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James Smith

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

JAMES SMITH,

Plaintiff and Petitioner,

v.

EDWARD D. REISKIN in his official capacity as the Director of Transportation of the San Francisco Municipal Transit Authority; the SAN FRANCISCO MUNICIPAL TRANSIT AUTHORITY; TEGSCO LLC dba SAN FRANCISCO AUTORETURN; DOES 1-10, inclusive,

Defendants and Respondents.

Case No. CPF18516045

PLAINTIFF AND PETITIONER'S MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION

Date: March 7, 2018
Time: 9:30 a.m.
Dept: 302
Judge: Honorable Harold E. Kahn

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Smith presents this Memorandum in Support of a Preliminary Injunction to enjoin Defendants from retaining possession of his car, which remains impounded by Defendants following an illegal tow.

Mr. Smith is homeless, and his car was his only shelter when Defendants seized it without a warrant, and without prior notice it would be towed. The reason for the tow was unrelated to public safety or traffic exigency; it was solely to coerce payment for parking tickets Mr. Smith could not afford to pay. Defendants failed to provide Mr. Smith with due process before the tow—no notice or opportunity to be heard—and after the tow, they allowed only a rubber-stamp hearing that did not meet minimum due process requirements. Accordingly, the tow violated Mr. Smith's constitutional rights to be free from a warrantless seizure of his property, and to due process of law.

Mr. Smith is suffering irreparable harm as a result of the loss of his car, which was his only shelter. Mr. Smith therefore seeks a preliminary injunction 1) prohibiting Defendants from continuing to retain Mr. Smith's vehicle and demanding payment from Mr. Smith before returning the car to him; 2) prohibiting defendants from ordering, conducting, or completing a sale of the car or otherwise transferring possession of the car to anyone other than Mr. Smith, and 3) that Defendants therefore shall return the car to Mr. Smith without charge until Mr. Smith is afforded a determination on the merits as to the lawfulness of Defendants' seizure of his car as a method to collect a municipal debt.

II. FACTS

James Smith is a 64-year-old lifelong San Francisco resident whose sole source of income is $1140 in Social Security Disability Income each month. (Declaration of James Smith ¶¶3-4, 6) ("Smith Decl."). He is the registered owner of a black 2007 Honda Accord license plate 5YVV308 ("the car"). (Smith Decl. ¶9).

1 For weeks at a time in 2017, Mr. Smith was unable to leave his apartment due to
2 severe mobility impairment. (Smith Decl. at ¶¶23.) He asked his caretaker to watch his car
3 to make sure it did not get parking tickets. (Smith Decl. at ¶¶23-24.) Though his caretaker
4 did not report any tickets, over the course of three months, from September through
5 December 2017, Mr. Smith received 20 parking citations, largely for failing to move his
6 car on sweet sweeping days. (Smith Decl. at ¶¶22-24; Ex B.) Mr. Smith was aware of
7 some but not all of the citations. (Smith Decl. at ¶¶22-23.)

8 In October 2017, Mr. Smith had to leave his apartment and he began living in his
9 car. (Smith Decl. at ¶¶19.) On December 28, 2017, Mr. Smith left his car to get food for
10 breakfast. (Smith Decl. at ¶¶16-18.) When he came back, his car was missing and he
11 thought that it had been stolen. (Smith Decl. at ¶¶19-21). Mr. Smith then called SFPD,
12 and he was informed that the car had been towed and was in the possession of AutoReturn.
13 (Smith Decl. at ¶¶21.)

14 Defendant San Francisco Municipal Transit Authority ("SFMTA") is the municipal
15 agency in the City and County of San Francisco responsible for management of all ground
16 transportation in the city, including parking. Defendant Edward D. Reiskin ("Reiskin") is
17 the Director of Transportation of SFMTA. Defendant TEGSCO LLC is a California
18 limited liability corporation doing business in the County of San Francisco under the
19 registered fictitious business name of San Francisco AutoReturn ("AutoReturn").
20 AutoReturn is the agent of the SFMTA and, under contract with the SFMTA, is
21 responsible for tow and storage of vehicles in San Francisco on behalf of Reiskin and
22 SFMTA.

23 The Defendants towed Mr. Smith's car pursuant to their policy and practice of
24 towing vehicles with more than five outstanding parking tickets. Cal. Veh. Code §
25 22651(i)(1); San Francisco Trans. Code § 8.3. Defendants did not give Mr. Smith any
26 notice that they planned to tow his vehicle, nor did they post any advance notice on his car.
27 (Smith Decl. ¶22.)

28 Although Defendants had scheduled the sale of Mr. Smith's car on or after
February 14, 2018, they temporarily postponed any sale or transfer of the car pending this

motion, and pursuant to this Court's February 13, 2018 Order to Show Cause and Temporary Restraining Order.

San Francisco's tow fees are some of the highest in the country, 2-3 times the cost of tows in New York, Chicago, or Los Angeles.[1] As of the February 13, 2018 hearing date, Mr. Smith would have had to pay $3836,50 to AutoReturn and $3163 to SFMTA, a total of $6999.50 to retrieve his car. (Smith Decl. Exs. A and B.) In the ensuing days, the amount he owes to Defendants for the tow, impound and storage of his car has increased by $71 per day. (Smith Decl. at Ex. B.) Mr. Smith is indigent, and does not have the ability to pay over $7,000 to Defendants. (Smith Decl. at ¶12.) Moreover, if Defendants retain possession of Mr. Smith's car, the lender through which he financed the vehicle may seek to repossess it. (Smith Decl. at ¶¶ 10-14.) Mr. Smith fears that he will not qualify to purchase another vehicle both because of his limited income, and because of the negative impact of the outstanding loan balance and the repossession will have on his credit. (Smith Decl. at ¶¶ 13-15.)

After his car was towed, Mr. Smith sought to regain possession of his car first by informally making inquiries of the SFMTA, and then by requesting a "tow hearing" from the SFMTA. (Larson Decl. at ¶¶ 7-20.) Neither avenue provided Mr. Smith with an opportunity to be heard regarding the appropriateness of the tow. Although Mr. Smith followed the SFMTA website's instructions to request a hearing, SFMTA at first refused to provide a hearing at all; when the hearing was finally held, it did not comply with the requirements of due process. (Larson Decl. at ¶¶9-11, 17-29; Complaint Ex. A.) First, the SFMTA hearing officer expressly refused to consider the constitutionality of the tow. (Complaint, Ex. A at p. 16:20; Exhibit C.) Second, the SFMTA hearing officer expressly refused to consider Mr. Smith's inability to pay the outstanding parking fines, tow fees, or storage fees, stating that the agency is "not allowed to take into consideration the economic status of the person." (Complaint, Ex. A at p. 15:23-25.) Third, the hearing officer did not provide Mr. Smith with an opportunity to confront the evidence against him, including by

[1] "SF's Steep Towing Fees Trouble City Supervisors." (March 8, 2016) https://www.sfgate.com/politics/article/SF-s-huge-towing-fees-can-be-devastating-to-the-6876008.php

cross-examining the officer who authorized the towing of Mr. Smith's car. (Complaint, Ex. A at p. 6:23-25; 3:17-25; 4:11-25.)

The one and only basis for the tow, and for the Hearing Officer's decision upholding the tow, is that Mr. Smith's vehicle had more than five parking tickets. (Complaint, Ex. A at p. 6:14-17; Exh. C.) There is no allegation that the car posed any threat to public safety when it was towed. *Id.*

Mr. Smith continues to suffer as a result of Defendants' seizure of his car. Although the Court ordered "SFMTA to work with the Department of Housing and Human Services in an effort to secure a 90-day shelter bed for Mr. Smith in an accessible shelter," as of the date of this brief, SFMTA has taken no such action. (Order to Show Cause and Temporary Restraining Order.) SFMTA reports that there are over 1,000 people on the waiting list for shelter beds, and that in spite of the court's order and the harm caused by the SFMTA's tow, the City will not shelter Mr. Smith nor return his vehicle so he has a safe place to sleep. Mr. Smith is and will continue to be homeless and sleeping on the street as a direct consequence of Defendants' impound of his vehicle. (Smith Decl. at ¶¶18, 39, 46, 48.) He cannot stay in shelters because there are not enough shelter beds for San Francisco's homeless people, and his disabilities make it difficult to wait in line each day for the extended period of time needed to obtain a one-night shelter bed if one becomes available.[2] (Smith Decl. at ¶43.)

Mr. Smith is not safe sleeping on the streets. (Smith Decl. at ¶40-45.) One night in January 2018, he was awakened at 4 a.m. by two people kicking him and beating him, demanding he give them everything he had. (Smith Decl. at ¶42.) Mr. Smith gave the attackers his wallet. *Id.* Mr. Smith has suffered ill health as a result of being homeless. (Smith Decl. at ¶40-41, 53-58.) Mr. Smith had an extended bout of the flu and has suffered terrible pain in his knees and back as a result of sleeping on the streets. (Smith Decl. at ¶53-58.) Mr. Smith feels dejected, anxious, and frightened now that he is living on the street. (Smith Decl. at ¶44, 56.)

[2] "HSA 90 Day Emergency Shelter Waitlist. https://data.sfgov.org/Health-and-Social-Services/HSA-90-day-emergency-shelter-waitlist/w4sk-nq57 (visited February 21, 2018.)

Without his car, it is extremely difficult for Mr. Smith to go to medical appointments, to visit his elderly mother, to visit his children and grandchildren, and to access social services. (Smith Decl. at ¶¶48-52). Further, without his car Mr. Smith has difficulty searching for an apartment, since open, affordable housing units in the Bay Area are more likely to be located outside of San Francisco.[3] (Smith Decl. at ¶¶16, 38-40, 45, 47-48.)

The continued impoundment of his vehicle is also causing irreparable harm to Mr. Smith's ability to obtain credit in the future. If Defendants are not enjoined as requested by Mr. Smith, one of two things will happen:

a) The holder of Mr. Smith's auto loan will repossess the car from AutoReturn.[4] The lender will be required to pay AutoReturn the full amount due to reclaim the car. Cal. Veh. Code § 22651(i)(5). Upon repossession, the lender will sell the vehicle at auction and seek to collect from Mr. Smith the outstanding balance of the loan and the fees paid by the lender to retrieve the car. (Smith Decl. at ¶¶13-15, 46). The repossession will appear on Mr. Smith's credit record, making it difficult for him to purchase another vehicle, or rent and apartment. (Smith Decl. at ¶¶13-15, 46.)

b) Alternatively, AutoReturn will sell the car at auction, keeping for Defendants the full amount due. Cal. Veh. Code § 22651(i)(5). The estimated value of the vehicle is $5,413.[5] Since the value that the car sells for at auction is likely to be significantly less than the more than $7,000 Mr. Smith allegedly owes in fines and fees, Mr. Smith will be responsible for both a deficiency balance to Defendants and the full balance of the loan due to the holder of his auto loan. Cal. Veh. Code § 22651(i)(5). Because Mr. Smith does not have the funds to resolve either of these debts, they will be reported on his credit report. His credit will irreparably damaged and he may be sued by AutoReturn to collect the remainder of the tow and storage fees.

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[3] See generally https://www.onehomebayarea.org/, a one-stop website for affordable housing listings.
[4] The standard California retail installment sales contract enumerates seizure as a breach of contract. https://www.automanager.com/auto-dealer-software/features/epay-forms-sample.pdf at p. 4, ¶ 2(b).
[5] Vehicle value estimated on Kelly Blue Book website on February 19, 2018 (http://www.kbb.com).

Mr. Smith would not be facing this cascade of terrible events but for the illegal tow of his vehicle. The damage will stop if Defendants are enjoining from retaining possession of the car, and return it to Mr. Smith without charge.

III. ARGUMENT

C. Legal Standard for Preliminary Injunction.

The Court must weigh two interrelated factors when deciding whether to issue a preliminary injunction: "(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." *Butt v. State of California*, 4 Cal. 4th 668, 677-78 (Cal. 1992). These two considerations should be evaluated on a sliding scale: "the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." *Butt*, 4 Cal. 4th at 678.

A Court must "exercise its discretion in favor of the party most likely to be injured. If the denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." *Robbins v. Superior Court*, 38 Cal. 3d 199, 205-06 (Cal. 1985) (internal citations omitted). "In the last analysis the trial court must determine which party is the more likely to be injured by the exercise of its discretion and it must then be exercised in favor of that party." *Family Record Plan, Inc. v. Mitchell*, 172 Cal. App. 2d 235, 242 (1959) (internal citations omitted).

a. The Balance of Hardships Tips Sharply in Mr. Smith's Favor.

Mr. Smith is suffering and will continue to suffer irreparable harm if he is not able to recover the car. Sleeping outside and without the protection of a car has exacerbated Mr. Smith's disabilities, caused him to suffer physically and emotionally, and exposed him to street violence—harms which cannot be fully compensated in financial terms. (Smith Decl. at ¶¶39-44, 46, 55-57.) If the car is not released to Mr. Smith, he will continue to suffer the great physical and emotion toll that comes with being homeless, and he will also

suffer irreparable injury to his credit and future ability to purchase a car or rent a home. (Smith Decl. at ¶¶13-15, 46.)

California courts have recognized studies that found that "[h]omeless individuals were 10 times as likely to be victimized by crime than the average population." *In re Eichorn*, 69 Cal. App. 4th 382, 386 (1998). Homeless people suffer physical injuries on the street and experience emotional distress, while full shelters and lack of disability access can make staying outside the only option for many homeless people. A recent study of homeless people showed close to 50% lack access to hygiene and have experienced medical problems as a result, 27.3% had been denied access to shelter, 26.7% had been denied employment, 24.7% were denied access to food or other services and 20% had been arrested.[6] Since the car was impounded, Mr. Smith has suffered many of these ills, including adverse health impacts and violence. (Smith Decl. at ¶¶39-44, 46, 55-57.) These harms are irreparable. *Harris v. Bd. of Supervisors, Los Angeles Cty.*, 366 F.3d 754, 766 (9th Cir. 2004) (holding that potential harms of overcrowding hospital patients, including pain and health risks, were irreparable); *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1159 (9th Cir. 2011) (holding that plaintiffs' potential loss of their place to live was irreparable harm); *see also Goichman v. Rheuban Motors Inc.* 682 F.2d 1320, 1324 (9th Cir. 1982) ("'The private interest in the uninterrupted use of an automobile is significant."); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (holding that loss of driving privileges was irreparable harm). In addition to the irreparable impact on Mr. Smith's health, loss of his car as transportation, and loss of his primary shelter, "an alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997).

In contrast, any theoretical harm to Defendants would be purely financial, and in an amount so small as to be negligible when compared to their overall budgets. While Mr. Smith contests whether any amount is owed as a result of the illegal tow, the total amount

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[6] Access to Hygiene Resources: A Basic Human Right and the Foundation of Personal and Public Health – Portland State University, available at https://www.pdx.edu/syndication/sites/www.pdx.edu.syndication/files/Hygiene%20Project%20Report%202016.pdf.

that Defendants seek against Mr. Smith is over $7,000, (Smith Decl. Ex. A; B.), an amount that represents more than 50 percent of Mr. Smith's annual income but only .00000063 percent of the annual city budget of $10.1 billion.[7]

On the other hand, keeping Mr. Smith homeless creates other, greater costs to the City. The average public cost incurred for a homeless person living on the streets in San Francisco is over $80,000 per year in emergency services.[8] Accordingly, the city will benefit financially if it ceases to impound Mr. Smith's vehicle and permits him to regain his shelter and seek affordable permanent housing, while continuing to deprive Mr. Smith of his car creates significant costs.

In this case, the balance of hardship is sharply skewed in Mr. Smith's favor. Where, as here, an injury is great to one party and the other side would suffer little harm, "it is an abuse of discretion to fail to grant the preliminary injunction." *Robbins* 38 Cal. 3d at 205; *see also Harris*, 366 F.3d at 766 ("[F]aced with [ ] a conflict between financial concerns and preventable human suffering, [the court has] little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor.").

b. Mr. Smith Is Likely to Prevail on the Merits.

i. The Seizure of the Car Likely Violated Mr. Smith's Fourth Amendment Rights.

Mr. Smith is likely to prevail on his claim that Defendants violated the Fourth Amendment when they impounded his car without a warrant and without a "community caretaking" rationale.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ." U.S. Const. amend. IV. Towing and impounding a vehicle, even if done pursuant to municipal ordinance or state law, constitutes a seizure

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[7] "Unpacking a $10 billion budget." Data SF, City and County of San Francisco, available at https://datasf.org/blog/unpacking-a-10-billion-budget/.

[8] "San Francisco Homelessness: Four Times More Expensive Not to Solve." https://www.thebaycitybeacon.com/politics/san-francisco-homelessness-four-times-more-expensive-not-to-solve/article_28c8effa-86aa-11e7-a37f-cb1d4ded3b6f.html .

within the protections of the Fourth Amendment. *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005).

Warrantless seizures – including the towing and seizure of vehicles – are "per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993). Where a government actor tows a vehicle without a warrant, the government bears the burden to persuade the court "that a seizure comes under one of a few specifically established exceptions to the warrant requirement." *United States v. Hawkins,* 249 F.3d 867, 872 (9th Cir. 2001). Here, the only possible exception which might apply is the "community caretaking" exception.

In their "'community caretaking'" function, police officers may impound vehicles that "'jeopardize public safety and the efficient movement of vehicular traffic.'" *South Dakota v. Opperman*, 428 U.S. 364 at 368-69 (1976) (defining the community caretaking function to cover vehicle accidents, the removal of disabled or damaged vehicles, and the impound of automobiles which impair the efficient movement of vehicular traffic.) While it may be reasonable to tow a vehicle that impedes traffic or threatens public safety, a police officer may not execute a warrantless seizure of a vehicle when no such threat to public safety exists. *Miranda* 429 F.3d at 864 (holding it was unconstitutional to tow a vehicle from a driver's home driveway after he had permitted his unlicensed wife to practice driving the car, because once the vehicle was safely parked in the driveway, no threat to public safety existed).

Following a similar rationale, the Ninth Circuit recently invalidated a California statute that entitles a municipality to punish an unlicensed driver by impounding her vehicle for thirty days. *Brewster v. Beck*, 859 F.3d 1194, 1997 (9th Cir. 2017) (the Fourth Amendment is "implicated by a delay in returning the property, whether the property was seized for a criminal investigation, to protect the public, or to punish the individual."); *see also United States v. Caseres*, 533 F.3d 1064, 1075 (9th Cir. 2008) (community caretaking exception inapplicable for towing a car parked on a residential street simply because the driver was unlicensed); *Mateos-Sandoval v. County of Sonoma*, 942 F. Supp. 2d 890, 910 (N.D. Cal. 2013) (rejecting contention that Fourth Amendment permitted warrantless

towing for lack of a California driver's license, and finding that no justification to tow a vehicle parked "in a safe and legal location, not blocking traffic."); *United States v. Duguay,* 93 F.3d 346, 352 (7th Cir. 1996)) ("The policy of impounding the car without regard to whether the defendant can provide for its removal is patently unreasonable if the ostensible purpose for impoundment is the 'caretaking' of the street."); *United States v. Squires* 456 F.2d 967, 970 (2nd Cir. 1972) (an officer cannot order impoundment where the location of the vehicle does not create any need to protect the vehicle or avoid a hazard to other drivers).

"The reasonableness of an impoundment under the community caretaking function does not depend on whether the officer had probable cause to believe that there was a traffic violation, but on whether the impoundment fits within the 'authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience.'" *Miranda*, 429 F.3d at 862, quoting *Opperman* 428 U.S. at 368-69. The community caretaking exception does not permit seizure of a vehicle as punishment for prior bad acts, or to coerce a driver into different conduct: "The need to deter a driver's unlawful conduct is by itself insufficient to justify a tow under the 'caretaker' rationale." *Miranda*, 429 F.3d at 866. Thus, the community caretaking exception does not permit warrantless seizure based upon outstanding parking tickets, regardless of whether a statute seems to permit towing under those circumstances: "the decision to impound pursuant to the authority of a city ordinance and state statute does not, in and of itself, determine the reasonableness of the seizure under the Fourth Amendment, as applied to the states by the Fourteenth Amendment." *Miranda*, 429 F.3d at 864.

"The question in this Court upon review of a state-approved search or seizure is not whether the search (or seizure) was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment." *Sibron v. New York*, 392 U.S. 40, 61 (1968). In the case at hand, Mr. Smith has demonstrated that the warrantless seizure was unreasonable. The *only* basis for Defendants' seizure of Mr. Smith's vehicle was their assertion that Mr. Smith had more than five unpaid parking tickets. (Complaint Ex. A . at pp. 3:8-11, 5:4-13, Complaint Ex. B.) The car was registered, it was parked safely, it was

not obstructing traffic, and it was not otherwise interfering with public safety. (Smith Decl. at ¶¶24-28; Smith Decl. Ex. B.) There is nothing inherently unsafe about unpaid parking tickets. As in *Miranda,* where the Ninth Circuit found that a warrantless tow was not permitted under the community caretaking exception just because the driver had *previously* violated driving laws, the community caretaking exception does not excuse a warrantless seizure here, where the tow was justified solely based on prior unpaid parking tickets. *Miranda* 429 F.3d at 865. Like the car in *Miranda*, Mr. Smith's car was safely parked, was not impeding the flow of traffic, and posed no threat to the public.

Because Defendants have no conceivable community caretaking rationale for seizing Mr. Smith's car without a warrant, but nonetheless implemented a warrantless seizure, there is a strong likelihood that Mr. Smith will prevail on his claim that Defendants violated his Fourth Amendment rights.

ii. Mr. Smith Is Likely To Prevail on His Claim that Defendants Deprived Him of Property Without Due Process.

Mr. Smith is also likely to prevail on his claim that Defendants violated his right to due process rights of law when they seized his car and refused to return it, without providing him reasonable notice and opportunity to be heard on the legality of the seizure.

The state and federal constitutions prohibit government actors from depriving any person "of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; Cal. Const. art. I, § 7. Because a car is a person's property, the Ninth Circuit has long required due process protections in connection with vehicle tows. "Loss of the use and enjoyment of a car deprives the owner of a property interest that may be taken from him only in accordance with the Due Process Clause. Due process strictures must be met though the deprivation be temporary." *Stypmann* 557 F.2d at 1342 (a five day delay in providing a post-tow hearing is excessive).

The process due under the federal constitution depends on "the private interest that will be affected by the official action," "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and "the Government's interest, including the function

involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Under the California Constitution, there is a fourth element of the analysis: "the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official." *People v. Ramirez*, 25 Cal. 3d 260, 269 (Cal. 1979).

Here, as explained above, Mr. Smith has significant interest in his car, as it is also his home, and he suffers tremendously without it. His dignitary interest in having a shelter cannot be overstated; without his car, Mr. Smith is utterly exposed to the elements. The risk of erroneous deprivation is of similar magnitude. The SFMTA's interest in the car is exclusively financial (collection of parking unpaid tickets), and Defendants will not be unduly prejudiced if the City were required to provide vehicle owners like Mr. Smith with basic notice and an opportunity to be heard by a responsible City official.

Generally, courts analyzing vehicle tows under the Due Process clause have required notice before the tow, and the opportunity for a meaningful hearing within two days of an owner's request. *See Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008) (pre-tow notice generally required); *Goichman* 682 F.2d at 1325 (post-tow hearing required within forty-eight hours of a request).

Notice is required under the Due Process Clause because "the government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking." *Clement*, 518 F.3d at 1093 (requiring the government to present "strong justification" for not providing notice to a vehicle owner prior to a non-emergency tow because "removal of an automobile is a big deal" that disrupts an individual's life, imposes significant retrieval costs, and can create anxiety at the unexplained loss of a vehicle). Merely issuing a generalized warning that a tow may result from unpaid tickets is insufficient; the vehicle's owner must have the opportunity to argue against impoundment before it occurs. *See id.* ("We have described the root requirement of the Due Process Clause as being that an individual be given an

opportunity for a hearing *before* he is deprived of any significant property interest.") (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)).

In the case at hand, Defendants did precisely what *Clement* prohibits: they seized his car "like a thief in the night," without any notice, leaving him to believe his car had actually been stolen. (Smith Decl. at ¶19). Pre-deprivation notice is required in the context of vehicle tows unless there is "an emergency, []or if notice would defeat the entire point of the seizure, []or when the interest at stake is small relative to the burden that giving notice would impose." *Clement*, 518 F.3d at 1093-94. Here, there was patently no emergency: the only reason for the tow is as a method to collect unpaid parking tickets. Nor is the interest at stake small: the use of one's automobile is a significant interest compared to the small burden of notice. *Id.* at 1094; *Scofield v Hillsborough*, 862 F.2d 759, 762 (9th Cir. 1988) ("The uninterrupted use of one's vehicle [on public roads] is a significant and substantial private interest."). Accordingly, there is no excuse for Defendants to seize Mr. Smith's vehicle without providing him with notice of their intent to do so.

Had Defendants provided Mr. Smith with adequate pre-deprivation notice, Mr. Smith would have had the opportunity to demonstrate that his nonpayment of parking tickets was due in part to his indigence, and in part to his disability and lack of knowledge of the tickets. In addition, he could have attempted to resolve his tickets by means other than immediate payment-in full, thus avoiding the tow altogether, or by being heard on his claim that any tow would be unconstitutional. A "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, because the SFMTA did not give Mr. Smith any notice of the tow, they deprived him of an opportunity to be heard at the most "meaningful" time: before the car was towed and before he was deprived of a significant property interest. *See Clement*, 518 F.3d at 1093. Mr. Smith had no opportunity to make his appeal to a responsible government official to prevent the Defendants from carrying out the illegal tow. Defendants' failure to provide

pre-tow notice not only deprived Mr. Smith of an opportunity to make this showing, it has also resulted in a far greater expenditure of public resources on the back end.

When Defendants' did permit Mr. Smith a hearing after his car was towed, the hearing was a sham. For a hearing to be meaningful, an agency must permit a party to present all relevant claims. *See Jonathan Neil & Assoc., Inc. v. Jones*, 33 Cal. 4th 917, 933 (2004) (exhaustion requires agency decision of "entire controversy"); *Bleeck v. State Bd. of Optometry* 18 Cal. App. 3d 415, 432 (1971) (exhaustion requires "a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings"). In this case, the hearing officer refused to consider or rule on Mr. Smith's claim that the tow was unlawful. First, the hearing officer refused to consider whether the tow was improper under the Fourth Amendment because Defendants towed the car without warrant. (Complaint, Exhibit A at 15:20, 17:20-18:10.) Second, the hearing officer refused to consider whether it was constitutionally permissible to tow Mr. Smith's vehicle for unpaid parking tickets when the reason for the nonpayment is Mr. Smith's indigence and inability to pay. (Complaint, Ex. A at pp. 16:20; 12:3-10; Exhibit C.) By refusing the consider Mr. Smith's contentions regarding the constitutionality of the tow, Defendants denied Mr. Smith of a meaningful opportunity to be heard.

Defendants' hearing violated other basic due process tenets. Defendants did not make available the evidence relied on at the tow hearing, and did not present the officer who ordered the tow for examination. (Complaint Ex. A at pp. 3:17-20; 5:1-24). The Supreme Court has taken for granted that a City must bring the officer who ordered the tow to the administrative tow hearing. *City of Los Angeles v. David*, 538 U.S. 715, 718, (2003) (noting that "the city has to contact the towing officer and arrange for his appearance" in detailing the administrative steps required for tow hearings). In addition, an agency violates a vehicle owner's post-tow due process right to a meaningful hearing if the owner is not given an opportunity to examine the evidence on which the hearing officer relies, or to confront the towing officer. *See Mathews*, 424 U.S. at 335. Mr. Smith requested copies of all evidence to be relied on at the hearing multiple times and received only the tow inventory. (Larson Decl. at ¶12-15.)

Defendants' failure to follow the most basic tenets of due process makes it likely that Mr. Smith will prevail on the claim he brings under the federal and state due process clauses.

D. Bond Should Be Waived because of Mr. Smith's Indigence.

Where a preliminary injunction is issued in favor of low-income persons, the Court has the common law power to waive the requirement that an undertaking be posted to protect the enjoined party. *Conover v. Hall*, 11 Cal.3d 842, 851-52 (Cal. 1974).

In this case, Mr. Smith is a homeless, disabled person who subsists on disability income. Mr. Smith is patently unable to post bond without seriously affecting his ability to pay for the necessities of life. Furthermore, as set forth above, Defendants will not be greatly harmed by the issuance of an injunction. For these reasons, the posting of bond should be waived.

IV. CONCLUSION

For the reasons outlined above, Mr. Smith respectfully requests that the Court issue an order 1) enjoining Defendants from ordering, conducting, or completing a sale of the car or otherwise transferring possession of the car to anyone other than Mr. Smith; 2) enjoining Defendants from demanding payment before returning the car to Mr. Smith; 3) enjoining Defendants from continuing to retain Mr. Smith's vehicle, and that Defendants therefore shall return the car to Mr. Smith without charge during the pendency of this Action. Mr. Smith requests that the Order continue until such time as the Court determines whether Defendants' tow of the car was lawful and conducted without violations of Mr. Smith's constitutional rights.

Respectfully submitted,

BAY AREA LEGAL AID

By

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