’ counsel informed Defendants that they would
10 determine the type of expedited relief based on the severity of the COVID-19 outbreak at
11 DSH-Patton, and that Plaintiffs intended to file the applications on December 14.

12 On December 10, 2020, Plaintiffs’ counsel informed Defendants’ counsel through
13 an email that, based on an increase of more than 100 cases in the past two weeks,
14 including three of the named Plaintiffs, Plaintiffs intend to move for a temporary
15 restraining order.

16 On both occasions, Plaintiffs’ counsel communicated with Lisa Tillman, Deputy
17 Attorney General, representing the Defendants. Plaintiffs understand that Defendants
18 oppose the application.

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DATED: December 14, 2020

Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Ervin Longstreet, Aldo Hernandez, Charles Gluck, and Graham Waldrop
4 (“Plaintiffs”), and hundreds of other psychiatric patients who are involuntarily confined
5 at Patton State Hospital (“DSH-Patton” or “Patton”) are fighting for their lives. The
6 facility, which is one of the largest psychiatric hospitals in the country, is in the midst of
7 a surging COVID-19 outbreak. In the past two weeks alone, more than 113 patients
8 have tested positive for COVID-19. Eighty-nine of these patients tested positive for
9 COVID-19 in the last seven days.

10 Three of the named Plaintiffs in this lawsuit—Ervin Longstreet, Aldo
11 Hernandez, and Graham Waldrop—tested positive for COVID-19 within the last week.
12 Each of these men has conditions that, according to guidelines from the Centers for
13 Disease Control and Prevention (“CDC”), put them at high risk for severe illness or
14 death from COVID-19. Hundreds of patients at Patton also have health conditions
15 that put them at heightened risk of becoming severely ill or dying from COVID-19.

16 Defendants Stephanie Clendenin, Director of California Department of State
17 Hospitals (“DSH”), which runs DSH-Patton and four other state psychiatric hospitals,
18 and Janine Wallace, Executive Director of DSH-Patton (collectively, “Defendants”), have
19 failed to take critical measures to protect Plaintiffs despite knowing that Plaintiffs and
20 similarly situated patients at DSH-Patton are especially vulnerable to grave harm.

21 For months, Defendants have maintained that Patton is sufficiently safe for
22 Plaintiffs despite holding Plaintiffs in crowded, congregate settings where social
23 distancing is impossible. Even while prisons, jails, and immigration detention facilities
24 across the country have taken affirmative measures to reduce their populations in
25 response to the severe threat posed by COVID-19, Defendants have failed to conduct an
26 adequate systematic review of high-risk patients in order to identify who can be safely
27 discharged to a less dangerous setting; facilitate the release or transfer of such high-risk
28 patients to safer, non- or less-congregate settings; or otherwise reduce the patient

1 population to allow for anything close to adequate social distancing. These failures are
2 responsible for the new deadly surge in COVID-19 infections at Patton.

3 Many high-risk patients who can be safely discharged to safer and less crowded
4 settings remain trapped in what has become a tinderbox of infections. As but one
5 example, in July, Defendants found Plaintiff Ervin Longstreet—an African American
6 Navy veteran who is a cancer survivor with multiple medical comorbidities—eligible to
7 discharge. After repeated advocacy by Plaintiffs’ counsel, Defendants again confirmed
8 him eligible for discharge in September. Yet despite the acknowledged severe risk Mr.
9 Longstreet faces from COVID-19, Defendants continue to hold Mr. Longstreet at Patton.
10 Their failure to act may prove deadly because earlier this month, Mr. Longstreet’s
11 crowded unit was exposed to COVID-19, and Mr. Longstreet, along with others in his
12 unit, tested positive for COVID-19 in the past week. Other high-risk patients face
13 similarly dire circumstances. James Moore, who has serious respiratory comorbidities,
14 contracted COVID-19 this week. He is now hospitalized due to difficulty breathing,
15 coughing up blood, and running a persistent fever.

16 Three prominent experts have reviewed the conditions and circumstances at DSH-
17 Patton: Dr. Peter Chin-Hong, director of the UCSF School of Medicine’s Infectious
18 Diseases/Immunocompromised Host and Transplant Infectious Diseases Program,
19 Heather Leutwyler, Ph.D., Associate Professor and Vice-Chair in the Department of
20 Physiological Nursing at the UCSF School of Nursing, and Elizabeth Jones, a nationally
21 recognized expert with over 35 years of experience in monitoring court orders regarding
22 services for individuals with mental illness. Their extensive findings confirm that the
23 conditions at DSH-Patton create enormous risk of COVID-19 transmission and mass
24 outbreaks, putting Plaintiffs at substantial risk of severe illness or death.

25 In light of the dangerous conditions at DSH-Patton, Plaintiffs seek immediate
26 provisional relief, including discharge or transfer to safer, non- or less-congregate
27 settings for appropriate high-risk patients, depopulation measures to allow for greater
28

1 social distancing, and increased infection control for those within the facility. Plaintiffs
2 meet all of the requirements for provisional relief.

3 *First*, Plaintiffs are likely to succeed on the merits of their claims, or at the very
4 least raise serious questions as to success on the merits. Defendants’ failure to take
5 reasonable steps to protect Plaintiffs from an increased risk of severe illness or death,
6 remedy impermissible punitive conditions, or make reasonable accommodations violate
7 Plaintiffs’ Fourteenth Amendment Due Process rights and Title II of the Americans with
8 Disabilities Act (“ADA”). *See, e.g., Helling v. McKinney*, 509 U.S. 25, 33 (1993)
9 (Constitution protects people from “a condition of confinement that is sure or very likely
10 to cause serious illness and needless suffering the next week or month or year”). Multiple
11 courts have found that litigants similarly situated to Plaintiffs are likely to succeed on the
12 merits of their claims. *E.g., Roman v. Wolf*, 977 F.3d 935 (9th Cir. 2020); *In re Von*
13 *Staich*, 56 Cal. App. 5th 53 (Cal. Ct. App., Oct. 20, 2020), *review filed* (Nov. 16, 2020);
14 *Torres v. Milusnic*, --- F.Supp.3d ---, No. CV 20-4450, 2020 WL 4197285 (C.D. Cal. July
15 14, 2020); *Ahlman v. Barnes*, 445 F.Supp. 3d 671 (C.D. Cal. 2020); *Zepeda-Rivas v.*
16 *Jennings*, 445 F.Supp. 3d 36 (N.D. Cal. 2020); *Fraihat v. U.S. Immigr. & Customs Enf’t*,
17 445 F. Supp. 3d 709 (C.D. Cal. 2020); *Bent v. Barr*, 445 F. Supp. 3d 408 (N.D. Cal.
18 2020); *Kaur v. U.S. Dep’t of Homeland Sec.*, No. 20-cv-03172, 2020 WL 1939386 (C.D.
19 Cal. Apr. 22, 2020).

20 *Second*, Plaintiffs are likely to suffer irreparable harm without immediate relief.
21 Plaintiffs have conditions that place them at increased risk of severe illness from COVID-
22 19. Given the current outbreak at DSH-Patton, Defendants must take the actions this
23 motion seeks in order to adequately protect Plaintiffs and the proposed Class.¹

24 *Third*, the balance of equities and public interest tip sharply in favor of Plaintiffs.
25 Any interest Defendants may have in maintaining the status quo at DSH-Patton is
26 outweighed by the high risk of serious harm or death to Plaintiffs and ongoing
27

28 ¹ *See* Pls. *Ex Parte* Appl. for Provisional Class Cert., filed concurrently herewith.

1 constitutional violations. Further, the outbreak at DSH-Patton endangers not only
2 Plaintiffs, but also other patients, staff members, and the community. Without immediate
3 relief, the virus could exacerbate the infections in the community and overwhelm local
4 healthcare resources. In order to save lives, urgent action must be taken now.

5 **II. FACTUAL BACKGROUND**

6 **A. COVID-19 is Highly Contagious and Poses an Imminent and**
7 **Substantial Risk of Serious Harm to Patients at DSH-Patton.**

8 The accompanying *ex parte* application for provisional class certification relays the
9 factual background of this action in detail. To summarize here, COVID-19 is a highly
10 contagious disease that poses a severe health and safety risk. COVID-19 is principally
11 spread through respiratory droplets produced when an infected person coughs, sneezes, or
12 talks.² COVID-19 also can spread through airborne transmission of infected droplets,
13 especially in enclosed spaces with poor ventilation or through contact with contaminated
14 surfaces.³ Since the onset of the pandemic, locked congregate facilities have been an
15 epicenter of coronavirus transmission, and psychiatric facilities such as DSH-Patton are
16 uniquely vulnerable to COVID-19 outbreaks.

17 The effects of COVID-19 are “very serious and can include severe respiratory
18 illness, major organ damage, and ... death.”⁴ People with high-risk factors have increased
19 rates of severe illness, with some estimates putting the fatality rate as high as 20%.⁵

22 _____
23 ² Chin-Hong Decl. ¶ 6; CDC, *How to Protect Yourself & Others*,
24 <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last
25 visited Dec. 13, 2020).

26 ³ *Id.* ¶¶ 6-7; CDC *Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission*,
27 <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html> (last
28 visited Dec. 13, 2020).

⁴ *Id.* ¶ 5.

⁵ *Id.* ¶¶ 8-9; Leutwyler Decl. ¶ 15; Hadreas Decl. ¶¶ 16-17, Ex. H; *see also Ahlman*, 445
F. Supp. 3d at 679.

1 People from certain racial and ethnic groups, including Black and Latinx people, are also
2 at increased risk of getting sick and dying from COVID-19.⁶

3 Although vaccines have begun to receive approval and a limited supply may be
4 distributed soon, there is no estimate about when full vaccination of the public, including
5 patients at Patton, will occur.⁷ Until widespread vaccination occurs, the “best way to
6 protect [oneself from COVID-19] and to help reduce the spread of the virus that causes
7 COVID-19 is to [l]imit ...interactions with other people as much as possible.”⁸ Such
8 social distancing is impossible at DSH-Patton.

9 ***1. Defendants Confine Plaintiffs and Class Members in Congregate***
10 ***Settings that Create Significant Risk of COVID-19 Transmission.***

11 DSH-Patton is a psychiatric facility in San Bernardino County that confines
12 individuals involuntarily for mental health treatment.⁹ Specifically, the patients at DSH-
13 Patton, including Plaintiffs and the proposed Class, were civilly committed to receive
14 treatment.¹⁰

15 DSH-Patton’s crowded, congregate conditions are of critical concern. The facility
16 operates 1,527 beds and employs more than 2,400 staff who rotate in and out of the
17

18 ⁶ Chin-Hong Decl. ¶ 10; Hadreas Decl. ¶ 18.

19 ⁷ Chin-Hong Decl. ¶¶ 51-54.

20 ⁸ CDC, *People with Certain Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated Dec. 1, 2020); CDC, *How to Protect Yourself & Others*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (updated Nov. 27, 2020); CDC, *Social Distancing*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (updated Nov. 17, 2020); *see also* Chin-Hong Decl. ¶¶ 17, 55.

21 ⁹ Cal. State Dep’t of Hosps., *Department of State Hospitals – Patton*, <https://www.dsh.ca.gov/Patton/index.html> (last visited Dec. 12, 2020).

22 ¹⁰ *See, e.g.*, Cal. Welf. & Inst. Code § 5000 *et seq.* (establishing civil commitment system); *see also* *People v. McKee*, 47 Cal. 4th 1172, 1207 (2010) (individuals found not guilty of insanity are “civilly committed rather than criminally penalized because of their severe mental disorder”); *People v. Robinson*, 63 Cal. App. 4th 348, 351 (1998) (California’s mentally disordered offender law is civil, not penal, in nature); *Jones. v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004) (sexually violent predator detainees are civilly committed).

1 facility each day.¹¹ Patients are housed in units of approximately 50 patients each.¹² Up to
 2 five patients share bedrooms at Patton.¹³ The bedrooms at Patton are so small that some
 3 patients are able to touch the adjacent beds while sitting or lying on their own beds.¹⁴
 4 Patients must share restrooms, a day room, telephones, computers, and drinking
 5 fountains.¹⁵

6 Many units are connected to a “sister” unit, which shares a hallway and a day
 7 room.¹⁶ Patients from sister units line up in the shared hallway to receive medications.¹⁷
 8 Patients are required to eat at a common dining area shared by patients from multiple
 9 units.¹⁸ There is no space for patients to socially distance while eating, when masks
 10 cannot be worn.¹⁹ Dining tables are not cleaned adequately.²⁰ The facility lacks adequate
 11 ventilation—including, for example, windows in the patient unit that do not open to allow
 12 for fresh air—thus creating additional, unreasonable risk of mass transmission.²¹

17 ¹¹ Jones Decl. ¶ 13.

18 ¹² Longstreet Decl. ¶¶ 8-9, 22; Gluck Decl. ¶¶ 6, 11; Hernandez Decl. ¶¶ 8, 12; Waldrop
 19 Decl. ¶¶ 7-8, 18; Aleman Decl. ¶¶ 4, 9, 12; Grajeda Decl. ¶ 6; Marin Decl. ¶¶ 5, 10;
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20 ¹³ Longstreet Decl. ¶ 12; Gluck Decl. ¶ 7; Hernandez Decl. ¶ 13; Waldrop Decl. ¶¶ 12-13;
 Aleman Decl. ¶¶ 6, 10; Grajeda Decl. ¶ 7; Marin Decl. ¶ 6.

21 ¹⁴ Hernandez Decl. ¶ 13; Waldrop Decl. ¶ 12.

22 ¹⁵ Longstreet Decl. ¶¶ 10, 15, 17; Gluck Decl. ¶ 8; Hernandez Decl. ¶¶ 9, 11, 14; Waldrop
 Decl. ¶¶ 8, 10, 14, 17-18; Aleman Decl. ¶ 7; Grajeda Decl. ¶¶ 8-9, 14; Marin Decl. ¶¶ 7,
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23 ¹⁶ Longstreet Decl. ¶¶ 9-10, 19, 21; Hernandez Decl. ¶¶ 9, 10, 17; Waldrop Decl. ¶¶ 8-9,
 17.

24 ¹⁷ Gluck Decl. ¶ 13; Hernandez Decl. ¶ 10; Waldrop Decl. ¶ 9.

25 ¹⁸ Longstreet Decl. ¶ 18; Gluck Decl. ¶ 9; Hernandez Decl. ¶ 15; Waldrop Decl. ¶ 15.

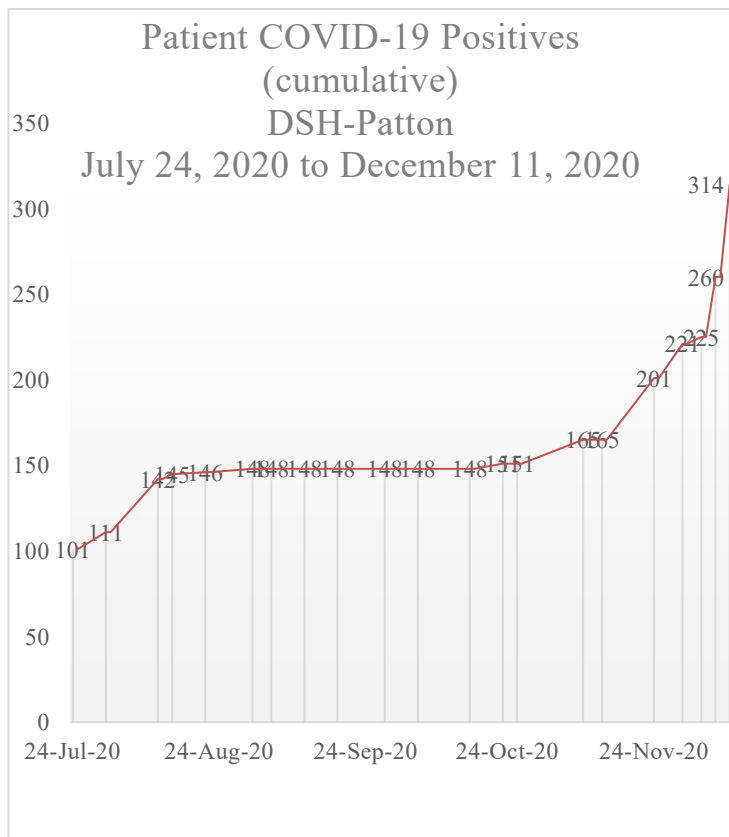
26 ¹⁹ Longstreet Decl. ¶¶ 18-19; Gluck Decl. ¶ 9; Hernandez Decl. ¶ 16; Waldrop Decl. ¶
 15-16; Aleman Decl. ¶ 11.

27 ²⁰ Waldrop Decl. ¶ 16.

28 ²¹ Gluck Decl. ¶ 10; Grajeda Decl. ¶ 10; Chin-Hong Decl. ¶¶ 25-29.

1 Among public health experts, there is general consensus that congregate
 2 institutional settings should operate at no higher than 50% capacity.²² The fully
 3 populated, dense, communal conditions at DSH-Patton place patients at high risk.

4 **2. DSH-Patton is in the Midst of a Dangerous COVID-19 Outbreak.**



5 Since COVID-19 reached DSH-
 6 Patton earlier this year, it has spread
 7 steadily throughout the facility and the
 8 severity of the recent outbreaks requires
 9 an immediate remedy: In the last two
 10 weeks alone, at least 113 patients and
 11 87 staff and onsite personnel have
 12 tested positive. A graph of DSH’s data
 13 highlights the current outbreak:²³

14 At least ten patients have died
 15 from complications due to COVID-
 16 19.²⁴ In one unit of 50 patients, at least
 17 44 have tested positive for COVID-
 18 19.²⁵ And at least three named

19 Plaintiffs—Mr. Hernandez, Mr. Waldrop, and Mr. Longstreet—recently tested positive
 20 for COVID-19.²⁶ Plaintiffs are afraid for their lives.²⁷

21
 22 ²² Chin-Hong Decl. ¶ 22.

23 ²³ *Id.* ¶ 13. The Department of State Hospitals posts data on patient and staff positives, as
 24 well as information on the number of deaths. *See* Cal. Dep’t of State Hosps., *Patient &*
 25 *Staff COVID-19 Tracking* [https://www.dsh.ca.gov/COVID-](https://www.dsh.ca.gov/COVID-19/Patient_and_Staff_COVID-19_Tracking.html)
 26 *19/Patient_and_Staff_COVID-19_Tracking.html* (last visited Dec. 14, 2020).

27 ²⁴ Hadreas Decl. ¶ 9.

28 ²⁵ Pederson Decl. ¶ 18.

²⁶ Pederson Decl. ¶ 7; Hadreas Decl. ¶ 10.

²⁷ Gluck Decl. ¶ 4; Waldrop Decl. ¶ 4; Hernandez Decl. ¶¶ 37-38; Longstreet Decl. ¶ 5;
 Marin Decl. ¶ 25; Moore Decl. ¶ 15; Quintana Decl. ¶ 12; Jackson Decl. ¶ 23; Heine

1 **B. Defendants are Failing to Implement Critical Measures to Protect High-**
 2 **Risk Patients and Mitigate the Spread of COVID-19.**

3 Recognizing the substantial risk of COVID-19 spreading in locked congregate
 4 settings, the CDC encourages facilities to coordinate with local government agencies and
 5 courts to “[c]onsider options to prevent overcrowding (e.g., diverting new intakes to other
 6 facilities with available capacity, and encouraging alternatives to incarceration and other
 7 decompression strategies where allowable).”²⁸ The federal Substance Abuse and Mental
 8 Health Services Administration (“SAMHSA”) recommends use of outpatient treatment
 9 “to the greatest extent possible.”²⁹ Despite the known risks of COVID-19 transmission at
 10 Patton, Defendants have failed to implement adequate policies and procedures to address
 11 the dangerous population density at the facility.

12 ***1. Defendants are Failing to Take Necessary Steps to Discharge or***
 13 ***Transfer High-Risk Patients to Safer, Less-Congregate Settings.***

14 The measures available to Defendants to reduce the patient population and allow
 15 for greater social distancing that they have failed to adopt include: undertaking a robust,
 16 systematic review of high-risk patients in order to identify who can be safely and
 17 effectively discharged to safer, less crowded settings; expediting discharge efforts for
 18 high-risk patients with appropriate services and supports; and transferring high-risk
 19 patients to non-congregate settings, including utilizing available facilities.³⁰ Despite the
 20 threat that Plaintiffs and class members face, Defendants’ “[d]ischarge planning
 21

22 _____
 23 Decl. ¶ 9 (stating that he’s never felt more stressed out in his entire life); Tapia Decl. ¶ 8
 24 (describing Patton as feeling like a “ticking time bomb”); Freund Decl. ¶ 5; Lowery Decl.
 25 ¶ 6.

26 ²⁸ See CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-*
 27 *19) in Correctional and Detention Facilities*, [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html)
 28 *ncov/community/correction-detention/guidance-correctional-detention.html*. (last updated
 Dec. 3, 2020).

²⁹ Hadreas Decl. ¶ 13, Ex. E.

³⁰ Jones Decl. ¶ 33; Hadreas Decl. ¶ 12.

1 continues to rigidly apply pre-pandemic criteria without considering the physical and
2 mental health risks of continued confinement at DSH-Patton.”³¹

3 The discharge or transfer of high-risk patients is warranted because “many DSH
4 patients can safely and effectively transition to less restrictive settings with appropriate
5 support services.”³² The model for transitioning people with mental health disabilities
6 from institutions to community placements already exists.³³ According to medical and
7 mental health authorities, the treatment of patients in the community mental health
8 system rather than institutions like DSH-Patton is not only reasonable, “it is necessary to
9 protect patients from the physical and mental health risks posed by COVID-19 in
10 congregate facilities.”³⁴

11 Defendants’ business-as-usual approach has contributed to the current crisis. To
12 illustrate, Defendants found Mr. Longstreet—an African American Navy veteran who is
13 a cancer survivor with medical comorbidities—eligible to discharge from DSH-Patton in
14 July.³⁵ Despite his heightened risk of severe illness or death from COVID-19 infection,
15 Defendants failed to effectuate his discharge. On or about December 7, 2020, Mr.
16 Longstreet tested positive for COVID-19.³⁶ James Moore, who has respiratory
17 comorbidities, has been on “pre-Community Outpatient Treatment” status from his
18 treatment team for five years.³⁷ Despite meeting his major treatment goals, Mr. Moore
19

20
21 ³¹ Leutwyler Decl. ¶ 29 (“Even high-risk patients that are documented as having a viable
22 WRAP and a plan for step-down community treatment face life-threatening delays in
23 discharge.”).

24 ³² Leutwyler Decl. ¶ 28; Jones Decl. ¶¶ 17-19.

25 ³³ Leutwyler Decl. ¶¶ 34-37; *see also id.* ¶¶ 26, 27(a)-(m) (discussing existing community
26 treatment models); Jones Decl. ¶¶ 23-28.

27 ³⁴ Leutwyler Decl. ¶¶ 22-25, 38 (noting that SAMHSA, American Medical Association,
28 California Mental Health Services Oversight and Accountability Commission, and others
support this position); Jones Decl. ¶¶ 3-34; Chin-Hong Decl. ¶¶ 11-12.

³⁵ Longstreet Decl. ¶ 44, Ex. A.

³⁶ Hadreas Decl. ¶ 10.

³⁷ Moore Decl. ¶¶ 4, 11.

1 remained confined at Patton.³⁸ He recently stated, “I keep wondering what is going to
 2 happen to me if I catch COVID-19 here. With all of my medical conditions, I do not
 3 know if I will survive the pandemic.”³⁹ He has now tested positive, and Defendants have
 4 transferred him to a local hospital because of his severe symptoms.⁴⁰

5 Defendants’ failure to timely discharge or transfer high-risk patients is particularly
 6 striking given that Defendants have ceased providing many forms of mental health
 7 treatment due to the COVID-19 pandemic.⁴¹ As Dr. Chin-Hong notes, “[t]he purpose of a
 8 psychiatric hospital is to provide necessary, clinically appropriate treatment to the
 9 patients it has. Where treatment is or cannot be delivered in a congregate health care
 10 facility (especially where the placement is on an involuntary basis, as it is at DSH-
 11 Patton), the elevated risk to health from COVID-19 in such a setting is hard to justify.”⁴²

12 ***2. Defendants are Failing to Enact Adequate Depopulation Efforts.***

13 Despite the well-recognized risk of COVID-19 spreading through Patton,
 14 Defendants have refused to take necessary steps to adequately reduce the population of
 15 the facility. Although Defendants activated a “surge capacity” facility in Norwalk on
 16 December 7, 2020, to transport 43 female patients out of DSH-Patton, this too late, one-
 17 time transfer is far insufficient. As noted by Dr. Chin-Hong, Defendants are using this
 18 facility “only *after* an untenable number of patients have tested positive at DSH-Patton,”
 19 as opposed to “proactively ... facilitat[ing] adequate social distancing to mitigate the risk
 20 of virus transmission (as should be the case).”⁴³ Despite the Norwalk facility having
 21 capacity for 98 patients, Defendants chose to transfer fewer than half of this number out
 22 of Patton. Even had Defendants transferred 98 patients out of the Patton, such a step
 23

24 ³⁸ Leutwyler Decl. ¶ 29(q); Pederson Decl. ¶ 42.

25 ³⁹ Moore Decl. ¶ 15.

26 ⁴⁰ Pederson Decl. ¶ 45.

27 ⁴¹ *See, e.g.*, Leutwyler Decl. ¶¶ 33(a)-(c); Chin-Hong Decl. ¶¶ 58-60.

28 ⁴² Chin-Hong Decl. ¶ 59.

⁴³ *Id.* ¶ 24.

1 would be “insufficient to facilitate adequate reduction of crowding in the DSH-Patton
2 living areas to allow for necessary social distancing for patients.”⁴⁴

3 **3. Defendants Are Failing to Take Appropriate Measures to Mitigate the**
4 **Risk of Transmission Within DSH-Patton.**

5 Defendants have failed to mitigate the risk of transmission within Patton. For
6 instance, Defendants have fail to: maintain adequate ventilation on the units; disinfect
7 shared spaces regularly; provide necessary cleaning supplies to patients; adopt quarantine
8 protocols that remove infected individuals from a unit without facilitating mass COVID-
9 19 transmission; prevent staff from moving between infected and non-infected units;
10 enforce the proper use of masks and protective equipment; and provide information and
11 education to patients necessary to help them protect themselves.⁴⁵

12 Defendants’ actions, including their quarantine protocols, have exacerbated the risk
13 of mass transmission. For example, Defendants placed Units 26 and 27 on quarantine in
14 October after an infected staff member exposed patients to COVID-19, and that
15 quarantine continuing into December.⁴⁶ In early December, dozens of putative Class
16 members in those units tested positive for COVID-19.⁴⁷ As Dr. Chin-Hong notes, the
17 outbreak in those and other units—which occurred weeks after quarantine status was
18 implemented—shows that “even with quarantine protocols meant to prevent or slow
19 transmission of the virus, the virus’ transmission has accelerated rapidly.”⁴⁸ Defendants’
20 failure to ensure appropriate social distancing and use of crowded COVID-19 units
21 (including for quarantines) have created a situation “*more conducive to mass*
22 *transmission.*”⁴⁹

23 _____
24 ⁴⁴ Chin-Hong Decl. ¶ 24.

25 ⁴⁵ Chin-Hong Decl. ¶¶ 25-50 (describing deficiencies in infection control at Patton).

26 ⁴⁶ Longstreet Decl. ¶ 35; Gluck Decl. ¶¶ 29, 31; Hernandez Decl. ¶¶ 34, 36; Waldrop
27 Decl. ¶¶ 28-29; Aleman Decl. ¶¶ 18-19; Grajeda Decl. ¶¶ 35-36.

28 ⁴⁷ See Hadreas Decl. ¶ 10.

⁴⁸ Chin-Hong Decl. ¶ 14.

⁴⁹ Chin-Hong Decl. ¶ 31.

1 The surging rates of COVID-19 at Patton “suggest that the steps that DSH has
2 taken to reduce the impact of COVID-19 at the facility are inadequate, or that the
3 crowded congregate setting itself (without sufficient social distancing, poor ventilation,
4 *etc.*) makes the facility unreasonably dangerous for patients at high-risk for severe
5 COVID-19 illness, or (most likely) both.”⁵⁰ In the words of nationally recognized mental
6 health expert Elizabeth Jones, “critical action needs to be taken now to discharge high-
7 risk patients from Patton... There is no time to waste.”⁵¹

8 **III. ARGUMENT**

9 A Temporary Restraining Order (“TRO”) may be issued upon a showing “that
10 immediate and irreparable injury, loss, or damage will result to the movant before the
11 adverse party can be heard in opposition.” Fed. R. Civ. P. 65(b)(1)(A). The analysis for a
12 TRO and a preliminary injunction is the same. *Frontline Med. Assoc., Inc. v. Coventry*
13 *Healthcare Workers Compensation, Inc.*, 620 F. Supp. 2d 1109, 1110 (C.D. Cal. 2009).

14 “A plaintiff seeking a preliminary injunction must establish that he is likely to
15 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
16 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
17 the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).
18 Under the Ninth Circuit’s “sliding scale” approach to preliminary injunctions, a plaintiff
19 need only show that “serious questions” exist as to success on the merits where the
20 balance of hardships tips sharply in the plaintiff’s favor and the plaintiff has
21 demonstrated a likelihood of irreparable harm. *Alliance for Wild Rockies v. Cottrell*, 632
22 F.3d 1127, 1131 (9th Cir. 2011).

23 Plaintiffs meet the standard for a TRO in this case. Plaintiffs have identified
24 compelling evidence that Defendants have failed to act to control the spread of COVID-

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26
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⁵⁰ Chin-Hong Decl. ¶ 15.

⁵¹ Jones Decl. ¶ 34.

1 19 throughout Patton and have created substantial and unnecessary risks to the health and
 2 lives of the patient population. Immediate action is needed to prevent additional deaths.

3 **A. Plaintiffs Are Likely to Succeed on the Merits.**

4 Defendants' inadequate response to the COVID-19 outbreak at DSH-Patton
 5 violates Plaintiffs' rights under the Fourteenth Amendment and the ADA. Plaintiffs can
 6 show a likelihood of success on the merits — or at least raise “serious questions” as to
 7 the success on the merits — on either of their claims. *See, e.g., Ahlman*, 445 F. Supp. 3d
 8 at 687-92 (finding a likelihood of success on both due process and disability claims);
 9 *Fraihat*, 445 F. Supp. 3d at 745 (same).

10 **1. Defendants Continue to Violate Plaintiffs' Due Process Rights.**

11 **a) Plaintiffs' Confinement at DSH-Patton Violates the**
 12 **Fourteenth Amendment Right to Reasonable Safety.**

13 When the government takes a person into custody, it gives rise to a “special
 14 relationship,” *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2011), with a
 15 constitutionally imposed duty to provide for “reasonable health and safety.” *Roman*, 977
 16 F.3d at 943 (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189,
 17 199-200 (1989)).

18 To state a due process deliberate indifference claim based on a failure to provide
 19 for reasonable health and safety, plaintiffs must show that the government:

20 (i) [] made an intentional decision with respect to the conditions under
 21 which the plaintiff[s] w[ere] confined; (ii) those conditions put the
 22 plaintiff[s] at substantial risk of suffering serious harm; (iii) the
 23 [government] did not take reasonable available measures to abate the risk,
 24 even though a reasonable official in the circumstances would have
 appreciated the high degree of risk involved . . . ; and (iv) by not taking such
 measures, the [government] caused the plaintiff[s'] injuries.

25 *Id.* at 943 (quoting *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018)).
 26 For the third element, Plaintiffs must only show that Defendants' actions are “objectively
 27 unreasonable”; plaintiffs need not demonstrate Defendants' “*subjective awareness* of the
 28

1 risk of harm.” *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1968, 1071 (9th Cir. 2016)
 2 (en banc). Plaintiffs satisfy each of these elements.

3 *First*, Defendants are intentionally holding Plaintiffs in dense, congregate
 4 conditions known to facilitate the spread of COVID-19. Defendants require Plaintiffs to
 5 spend significant time in crowded spaces—such as shared bedrooms, communal
 6 bathrooms, and common day rooms—and to use communal water fountains, telephones,
 7 and more.⁵² Defendants likewise require Plaintiffs to eat at a common dining area shared
 8 by patients from multiple units and stand in crowded medication lines.⁵³ Plaintiffs cannot
 9 avoid contact with other patients and staff members who move in and out of the hospital
 10 and between units.⁵⁴ Social distancing is thus impossible.⁵⁵ The conditions in which
 11 Defendants hold Plaintiffs “contradict[] the very measures urged as precautions to
 12 infection from COVID-19.”⁵⁶

13 *Second*, Defendants continue to subject Plaintiffs to substantial, unnecessary risk
 14 of serious harm and death. COVID-19 is a highly contagious respiratory virus that is
 15 particularly dangerous to Plaintiffs and class members because their underlying medical
 16 conditions significantly increase the risk of severe illness or death should they contract
 17 COVID-19.⁵⁷ Courts across the country have recognized that the spread of COVID-19
 18 within locked congregate settings constitutes a substantial risk of serious harm. *See, e.g.*,
 19 *Roman*, 977 F.3d at 943; *see also Torres*, 2020 WL 4197285, at *9 (“Petitioners show
 20 they are at substantial risk of exposure to COVID-19, which is inconsistent with
 21

22 ⁵² *See, e.g.*, Longstreet Decl. ¶¶ 10, 12, 15, 17; Gluck Decl. ¶¶ 7-8; Hernandez Decl. ¶¶ 9,
 23 11, 13-14; Waldrop Decl. ¶¶ 8, 10, 12-14, 17-18; Aleman Decl. ¶¶ 6-7; Grajeda Decl. ¶¶
 24 7-9, 14; Marin Decl. ¶¶ 6-7, 10; Jackson Decl. ¶ 6.

25 ⁵³ *See, e.g.*, Longstreet Decl. ¶¶ 9, 18, 19, 21; Hernandez Decl. ¶¶ 9-10, 12, 15, 17;
 26 Waldrop Decl. ¶¶ 8-9, 15, 17; Gluck Decl. ¶¶ 9, 13; Aleman Decl. ¶¶ 4, 7, 11; Marin
 27 Decl. ¶ 9.

28 ⁵⁴ Longstreet Decl. ¶¶ 10, 19; Gluck Decl. ¶ 15; Hernandez Decl. ¶ 12; Waldrop Decl.
 ¶ 11.

⁵⁵ Chin-Hong Decl. ¶ 17-22; *see also* Leutwyler Decl. ¶ 20.

⁵⁶ Jones Decl. ¶ 13.

⁵⁷ Chin-Hong Decl. ¶¶ 8-12; Leutwyler Decl. ¶¶ 13-17.

1 contemporary standards of human decency.”); *Fraihat*, 445 F. Supp. 3d at 744 (“once a
 2 facility has a few cases, the disease spreads rapidly, despite IHSC and CDC protocols.”);
 3 *Castillo v. Barr*, 449 F.Supp.3d 915, 920 (C.D. Cal. 2020) (“A civil detainee’s
 4 constitutional rights are violated if a condition of his confinement places him at
 5 substantial risk of suffering serious harm, such as the harm caused by a pandemic.”). As
 6 in each of these cases, there can be no reasonable dispute that a substantial risk of serious
 7 harm is present here.

8 *Third*, Defendants have not taken reasonable and available steps to protect
 9 Plaintiffs from such risk. It is well-known that “locked psychiatric facilities [such as
 10 Patton], just like jails and prisons, are jam-packed incubators for disease that should be
 11 made safer by judicious but significant releases and alternative placements.”⁵⁸ Despite the
 12 recent surge in positive cases and increase in deaths within DSH-Patton, Defendants have
 13 failed to expedite discharge planning for high-risk patients, transfer high-risk patients to
 14 non-congregate settings, or otherwise meaningfully reduce the patient population to
 15 enable patients to practice the social distancing necessary to protect themselves from
 16 serious illness or death.⁵⁹ *See Campbell v. Barnes*, No. 30-2020-11411117, at 16-17
 17 (Super. Ct. Orange County Dec. 11, 2020) (finding deliberate indifference where
 18 measures taken by Sheriff in response to COVID-19 lacked the “very cornerstone of a
 19 successful abatement plan, namely a sufficient reduction in jail population to enable
 20 proper social distancing”).⁶⁰

21 Defendants’ current protocols *exacerbate* the current crisis. Although Defendants
 22 placed a significant number of Patton’s housing units on quarantine in early October

24 ⁵⁸ Times Editorial Board, *Editorial: Psychiatric hospitals, like jails, requires releases in*
 25 *the Covid era*, L.A. Times (Aug. 13, 2020), [https://www.latimes.com/opinion/story/2020-](https://www.latimes.com/opinion/story/2020-08-13/covid-mental-hospitals-releases)
 26 [08-13/covid-mental-hospitals-releases](https://www.latimes.com/opinion/story/2020-08-13/covid-mental-hospitals-releases). Plaintiffs’ counsel have been communicating with
 DSH leadership since April about feasible methods to protect patients, to no avail.
 Hadreas Decl. ¶¶ 29-30, Exs. P, Q.

27 ⁵⁹ *See, e.g., Chin-Hong Decl. ¶¶ 17-24; Leutwyler Decl. ¶¶ 22-25.*

28 ⁶⁰ https://www.aclu.org/sites/default/files/field_document/20.12.11_campbell_order.pdf.

1 2020, the transmission of COVID-19 has exploded in recent weeks—with 44 out of 50
 2 patients testing positive in just one unit.⁶¹ Rather than preventing the spread of the virus,
 3 Defendants’ use of congregate infection units to quarantine patients with COVID-19 has
 4 created a situation “*more conducive to mass transmission.*”⁶² Defendants also have
 5 allowed Patton staff to “float” between contaminated units and uninfected units,⁶³ thereby
 6 unreasonably increasing transmission risks.⁶⁴ Further, contrary to CDC guidelines,
 7 Defendants are not providing patients with adequate ventilation, access to cleaning
 8 supplies, or patient education and information, and they are not adequately enforcing face
 9 covering protocols.⁶⁵ Given the surge in infections that is overwhelming Patton,
 10 Defendants’ actions are objectively unreasonable.⁶⁶ *Cf. In re Von Staich*, 56 Cal. App. 5th
 11 at 80 (“In the face of this pandemic, which appears to take its greatest toll among older
 12 individuals and in congregate living situations, and in an aged facility with all the
 13 ventilation, space, and sanitation problems ... respondents’ failure to immediately adopt
 14 and implement measures designed to ... permit physical distancing between inmates is
 15 morally indefensible and constitutionally untenable.”).

16 *Finally*, Defendants’ conduct harms Plaintiffs. More than 100 patients have tested
 17 positive in the past two weeks, including three named Plaintiffs.⁶⁷ Certain infected
 18

19 ⁶¹ Pederson Decl. ¶ 18; Chin-Hong Decl. ¶¶ 13-14.

20 ⁶² Chin-Hong Decl. ¶ 31.

21 ⁶³ Longstreet Decl. ¶ 35; Gluck Decl. ¶¶ 28, 31; Hernandez Decl. ¶ 36; Waldrop Decl.
 22 ¶¶ 27, 29; Grajeda Decl. ¶ 36.

23 ⁶⁴ Chin-Hong Decl. ¶¶ 40-45.

24 ⁶⁵ Chin-Hong Decl. ¶¶ 25-50 (describing deficiencies in COVID-19 practices at Patton).

25 ⁶⁶ Chin-Hong Decl. ¶ 15; *cf. Fraihat*, 445 F. Supp. 3d at 744–45 (“[w]hile Defendants
 26 took some available measures to mitigate the threat of COVID-19,” there was still a
 27 “serious question” whether defendants’ actions were “an objectively ‘reasonable’
 28 response to a pandemic, given the high degree of risk and obvious consequences of
 inaction).

⁶⁷ Hadreas Decl. ¶¶ 8, 10; Pederson Decl. ¶¶ 7, 18; *see also* Chin-Hong Decl. ¶¶ 34-35
 (infected patients at Patton are placed at even greater risk given congregate infection
 units) and *id.* ¶¶ 56-57 (discussing risk of re-infection and related risks even after
 recovery).

1 patients have experienced severe symptoms and require hospitalization; at least ten have
 2 died due to the pandemic.⁶⁸ Urgent action is required to avoid further tragedy.

3 **b) Defendants' Actions Subject Plaintiffs to Impermissible**
 4 **Punitive Conditions**

5 The conditions of Plaintiffs' detention during the COVID-19 pandemic also
 6 constitute impermissible punishment under the Fourteenth Amendment's Due
 7 Process Clause. Plaintiffs are civil detainees who are entitled to "more
 8 considerate treatment" than criminal detainees and therefore may not be subjected to
 9 punitive conditions. *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004). "If it is cruel and
 10 unusual punishment to hold convicted criminals in unsafe conditions, it must be
 11 unconstitutional to confine the involuntarily committed—who may not be punished at
 12 all—in unsafe conditions." *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982); *see also*
 13 *Oregon Advo. Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003) (holding that the
 14 substantive due process rights of civil detainees are not governed solely by the deliberate
 15 indifference standard); *King v. Cnty. of Los Angeles*, 885 F.3d 548, 556-57 (9th Cir.
 16 2018) ("Under the Due Process Clause of the Fourteenth Amendment, an
 17 individual detained under civil process ... cannot be subjected to conditions that 'amount
 18 to punishment.'" (citation omitted).

19 To establish such a violation, Plaintiffs need not show that Defendants intended to
 20 subject them to punishment. *Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1205 (9th Cir.
 21 2008). Conditions of confinement are considered "presumptively punitive" if: (1) they are
 22 "identical to, similar to, or more restrictive than, those in which [a civil detainee's]
 23 criminal counterparts are held," *Jones*, 393 F.3d at 934; or (2) where those conditions
 24 "are employed to achieve objectives that could be accomplished in so many alternative
 25 and less harsh methods," *id.* at 932. If plaintiffs establish one of these presumptions, "the
 26 burden shifts to the defendant to show (1) legitimate, non-punitive interests justifying the
 27

28 ⁶⁸ Pederson Decl. ¶ 45; Hadreas Decl. ¶ 9.

1 conditions of [the detained person’s] confinement and (2) that the restrictions imposed . .
 2 . [are] not excessive in relation to these interests.” *King*, 885 F.3d at 557 (internal
 3 quotation marks omitted).

4 Here, Plaintiffs are likely to establish, or at least raise serious questions as to the
 5 success of the merits, that Defendants’ treatment constitutes punitive conditions. While
 6 the purpose of holding Plaintiffs at DSH-Patton is to provide clinically indicated
 7 treatment, Defendants have significantly reduced treatment for at least several months,
 8 with certain programming on hold altogether.⁶⁹ As Dr. Chin-Hong observed, “[w]ithout
 9 provision of clinically indicated treatment, an involuntary mental health treatment facility
 10 becomes little more than a detention facility, like a jail or a prison.”⁷⁰ Further, there are
 11 alternative, less punitive methods of treating Plaintiffs, such as community-based mental
 12 health services that can provide appropriate treatment.⁷¹ No non-punitive basis requires
 13 Plaintiffs’ continued confinement.

14 Throughout the country, jails and prisons have released hundreds of *criminal*
 15 detainees for this reason. *See, e.g., Campbell*, No. 30-2020-11411117 (ordering the
 16 release or transfer of the number of inmates necessary to ensure that all dorms and multi-
 17 person cells are populated at no greater than 50% capacity); *In re Ivan Von Staich*, 56
 18 Cal. App. 5th at 84-85 (ordering San Quentin State Prison to reduce prison population to
 19 50% capacity to remedy risk of substantial harm); *Torres*, 2020 WL 4197285, at *23;
 20 *Ahlman*, 445 F.Supp. 3d at 694-95. In contrast, Defendants have failed to take reasonable
 21 and necessary measures to facilitate adequate social distancing, leading to multiple large
 22 COVID-19 outbreaks among the *civilly-committed* patients in their custody.⁷² Defendants
 23

24 ⁶⁹ Leutwyler Decl. ¶¶ 33(a)-(c); Chin-Hong Decl. ¶¶ 58-59; Gluck Decl. ¶¶ 33-34;
 Hernandez Decl. ¶ 40; Longstreet Decl. ¶¶ 40-41; Waldrop Decl. ¶ 33.

25 ⁷⁰ Chin-Hong Decl. ¶ 60; *see also id.* ¶ 59 (“Where treatment is or cannot be delivered in
 26 a congregate health care facility . . . the elevated risk to health from COVID-19 in such a
 setting is hard to justify.”).

27 ⁷¹ *See Jones* Decl. ¶¶ 23-28; Leutwyler Decl. ¶¶ 26, 27(a)-(m).

28 ⁷² Chin-Hong Decl. ¶¶ 13-15.

1 waited until *after* a major outbreak at Patton to utilize “surge capacity” for 43 patients at
 2 a facility with capacity for more than 1,500 patients; this belated closing-of-the-barn-door
 3 decision is itself “insufficient . . . to allow for necessary social distancing for patients.”⁷³
 4 Further, Defendants have failed to expeditiously conduct assessments of patients
 5 regarding their suitability for release or take affirmative measures to effectuate prompt
 6 discharges or transfers.

7 Plaintiffs establish that their conditions are presumptively punitive because the
 8 “restrictions” imposed on Patton patients—crowded, high-risk confinement without
 9 provision of clinically indicated treatment—are more restrictive than their criminal
 10 counterparts and “employed to achieve objectives that could be accomplished in so many
 11 alternative and less harsh methods.” *Torres v. U.S. Dep’t of Homeland Sec.*, 411 F. Supp.
 12 3d 1036, 1065 (C.D. Cal. 2019) (quoting *Jones*, 393 F.3d at 932). Defendants cannot
 13 point to any legitimate, non-punitive interests to justify the current conditions—
 14 particularly in light of the recent deadly surge in infections—or show that the current
 15 punitive restrictions are not excessive.

16 ***2. Defendants Violate Plaintiffs’ Rights Under the ADA.***

17 Defendants’ actions violate Title II of the ADA, which prohibits public entities
 18 from discriminating based on disability. 42 U.S.C. § 12132. Plaintiffs and the proposed
 19 Class are qualified individuals with disabilities within the meaning of the ADA.
 20 *Id.* § 12102(1)(A), (2)(B), 28 C.F.R. § 35.108(d)(2)(iii).

21 To comply with Title II, public entities must take affirmative steps to ensure that
 22 people with disabilities can participate in programs, benefits, and services on an equal
 23 and equally safe basis as people without disabilities. 28 C.F.R. §§ 35.102(a), 35.130(a),
 24 (b); *Updike v. Multnomah Cnty.*, 870 F.3d 939, 949 (9th Cir. 2017). These obligations
 25 include making reasonable modifications to policies, practices, or procedures where
 26 necessary to avoid disability discrimination. 28 C.F.R. § 35.130(b)(7)(i).

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 28 ⁷³ *Id.* ¶¶ 23-24.

1 Plaintiffs are entitled to reasonable accommodations to ensure that they can
 2 participate equally and with equal safety in all activities provided by Defendants,
 3 including constitutionally adequate care and treatment for their mental illness during
 4 confinement. If Plaintiffs contract COVID-19 and experience significant illness or worse,
 5 they cannot access these services.

6 Defendants also fail to provide treatment to Plaintiffs in the “most integrated
 7 setting appropriate for [their] needs,” as required by the ADA. *See* 28 C.F.R. § 35.130(d).
 8 Unnecessary institutionalization is a form of discrimination prohibited by the ADA.
 9 *Olmstead v. L.C.*, 527 U.S. 581, 597-601 (1999). There are Plaintiffs and Class members
 10 currently detained at Patton for whom less restrictive, more integrated settings would be
 11 appropriate.⁷⁴ For example, Mr. Longstreet’s treatment team has, for months, found him
 12 appropriate for discharge to a less restrictive placement, yet he remains confined.⁷⁵

13 The continued confinement of high-risk patients at Patton who would be better
 14 served in less restrictive environments unnecessarily endangers their health.⁷⁶ By refusing
 15 to effectuate discharge for eligible, at-risk Class members who could receive treatment in
 16 a less restrictive and less congregate setting, Defendants subject Class members to
 17 discrimination in the form of unnecessary institutionalization.

18 Defendants’ actions also impermissibly “utilize criteria or methods of
 19 administration . . . [t]hat have the effect of subjecting qualified individuals with
 20 disabilities to discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(3)(i).
 21 Policies that create a disparate impact against people with disabilities violate this
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23 ⁷⁴ Leutwyler Decl. ¶ 28; Jones Decl. ¶ 19.

24 ⁷⁵ Leutwyler Decl. ¶ 29 Longstreet Decl. ¶¶ 44-45; *see also Steimel v. Wernert*, 823 F.3d
 25 902, 916 (7th Cir. 2016) (finding that public entity “cannot avoid the integration mandate
 by binding its hands in its own red tape.”).

26 ⁷⁶ Jones Decl. ¶ 34 (“Given the extraordinary risks to patients in congregate settings like
 27 those at Patton, efforts to utilize and, if necessary, expand community-based options are
 28 necessary both to realize the requirements of *Olmstead* . . . and to mitigate the elevated
 and avoidable risks to patients’ health and well-being.”); *see also* Chin-Hong Decl. ¶ 58-
 61.

1 provision. *See, e.g., Campbell*, No. 30-2020-11411117, at 25 (finding disability
 2 discrimination under California law where defendant failed to “address the uncontested
 3 fact that for medically vulnerable inmates (including those with a qualifying disability)
 4 [who are] not released, the current conditions in the Jail place them at substantially
 5 greater risk of and from a COVID-19 infection than the inmate population at large”).

6 Here, Defendants have treated the proposed Class similarly to other patients in
 7 regards to infection control and social distancing. They have failed to provide additional
 8 essential protections, such as space for social distancing, in the face of incontrovertible
 9 evidence that Class members are at higher risk for severe illness or death.⁷⁷ Plaintiffs
 10 cannot access the mental health services to which they are entitled if they contract
 11 COVID-19, defeating or substantially impairing the DSH’s objectives.

12 ***3. Defendants Cannot Reasonably Claim That There Is Nothing They***
 13 ***Can Do to Protect the Lives of Proposed Class Members, or That Their***
 14 ***Hands Are Tied by Superior Court Commitment Orders or Procedures.***

15 In March 2020, the State of California authorized Defendant Clendenin to take
 16 whatever steps are necessary to protect the patients in her custody and care.

17 Governor Newsom’s March 21, 2020 Executive Order N-35-20, recognized that
 18 “state institutions housing vulnerable populations, such as those operated by the
 19 Department of State Hospitals . . . require special measures to protect those populations
 20 from COVID-19 and ensure continuity of care.”⁷⁸ Under the order, Defendant Clendenin
 21 is empowered to waive requirements under state law as warranted “to protect the health,

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 23 ⁷⁷ Chin-Hong Decl. ¶¶ 13-16; Leutwyler Decl. ¶ 15 (noting that the estimated fatality rate
 24 for high-risk individuals who contract COVID-19 is up to 20%); Hadreas Decl. ¶ 11.

25 ⁷⁸ Hadreas Decl. ¶ 28, Ex. O (Cal. Governor Exec. Ord. N-35-20, Mar. 21, 2020). The
 26 Governor’s order should be read in tandem with California’s longstanding legislative
 27 commitment to protect its residents in times of emergency: “The state has long
 28 recognized its responsibility to mitigate the effects of natural, manmade, or war-caused
 emergencies that result in conditions of disaster or in extreme peril to life, property, and
 the resources of the state, and generally to protect the health and safety and preserve the
 lives and property of the people of the state.” Cal. Gov. Code § 8550.

1 safety and welfare of patients with mental or behavioral health conditions committed to
2 the State Department of State Hospitals facilities”:

3 [T]he Director of the State Department of State Hospitals may issue
4 directives waiving any provision or requirement of the Welfare and
5 Institutions Code; any provision or requirement of the Penal Code that affects
6 the execution of laws relating to care, custody, and treatment of persons with
7 mental illness committed to or in the custody of the State Department State
8 Hospitals. . . . Any waivers and extensions granted pursuant to this paragraph
9 shall be posted on the Department’s website.⁷⁹

10 To date, Defendant Clendenin has issued *no* waivers of state law pursuant to the
11 March 21 Executive Order to facilitate discharges or transfers necessary to ensure
12 adequate social distancing or related population-based virus transmission precautions.⁸⁰

13 Defendants have the authority under the March 21 Executive Order to take
14 affirmative steps to protect Plaintiffs and the proposed Class. They have not done so.
15 Because they have clear emergency authority to act, Defendants cannot avoid their legal
16 and constitutional duties to Plaintiffs by relying on superior court commitment orders or
17 state law procedures. *Cf. Campbell*, No. 30-2020-11411117 at 27 (“Because Respondent
18 has failed to reduce jail population sufficiently to ensure appropriate social distancing,
19 the abuse of discretion lies in his failure to then consider all medically vulnerable
20 inmates, including those with disabilities rendering them medically vulnerable, for
21 release under the authority granted by [state law].”).

22 Given Defendants’ failure to act, this Court has authority to order broad relief to
23 ensure that Plaintiffs’ constitutional rights are protected. *Roman*, 977 F.3d at 942; *Stone*
24 *v. City & Cnty. of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992); *see also Valdivia v.*
25 *Schwarzenegger*, 599 F.3d 984, 995 (9th Cir. 2010).

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27 ⁷⁹ Hadreas Decl. ¶ 28, Ex. O (Exec. Ord. N-35-20 at Ord. (5)).

28 ⁸⁰ *See* Cal. Dep’t of State Hospitals, *Treatment*,
<https://www.dsh.ca.gov/Treatment/index.html> (last visited Dec. 13, 2020).

1 **B. Plaintiffs Will Be Irreparably Harmed Absent Injunctive Relief.**

2 “It is well established that the deprivation of constitutional rights unquestionably
3 constitutes irreparable injury.” *Castillo*, 449 F. Supp. 3d at 923. Plaintiffs and the
4 proposed Class have demonstrated irreparable harm.

5 The grave risk of a “severe, and quite possibly fatal, infection . . . constitutes
6 irreparable harm warranting” relief. *Basank v. Decker*, 449 F. Supp. 3d 205, 213
7 (S.D.N.Y. 2020); *see also M.R. v. Dreyfus*, 663 F.3d 1100, 1111 (9th Cir. 2011),
8 *amended by* 697 F.3d 706 (9th Cir 2012); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*,
9 543 F.3d 1047, 1050 (9th Cir. 2008).

10 Multiple courts have found irreparable harm in circumstances analogous to
11 Plaintiffs’. *See, e.g., Fraihat*, 445 F. Supp. 3d at 749 (“Even in the early days of the
12 pandemic, and with few exceptions, courts did not hesitate to find irreparable harm as a
13 result of potential COVID-19 exposure in prison and detention, including in facilities
14 where there had not been a confirmed case.”); *Ahlman*, 445 F. Supp. 3d 692 (“Certainly,
15 there is no greater irreparable harm than death.”); *Bent*, 445 F. Supp. at 419 (finding
16 irreparable harm where ICE detainee’s condition put him at high risk for illness or death
17 from COVID-19); *Castillo*, 449 F. Supp. 3d at 923 (same).

18 As discussed above, Plaintiffs and the proposed Class have conditions that put
19 them at heightened risk of severe illness or death from COVID-19. They are at grave risk
20 of COVID-19 infection if they remain confined under current conditions. As described by
21 Dr. Leutwyler, “patients at DSH-Patton are at increased risk of contracting COVID-19 as
22 compared to community mental health facilities and transitional housing programs, which
23 have patient populations that are far smaller than DSH-Patton.”⁸¹

24 While Defendants may claim that a forthcoming vaccine for healthcare workers
25 will mitigate the risk that Plaintiffs face, such a prospect remains speculative because the
26 vaccine distribution timeline remains uncertain. Moreover, any forthcoming vaccine will
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⁸¹ Leutwyler Decl. ¶ 21.

1 not arrive soon enough to mitigate the widespread transmission currently affecting high-
2 risk patients. Put simply: “[u]ntil public health data affirmatively demonstrate that the
3 risk of COVID-19 transmission and severe illness has abated, there is no scientific basis
4 for refraining from any and all available measures to prevent virus transmission,
5 especially in congregate facilities like DSH-Patton.”⁸²

6 Unless this Court intervenes now, Plaintiffs and the proposed Class are at grave
7 and imminent risk of serious illness or death.

8 **C. The Balance of Equities and the Public Interest Both Favor Granting**
9 **Plaintiffs’ Immediate Relief.**

10 The balance of equities and the public interest both tip sharply towards Plaintiffs.
11 *Fraihat*, 445 F. Supp. 3d at 749 (“Where the government is the opposing party, balancing
12 of the harm and the public interest merge.”); *id.* (“[I]t is always in the public interest to
13 prevent the violation of a party’s constitutional rights” and there is “no public interest in
14 exposing vulnerable persons to increased risks of severe illness and death.”); *Harris v.*
15 *Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004) (interest in protecting
16 people from physical harm outweighs government financial concerns).

17 Plaintiffs seek an immediate assessment of proposed Class members to effectuate,
18 whenever possible, discharge or transfer to non-congregate or less-congregate settings.⁸³
19 Plaintiffs also seek a remedial order to ensure that Defendants implement adequate social
20 distancing at Patton, as well as additional infection control measures to address the
21 deficiencies identified by UCSF infectious disease expert Dr. Chin-Hong.

22 Any purported interest that Defendants may have in continued confinement is far
23 outweighed by the significant risk of severe illness or death to Plaintiffs. To the extent
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26 ⁸² Chin-Hong Decl. ¶¶ 51-55.

27 ⁸³ Leutwyler Decl. ¶ 26 (“Through effective individualized assessments, a discharge/
28 treatment planning team can identify appropriate housing and services that are tailored to
individual patient needs for many DSH-Patton residents.”).

1 that Defendants claim an interest in continued confinement of Plaintiffs due to their
 2 mental health treatment needs, Defendants have suspended treatment programming at
 3 DSH-Patton, including all group therapy sessions.⁸⁴ Many proposed Class members
 4 require treatment services that can be provided in safer settings, and many have already
 5 been found appropriate for discharge yet remain confined at DSH-Patton.⁸⁵ No reason
 6 exists why they should remain at DSH-Patton rather than move to safer, non-congregate
 7 settings. To the extent public safety concerns exist, the requested patient assessments can
 8 include an evaluation of whether the patient can be transitioned into an appropriate
 9 placement to address such risk.⁸⁶

10 Finally, preventing COVID-19 from spreading within DSH-Patton furthers the
 11 interests of the public. Patton's staff enter and exit the facility daily, which means that
 12 infection rates at the facility affect staff members' families and communities.⁸⁷ The
 13 continued spread of COVID-19 at Patton strains hospital resources within San
 14 Bernardino County: DSH data from December 11 shows that at least 11 Patton patients
 15 have required hospitalization for acute COVID-19 symptoms.⁸⁸ Even without this influx,
 16 hospital resources in San Bernardino County are stretched dangerously thin.⁸⁹

17 IV. CONCLUSION

18 Plaintiffs respectfully request that the Court grant this *ex parte* application and
 19 order the relief set forth in the accompanying proposed order as the earliest possible time.

21 ⁸⁴ Leutwyler Decl. ¶¶ 33(a)-(c).

22 ⁸⁵ *Id.* ¶¶ 28-29(a)-(b).

23 ⁸⁶ *Id.* ¶¶ 26-28, 34-36.

24 ⁸⁷ *Id.* ¶ 43.

25 ⁸⁸ Hadreas Decl. ¶ 8, Ex. C.

26 ⁸⁹ Under Rule 65(c), courts have discretion when granting a TRO or preliminary
 27 injunction to set no bond or only a nominal bond. *Save Our Sonoran, Inc. v. Flowers*, 408
 28 F.3d 1113, 1126 (9th Cir. 2005). The Court should waive a bond because the injunction
 serves the public interest, Plaintiffs are likely to prevail, and the suit is brought by
 involuntarily confined patients with limited means. Hadreas Decl. ¶ 33; *see Hernandez v.*
Cnty. of Monterey, 110 F. Supp. 3d 929, 958-59 (N.D. Cal. 2015); *Barahona-Gomez v.*
Reno, 167 F.3d 1228, 1237 (9th Cir. 1999); *Calif. ex rel. Van De Kamp v. Tahoe Reg'l*
Plan. Agency, 766 F.2d 1319, 1326 (9th Cir. 1985).

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Respectfully submitted,

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