No. 21-1025

In the United States Court of Appeals
For the Tenth Circuit

DENVER HOMELESS OUT LOUD, et al.,

Plaintiffs-Appellees,

v.

CITY AND COUNTY OF DENVER, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Colorado
Civil Action No. 1:20-cv-02985-WJM-SKC
The Honorable William J. Martinez

PLAINTIFFS-APPELLEES' ANSWER BRIEF

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ORAL ARGUMENT IS REQUESTED

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1. STATEMENT REGARDING PRIOR OR RELATED APPEALS

There are no prior or related appeals.

2. JURISDICTIONAL STATEMENT

Plaintiffs-Appellees ("Appellees") agree with Defendant-Appellant City and County of Denver's ("Denver") jurisdictional statement.

3. ISSUES PRESENTED

Appellees agree with Denver's listed issues as being properly considered by this Court. Appellees also believe the following issue is presented by Denver's appeal:

- Whether Denver forfeited a number of their arguments on appeal.

4. STATEMENT OF THE CASE

Appellees, a number of Denver's homeless residents and an organization that is comprised of (and advocates for) homeless individuals, filed this lawsuit, and a corresponding motion for preliminary injunction, seeking to stop Denver's sweeps[1] of homeless encampments. After three days of in-person testimony, the District Court, in a well-reasoned and lengthy decision, issued "the narrowest injunction possible so that [Appellees]' procedural due process rights are protected, *and* [Denver is] not unduly restrained in [its] ability to maintain the

[1] The correct terminology for the mass and ongoing eviction of Denver's homeless residents from encampments, as recognized by the District Court, is "sweeps." *See Denver Homeless Out Loud v. Denver, Co.*, Civil Action No. 20-cv-2985-WJM-SKC, 2021 WL 243450, 2021 U.S. Dist. LEXIS 13027 (D. Colo. Jan. 25, 2021).

public health and safety." *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *58. The District Court's injunction was heavily based on factual findings and credibility determinations, with significant analysis regarding how those findings fit into the fact-intensive Fourteenth Amendment procedural due process balancing analysis. The District Court did not enjoin Denver from conducting sweeps of homeless encampments. The narrow injunction required only that Denver provide minimal notice before conducting sweeps.

4.1 **Factual Background**

Between March of 2020 and December of 2020, at over twenty separate homeless sweeps, Denver's officials seized and destroyed Appellees' property. Aplt.App. at 1827-28, 1843. Because of a lack of notice, many homeless individuals were unable to pack up their belongings and move them beforehand, thereby losing many of their possessions. *Id.* at 1956-57. Many times Denver officials threw away entire tents and their contents without even opening them first to assess their contents. Aplt.App. at 1827-28, 1843. Denver disposed of tents at multiple sweeps that had notes on them from the tent's owner saying that the owner was out getting social services and would be back, *Id.* at 1957, 1959-61. Denver also customarily discarded homeless residents' important legal documents, including birth certificates and identification cards. *Id.* at 1957-58.

Contrary to Denver's assertions, the decision to conduct sweeps at a particular encampment, and on a particular day, was not based on public health and safety concerns but rather political concerns. Sweeps happened when there was major development planned near an encampment or nearby residents had complained, not when public health and safety concerns necessitated them. *Id.* at 1996-97. Denver swept encampments that were clean, including one encampment that was so clean that its residents would sweep the sidewalks around the encampment with a broom. *Id.* at 1990-96.

Denver also regularly used public health and safety as a pretext for conducting sweeps without notice. Denver's public health department monitored encampments for months prior to sweeps. *Id.* at 2291. Denver thus knew, at least weeks in advance of a planned sweep, the conditions of the encampment. *Id.* at 2291-92. Denver decided at least a week in advance of nearly every sweep when that sweep would be conducted. *Id.* at 2291-92. Yet, Denver consistently did not provide any written notice of the sweep to encampment residents until the day of. *Id.* at 2292-93.

The decisions regarding notice and when to sweep were typically made by Bob McDonald, head of the Denver Department of Public Health and Environment ("DDPHE"), or Danica Lee, who is McDonald's subordinate and had been delegated final policymaking authority by him as to when to provide

notice for the sweeps. *Id.* at 2326-28. Denver decided to provide no notice prior to sweeps that happened after June of 2020 because protesters had begun showing up to sweeps to voice displeasure with the sweeps. *Id.* at 2000-02, 2287-94. Denver asserted that the protestors' yelling at public officials from public fora justified providing no advance notice. *Id.* at 2287-94, 2408-09. Lee specifically testified *on direct examination by Denver's counsel* at the preliminary injunction hearing that the protestors' outcry was the justification for Denver's failing to provide advance notice. *Id.* at 2207, 2204, 2208, 2201-02.

Two sweeps in particular were emblematic of Denver's customary violation of Appellees' procedural due process rights. On July 29, 2020, there was an encampment of homeless individuals residing at Lincoln Park in downtown Denver. *Id.* at 2090-95, 2096-97. Denver's officials seized and destroyed Appellees' unabandoned and uncontaminated property at the Lincoln Park Sweep. *Id.* at 1818-23. The only notice given to encampment residents was a posting that morning, even though Denver had decided at least two days before the Lincoln Park Sweep that it would happen on July 29, 2020, as evidenced in part by the fact that an interagency plan to sweep the homeless encampment was in place over forty-eight hours prior to the sweep. *Id.* at 1833, 2094, 2203-04, 2390-93, 2521-2522. Denver consciously decided not to provide advance notice before the

Lincoln Park Sweep, and did so solely because of the threat of protesters showing up. *Id.* at 2000-02, 2287-94, 2408-09.

Later, on September 15, 2020, Denver swept an encampment of homeless individuals staying in tents near the South Platte River and only posted notice of the sweep on the morning-of. *Id.* at 2026-30. Denver seized and destroyed multiple homeless individuals' uncontaminated and unabandoned property. *Id.* at 2026-30. Prior to the morning of the sweep, Denver had posted no notice that the sweep would occur. *Id.* Again, Denver had consciously decided not to provide notice before the South Platte River Sweep specifically because of the threat of protesters showing up. *Id.* at 2000-02, 2287-94, 2408-09.

4.2 **Procedural Background**

Appellees filed a lawsuit seeking to enjoin Denver from continuing to violate their constitutional rights through the sweeps. *Id.* at 487-597. Because of the ongoing violation of their rights by Denver, which had continued unabated even after the filing of the Complaint, Appellees moved for a preliminary injunction to stop the seizure and destruction of their property without adequate notice. *Id.* at 345-85. Specifically, Appellees sought to enjoin Denver from conducting sweeps at all or, at the very least, without providing seven days' advance notice. *Id.* at 347. In support of their motion for preliminary injunction, Appellees submitted sixteen sworn declarations from Appellees and independent

witnesses to the sweeps. *Id.* at 387-412, 473-485, 880-989. Many of these declarations outlined how Denver systematically, without notice, seized and destroyed homeless individuals' property at numerous sweeps over the last year and a half. *Id.* A significant amount of video evidence confirmed as much. *Id.* at 959-962, Supp.Appx. at 002691.

After extensive briefing on the motion for preliminary injunction, District Court Judge William J. Martinez held a three-day hearing, allowing both Denver and Appellees to present as much evidence as they desired. Aplt.App. at 1798-2616. During that hearing multiple witnesses, including numerous homeless individuals, testified that Denver's officials seized, and destroyed, homeless individuals' property without providing any notice or any opportunity to retrieve the property or challenge the seizure. *Id.*

One encampment resident, Michael Lamb, testified that he woke up to trash trucks surrounding Lincoln Park on July 29, 2020. *Id.* at 2090-95, 2096-97. He immediately began to gather his belongings to move them out of the park, but he was able to gather only one armful of items. *Id.* When he attempted to return to retrieve the rest of his belongings, there already was a large fence erected around the park that prevented him from re-entering it. *Id.* He watched from outside the fence as Denver's officials threw away his uncontaminated, unabandoned property, as well as that of many of his neighbors. *Id.* Lamb further observed that

several residents of the encampment who were day laborers and had gone to work in the morning before Denver's officials arrived returned to find all of their property taken and destroyed. *Id.* at 980-82. Lamb's testimony at the preliminary injunction hearing was consistent with sworn declarations submitted by other homeless individuals outlining how Denver seized and destroyed their property without notice at the Lincoln Park Sweep. *Id.* at 977-79, 984-89. It was also consistent with video of the Lincoln Park Sweep. Supp.Appx. at 002691.

Another homeless individual, Steve Olsen, was staying in a tent in an encampment near the South Platte River on September 15, 2020. *Id.* Aplt.App. at 2026-37, 929-931. He left his tent, and belongings, early in the morning to apply for two jobs. *Id.* When he returned around noon, he found that all of his property was gone from his campsite. *Id.* Olsen learned from his neighbors that Denver's officials seized his property. *Id.* After the sweep, Olsen went to the storage facility (where Denver claims to store property that is seized during sweeps) to see if his property had been taken and stored. *Id.* at 973-975. An employee for the contractor Denver employs to conduct the sweeps, Environmental Hazmat Services, told him that they had stored *no* property on September 15, 2020, and that his property had been destroyed.[2] *Id*. Olsen's testimony at the preliminary

[2] A video recording of that interaction is part of the records and can be seen here: https://youtu.be/U2ooG4ukzEg. It was also included in the record below. Aplt.App. at 930.

injunction hearing was consistent with sworn declarations submitted by other homeless individuals outlining how Denver seized and destroyed their uncontaminated and unabandoned property without notice at the South Platter River Sweep. *Id.* at 973-75.

During another sweep that occurred near Lowell Boulevard and Hampden Avenue in Denver on March 13, 2020, Denver's officials seized and destroyed encampment resident Marcos Sepulvda's property without any notice, hours before a major snowstorm. *Id.* at 2529-2534. Sepulvda was forced to sleep outside under a tree during the storm because Denver's officials had seized his tent and other shelter. *Id.* When Sepulvda attempted to retrieve some property that he initially had been told was stored, he learned that it actually had been destroyed. *Id.* at 2544-45.

A final encampment resident, Tillie English, testified that Denver seized and destroyed her property without notice on August 19, 2020, near 29th Avenue and Glenarm Place in Denver. *Id.* at 2547-48, 2551-54. English had been camping at that location for three months when Denver seized her property. *Id.* When she went with claim ticket in hand to retrieve property that Denver claimed it had stored, she was told Denver had destroyed her property. *Id.* at 2554-57.

At the end of the hearing, Judge Martinez bluntly asked Denver's counsel for a scenario when public health and safety would require Denver to sweep an

encampment with less than forty-eight hours' notice. *Id.* at 2601. Counsel for Denver noted that a fire or infectious disease outbreak could be a situation where it would be necessary to clear *people* from an encampment. *Id.* at 2601-2602. However, counsel could not think of a situation when it would be necessary to seize *property* with less than forty-eight hours' notice, and was unable to produce any such scenario that was supported by the evidence in the record. *Id.* at 2601-2608. Judge Martinez correctly noted that situations like a fire or infectious disease outbreak that might require the evacuation of people from an encampment were not analogous to a sweep, in which Denver proactively (rather than reactively) clears encampments and seizes property. *Id.* at 2603-04. When Judge Martinez further pressed Denver's counsel to demonstrate just *a single hypothetical scenario* when Denver would need, based on a public health and safety concern, to conduct a sweep with less than forty-eight hours' notice, counsel stated that operation of a "mobile meth lab" might require such a sweep. *Id.* at 2604-06. Judge Martinez, rightly, pointed out that such a scenario would be a criminal matter, not a public health and safety matter, and counsel for Denver conceded as much. *Id.*

At the end of the day, counsel for Denver could not produce one *hypothetical scenario* (let alone a scenario supported by the evidence in the record) when a public health and safety concern would *require* that Denver

proactively sweep an encampment with less than forty-eight hours' notice. *Id.* at 2601-2608. On the other hand, the evidence in the record conclusively showed that Denver had conducted repeated sweeps without any notice, authorized by an individual who had been delegated final policymaking authority by Denver, simply because it did not want protesters to show up and engage in First Amendment-protected activity. *Id.* at 2604.

Two weeks after the hearing, the District Court issued a lengthy order partially granting the motion for preliminary injunction, on Fourteenth Amendment procedural due process grounds only.

4.3 **The order on appeal.**

The District Court denied the vast majority of the relief requested by Appellees in their motion for preliminary injunction. *Compare* Aplt.App. at 347 *with Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *30-62. It held that Appellees had not met the heightened standard to obtain an injunction as to their Fourth Amendment, Fourteenth Amendment substantive due process, and breach of contract claims. *Id.* at *30-62. However, the District Court concluded that Appellees had met the heightened standard as to their Fourteenth Amendment procedural due process claim. *Id.* at *14-30.

4.3.1 **Likelihood of success on the merits.**

The District Court recognized that, "under the doctrine known as 'procedural due process,' a court must ask two questions: first, 'whether there exists a liberty or property interest which has been interfered with by the State'; and second, 'whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Id.* at *14-15 (quoting and citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). Denver conceded that Appellees had a possessory interest in their property, so Denver only challenged the second aspect of the procedural due process inquiry: what type of "notice and…opportunity to be heard" should Appellees be entitled "before the Government deprives them of property." *Id.* at *15 (quoting *Lyall v. City of Denver*, 2018 U.S. Dist. LEXIS 48846, 2018 WL 1470197, at *14 (D. Colo. Mar. 26, 2018), and citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993)).

The District Court then correctly applied the test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which requires that the court balance three factors: (1) the interests of the individual in retaining their property and the injury threatened by the official action; (2) the risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards; and (3) the costs and administrative burden of the additional process, and the interests of the government in efficient adjudication. *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *15-16 (citing *Mathews*, 424 U.S. at 335). The

District Court determined that each factor of the test weighed in Appellees' favor, and held that therefore Appellees had shown a substantial likelihood of success on the merits of their procedural due process claim. *Id.* at *14-30.

The District Court held that Appellees met the first prong of the *Mathews* test because Denver did "not dispute that [Appellees] have a possessory interest in their personal property which is located at encampments." *Id.* at *17.

The District Court held that Appellees met the second prong of the *Mathews* test because Appellees' "declarations and the Evidentiary Hearing testimony establish[ed] that there [was] a significant risk that the [Denver] [would] erroneously deprive [Appellees] of their property through [Denver's] actions." *Id.* at *17-18. The court concluded that "[Denver's] procedures for providing notice of a [sweep] did not afford homeless individuals sufficient time to remove their property from designated areas such that they might avoid seizure." *Id.* at *18. The District Court noted that the risk [of erroneous deprivation was] particularly pronounced in the context of the temporary area restrictions, for which DDPHE only provided written notice on the morning of the sweeps." *Id.*

The District Court found that not only did the lack of pre-deprivation process provided by Denver pose a significant risk that Denver would erroneously deprive Appellees of their property, but also that Denver's "current [post-deprivation] procedures [did] not appear to afford homeless individuals a

meaningful way to recover confiscated property." *Id.* at *20. The District Court concluded that "[i]f [Denver] provided homeless individuals with additional advance notice of sweeps, it would allow [Appellees] a better chance to protect the property critical to their survival" and cited specific examples in the evidence for this finding. *Id.* at *20-21.

Regarding the final *Mathews* factor, the District Court properly noted that "[t]he government's overarching interest here—maintaining public health and safety—is unquestionably significant." *Id.* at *21. However, the District Court found that the evidence in the record showed that "the decision of DDPHE [officials] to conduct the sweeps at issue in the manner that they did [was] not based on actual, scientific, or evidence-based, public health concerns." *Id.* at *25. The District Court clearly stated that "had [Denver]… made such a showing, predicated on actual public health medical science, the Court would be reaching a very different conclusion today." *Id.* at *26-27. However, "the hearing evidence, even as articulated through the testimony of McDonald and Lee, made it manifestly clear to the Court that the decision on how much (or actually, how nearly non-existent) advance notice was to be given to encampment residents prior to the area restriction sweeps was based on no such thing." *Id.* at *26-27.

Rather, the "decision to conduct these area restrictions with effectively no advance notice to the residents of the affected encampments [was] actually based

[] on the possibility of additional (and vociferous) public scrutiny and the threat of First Amendment protected activity, and [Denver's officials'] preference to avoid same." *Id.* at *25-26. The District Court specifically cited Lee's and McDonald's testimony as the basis for this finding. *Id.* at *23-24. Importantly, the District Court found that "the evidence in the record does not support the deprivation of [Appellees'] procedural due process rights based on inchoate, vague, and potentially unwarranted fears for the safety of those implementing the sweeps arising out of possible, First Amendment-protected, protests," and that "[t]his is particularly the case where, as here, those fears are predicated solely on the possibility of future, constitutionally-protected activity by homeless advocates." *Id.* at *26.

Ultimately, the District Court found that the evidence failed to show that the "timing of [Denver's] notice procedures had a basis in anything other than a bureaucratic pronouncement of DDPHE managers, one devoid of any basis in medical science," and that "[n]othing in the record [showed] that [Denver] could not accomplish the same goal of remediating the encampments and the health threats they allegedly posed if DDPHE had instead given even 48 hours' advance notice to encampment residents." *Id.* at *28.

The District Court concluded, based on these clear and unequivocal factual findings, that Appellees had established a likelihood of prevailing on the merits of

their Fourteenth Amendment procedural due process claim. *Id*. And, because it was undisputed that "DDPHE's executive director, McDonald[,] [was] a final policymaker for [Denver] who authorized the subject area restrictions, and the amount of advance notice of such area restrictions to be given to those encampment residents," "his decision …to repeatedly impose area restrictions on encampments with effectively no advance written notice" made Denver municipally liable for purposes of the preliminary injunction. *Id.* at *30.

4.3.2 **The other preliminary injunction factors.**

In addressing the other preliminary injunction factors, the District Court found, first, that the evidence at the preliminary injunction hearing demonstrated Appellees would suffer irreparable harm absent an injunction. *Id.* at *57. The District Court held that in the absence of an injunction, there was a significant "likelihood that Plaintiffs' vital possessions, such as tents, blankets, tarps, and other items necessary to survive outside in the elements—particularly during the winter in Colorado—will be seized and potentially destroyed without sufficient advance notice." *Id.* In so holding, the District Court relied on testimony from multiple homeless individuals who had been forced by the sweeps to sleep outside unsheltered in inhospitable conditions that put them at significant risk of injury and death. *Id.*

Then, the District Court correctly held that "[i]n analyzing whether a preliminary injunction should issue against the government, the final two elements of the preliminary injunction test [the balance of harms and public interest] are treated together." *Id.* at *57. The District Court then balanced the harms by considering Denver's contentions that "requiring a specific amount of notice before a sweep will to some degree limit 'Denver's health experts from making decisions to combat the spread of disease and the deterioration of public health,'" but the court found that, based "on the evidence adduced at the Evidentiary Hearing, as well as on other supporting declarations," requiring "at least seven days' notice before an encampment sweep will preclude [Denver] from fulfilling its duty to protect public health and safety." *Id.* at *58. It further, rightly, considered the harm that would befall Appellees by having their only property seized and destroyed and the fact that "[i]t is always in the public interest to prevent the violation of a party's constitutional rights[.]" *Id.* at *57 (citations omitted). Based on this, the District Court concluded that the final two factors heavily weighed in Appellees favor. *Id.*

4.4 **The District Court's injunction.**

The District Court issued "the narrowest injunction possible so that [Appellees'] procedural due process rights are protected, and [Denver is] not unduly restrained in their ability to maintain the public health and safety." *Id*. at

*58. That injunction simply required that Denver "provide to all residents of affected homeless encampments not less than seven days' advance written notice prior to initiating a large-scale encumbrance cleanup performed by DOTI, or a DDPHE-ordered temporary area restriction of such encampments," but allowed for a sweep to be conducted "with less than seven days' advance notice" if "the Colorado Department of Public Health and Environment, DDPHE, and/or Denver Public Health, singly or in combination, determine that there exists reasonable, evidence-based reasons to believe that a public health or safety risk exists which requires the undertaking of such encampment sweeps with less than seven days' advance notice to the residents of those encampments." *Id.* at *62-63. The District Court also required Denver to comply with a few reporting and monitoring requirements prior to conducting sweeps so as to ensure that the substance of its injunction is not violated. *Id.*

5. **SUMMARY OF THE ARGUMENT**

Because Denver's arguments are no more than mere disagreement with the District Court's factual findings, and how they were applied within the *Mathews* framework, this appeal must fail. The District Court applied the correct legal standard and only entered an injunction after finding that the facts demonstrated Appellees had met their heightened burden of showing a likelihood of success that that their procedural due rights had been violated and that the other preliminary

injunction factors weighed in their favor. Denver cites to no evidence on which this Court could rely to deem the District Court's factual findings irrational or clearly erroneous. Denver also cites no cases that suggest the District Court's weighting of Denver's public health justification was an abuse of discretion. Denver simply argues that the District Court substituted its judgment for the public health experts (without citing to evidence that it did so) and cites to a line of (inapposite) cases about judges making inappropriate policy decisions (entirely unlike the District Court ordering constitutionally adequate notice before a sweep). For these reasons, this Court should not overturn the underlying substance of the District Court's order.

Additionally, the District Court's injunction, which merely imposed a few basic due process requirements before Denver can seize and destroy Appellees' only property, is not legally erroneous. The preliminary injunction directly remedied the constitutional violation at issue. The injunction also is within the District Court's authority under Article III, ordered relief that was narrower than that requested by Appellees, and specifically delineated what conduct is enjoined.

6. **STANDARD OF REVIEW**

This Court reviews a district court's decision to issue a preliminary injunction for abuse of discretion. *See AG of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 775 (10th Cir. 2009). "The standard for abuse of discretion is high. [Denver]

must show that the district court committed an error of law (for example, by applying the wrong legal standard) or committed clear error in its factual findings." *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1205 (10th Cir. 2003). This Court has previously characterized an abuse of discretion as "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009).

7. ARGUMENT

7.1 Denver forfeited a number of its arguments on appeal by not raising them with the District Court.

Denver forfeited a number of issues it raises on appeal by failing to raise them before the District Court. *See Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721 (10th Cir. 1993). Denver failed to argue to the District Court that: (1) demonstrating a procedural due process violation requires showing an unreasonable seizure; (2) the standard outlined by the Supreme Court in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) applies to this case; (3) this Court in *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019), wrongly decided that the constitutional-violation-as-irreparable-injury principle is the law in this Circuit; and (4) the constitutional-violation-as-irreparable-injury principle outlined in *Free the Nipple-Fort Collins* is inapplicable to procedural due process violations. This Court should not consider

these arguments on appeal because Denver has forfeited them.[3] *See Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127-28 (10th Cir. 2011).

7.2 **The District Court properly applied the *Mathews* balancing test to Appellees' procedural due process claims.**

Denver does not dispute that *Mathews* is the proper rubric for evaluating the merits of Appellees' procedural due process claims. Instead, Denver attempts to couch its clear disagreement with the District Court's factual findings as legal error. This Court should not take Denver's bait.

The District Court did not improperly shift the burden by recognizing that there was a lack of evidence in the record, presented by Denver or otherwise, that providing notice to Appellees prior to seizing their property would negatively affect Denver's claimed interest in public health and safety. Rather, *Mathews* required the District Court to do exactly that: balance the "interests of the government" with Appellees interest in "retaining their property[,] the "injury [to Appellees] threatened by the official action[,]" and the "risk" of loss of property to Appellees that the lack of process presents. *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *15 (citing *Mathews*, 424 U.S. at 335).

Because the District Court applied the proper legal standard, this Court should assess Denver's arguments in light of what they are: attacks on the District

[3] However, even if this Court considers these arguments, they are unavailing as demonstrated *infra* **Sections 7.3-7.8**.

Court's factual findings. *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). "Where, as here, everything turns on the resolution of a factual dispute, that means '[this Court] will not challenge [the district court's] evaluation [of the evidence] unless it finds no support in the record . . . or follows from a plainly implausible, irrational, or erroneous reading of the record.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (citation omitted). This Court must "give due deference to the district court's evaluation of the salience and credibility of testimony, affidavits, and other evidence." *Id.* In doing so, it is clear that the District Court did not err in finding that Appellees were likely to succeed on their Fourteenth Amendment due process claim.

7.3 **The District Court's factual findings within the *Mathews* framework were not clearly erroneous.**

Contrary to Denver's arguments, the District Court's factual findings are well supported by the evidence and Denver provides no basis for this Court to disturb them. *See Fish v. Schwab*, 957 F.3d 1105, 1135 (10th Cir. 2020). The due process inquiry, and what process is necessary, is a highly fact-intensive analysis. *Mathews*, 424 U.S. at 335. The Supreme Court has repeatedly stated "that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The District Court properly found facts within, and balanced, the three *Mathews* factors: (1) "the interests of the individual in retaining their property and

the injury threatened by the official action;" (2) "the risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards;" and (3) "the costs and administrative burden of the additional process, and the interests of the government in efficient adjudication." *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *15-16 (citing *Mathews*, 424 U.S. at 335). And, after weighing these factors in light of the evidence in the record, the District Court found that there was strong evidence demonstrating that Appellees had met their heightened burden in showing they were likely to succeed on their Fourteenth Amendment procedural due process claim. *Id.* at *14-30.

7.3.1 **The District Court did not clearly err in finding Appellees would suffer a serious injury should they be deprived of their property.**

In front of the District Court, and on appeal, Denver does "not dispute that Plaintiffs have a possessory interest in their personal property which is located at encampments." *Id.* at *17. However, on appeal, Denver fails to reckon with the fact that this factor weighs *heavily* in Appellees' favor because of the serious injury posed to Appellees by the erroneous deprivation of their property. The District Court found notice was necessary because sweeping without any notice "depriv[es] [Appellees] of most, if not all, of the meager property in their possession," including "items necessary to survive outside in the elements." *Id.* at *28, *57. The District Court's finding was supported by evidence in the record, which showed that homeless individuals lost their only shelter, important personal

documents (such as birth certificates and identification), and other items necessary for survival during the sweeps. Aplt.App. at 929-931, 973-975, 77-79, 984-89, 1818-28, 1843, 1956-57, 1959-61, 2090-95, 2096-97, 2026-37, 2529-2534.

The District Court's finding was also consistent with the caselaw from a consensus of courts that "the loss of personal effects may pose a minor inconvenience for many citizens, but 'the loss can be devastating for the homeless.'" *See v. City of Fort Wayne*, No. 1:16-cv-00105-JVB-SLC, 2016 U.S. Dist. LEXIS 185598, at *27 (N.D. Ind. June 16, 2016) (quoting *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992)); *Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 U.S. Dist. LEXIS 93464, 2006 WL 3542732, at *33 (E.D. Cal. Dec. 8, 2006). "The property seized during a [sweep] may be all that a homeless individual has, and may include personal papers, social security cards, and medicines, as well as unique and irreplaceable property." *See*, 2016 U.S. Dist. LEXIS 185598, at *27; *Kincaid*, 2006 U.S. Dist. LEXIS 93464, 2006 WL 3542732, at *33. Particularly, "the seizure of shelter, bedding, and clothing makes it more difficult for a homeless person to survive and also affects his ability to obtain and maintain employment, which in turn, is key to his effort to end his condition of homelessness." *See*, 2016 U.S. Dist. LEXIS 185598, at *28. Courts thus have continuously recognized that homeless persons "have a compelling ownership interest in their personal property. " *Acosta v. City of Salinas*, No. 15-

cv-05415 NC, 2016 U.S. Dist. LEXIS 50515, at *8 (N.D. Cal. Apr. 13, 2016); *Lavan v. City of L.A.*, 693 F.3d 1022, 1032 (9th Cir. 2012); *Mitchell v. City of L.A.*, No. CV 16-01750 SJO (GJSx), 2016 U.S. Dist. LEXIS 197949, at *14 (C.D. Cal. Apr. 13, 2016); *See*, 2016 U.S. Dist. LEXIS 185598, at *27.

Ultimately, based on the evidence in the record and resounding authority, the District Court's finding that the first *Mathews* factor weighed *heavily* in Appellees' favor was not clearly erroneous. *Lavan*, 693 F.3d at 1032.

7.3.2 **The District Court did not clearly err in finding there was a significant risk that Denver would erroneously deprive Appellees of their property.**

The District Court conclusively found that the lack of process provided by Denver both before and after the sweeps posed a grave risk that Denver would erroneously deprive Appellees of their property because: (1) Denver's "procedures for providing notice of a DDPHE area restriction did not afford homeless individuals sufficient time to remove their property from designated areas such that they might avoid seizure" and (2) Denver's "current procedures [did] not appear to afford homeless individuals a meaningful way to recover confiscated property." *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *19, 20 (citing Aplt.App. at 980-82, 929-931, 2090-95, 2096-97, 2026-37). The District Court based these findings on evidence that a number of homeless individuals watched their unabandoned and uncontaminated property be summarily discarded,

while others attempted to retrieve property that had been seized and ostensibly stored only to find that it had been destroyed. *Id.* at *18-20.

The record amply supports the District Court's findings. A number of witnesses and declarants testified that they witnessed homeless individuals be permanently deprived of property, or were themselves permanently deprived of their property, because of Denver's failure to provide any notice prior to the sweeps. Aplt.App. at 929-931, 973-975, 77-79, 984-89, 1818-28, 1843, 1956-57, 1959-61, 2090-95, 2096-97, 2026-37, 2529-2534. Other homeless individuals testified that they attempted to retrieve their property, or sought remuneration from Denver, and were completely unable to recover their property, or obtain any compensation for it. *Id.* at 929-931, 2026-37, 2544-45, 2554-57. Video evidence supported this testimony. Supp.Appx. at 002691. The District Court, rightly, found that this evidence demonstrated that a lack of notice caused these erroneous, permanent deprivations of Appellees' property. *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *18-20.

The District Court's conclusions are also consistent with ample authority holding that failing to provide any notice prior to sweeping encampments presents a substantial risk of erroneous property deprivation. *Phillips v. City of Cincinnati*, 479 F. Supp. 3d 611, 647 (S.D. Ohio 2020); *See*, 2016 U.S. Dist. LEXIS 185598, at *30-31; *Le Van Hung v. Schaaf*, No. 19-cv-01436-CRB, 2019 U.S. Dist. LEXIS

68867, at *20 (N.D. Cal. Apr. 23, 2019); *Mitchell*, 2016 U.S. Dist. LEXIS 197949, at *22 (C.D. Cal. Apr. 13, 2016); *Lavan v. City of L.A.*, 797 F. Supp. 2d 1005, 1017 (C.D. Cal. 2011) *aff'd Lavan*, 693 F.3d at 1032; *Pottinger*, 810 F. Supp. at 1584. Accordingly, the District Court's factual findings that Denver's failure to provide Appellees with at least some prior notice led to the erroneous deprivation of their property, were not clearly erroneous.

Finally, contrary to Denver's contentions, Aplt.Br. at 22, there is a significant difference, as a matter of law, between the Fourth and Fourteenth Amendment standards. The District Court properly appreciated that a *reasonable* seizure under the Fourth Amendment could still *erroneously deprive* Appellees of their property under the Fourteenth Amendment. This Court has recognized as much on multiple occasions, holding that courts must analyze the "propriety of the initial seizure by police under the Fourth Amendment" separately from whether that seizure complied "with the protections of procedural due process." *Snider v. Lincoln Cty. Bd. of Cty. Comm'rs*, 313 F. App'x 85, 93 (10th Cir. 2008) (citing *Winters v. Bd. of County Comm'rs*, 4 F.3d 848, 853, 856 (10th Cir. 1993)); *see also Lavan*, 693 F.3d at 1032; *accord Soldal v. Cook County*, 506 U.S. 56 (1992); *James Daniel Good Real Prop.*, 510 U.S. at 48. In other words, pursuant to *Snider* and *Winters*, courts must analyze what process is necessary to protect individuals from being erroneously deprived of their property (under the Fourteenth

Amendment) independently from whether a seizure was unreasonable (under the Fourth Amendment), and it was not error for the District Court to do so.

7.3.3 The District Court did not clearly err in finding a lack of evidence supported Denver's claimed need to give no notice because of public health and safety.

The District Court, correctly, recognized that the "government's overarching interest here—maintaining public health and safety—is unquestionably significant." *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *21. However, the court found, based on the evidence in the record, that Denver's decision to conduct the sweeps without prior notice was not in fact motivated by public health and safety concerns. *Id.* at *25. The District Court based this factual finding on the testimony of Denver's own witnesses from its public health department that the decision to conduct the sweeps with no advance notice was based on the desire to prevent protestors from showing up at the scene of the sweeps to voice their disapproval. *Id.* at *25-26. These findings were well-supported by the record. Aplt.App. at 2287-94.

To the extent that Denver showed that the encampments posed health and safety threats, the District Court rejected Denver's argument that it "could not accomplish the same goal of remediating the encampments and the health threats they allegedly posed" by instead giving "even 48 hours' advance notice to encampment residents." *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS

13027, at *28. Record evidence showed that Denver's public health department monitored encampments for months prior to sweeps. Aplt.App. at 2291, 2314-15. The evidence also demonstrated that Denver knew at least a week in advance of a planned sweep the conditions of the encampment, and the public health and safety risks (if any) posed by it, and decided at least a week in advance of nearly every sweep when that sweep would be conducted. *Id.* 2291-92. Encampments do not become a public health and safety threat overnight. *Id.* 2291-92, 2314-15. Denver presented no evidence that an emergency public health and safety concern has ever arisen requiring conducting a sweep with no notice. *Id.* 2287-94, 2314-15. Even counsel for Denver could not come up with a scenario that would require it when pressed by the District Court. *Id.* 2601-2608. And, the testimony was clear that Denver has numerous other ways to address the public health and safety concerns associated with the encampments absent sweeps, including by providing public restrooms, additional trash services, and other remediation efforts. Aplt.App. at 2277-79.

Moreover, contrary to Denver's arguments, the District Court did not discount the public health considerations or disagree with determinations made by public health officials. Instead, as discussed above, the District Court found, after carefully considering all of the evidence, that such considerations did not underlie Denver's decision to provide no notice. *Denver Homeless Out Loud*, 2021 U.S.

Dist. LEXIS 13027, at *25-26, 28. Instead, Denver's assertions were "devoid of any basis in medical science." *Id.* at *25-26, 28.

Importantly, when making its factual findings, the District Court noted that it was relying on the testimony of the Denver's own public health officials (who testified that they made the decision themselves as to when to give notice): McDonald and Lee. *Id.* at *25-26 ("[T]he decision of *DDPHE managers* to conduct the sweeps at issue in the manner that *they* did were not based on actual, scientific, or evidence-based, public health concerns." (emphasis added)). McDonald had delegated to Lee the authority to decide to conduct the sweeps with only morning-of notice; decisions which McDonald ratified. Aplt.App. at 2287-94, 2314-15, 2323-24. And, Lee unambiguously testified that she decided to sweep with only morning-of notice because of concerns about protesters showing up to voice displeasure with the sweeps, and the way they were conducted. Aplt.App. at 2287-94. The District Court's decision to take as true Lee's own clear and unequivocal testimony was not clear error. *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *26.

The District Court's weighing of the third *Mathews* factor was also consistent with precedent in analogous cases, where courts, while weighing public health and safety concerns posed by encampments that were substantiated by evidence, have held that the balancing of interests weighs in favor of providing

some notice (usually at least 48 hours) because cities, like Denver, "can keep [their] public areas clean without the wholesale, immediate destruction of the personal property of homeless people." *See*, 2016 U.S. Dist. LEXIS 185598, at *21; *see also Lavan*, 797 F. Supp. 2d at 1019; *Pottinger*, 810 F. Supp. at 1573.

Denver, in its brief, disputes the District Court's factual findings, but its citations to the record simply do not show that the District Court's factual findings constituted clear error. First, Denver cites to testimony from Lee about losing the ability to sweep *at all*. Aplt.App. at 2205-06, 2210. This testimony does not relate in any way to providing minimal notice prior to conducting sweeps. The only direct testimony from Lee regarding why no notice was provided prior to the day of sweeps was that such decision was made because of a concern that members of the public would protest the sweeps. *Id.* 2287-94. The District Court correctly noted this was not a valid public health and safety basis for failing to provide any notice to Appellees.

Second, Denver cites to testimony from a Denver Health physician, Dr. Bill Burman, but this testimony, again, contradicts Denver's bald assertions that public health and safety concerns require that it be able to conduct sweeps without providing any notice to Appellees. *Id.* 2266. In fact, Dr. Burman stated that there was no "right or wrong answer" from a public health perspective as to how to handle encampments, and no rational person could read his testimony as stating

that requiring minimal notice prior to sweeps would jeopardize public health and safety. *Id.*

Third, Denver cites to testimony from Bob McDonald, who admitted that the public health department monitors encampments *for months* prior to conducting sweeps. *Id.* 2314-15. McDonald's testimony does not support, or even address, the argument that public health and safety requires providing no notice to encampments prior to conducting sweeps. *Id.* 2314-15, 2323-24.

Denver also focuses on the "governmental interest" portion of the third prong of the *Mathews* analysis in its briefing, but, as the District Court found, providing notice imposes a low administrative burden on Denver (posting a few notices, sending a few emails, and posting on a website) compared to the monumental interest Appellees have in receiving notice before Denver seizes their unabandoned, uncontaminated possessions. *Id.* at *19. Denver does not point to any evidence that the District Court clearly erred in finding that the administrative burden imposed by providing minimal notice outweighs Appellees' weighty interest in not having all of their worldly possessions erroneously taken from them.

Ultimately, the District Court properly applied the *Mathews* balancing test by taking into account every issue raised by Denver (the current pandemic, public health concerns presented by encampments, Denver's interest in maintaining

public health and safety generally, and even the administrative burdens imposed), along with the unique property interest Appellees have in their only belongings (many of which are necessary for survival on the streets), and determined that seven days' notice (when there is no articulable public health and safety concern) was necessary to protect Appellees' due process rights. *Id.* at *18-29. Denver fails to reckon with the fact that mere disagreement with the District Court's factual findings is not sufficient to deem such findings an abuse of discretion. *Heideman*, 348 F.3d at 1188. Given the District Court's strongly supported factual findings that Denver's claimed public health and safety interest was contradicted by the evidence in the record, and resounding authority that even substantiated public health and safety concerns do not outweigh homeless individuals' interest in receiving adequate notice so as to not have their only possessions erroneously seized, the District Court's imposition of basic notice requirements before sweeps was not an abuse of discretion.

7.4 **The District Court did not err by judicially reviewing Denver's invocation of public health and safety.**

Contrary to Denver's argument, the District Court had discretion—and in fact, a duty—to review the basis for its assertions that public health and safety supported conducting the sweeps with no notice. Aplt.Br. at 19-22. The Supreme Court stated over a century ago that "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or

substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Jacobson*, 197 U.S at 28. More recently, courts have routinely held, in the context of the COVID-19 pandemic (a much more deadly public health crisis than homeless encampments), that courts "grant no special deference to the executive when the exercise of emergency powers infringes on constitutional rights." *Agudath Isr. v. Cuomo*, 983 F.3d 620, 635-36 (2d Cir. 2020). That is because "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 68 (2020); *see also id.* (confirming that "[the Court has] a duty to conduct a serious examination" into the necessity of public-health measures that infringe on constitutionally protected rights); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2615 (2020) (Kavanaugh, J., dissenting) ("[H]istory is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances…"). No matter the context or government interest asserted, courts "have a duty to conduct a serious examination of the need" for measures infringing on constitutional rights. *Roman Catholic Diocese*, 141 S. Ct. at 68; *Gomes v. Wood*, 451 F.3d 1122, 1128 (10th Cir. 2006). This Court "may not shelter in place when the Constitution is under attack," even when public health

and safety is invoked. *Roman Catholic Diocese*, 141 S. Ct. at 71 (Gorsuch, J., concurring).[4] Thus, the factual basis for a government-declared public health and safety emergency must be judicially reviewed. *See Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548 (1964); *see also Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 442 (1934). And, in fact, "[t]he judiciary's role may, in fact, be all the more important in [a national emergency]." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (citing *Koretmatsu v. United States*, 323 U.S. 214 (1944), as a shameful example of disregarding constitutional rights in the name of public health and safety deference).

The District Court did exactly that here by judicially reviewing Denver's invocation of a public health and safety emergency. It considered the evidence, including Denver's bald assertions that it needed to act immediately (and without providing any notice) to sweep homeless encampments, but also the mountain of evidence that no such need exists. The court then carefully considered Denver's arguments that emergent public health concerns were driving its decision to provide no notice, let alone process, before seizing and destroying Appellees' only belongings. The District Court determined that Denver's arguments failed in the

[4] *See also* Lindsay F. Wiley & Stephen I. Vladeck, Coronavirus, *Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. 179 (2020).

face of judicial scrutiny, and the clear evidence in the record. This was appropriate under *Mathews*, and recent Supreme Court caselaw.

Further, Denver's citations to *Camuglia*, *North American Cold Storage Company*, *Clark*, and *Miller* are unavailing. *See Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1222 (10th Cir. 2006); *N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 313 (1908); *Clark v. City of Draper*, 168 F.3d 1185, 1189 (10th Cir. 1999); *Miller v. Campbell Cty.*, 945 F.2d 348 (10th Cir. 1991).[5] None of these cases addressed the factual circumstance presented here, what notice is required by the due process clause prior to clearing homeless encampments, nor the procedural posture that is before this Court, whether the District Court clearly erred in finding that Appellees demonstrated a likelihood of success on the merits of their procedural due process claim. Rather, these cases involve food safety inspections and killing of dangerous animals. Clearly, the very important property interests that Appellees have in keeping their only shelter and their belongings (especially during a global pandemic where the safest place to shelter is one's own home or tent and when there is inadequate public shelter and housing available for Denver's homeless population) and the health and safety implications of leaving Appellees on the streets with no shelter or belongings were not implicated in *Camuglia*, *North American Cold Storage Company*, *Clark*, and *Miller*. Further,

[5] The other case cited by Denver does not even address procedural due process. *See Jacobson*, 197 U.S. at 22.

these decisions discuss only the timing requirements of holding a *hearing* in the due process context, not what *notice* is necessary when. The District Court's order recognized the fundamental difference between seizing spoiled food from a restaurant and seizing a homeless individual's only shelter, along with the difference between requiring a hearing versus providing notice (a much lower administrative burden than a pre-deprivation hearing) before seizing property.

And, Denver's alarming implication that the District Court's ruling made an error of law by not simply deferring to Denver's invocation of public health and safety is simply unsupported by the weight of authority in cases involving what process is due to homeless individuals before seizing their only belongings. Scores of courts have at least implicitly reviewed such invocations by holding that homeless individuals' interest in their property outweighs an asserted governmental interest in public health and safety. *Lavan*, 693 F.3d at 1032; *Phillips*, 479 F. Supp. 3d at 647; *Pottinger*, 810 F. Supp. at 1584; *Le Van Hung*, 2019 U.S. Dist. LEXIS 68867, at *20; *See*, 2016 U.S. Dist. LEXIS 185598, at *30-31; *Mitchell*, 2016 U.S. Dist. LEXIS 197949, at *22. As evidenced by this weight of authority, the District Court's determination that due process required Denver provide *basic* notice prior to seizing Appellees' only possessions, even in the face of the invocation of "public health and safety", was not an abuse of discretion.

Ultimately, Denver asks this Court to completely disregard the Supreme Court's decision in *Mathews* and instead allow, without any judicial scrutiny whatsoever, a government to seize property without notice whenever it desires so long as it invokes the term "public health and safety." This standard contradicts modern constitutional jurisprudence relating to the invocation of public health and safety, *see Roman Catholic Diocese*, 141 S. Ct. at 68, and well-established Supreme Court caselaw, *Mathews*, 424 U.S. at 335. More fundamentally, Denver's position is antithetical to our system of government wherein it has been long-established that courts have the power of judicial review when it comes to violations of the constitution. *Marbury v. Madison*, 5 U.S. 137 (1803). If the judicial branch is required to simply take as true the government's bald proclamations that its unconstitutional actions were taken to preserve "public health and safety" without subjecting such proclamations to scrutiny, then the Constitution would not be worth the paper it is written on.

7.5 **The District Court's decision to hold Appellees to a greater burden than required does not support reversing its Order on appeal.**

Contrary to Denver's arguments, Aplt.Br. at 25, the District Court required that Appellees meet a "heightened standard" because they sought a "disfavored injunction." *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, *13-14 (citing *Free the Nipple-Fort Collins*, 916 F.3d at 814). It held Appellees to this burden throughout its order. *Id.* at *65, n. 12. Specifically, the District Court

rejected Appellees' requested relief on their Fourth Amendment and Fourteenth Amendment substantive due process claims because Appellees failed to meet this heightened burden. *Id.* at *33-57.[6] The District Court's application of the "heightened burden" standard to Appellees' claims is not a basis for overturning its order.

7.6 **The District Court did not err in applying the *Mathews* test rather than the *Jacobson* standard.**

Denver, in passing, argues that the District Court erred by not judging Appellees' procedural due process claims under the standard set out in *Jacobson*. Aplt.Br. at 19. Given recent Supreme Court authority, the District Court's decision to apply the *Mathews* balancing test was not error.

In *Jacobson*, the Supreme Court upheld a mandatory vaccination law against a substantive due process challenge under rational basis review. 197 U.S. at 25. *Jacobson* did not consider, or set precedent related to, a procedural due process claim. The *Jacobson* Court also specifically noted that "even if based on

[6] The District Court applied this heightened standard despite the fact that: (1) Appellees sought a prohibitory, rather than mandatory, injunction by asking the District Court to stop Denver from conducting sweeps, *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1006 (10th Cir. 2004) (Seymour, J., concurring); (2) Appellees' injunction sought to preserve the status quo, which in this case would be the status *before* Denver began conducting the sweeps with no notice, *Free the Nipple-Fort Collins*, 916 F.3d at 814, n.3; and (3) the injunction sought would not have given Appellees all the relief they sought on the merits because Appellees seek damages, among other relief, as well. *Id.* While Appellees were not required to meet a heightened burden, the District Court nonetheless held them to one.

the acknowledged police powers of a state," a public health measure "must always yield in case of conflict with . . . any right which [the Constitution] gives or secures." 197 U.S. at 25. For these reasons alone, it is inapplicable here.

Additionally, many courts, including the Supreme Court, have observed that the test some courts have derived from *Jacobson* (and the one advocated by Denver) was never good law, and certainly has no application today. *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925-27 (6th Cir. 2020); *Bayley's Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 31 (D. Me. 2020). For one thing, as Justice Gorsuch observed in *Roman Catholic Diocese*, *Jacobson* never departed from the standard constitutional analysis; it applied the traditional legal test associated with the right at issue: rational basis review in a substantive due process challenged not predicated on a suspect or other protected class. 141 S. Ct. at 70 (Gorsuch, J., concurring). *Jacobson* also predated modern constitutional jurisprudence and "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction" than the one at issue here. *Id.* Because of this, recently, the Supreme Court has continuously applied strict scrutiny to public health orders during the COVID-19 pandemic, and Justice Gorsuch advised that lower courts should not depart from the "traditional legal test associated with the right at issue" even in the face of the enormous public health and safety concerns

presented by the COVID-19 pandemic. *Id.*; *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 630-37 (2d Cir. 2020); *Heights Apartments, LLC v. Walz*, 2020 U.S. Dist. LEXIS 245190, 2020 WL 7828818, at *10 (D. Minn. Dec. 31, 2020).

Ultimately, "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so" in circumstances, like those here, that do not present an emergent public health concern. *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). Instead, *Jacobson* was a "modest decision" that has been wrongly advanced by Denver as a "towering authority that overshadows the Constitution." *Id*. at 71. For these reasons, the District Court did not err in applying the *Mathews* standard, and not the *Jacobson* test, to Appellees' procedural due process claim.

7.7 **The District Court did not abuse its discretion in finding that Appellees would be irreparably harmed absent an injunction.**

The District Court reviewed the evidence and found that "in the absence of an injunction, the[re] [is a high] likelihood that [Appellees]' vital possessions… necessary to survive outside in the elements…will be seized and potentially destroyed" and that such an injury constituted "irreparable harm for purposes of [Appellees]' instant Motion." *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *57 (citing *Mitchell*, 2016 U.S. Dist. LEXIS 197949, 2016 WL 11519288, at *6). The District Court based this finding on the testimony of multiple homeless witnesses at the preliminary injunction hearing who, after

having their property seized because of lack of notice, were forced to "try to make a tree into a shelter" in the middle of a "blizzard" with only "the clothes on [their] back" and "sleep on the streets without a tent… unsheltered on a median for multiple nights." *Id.* at *56. These are just the type of injuries, potentially involving risk of death and serious bodily injury, that "cannot be compensated after the fact by money damages." *Fish v. Kobach*, 840 F.3d 710, 751 (10th Cir. 2016); *see also See*, 2016 U.S. Dist. LEXIS 185598, at *27. The testimony also demonstrated that homeless individuals continuously had their property seized with no remedy for its return, which also supports a finding of irreparable harm. *See Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929).

Finally, contrary to Denver's arguments (which Denver forfeited, as explained above), the District Court did not simply apply the constitutional-violation-as-irreparable-injury principle in its order (and, in fact, did not even cite to *Free the Nipple-Fort Collins* in this section of the order). *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *56-57. However, again contrary to Denver's forfeited argument, if the District Court had followed this principle, it would not have been error. The constitutional-violation-as-irreparable-injury is the well-established law of this Circuit, no matter the constitutional right at issue. *Free the Nipple-Fort Collins*, 916 F.3d at 806; *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012). This

panel may not overrule this precedent. *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000).

7.8 **The District Court did not abuse its discretion in finding that the balance of harms and public interest favored issuance of an injunction.**

Denver concedes that the District Court properly analyzed the balance of harms and public interest factors together, but it repackages its prior arguments about its claimed interest in public health and safety to advance the (inaccurate) argument that the District Court failed to balance the harms. In fact, the District Court did balance the harms; Denver simply disagrees with how it did so. However, Denver's mere disagreement with the court's balancing is not enough to constitute an abuse of discretion by the District Court.

The District Court considered, and balanced, Denver's contentions about the public health and safety implications of requiring notice prior to sweeps. *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *58. While the District Court did not repeat the lengthy factual basis for this finding, which is set out fully in other parts of the order, it is clear that it did consider the possible harm that the injunction would cause to Denver because it crafted "the narrowest injunction possible" to ensure that Denver is "not unduly restrained in [its] ability to maintain the public health and safety". *Id.* at *58. This is exactly the approach that the Supreme Court has recently held is appropriate when dealing with claims

by the government that restricting constitutional rights is necessary to protect public health and safety. *Roman Catholic Diocese*, 141 S. Ct. at 68; *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021).

Moreover, Denver has not established that the District Court abused its discretion in concluding that the harm Appellees will suffer without the injunction, outweighs any harm that Denver might suffer by being unable to seize and destroy Appellees' property without any notice. *See Mitchell*, 2016 U.S. Dist. LEXIS 197949, 2016 WL 11519288, at *6. And, Denver fails to reckon with well-established precedent concluding the balance of harms and public interest strongly favor issuance of an injunction when there is a likelihood that a party's constitutional rights are being violated. *Awad*, 670 F.3d at 1131; *see also Free the Nipple-Fort Collins*, 916 F.3d at 805.

Importantly, courts have consistently held "the constitutional rights of homeless individuals outweigh the potential hurdles the injunction might pose to [a city's] efforts to keep the sidewalks clean." *Garcia v. City of L.A.*, No. CV 19-6182 DSF (PLAx), 2020 U.S. Dist. LEXIS 212176, at *37-38 (C.D. Cal. Apr. 13, 2020); *Lavan v. City of Los Angeles*, No. CV 11-2874 PSG (AJWx), 2011 U.S. Dist. LEXIS 46030, 2011 WL 1533070, at *6 (C.D. Cal. Apr. 22, 2011); *Justin v. City of Los Angeles*, 2000 U.S. Dist. LEXIS 17881, at *11 (C.D. Cal. Dec. 5,

2000); *Pottinger*, 810 F. Supp. at 1559. The District Court's order, which was in line with this well-established precedent, was not an abuse of discretion.

7.9 **The District Court did not exceed its equitable authority in fashioning an injunction.**

"The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself." *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977). Throughout our nation's history, federal courts have rightly stepped in to protect constitutional rights by fashioning equitable remedies tailored to the violation. *See Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The federal equitable power has reached areas beyond school desegregation as federal courts have used their broad equitable powers to, for example, ensure prisons were not cruelly punishing inmates, *see Hutto* v. *Finney,* 437 U.S. 678 (1978), protect those committed to our country's mental health hospitals, *see Thomas S.* v. *Flaherty,* 902 F.2d 250 (4th Cir. 1990), and eradicate discrimination from public housing, *see Hills v. Gautreaux,* 425 U.S. 284 (1976). The Supreme Court has acknowledged that "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *accord Ramos v. Lamm*, 639 F.2d 559, 586 (10th Cir. 1980). In civil rights matters, "as with any equity case, the nature of the

violation determines the scope of the remedy." *Swann*, 402 U.S. at 16; *see also United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175 (9th Cir. 1987). This broad authority is particularly important when invoked to "bring an ongoing [constitutional] violation to an immediate halt" like the District Court did here. *Hutto*, 437 U.S. at 687 n.9; *see also Keyes v. Sch. Dist. No. 1*, 895 F.2d 659, 670 (10th Cir. 1990).

The District Court's use of this broad equitable authority to fashion a narrow remedy that cures ongoing constitutional violations does not exceed the authority conferred on the judiciary by Article III. "[W]here, as here, a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.'" *Milliken*, 433 U.S. at 281-82 (citation omitted). The relief ordered by the District Court directly addresses the constitutional violation: the violation of Appellees' due process rights. The injunction simply imposes advance notice requirements. *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *62-65. It does not rewrite a duly enacted statute or ordinance, making the authority cited by Denver inapplicable. *See* Aplt.Br. at 38-39.

Contrary to Denver's argument, the District Court did not improperly usurp the function of Denver's public health department; rather it simply imposed basic notice requirements to protect the due process rights of Appellees. The Supreme

Court has held that ordering injunctive relief requiring that a public agency take specific actions to preserve constitutional rights that would normally be reserved to the discretion of governmental officials is within the equitable authority of a district court. *Milliken*, 433 U.S. at 282. And, the Court recently reaffirmed this principle when enjoining public health orders in relation to the COVID-19 pandemic in multiple cases (when, unlike here, there was actual evidence in the record of an emergent public health and safety risk). *Gateway City Church*, 141 S. Ct. at 1460; *Tandon*, 141 S. Ct. at 1294; *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *Roman Catholic Diocese*, 141 S. Ct. at 65; *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020).

Moreover, given the previous litigation over a string of incidents in which Denver failed to provide notice prior to conducting sweeps, *see Lyall*, 2018 U.S. Dist. LEXIS 48846, the District Court had "ample authority… to address each [issue] contributing to the violation" of Appellees' due process rights. *Hutto*, 437 U.S. at 687. In other words, "taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance." *Id.*

Additionally, "the exercise of discretion in this case is entitled to special deference because of the trial judge's years of experience with the problem at

hand and his recognition of the limits on a federal court's authority in a case of this kind." *Id.* at 688. Judge Martinez has many years on the bench and presided over the *Lyall* litigation. This Court should not second-guess his decision to narrowly exercise his equitable authority.

Fundamentally, under the District Court's narrow injunction, Denver "will still be able to lawfully seize and detain property, as well as remove hazardous debris and other trash; issuance of the injunction [will] merely prevent it from unlawfully seizing and destroying personal property that is not abandoned without providing any meaningful notice and opportunity to be heard." *Lavan*, 797 F. Supp. 2d at 1019. The injunction does nothing to prevent Denver from taking actions to address public health and safety concerns within encampments. Denver can still provide trash services to encampments, public restrooms, and health services to encampment residents. It can still enforce criminal laws of general applicability. Despite the fact, as outlined *supra* **Section 7.3.3**, that there was a lack of evidence in the record that actual public health and safety concerns justify conducting sweeps with less than seven days' notice, the District Court allowed Denver to conduct sweeps with only forty-eight hours' notice when "there exists reasonable, evidence-based reasons to believe that a public health or safety risk exists which requires the undertaking of such encampment sweeps with less than seven days' advance notice." *Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS

13027, at *63. In other words, the District Court's injunction simply requires that Denver comply with basic due process requirements before conducting a sweep. Such an injunction "not only benefits [Appellees], but the general public as well." *Lavan*, 797 F. Supp. 2d at 1019-20 (citing *Pottinger*, 810 F. Supp. at 1573).

Ultimately, in fashioning equitable remedies, the District Court's "task [wa]s to correct, by a balancing of the individual and collective interests, the condition that offend[ed] the Constitution." *Swann*, 402 U.S. at 15-16. The District Court's order addressed the "issue head on" in imposing basic notice requirements on Denver. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1244 (10th Cir. 2001). Courts across the country have done just what the District Court did in *this exact situation* and ordered cities to provide notice before seizing and destroying homeless individuals' only property. *See Pottinger*, 810 F. Supp. at 1584; *See*, 2016 U.S. Dist. LEXIS 185598, at *30-31; *Mitchell*, 2016 U.S. Dist. LEXIS 197949, at *21; *Lavan*, 797 F. Supp. 2d at 1020; *Justin*, 2000 U.S. Dist. LEXIS 17881, at *38; *Le Van Hung,* 2019 U.S. Dist. LEXIS 68867, at *20; *Jeremiah v. Sutter Cty.*, 2018 U.S. Dist. LEXIS 43663, at *15 (E.D. Cal. Mar. 16, 2018). Far from legislating from the bench, the District Court's injunction was a narrow exercise of the broad equitable authority conferred on it by Article III of the Constitution.

7.10 **The District Court's order does not affect the terms of the *Lyall* settlement agreement.**

The District Court rightly determined, independently of the *Lyall* settlement agreement, what process was necessary to ensure that Appellees' rights were protected. The *Lyall* agreement is still in effect, but that did not preclude the District Court from independently concluding that, given the evidence, certain basic notice requirements were necessary to preserve Appellees' constitutional rights. Even so, the District Court's injunction on its face does not conflict with the *Lyall* settlement agreement; like the *Lyall* agreement, it requires seven days' notice prior to sweeping a homeless encampment unless there is a public health and safety justification for providing less notice. Aplt.App. at 433.

Additionally, contrary to Denver's arguments, the District Court's order was proper because the *Lyall* settlement agreement resolved claims unrelated to the claims at issue in this lawsuit. Aplt.Br. at 45. *Lyall* arose from a different set of events, involved different individual Defendants, was brought by different named Plaintiffs, involved constitutional violations that happened on different days, in different years, at different locations, and implicated different types and degrees of impairments to homeless individuals' Constitutional rights. Moreover, in *Lyall,* there was no evidence that Denver decided not to provide notice for the sweeps because of the First Amendment protected activity of Plaintiff Denver Homeless Out Loud.

Finally, this Court's precedent is contrary to Denver's claims that the District Court improperly entered the injunction in contravention of the *Lyall* settlement agreement. In *Johnson v. Lodge # 93 of Fraternal Order of Police*, this Court affirmed an order approving a consent decree between a city and African-American members of the police department. 393 F.3d 1096, 1100–1101 (10th Cir. 2004). A union intervened into the lawsuit to object to the consent decree on the basis that it improperly re-wrote its contract with the city. *Id.* This Court held that because the union was able to "participate" in the proceedings that led to the entry of the consent decree, it had no basis to claims its rights were violated by the entry of the consent decree. *Id.* Likewise, here, Denver was a full participant in the proceedings below; the District Court allowed it to call witnesses, cross-examine Appellees' witnesses, and present both an opening statement and closing argument. There is no basis for concluding that the limited preliminary injunction violated its contractual rights. *See also Tennessee Assn. of Health Maintenance Organizations, Inc. v.* Grier, 262 F.3d 559 (6th Cir. 2001); *People Who Care v. Rockford Bd. of Education*, 961 F.2d 1335, 1336 (7th Cir. 1992); *U.S. v. State of Oregon*, 913 F.2d 576, 582 (9th Cir. 1990); *Dennison v. Los Angeles Dept. of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981); *Equal Employment Opportunity Com. v. American Telephone & Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977).

7.11 **The District Court's injunction was narrower than the relief requested by Appellees.**

Appellees claim that the District Court granted relief that Appellees never sought; however, the District Court merely ordered *narrower* relief than Appellees requested. Appellees asked the District Court to completely enjoin the sweeps or, at the very least, require a full seven days' notice no matter the circumstances. The District Court found that a narrower injunction was supported by the record, and imposing *less* relief than that requested by Appellees was not contrary to law.

Further, the fact that the amount of notice, and the means of providing notice, was at issue below, and the Court issued a narrower injunction than requested by Appellees, makes the authority cited by Denver inapposite. In *McDonnell v. City & County of Denver*, this Court held that an issue that was not briefed, nor addressed, below was abandoned on appeal, and not a basis for imposing a preliminary injunction. 878 F.3d 1247, 1257 (10th Cir. 2018). And, in *Republican National Commission v. Democratic National Commission*, the Supreme Court held that specific relief, that was outside the scope of the issues on appeal, could not form the basis for the injunctive relief on appeal. 140 S. Ct. 1205, 1207 (2020). Plainly, both of these cases are inapplicable here.

Finally, the portions of the injunction that Denver claims are unsupported by the evidence and were never specifically sought by Appellees are mere reporting and monitoring requirements. Courts have repeatedly held that reporting

and monitoring requirements meant to ensure compliance with an injunction are proper. *See, e.g.*, *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 405-06 (1976); *Gluth v. Kangas*, 951 F.2d 1504, 1511 (9th Cir. 1991); *Guerra v. Board of Trustees of Cal. State Universities*, 567 F.2d 352, 355 (9th Cir. 1977); *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508 (5th Cir. 1969). These reporting requirements further the goal of the injunction: ensuring that Denver honors the injunction and provides adequate process to Appellees prior to seizing and destroying their only belongings.

7.12 **The District Court's injunction specifically delineates what conduct is enjoined.**

A preliminary injunction is unacceptably vague only when "the delineation of the proscribed activity lacks particularity or when containing only an abstract conclusion of law, not an operative command capable of enforcement." *CF&I Steel Corp. v. United Mine Workers of America*, 507 F.2d 170, 173 (10th Cir. 1974) (citing *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1243-44 (10th Cir. 2001)). "Rule 65(d) requires only that the enjoined conduct be described in reasonable, not excessive, detail—particularly in cases . . . when overly precise terms would permit the very conduct sought to be enjoined." *Reliance Ins. Co. v. Mast Constr. Co.*, 159 F.3d 1311, 1316 (10th Cir. 1998); *see also Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1431-32 (7th Cir. 1985); *Johnson v. Radford*, 449 F.2d 115, 117 (5th Cir. 1971). In assessing

whether an order complies with Rule 65(d), this Court must construe the district court's language "in light of the injunctive order as a whole." *Reliance Ins. Co.*,159 F.3d at 1316; *see also Retiree, Inc. v. Anspach*, 660 F. App'x 582, 590 (10th Cir. 2016).

The District Court's injunction is sufficiently specific because it states "precisely what conduct [i]s being enjoined." *Prairie Band of Potawatomi Indians*, 253 F.3d at 1244. It prohibits Denver from taking a number of actions, including conducting sweeps of homeless encampments without appropriate notice. If Denver does choose to conduct sweeps, it requires that Denver take specific actions prior to doing so. Particularly when read within the context of the District Court's entire order, it is clear to any reasonable person the strictures of the injunction.

Denver's arguments that the injunction is ambiguous are unavailing. First, the injunction does not incorporate any external document. The references to the *Lyall* settlement agreement "do[] [not] engraft the [settlement agreement] in gross" or "rely on the [settlement agreement] for clarification of what [was] otherwise unclear in the [injunction] itself." *Gulf King Shrimp Co.*, 407 F.2d at 517; *id.* at 517 n.10. If anything, the injunction's reference to the *Lyall* settlement agreement "merely supplement[s] specific instructions" in the injunction so as to

make its instructions even clearer. *Id.*; *see also Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989).

Moreover, the injunction adequately defines "encampment." The term homeless "encampment" is a commonly known term within Denver and nationwide. It refers to one or more homeless individuals living in close proximity on the streets and sidewalks, in parks, or along the river. In fact, Denver regularly uses the terminology, and did so throughout its motions practice and at the preliminary injunction hearing below. *See Denver Homeless Out Loud*, 2021 U.S. Dist. LEXIS 13027, at *17 (showing that Denver's response motion referenced "homeless encampments"). Additionally, across the country have routinely used the term "encampment" without further definition. *See, e.g.*, *Santa Cruz Homeless v. Bernal*, No. 20-cv-09425-SVK, 2021 U.S. Dist. LEXIS 13839 (N.D. Cal. Jan. 20, 2021); *Phillips*, 2020 U.S. Dist. LEXIS 145507; *Garcia*, 2020 U.S. Dist. LEXIS 212176, at *41; *See*, 2016 U.S. Dist. LEXIS 185598, at *30. The term "encampment" is not vague, has a commonly understood meaning, and the District Court's usage of "encampment" is not a basis for overturning the injunction.

Furthermore, the other terms that Denver claims are "ambiguous" are far from it. It is unclear how much more specific the term "science" and "evidence-based reasons" could be, especially when read in conjunction with the rest of the

order. Nothing in the injunction provides any basis for Denver to believe that it would be prevented from conducting criminal investigations, or arresting those who commit crimes. Its repeated claims that it is prevented by the injunction from taking action, based on probable cause, against criminal activity simply lacks credibility. Certainly, if Denver could articulate that a fire hazard required immediate clearing of a homeless encampment (which it failed to do at the preliminary injunction hearing and has clearly failed to find any evidence of since the entry of the injunction), then the injunction would allow the immediate remediation of that threat. The injunction is crystal clear about what Denver is, and is not, allowed to do with respect to its ongoing insistence on sweeping homeless encampments (in the face of evidence that it does nothing to improve public health and safety outcomes, or solve homelessness). Denver's claims otherwise lack merit.

Finally, the fact that Denver has easily complied with the terms of the injunction on over twenty occasions since its issuance is persuasive evidence that the District Court's order was not ambiguous. Supp.Appx. at 002617-90. "In this posture it is difficult to term [Denver]'s argument that the injunction is inoperative from lack of specificity as more than self-denying." *Williams v. United States*, 402 F.2d 47, 48 (10th Cir. 1967); *cf. Drywall Tapers and Pointers, Local 1974 v.*

Local 530 of Operative Plasterers and Cement Masons Int'l Ass'n, 889 F.2d 389, 395-96 (2d Cir. 1989).

8. **CONCLUSION**

Appellees respectfully request that this Court affirm the District Court's preliminary injunction order.

9. **STATEMENT REGARDING ORAL ARGUMENT**

Appellees believe that oral argument will assist the Court with resolving the issues presented by this appeal.

DATED this 9th day of June 2021.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **12,996** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Local Rule 32.

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Date: June 9, 2021.

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CERTIFICATE OF SERVICE

I certify that on this 9th day of June 2021, I filed this **PLAINTIFF-APPELLEE'S ANSWER BRIEF** via CM/ECF which will generate a Notice of Electronic Filing to the following:

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