Selected docket entries for case 21−1025

Generated: 11/15/2021 09:03:47

Filed	Document Description	Page	Docket Text
04/19/2021	Main Document	2	[10823578] Appellant/Petitioner's brief filed by Kristin M. Bronson, Mr. Mike Cody, Brian Conover, Denver, Colorado, Michael Hancock, Mr. James D. Harvey, David Hunter, Mallory Lutkin, Mr. A. Martinez, Mr. David Martinez, Anthony Martinez, Bob McDonald, Rop Monthathong, Mark Moore, Thanarat Phuvhapisalkij, Christopher Randall, Murphy Robinson, Jon Udland, Darren Ulrich and Toby Wilson. Served on 04/19/2021 by email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [21−1025] GK
06/09/2021	Main Document	115	[10835777] Appellee/Respondent's brief filed by Gregory Costigan, Mr. Charles Davis, Denver Homeless Out Loud, Tomasa Dogtrail, Michael Lamb, Sean Martinez, Lisa Masaro, Rick Meitzen, Jr., Sharron Meitzen, Steve Olsen and Nathaniel Warner. Served on: 06/09/2021. Manner of service: email. Oral argument requested? Yes. Word/page count: 12996. This pleading complies with all required privacy and virus certifications: Yes. [21−1025] AM
06/23/2021	amicus brief	185	[10838943] Amicus Curiae brief filed by American Civil Liberties Union of Colorado. Served on 06/16/2021. Manner of Service: email. [21−1025]
06/23/2021	Main Document	212	[10838990] Amicus Curiae brief filed by National Homelessness Law Center. Served on 06/16/2021. Manner of Service: email. [21−1025]

CASE 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
The Honorable William J. Martinez
District Court No. 20-cv-02985-WJM-SKC

DEFENDANTS-APPELLANTS' OPENING BRIEF

GEOFFREY C. KLINGSPORN
WENDY J. SHEA
CONOR D. FARLEY
Assistant City Attorneys
Denver City Attorney's Office
201 West Colfax Ave., Dept. 1108
Denver, CO 80202-5332
Telephone: (720) 913-3100

ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

Defendants-Appellants, the City and County of Denver and individually-named Defendants Hancock, McDonald, Robinson, Bronson, Cody, A. Martinez, Conover, Moore, Phuvhapaisalkij, Monthathong, Randall, Hunter, Wilson, Udland, D. Martinez, Sam, Harvey, Ulrich and Lutkin ("Denver"), submit the following Opening Brief:

I. JURISDICTIONAL STATEMENT

The district court exercised jurisdiction over the claims in Plaintiffs' complaint pursuant to 28 U.S.C. § 1331. *See* Aplt. App. Vol. III at 490.[1] The district court entered its "Order Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction and Expedited Hearing" on January 25, 2021. *Id*. at Vol. VII at 1481–1530. Denver timely filed its notice of appeal on January 26, 2021. *Id.* at 1531–32. The district court's Order, which grants a preliminary injunction, is immediately appealable under 28 U.S.C. § 1292(a)(1). Accordingly, this Court has jurisdiction over the issues raised on appeal.

II. ISSUES PRESENTED

A. Did the district court err in determining that Plaintiffs were likely to prevail on their procedural due process claim, where it disregarded settled law that public health authorities may immediately act to remediate health and safety risks

[1] References to the appendix are by volume and page number (e.g., Aplt. App. Vol. II at 27).

without offending due process, disregarded its holding on Plaintiffs' unlawful seizure claim, and shifted the burden to Denver on this issue?

B. Should the Tenth Circuit's "constitutional-violation-as-irreparable-injury principle" apply where the district court's injunction is based on a procedural due process claim for which monetary damages provide an adequate remedy?

C. Did the court abuse its discretion in finding that Plaintiffs made a strong showing that the balance of harms and public interest tipped in their favor?

D. Did the district court abuse its discretion by issuing an injunction which mandates specific procedures that Denver must follow prior to enforcing its ordinances to address public health and safety issues, which also alter the terms of an existing settlement agreement, and which are unsupported by any evidence?

E. Does the district court's preliminary injunction Order violate Rule 65(d) because it is impermissibly ambiguous?

III. STATEMENT OF THE CASE

This case arises out of actions taken by Denver's public health authority, the Department of Public Health and Environment (DDPHE), to immediately remediate emergent public health conditions resulting from unsanctioned encampments found in three specific locations in Denver—Lincoln Park, Morey Middle School, and the South Platte through ordering area restrictions. In their Complaint, Plaintiffs challenge area restrictions imposed by DDPHE as well as Denver's enforcement of

its encumbrance ordinance through its Department of Transportation and Infrastructure (DOTI). Aplt. App. Vol. III at 526–34, 541–47. While Plaintiffs moved for a preliminary injunction barring Denver from disrupting any unsanctioned encampment for any reason, they only focused on the three locations where DDPHE area restrictions had been imposed for the purpose of their Motion. *Id*. at 614-621, 620 n.55. Following a three-day limited evidentiary hearing, the district court entered a preliminary injunction against Denver. *Id*. at Vol. VII at 1481–1530.

IV. STATEMENT OF THE FACTS

In 2016, a group of people experiencing homelessness brought suit against the City and County of Denver, alleging that Denver seized and destroyed their property during "Homeless Sweeps … in violation of their Fourth Amendment right against unreasonable searches and seizures; their Fourteenth Amendment right to due process of law; and their Fourteenth Amendment right to equal protection." *Lyall v. City of Denver*, 319 F.R.D. 558, 561 (D. Colo. 2017). The *Lyall* complaint specifically challenged Denver's enforcement of its encumbrance ordinance though its Department of Public Works—now known as DOTI. D. Colo. Case No. 16-cv-2155-WJM-SKC, Doc. #54 at ¶¶ 9, 12.[2] The district court granted the plaintiffs'

[2] As the district court's Order on appeal cited to the *Lyall* Settlement, Denver requests this Court take judicial notice of the pleadings and orders from the *Lyall*

motion to proceed as a class, albeit with a class definition that made no mention of homelessness. *Lyall*, 319 F.R.D. at 567 n.6.[3] Shortly before trial, in early 2019, the parties settled. Aplt. App. Vol. II at 292–328. After a fairness hearing, the district court approved the settlement. *Id*. at Vol. III at 522; *see* D. Colo. Case No. 16-cv-2155-WJM-SKC, Docs. ## 224-1 (settlement), 225 (approval).

The *Lyall* settlement agreement sets forth detailed protocols for DOTI's enforcement of the encumbrance ordinance. Specifically, it provides that "[t]he City, to the extent reasonably possible, shall give at least seven days' notice prior to a large-scale encumbrance cleanup," but may give less notice "if the City determines that a public health or safety risk exists which requires it." Aplt. App. Vol. II at 306. In such cases, "the City shall provide reasonable notice of the cleanup, with the determination of reasonableness based upon the nature of the public health and safety risk present in the area." *Id.* During the fairness hearing in *Lyall*, to ensure complete understanding, DOTI—the City Department responsible for enforcing the

litigation cited herein. *See St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979) ("Judicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it.").

[3] The *Lyall* class was defined as "All persons in the City and County of Denver whose personal belongings may in the future be taken or destroyed without due process on account of the City and County of Denver's alleged custom or practice (written or unwritten) of sending ten or more employees or agents to clear away an encampment of multiple homeless persons by immediately seizing and discarding the property found there." *Id*. at 571.

encumbrance Ordinance—defined large-scale encumbrance removals or cleanups as:

> [C]oordinated multi-agency cleanups of a specific, designated area that Public Works has determined cannot be properly cleaned due to the amount of encumbrances and trash found in the designated area through the regular work of Solid Waste crews.

D. Colo. Case No. 16-cv-2155-WJM-SKC, Doc. #225-2; *see also* Denver Revised Municipal Code, Article IX, §§ 49-246; 49-247.[4]

The settlement agreement also sets forth agreed-upon protocols for regular DOTI cleanups, including notice and storage for property that does not pose a public health or safety risk, and notice and storage for removal of property that does not pose a public health or safety risk in areas not within the designated cleanup area or posted for a large-scale cleanup. Aplt. App. Vol. II at 306–07.

A year later, Plaintiffs filed this lawsuit, asserting many of the same claims as the *Lyall* plaintiffs. Plaintiffs also immediately moved for a preliminary injunction. Aplt. App. Vol. II at 177–344.[5] In their Motion, Plaintiffs requested an order prohibiting the displacement of any encampment, for any reason, for at least the duration of the COVID-19 pandemic. *Id.* at Vol. III at 601; *see id.* at Vol VII at

[4] *Available at* https://library.municode.com/co/denver/codes/code_of_ordinances.

[5] Plaintiffs subsequently amended their motion twice: first (by order of the district court) to reduce its length, and a second time to substitute parties and amend the caption. *See* Aplt. App. Vol. III at 345–485, 598–639.

1488–89. Plaintiffs also sought an order requiring Denver to "provide restrooms, sanitation services (including trash service), and personal hygiene facilities (including handwashing stations)" to Plaintiffs; to comply with the *Lyall* settlement; and (presumably in the alternative) to provide seven-day written notice for any cleanup. *Id.* at Vol. III at 601; *see id.* at Vol. VII at 1488–89.

While the parties were briefing the preliminary-injunction motion, Plaintiffs sought early discovery. Aplt. App. Vol. IV at 655–66. The court denied almost all requested discovery, citing "considerable concerns about the scope of Plaintiffs' requests, and the undue burden production would place on Defendants in the limited time available." *Id*. at Vol. V. at 835–52, 850. In that same Order, however, the court *sua sponte* ordered Denver to collect and file with the court "three other categories of evidence" which the court thought would "assist it in its consideration of the [preliminary-injunction] Motion," including "[a]ny evidence" it possessed about "the possibility of sanctioned homeless encampments … the frequency and geographic scope of COVID-19 testing in homeless encampments in Denver … [and] the latest estimate of the number of people experiencing homelessness in Denver." *Id.* at 850–51.

Denver submitted its response to this court-ordered discovery, followed by two supplemental responses as more information was gathered. *Id.* at Vol. VI at 1039–1194; Vol. VII at 1314–41, 1350–62. Shortly before the preliminary-

injunction hearing, the district court informed the parties that it had "drastically underestimated the volume of documents Defendants would serve on the Court in response to its request" and put the parties on notice that it would not undertake a "comprehensive review of this information," but instead would rely solely on the evidence and testimony submitted with the briefs or presented at the hearing. *Id*. at Vol. VII at 1363.

Initially scheduled for two days, and subsequently extended to a third, the hearing took place on December 15–16, 2020 and January 11, 2021. Aplt. App. Vol. VII at 1404–09, 1412–16, 1420–21, 1435–56. Two named plaintiffs testified, along with a reporter; directors of two homeless outreach organizations; a Denver City Councilmember; a graduate student in health and behavioral sciences; a nonpracticing physician working for a "financial and healthcare company," and a Florida psychiatrist with expertise in "street psychiatry." *Id.* at Vol. VII at 1487; Vol. IX at 2043 (246:17–18). Denver's witnesses included the Director of Denver Public Health; the Executive Director of the Denver Department of Public Health and Environment (DDPHE); the Director of DDPHE's Public Health Investigations Division; the Manager of the Solid Waste Division of the Department of Transportation and Infrastructure (DOTI); the Assistant Director of Denver's Park Ranger Program; and the supervising Sergeant of the Denver Police Department's Homeless Outreach Team. *Id.* at Vol. VII at 1487.

On January 25, 2021, the district court issued its Order granting in part Plaintiffs' request for a preliminary injunction. *Id.* at 1481–1530. The court found that Plaintiffs were likely to succeed on their claim that Denver had violated their Fourteenth Amendment right to due process, concluding that DDPHE's area restrictions "demanded more procedural protections than the Denver Defendants afforded Plaintiffs." *Id*. at 1499. The court enjoined Denver and its "officers, managers, directors, agents, employees, successors and assigns, and all other persons in active concert or participation with them," *id.* at 1527, as follows:

First, the court required 7-day notice for any large-scale encumbrance cleanup or area restriction in "homeless encampments:"

> 1. The Denver Defendants shall 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. The number, form and content of such notices shall comply in all respects with Items A.3 & A.4 of Exhibit A to the *Lyall* Settlement Agreement.

Id. Next, the district court required Denver to email "additional advance notice of such sweeps [*sic*]"[6] to the City Councilmember representing the district in

[6] Throughout the *Lyall* litigation and this case, Denver has consistently objected to Plaintiffs' use of the term "sweeps," adopted uncritically by the district court here. Plaintiffs' own expert witness conceded that the term has "a negative connotation" and that he would not expect his outreach workers to use it. Aplt. App. Vol. IX at 1869 (72:1-15). In addition, the term deliberately elides the distinction between area restrictions ordered by DDPHE with large-scale encumbrance cleanups conducted

which the action was scheduled to take place and Plaintiffs' counsel, and to "permanently retail all copies of" these emails:

> 2. Not less than seven days prior to the commencement of any homeless encampment [cleanup or area restriction] referenced in Paragraph 1 of this Preliminary Injunction, the Denver Defendants shall provide additional advance notice of such [cleanup or area restriction], by way of electronic mail, sent to Plaintiffs' counsel, as well as to the Denver City Council member representing the Denver city council district in which the encampment [] subject to this Preliminary Injunction is expected to take place. Said e-mail notice to counsel and City Council member shall, at a minimum, advise them of the imminent encampment [cleanup or area restriction], including the date, time, place, and nature of the impending action, and the reasons why the Denver Defendants have decided that such action is necessary at that time. The Denver Defendants shall permanently retain all copies of these e-mail messages.

Id. at 1527–28.

Third, the injunction permits Denver to provide less than 7-days' notice but no less than 48-hours' notice to conduct a large-scale encumbrance cleanup or area restriction and only if DDPHE first publishes detailed written explanations for the public health basis(es) regarding the need to take such action in less than seven days, requires the same notification be emailed to the City Council member and Plaintiffs' attorneys, requires permanent retention of those emails, and absolutely prohibits any immediate cleanups or area restrictions:

---

by DOTI. Thus, Denver's use of "area restriction" and "cleanup" or "encumbrance cleanup" is not mere semantics. These terms convey differences between specific actions and authorities; the pejorative term "sweep" does not.

3. The Denver Defendants shall be permitted under this Preliminary Injunction to conduct a large-scale encumbrance cleanup [], or temporary area restriction [], with less than seven days' advance notice only in the event that 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 [cleanups or area restrictions] with less than seven days' advance notice to the residents of those encampments. Such determination(s) must be in writing, must provide a reasonably detailed explanation of the public health basis(es) for the determination, and it/they must be published in the authoring agency(ies) official online website prior to the Denver Defendants undertaking any such homeless encampment [cleanup or area restriction];

4. In the event the requirements for an abbreviated advance notice as set forth in Paragraph 3 of this Preliminary Injunction have been met, then the Denver Defendants may cause a homeless encampment [cleanup or area restriction] to take place with less than seven days' advance notice to the residents of those encampments. In no event, however, may any homeless encampment [cleanup or area restriction] take place with less than 48 hours' advance notice being given to the residents of the affected encampments.

Id. at 1528–29.

This appeal followed.

V. SUMMARY OF THE ARGUMENT

The district court abused its discretion when it determined that the decisions by Denver's public health authority that it needed to immediate act to address public health emergencies by posting area restrictions without advance notice at three specific encampment locations—Lincoln Park, Morey Middle School and the South

Platte—violated procedural due process. In reaching its conclusion, the court failed to consider long-standing case law recognizing that in public health emergencies, the government may act first and provide a hearing later without offending due process. This resulted in the court's erroneous conclusion that Plaintiffs made a strong showing of success on the merits of their procedural due process claim.

This conclusion also directly contradicted findings the court made when it recognized Denver's "legitimate interest in removing property that contributed to unsafe and hazardous conditions" and determined that Plaintiffs were not likely to succeed on their Fourth Amendment claim because they failed to adequately demonstrate any risk, much less a "significant risk," that their property would be unlawfully destroyed in homeless encampment cleanups. *Id.* at 1512. The court's failure to consider the interdependence of its findings related to Plaintiffs' Fourth and Fourteenth Amendment claims compounded its legal error. As a result, the district court failed to recognize that Plaintiffs' interests in receiving advance notice of public health area restrictions could not outweigh Denver's need or flexibility to respond to a public health emergency under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

With respect to irreparable harm, the district court noted the "constitutional-violation-as-irreparable injury principle" and found that Plaintiffs would be irreparably harmed by losing their property caused by the failure to provide advance

notice of a public health area restriction (again, property which it previously found they were not at "substantial risk" to lose). But this not the sort of injury for which money damages are inadequate or incapable of measurement, justifying injunctive relief. The court's reasoning here demonstrates why not every alleged constitutional violation that involves an individual right should automatically be presumed to cause irreparable harm. This Court should take the opportunity to reconsider its precedents, clarify when the "constitutional-violation-as-irreparable injury principle" should automatically apply, and hold that it does not apply to the procedural due process claim here.

But even if irreparable harm may be presumed under these circumstances, the district court's decision must nevertheless be reversed due to the abuse of discretion in the court's balancing of the harms and the public interest. Instead of analyzing these two factors together, paying particular attention to the public consequences of employing the extraordinary remedy of an injunction altering the status quo, the district court found that it is "always in the public interest to prevent the violation of a constitutional right" and conducted no analysis into the consequences of its decision on Denver or the public health and safety of its residents—despite evidence in the record showing the harm that would result.

In fact, the district court did not require Plaintiffs to meet any burden with respect to the final two preliminary injunction factors. It relied instead upon its

conclusion that procedural due process had been violated, based upon its erroneous belief that advance notice is always required before local government officials may act on public health or safety issues, regardless of their urgency. Because it rested on an erroneous legal conclusion and there is no rational basis found in the record to support its finding in Plaintiffs' favor, the district court's determination that Plaintiffs made the required strong showing on the balance of harms was an abuse of discretion.

Finally, even if this Court decides that the district court was within its discretion to issue a preliminary injunction on this record, that injunction is fatally flawed. By creating and mandating specific protocols for public health and safety actions for Denver's Departments to follow, including for DOTI's encumbrance enforcement and DDPHE's area restrictions, the court usurped Denver's right to make its own procedures and substituted its own judgment for that of Denver's experts regarding how to best handle emergent public health and safety issues. In doing this, it also impermissibly rewrote the bargained-for terms of the existing *Lyall* settlement agreement related to large-scale encumbrance removals conducted by DOTI. In fact, it granted relief never sought by Plaintiffs and unsupported by any evidence presented at the hearing.

And, in violation of Rule 65(d) and this Court's clear precedent, the terms of the injunction depend upon reference to outside documents and introduce

ambiguous, undefined terms that create uncertainty and prevent Denver from taking action in the face of immediate dangers to public health, safety, or the environment. Instead, the injunction requires Denver to hesitate and determine what conduct might comply with the Order and what might not.

For all these reasons, the Court should reverse the preliminary injunction Order, or in the alternative, modify the injunction to eliminate all the conditions the district court judicially legislated and improperly imposed upon Denver.

VI. ARGUMENT

A. Standard of Review

A district court's Order granting a preliminary injunction is reviewed for abuse of discretion. *McDonnell v. City & Cty. of Denver*, 878 F.3d 1247, 1252 (10th Cir. 2018) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). A court abuses its discretion when it "commits a legal error or relies on clearly erroneous factual findings, or where there is no rational basis in the evidence for its ruling." *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006) (quoting *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002)). A court also commits clear error when it makes factual findings without support in the record or that are incompatible with relevant hearing testimony. *See McDonnell*, 878 F.3d at 1254–57. The district court's legal conclusions are reviewed de novo. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003).

B. Plaintiffs did not make a strong showing that they were likely to succeed on the merits of their procedural due process claim

Any preliminary injunction is "an extraordinary and drastic remedy," and "the right to relief must be clear and unequivocal." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009). Where, as here, Plaintiffs sought a disfavored preliminary injunction that mandates action and alters the status quo, their burden is greater as they are required to "make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of the harms." *McDonnell*, 878 F.3d at 1252 (citation, quotation, and alterations omitted).

The district court acknowledged that the heightened standard applied. Aplt. App. Vol. VII at 1490; Vol. IV at 736–37. But it failed to hold Plaintiffs to this standard. While Plaintiffs pressed four claims in their motion for preliminary injunction, the district court's injunction rests solely on its finding that Plaintiffs were substantially likely to prevail on their procedural due process claim. *Id.* at Vol VII at 1522 n.24. Specifically, the court found "that the limited process afforded by [Denver], particularly in conducting DDPHE-led area restrictions with only morning-of notice, carries a significant risk that homeless individuals have been and will be erroneously deprived of property." *Id.* at 1496. This became the rationale for the court's imposition of additional notice requirements. *See id.* ("If Denver provided homeless individuals with additional advance notice of sweeps, it would

allow Plaintiffs a better chance to protect the property critical to their survival.").

This was error, in several respects. First, the court's legal analysis failed to consider settled authority that, in matters of public health, environment, and safety, the government may act immediately and provide only post-deprivation process without offending the Fourteenth Amendment. Second, the district court's finding that there was "a significant risk" of property destruction with to respect Plaintiffs' procedural due process claim is flatly inconsistent with its simultaneous determination that Plaintiffs failed to establish that any unreasonable seizure had occurred or would occur. *Compare id.* at 1496, *with id.* at 1512–13. Finally, the district court impermissibly shifted the burden, requiring Denver to prove that advance notice could not have been given for the three public health area restrictions issued by DDPHE, even though such notice was not legally required. All three errors require reversal.

i. Taking immediate action for public health reasons does not offend procedural due process

Procedural due process requires a court to analyze first whether an individual possessed a protected interest and second whether the individual was afforded the appropriate process. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977). In analyzing these considerations, this Court has emphasized that due process "is flexible and calls for such procedural protections as the particular situation demands." *Ward v. Anderson*, 494 F.3d 929, 935 (10th Cir. 2007) (quotations omitted, citing cases). To

determine the process due, courts weigh the private interest affected; the risk of an erroneous deprivation and value of any additional safeguards; and the government's interest. *Mathews*, 424 U.S. at 335.

Here, the district court recognized that Denver has a "legitimate interest in removing property that contributes to unsafe and hazardous conditions," and found that "rodent infestation, discarded sharps, overwhelming amounts of trash, waste, including human feces and urine, and other health hazards were present in the encampments." Aplt. App. Vol. VII at 1512–13. The court reiterated that Denver's interest in "maintaining public health and safety[ ]is unquestionably significant," and insisted that its "conclusion does ***not*** turn on a minimization of the acknowledged importance of [Denver's] governmental interest in preserving public health." *Id*. at 1496, 1500 (emphasis original).

But that is exactly what the court did. Minimizing Denver's interest in preserving public health—especially during a pandemic—the court concluded that DDPHE area restrictions "demanded more procedural protections," and, as such, Plaintiffs had made the required very strong showing that they were likely to prevail on their procedural due process claim. *Id.* at 1496–1501. The court then imposed its injunction, under which even in the most dire circumstances DDPHE must stop to compose written justifications for risks based upon the district court's standard of "reasonable, evidence-based reasons," send these to Plaintiffs' counsel and post

them on an official website, and then sit idle for 48 hours hoping that public health and safety is not further compromised before they can act. *Id.* at 1528–29 ("In no event . . . may any homeless encampment [cleanup or area restriction] take place with less than 48 hours' advance notice.").

In other words, the court held that any public health or safety action taken without prior notice of at least 48-hours would be *per se* unreasonable and unconstitutional. This was legal error. The Constitution does not require pre-deprivation notice and hearing in all circumstances—especially when significant matters of public health are involved.

Denver put before the court evidence and authority establishing the strong governmental interest in the need for local officials to act immediately when determined necessary to protect public health. Aplt. App. Vol. X at 2205–06 (408:10–409:9), 2210 (413:3–22), 2266 (469:16–21), 2314–15 (517:11–518:4), 2322–23 (525:17–526:10); Vol. XI at 2573–74 (776:6–777:13); *see id.* at Vol. IV at 754. Only by ignoring this proffered authority was the district court able to conclude that "[n]othing in the record even approaches a showing" that Denver's interests would be harmed by "even 48 hours' advance notice to encampment residents." *Id.* at Vol. VII at 1505. Moreover, this 48-hour advance notice was simply imposed by the court without citation to any legal authority. In fact, such a requirement was not even raised until the court questioned the attorneys after the close of evidence. *Id.* at

Vol. XI at 2595–99 (798:20–802:14), 2601–09 (804:5–812:1).

The ongoing pandemic highlights the need for public health authorities to have the flexibility to quickly act in the face of uncertain but serious risks. As the Supreme Court held in *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 30 (1905), "[i]t is no part of the function of a court… to determine [what is] likely to be the most effective for the protection of the public against disease." There, the plaintiff argued that his state's compulsory vaccination law was "in derogation of the rights secured to [him] by the 14th Amendment of the Constitution of the United States." *Id.* at 14. The Supreme Court rejected this claim in the strongest terms: "Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." *Id*. at 26. Thus, emergency public-health restrictions are subject to judicial review only if the challenged action "has no real or substantial relation to [securing public health and safety], or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31. As the Supreme Court more recently stated, such actions "should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, (Mem) 1614 (2020) (quotation omitted).

Even outside the context of infectious disease, the Supreme Court has repeatedly recognized that in matters of public health and safety, the government must be allowed to act quickly. *See N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 315–16 (1908) (city may summarily seize and destroy food possibly unfit for human consumption to prevent the danger that might arise from eating it). Under such circumstances, advance notice and a pre-deprivation hearing are not constitutionally required. *See id.* at 320. Rather, protection of public health and safety "is a paramount governmental interest which justifies summary administrative action." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981); *see also United States v. Salerno*, 481 U.S. 739, 748 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.").

The Tenth Circuit has likewise repeatedly stated that "[i]n matters of public health and safety, the Supreme Court has long recognized that the government must act quickly. Quick action may turn out to be wrongful action, but due process requires only a post-deprivation opportunity to establish the error." *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1222 (10th Cir. 2006) (no procedural due process violation when inspector immediately closed restaurant based on his belief that pesticide was not being safely applied); *see Clark v. City of Draper*, 168 F.3d 1185, 1189–90 (10th Cir. 1999) ("[W]here, as in this case, the state must act quickly, a

meaningful postdeprivation hearing is adequate."); *Miller v. Campbell Cty.*, 945 F.2d 348, 353 (10th Cir. 1991) ("[W]here the state is confronted with an emergency, it may deprive an individual of his or her property without first providing a hearing."). The latitude to act quickly to protect public health or the environment is but a particular example of the general rule that due process "calls for such procedural protections as the particular situation demands." *Ward*, 494 F.3d at 935.

Denver cited this law to the district court and provided testimony to support DDPHE's need for such flexibility. Aplt. App. Vol. IV at 754; Vol. X at 2205–06 (408:10–409:9), 2210 (413:3–22), 2266 (469:16–21), 2314–15 (517:11–518:4), 2322–23 (525:17–526:10); Vol. XI at 2573–74 (776:6–777:13). The district court clearly disagreed with DDPHE's determination that three specific area closures (Lincoln Park, Morey, and the South Platte) were necessary to ensure public health and safety without advance notice. But such disagreement is insufficient to establish that Plaintiffs' procedural due process rights were, and would always be, violated by DDPHE's statutory authority to act without notice. *See N. Am. Cold Storage Co.*, 211 U.S. at 320 ("[T]he emergency must be one which would fairly appeal to the reasonable discretion of the legislature as to the necessity for a prior hearing, and in that case its decision would not be a subject for review by the courts.").

By disregarding the law establishing Denver's right and need to act immediately, the district court abused its discretion and failed to properly weigh "the

Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. As a result, the court erred in concluding that Plaintiffs had made an unequivocally strong showing that they were likely to succeed on the merits of their procedural due process claim.

ii. The district court's Fourteenth Amendment procedural due process determination is inconsistent with its Fourth Amendment seizure determination

The district court also erred on the other side of the *Mathews* equation. While Plaintiffs did not assert a First Amendment claim,[7] the district court credited their argument that DDPHE officials used public health as a pretext for violating the speech rights of protestors. Aplt. App. Vol. VII at 1499. Having thus discounted DDPHE's public-health reasons for immediate action as "aspirational justifications," the district court concluded that Plaintiffs were likely to prevail on their procedural due process claim because Denver could not show "that the public health situation in the Lincoln Park, Morey, or the South Platte encampments was so exigent that effectively no advance notice was required *before depriving Plaintiffs of most, if not all, of the meager property in their possession*." *Id*. at 1499, 1501 (emphasis added).

[7] After this appeal was filed, Plaintiffs amended their Complaint a second time, adding a First Amendment claim. Aplt. App. Vol. VIII at 1651–53.

This finding flies in the face of the court's own conclusion that no unreasonable seizure of property had been persuasively shown. More precisely, noting the "stark contrast" between Plaintiffs' allegations of no-notice property destruction and Denver's "substantial evidence of conditions … that arguably necessitate seizure and disposal of property to maintain public health and safety," the court concluded that "a clear factual dispute precludes a finding in Plaintiffs' favor" on their Fourth Amendment claim. *Id*. at 1512. This contradiction exposes the district court's fundamental error: it granted an injunction based on "a significant risk that homeless individuals have been and will be erroneously deprived of property" even though Plaintiffs failed to sufficiently demonstrate the existence of any such risk. *See id.*

The district court's reasoning is logically inconsistent. If Plaintiffs had not met their burden to prove an unreasonable seizure, how then could they have met their burden to prove that the risk of such unproven seizure was so great as to outweigh Denver's "unquestionably significant" interest in protecting the public health? From the evidence put forth at the hearing, the court could not find that anyone's property had been unreasonably destroyed, or that the likelihood of future seizures was imminent enough to justify injunctive relief under the Fourth Amendment. Yet the court determined that the same evidence justified an injunction under the Fourteenth Amendment requiring additional procedures to guard against

the same unproven risk. It did not explain how a factual dispute could preclude a likelihood of success under the Fourth Amendment while the same disputed facts could support a likelihood of success under the Fourteenth.

This logical flaw led to legal error. *Mathews* required the district court to weigh "the risk of an erroneous deprivation of" Plaintiffs' asserted property interest. 424 U.S. at 335. The court found in its Fourth Amendment analysis that Plaintiffs could not sufficiently demonstrate that risk. That finding should have weighed against Plaintiffs in this factor of the *Mathews* analysis. But, instead, the district court simply stated—without reference to its Fourth Amendment finding—that there was "a *significant* risk that homeless individuals have been and will be erroneously deprived of property." Aplt. App. Vol. VII at 1496 (emphasis added). This unsupported and inconsistent conclusion was an abuse of discretion.

The interdependence of Plaintiffs' Fourth and Fourteenth Amendment claims was squarely before the district court: it recognized that "[t]he parties dispute how closely intertwined the Fourth Amendment and procedural due process claims are." *Id.* at 1491 n.13 (citing Aplt. App. Vol. III at 631 n.69; Vol. IV at 744).[8] But the

[8] In a different context, this Court has analyzed the interdependence of Fourth Amendment unreasonable seizure and Fourteenth Amendment procedural due process claims, finding that if there is no violation of procedural due process arising out of a set of facts, then necessarily no unreasonable seizure arises out of the same facts (absent other indication of unreasonableness). *Santana v. City of Tulsa,* 359 F.3d 1241, 1245 (10th Cir. 2004).

court, in a footnote, claimed that it need not resolve the issue. *Id.* This abdication (which, for practical purposes, silently decided the issue in Plaintiffs' favor) underscores the court's legal error. By refusing to consider the effect of its Fourth Amendment analysis on the outcome of its procedural due process determination, the district court both incorrectly balanced the interests and failed to hold Plaintiffs to their burden of making a clear, "strong showing" of likelihood of success.

iii. The district court impermissibly shifted the burden to Denver to show why advance notice could not have been given

It was also Plaintiffs' burden to clearly show that they were not afforded the process that was due. An allegation of mistake—for instance, that a DDPHE official incorrectly assessed a specific public-health danger—is insufficient: "[t]he process one is due is not dependent on whether the government was right or wrong in the particular case but on whether, in general, constitutional norms require particular procedures to balance private and public interests…. the public interest in prompt action permits that action to precede a hearing in public-health matters." *Camuglia*, 448 F.3d at 1222. While the district court acknowledged the correct "strong showing" standard, *see* Aplt. App. Vol. VII at 1489–90, in practice it improperly shifted the burden to Denver when analyzing Plaintiffs' procedural due process claim.

The court concluded that Plaintiffs were likely to succeed on that claim because "*Defendants* have not demonstrated that the government's interest …

justifies providing written notice no earlier than the morning of DDPHE area restriction[s].” *Id.* at 1496 (emphasis added). Again, this was legal error. Denver was not required to put on evidence to disprove Plaintiffs’ claims nor to prove that its determinations of a public-health emergency were “correct” after the fact to justify the notice it provided. But that is precisely what the district court required here: “had the Denver Defendants … made such a showing, predicated on actual public health medical science, the Court would be reaching a very different conclusion today.” *Id.* at 1500; *see id.* at 1501 (“Denver Defendants . . . have not demonstrated that the timing of their notice procedures had a basis in anything other than a bureaucratic pronouncement of DDPHE managers);” *id.* (“Nothing in the record even approaches a showing by the Denver Defendants…”). Based on this alleged failure of proof, the district court erroneously concluded that “Plaintiffs have met their burden of showing a substantial likelihood of success on the merits of their procedural due process claim.” *Id.*

The district court mistakenly placed the burden on Denver to show that Plaintiffs were *not* entitled to their requested injunction and incorrectly determined that the Constitution requires advance notice of DDPHE’s area restrictions. *Id.* at 1496, 1500–01. This was an abuse of discretion.

C. Irreparable harm should not be presumed based upon an alleged procedural due process violation

Relying upon *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001), Plaintiffs contended that if they demonstrated a likelihood of success on any of their constitutional claims, that alone would show irreparable harm—a position this Court has termed "the constitutional-violation-as-irreparable-injury principle." Aplt. App. Vol. III at 637–38; *see Free the Nipple v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019). The district court referenced this principle (Aplt. App. Vol. VII at 1522), but then analyzed witness testimony regarding physical hardships allegedly suffered after property was lost.[9] *Id.* at 1522–123 (concluding that "the likelihood that Plaintiffs' vital possessions … will be seized and potentially destroyed without sufficient advance notice, constitutes irreparable harm."). The court's analysis demonstrates why the constitutional-violation-as-irreparable injury principle cannot apply to every alleged violation of a constitutional right without impermissibly relaxing the preliminary injunction standard and permitting injunctive relief in cases in which monetary damages may provide an adequate remedy.

As this Court recognized in *Free the Nipple*, "[w]hat makes an injury 'irreparable' is the inadequacy of, and the difficulty of calculating, a monetary

[9] Curiously, the district court relied here on the testimony of Marcos Sepulveda, even though it specifically found that Mr. Sepulveda's testimony was unclear about who had actually seized his property—Denver or the State Department of Transportation. Aplt. App. Vol. VII at 1505 n.19; *see id.* Vol. XII at 2603–06 (737:14–740:8).

remedy after a full trial." 916 F.3d at 806; *see also Fish v. Kobach*, 840 F.3d 710, 751 (10th Cir. 2016) (recognizing that party seeking an injunction "must demonstrate a significant risk that he or she will experience harm that cannot be compensated after the fact by money damages"); *Ditucci v. Bowser*, 985 F.3d 804, 811 (10th Cir. 2021) ("[I]t is well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm [because] such losses are compensable by monetary damages.") (quotation omitted).

The *Free the Nipple* Court went on to remark, in sweeping language, that "[a]ny deprivation of any constitutional right fits that bill." 916 F.3d at 806. But the presumption that *every* alleged constitutional violation involving an individual right causes irreparable harm is in tension with the Court's well-settled rule that potential losses compensable by monetary damages do not warrant an injunction. *See id.*; *see also Stanley v. Gallegos*, No. CV 11-1108, 2018 WL 3801247, at *9 (D.N.M., Aug. 9, 2018) ("[N]otwithstanding the broad dicta contained in certain Tenth Circuit jurisprudence that this default finding applies to all constitutional violations, such an assertion could not be correct. For example, not every violation of the Takings Clause of the Fifth Amendment subjects an individual to irreparable harm.").

A broad presumption that automatically collapses likelihood of success into irreparable harm is also in tension with this Court's *en banc* holding that "*any* modified test which relaxes one of the prongs for preliminary relief and thus deviates

from the standard test is impermissible." *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) (emphasis added); *see also Winter*, 555 U.S. at 22 (modified test that relaxed the irreparable harm prong when plaintiff demonstrated a strong likelihood of prevailing on the merits was "inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). Indeed, in a recent dissent, one Judge of this Court noted that "in an appropriate case, we should consider revisiting (or at least limiting) that specific holding from *Free the Nipple*. Allowing *any* deprivation of *any* constitutional right to serve as per se irreparable harm is a far-too-powerful tool in most cases." *Aposhian v. Barr*, 958 F.3d 969, 1000 (10th Cir. 2020), (Carson, J., dissenting), *reh'g en banc granted, judgment vacated*, 973 F.3d 1151 (10th Cir. 2020), *opinion reinstated sub nom. Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021). Denver submits that this is an appropriate case to consider the limits of the constitutional-violation-as-irreparable-injury principle.[10]

[10] Below, Denver argued to the district court that irreparable harm was inconsistent with the availability of compensatory damages, and that Plaintiffs could not show irreparable harm under the constitutional-violation-as-irreparable-injury principle, but never explicitly asked the district court to distinguish or limit the holding in *Free the Nipple-Fort Collins*—principally because Plaintiffs' argument for irreparable injury throughout the proceedings centered on the potential of COVID-19 infection, not procedural due process. Aplt. App. Vol. IV at 750–52; Vol. XI at 2575 (778:10–18); *see id.* at Vol. III at 638; Vol. V at 874–75; Vol. XI at 2569–70 (772:24–773:4).

There are certainly some constitutional rights the violation of which would be difficult to evaluate and compensate, such as those protected by the First Amendment or equal protection clause; it makes sense that, when such rights are at issue, irreparable harm may be presumed when a plaintiff clearly shows a substantial likelihood of success on the merits of such a claim. *See, e.g.*, *Planned Parenthood Ass'n v. Herbert*, 828 F.3d 1245 (10th Cir. 2016) (presuming irreparable harm where plaintiff demonstrated it was substantially likely to prevail on its claims of denial of right of association and right to privacy).

But that same logic does not hold, and thus the constitutional-violation-as-irreparable-injury principle should not apply, in cases where (as here) the constitutional right at issue is procedural due process rather than a substantive right involving intangible and unquantifiable interests. Notably, other Circuits considering this issue have declined to collapse the irreparable harm factor into the substantial likelihood factor for procedural due process claims. *See, e.g.*, *Powell v. Ryan*, 855 F.3d 899, 907 (8th Cir. 2017) (Shepherd, J., concurring) (explaining that most courts to consider the issue conclude that a loss of due process is not itself sufficient to establish harm; plaintiff's "alleged due process violation alone cannot

---

Nevertheless, this Court may consider the proper construction of its precedent because once "an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

support a finding of irreparable harm, and [he] is therefore not entitled to a preliminary injunction."); *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484–85 (1st Cir. 2009) ("[I]t cannot be said that violations of plaintiffs' rights to due process and equal protection automatically result in irreparable harm."); *Pub. Serv. Co. v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) ("The alleged denial of procedural due process, without more, does not automatically trigger [a finding of irreparable harm]."); *Ciechon v. City of Chicago*, 634 F.2d 1055, 1058 (7th Cir. 1980) (concluding that firefighters alleged violations of their procedural due process rights because of a city residency requirement, but their harm was not irreparable because they could be compensated by back pay).

This rule comports with the purpose underlying the constitutional-violation-as-irreparable-injury principle: to account for "the inadequacy of, and the difficulty of calculating, a monetary remedy after a full trial." *Free the Nipple-Fort Collins*, 916 F.3d at 806. It also relieves the tension that a universal application of the principle creates with the longstanding maxim that "*any* modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible." *Diné Citizens*, 839 F.3d at 1282. In cases involving procedural due process, this Court should not allow the substantial likelihood and irreparable harm factors to collapse into each other.

Here, unless the principle applies to rescue them, Plaintiffs cannot show

irreparable harm. Plaintiffs provided no argument or evidence in their motion or at the hearing to demonstrate that any irreparable injury to any given Plaintiff was imminent, certain, great, actual, and not theoretical absent a preliminary injunction on their procedural due process claim. *Heideman*, 348 F.3d at 1189. As the district court found, Denver presented ample evidence to show it had only disposed of property that posed a health or safety risk. Aplt. App. Vol. VII at 1513 (noting "factual disputes regarding whether [Denver] complied with property storage requirements, as well as [Denver's] legitimate interest in removing property that contributes to unsafe and hazardous conditions."). This dispute fatally undermines the district court's conclusion that Plaintiffs sufficiently established imminent and certain physical harm.

Nor can Plaintiffs point to property loss as the source of irreparable harm. If the property that Plaintiffs lost was a health and safety risk, *see id.*, then it was a risk not only to the public at large but also the Plaintiffs themselves; Plaintiffs cannot argue that removal of contaminated or unsanitary property made them *less* safe, much less created irreparable harm. But even if Plaintiffs' allegations of unconstitutional seizure of property are credited (contrary to the district court's findings) or assumed to be true, they still cannot support injunctive relief, because that harm can be remedied by money damages. For all these reasons, the Court should hold that Plaintiffs failed to provide a strong showing of irreparable harm and

vacate the injunction on that basis as well.

D. The district court abused its discretion in failing to conduct an analysis of whether Plaintiffs made a clear, strong showing that the balance of harms and the public interest tipped in their favor

The district court also abused its discretion when analyzing the balance of the harms and the public interest. Recognizing that these two factors should be analyzed together when determining whether a preliminary injunction should issue against the government, *see Nken v. Holder*, 556 U.S. 418, 435 (2009), the court failed to conduct any such analysis. Instead the court merely relied upon the Tenth Circuit's agreement with the Sixth Circuit that "it is always in the public interest to prevent the violation of a party's constitutional rights" and conducted no further analysis. Aplt. App. Vol. VII at 1523 (quoting *Awad v. Zirix*, 670 F.3d 1111, 1132 (10th Cir. 2012)). However, as the Supreme Court has recognized, when balancing both parties' harms a court "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter,* 555 U.S. at 24 (quotation omitted).

Here, when finding that the Plaintiffs prevailed on these two factors, the court failed to pay any regard to the public consequences of its decision. In fact, it completely discounted the valid and significant public health considerations Denver presented regarding the need for its public health authority to have the flexibility to respond quickly when faced with situations involving public health and safety. *See*

supra, § VI(B)(i). Instead, the court merely indicated that it was "mindful" that requiring advance notice under all circumstances "will to some degree limit 'Denver's health experts from making decisions to combat the spread of disease and the deterioration of public health." Aplt. App. Vol. VII at 1524. At no point did the court consider how this "degree of limitation" might negatively impact the health and safety of Denver's residents, including people experiencing homelessness.

The district court's conclusion that Plaintiffs met their burden of a strong showing on both of these elements was based upon its flawed legal conclusion that procedural due process required Denver to prove that a requirement of seven days' advance notice would preclude it from fulfilling its duty of protecting public health and safety. *See id.* In support of its finding, the court then relied upon its own judicially created remedy, which carved out an exception to the seven-day notice requirement "in the event DDPHE is able to adequately articulate why protection of the public-c health and safety requires advance notice of a shorter duration." *Id*. Thus, according to the court, Plaintiffs met their burden merely because the court determined that seven-days' notice should be required; and by carving out a 48-hour exception, the court determined that the public consequences of constraining a local public health authority need not be further considered. This constituted an abuse of discretion.

Had the court conducted the proper analysis and held Plaintiffs to their

heightened burden of making a strong showing on the balance of the harms and public interest factors, it should not have granted the extraordinary remember of any injunction which altered the status quo. *See Schrier v. Univ. of Colorado*, 427 F.3d 1235, 1258–59 (10th Cir. 2005). An examination of the evidence presented in the briefing and at the hearing demonstrates that the court abused its discretion when it found for Plaintiffs on the balance of the harms and public interest factors because such a finding rested on an erroneous legal conclusion. In fact, the court did not even specifically address the evidence of harm to Denver and the public that could result from requiring advance notice prior to permitting Denver's public health authority to take any action regardless of the circumstances.

Nor does the record rationally show that Plaintiffs mere contention without that an injunction would stop the spread of COVID-19 or prevent future allegedly unlawful property seizure clearly and unequivocally outweigh the government and public health, environmental and safety interests at stake. Aplt. App. Vol. VII at 1512–13, 1521–22. Denver, in contrast, presented evidence and supporting legal authority about the serious harm to the public interest that would result from judicial interference with the ability of local authorities to act immediately when determined necessary to protect public health or safety. *See supra*, § VI(B)(i); *see also* Doc. 010110486365, at 4 (Lucero, J., dissenting) ("The preliminary injunction hamstrings [Denver] from promptly responding to potentially serious public health crises.…

Preventing [Denver] from taking prompt and meaningful action to mitigate public health risks threatens Appellants, Appellees, and the entire city and county of Denver with irreparable harm."). Because the court abused its discretion in failing to hold Plaintiffs to the correct burden on the balance of the equities and public interest factor and failed to pay "particular regard" to the public consequences in granting the injunction as it was required to do prior to granting the injunction, the court's Order should be reversed.

E. Where there is no underlying constitutional violation, there can be no municipal liability

Municipal liability requires an underlying constitutional violation by a municipal actor. *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993). Because, as discussed above, Plaintiffs failed to adequately demonstrate the existence of an underlying violation of procedural due process, the district court also erred when it found that Plaintiffs were likely to prevail on their municipal liability claim. Aplt. App. Vol. VII at 1502–03.

F. The preliminary injunction improperly restricts Denver's enforcement of its public health ordinances and alters the terms of the *Lyall* settlement agreement

Even if the Court does not find that the district court abused its discretion in granting Plaintiffs a preliminary injunction, the Preliminary Injunction Order must nevertheless be modified to remove the inappropriate procedures and arbitrary restrictions the district court imposed upon Denver. The court went much further

than it should, improperly engaging in judicial legislation by imposing upon DDPHE procedures related to how and when it may make decisions regarding an area restriction and the length of notice it must provide before acting. The district court also altered the terms of the *Lyall* settlement agreement—over which the court acknowledged that it no longer retains jurisdiction—changing specifically agreed-upon notice procedures for DOTI large-scale encumbrance cleanups and creating additional protocols not contemplated as part of the settlement for DOTI to follow.

Specifically, the Order requires Denver[11] to provide "not less than seven days' advance written notice prior to initiating a large-scale encumbrance cleanup performed by DOTI" in a form that was developed pursuant to the *Lyall* settlement agreement for DOTI cleanups conducted pursuant to Denver's encumbrance Ordinance and to send such notice by email "to Plaintiff's counsel, as well as to the Denver City Council member representing the Denver city council district in which the encampment [cleanup] … is expected to take place" and include the reasons why the "Denver Defendants" have decided that such action is necessary at that time." Aplt. App. Vol. VII at 1527–28. The court even interposes itself in the agency's document retention policy, mandating that Denver "shall permanently retain all copies of these email messages." *Id.*

[11] On its face and under Rule 65, the injunction applies equally to "officers, managers, directors, agents, employees, successors and assigns and all other persons in active concert or participation with them." Aplt. App. Vol. VII at 1527.

The Order goes on to mandate that only DDPHE or two other separate entities—the Colorado Department of Public Health and Environment (CDPHE) or Denver Public Health (DPH)—may make the determination that less than seven days' advance notice may be provided for a large-scale encumbrance cleanup or area restriction. *Id.* at 1528. And such a determination may only be made if:

> [S]ingly or in combination, [DDPHE, CDPHE, or DPH], 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. Further, "[s]uch determination(s) must be in writing, must provide a reasonably detailed explanation of the public health basis(es) for the determination, and it/they must be published in the authorizing agency(ies) official online website ***prior*** to" any action. *Id.* (emphasis in original). Finally, the court ordered that "in no event" shall such "abbreviated advance notice" requirements take place with less than 48 hours' advance notice being given to the residences of the affected encampments and that all requirements of the advance notices as set forth in the Preliminary Injunction Order shall apply to the "abbreviated advance notices." *Id.* at 1529.

Rather than determining whether Plaintiffs were entitled to the injunctive relief they sought or leaving it to Denver to develop its own protocols to comply with the Order, the court went much further. By improperly creating and imposing its own procedures to modify or replace Denver's ordinances and established

procedures, the court inappropriately legislated from the bench. *See, e.g.*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884–85 (1997) ("We 'will not rewrite a ... law to conform it to constitutional requirements.'") (quoting *Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S. 383, 397 (1988)); *United States v. Stevens*, 559 U.S. 460, 481 (2010) ("We will not rewrite a … law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain.") (citations and internal quotations omitted); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 (1995) (noting court of appeals recognized that "its remedy required it to tamper with the text of the statute—a practice we strive to avoid"); *Badaracco v. Comm'r of Internal Revenue,* 464 U.S. 386 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."); *Coleman v. Frantz*, 754 F.2d 719, 723 (7th Cir. 1985), *abrogated on other grounds by Benson v. Allphin*, 786 F.2d 268, 279 n.26 (7th Cir. 1986) (18-day detention without appearance before magistrate constituted due process violation, but "[t]o specify after what period of time a given detention not accompanied by a first appearance becomes constitutionally infirm, or to outline which of the various elements of a first appearance are minimally necessary to satisfy the due process requirement would amount to inappropriate judicial legislation.").

Courts have been cautioned to avoid engaging in judicial legislation to ensure

that the government's unique expertise is not replaced by a court. *See Nat'l Treasury Employees Union*, 513 U.S. at 479 (discussing obligation to avoid judicial legislation). Here, the court did just that—creating its own procedures mandating how Denver's officials must perform their duties pursuant to Denver's Ordinances thereby supplanting the expertise of DDPHE and DOTI. In fact, the court went so far as to mandate an entire notification process specifying the who, what, when, where, and how to provide notice. And it permitted no possible scenario in which DDPHE or any other Denver agency may proactively take steps to eliminate dangerous conditions without giving advance notice—no matter how dangerous the conditions are deemed to be. The Order is a far cry from the "narrowest injunction possible" to ensure that Denver is "not unduly restrained" in its ability to maintain public health and safety. Aplt. App. Vol. VII at 1524.

Worse, the district court granted relief never sought by Plaintiffs and thus unsupported by any evidence or argument at the preliminary injunction hearing. For these reasons, if the Court does not reverse the district court's decision to grant a preliminary injunction—at a minimum—the Order must be modified to eliminate the improper mandates imposed upon Denver by judicial fiat.

i. The district court abused its discretion by legislating how and when Denver's public health authority may act

In its Order, the district court acknowledged that requiring a specific amount of notice before an area restriction "will to some degree limit Denver's health experts

from making decisions to combat the spread of disease and the deterioration of public health." *Id.* at 1524 (quotation omitted). However, the impact of the district court's Order is much more than just a matter of degree. It effectively eliminates the ability of DDPHE—and any other Denver agency, such as its fire department—to take quick and proactive action necessary to protect public health and safety before an emergency arises. Under the Order, DDPHE has no option but to sit and wait for at least forty-eight hours before an encampment area may be restricted no matter the circumstances. And it may only act with less than seven days' notice if it (or two outside public health organizations) determines there are "reasonable, evidence-based reasons to believe a health or safety risks exists" which require it. *Id*. at 1528. The problems with the ambiguity of this language are addressed below, but even if DDPHE could be said to know what "reasonable, evidence-based reasons" entails, the inability to act with urgency—regardless of the conditions present—improperly restricts Denver from protecting the public health and safety of its residents, including people experiencing homelessness.

Not only is Denver continuing to respond to a public health crisis, but the conditions of the encampments continue to pose numerous dangers, including significant fire hazards, rodent infestations, discarded needles, human waste, and violent crime. Precluding Denver from acting without at least 48-hours' notice hamstrings it to the point where significant damage or injury might occur that could

otherwise be avoided by acting quickly.

For example, the court's Order precludes Denver from taking immediate steps to move an encampment where significant fire hazards are found—even if the encampment is located next to residences or buildings. At best, Denver would have to post the area with 48-hour notice, but even more time would need to be taken in advance of the posting of such notice to prepare the written report the court has required. These requirements unnecessarily impair Denver's ability to act and could result in an explosion that endangers or destroys not only those present in the encampment but also people who are present in surrounding homes or buildings. Without such restrictions, Denver's experts—who are far more qualified than a court to make such decisions—could act as soon as dangerous fire hazards in an encampment are discovered. *See Cagle v. King Cty.*, 70 F. App'x 450, at *2 (9th Cir. 2003) (unpublished decision) (county did not violate due process by declaring unfit a home used to manufacture methamphetamine without prior notice and hearing "given the public interest in having contaminated properties isolated and de-contaminated before they adversely affect the general population").

This danger is more than hypothetical. Denver has already recently experienced a very dangerous situation in a homeless encampment related to the existence of a large amount of propane gas and a suspected drug operation, which

resulted in a large explosion and took out power to surrounding homes.[12] Under the Court's Order, had Denver discovered the dangerous conditions the day prior to the explosion, it could have taken no action to mitigate the danger.

In addition, all notice, whether seven days or forty-eight hours, must also be provided to Plaintiffs' counsel and the City Council member for the affected district before any action may occur. And the court has mandated that such notice must also provide certain specific information and be retained permanently. There is no legitimate reason to require Denver to provide notification in this manner—especially in the form mandated by the court—other than the court's own belief that such notice should be provided and permanently kept. Requiring notice in the mandated form adds yet another layer for Denver to comply with or be precluded from acting.

Further, these overreaching requirements give Plaintiffs yet another basis to continue to seek relief from the court challenging Denver's compliance with the notice requirements, or Denver's justification for any encumbrance cleanup or area restriction, improperly inserting themselves and the court directly into areas properly left to local government authorities, and ultimately interfering with the ability of

[12] This incident occurred on Saturday, April 10, 2021, when a fire was ignited by explosions at a large encampment of people experiencing homelessness located near York Road and Clayton Street in north Denver. Firefighters traced the explosion to dozens of propane tanks stored for a suspected drug manufacturing operation inside the camp.

DDPHE, DOTI, and Denver's safety departments to perform the essential functions for which these departments were created. This has already occurred as Plaintiffs have continuously challenged additional decisions related to existing encampments—not just the three area restrictions the court addressed in its Order. *See* Aplt. App. Vol. III at 621; Vol. V at 856; Vol. XI at 2564 (767:3–19).

The court's imposition of such overreaching requirements on Denver is not only arbitrary, it constitutes an abuse of discretion. *See Virginia*, 484 U.S. at 397 (court may not craft its own judicial regulatory scheme); *accord ACLU v. Johnson*, 194 F.3d 1149, 1159 (10th Cir. 1999) ("We agree with plaintiffs that defendants' proposed narrowing construction really amounts to a wholesale rewriting of the statute. That we cannot do."). By creating its own procedural requirements, the Court's Order imposes a substantial and impermissible burden on Denver—a burden that could negatively impact on the public health and safety of its citizens.

The reasons why it should not be up to a court to decide what procedures and protocols Denver's departments must use before they are permitted to act is evident from the Order entered in this case. Accordingly, if this Court finds that the preliminary injunction should be upheld, the specific requirements the court imposed upon Denver should be eliminated from the Order. If an injunction is warranted here, it should still be up to Denver's experts to determine the best method to implement the injunction based upon its unique expertise managing and

responding to matters involving matters of public health or safety.

ii. The preliminary injunction improperly rewrites agreed upon terms set forth in the Lyall settlement agreement

Further compounding its error of engaging in judicial legislation, the court's order rewrote terms of the *Lyall* settlement agreement—an agreement which it otherwise held it had no jurisdiction to enforce. In the *Lyall* settlement, with respect to DOTI[13] large-scale encumbrance removals or cleanups, the parties agreed that Denver would provide at least seven days' notice *unless Denver determined that a public health or safety risk exists which requires less than seven days' notice*. Aplt. App. Vol. II at 306. Reasonable notice was still to be provided, "with the determination of reasonableness based upon the nature of the public health and safety risk present in the area." *Id.* Under such circumstances, the City was to document the public health and safety risk and keep such documentation for one year. *Id.*

The court's Order impermissibly alters the parties' bargain, precluding DOTI from acting with less than 7 days' notice under any circumstance and requiring DOTI to keep its documentation permanently. *Id.* at Vol. VII at 1527–28. The court also requires DOTI to provide notice of its encumbrance cleanups in a manner not contemplated by the agreement—requiring advance notice to be provided Plaintiffs'

[13] At the time of the settlement, DOTI was still known as the Department of Public Works.

counsel as well as to the Denver City Council member representing the district in which the cleanup is expected to take place. *Id.* The court's alteration of the terms of the settlement agreement constitutes an abuse of discretion and must be reversed. *See, e.g.*, *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2nd Cir. 1990) ("In its efforts to preserve the parties' rights and the status quo, the court must be careful not to alter the terms of the agreement." (quoting *Diversified Mortgage Investors v. U.S. Title Ins. Co.*, 544 F.2d 571, 575–76 (2nd Cir. 1976) ("The parties having agreed upon their own terms and conditions, 'the courts cannot change them and must not permit them to be violated or disregarded.'")).

iii. The district court granted relief never sought by Plaintiffs and unsupported by any evidence or argument

The district court also erred by unilaterally granting relief that Plaintiffs never sought. The court directed Denver to: (1) email a detailed 7-day notice to Plaintiffs' counsel and City Council prior to carrying out a large-scale encumbrance removal or area restriction; (2) permanently retain these emails; and (3) post on an official agency website a detailed explanation of the public health or safety reasons for the determination that "there exists reasonable, evidence based reasons to believe that a public health or safety risk exists which requires the undertaking [of some action] with less than seven days' advance notice to the residents of those encampments. Aplt. App. Vol. VII at 1527–28. Since no testimony or evidence was presented in the briefing or at the hearing on any of these requirements, the district court also

erred in granting such relief. *See Republican Nat'l Comm. v. Democratic Nat'l Comm*., 140 S. Ct. 1205, 1207 (2020) (finding that district court erred "by affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions"); *McDonnell*, 878 F.3d at 1257 (reversing part of injunction "because the issue was not addressed in the briefing or during the hearing and neither party presented evidence on the matter.")

When the district court overreached its authority and substituted its own judgment for the judgment of local officials with expertise in local public health and safety issues, the court inappropriately deprived Denver of the opportunity to present evidence in response to the nature of the injunctive relief ultimately imposed by the district court, as that relief was never sought by Plaintiffs. For these reasons as well, the preliminary injunction should be vacated. *See McDonnell*, 878 F.3d at 1257.

G. The injunction is impermissibly ambiguous

"The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one." *Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). This Court shares the Supreme Court's concern for "ensuring that the trial court's decree not furnish a basis for contempt unless it constituted 'an operative command capable of enforcement.'" *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 979 (10th Cir.

1986) (quoting *Int'l Longshoremen's*, 389 U.S. at 74). For this reason, the Tenth Circuit "strictly applies Rule 65(d). This strict approach mandates that the parties be able to interpret the injunction from the four corners of the order." *Hatten-Gonzales v. Hyde*, 579 F.3d 1159, 1168 (10th Cir. 2009) (citations and quotations omitted).

Federal Rule of Civil Procedure 65(d) itself "mandates that an injunction "shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." This rule "protects those who are enjoined by informing them of the specific conduct regulated by the injunction and subject to contempt." *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 84 F.3d 367, 371 (10th Cir. 1996). Unlike a district court's decision to enter an injunction in the first instance, the question of that injunction's specificity under Rule 65(d) is reviewed *de novo*. *Reliance Ins. Co. v. Mast Const. Co.*, 159 F.3d 1311, 1316 (10th Cir. 1998) ("Whether the Second TRO's description of the enjoined conduct was sufficiently specific is a question of law which we review de novo.").

The district court's Order violates Rule 65(d) in at least three ways. First, the injunction requires that "[t]he number, form and content of [] notices" required under the injunction "shall comply in all respects with Items A.3 & A.4 of Exhibit A to the *Lyall* Settlement Agreement." Aplt. App. Vol. VII at 1527. This invocation of the *Lyall* settlement violates the plain language of the rule and this Court's precedent,

which insist that an injunction explain the "acts restrained or required" without reference to any external document. *Hatten-Gonzales*, 579 F.3d at 1168.

This is not merely a technical flaw: reference to the document in this case creates substantial ambiguity. The form and content of the notices in Exhibit A of the *Lyall* settlement contain statutory references and other language specific to DOTI's large-scale encumbrance removals. Aplt. App. Vol. II at 313–15. It makes little sense, and indeed would defeat the purpose of providing notice of which agency is acting under what authority, to use DOTI forms to give notice of a DDPHE area restriction. Yet that is what the court has required Denver to do.

Second, the injunction is unclear about who are the beneficiaries of the injunction: "it does not define the term 'encampment,' which renders the requirement for notice … fatally ambiguous." *See* Doc. 010110486365, at 4 (Lucero, J., dissenting). This Court previously asked Plaintiffs "whether the preliminary injunction adequately defines an 'encampment.'" Doc. 010110472543, at 2–3. Plaintiffs responded that the word "is a commonly known term within Denver, and nationwide," (Doc. 010110476437, at 12), which amounts to an admission that the term is undefined in the injunction itself.

Plaintiffs then provided their own *post hoc* definition: an encampment is "one or more homeless individuals living in close proximity on the streets and sidewalks, in parks, or along the river." *Id.* Plaintiffs may define the term this way but cannot

demonstrate that this proposed definition is in any way "commonly known," much less mandated by the text of the injunction. Denver does not consider a single individual living on the street to be an "encampment" and is not aware of any "common" definition that would. Further, Plaintiffs' suggested extra-textual definition for the term used in the court's injunction only highlights the ambiguity of the court's Order. Does the injunction now require Denver to give 7-days' notice to cleanup or remediate an area where one person is residing outside, as Plaintiffs claim? If Denver fails to give notice to five people residing outside in one area, does that violate the injunction? *See* Doc. 010110486365, at 5 ("No one is asserting that the DOTI must give a week's notice to facilitate the removal [of] a single person ... But what about five people? What about ten? Thirty? One hundred?") (Lucero, J., dissenting). Since the Order nowhere defines "encampments," Denver is left without certainty about where and when the injunction applies, including to whom and how the required advance notice must be provided.

Finally, the injunction leaves other important terms equally undefined. The district court imposed a requirement of showing "reasonable, evidence-based reasons to believe that a public health or safety risk exists which requires less than 7-days' notice," repeatedly stressing the need for decisions based upon "actual, scientific, or evidence-based public health concerns," or "predicated on actual public health medical science." Aplt. App. Vol. VII at 1528–29. In short, the court

distinguished "actual" science and "evidence-based reasons" from the testimony offered by Denver's public-health officials, whose decisions it denigrated as mere "bureaucratic pronouncement[s]… devoid of any basis in medical science." *Id.* at 1499–1501. But where that distinction lies, and more importantly how Denver is to meet this "actual science" standard, remains unaddressed and undefined. Must Denver conduct scientific testing or some other type of experiment of every encampment to demonstrate that the existence of large amounts of trash, rotting food, human waste, discarded needles, and rodent and insect infestation negatively impacts public health and the environment? How many and what kind of tests amount to "actual science" or a "reasonable basis?" And what of hazards like fire, and crime? Is Denver required to allow existing fire hazards, drug activity, and other types of crime, including murders, as occurred in Lincoln Park and the South Platte, (Aplt. App. Vol. X at 2100 (303:18–20); Vol. XI at 2377–79 (580:8–582:20), 2505–06 (708:20–709:1)), to just continue—exposing the entire community to harm—for seven days before it can take any action?

The ambiguity in the Order violates Rule 65(d) and this Court's strict interpretation of that rule. It also creates uncertainty, promoting hesitation rather than urgent action in the face of emergencies. Such ambiguity is fatal and further demonstrates why reversal of the Court's Injunction Order is required here.

VII. CONCLUSION

The district court abused its discretion when it determined that Denver violated Plaintiffs' procedural due process rights by failing to provide advance notice of DDPHE's area restrictions due to the substantially deteriorating conditions found in Lincoln Park, Morey Middle School, and the South Platte. The Constitution does not require advance notice to be provided when public health is at stake. Further, the injunction the district court imposed upon Denver constitutes judicial legislation and must be reversed. Finally, the Order violates Rule 65(d) due to the ambiguity and uncertainty of its terms. For all these reasons, Denver respectfully requests that this Court reverse the district court's Order in its entirety, vacating the preliminary injunction. In the alternative, should the Court find that the injunction was properly granted, Denver requests that the Order be modified to eliminate the specific terms mandated by the court by way of improper judicial legislation.

VIII. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted in this case because (a) this appeal is not frivolous, (b) the dispositive issues raised in this appeal have not been recently and authoritatively decided, and (c) the decisional process would be significantly aided by oral argument. F.R.A.P. 34(a)(2). The issues regarding specificity of injunctions are important to civil litigants in this Circuit, including but not limited to government officials and civil-rights litigants. Finally, oral argument will assist this Court with

any unaddressed questions arising from the lengthy and complex legislative, policy, and factual background of this matter.

Dated this 19th day of April 2021.

Respectfully submitted,

By: *Geoffrey C. Klingsporn*
Geoffrey C. Klingsporn, Assistant City Attorney
Wendy J. Shea, Assistant City Attorney
Conor D. Farley, Assistant City Attorney
Denver City Attorney's Office
201 West Colfax Ave., Dept. 1108
Denver, CO 80202-5332
geoffrey.klingsporn@denvergov.org
wendy.shea@denvergov.org
conor.farley@denvergov.org
Phone: (720) 913-3100
Fax: (720) 913-3190
Attorneys for Defendants-Appellants

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,746 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 MSO and 14-point Times New Roman.

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; and

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, CrowdStrike Falcon Sensor, and according to the program are free of viruses.

Dated: April 19, 2021

By: *Geoffrey C. Klingsporn*

Geoffrey C. Klingsporn
Assistant City Attorney
Denver City Attorney's Office
201 West Colfax Ave., Dept. 1108
Denver, CO 80202-5332
(720) 913-3100
geoffrey.klingsporn@denvergov.org
Attorney for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April 2021, I electronically filed the foregoing **DEFENDANTS-APPELLANTS' OPENING BRIEF** using the court's CM/ECF system which will send notification of such filing to the following:

David A. Lane, Esq.,
Darold W. Killmer, Esq.
Andy McNulty, Esq.,
Reid Allison, Esq.
Killmer, Lane & Newman, LLC
dlane@kln-law.com
dkillmer@kln-law.com
amcnulty@kln-law.com
rallison@kln-law.com

Timothy R. Gablehouse, Esq., Melanie J. Granberg, Esq.
Evan C. Singleton, Esq., Ashley L. Zurkan, Esq.
Gablehouse Granberg, LLC
tgablehouse@gcgllc.com
mgranberg@gcgllc.com
esingleton@gcgllc.com
azurkan@gcgllc.com

Kathleen Spalding
Stephanie Lindquist Scoville
Emely Garcia
Colorado Attorney General's Office
kit.spalding@coag.gov
stephanie.scoville@coag.gov
emely.garcia@coag.gov

By: *s/Geoffrey C. Klingsporn*
Denver City Attorney's Office