

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 20-cv-2985

DENVER HOMELESS OUT LOUD, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

DENVER, COLORADO, *et al.*

Defendants.

MOTION FOR PRELIMINARY INJUNCTION AND EXPEDITED HEARING

Plaintiffs, by and through undersigned counsel, respectfully move for a preliminary injunction to ensure that they are adequately protected from the tremendous risk of contracting COVID-19, the seizure and destruction of their property, and the violation of hard-earned rights under the *Lyall v. Denver* settlement agreement. Plaintiffs also request an expedited evidentiary hearing.

1. INTRODUCTION

“These are extraordinary times.”¹ COVID-19 poses an unprecedented threat to the country, our state, the Denver community, and, particularly, Denver’s homeless residents. COVID-19 has been declared a national pandemic, President Trump has declared a national emergency, the Governor has issued a proclamation declaring a disaster in the State of Colorado, and Mayor Hancock declared a local state of emergency. More than 200,000 people in the United States have died.

¹ This is how federal judges have described the current COVID-19 outbreak. *See Matter of Extradition of Toledo Manrique*, No. 19-MJ-71055 (TSH), 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020).

Despite this real threat, Denver and the State of Colorado have been outliers in their response to the pandemic when it comes to its homeless residents. Cities across the nation have followed the guidance issued by the Centers For Disease Control And Prevention (“CDC”), which has unequivocally stated that cities should not clear or move encampments during COVID-19, unless “individual housing options” are available.² The CDC issued this guidance because “[c]learing encampments can cause people to disperse throughout the community and break connections with service providers. This increases the potential for infectious disease spread.”³ Instead of following this generally regarded guidance, Defendants, and particularly Defendant Denver, has continuously cleared encampments through a process that has become to be known as homeless “sweeps.” Defendants have done so under the guise of “public health and safety” despite public health guidance explicitly stating that sweeps should not happen during COVID-19. Defendants’ actions have exposed Plaintiffs to a substantially increased risk of contracting COVID-19 and becoming seriously ill and dying.

Not only have these sweeps been an unmitigated public health disaster (and violated Plaintiffs’ substantive Fourteenth Amendment rights), but they have also violated Plaintiffs’ property rights under the Fourth and Fourteenth Amendments and a historic settlement agreement entered between all of Denver’s homeless residents and Denver itself. That settlement agreement required that Denver provide notice to Plaintiffs before conducting the sweeps and that it must not summarily destroy Plaintiffs’ property. Despite this clear language, and the mandates of the United States and Colorado constitutions, during the sweeps, and particularly two brutal sweeps (one of which occurred across the street from the Colorado Capitol and

² Coronavirus Disease 2019 (COVID-19): Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>.

³ *Id.*

another that happened along the South Platte river), Defendants have seized and discarded Plaintiffs property without notice. This flagrant disregard for constitutional rights, and a settlement agreement approved by United States District Court Judge William J. Martinez, must be stopped immediately.

Ultimately, Plaintiffs respectfully request that this Court grant Plaintiffs' request for a preliminary injunction, order the below-outlined relief, and provisionally certify Plaintiffs' proposed class. The public interest in avoiding further exacerbating the spread of COVID-19 in Denver, along with the due process and property protections afforded to Plaintiffs by the United States and Colorado constitutions, demands these actions be taken swiftly in these unprecedented times.

2. REQUEST FOR RELIEF

Plaintiffs ask that this Court:

- Enjoin Defendants from conducting sweeps, or other displacement of encampments of homeless individuals (whether those displacements are carried out through the enforcement of a public health order, the Camping Ban, the Encumbrance Removal Ordinance, or any other law) until public health authorities have determined that the COVID-19 pandemic is over;
- Require Defendants provide restrooms, sanitation services (including trash services), and personal hygiene facilities (including handwashing stations) to Plaintiffs;
- Enjoin Defendants from conducting sweeps without at least seven-days written notice;
- Enjoin Defendants from discarding and/or destroying Plaintiffs' unabandoned property;
- Enjoin Defendants from violating the terms of the *Lyall v. Denver* settlement agreement; and
- Enjoin Defendants from conducting the sweeps (whether those displacements are carried out through the enforcement of a public health order, the Camping Ban, the Encumbrance Removal Ordinance, or any other law), even after the pandemic has concluded.

3. FACTUAL BACKGROUND

3.1 The COVID-19 outbreak has created a global health emergency.

We are living in the midst of an extreme worldwide health emergency caused by the rapid spread of COVID-19. The World Health Organization has declared COVID-19 to be a

global pandemic.⁴ On March 10, 2020, Governor Jared Polis issued a proclamation declaring a disaster in the State of Colorado.⁵ On March 12, 2020, Mayor Hancock declared a local state of emergency in Denver.⁶ On March 13, 2020, President Trump declared a national emergency.⁷

The number of known COVID-19 infections is increasing daily. In the United States alone, there are over 200,000 deaths.⁸ The number of COVID-19 cases in the United States and Colorado is expected to continue its exponential growth. The Centers for Disease Control and Prevention (“CDC”) projects that without swift and effective public health interventions, over 200 million people in the U.S. could be infected with COVID-19 over the course of the epidemic, with as many as 1.7 million deaths.⁹

COVID-19 is a particularly contagious disease. Controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission—people who

⁴ Coronavirus disease (COVID-2019) situation reports, World Health Organization, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports>.

⁵ Executive Order Declaring Emergency Due to the Presence of Coronavirus Disease 2019 in Colorado (March 10, 2020), available at <https://drive.google.com/file/d/1szJfU9WF36-1CVgRhXMAAnJdlQyTSG83e/view>.

⁶ Mayor Hancock Makes Local Stat Of Emergency Declaration (March 12, 2020), <https://www.denvergov.org/content/denvergov/en/mayors-office/newsroom/2020/mayor-hancock-makes-local-state-of-emergency-declaration.html>.

⁷ Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), available at <https://www.whitehouse.gov/presidentialactions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

⁸ Erika Edwards, *U.S. Covid death total surpasses 200,000*, NBC NEWS (Sept. 18, 2020), available at: <https://www.nbcnews.com/health/health-news/u-s-covid-19-death-toll-surpasses-200-000-n1240034>.

⁹ Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths*, The New York Times, (Mar. 13, 2020), available at <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>.

are contagious but who exhibit no symptoms, rendering ineffective any screening tools dependent on identifying disease symptoms.¹⁰

The virus which causes COVID-19 typically has a two to fourteen-day incubation period in human beings, and a person can remain infectious for fourteen days past initial symptoms.

Exhibit 1, Expert Declaration Of Marisa Westbrook, ¶ 7. During the incubation period, infected people are asymptomatic – meaning they will not exhibit the physical symptoms associated with COVID-19, such as fever or coughing. An estimated 18-30% of people will remain asymptomatic even after the incubation period ends. *Id.* Asymptomatic people are contagious and can spread the disease in the same way as people exhibiting symptoms. *Id.*

There is no known vaccine or cure for COVID-19. No one is immune. Common symptoms of COVID-19 include fever, cough, and shortness of breath.¹¹ Other symptoms include congestion, sneezing, fatigue, or diarrhea.¹² Many individuals who become infected with COVID-19 may have mild or moderate symptoms; some may experience no symptoms at all. Other patients may experience severe symptoms requiring intensive medical intervention.¹³ However, even with hospitalization and intensive treatment, hundreds of thousands of individuals have died as a result of this infection. Regardless of the type of severity of symptoms, all infected persons are contagious and can rapidly transmit the virus from person to person without proper public health interventions.¹⁴ The virus is known to spread from person to person

¹⁰ Johnny Milano, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, NEW YORK TIMES, <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html>.

¹¹ Coronavirus Disease 2019 (COVID-19), Symptoms of Coronavirus, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

¹² Q&A on Coronaviruses (COVID-19), World Health Organization, <https://www.who.int/newsroom/q-a-detail/q-a-coronaviruses>.

¹³ *Id.*

¹⁴ Coronavirus Disease 2019 (COVID-19): How It Spreads, CDC,

through respiratory droplets, close personal contact, and from contact with contaminated surfaces and objects.¹⁵

3.2 Exposure to and infection with COVID-19 presents a serious and known risk of serious injury and death.

The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 infection than from other viruses, including common influenza.¹⁶ According to preliminary data from China, 20% of people in high risk categories who contract COVID-19 have died. **Exhibit 1**, *Expert Declaration Of Marisa Westbrook*, ¶ 8. Serious illness and death is most common among people with underlying chronic health conditions, like heart disease, lung disease, liver disease, and diabetes, and older age. *Id.* The upcoming influenza season means that people are also at risk from serious illness and death due to influenza, especially when they have not received the influenza vaccine or the pneumonia vaccine. *Id.*¹⁷ In the United States alone, over 200,000 people have died from COVID-19. *Id.*¹⁸

People over the age of sixty face substantially increased risk of serious illness or death from COVID-19. In one World Health Organization Report, the preliminary mortality rate analyses showed that individuals age 70-79 had an overall 8% mortality rate, individuals age 60-

https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covidspreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html.

¹⁵ *Id.*

¹⁶ Betsy McKay, *Coronavirus vs. Flu Which Virus is Deadlier*, WALL ST. J. (Mar. 10, 2020, 12:49 PM), <https://cutt.ly/itEmi8j>.

¹⁷ World Health Organization (2020, February), Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-2019), Available from <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>; Scientific American (2020, March), Which Groups Are Most At Risk from the Coronavirus?, Available from <https://www.scientificamerican.com/article/which-groups-are-most-at-risk-from-the-coronavirus/>.

¹⁸ World Health Organization (2020, September), Coronavirus Disease 2019 (COVID-2019) Weekly Epi Update, Available from https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200928-weekly-epi-update.pdf?sfvrsn=9e354665_6.

69 had a 3.6% mortality rate, and individuals age 50-59 had a 1.3% mortality rate.¹⁹ People of any age who suffer from certain underlying medical conditions are also at elevated risk, including people with respiratory conditions including chronic lung disease or moderate to severe asthma; people with heart disease or other heart conditions; people who are immunocompromised as a result of cancer, HIV/AIDS, or any other condition or related to treatment for a medical condition; people with chronic liver or kidney disease or renal failure (including hepatitis and dialysis patients); people with diabetes, epilepsy, hypertension, blood disorders (including sickle cell disease), inherited metabolic disorders; and people who have had or are at risk of stroke.²⁰ The WHO-China Joint Mission Report indicates that the mortality rate was 13.2% for those with cardiovascular disease, 9.2% for those with diabetes, 8.4% for those with hypertension, 8.0% for those with chronic respiratory disease, and 7.6% for those with cancer.²¹

For these vulnerable populations, the symptoms of COVID-19, particularly shortness of breath, can be severe and complications can manifest at an alarming pace. Most people in higher risk categories who develop serious illness will need advanced support. This level of supportive

¹⁹ Age, Sex, Existing Conditions of COVID-19 Cases and Deaths Chart, <https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/> (date analysis based on WHO-China Joint Mission Report)

²⁰ Coronavirus Disease 2019 (COVID-19): People Who Need Extra Precautions, CDC, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higherrisk.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fhigh-risk-complications.html.

²¹ Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19), World Health Organization (Feb. 28, 2020), at 12, <https://www.who.int/docs/default-source/coronaviruse/whochina-joint-mission-on-covid-19-final-report.pdf>.

care requires expensive and specialized equipment, including ventilators, that are in limited supply.²²

Increasingly, and in the United States in particular, even some younger and healthier people who contract COVID-19 may require hospitalization for supportive care, including intravenous fluids and supplemental oxygen. Medical providers and medical facilities are in peril of becoming completely overwhelmed and beyond capacity to provide this type of intensive care as COVID-19 continues to spread.

Even for those who survive COVID-19, recent clinical evidence indicates that, in persons who suffer severe symptoms, the virus may also cause damage to organs such as the heart, the liver, and the kidneys, as well as to organ systems such as the blood and the immune system. This damage is so extensive and severe that it may be enduring. Among other things, patients who suffer severe symptoms from COVID-19 end up with damage to the walls and air sacs of their lungs, leaving debris in the lungs and causing the walls of lung capillaries to thicken so that they are less able to transfer oxygen going forward. Indeed studies of some recovered patients in China and Hong Kong indicate a declined lung function of 20% to 30% after recovery.²³

A recent study shows that even those who do not exhibit symptoms, so-called asymptomatic carriers, exhibit potentially permanent heart damage from the disease. **Exhibit 1**,

²² Sarah, Kliff, et al., *There Aren't Enough Ventilators to Cope With the Coronavirus*, THE NEW YORK TIMES (March 26, 2020), <https://www.nytimes.com/2020/03/18/business/coronavirus-ventilator-shortage.html>.

²³ Tianbing Wang, et al., *Comorbidities and Multi-Organ Injuries in the Treatment of COVID-19*, 395 *Lancet* 10228 (2020), available at [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30558-4/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30558-4/fulltext); George Washington University Hospital, *GW Hospital Uses Innovative VR Technology to Assess Its First COVID-19 Patient*, <https://www.gwhospital.com/resources/podcasts/covid19-vr-technology>.

Expert Declaration Of Marisa Westbrook, ¶ 10.²⁴ In that study, seventy-eight percent of those who contracted patients had ongoing heart abnormalities and 60 percent had myocarditis, inflammation of the heart muscle. The risk of serious permanent injury is not confined to those who exhibit symptoms, or who are in higher risk categories.

3.3 **Homeless individuals are particularly vulnerable to infection from COVID-19.**

Homeless individuals have higher rates of chronic physical and mental health conditions, higher rates of morbidity and mortality, and more related diseases and co-occurring disorders compared to the general population. **Exhibit 1**, *Expert Declaration Of Marisa Westbrook*, ¶¶ 13-16.²⁵ As homeless individuals tend to have compromised immune systems, they are at even higher risk of contracting infectious diseases than the average person. *Id.* With the lack of access to the most basic of human needs – including running water, toilets, sanitizing wipes or sprays, and trash disposal – infectious diseases can spread quickly. *Id.* Making matters worse, the lack of a safe, reliable place to get adequate rest, to store and administer medications, and/or to charge and store necessary medical equipment make treatment of homeless persons’ health conditions much more difficult than it is for people with stable housing. *Id.*

The CDC itself has stated that homeless individuals are at increased risk to infection from COVID-19. *Id.*²⁶ The CDC notes that homeless individuals are at increased risk of contracting COVID-19 because “[h]omeless services are often provided in congregate settings, which could facilitate the spread of infection” and “many people who are homeless are older adults or have

²⁴ Valentina O. Puntmann, MD, PhD, et al., *Outcomes of Cardiovascular Magnetic Resonance Imaging in Patients Recently Recovered From Coronavirus Disease 2019 (COVID-19)*, *JAMA Cardiol.* (July 27, 2020), available at: <https://jamanetwork.com/journals/jamacardiology/fullarticle/2768916?referringSource=articleShare>.

²⁵ National Health Care For The Homeless Council (2019), *Homelessness & Health: What’s The Connection?*, <https://www.nhchc.org/wp-content/uploads/2019/02/homelessness-and-health.pdf>.

²⁶ *Coronavirus Disease 2019 (COVID-19): People At Increased Risk*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>.

underlying medical conditions.”²⁷ Because of this, the CDC has specifically advised homeless individuals to “avoid other crowded public settings” and that “if individual housing options are not available” “people who are living in encampments” should “remain where they are.”²⁸ The CDC acknowledges that people experiencing homelessness are especially vulnerable during the global COVID-19 pandemic, both to exposure to the virus and to experiencing severe illness if infected. *Id.* That is because people experiencing homelessness experience chronic health conditions that place them at high risk of serious illness or death from COVID-19. *Id.* They have higher rates of hypertension and heart disease, asthma and chronic obstructive pulmonary disease (COPD), diabetes, chronic liver disease and HIV/AIDS than the general population. *Id.* Ultimately, the CDC recognizes that homeless individuals are at even higher risk of contracting COVID-19 than the average person. *Id.*²⁹

People experiencing homelessness, who suffer worse health than housed people in general, are more likely to become severely ill or die from COVID-19 whether or not they fall into the currently accepted category of vulnerable groups. *Id.* Adults experiencing homelessness have “medical ages that far exceed their biological ages.” *Id.*³⁰ People experiencing homelessness have “geriatric medical conditions such as cognitive decline and decreased

²⁷ Coronavirus Disease 2019 (COVID-19): People Experiencing Homelessness, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/homelessness.html>.

²⁸ Coronavirus Disease 2019 (COVID-19): Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>.

²⁹ Centers for Disease Control (2020, August), Coronavirus Disease 2019 (COVID-19): People at Increased Risk: People Experiencing Homelessness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/homelessness.html>.

³⁰ Culhane, D., Doran, K., Byrne, T., et al. (2019), *The Emerging Crisis of Aged Homelessness: Could Housing Solutions be Funded by Avoidance of Excess Shelter, Hospital, and Nursing Home Costs?*, Actionable Intelligence for Social Policy at the University of Pennsylvania, <https://www.aisp.upenn.edu/wp-content/uploads/2019/01/Emerging-Crisis-of-Aged-Homelessness-1.pdf>.

mobility at rates that are on par with those among their housed counterparts who are 20 years older.” *Id.* For example, a 60—year-old person experiencing homelessness would likely have a similar risk of death due to COVID-19 as an 80 year-old person who has never been homeless. *Id.* In addition, the accepted risk categories identified by the CDC are not inclusive of all people truly at risk. *Id.* For example, all people who smoke are at increased risk because of the impact of smoking on respiration, but the accepted vulnerable group – people with lung disease – does not include smokers. *Id.* Homeless individuals are also disadvantaged related to the pandemic as they have less access to health care providers who could otherwise order diagnostic testing and, if confirmed, isolate them from others in coordination with local health departments. *Id.* This lack of care access makes the homeless community particularly vulnerable to COVID-19 outbreaks and COVID-19 illness. *Id.*

Plaintiffs also include individuals over the age of 65³¹ and those with co-morbidities that significantly increase their risk of death should they be exposed to COVID-19.³²

3.4 Preventing contraction of COVID-19 is the only way to adequately protect against the risk of death.

The only way to prevent complications and the enormous risk of serious illness or death to medically vulnerable people is to prevent them from becoming infected. Everyone is at risk of transmission of COVID-19. There is no available vaccine to protect against infection from COVID-19 and no medications approved to treat it.³³ The CDC and other public health agencies have universally prescribed physical distancing (every person should remain at a distance of at

³¹ Coronavirus Disease 2019 (COVID-19): Older Adults, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

³² Coronavirus Disease 2019 (COVID-19): People with Certain Medical Conditions, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

³³ Coronavirus Disease 2019 (COVID-19): Situation Summary, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>.

least six feet from every other person), rigorous hygiene (including regular and thorough hand washing with soap and water, the use of alcohol-based hand sanitizer, proper sneeze and cough etiquette, and frequent cleaning of all surfaces), and staying away from congregate indoor settings as the only ways to meaningfully mitigate the spread of this virus.³⁴

The CDC has issued guidance that gatherings of more than 10 people must not occur.³⁵ People in congregate environments, which are places where far more than 10 people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19, as already evidenced by the rapid spread of the virus in cruise ships, nursing homes, and jails/prisons. The CDC also warns of “community spread” where the virus spreads easily and sustainably within a community where the source of the infection is unknown.³⁶

Proactive risk mitigation, including eliminating close contact in congregate environments, is the only effective way to prevent the spread of the COVID-19 infection. In fact, a study published in the *Journal of Travel Medicine* found that the number of COVID-19 cases on the Diamond Princess cruise ship would have been more than eight times lower if the ship had been evacuated in a timely manner, rather than requiring the passengers to quarantine within the close confines of the ship.³⁷

³⁴ Coronavirus Disease 2019 (COVID-19): How to Protect Yourself, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fprevention.html.

³⁵ Interim Guidance for Coronavirus Disease 2019 (COVID-19), Guidance as of 3/15/2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid19.html>.

³⁶ Coronavirus Disease 2019 (COVID-19): How Coronavirus Spreads, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

³⁷ Sandoiu, supra (citing Rocklov J., Sjodin H., Wilder-Smith A., *COVID-19 Outbreak on the Diamond Princess Cruise Ship: Estimating the Epidemic Potential and Effectiveness of Public Health Countermeasures*, *Journal of Travel Medicine* (Feb. 28, 2020), <https://academic.oup.com/jtm/advancearticle/doi/10.1093/jtm/taaa030/5766334>).

3.5 The CDC has issued public health guidance that local governments should not displace encampments during the COVID-19 pandemic.

In the early days of the recognition of the COVID-19 pandemic in the United States, and by at least May 10, 2020, the CDC, issued public health guidance on “Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials” that was meant to provide notice for, among other persons, “local and state health departments, ... housing authorities, [and] emergency planners” as to how to treat those experiencing unsheltered homelessness during the pandemic.³⁸

The CDC noted that “[p]eople experiencing unsheltered homelessness (those sleeping outside or in places not meant for human habitation) may be at risk for infection when there is community spread of COVID-19” however “the risks associated with sleeping outdoors or in an encampment setting are different than from staying indoors in a congregate setting such as an emergency shelter or other congregate living facility.”³⁹ For example, the CDC noted at the outset that “[o]utdoor settings may allow people to increase physical distance between themselves and others.”⁴⁰

The CDC went on to outline *specific guidance* for encampments of those experiencing homelessness during the duration of the COVID-19 pandemic. The CDC stated, unequivocally, that “[i]f individual housing options are not available, allow people who are living unsheltered or in encampments to remain where they are.”⁴¹ Instead of clearing encampments, the CDC stated that state and local officials should use the large amount of resources that would be expended

³⁸ Coronavirus Disease 2019 (COVID-19): Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

clearing encampments to “[e]nsure nearby restroom facilities have functional water taps, are stocked with hand hygiene materials (soap, drying materials) and bath tissue, and remain open to people experiencing homelessness 24 hours per day.”⁴² The CDC noted that, if this option was not available, that state and local officials should at least “[a]ssist with providing access to portable latrines with handwashing facilities for encampments of more than 10 people” and stock these facilities “with hand sanitizer (containing at least 60% alcohol).”⁴³ Finally, the CDC recommended that state and local officials “[w]ork together with community coalition members to improve sanitation in encampments” and “[e]ncourage those staying in encampments to set up their tents/sleeping quarters with at least 12 feet x 12 feet of space per individual” without clearing encampments.⁴⁴

3.6 Sweeps and Camping Ban enforcement have a negative health impact on homeless individuals leading to an increased risk of contraction of COVID-19.

The current reliance on the urban camping ban and the sweeping of encampments has been studied and is shown to be related to negative health outcomes for homeless individuals, which is relevant to the current pandemic due to the continued policing and sweeps of homeless encampments. **Exhibit 1, Expert Declaration Of Marisa Westbrook**, ¶¶ 24-29. There is a correlation between instructions by Denver police officers to homeless individuals not to use shelter on the streets and increased rates of frostbite. *Id.*⁴⁵ In Denver, of those who police have not ordered out of their shelter, 6.7% have experienced frostbite. *Id.* But among those who have repeatedly been instructed by police to quit using shelter, between 12% and 17% have experienced frostbite. *Id.* These same patterns are replicated among homeless respondents who

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Westbrook, M. & Robinson, T. (2020), Unhealthy by design: health & safety consequences of the criminalization of homelessness, *Journal of Social Distress and Homelessness*, DOI: [10.1080/10530789.2020.1763573](https://doi.org/10.1080/10530789.2020.1763573)

have chosen not to use shelter, in an effort to avoid police attention. *Id.* Almost 13% of people who chose not to use shelter have experienced frostbite - twice the frostbite rate of those who have not felt forced to remove their shelter. *Id.* The danger of not using shelter from the elements is high —exposure, frostbite, and even death may result. The problem of exposure is not only a cold weather challenge. During the hot summer months, the inability to shelter oneself from the elements (either due to police directive, or fear of attracting police contact) can lead to significantly higher rates of heat stroke and dehydration. *Id.* Homeless residents who have been instructed by the police to quit using shelter are more than twice as likely to suffer heat stroke, and 43% more likely to suffer dehydration. *Id.* At least one study's data shows that police enforcement of Denver's camping ban, through directives to quit using shelter, is linked to worsening health outcomes for Denver's homeless residents. *Id.* Exposure exacerbates homeless individuals' vulnerability to COVID-19. *Id.*

Policies that penalize people who are unstably or inadequately housed and are trying to survive on the street (e.g. using shelter from the outdoor elements) can exacerbate the physical and mental health problems that people experiencing homelessness face. *Id.* Denver's sweeps and enforcement of the Camping Ban causes homeless individuals to move frequently and experience chronic sleep deprivation, which has devastating effects on Denver's homeless population's mental and physical health through the interruption of their sleep. *Id.* Sleep deprivation is linked to a cascade of health problems, such as increased rates of mental illness, diabetes, hypertension, drug abuse, and violence. *Id.* Schizophrenia-like symptoms are associated with lack of sleep, as are increases in anxiety, memory loss, and depression. *Id.* The data is clear showing that police contact, and even the fear of police contact, substantially undermines the sleeping-related health of Denver's homeless residents. *Id.* Only 29% of Denver's homeless who sometimes sleep

outside get more than 6 hours of sleep a night; 30% only get three hours or less of sleep each night. *Id.* In addition to diminished hours of sleep, people experiencing homelessness typically sleep in short bursts, subject to frequent interruption. *Id.* In Denver, 16% of homeless residents only sleep for 30 minutes on average before being awoken by an interruption; another 24% sleep 1-2 hours at a stretch before interruption. *Id.* Data shows that Denver police constantly wake homeless people up from sleep and are a main contributor to the sleep problems experienced by Denver's homeless population. 83% of people who sometimes sleep outside in Denver have been awakened by police in the last year. *Id.* Of that group, 57% have had their sleep abruptly interrupted more than three times. *Id.* Police interaction and harassment is also a situation that leads to constant stress and worry among homeless people. *Id.* Even when police aren't waking people up, advising them against the use of blankets and urging them to "move on," homeless individuals are frequently concerned about the possibility of being awakened by police, to the point where it causes people to lose sleep and change their behavior. *Id.* Chronic sleep deprivation, in turn, is linked to immune suppression, hypertension, diabetes, obesity, and cardiovascular disease, and is a known risk factor for the exacerbation of many psychiatric disorders. *Id.*

Additionally, the American Public Health Association issued a policy statement on Housing and Homelessness as a Public Health Issue in 2017, stating, "criminalization measures in effect across the United States that target activities associated with homelessness are not only ineffective in reducing homelessness and costly to enforce but serve as a barrier to income and housing stability." *Id.*⁴⁶ The statement instead calls for evidence-based housing strategies to reduce homelessness because permanent housing, particularly permanent housing with

⁴⁶ American Public Health Association (2017, November), Housing and Homelessness as a Public Health Issue, <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/housing-and-homelessness-as-a-public-health-issue>

supportive services, protects and even improves mental and physical health, reducing a person's reliance on expensive hospital visits or other medical treatments. And, ample research demonstrates that permanent supportive housing can dramatically improve health. Indeed, permanent housing reduces emergency room visits by up to 81%, lowers hospital admissions by up to 61%, and even shortens hospital stays by up to 80%. *Id.*⁴⁷

Moreover, people without housing experience a higher burden of psychiatric and mental health disorders. *Id.* Studies show that 25% of people experiencing homelessness at a single point in time count had a serious mental illness and 45% of people experiencing homelessness at that time had at least one mental illness. *Id.*⁴⁸ Comparatively, only 4% of adults in the United States have a serious mental illness. *Id.* Specifically, psychotic disorders such as schizophrenia are over-represented in homeless populations. *Id.* Other studies show that Post-traumatic Stress Disorder (PTSD) disproportionately affects people experiencing homelessness, with 17% of people who have been homeless for 1 week or more meeting diagnostic criteria compared to 6% of people who have always been housed. *Id.* Many people experiencing homelessness have more than one psychiatric diagnosis, stating that roughly 50% of people with Major Depressive Disorder, Schizophrenia, Bipolar disorder, and Generalized Anxiety Disorder also have co-morbid PTSD. *Id.*⁴⁹ A meta-analysis found that in Western countries, including the United States, 12.7% of homeless individuals had psychotic illness, compared to 1% of the general

⁴⁷ Staten, L. & Rankin, S. (2019), *Penny Wise but Pound Foolish: How Permanent Supportive Housing Can Prevent a World of Hurt*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3419187.

⁴⁸ Tarr, P. (2018, November), Brain Matters Blog – Homelessness and Mental Illness: A Challenge to Our Society, <https://www.bbrfoundation.org/blog/homelessness-and-mental-illness-challenge-our-society>.

⁴⁹ Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration (2013), Treatment Improvement Protocol No. 55: Behavioral Health Services for People Who are Homeless, <https://www.ncbi.nlm.nih.gov/books/NBK138725/>.

population with Schizophrenia. *Id.*⁵⁰ Poor mental health may also affect physical health, especially for people who are homeless. *Id.* Mental illness may cause people to neglect taking the necessary precautions against disease. *Id.* When combined with inadequate hygiene due to homelessness, this may lead to physical problems such as respiratory infections, skin diseases, or exposure to tuberculosis or HIV. *Id.*⁵¹ This includes COVID-19.

As a result of physical and mental health conditions that are caused or exacerbated by a lack of stable and adequate housing, people without housing are significantly more likely to be admitted to the hospital than other populations. *Id.* According to the American Medical Association, nearly 66% of people experiencing homelessness individuals visit the emergency room annually, compared to 20% of the general population. *Id.*⁵² As much as a third of people experiencing homelessness are hospitalized during a given year, and they are likely to have a longer length of stay and return more frequently than people with housing. *Id.*⁵³ People experiencing homelessness are also twice as likely as members of the general public to return to emergency departments within only one week of a hospitalization—often in an ambulance, contributing to high treatment costs and strain on limited emergency resources. *Id.* COVID-19 has exacerbated these problems.

⁵⁰ Fazel, S., Khosla, V., Doll, H., Geddes, J. et al. (2008), The Prevalence of Mental Disorders among the Homeless in Western Countries: Systematic Review and Meta-Regression Analysis, *PLOS Med* 5(12), <https://pubmed.ncbi.nlm.nih.gov/19053169/>; North, C., Eyrich, K., Pollio, D., Spitznagel, E. (2004), Are Rates of Psychiatric Disorders in the Homeless Population Changing?, *American Journal of Public Health*, 94(1), <https://pubmed.ncbi.nlm.nih.gov/14713706/>

⁵¹ National Coalition for the Homeless (2009, July), Mental Illness and Homelessness, https://www.nationalhomeless.org/factsheets/Mental_Illness.pdf.

⁵² Berg, S. (2019, June), Homeless people need more help, not stays in jail: AMA, American Medical Association, <https://www.ama-assn.org/delivering-care/population-care/homeless-people-need-more-help-not-stays-jail-ama>.

⁵³ Kushel, M., Perry, S., Bangsberg, D., Clark, R., Moss, A. (2002), Emergency Department Use Among the Homeless and Marginally Housed: Results From a Community-Based Study, *American Journal of Public Health* 92(5), <https://pubmed.ncbi.nlm.nih.gov/11988447/>.

Ultimately, people experiencing homelessness are projected to be 2 to 3 times more likely to require hospitalization, 2 to 4 times more likely to require critical care in an ICU, and twice as likely to die as a result of COVID-19 infection. *Id.*⁵⁴

3.7 Being forced into congregate shelters dramatically increases the risk of contraction of COVID-19 to homeless individuals.

Congregate settings like emergency shelters and jails are the least desirable settings for curbing the spread of COVID-19. **Exhibit 1**, *Expert Declaration Of Marisa Westbrook*, ¶¶ 30-37. Following safe physical distancing guidelines is far more difficult in high-density congregate settings than it is in encampments. *Id.* A number of factors contribute to a heightened risk of COVID-19 infection and serious illness in congregate shelter settings. *Id.* Even if beds are placed six feet apart or separated by barriers, as recommended by the CDC, they are still within range of exposure. *Id.* When people are not on their beds or cots, such as when they get food, use the restroom, or go outside, they would not be able to maintain adequate physical distance from other residents. *Id.* Moreover, shared bathrooms, shared drinking fountains, and shared eating facilities increase the number of shared surfaces that people staying in congregate shelters must touch during daily routines. *Id.* The increased contact with other people and shared surfaces also increases the risk of COVID-19 infection, and increases the risk that multiple people will become infected in a short time. *Id.*

COVID-19 infects people sleeping in homeless shelters more rapidly than people sleeping outdoors, as shelters often house anywhere from 20 to several hundred people within the same room and usually do not offer enough restrooms to meet the United Nations' minimum

⁵⁴ Culhane, D., Treglia, D., Steif, K. (2020, March), Estimated Emergency and Observational/Quarantine Capacity Need for the US Homeless Population Related to COVID-19 Exposure by County; Projected Hospitalizations, Intensive Care Units and Mortality, https://endhomelessness.org/wp-content/uploads/2020/03/COVID-paper_clean-636pm.pdf

standard of one toilet per every 20 people. *Id.*⁵⁵ With lack of access to the most basic of human needs, including running water, toilets, and trash disposal, infectious diseases like COVID-19 spread quickly among unsheltered individuals, particularly those living in environments with minimal protective barriers between them. *Id.*

Congregate emergency shelters are not an adequate replacement for the stable, private shelter available to people who sleep in encampments during the COVID-19 pandemic. *Id.* Congregate emergency shelters expose people to communicable disease, infestations, and parasites that are more easily spread in crowded conditions, similar to low-term care facilities. *Id.* Congregate shelters frequently struggle with inadequate ventilation, overcrowding, and insufficient procedures for handling contagious clients. *Id.* According to the CDC, these factors contribute to the spreading of diseases such as tuberculosis, influenza, and COVID-19. *Id.* It is estimated that each individual infected with COVID-19 will infect approximately 2.5 other people – and that number is likely to be higher in homeless populations due to their medical vulnerability and their inability to reduce their contacts with others in congregate settings or public spaces. *Id.*⁵⁶

Public health literature is universal in its conclusion that COVID-19 spreads extremely quickly within congregate facilities like shelters. *Id.* Recent studies consistently find that homeless shelters are a high-risk setting for COVID-19 transmission because of crowding and shared hygiene facilities and homeless populations in congregate shelters are at increased risk of

⁵⁵ United Nations High Commissioner for Refugees (2020, September), UNHCR Emergency Handbook: Emergency Sanitation Standards, <https://emergency.unhcr.org/entry/33014/emergency-sanitation-standards>.

⁵⁶ Liu Y, Gayle AA, Wilder-Smith A, Rocklöv J (2020). The reproductive number of COVID-19 is higher compared to SARS coronavirus. *J Travel Med* 27(2), doi:10.1093/jtm/taaa021; Auerswald, C. (2020), For the Good of Us All: Addressing the Needs of Our Unhoused Neighbors During the COVID-19 Pandemic, <https://publichealth.berkeley.edu/wp-content/uploads/2020/04/For-the-Good-of-Us-All-Report.pdf>.

infection with COVID-19. *Id.*⁵⁷ These studies demonstrate the futility of using symptom screening tools to limit the spread of the virus in congregate shelters. *Id.* In its *Morbidity and Mortality Weekly Report* on April 22, 2020, the CDC identifies emergency shelters and transitional housing as “settings that can pose risks for communicable diseases.” *Id.*

In addition to physical health risks, congregate shelters may not be medically appropriate settings for people with a history of trauma and/or mental illness. *Id.* For example, people with schizophrenia may experience a worsening of paranoia and auditory hallucinations when surrounded by large groups of people. *Id.* Equally, flashbacks, nightmares, anxiety, and hypervigilance related to post-traumatic stress disorder may make it difficult for people to cope with the noisy and crowded conditions in shelters. *Id.* Avoidance of people, places, and objects that remind people of past traumas is a diagnostic feature of PTSD. *Id.* For many people who experience homelessness and PTSD, avoidance of homeless shelters is a survival strategy, as the avoidance reduces PTSD symptoms. *Id.*

The safest, most effective way to reduce risks for homeless individuals, and the general public, during the COVID-19 pandemic is to allow homeless individuals to reside in encampments for the duration of the pandemic. *Id.*

3.8 Defendants were on notice of this fact being forced into congregate shelters dramatically increases the risk of contraction of COVID-19 to homeless individuals.

⁵⁷ Rogers, J., Link, A., McCulloch, D., Brandstetter, E., Newman, K., et al. (2020), Characteristics of COVID-19 in Homeless Shelters: A Community-Based Surveillance Study, *Annals of Internal Medicine*, <https://doi.org/10.7326/M20-3799>; Tobolowsky, F., Gonzales, E., Self, J., Rao, C., Keating, R., Marx, G., McMichael, T., et al. (2020), COVID-19 Outbreak Among Three Affiliated Homeless Service Sites - King County, Washington, *Morbidity and mortality weekly report*, 69(17), <https://doi.org/10.15585/mmwr.mm6917e2>; Imbert, E., Kinley, P., Scarborough, A., Cawley, C., Sankaran, M., et al. (2020), Coronavirus Disease 2019 (COVID-19) Outbreak in a San Francisco Homeless Shelter, *Clinical Infectious Diseases* *ciaa1071*, <https://doi.org/10.1093/cid/ciaa1071>.

Denver knew about the increased risk congregate shelters pose because their own prevalence testing demonstrated that homeless individuals who stay in Denver's congregate shelters contract COVID-19 at a significantly higher rate than those living in encampments. On Monday, June 8, the Colorado Coalition for the Homeless (CCH) in partnership with Denver Public Health (DPH) and DDPHE conducted a voluntary COVID-19 testing pilot for people experiencing homelessness and living unsheltered in the downtown area around the CCH Stout Street Health Center.⁵⁸ Encampments were notified by Denver Street Outreach Collaborative (DSOC) members a few days before that testing would take place on Monday morning at Stout and 22nd Streets. Fifty people volunteered to be tested with tests obtained by DDPHE and administered by the DPH team. The following day, June 9, testing results were returned and 29 people were notified of their results with ongoing notification to the remaining volunteers. Of the fifty people tested, no one tested positive for COVID-19. The individuals who were tested were also screened for high-risk conditions including underlying medical conditions that could make them more susceptible to COVID-19 complications if they were to contract to the virus. During testing, eight individuals were identified as high-risk and eligible for referrals to protective action motel rooms due to age or underlying medical conditions. Seven people were relocated with one person declining. The most common high-risk conditions included Asthma, Chronic Obstructive Pulmonary Disease (COPD), High Blood Pressure, and Diabetes.

The prevalence rate of COVID-19 of those sheltering on the streets is much lower than the prevalence rate of the general population, which is around seven percent. Importantly, the prevalence of COVID-19 among those sheltering on the streets is also significantly lower than

⁵⁸ *COVID-19 Prevalence Rate of 0% Found in People Experiencing Homelessness and Living in An Encampment in Downtown Denver – Other Health Risks Identified*, COLORADO COALITION FOR THE HOMELESS, <https://www.coloradocoalition.org/covid-19-prevalence-rate-0-found-people-experiencing-homelessness-and-living-encampment>.

those confined in shelters. On Monday, May 4, Colorado Coalition for the Homeless healthcare staff conducted a pilot study at St. Francis Center where 52 individuals utilizing the day shelter volunteered to be tested for COVID-19.⁵⁹ Fourteen of the 52 resulted in a positive diagnosis of COVID-19, or 26.9% of total people tested. Using these findings as the benchmark for COVID-19 cases within the homeless population, 538 people of the 2000 utilizing Denver shelters could have COVID-19.

In a later round of testing, conducted between May 18, 2020 and June 22, 2020, by the Colorado Coalition for the Homeless (CCH) in partnership with Denver Public Health (DPH) and the Denver Department of Public Health and Environment (DDPHE) found that out of 290 individuals tested who were accessing Denver's shelters, 20 were positive for COVID-19, or approximately 7%.⁶⁰ There was also an outbreak among staff at the large shelter for men experiencing homelessness at Denver's National Western Complex. In May of this year, at least thirteen people working for the Denver Rescue Mission, which operates the men's shelter, tested positive for COVID-19.⁶¹

These testing results demonstrate that people experiencing homelessness are less likely to be in danger of having or contracting COVID-19 while living in encampments. This is likely because they are living in their own self-contained space with the opportunity to isolate

⁵⁹ *Surveillance Testing Pilot To Establish Potential COVID-19 Prevalence Among People Experiencing Homelessness In Denver*, COLORADO COALITION FOR THE HOMELESS, available at: <https://www.coloradocoalition.org/sites/default/files/2020-05/Prevalence%20of%20COVID-19.pdf>.

⁶⁰ *Surveillance Testing Pilot To Establish Potential COVID-19 Prevalence Among People Experiencing Homelessness Who Utilize Denver Shelters*, COLORADO COALITION FOR THE HOMELESS, available at: https://www.coloradocoalition.org/sites/default/files/2020-06/shelter%20testing_final_0.pdf.

⁶¹ Donna Bryson, *Staff members at Denver's National Western Complex shelter have tested positive for the disease caused by the new coronavirus*, DENVERITE, <https://denverite.com/2020/04/30/at-least-seven-staff-members-at-the-national-western-complex-shelter-have-tested-positive-for-covid-19/>

themselves in their tents. Being outdoors, rather than in a confined, shared indoor space like a shelter also certainly helps.

Additionally, Defendants were aware that nearly all of the biggest known clusters of COVID-19 outbreak in America have been in nursing homes, food processing plants, and correctional facilities; in other words, all places, like Denver’s congregate homeless shelters, where people are packed in close quarters with little opportunity for social distancing.⁶²

Despite this knowledge, Defendants explicitly conducted the sweeps to force Plaintiffs, and others similarly situated, into congregate facilities where they knew Plaintiffs were significantly more likely to contract COVID-19. This is evidenced by the fact that at the sweeps, buses were provided to take homeless individuals to Denver’s congregate shelters.

3.9 Ending the sweeps, and providing adequate sanitation to encampments, is the best way to prevent homeless individuals from being infected with, and suffering serious health consequences from, COVID-19.

It is critical for all people to be able to safely shelter in place and to maintain necessary physical distancing—including people living in encampments as their only form of available housing. **Exhibit 1, *Expert Declaration Of Marisa Westbrook*, ¶¶ 43-50.** The sweeps and displacement of homeless individuals in Denver contributes to the spread of disease by encouraging people living in encampments to frequently move throughout the City to avoid arrest and seizure of their only means of survival. *Id.*⁶³ Frequent moving increases risk for spread of disease as individuals will come into contact with people with whom they normally would not be in contact. *Id.*

⁶² *Coronavirus in the U.S.: Latest Map and Case Count*, THE NEW YORK TIMES, available at: <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

⁶³ Westbrook, M. & Robinson, T. (2020), Unhealthy by design: health & safety consequences of the criminalization of homelessness, *Journal of Social Distress and Homelessness*, DOI: [10.1080/10530789.2020.1763573](https://doi.org/10.1080/10530789.2020.1763573).

Even if a place of shelter isn't optimal, such as an encampment, a stable place to access shelter is invaluable to safety and health. *Id.* Constant movement shifts all priorities to meeting basic physiologic needs such as food, shelter and safety. *Id.* The threat of punishment related to habitation in an encampment can undermine individuals' health by interrupting sleep, raising stress levels, and causing people not to access necessary goods and services. *Id.* In addition, in response to orders to move along, homeless residents report that they frequently leave behind the security of groups and the safety of well-lit areas, with 50% seeking out hidden or isolated city locations to sleep, 23% seeking out hidden river or creek bed locations, and 24% choosing to keep moving all night. *Id.* In these locations, they find themselves at higher risk of physical assault, robbery, and violent threats compared to those who don't feel forced to move. *Id.* This focus on survival makes progressing in anything else such as obtaining a job, enrolling in benefits, or even attending to health needs impossible. People who are subject to penalty for meeting their basic human need for shelter in encampments do not have adequate stability, and their health suffers for it. *Id.*

The sweeps result in further destabilization of homeless individuals' lives, requiring repeated moves to different and documented less safe locations, and reducing their access to the healthcare and social service providers who know them best and provide resources in times of crisis, particularly in a time of pandemic. *Id.* Healthcare is already fragmented for people experiencing homelessness, sheltered or otherwise, and most have complicated physical and mental health histories. *Id.* Moving reduces access to their healthcare providers who prescribe medications for their chronic illnesses. *Id.* Without these medications, people experiencing homelessness will be more likely to visit an emergency room for reasons that could have been

avoided. *Id.* Healthcare connections are critical and contracting COVID-19 somewhere different from where a homeless person usually stays may lead to fragmented access to healthcare. *Id.*

The constant movement to multiple parts of Denver also increases the likelihood that people living in encampments will be exposed to and, in turn, spread COVID-19 infection. *Id.* Thus, these policies increase the likelihood that people living in encampments will need to use limited emergency health care resources and/or be hospitalized – a significant public health risk factor during the COVID-19 outbreak. *Id.* Constantly being forced to move also increases their risk of serious illness from COVID-19. *Id.* People experiencing homelessness suffer worse health than housed people in general and are more likely to become severely ill or die from COVID-19 whether or not they fall into the currently accepted vulnerable groups. *Id.* Prohibiting people living in encampments from sheltering in place during the COVID-19 outbreak will not only threaten their lives, but also the health and lives of Denver’s community at large by undermining collective efforts to stop the spread of the virus. *Id.* This not only has a harmful public health impact, but it also makes public health policies, which come with significant economic costs to Denver, less effective and can prolong the life of the pandemic. *Id.*

Unrestricted access to public bathrooms equipped with toilets, running water, and soap for individuals experiencing homelessness is also extremely important to COVID-19 mitigation and public health generally. *Id.* Lack of access to toilets and hand washing leads to increased frequency of open defecation where people are forced to defecate in public spaces. *Id.* This is a significant health concern. *Id.* Flush toilets and portable toilets remove solid waste from the environment safely and limit fecal exposure to people experiencing homelessness and the general public. *Id.* Outbreaks of Hepatitis A and other infectious diseases in the United States have been linked with lack of access to toilets within homeless encampments. *Id.*

Ultimately, ensuring that people experiencing homelessness can properly shelter in place will help to “flatten the curve,” decrease the demand for services from hospitals, and enable us to lift shelter-in-place orders sooner than if people experiencing homelessness are not sheltered-in-place. *Id.*

3.10 Plaintiff Nathaniel Warner caught COVID-19 while sleeping in Denver’s congregate shelters to avoid the sweeps and Camping Ban move-on orders.

Plaintiff Nathaniel Warner has been homeless for the past few years in Denver. Because of Camping Ban enforcement, sweeps, and harassment from Defendant Denver officials, which continuously chased him from block-to-block, Mr. Warner began staying in shelters earlier this year. Mr. Warner has COPD and heart problems, including a heart murmur and inoperable valves, which he takes medications for. He is also a cigarette smoker. He is particularly vulnerable to contracting, and dying from, COVID-19, per the CDC’s guidelines.

Over the past year, Mr. Warner has been told to “move along” by Denver officials at least a dozen times. In March of 2020 alone Mr. Warner was threatened with the Camping Ban multiple times, and told to move on. Another time in March, during a sweep near 24th Street and California Street, Mr. Warner had his property (including his tent, bedding, and other personal items) seized and destroyed by Denver officials. As a result of this campaign of harassment by Denver officials, Mr. Warner decided to enter the National Western Complex congregate shelter mid-April 2020.

Upon arrival at the National Western Center congregate shelter, Mr. Warner noticed that, a large portion of the time, staff (including the security personnel who greeted every single person who entered the facility) were not wearing masks or were wearing them so as to render them ineffective (i.e. with their noses uncovered). He noticed that when employees would speak to each other, they would take off their masks and stand roughly two feet from one another. Mr.

Warner also noticed that other residents of the shelter would not wear masks a large portion of the time. Mr. Warner, in that congregate shelter, was forced to share communal restrooms with other homeless individuals. When Mr. Warner would enter the shelter, he would be patted down by security staff that would go as far as opening his cigarette package and running their fingers over the cigarettes in that container.

Mr. Warner also noticed that the congregate shelters were very similar to a jail. Those in the shelter had a strict curfew of 8:30pm, and could not leave their designated area 6-foot by 9-foot area after this time. Mr. Warner was assaulted by other shelter attendees multiple times, but his complaints went unanswered because if he were to have been implicated in the assault in any way, he would have been kicked out of the shelter. The individuals who assaulted Mr. Warner were also allowed to continue to stay in the shelter. Demonstrating the extreme risk of violence Mr. Warner faced, he witnessed a man get stabbed to death within the National Western Center congregate shelter.

After two weeks at the National Western Center congregate shelter, Mr. Warner noticed respiratory symptoms similar to a sinus infection. He immediately informed staff who removed him from the shelter and tested him for COVID-19. Three days later, test results confirmed that Mr. Warner had contracted COVID-19. A few days later, complications from COVID-19 forced Mr. Warner into the hospital. He would spend the next six days recovering in a hospital bed.

When Mr. Warner was released from the hospital, he returned to a congregate shelter, the 48th Street congregate shelter. He witnessed the same behaviors by staff at the 48th Street congregate shelter that he had witnessed at the National Western Center congregate shelter. Mr. Warner would like to stay in a tent on the streets, but does not do so because he fears the sweeps

and enforcement of the Camping Ban. Despite being vulnerable to potentially catching COVID-19 again, he continues to stay in a congregate shelter

3.11 Defendant Denver entered into a settlement agreement with Plaintiffs that prevented it from sweeping Plaintiffs without notice and destroying their property.

In February of 2019, Defendant Denver entered into a Settlement Agreement with a class of homeless individuals (which includes Plaintiffs) of “[a]ll 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[.]” **Exhibit 2**, *Lyall Settlement Agreement*. That Settlement Agreement was approved by Judge William Martinez in September of 2019 and went into effect immediately. It was in effect during the events outlined in this Complaint.

In bargained for consideration of dismissal of the Plaintiff Class’ meritorious legal claims in *Lyall v. Denver*, Defendant Denver agreed, in the Settlement Agreement, that it would “give at least seven days’ notice prior to a [sweep] and shall include such language in its written protocol for [sweeps]” and that Denver “may conduct [sweeps] with less than seven days’ notice only if the City determines that a public health or safety risk exists which requires it.” *Id.* Further, Denver agreed that “[i]f a [sweep] is conducted with less than seven days’ notice, the City shall provide reasonable notice of the [sweep], with the determination of reasonableness based upon the nature of the public health and safety risk present in the area.” *Id.*

Defendant Denver also agreed that (for any sweep) it would provide a “written notice” including “[l]anguage indicating that stored property may be retrieved at no cost, without fear of

arrest; A phone number for individuals to call who may have questions regarding property retrieval; The location and hours of the storage facility; The length of time that the property shall be stored at the facility and the length of time that the City shall store the property until it shall be disposed of. The City shall store any personal property that does not pose a public health or safety risk for at least 60 days.” *Id.*

Importantly, Defendant Denver agreed that “[p]ersonal property” seized by Defendant Denver “shall be stored for sixty days unless the property is determined by a City employee or contractor... to pose a public health or safety risk.” *Id.* Property that could be discarded under the Settlement Agreement includes “illegal drugs, used syringes, medical waste, and perishable food item” along with “[a]ny trash or litter, such as used napkins, dirty diapers, food wrappers or used food containers, empty cans, used Styrofoam containers or paper cups, cigarette butts” and “mattresses.” *Id.* However, “[a]ny items of personal property that could reasonably be assumed to have value to any person will be collected and stored. These items include: tents, sleeping bags, and any other camping equipment; backpacks, suitcases, duffle bags, and any other containers of personal items; clothing; bicycles; phones, electronic devices, and musical instruments; and other similar identifiable items of personal property, including furniture.” *Id.*

The Settlement Agreement outlined that Denver’s officials were required to “take particular care to identify, collect and store sensitive personal items and documents, such as wallets and purses, prescription drugs, birth certificates, identification cards, drivers’ licenses, and health care documents.” *Id.* And, the Settlement Agreement made sure to bind Defendant Denver to the presumption that “[i]f there is any question concerning whether an item should be considered as trash or valuable property, the City will assume the property has value and it should be stored.” *Id.*

Defendant Denver has violated all of these provisions of the Settlement Agreement during the sweeps that occurred after the entry of the Settlement Agreement.

3.12 Defendants swept Plaintiffs without notice and seized and summarily destroyed their property at Lincoln Park on July 29, 2020.

Governor Polis held a news conference on July 23, 2020, where he stated that he welcomed a sweep of the Lincoln Park encampment.⁶⁴ At the press conference, Governor Polis noted that he had been working with Denver to give CSP the authority to enforce laws in Denver to clear the encampment at Lincoln Park.⁶⁵ Governor Polis said that he had “encourage[d]” Denver “to remove tents” from Lincoln Park.⁶⁶ Governor Polis also admitted that he had been talking to Mayor Hancock and Denver City Council for “weeks” about sweeping the encampment at Lincoln Park and asking them to sweep the encampment.⁶⁷ In the wake of these comments, Defendants accelerated their timeline for sweeping the Lincoln Park encampment. **Exhibit 3, Operational Plan.** Defendants coordinated the Lincoln Park sweep for at least a week prior to the sweep, but without providing any indication or notice to encampment residents. *Id.*

The Lincoln Park sweep was a multi-agency, coordinated effort that involved all Defendants. The Lincoln Park sweep was primarily planned by the Denver Mayor’s Office (“MO”), under the direction of Defendant Hancock, and the Denver City Attorney’s Office (“CAO”), under the direction of Defendant Bronson. Both the MO and CAO directed, and advised those on the ground about, the execution of the Lincoln Park sweep. *Id.*

⁶⁴ Saja Hindi, *Gov. Jared Polis says he welcomes removal of homeless encampment on state property*, THE DENVER POST, <https://www.denverpost.com/2020/07/23/colorado-jared-polis-welcomes-homeless-sweeps/>.

⁶⁵ *Governor Polis Provides Update on COVID-19 Testing*, YouTube, 26:20-28:25, available at: <https://www.youtube.com/watch?v=fWRnvsIxJKg>.

⁶⁶ *Id.* at 28:00-28:15.

⁶⁷ *Id.* at 28:10-28:25.

DDPHE's role was to post the public health order at the outset of the sweep, along with coordinating, managing, and monitoring the sweep. DDPHE was also the main agency tasked with coordinating the cross-agency seizure of property. *Id.* DPR assisted DDPHE with these actions, and helped to close the park. DOTI, SWM, and EHS took on the role of actually seizing and discarding the homeless residents' property. DPD's and CSP's role was to provide security for the entire operation, and arrest anyone who attempted to enter the park after it had been closed. *Id.*

On July 29, 2020, Defendants, in a coordinated effort involving multiple agencies from Denver and the State of Colorado, conducted a sweep of an encampment of those experiencing homelessness that were surviving outside in Lincoln Park. **Exhibit 4**, *Declaration of Terese Howard*, ¶¶ 27-45. Lincoln Park is located directly across Lincoln Street from the Colorado State Capitol building, and is bounded on four sides by Lincoln Street, Broadway, Colfax Avenue, and 14th Avenue. At least by 6:30 a.m., without providing any advance written notice, Defendants began to stage near Lincoln Park. Most of the encampment residents were sleeping. *Id.*

Officials from DDPHE, including John & Jane Foes 1-25, posted a written area restriction on the outskirts of Lincoln Park stating that the park was being "closed" immediately due to a "public health and safety emergency." *Id.* No specific emergency was identified, nor was there any clarity as to whether the emergency related to public health, public safety, or both. *Id.* Throughout the sweep, DDPHE officials, including John & Jane Foes 1-25 and Defendant McDonald, would coordinate, manage, and monitor the restriction. DDPHE officials, including John & Jane Foes 1-25 and Defendant McDonald, also coordinated the cross-agency seizure and destruction of Plaintiffs' property. *Id.*

While some of John & Jane Foes 1-25 (DDPHE officials) were posting this notice, Defendants, including Defendant DPD Officers, John & Jane Does 1-25 (Denver park rangers), other John & Jane Foes 1-25 (DDPHE officials), and John & Jane Poes 1-25 (CSP troopers), began fencing off the entirety of Lincoln Park. *Id.* They systematically set up a six-foot-tall chain-link fence along the entire perimeter of the park. *Id.* Meanwhile, John & Jane Does 1-25 (DPD officers), John & Jane Does 1-25 (Denver park rangers), and John & Jane Joes 1-25 (DOTI officials) began telling everyone in the park that they would need to move their belongings immediately or the property would be seized. *Id.*

Seeing the park being cordoned off, and hearing this threat, Plaintiffs began to frantically gather their belongings. *Id.* While Plaintiffs were transporting their belongings out of the park, Defendants began to seize Plaintiffs' unabandoned belongings and summarily discard them. Specifically, John & Jane Joes 1-25 (DOTI officials), John & Jane Does 1-25 (Denver park rangers), John & Jane Loes (EHS employees), and John & Jane Moes 1-25 (SWM officials) seized and discarded Plaintiffs' property while Defendant DPD Officers and Defendant CSP Troopers secured the fencing around Lincoln Park and prevented Plaintiffs from retrieving their property. *Id.* Defendant DPD Officers and Defendant CSP Troopers watched and did nothing to intervene. *Id.* In fact, Defendant DPD Officers and Defendant CSP Troopers provided the security that allowed the other officials to seize and destroy the property. *Id.*

Plaintiffs watched as an excavator, equipped with a claw, began grabbing their belongings, *en masse*, and throwing them into dumpsters and trash trucks. *Id.* Defendants destroyed everything in the park that Plaintiffs were unable to carry out upon the initial order to vacate the area. *Id.* Defendants seized and discarded a wide range of Plaintiffs belongings. *Id.* Defendants seized and discarded belongings necessary for survival outside, including tents,

blankets, shades, umbrellas, tarps, clothing, and sleeping bags. Defendants seized and discarded irreplaceable belongings, including photographs, family heirlooms (such as jewelry), letters, and notes. *Id.* Defendants seized and discarded Plaintiffs' only means of transportation, including bicycles, skateboards, and shoes. *Id.* Defendants seized and discarded Plaintiffs' only means of communication: cell phones. *Id.*

Within a few hours of when they notified Plaintiffs that the park would be closed, at approximately 10 a.m., Defendants closed the park and would not allow Plaintiffs to re-enter to gather their belongings. *Id.* Nearly every Plaintiff only had time to gather one armful of belongings, and transport them out of the park, before the park was closed and they were not allowed to re-enter. *Id.* The belongings that remained in the park were discarded. *Id.*

It was obvious to Defendants that Plaintiffs had not abandoned their property. In fact, Plaintiffs had explicitly attempted to reclaim their property, but were denied the opportunity to do so by Defendants. *Id.*

A number of Plaintiffs were not in Lincoln Park when the sweep began because they were at work, getting breakfast, or otherwise away from their campsite. *Id.* Those Plaintiffs who were not present, and returned after approximately 10 a.m., had all of their belongings seized and discarded by Defendants. *Id.*

There were no offers by Defendants to store property. *Id.* Defendants took no actions to safeguard property that was valuable to Plaintiffs. *Id.* No property was stored during the sweep on July 29, 2020.⁶⁸

⁶⁸ See Denver: Housing Stability, *Property Storage*, available at: <https://www.denvergov.org/content/denvergov/en/housing-information/resident-resources/property-removal-and-storage.html>

Defendant Polis directed the actions of the State Defendants on July 29, 2020. During the sweep, Defendant Polis was in contact with those on the ground of the sweep. *Id.* He directed, and knew that, the State Defendants on the ground had seized and discarded Plaintiffs belongings, locked Plaintiffs out of Lincoln Park, and prevented Plaintiffs from retrieving their clearly unabandoned property.

Defendants Hancock, Bronson, McDonald, and Robinson directed the actions of their respective agencies (and Defendant Hancock directed the actions of all of the Denver Defendants) on July 29, 2020. **Exhibit 3**, *Operational Plan*. Defendants directed, and knew that, the Defendants on the ground had seized and discarded Plaintiffs belongings, locked Plaintiffs out of Lincoln Park, and prevented Plaintiffs from retrieving their clearly unabandoned property. *Id.*

Denver provided buses at the sweep to take those swept to a shelter. It was apparent that the purpose of the sweep was to force the encampment's residents into a shelter. **Exhibit 4**, *Declaration of Terese Howard*, ¶ 45.

3.14 In the days after the Lincoln Park sweep, Mayor Hancock, Defendant Robinson, Defendant Polis, and DDPHE make startling admissions to the press about the sweep.

First, Defendant Robinson stated after the sweep, during a news conference, that the sweep had been in the planning stages for over a week.⁶⁹ Despite this longstanding plan, no notice was provided to the residents of the Lincoln Park encampment prior to the sweep.

Then, during a press conference on July 31, 2020, Mayor Hancock and Defendant McDonald took questions from members of the media about the Lincoln Park sweep and the

⁶⁹ MSN, *Full news conference: Denver Department of Public Safety provides update after homeless sweep, clash with protesters*, <https://www.msn.com/en-us/health/medical/full-news-conference-denver-department-of-public-safety-provides-update-after-homeless-sweep-clash-with-protesters/vp-BB17lnUl>.

upcoming Morey Middle School sweep. During that press conference, Mayor Hancock admitted that he, and Denver, knew “what the CDC guidelines say” prior to the Lincoln Park sweep. *Full update from Mayor Hancock on Denver’s COVID-19 response*, 9NEWS, 24:45-24:50, available at: <https://www.9news.com/video/news/health/coronavirus/denver-mayor-hancock-full-update-coronavirus-july-31/73-73c2f1e2-5ed8-4a96-bbd7-2578a3e4fbf5>.

Defendant Hancock also admitted in that news conference that no notice was given for the Lincoln Park sweep because Councilmember Candi CdeBaca had been notifying the public when and where prior sweeps were occurring.⁷⁰ Denver did not provide notice because they did not want members of the public showing up to witness what was happening during the sweep at Lincoln Park, or showing any disapproval of the brutal tactics in the moment. Mayor Hancock specifically admitted that Denver would not give notice or, his words, “publicize [the] exact time, place, and location” as to when the Morey Middle School encampment would be swept, because a city councilmember had been “tipping off folks who want to... come up and protest” the sweeps. *Id.* at 26:40-27:35. These comments prove that Denver did not provide notice for political reasons. There was no emergent public health and safety need that required the City to forego its commitment to provide seven days advance notice prior to the sweep—this could not be clearer from the fact that Defendants had planned the sweep more than seven days prior to conducting it, with no emergent rush to get it done.

Additionally, in a press release after the sweep, DDPHE reiterated that no notice was provided, not because a public health and safety emergency required no notice be required, but

⁷⁰ Conor McCormick-Cavanagh, *Mayor Hancock Mum on When Morey Encampment Will Be Swept*, WESTWORD, <https://www.westword.com/news/denver-mayor-refuses-to-say-when-city-will-sweep-controversial-camp-11763613>.

because of the concerns outlined by Mayor Hancock in his news conference: that there might be members of the public who would show up to scrutinize the sweep.⁷¹

Finally, Defendant Polis called the sweep “a relief” and condoned the actions of Denver during the sweep by saying that it was “a great and important” step by Mayor Hancock.⁷²

3.15 Defendants swept Plaintiffs without notice and seized and summarily destroyed their property near Morey Middle School on August 5, 2020.

On August 5, 2020, Defendants, in a coordinated effort involving multiple agencies from Denver, conducted a sweep of an encampment of those experiencing homelessness that were surviving outside near Morey Middle School. **Exhibit 4**, *Declaration of Terese Howard*, ¶¶ 46-57. Morey Middle School is located at 840 E 14th Ave in Denver, CO. At approximately 5:45 a.m., Defendants began to stage near Morey Middle School. *Id.* Officials from DDPHE, including John & Jane Foes 26-50, posted a written notice at the start of the sweep. The notice stated that the area was “closed” immediately due to a “public health and safety emergency.” *Id.* Throughout the sweep, DDPHE officials, including John & Jane Foes 26-50 and Defendant McDonald, would coordinate, manage, and monitor the restriction. DDPHE officials, including John & Jane Foes 26-50 and Defendant McDonald, also coordinated the cross-agency seizure and destruction of Plaintiffs’ property.

⁷¹ Stephanie Butzer, *Protesters clash with Denver authorities during sweep of homeless camp in Lincoln Park*, DENVER ABC 7, available at: <https://www.thedenverchannel.com/news/local-news/homeless-sweep-underway-in-lincoln-park-west-of-state-capitol> (“DDPHE determined that advanced posting of the order would not be appropriate because of concerns around the recent escalating violence in encampments.”).

⁷² Arvada Patch, *Gov. Jared Polis Calls Recent Clearing Of A Large Homeless Encampment Around the CO Capitol ‘A Relief’*, NEWS BREAK, available at: <https://www.newsbreak.com/colorado/denver/news/1609863175403/gov-jared-polis-calls-recent-clearing-of-a-large-homeless-encampment-around-the-co-capitol-a-relief>

While some of John & Jane Foes 26-50 (DDPHE officials) were posting this notice, John & Jane Does 26-50 (DPD officers), other John & Jane Foes 26-50 (DDPHE officials), and John & Jane Joes 26-50 (DOTI officials) began telling everyone that they would need to move their belongings immediately. *Id.* Some of these Defendants also began to cordon off the area with police tape. *Id.*

Seeing the area being cordoned off, and hearing this threat, Plaintiffs began to frantically gather their belongings. While Plaintiffs were transporting their belongings out of the area, Defendants began to seize Plaintiffs belongings and discard them. *Id.* Specifically, John & Jane Joes 26-50 (DOTI officials), John & Jane Loes 26-50 (EHS employees), and John & Jane Moes 26-50 (DSWM officials) seized and discarded Plaintiffs' property while John & Jane Does 26-50 (DPD officers) secured the area. *Id.*

Defendants seized and discarded a wide range of Plaintiffs belongings. *Id.* It was obvious to Defendants that Plaintiffs had not abandoned their property. *Id.* A number of Plaintiffs were not at Morey Middle School when the sweep began because they were at work, getting breakfast, or otherwise away from their campsite. *Id.* Those Plaintiffs who were not present, and returned later in the day, had all of their belongings seized and/or discarded by Defendants. No property was stored during the sweep on August 5, 2020.⁷³

After the sweep, Defendants provided buses to take Plaintiffs to Denver's congregate shelters. *Id.* The purpose of the sweep was to force Plaintiffs into congregate shelters. Demonstrating this, Defendant Hancock said during a press conference after the sweep that the sweep's purpose was to drive Plaintiffs into congregate shelters. *Id.*

⁷³ See Denver: Housing Stability, *Property Storage*, available at: <https://www.denvergov.org/content/denvergov/en/housing-information/resident-resources/property-removal-and-storage.html>

3.16 Defendants swept Plaintiffs without notice and seized and summarily destroyed their property on September 15, 2020 near the South Platte River.

On September 15, 2020, Defendants, in a coordinated effort involving multiple agencies from Denver, conducted a sweep of an encampment of those experiencing homelessness that were surviving outside near the South Platte River. The sweep took place adjacent to the intersection of West Dartmouth Avenue and South Platte River Drive and immediately next to 2800 S Platte River Dr, Englewood, CO 80110. However, this strip of land was in Denver, Colorado.

Four days prior to the sweep, on September 11, 2020, DPD officers visited the encampment. The encampment consisted of a number of RVs, campers, and tents. The DPD officers who visited the encampment placed notices on all of the RVs and campers stating that their property would be seized 72 hours later. However, these DPD officers specifically told the RV and camper residents that the notices did not apply to the tents and that the tents were not subject to seizure. Upon seeing the DPD officers placing notices on the RVs and campers, a number of Plaintiffs spoke to the DPD directly. Those DPD officers told Plaintiffs that the tents were not subject to the notice and would not be seized. DPD officers left and did not return to the encampment.

Four days later, on September 15, 2020, at approximately 3:00 a.m., Defendants blocked off the area surrounding the encampment while its members were sleeping. Defendants did not allow anyone into the encampment after blocking off all entry points.

Four hours later, at approximately 7:30 a.m. officials from DDPHE, including John & Jane Foes 51-75, posted a written notice at the start of the sweep. The notice stated that the area was “closed” immediately due to a “public health and safety emergency.” Throughout the sweep, DDPHE officials, including John & Jane Foes 51-75 and Defendant McDonald, would

coordinate, manage, and monitor the restriction. DDPHE officials, including John & Jane Foes 51-75 and Defendant McDonald, also coordinated the cross-agency seizure and destruction of Plaintiffs' property.

While some of John & Jane Foes 51-75 (DDPHE officials) were posting this notice, John & Jane Does 51-75 (DPD officers), other John & Jane Foes 51-75 (DDPHE officials), and John & Jane Joes 51-75 (DOTI officials) began telling everyone that they would need to move their belongings immediately.

Hearing this threat, Plaintiffs began to frantically gather their belongings. While Plaintiffs were transporting their belongings out of the area, Defendants began to seize Plaintiffs belongings and discard them. Specifically, John & Jane Joes 51-75 (DOTI officials), John & Jane Loes 51-75 (EHS employees), and John & Jane Moes 51-75 (DSWM officials) seized and discarded Plaintiffs' property while John & Jane Does 51-75 (DPD officers) secured the area.

Defendants seized and discarded a wide range of Plaintiffs belongings. This included items necessary for survival outside, including tents, tarps, cooking supplies, and sleeping bags. It was obvious to Defendants that Plaintiffs had not abandoned their property. A number of Plaintiffs were not at the South Platte River encampment when the sweep began because they were at work, looking for work, sleeping elsewhere for the night, or otherwise away from their campsite. Those Plaintiffs who were not present, and returned later in the day, had all of their belongings seized and/or discarded by Defendants. No property was stored during the sweep on September 15, 2020.⁷⁴

⁷⁴ See Denver: Housing Stability, *Property Storage*, available at: <https://www.denvergov.org/content/denvergov/en/housing-information/resident-resources/property-removal-and-storage.html>

3.17 Defendant Denver has customarily swept Plaintiffs without notice, seized their property, and summarily destroyed it.

On at least April 30th, May 7th, May 14th, May 19th, May 20th, May 27th, July 29th, August 5th, August 17th, August 18th, and August 19th, Denver Defendants instituted a sweep of homeless individuals who were surviving in Denver. These sweeps all happened during the COVID-19 pandemic and occurred in direct contravention of CDC guidance, which stated that sweeps increased the risk of the spread of COVID-19. At the time all of these sweeps were conducted, individual housing options were not available to those swept. **Exhibit 4**, *Declaration of Terese Howard*, ¶¶ 13-14.

On April 30, 2020, officials from the Denver DOTI and Denver SWM, along with DPD officers, conducted a sweep of approximately 150 homeless individuals who were surviving near the intersection of 22nd Street and Stout Street in Denver. *Id.*, ¶ 15.

On May 1, 2020, officials from the Denver DOTI and Denver SWM, along with DPD officers, conducted a sweep of approximately 100 homeless individuals who were surviving near the intersection of 21st Street and California Street in Denver. Denver officials seized and discarded all of the property, including clearly unabandoned tents and other unabandoned property of apparent value, of any homeless individual who was not present during the sweep. *Id.*, ¶ 16.

On May 7, 2020, officials from the Denver DOTI and Denver SWM, along with DPD officers, conducted a sweep of approximately 300 homeless individuals who were surviving near the intersection of 22nd Street and Stout Street in Denver. Denver officials seized and discarded all of the property, including tents, of any homeless individual who was not present during the sweep. *Id.*, ¶ 17.

On May 14, 2020, officials from the Denver DOTI and Denver SWM, along with DPD officers, conducted a sweep of 150 homeless individuals who were surviving near Arkins Court in Denver. Denver officials seized and discarded all of the property, including tents, of any homeless individual who was not present during the sweep. *Id.*, ¶ 18.

On May 19, 2020, officials from the Denver DOTI and Denver SWM, along with DPD officers, conducted a sweep of 50 homeless individuals who were surviving near at 21st and Glenarm Place in Denver. Denver officials seized and discarded all of the property, including tents, of any homeless individual who was not present during the sweep. *Id.*, ¶ 19.

On August 17, 2020, officials from the Denver DOTI and Denver SWM, along with DPD officers, conducted a sweep of 80 homeless individuals who were surviving near 12th Street and Acoma Street in Denver. *Id.*, ¶ 24.

On September 10, 2020, around 11:00am, at least five DPD officers, as well as DOTI and EHS officials, came to the area near 22nd Street, Stout Street, Champa Street, and Curtis Street, and told anyone present in a tent or tarp that they had to pack up and leave as they said the area was “closed.” They proceeded to seize the property of anyone who was not present and trashed a decent amount of that property. One man’s tent and all his property was put directly in the trash. Prior to the seizure of property, there was no written notice posted. And, there had been no prior warning at all that the area was “closed” and that property would be seized. *Id.*, ¶ 25.

4. NOTICE TO DEFENDANT

On April 7, 2020, counsel for Plaintiffs gave notice of their intent to file this action to the counsel for Defendant in compliance with Fed.R.Civ.P. 65 and D.C.COLO.LCivR 65.1.

5. ARGUMENT

Defendants elevate the serious risk of COVID-19 transmission among unhoused people with each sweep and, should sweeps continue, it is foreseeable that more homeless people will contract the potentially lethal virus with no cure. Without urgent action, homeless individuals will be exposed to an elevated risk of serious illness and death. Not only is the risk of COVID-19 grave, but also Defendants actions flagrantly have violated Plaintiffs constitutional and contractual rights to not have their property seized and destroyed without notice. Plaintiffs therefore request that the Court grant injunctive relief that will protect them from threatened exposure to COVID-19 and the continued violation of their property rights.

Courts are empowered to grant preliminary injunctions in class actions, the same as in other actions. *See* William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, § 10:773 (nat'l ed. 2009); *accord Price v. City of Stockton*, 390 F.3d 1105, 1117-18 (9th Cir. 2004) (preliminary injunction may extend beyond named plaintiffs). This is so regardless of whether the class has yet been certified. *Simer v. Rios*, 661 F.2d 655, 658 (7th Cir. 1981) (granting temporary restraining order within days of action's filing); *see also Yue v. Conseco Life Ins. Co.*, 282 F.R.D. 469, 475 (C.D. Cal. 2012) (holding that, even if a party simultaneously moves for class certification and preliminary injunction, there is no requirement to show irreparable injury and success on merits to prevail on class certification).

A plaintiff seeking interim injunctive relief “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1252 (10th Cir. 2016). “[W]here the moving party has established

that the three ‘harm’ factors tip decidedly in its favor, the ‘probability of success’ requirement is relaxed[.]” *Star Fuel Marts, LLC v. Sam’s East, Inc.*, 362 F.3d 639, 652-53 (10th Cir. 2004).

Immediate and unequivocal action by this Court is necessary. Every day Defendants continue to violate Plaintiffs’ constitutional, and contractual, rights by seizing their property without notice. And, Defendants keep sweeping Plaintiffs in contravention of CDC guidance despite the fact that there is no vaccine or cure for COVID-19. Treatment of high-risk persons like the Plaintiffs is costly and resources are limited. Even those successfully treated have life-long damage to their heart, lungs, and other organs. Defendants’ actions, which substantially increase Plaintiffs’ risk of exposure to these serious effects, violate their rights, and basic human decency.

Injunctive relief is necessary because the two dangers presented here, the continued violation of constitutional (and contractual) rights and condemning vulnerable people to prolonged suffering and illness, are quintessential irreparable harms. *See Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (“When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”) (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1 (2d ed. 1995)); *Edmisten v. Werholtz*, 287 F. App’x 728, 732-35 (10th Cir. 2008) (holding that evidence that health will “deteriorate irreparably” absent relief is sufficient to support issuance of injunctive relief); *Jones’El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wisc. 2001) (“[P]ain, suffering and the risk of death constitute ‘irreparable harm’ sufficient to support a preliminary injunction in prison cases.”). There is also an overwhelming public interest in limiting the spread of COVID-19, both to minimize further infections and to reduce strain on health systems. And, in light of the

COVID-19 pandemic, the balance of equities weighs heavily in favor of Plaintiffs, who simply ask Defendants to follow CDC guidance.

5.1 Plaintiffs Are Likely to Succeed on the Merits.

Plaintiffs are likely to establish that Defendants actions, which expose them to a significantly greater risk of contracting COVID-19 and violate their property and due process rights, are unconstitutional. Plaintiffs are also likely to establish that Defendants Denver and Hancock’s actions have breached, and threaten to continue to breach, the *Lyll v. Denver* settlement agreement.

5.1(a) Plaintiffs are likely to succeed on their claims that Defendants violated their substantive due process rights.

There is no doubt that homelessness is a serious public health concern. Homeless individuals have higher rates of chronic physical and mental health conditions, increased rates of mortality, and related diseases and co-occurring disorders. With the lack of access to the most basic of human needs, including running water, toilets, and trash disposal, infectious diseases—like COVID-19—can spread quickly. Uprooting homeless individuals, without providing them with basic sanitation and waste disposal needs, does nothing more than shift a public health crisis from one location to another, potentially endangering the health of the public in both locations. This concern is particularly acute during the current COVID-19 pandemic.

Blake v. City of Grants Pass, No. 1:18-cv-01823-CL, 2020 U.S. Dist. LEXIS 129494, at *49-50 (D. Or. July 22, 2020). Defendants have responded to the dual significant public health crises of homelessness and COVID-19 with conscience-shocking indifference to the health and safety of Denver’s homeless population.

The Due Process Clause protects against “deliberately wrongful government decisions[.]” *Uhlig v. Harder*, 64 F.3d 567, 573 (10th Cir. 1995), when “a state actor affirmatively acts to create, or increases a plaintiff’s vulnerability to, or danger from private violence.” *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001); *see also Estate of B.I.C. v. Gillen*, 702 F.3d 1182,

1187 (10th Cir. 2012) (“[S]tate officials can be liable for the acts of private parties where those officials created the very danger that caused the harm.”). Under a danger-creation theory, there is liability when there governmental “intent to place a person unreasonably at risk of harm.” *Uhlrig*, 64 F.3d at 573. A plaintiff must show “sufficient[] ‘affirmative conduct on the part of the state in placing the plaintiff in danger.’” *Estate of B.I.C.*, 702 F.3d at 1187 (quoting *Gray v. Univ. Colo. Hosp. Auth.*, 672 F.3d 909, 916 (10th Cir. 2012)). Plaintiffs must only show that: (i) Defendants created the danger or increased plaintiff’s vulnerability to the danger in some way; (ii) Plaintiffs are members of a limited and specifically definable group; (iii) Defendants conduct put Plaintiffs at substantial risk of serious, immediate, and proximate harm; (iv) Defendants were deliberately indifferent to that substantial risk of serious harm; and (v) Defendants’ actions shock the judicial conscience. *Uhlrig*, 64 F.3d at 573; *see also Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1126 (10th Cir. 2008)).

In determining whether the danger-creation theory of liability applies, the Tenth Circuit has focused on the deliberateness of the conduct in relation to the caused harm. *See Christiansen v. City of Tulsa*, 332 F.3d at 1281. The defendant must recognize the unreasonableness of the risk of the conduct and act “with an intent to place a person unreasonably at risk.” *Medina v. City & Cty. of Denver*, 960 F.2d at 1496. The intent to place a person unreasonably at risk is present where the defendant “is aware of a known or obvious risk” creating a high probability that serious harm will follow, and the defendant nonetheless proceeds with a “conscious and unreasonable disregard of the consequences.” *Medina v. City & Cty. of Denver*, 960 F.2d at 1496 (citations omitted). And, courts have held that a government actor’s official conduct taken to injure in a way that cannot reasonably be justified by any government interest most likely shocks the conscience. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998). “Whether the conduct

shocks the conscience is an objective test, based on the circumstances, rather than a subjective test based on the government actor’s knowledge.” *Peña v. Greffet*, 922 F. Supp. 2d 1187, 1227 (D.N.M. 2013).

5.1(a)(1) Defendants increased the danger to Plaintiffs by conducting the sweeps.

Defendants’ actions in displacing Plaintiffs encampments was in direct contravention of CDC guidance⁷⁵ that unequivocally stated that local officials, like Defendants, should not displace encampment residents unless “individual housing options” are available.⁷⁶ Defendants swept Plaintiffs without providing individual housing options.

There is also unrebuttable evidence that (1) homeless individuals are more susceptible to contracting (and becoming seriously ill from) COVID-19, *supra* **Section 3.3**; (2) the sweeps increase the risk of homeless individuals contracting (and becoming seriously ill from) COVID-19, *supra* **Section 3.6**; and (3) warehousing in congregate shelters poses a significantly heightened risk of COVID-19 contraction to Plaintiffs, *supra* **Section 3.7-3.8**. Defendants swept Plaintiffs placing them at risk and did so with the aim of forcing them into congregate shelters. It can hardly be argued that taking Plaintiffs’ only shelter, in the middle of a pandemic, does not expose them to greater risk of contracting COVID-19.

5.1(a)(2) Plaintiffs are part of a limited and specifically definable group, homeless individuals, that were exposed to an increased risk of contracting COVID-19 by Defendants’ actions.

⁷⁵ This Court can, and should, take judicial notice of the CDC guidance regarding COVID-19. *See Wright v. Hayden*, No. 5:08CV-179-R, 2009 U.S. Dist. LEXIS 26399, at *7 n.1 (W.D. Ky. Mar. 31, 2009) (taking judicial notice of the CDC guidelines for the transmission of HIV); *Seddens v. McGinnis*, No. 91-1500, 1992 U.S. App. LEXIS 17945 (7th Cir. July 24, 1992) (taking judicial notice of “recent federal publications stating that AIDS cannot be transmitted through non-sexual social contact”).

⁷⁶ Coronavirus Disease 2019 (COVID-19): Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>.

As demonstrated, *supra* **Section 3.3**, homeless individuals are more susceptible to contracting (and becoming seriously ill from) COVID-19. And, the CDC has determined that homeless individuals are more susceptible to being infected with COVID-19.⁷⁷ Numerous courts have recognized this fact since the pandemic began. *See e.g., Diego A. A. v. Decker*, Civil Action No. 20-4337(MCA), 2020 U.S. Dist. LEXIS 123345, at *9 (D.N.J. July 14, 2020) (relying on CDC guidance on COVID-19 that certain populations are also at higher risk of contracting COVID-19 or developing severe symptoms, “including... those who are homeless”); *Doe v. Barr*, No. 20-cv-02141-LB, 2020 U.S. Dist. LEXIS 64459, at *2-4 (N.D. Cal. Apr. 12, 2020); *Renat T. v. Decker*, Civil Action No. 20-4658 (MCA), 2020 U.S. Dist. LEXIS 119444, at *6 (D.N.J. July 8, 2020). Homeless individuals, and specifically unsheltered homeless individuals residing in encampments, are a limited and specifically definable group that have been exposed to an increased risk of contracting, and becoming seriously ill with, COVID-19 by the sweeps.

5.1(a)(3) Defendants’ conduct put Plaintiffs at substantial risk of serious, immediate, and proximate harm.

Applying the Supreme Court’s reference to whether “society considers the risk . . . to be so grave[,]” *Helling v. McKinney*, 509 U.S. 25, 36 (1993), results in the inexorable conclusion that COVID-19 poses a serious risk of harm to Plaintiffs. To conclude that COVID-19 poses a risk of serious harm, the Court need look no further than the drastic way society has been reshaped in a matter of months. Businesses and schools are closed. Travel is restricted. Even this Court’s own operations have been dramatically changed by COVID-19 in response to the well-

⁷⁷ Centers For Disease Control and Prevention, *Groups At Risk For Severe Illness* (April 2, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last visited Apr. 10, 2020).

known fact that “gatherings of people pose a threat to public health and safety[.]”⁷⁸ The declarations of emergency from nearly every level of government is strong evidence COVID-19 is a risk that society considers to be grave. In declaring a national emergency on March 13, 2020, President Trump proclaimed that “[t]he spread of COVID-19 within our Nation’s communities threatens to strain our Nation’s healthcare systems.”⁷⁹

For these and other reasons, courts unanimously agree that COVID-19 poses a risk of serious harm. *See Carranza v. Reams*, No. 20-cv-00977-PAB, 2020 U.S. Dist. LEXIS 82299, at *22-23 (D. Colo. May 11, 2020) (holding that “COVID-19 is a potentially deadly disease that has led to unprecedented measures around the world to stop its spread” and “presents some risk of harm to all individuals[.]”); *see also Basank*, 2020 WL 1481503, *3 (citing *Stephens*, 2020 WL 1295155, at *2; *United States v. Garlock*, No. 18-cr-418 (VC), 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020)); *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Case No. 84230 (N.J. March 22, 2020).⁸⁰

5.1(a)(4) Defendants’ actions were deliberately indifferent.

⁷⁸ Court Operations Under The Exigent Circumstances Created By COVID-19, *District Court General Order 2020-16*, available at: <http://www.cod.uscourts.gov/CourtOperations/COVID-19Guidance.aspx>.

⁷⁹ Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), available at <https://www.whitehouse.gov/presidentialactions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

⁸⁰ This Court also need look no further than the consensus among federal courts that exposure to tuberculosis — a less severe disease, at least in terms of mortality rate — is a “serious harm” for Eighth Amendment purposes. *See, e.g., Jeffries v. Block*, 940 F. Supp. 1509, 1514 (C.D. Cal. 1996) (citing the determination of the California Legislature that “tuberculosis is a serious contagious disease, which presents a serious risk to inmate health”); *cf. Brown v. District of Columbia*, 514 F.3d 1279, 1285 (D.C. Cir. 2008) (concluding, under the slightly different deliberate indifference to “serious medical needs” test, that gallstones were “easily” in the “category of serious medical needs,” a point conceded by the District of Columbia)

Mayor Hancock admitted that he, and Denver, knew “what the CDC guidelines say” prior to the Lincoln Park sweep.⁸¹ Courts have held that deliberately ignoring medical guidelines, and specifically CDC guidance, is persuasive authority of deliberate indifference. For example, in *Ferguson v. Bd. of Cty. Comm’rs*, the court relied on CDC information that “MRSA is contagious, spread by having contact with individuals or objects touched by infected individuals, and is ‘most likely to be spread where people are in close contact with others’” in holding that plaintiffs properly alleged claims of deliberate indifference when they were held in a cell with high levels of MRSA. No. CV 11-1001 WPL/CG, 2013 U.S. Dist. LEXIS 202824, at *54 (D.N.M. Apr. 2, 2013).⁸² And, the Tenth Circuit, *Mata v. Saiz*, held that “[w]hile published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison health care [worker] knew of a substantial risk of serious harm.” 427 F.3d 745, 757-59 (10th Cir. 2005) (citing *Howell v. Evans*, 922 F.2d 712, 719 (11th Cir. 1991)) (stating that “contemporary standards and opinions of the medical profession also are highly relevant in determining what constitutes deliberate indifference to medical care.”). The Tenth Circuit relied on established medical guidelines in holding that plaintiff had demonstrated evidence of deliberate indifference. *Id.* at 758-59.

Moreover, in *Hernandez v. Cty. of Monterey*, the Court relied on CDC guidelines in granting a preliminary injunction based on a jail’s failure to adequately stop the spread of tuberculosis in its facility. 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015). In so holding, the Court stated that “known noncompliance with generally accepted guidelines for inmate health” such as the CDC guidelines related to tuberculosis, “strongly indicates deliberate indifference to a

⁸¹ Full update from Mayor Hancock on Denver’s COVID-19 response, 9NEWS, 24:45-24:50, available at: <https://www.9news.com/video/news/health/coronavirus/denver-mayor-hancock-full-update-coronavirus-july-31/73-73c2f1e2-5ed8-4a96-bbd7-2578a3e4fbf5>.

⁸² The court cited to: *MRSA Infections: Causes of MRSA Infections*, CENTERS FOR DISEASE CONTROL AND PREVENTION (August 9, 2010), <http://www.cdc.gov/mrsa/causes/index.html>.

substantial risk of serious harm” and, therefore, “[a]t least since the CDC released its guidelines.... Defendants’ policies and practices fell below the constitutional standard of care [because] Defendants have known about the risks of harm but have not changed their practices.” *Id.* The CDC has released guidance outlining specific actions not to take during the pandemic that Defendants have purposefully disregarded.

In addition to the CDC guidance in this case, there was mounting evidence, in the form of prevalence testing, that encampments were objectively safer for homeless individuals, in that their likelihood of contracting COVID-19 was significantly less in an encampment versus a congregate shelter. Denver itself, through its public health department, had conducted this prevalence testing and, therefore, knew the increased risk to homeless individuals that being in congregate shelters posed.⁸³ Despite this, Denver specifically attempted to force Plaintiffs into shelter through the sweep; this is evidenced by the fact that Denver had buses at the sweeps in an attempt to push those within the encampment into congregate shelters. **Exhibit 4**, *Declaration of Terese Howard*, ¶ 45, 57.

Ultimately, this is not a case where Defendants have simply failed to act. It is a case where they affirmatively took actions that go against the guidance of the single most relied-upon authority in this country as to how to respond to the COVID-19 pandemic. This shows that Defendants knew of the risk of conducting sweeps during COVID-19, but recklessly disregarded that risk. This is textbook deliberate indifference.

5.1(a)(5) Defendants’ actions shock the judicial conscience.

⁸³ *Surveillance Testing Pilot To Establish Potential COVID-19 Prevalence Among People Experiencing Homelessness In Denver*, COLORADO COALITION FOR THE HOMELESS, available at: <https://www.coloradocoalition.org/sites/default/files/2020-05/Prevalence%20of%20COVID-19.pdf>; *Surveillance Testing Pilot To Establish Potential COVID-19 Prevalence Among People Experiencing Homelessness Who Utilize Denver Shelters*, COLORADO COALITION FOR THE HOMELESS, available at: https://www.coloradocoalition.org/sites/default/files/2020-06/shelter%20testing_final_0.pdf.

Conducting a sweep of those who have nowhere else to go, in the midst of a pandemic, is heartless. Defendants' actions in sweeping Plaintiffs in direct contravention of public health guidelines is a "course of proceeding by agents of government... [that] is bound to offend even hardened sensibilities." *Rochin v. California*, 342 U.S. 165, 172 (1952). It is conduct that "[affords] brutality the cloak of law." *Id.* at 173. It certainly "shocks the conscience" and is so "brutal" and "offensive" that it does not comport with traditional ideas of decency. *Id.* at 172; *see also Breithaupt v. Abram*, 352 U.S. 432, 435 (1957). Defendants, after deliberation, actively chose to disregard CDC guidance and displace encampments through mass sweeps. This is judicial conscience-shocking behavior. *Perez v. Unified Gov't of Wyandotte Cty./Kan. City*, 432 F.3d 1163, 1166 (10th Cir. 2005) (quoting *Lewis*, 523 U.S. at 851) (holding that "when a government official has enough time to engage in 'actual deliberation,' conduct that shows 'deliberate indifference' to a person's life or security will shock the conscience and thereby violate the Fourteenth Amendment").

And, this Court would not be the first to find such treatment of homeless residents, during COVID-19, to be conscience-shocking. In *La All. for Human Rights v. City of L.A.*, the court held that the City of Los Angeles had violated its homeless resident's Fourteenth Amendment rights by failing to provide adequate shelter or alternative housing options and, therefore, "essentially" forcing homeless individuals to camp under dangerously polluted highway overpasses. No. LA CV 20-02291-DOC-KES, 2020 U.S. Dist. LEXIS 90979, at *12-15 (C.D. Cal. May 22, 2020) (vacated on other grounds). The Court held that indifference to the obvious health problems associated with the location of these encampments, particularly during the COVID-19 pandemic, demonstrated the City's deliberate indifference and that such indifference was judicial conscience-shocking. *Id.* Here, Denver's behavior is even more

egregious. Denver is not just allowing an encampment to exist in a dangerous location. It is *affirmatively* taking action to increase the risk to Plaintiffs by sweeping them in contravention of known CDC guidance.

Finally, any argument that the sweeps serve an important or substantial public health and safety interest must fail. The CDC guidance demonstrates that sweeps, during the pandemic, are a significant detriment to public health and safety. And if Defendants' aim was to push Plaintiffs into homeless shelters, that goal would be detrimental to public health and safety. *See Denbow v. Me. Dep't of Corr.*, No. 1:20-cv-00175-JAW, 2020 U.S. Dist. LEXIS 100003, at *25 (D. Me. June 8, 2020) (holding that release of incarcerated, homeless individuals during the COVID-19 pandemic was inappropriate, in part, because release to “[h]omeless shelters [is] not appropriate because of documented outbreaks of COVID-19 in homeless shelters”); *Elmsford Apartment Assocs., LLC v. Cuomo*, No. 20-cv-4062 (CM), 2020 U.S. Dist. LEXIS 115354, at *53 (S.D.N.Y. June 29, 2020) (upholding eviction moratorium because it served the substantial government interest in “avoid[ing] crowding in... homeless shelters during an ongoing public health emergency). It is indisputable “that the most effective way of preventing [COVID-19] infection is avoiding interaction with those who are infected—more specifically, not touching them or the things they touch, and not breathing the air they breathe.” *Essien v. Barr*, Civil Action No. 20-cv-1034-WJM, 2020 U.S. Dist. LEXIS 72422, at *14-15 (D. Colo. Apr. 24, 2020).

For example, in *Auracle Homes, LLC v. Lamont*, a federal court upheld Connecticut's eviction moratorium as constitutional because, in part, because it served the substantial government interest in “prevent[ing] individuals from being evicted, becoming homeless and having to live in shelters, or having to double up on housing situations, which has a real or substantial relation to the public health crisis that has gripped our state and nation[.]”*Id.*, at *22.

In doing so, the Court also took into account the demonstrated fact that the eviction moratorium reduced “the exposure to the virus” because it prevented those evicted from “entering homeless shelters that lack the ability to house all their residents in a safe manner during a pandemic, and either exposing or being exposed to the coronavirus in that setting[.]”*Id.*, at *26.⁸⁴ This precedent is in line with real-world facts known by Defendants: the prevalence of COVID-19 among homeless residents of encampments is *significantly* lower than that of homeless individuals residing in congregate shelters. *See supra* **Section 3.8**. Sweeping Plaintiffs, whether in an attempt to push them into congregate shelters or not, does a disservice to public health and safety.

Defendants had myriad other options if there were, in fact, public health and safety concerns about the encampment. They could have provided hygiene supplies, as the CDC recommends, to encampment residents. They could have provided restrooms and trash services to encampment residents. They could have secured one of the hundreds, and possibly thousands, of vacant hotel rooms in this city to house individuals until the pandemic subsides, like other cities have done. Instead, Defendants chose the path of most cruelty. They chose to seize and destroy the only belongings of Denver’s growing homeless population. For what reason? What interest could possibly be served by destroying tents and sleeping bags and medication and photographs of loved ones? How did that help those staying at the encampment? How did it help the community, which is now exposed to a greater risk of COVID-19? Plaintiffs believe that there is no rational answer to these questions and, therefore, this Court should find that Defendants’ actions shock the judicial conscience.

⁸⁴ The Court also relied on the fact that “[t]he eviction moratorium has helped prevent a disastrous increase in homelessness and virus exposure that would disproportionately impact renters of color.” *Auracle Homes, LLC v. Lamont*, No. 3:20-cv-00829 (VAB), 2020 U.S. Dist. LEXIS 141500, at *54 (D. Conn. Aug. 7, 2020)

5.1(b) Defendants violated Plaintiffs' Fourth Amendment rights.

The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]” U.S. Const. amend IV. The Fourth Amendment “protects two types of expectations, one involving ‘searches,’ the other ‘seizures.’ . . . A ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

5.1(b)(1) Plaintiffs have a possessory interest in their unabandoned property.

Fourth Amendment protections attach to unattended property and the Supreme Court has clearly held that an individual has a possessory interest in unattended personal property located in a public area. *Soldal v. Cook Cty.*, 506 U.S. 56, 63-64 (1992) (citation omitted). It is well-established that “a possessory interest is all that is needed for the Fourth Amendment’s reasonableness requirement to apply to a *seizure*.” *United States v. Paige*, 136 F.3d 1012, 1021 (5th Cir. 1998); *Lenz v. Winburn*, 51 F.3d 1540, 1550 n.10 (11th Cir. 1995) (“It is true that a possessory interest is all that is needed for the Fourth Amendment’s reasonableness requirement to apply to a *seizure*.”) (citing *Soldal v. Cook County*, 506 U.S. 56 (1992); *Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994) (“[O]ur finding that [plaintiff] had no reasonable expectation of privacy in the house at 4174 Dunn Avenue does not affect our conclusion that [plaintiff] has standing to challenge the seizure of her property.”)).

Defendant Denver has previously conceded that Plaintiffs “have a property interest in the sorts of items” that were seized in the sweeps at issue in this case. *Lyall v. City of Denver*, Civil Action No. 16-cv-2155-WJM-CBS, 2018 U.S. Dist. LEXIS 48846, at *37 (D. Colo. Mar. 26, 2018). And numerous courts have held that “[t]he Fourth Amendment protects . . . homeless

individuals' retreats, regardless how ramshackle." *Cobine v. City of Eureka*, No. C 16-02239 JSW, 2016 U.S. Dist. LEXIS 58228, 2016 WL 1730084, at *4 (N.D. Cal. May 2, 2016); *Lavan v. City of L.A.*, 693 F.3d 1022, 1030 (9th Cir. 2012) ("[B]y seizing and destroying [homeless individuals'] unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Appellees' possessory interests in that property"); *Pottinger v. Miami*, 810 F. Supp. 1551, 1570-73 (S.D. Fla. 1992) ("In sum, the property of homeless individuals is due no less protection under the fourth amendment than that of the rest of society."); *See v. City of Fort Wayne*, No. 1:16-cv-00105-JVB-SLC, 2016 U.S. Dist. LEXIS 185598, at *21 (N.D. Ind. June 16, 2016) ("The personal property of See, a homeless person, is entitled to Fourth Amendment protection."); *Acosta v. City of Salinas*, No. 15-cv-05415 NC, 2016 U.S. Dist. LEXIS 50515, 2016 WL 1446781, at *5 (N.D. Cal. April 13, 2016).

Any argument that Plaintiffs are not entitled to the Fourth Amendment's protections for seizure of their property simply because they are homeless individuals is baseless. In *Lavan v. City of L.A.*, the Ninth Circuit rejected such an argument. 693 F.3d 1022, 1028-29 (9th Cir. 2012). The *Lavan* court began by noting that, under the Fourth and Fourteenth Amendments, plaintiffs merely need to show that they have a possessory interest in their property, and not also a reasonable expectation of privacy, to enjoy the protections of the Fourth and Fourteenth Amendments. *Id.* The Court found that the homeless plaintiffs had a possessory interest in their belongings, which included shopping carts filled with "personal identification documents, birth certificates, medications, family memorabilia, toiletries, cell phones, sleeping bags and blankets." *Id.* at 1025. Therefore, the Court held that seizure of these belongings by City officials was subject to the Fourth Amendment reasonableness standard. *Id.* at 1028-29. Importantly, the Court noted that

Even if we were to assume, as the City maintains, that Appellees violated LAMC § 56.11 [which provides that “No person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk”] by momentarily leaving their unabandoned property on Skid Row sidewalks, the seizure and destruction of Appellees’ property remains subject to the Fourth Amendment’s reasonableness requirement. Violation of a City ordinance does not vitiate the Fourth Amendment’s protection of one’s property. Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment.

Id. at 1029.

Every violation of the trespassing or curfew ordinance does not result in the seizure of the violator’s property. Defendant officials do not rummage through the pockets of those violating curfew to take their belongings. Instead, they issue a citation and move on. Only Plaintiffs, because they are homeless individuals, receive this treatment from Defendant. Simply because Plaintiffs do not have private property on which to store their belongings does not mean that they are any less their belongings. For example, Defendant could not simply tow a car parked on the street, from a non-tow-away zone, when the owner does not have a garage to store. Even if that hypothetical person receives a ticket, Defendant would not tow away the vehicle. As every garage-less resident of Denver’s Capitol Hill neighborhood knows, when she or he leaves her or his car on the street during the first Thursday of the month, and consequently violates the street-sweeping notice, her or his car is not impounded. It is certainly not sent to the salvage yard to be crushed. *See Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th Cir. 2005 (holding that, even though the plaintiffs admitted that they had no reasonable expectation of privacy in their parked car, their possessory interest in the car allowed them to enjoy the protections of the Fourth Amendment and that “[t]he Fourth Amendment protects against unreasonable interferences in property interests regardless of whether there is an invasion of privacy.”). Plaintiffs ask that this Court follow *Lavan* and hold that Plaintiffs had a possessory interest in their attended and

unattended, but unabandoned, property and that Defendants' seizure of their property implicates the Fourth Amendment. Defendants' customary seizure of Plaintiffs' property during the sweeps implicates the Fourth Amendment.

5.1(b)(2) Defendants unreasonably seized, discarded, and destroyed Plaintiffs' property.

Seizures of property are unlawful if they are unreasonable. *Jacobsen*, 466 U.S. at 113. A seizure is deemed unreasonable if the government's legitimate interest in the search or seizure does not outweigh the individual's interest in the property seized. *See Edmundson v. City of Tulsa*, 152 F. App'x. 694, 698 (10th Cir. 2005) ("In determining whether a government seizure violates the Fourth Amendment, the seizure must be examined for its overall reasonableness."). Numerous courts have held that seizing homeless individuals' property, whether attended or unattended, without notice and discarding (or destroying) it is unreasonable and violates the Fourth Amendment. *See e.g., Lavan*, 693 F.3d at 1029; *Acosta*, 2016 U.S. Dist. LEXIS 50515, at *5; *See*, 2016 U.S. Dist. LEXIS 185598, at *21; *Pottinger*, 810 F. Supp. at 1570-73; *Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 U.S. Dist. LEXIS 93464, at *94 (E.D. Cal. Dec. 8, 2006). Included among these courts is at least one court in this District. *See Lyall*, 2018 U.S. Dist. LEXIS 48846, at *43.

"The destruction of property by state officials poses as much of a threat, if not more, to people's right to be secure in their effects as does the physical taking of them." *San Jose Charter of Hells Angels Motorcycle Club v. San Jose*, 402 F.3d 962, 975 (9th Cir. 2005) (internal quotation marks and citations omitted). The government cannot simply destroy property that it deems is in violation of some law or ordinance because "[w]ere it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment." *Lavan*, 693 F.3d at 1029.

The allegations in the Complaint, along with the submitted declaration of Terese Howard, demonstrates that it was pervasive for Defendants to conduct sweeps of the homeless without notice, wherein any property Plaintiffs could not carry was discarded (or summarily destroyed). And no one was arrested during these sweeps, so these seizures of Plaintiffs property cannot be accounted for as incident to arrest.⁸⁵

It was also customary for Defendants who seized and discarded the property of Plaintiffs outside of their presence to not leave any notice that the property had been seized, who had seized it, and whether it could be retrieved. Moreover, even when property was seized by Defendants under the pretense that it would be stored and made available for retrieval, this pretense turned out to be false and Plaintiffs were told that their property had been destroyed.⁸⁶

Adding to the unreasonableness of Defendants seizure of Plaintiffs' property is that the discretion of what property was trash (and should be summarily destroyed) and what property

⁸⁵ Even if the Court were to assume, that Plaintiffs had violated the obstruction ordinance by neatly keeping their property on city sidewalks (a conclusion that is contradicted by the evidence), the seizure and destruction of Plaintiffs' property remains subject to the Fourth Amendment's reasonableness requirement. Violation of a city ordinance does not vitiate the Fourth Amendment's protection of one's property. Indeed, the Supreme Court has recognized protected possessory interests even in contraband. For example, in *Jacobsen*, the Court found that the government's testing of illegal cocaine (which resulted in the destruction of a portion of the cocaine) was a "seizure" that "affect[ed] respondents' possessory interests protected by the [Fourth] Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation of possessory interests into a permanent one." 466 U.S. at 124-125. Moreover, the Fourth Amendment protected the cocaine from unreasonable seizures despite the lack of any reasonable expectation of privacy in concealing the contraband nature of the powder. *See id.* at 123 ("Congress has decided . . . to treat the interest in 'privately' possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine . . . compromises no legitimate privacy interest."). Here, by seizing (and discarding or destroying) Plaintiffs' unabandoned property, Defendants meaningfully interfered with Plaintiffs' possessory interests in that property. No more is necessary to trigger the Fourth Amendment's reasonableness requirement.

⁸⁶ *CONFIRMED: Denver lied, they stole everything from all but 3*, YOUTUBE, available at: <https://youtu.be/U2ooG4ukzEg>.

should be stored was completely in the discretion of low-level officials (and in contravention of the *Lyll* settlement agreement).

Furthermore, Defendants' seizure of Plaintiffs property has been (and continues to be) particularly unreasonable because of the heightened possessory interest Plaintiffs, as homeless individuals, have in their possessions. The loss of personal effects may pose a minor inconvenience for many citizens, but "the loss can be devastating for the homeless." *Pottinger*, 810 F. Supp. at 1559. As such, courts have recognized that homeless persons "have a compelling ownership interest in their personal property, especially given the vulnerability of [] homeless residents[.]" *Acosta*, 2016 U.S. Dist. LEXIS 50515, at *8 (alteration in original) (citation and internal quotation marks omitted); *see also Lavan*, 693 F.3d at 1031-32; *Martin v. City & Cty. of Honolulu*, No. 15-00363 HG-KSC, 2015 U.S. Dist. LEXIS 135071, 2015 WL 5826822, at *8 (D. Haw. Oct. 1, 2015). 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, such as photographs of deceased family members. *See Kincaid*, 2006 U.S. Dist. LEXIS 93464, at *33. 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. *Id.* Other courts balancing the hardships in similar cases have further observed that the "destruction of the property of the homeless has a devastating effect on the dignity of homeless people, who live a precarious existence and then are knocked down even lower from this destruction." *Id.*

Given the totality of the above-outlined actions by Defendants, the seizure of Plaintiffs property violated the Fourth Amendment. *See Jacobsen*, 466 U.S. at 124-125 ("[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of

execution unreasonably infringes possessory interests protected by the Fourth Amendment’s prohibition on ‘unreasonable seizures.’”). The government cannot simply destroy property because “[w]ere it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment.” *Lavan*, 693 F.3d at 1029. Ultimately, it is clear that Defendants violated Plaintiffs’ Fourth Amendment rights by unreasonably seizing and discarding (or destroying) their unabandoned property.

5.1(c) Defendants violated Plaintiffs’ Fourteenth Amendment procedural due process rights.

The Fourteenth Amendment provides that no government actor shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. “Any significant taking of property by the State is within the purview of the Due Process Clause.” *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

Application of this prohibition requires the familiar two-stage analysis: We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment’s protection of “life, liberty or property”; if protected interests are implicated, we then must decide what procedures constitute “due process of law.”

Ingraham v. Wright, 430 U.S. 651, 672 (1977); *see also Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1219 (10th Cir. 2006).

The Supreme Court has “made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.” *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972). As demonstrated *supra*, Plaintiffs had a property interest in their possessions, both attended and unattended. *See also Lavan*, 693 F.3d at 1031-33 (“[T]his case concerns the most basic of property interests encompassed by the due process clause: [homeless individuals’] interest in the continued ownership of their personal possessions.”); *Hooper v. City of Seattle*, No. C17-0077RSM, 2017 U.S. Dist. LEXIS 20829, at

*23-24 (W.D. Wash. Feb. 14, 2017) (“The Court further recognizes that because homeless persons’ unabandoned possessions are “property” within the meaning of the Fourteenth Amendment, the City must comport with the requirements of the Fourteenth Amendment’s due process clause if it wishes to take and destroy them.”).

When Defendants seized Plaintiffs’ property, they violated Plaintiffs’ due process rights in four separate ways: (1) Defendants provided no (or deficient) notice prior to seizing their property, (2) Defendants failed to provide any prior opportunity for Plaintiffs to contest the seizure of their property, (3) Defendants summarily discarded (and destroyed) Plaintiffs’ property without any process for challenging the discarding (or destruction), and (4) post-deprivation, Defendants did not provide an adequate process for Plaintiffs to challenge the seizure of their property or, alternatively, to retrieve their property.

5.1(c)(1) Defendants failed to provide Plaintiffs constitutionally adequate notice prior to seizing their property.

If there is a basic tenet of due process it is that “the government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking.” *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008). “This simple rule holds regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart.” *Lavan*, 693 F.3d at 1032. Supreme Court precedent “establish[es] the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.” *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993).

Customarily, Defendants provided no notice to Plaintiffs prior to seizing their property during the sweeps. And, specifically, during at least the Lincoln Park and Morey Middle School sweeps, Defendants *actively chose* not to provide notice for political reasons. The failure to

provide any notice prior to seizure of the unabandoned property, even when that property belongs to homeless individuals, violates due process guarantees. *See Lavan*, 693 F.3d at 1032.

5.1(c)(2) Defendants failed to give Plaintiffs an opportunity to be heard prior to seizing their property.⁸⁷

“The root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest” *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985).⁸⁸ Exceptions to this rule are only justified in “extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.” *Fuentes*, 407 U.S. at 82 (quotations omitted). In *Fuentes*, the Supreme Court held that the loss of kitchen appliances and household furniture was significant enough to warrant a pre-deprivation hearing. 407 U.S. at 70-71. And in *Connecticut v. Doehr*, 501 U.S. 1 (1991), the Court held that a state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional, in the absence of extraordinary circumstances, even though the attachment did not interfere with the owner’s use or possession and did not affect, as a general matter, rentals from existing leaseholds. The Ninth Circuit in *Stypmann v. City & County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977), held that an ordinance regarding the towing and storage of illegally parked cars was unconstitutional, in part because it provided that someone who could not pay the towage fee could obtain a post-deprivation hearing.

⁸⁷ Due process requires more than the availability of post-deprivation state law remedies where the actions of officials are authorized (as they are here) by the customs, policies, and practices of a government. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Easter House v. Felder*, 879 F.2d 1458, 1467 (7th Cir. 1989).

⁸⁸ *See also Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (“In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.”).

The seizure of a homeless individuals' property produces a far greater deprivation than the loss of furniture or a vehicle. Homeless individuals' property, which includes items necessary for survival on the streets (such as blankets, tents, tarps, and jackets), is most analogous to real property, which the Supreme Court has held cannot be seized (absent exigent circumstances) without first holding a pre-deprivation hearing. *See James Daniel Good Real Prop.*, 510 U.S. at 54; *see also* 26 U. S. C. §§ 6212, 6213, 6851, 6861 (prohibiting the government from levying upon a deficient taxpayer's property without first affording the taxpayer notice and an opportunity to a hearing).

Plaintiffs were not provided with a pre-deprivation hearing prior to the seizure and discarding (or destruction) of their property during at least the Lincoln Park, Morey Middle School, and South Platte River sweeps. Defendants decision to forego any process before permanently depriving Plaintiffs of protected property interests is especially troubling given the vulnerability of its homeless residents: "For many of us, the loss of our personal effects may pose a minor inconvenience. However, . . . the loss can be devastating for the homeless." *Pottinger*, 810 F. Supp. at 1559. Denver's failure to provide pre-deprivation process to Plaintiffs violated (and continues to violate) their Fourteenth Amendment Due Process rights.

5.1(c)(3) Defendants' summary disposal (or destruction) of Plaintiffs property violated Plaintiffs' due process rights.

"[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan*, 455 U.S. at 434. The incontrovertible evidence in the record demonstrates that Defendants customarily disposed of (and destroyed) Plaintiffs' property after seizing it, without providing Plaintiffs with any opportunity to be heard. Allowing such egregious action would "create an exception to the requirements for belongings of homeless persons," *Lavan*, 693 F.3d. at 1039, and relegate them

to second-class citizens which other courts have rejected. *See id.*; *see also See*, 2016 U.S. Dist. LEXIS 185598, at *21; *Pottinger*, 810 F. Supp. at 1570-73. Defendants' summary destruction of Plaintiffs' property is blatantly unconstitutional.

5.1(c)(4) Defendants did not provide Plaintiffs with an adequate procedure for challenging the seizure of their property, or to retrieve their property, after it had been taken.

Due process requires law enforcement "to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return." *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999). Customarily, Defendants did not provide any way for Plaintiffs to challenge the seizure of, or retrieve, their belongings post-deprivation. That is because they summarily destroyed Plaintiffs' belongings. For example, in *Russell*, 2013 U.S. Dist. LEXIS 169114, at *27, the court found that a system that provided for a post-seizure hearing procedure was unconstitutional. Defendants do not even have a post-deprivation procedure; instead, Defendants seize property and destroy it, making this case analogous to *Lavan*, where Los Angeles officials seized homeless individuals' property and summarily destroyed them with no post-deprivation process. Defendants, like Los Angeles, "failed utterly to provide any meaningful opportunity to be heard. . . after it seized and destroyed property belonging to [the] homeless population." 693 F.3d. at 1033; *see also See*, 2016 U.S. Dist. LEXIS 185598, at *21 ("This lack of a post-deprivation process where homeless persons have the opportunity to reclaim seized property, when coupled with just a 48-hour advance notice of a cleanup, raises serious due process questions, particularly where there is no designation of a "safe area" to which homeless persons could move their property during a cleanup[.]"). By not providing Plaintiffs with a means to retrieve their property, Defendants violated their Fourteenth Amendment Due Process rights.

5.1(d) Defendants violated Plaintiffs procedural and substantive due process rights because the *Lyall* Settlement created a property right.

Generally, “[a] person’s interest in a benefit is a “property” interest for due process purposes if there are . . . rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.”⁸⁹ *Curtis Ambulance of Fla., Inc. v. Bd. of County Comm’rs*, 811 F.2d 1371, 1375-76 (10th Cir. 1987) (quoting *Perry v. Sindermann*, 408 U.S. 593, 601 (1972)); *see also Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). The Tenth Circuit has held that valid contracts with the government, that provide for substantive rights, constitute a property interest for purposes of due process. *See Robbins v. United States BLM*, 438 F.3d 1074, 1083-85 (10th Cir. 2006); *see also S. Disposal, Inc. v. Tex. Waste Mgmt.*, 161 F.3d 1259, 1265 (10th Cir. 1998) (noting that “valid contracts may constitute a property interest for purposes of due process.”). The *Lyall v. Denver* settlement agreement certainly provided Plaintiffs with certain substantive rights. First, it provided that Defendant Denver would not seize their property without notice. Second, it provided that Defendant Denver would not discard certain property if it did seize Plaintiffs’⁸⁹ property. Defendant Denver violated both

⁸⁹ The fact that plaintiffs who acquired property rights by the settlement were organized as a certified class cannot excuse repudiation of the rights of the individual members of that class. *See Van Gemert v. Boeing Co.*, 590 F.2d 433, 439 (2d Cir. 1978) (en banc) (“each plaintiff has a present vested interest in the class recovery”), *aff’d*, 444 U.S. 472 (“The members of the class, whether or not they assert their rights, are at least the equitable owners of their respective shares in the recovery.”). Class actions are predicated on the notion that the interests of all class members are fully represented through the class representatives and through class counsel. It is as if each sues individually in a consolidated action. All party-members, including absent members and future members, are equally bound by the strictures of the class action judgment. *See, e.g., In re Joint Eastern & Southern District Asbestos Litigation (Johns-Manville Corporation)*, 878 F. Supp. 473 (E. & S.D.N.Y. 1995); *In re “Agent Orange” Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984). In the instant case all past, present, and future class members relinquished valuable rights in return for Defendant Denver’s provision of certain rights under the settlement. Each class member is entitled to the full legal benefits which flow to him, her, or it from the judgment.

of these substantive rights conferred by the *Lyall v. Denver* settlement agreement, and did so without providing Plaintiffs without notice or an opportunity to be heard. These actions violate Plaintiffs' Fourteenth Amendment rights. *Cty. of Suffolk v. Long Island Lighting Co.*, 14 F. Supp. 2d 260, 264-66 (E.D.N.Y. 1998) (holding that modification of consent decree that deprived Plaintiffs of a property right without due process of law violated the Fourteenth Amendment); *Transam Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, No. 14-2015-CM, 2016 U.S. Dist. LEXIS 94682, at *7-9 (D. Kan. July 19, 2016) (holding that plaintiff had a vested property interest in compliance with a settlement agreement); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985), *Arnett v. Kennedy*, 416 U.S. 134, 166, (1974).

5.1(e) Plaintiffs can likely show that Defendants Denver and Hancock violated the Lyall Settlement Agreement.

A claim for breach of contract has four elements: (1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff. *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992).

First, Plaintiffs, as class members of the *Lyall v. Denver* case, had a contract with Defendants. Second, in bargained for consideration, and in performance of the contract, Plaintiffs dismissed their claims in the *Lyall v. Denver* in exchange for a number of provisions that Defendants were required to follow.

Third, Denver failed to perform a number of the provisions of the contract. Defendants Denver and Hancock agreed that they would “give at least seven days’ notice prior to a [sweep] and shall include such language in its written protocol for [sweeps]” and that Denver “may conduct [sweeps] with less than seven days’ notice only if the City determines that a public health or safety risk exists which requires it.” Further, Denver agreed that “[i]f a [sweep] is

conducted with less than seven days' notice, the City shall provide reasonable notice of the [sweep], with the determination of reasonableness based upon the nature of the public health and safety risk present in the area." Here, Defendants Denver and Hancock failed to provide any notice simply because they feared demonstrators would show up. They had been planning the Lincoln Park sweep for weeks. There was no public health and safety reason for failing to provide notice.

Defendants Denver and Hancock also agreed that (for any sweep) it would provide a "written notice" including "[l]anguage indicating that stored property may be retrieved at no cost, without fear of arrest; A phone number for individuals to call who may have questions regarding property retrieval; The location and hours of the storage facility; The length of time that the property shall be stored at the facility and the length of time that the City shall store the property until it shall be disposed of. The City shall store any personal property that does not pose a public health or safety risk for at least 60 days." Defendants did not provide any such notice upon seizing, and destroying, Plaintiffs property.

Defendants Denver and Hancock agreed that "[p]ersonal property" seized by Defendant Denver "shall be stored for sixty days unless the property is determined by a City employee or contractor... to pose a public health or safety risk." Property that could be discarded under the Settlement Agreement includes "illegal drugs, used syringes, medical waste, and perishable food item" along with "[a]ny trash or litter, such as used napkins, dirty diapers, food wrappers or used food containers, empty cans, used Styrofoam containers or paper cups, cigarette butts" and "mattresses." However, "[a]ny items of personal property that could reasonably be assumed to have value to any person will be collected and stored. These items include: tents, sleeping bags, and any other camping equipment; backpacks, suitcases, duffle bags, and any other containers of

personal items; clothing; bicycles; phones, electronic devices, and musical instruments; and other similar identifiable items of personal property, including furniture.” The Settlement Agreement outlined that Denver’s officials were required to “take particular care to identify, collect and store sensitive personal items and documents, such as wallets and purses, prescription drugs, birth certificates, identification cards, drivers’ licenses, and health care documents.” And, the Settlement Agreement made sure to bind Defendants Denver and Hancock to the presumption that “[i]f there is any question concerning whether an item should be considered as trash or valuable property, the City will assume the property has value and it should be stored.”

Defendants seized and destroyed property that fails into nearly every category outlined above.

Fourth, by Defendants seizing Plaintiffs property without seven days’ notice, and discarding it, Denver and Hancock caused Plaintiffs damages. Their actions were a clear and knowing violation of the Settlement Agreement.

5.1(e) Denver is municipally liable for the violation of Plaintiffs’ constitutional rights.

Municipalities are “persons” subject to suit under 42 U.S.C. § 1983 for civil rights violations. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). A municipality or other local government unit is liable for constitutional torts if the alleged unconstitutional acts implicate a policy, practice, or custom of the local government. *Id.* at 690-94. A municipality, like Denver, is responsible under § 1983 when the execution of a policy or custom actually caused an injury of constitutional dimensions. *Id.* at 694; *D.T. v. Indep. Sch. Dist.*, 894 F.2d 1176, 1187 (10th Cir. 1990). To ultimately prevail on their claim against Denver, Plaintiffs must establish “(1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation.” *Myers*

v. Okla. Cnty. Bd. of Cnty. Commr's, 151 F.3d 1313, 1316 (10th Cir. 1998). As demonstrated, *supra*, Defendants have violated Plaintiffs' constitutional rights.

A policy, custom, or practice for purposes of *Monell* liability can be established in many ways, including demonstrating the existence of:

(1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions – and the basis for them – of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Bryson v. Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010) (citation and quotations omitted).

First, Defendants' actions were taken at the behest of an individual with final policymaking authority for Denver: Defendant Hancock. And, second, the evidence demonstrates that Denver had multiple customs that violated Plaintiffs' constitutional rights. The multiple unconstitutional actions undertaken at each sweep are illustrative of the customs and practices of Denver. Each sweep was a long-planned coordination of multiple agencies (including the Denver Police Department, Denver Public Works, Denver Waste Management, Denver Park Rangers, and the Denver Sheriff's Office). None of the actions taken during the sweeps was the result of an official operating outside of official custom or policy. The sweeps were systematic and the actions taken by Denver officials in the execution of the sweeps constitutes official Denver custom, policy, and practice.

5.1(e)(1) The unconstitutional actions during the sweeps are fully attributable to the final policymaker for Denver: Defendant Hancock.

A decision by municipal policymakers on a single occasion satisfies the “official policy” requirement of *Monell. Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). Where action is directed by a “final policymaker,” the municipality is equally responsible whether that action is taken only once or repeatedly. *Id.* at 484-85.⁹⁰ Here, Defendant Hancock possesses final policymaking authority in the direction of the Denver agencies in this case and, therefore, his decisions are the decisions of Denver.

“[F]inal policymaking authority is a legal issue to be determined by the court based on local and state law.” *Randle v. City of Aurora*, 69 F.3d 441, 447 (10th Cir. 1995). Defendant Hancock is mayor of Denver. Denver is a strong-mayor city and affords Defendant Hancock “all the executive and administrative powers.” Denver City Charter § 2.2.1-2. Defendant Hancock has the unfettered power to “appoint the heads of all administrative departments” and those “appointees shall hold said appointments so long as their services are satisfactory to the Mayor.” Denver City Charter § 2.2.6. The head of the DOTI, DPW, DPD, DPS, and DDPHE are appointed by the Mayor and hold office at the pleasure of the Mayor. Denver City Charter §§ 2.3.2, 2.4.2, 2.6.1, 2.6.5, 2.12.1. Defendant Hancock’s authority over the Denver officials involved in this lawsuit is unlimited and unchecked. The circumstances of Defendant’s authority make clear that he is a final policymaker. Defendant Hancock is not “meaningfully constrained by policies not of that official’s own making,” Defendant Hancock’s decisions are “final -- i.e., are [not] subject to any meaningful review,” and the decision in how to respond to the homeless encampment throughout Denver is “within the realm of [his] grant of authority” at state law. *Randle*, 69 F.3d at 448.

⁹⁰ See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736-38 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

The deliberate indifference exhibited by Defendant Hancock in conducting the sweeps in direct violation of CDC guidance, and the property and due process rights of Plaintiffs, is obvious. Defendant Hancock was on notice, by CDC guidance, that sweeping encampments would expose the inhabitants to a greater risk of contracting COVID-19. He admitted in an interview that he was aware of the CDC guidance. And, he was certainly on notice that sweeping Plaintiffs without notice, and seizing and destroying their property, was unconstitutional given the settlement agreement in *Lyall* and Judge Martinez’s order on summary judgment in that case. *See Lyall*, 2018 U.S. Dist. LEXIS 48846.

Defendant Hancock’s continued insistence on sweeping Plaintiffs, without notice, and seizing and destroying their property further demonstrates his deliberate indifference. The failure to remedy ongoing constitutional violations is “evidence of deliberate indifference on the part of a municipality.” *Layton v. Bd. of Cty. Comm’rs*, 512 F. App’x 861, 870-72 (10th Cir. 2013); *see also Bd. of the Cty. Comm’rs v. Brown*, 520 U.S. 397, 407 (1997) (“[A final policymaker’s] continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the ‘deliberate indifference’—necessary to trigger municipal liability.” (quoting *City of Canton v. Harris*, 489 U.S. 378, 390, n.10 (1989))). Defendant Hancock’s deliberate indifference has been clear. And, as a final policymaker, Defendant Hancock’s conscious disregard, alone, of the risks presented by COVID-19 and the due process and property rights of Plaintiffs is enough to support municipal liability. *Id.* at 872.

Finally, Defendant Hancock’s decision to conduct the sweeps is the “moving force” behind the violation of Plaintiffs’ constitutional rights. *Brown*, 520 U.S. at 404. His actions demonstrate a “direct causal link,” *see Brown*, 520 U.S. at 404, between Defendants’ actions and

Plaintiffs risk of catching COVID-19 and suffering serious illness or death, along with the violation of their property rights. *Layton*, 512 F. App'x at 870-72. Therefore, if this Court finds that Plaintiffs have demonstrated that they are exposed to an unreasonable and unconstitutional risk of harm from COVID-19 and have had their due process and property rights violated by the sweeps, Denver is liable because Defendant Hancock is a final policymaker.

5.1(e)(1) Denver's multiple unconstitutional customs and practices caused the violation of Plaintiffs' constitutional rights.

To show that a challenged practice is a “custom,” the practice must be so “persistent and widespread” that it “constitutes the standard operating procedure of the local governmental entity.” *Mitchell v. City & Cnty. of Denver*, 112 F. App'x 662, 672 (10th Cir. 2004) (quoting *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)) (internal quotation marks omitted). A municipal custom may also be comprised of “a series of decisions by a subordinate [governmental] official of which the supervisor [was] aware.” *Id.* (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988) (plurality opinion)). As established by the evidence, Denver has multiple unconstitutional customs and practices.

First, Denver has a custom or practice of sweeping Plaintiffs during the COVID-19 pandemic. Second, Denver has a custom and practice of seizing homeless individuals' abandoned property and summarily (or subsequently) discarding (or destroying) it. Third, Denver has a custom and practice of seizing homeless individuals' property without adequate notice or a post-deprivation process for retrieving their property. All of these customs and practices are evidenced by the declaration of Terese Howard. **Exhibit 4**, *Declaration of Terese Howard*. The continuous and systematic way that the sweeps have been conducted demonstrates the above-outlined customs and practices.

High-level Denver officials, including the Mayor, City Attorney, and Director of Public Safety, and DDPHE Executive director, were involved in the planning of the sweeps and were aware of the actions taken during the sweeps, including the above outlined customs and practices. **Exhibit 3**, *Operational Plan*. It is undisputable that each sweep was carried out in accordance with a plan that Denver itself, through its high-level officials, put into place and approved of.

5.1(e)(1) The Lincoln Park and Platte River sweeps alone demonstrates that Denver is liable.

Liability may be imposed on Denver based solely on the Lincoln Park and South Platte River sweeps, even if this Court finds that the other sweeps were constitutional. During the Lincoln Park and South Platte River sweeps over one hundred Defendants seized hundreds of items of property from Plaintiffs and summarily discarded them without providing Plaintiffs notice or an opportunity to contest the seizure in any way, which constitutes hundreds of constitutional violations. “[D]eliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a ‘highly predictable’ or ‘plainly obvious’ consequence of a municipality’s action or inaction.” *Barney v. Pulsipher*, 143 F.3d 1299, 1307-08 (10th Cir. 1998) (internal citation omitted), *superseded by statute on other grounds*; 42 U.S.C. § 1997e. Defendants sustained and willful seizures of Plaintiffs’ property during the Lincoln Park and South Platte River sweeps shows that Defendants customs, policies, and practices resulted in the violation of Plaintiffs’ constitutional rights.

Further, the Lincoln Park and South Platte River sweeps were a coordinated effort made by multiple Denver and State of Colorado agencies (including the Denver Department of Transportation and Infrastructure, Denver Police Department, Denver Park Rangers, Denver Department of Health and the Environment, Denver City Attorneys’ Office, Denver Mayor’s

Office, Colorado State Patrol, and Colorado Governor's Office) that were carried out by hundreds of State of Colorado and Denver officials and was authorized by the highest echelons of Denver's and the state of Colorado's government. These facts support Defendants' liability on the sole basis of the unconstitutionality of the Lincoln Park and South Platte River sweeps. *See Pinder v. Commissioners of Cambridge*, 821 F. Supp. 376 (D. Md. 1993) (holding that a single incident of unconstitutional conduct may serve as a basis of liability when a particular course of action is made by a municipality's authorized decision makers). *Bordanaro v. McLeod*, 871 F.2d 1151, 1156–57 (1st Cir.), *cert. denied*, 493 U.S. 820 (1989) (“While it is true that evidence of a single event alone cannot establish a municipal custom or policy, ... where other evidence of the policy has been presented and the ‘single incident’ in question involves the concerted action of a large contingent of municipal employees, the event itself provides some proof of the existence of the underlying policy or custom.”); *Lavoie v. Town of Hudson*, 740 F. Supp. 88 (D.N.H. 1990) (finding that while generally more than a single incident is necessary to establish the existence of a municipal policy, a policy may be found where other evidence of the policy has been presented and the single incident in question involves the concerted action of a large contingent of individual municipal employees); *Andujar v. City of Boston*, 760 F. Supp. 238 (D. Mass. 1991) (stating that where incident in question involves the concerted action of a large contingent of individual municipal employees, the event itself provides some proof of the existence of the underlying policy or custom).

Finally, the egregiousness of Defendants' conduct during the Lincoln Park and South Platte River sweeps is probative evidence that Defendants are liable on the sole basis of those unconstitutional sweeps. *Foley v. City of Lowell*, 948 F.2d 10, 14 (1st Cir. 1991) (“Where ... a plaintiff attempts to establish the existence of a municipal policy of deliberate indifference [to

police use of excessive force] through a concatenation of similar, but isolated, events, egregiousness is a hallmark of probative value; the more outrageous the occurrences, the more probable that a policy of tolerance was in place”); *Hodge v. Ruperto*, 739 F. Supp. 873 (S.D.N.Y. 1990) (find that although a municipal policy ordinarily may not be inferred from a single incident, particularly egregious conduct by a group of municipal officers may warrant an inference of official acquiescence even though only one unconstitutional act is alleged).

5.2 Stopping the violation of Plaintiffs constitutional rights through Defendants seizure, and summary destruction, of their property is in the public interest, prevents irreparable harm, and is consistent with the balance of the equities in this case.

Where, as here, Plaintiffs demonstrate that their constitutional rights have been violated, it follows that granting injunctive relief is in the public interest, prevents irreparable harm, and consistent with the balance of the equities in this case. ““It is always in the public interest to prevent the violation of a party’s constitutional rights.” *Awad v. Ziriox*, 670 F.3d 1111, 1131 (10th Cir. 2012). ”When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1 (2d ed. 1995)); *Elrod v. Burns*, 427 U.S. 347); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (holding that “[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm”). And, when a plaintiff has shown a substantial likelihood of the violation of her or his constitutional rights, the balance of equities weighs in favor of the plaintiff. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (citing *Awad*, 670 F.3d at 1114); *Planned Parenthood Ass’n of Utah v. Herbert*, 828 F.3d 1245, 1265 (10th Cir. 2016).

5.3 There is a strong public interest in stopping the spread of COVID-19, both among Plaintiffs and within the community.

Here, however, the public has an additional independent and overwhelming interest in preliminary relief that would require Defendants to cease taking actions that increase spread of COVID-19. It is well established that “public health” is a “significant public interest.” *See Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005). The public interest in minimizing the spread of COVID-19 is overwhelming and nearly impossible to overstate.

As noted above, COVID-19 is highly contagious and has substantially higher mortality rates than any other disease with its rate of transmission. The disease has no vaccine or cure, meaning that each new infection may result in several more individuals becoming infected. Public health experts have thus unanimously agreed that the most critical actions that can be taken are preventive measures like self-isolating and maintaining a distance of six feet from all other individuals. Should Plaintiffs continue to be swept, they are thus destined to become vectors of disease, and will inevitably infect several other (and new) fellow class members, medical care providers, and, eventually, individuals in the community. An outbreak of COVID-19 could put significant pressure on the capacity of local health infrastructure. Stopping the sweeps “furthers public health, which is a matter of public interest.” *Carranza*, 2020 U.S. Dist. LEXIS 82299, at *33; *see also Castillo v. Barr*, 2020 U.S. Dist. LEXIS 54425, 2020 WL 1502864, at *6 (C.D. Cal. Mar. 27, 2020) (noting that “[t]he public has a critical interest in preventing the further spread of the coronavirus”); *Banks v. Booth*, 2020 U.S. Dist. LEXIS 68287, 2020 WL 1914896, at *12 (D.D.C. Apr. 19, 2020).

And, finally, preventing Defendants from taking actions that the CDC has warned will spread COVID-19 significantly reduces the health and economic burden on the local community and health infrastructure at large. *Hernandez*, 872 F.3d at 996-97 (“[T]he general public’s

interest in efficient allocation of the government’s fiscal resources favors granting [relief]).

Stopping the sweeps is essential to public safety.

5.4 Plaintiffs are likely to suffer irreparable harm absent the temporary restraining order.

Plaintiffs have moved for emergency interim injunctive relief because they are vulnerable to contracting COVID-19. Given the deadliness of the disease and Plaintiffs’ lack of resources to pay for treatment of COVID-19 should they contract it, there is a substantial possibility that absent immediate relief from the Court, Plaintiffs will be infected with COVID-19 as a result of the sweeps. And Plaintiffs include individuals who are older adults or people with pre-existing medical conditions that increase the likelihood of severe illness or death if they contract COVID-19. For some of these vulnerable Plaintiffs, if they contract “Coronavirus they have up to a 20 percent chance of death, greater than the odds of losing a game of Russian roulette.” *Coreas v. Bounds*, Civil Action No. TDC-20-0780, 2020 U.S. Dist. LEXIS 59211, at *42 (D. Md. Apr. 3, 2020).

Courts have expressed no hesitation in finding that risk of contracting COVID-19 constitutes irreparable harm. In *Basank*, 2020 WL 1481503, the Court observed that because “[e]ach of the jails where a Petitioner is being housed has reported confirmed cases of COVID-19,” the “risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in . . . detention constitutes irreparable harm warranting a TRO.” *Id.* at *4. And, the Tenth Circuit has held that these these life-and-death stakes (where injury is “both certain and great,” “serious or substantial[,]” of the sort that “cannot be adequately atoned for in money[,]” and one that “the district court cannot remedy following a final determination on the merits”) are sufficient to establish a likelihood of irreparable harm in support of injunctive relief. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (quotations and alterations

omitted); *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (holding that there is a showing of irreparable harm when the “harm cannot be compensated after the fact by monetary damages”); *see also Indep. Living Cent. of S. California, Inc. v. Shewry*, 543 F.3d 1047, 1050 (9th Cir. 2008) (recognizing that Medi-Cal beneficiaries would suffer irreparable harm where new policy would limit beneficiaries’ access to “much-needed pharmaceuticals”). Denver’s continued sweeps not only risk irreparable harm to Plaintiffs but nearly guarantee it. *Jones’El*, 164 F. Supp. 2d at 1123 (“[P]ain, suffering and the risk of death constitute irreparable harm sufficient to support a preliminary injunction in prison cases.” (internal quotation marks omitted)).

Even for those who survive infection, there may be a prolonged recovery, including the need for extensive rehabilitation, neurological damage, and the loss of respiratory capacity. *Cole v. Collier*, No. 4:14-CV-1698, 2017 U.S. Dist. LEXIS 112095, at *141-42 (S.D. Tex. July 19, 2017) (holding plaintiffs had demonstrated irreparable injury where there was evidence that “[t]hose who experience heat stroke but do not die are at risk of being permanently disabled”). And, new studies show that those who experience no symptoms have a significant risk of permanent damage from the virus.

The Constitution does not require that Plaintiffs wait until they have contracted or been exposed to COVID-19 before obtaining injunctive relief. *Thakker, et al. v. Doll, et al.*, No. 20 C 0480, Dkt. 47, at 8 (M.D. Pa. Mar. 31, 2020) (“Petitioners face the inexorable progression of a global pandemic creeping across our nation—a pandemic to which they are particularly vulnerable to due to age and underlying medical conditions. At this point, it is not a matter of if COVID-19 will enter Pennsylvania prisoners, but when it is finally detected therein.”); *Coronel*, at *5 (“Due to their serious underlying medical conditions, all Petitioners face a risk of severe,

irreparable harm if they contract COVID-19.”). Simply put, Plaintiffs’ lives are on the line and the harm they face is clearly irreparable.

5.5 The balance of equities favors immediately stopping the spread of COVID-19 among Plaintiffs, and the community.

The balance of equities weighs in favor of ordering Defendants to stop sweeping Plaintiffs, in contravention of CDC guidelines, until the pandemic ends. In evaluating this factor, the Court must “balance the competing claims of injury, which involves considering the effect on each party of the granting or withholding of the requested relief.” *Shvartser v. Lekser*, 308 F. Supp. 3d 260, 267 (D.D.C. 2018). Here, a preliminary injunction will not “substantially injure other interested parties.” *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. To the contrary, given the nature of COVID-19, not issuing preliminary relief in this case would cause injury to parties beyond the plaintiffs, including Defendants, their constituents, and the public at large. As the Central District of California explained in granting a TRO in a case that was aimed at stopping the spread of COVID-19:

The balance of the equities tip sharply in favor of the Petitioners. The Petitioners face[] irreparable harm to their constitutional rights and health. Indeed, there is no harm to the Government when a court prevents the Government from engaging in unlawful practices.

Temporary Restraining Order and Order to Show Cause at 10, *Castillo*, No. 20-cv-605. Here too, other than the relatively minimal administrative burden, there is no identifiable “harm” to Defendants. This burden is far outweighed by what is at stake to plaintiffs and the public if no TRO is issued. Plaintiffs’ request is potentially a matter of life and death. The balance of the equities in this case favors life.

5.6 The Court should not require Plaintiffs to provide security prior to issuing a temporary restraining order.

Under Rule 65(c) of the Federal Rules of Civil Procedure, district courts have discretion to determine the amount of the bond accompanying a preliminary injunction, and this includes the authority to set a nominal bond. In this case, the Court should waive bond because Plaintiffs are indigent. *Pocklington v. O’Leary*, 1986 WL 5748, at *2 (N.D. Ill. May 6, 1986) (“[B]ecause of [a prisoner’s] indigent status, no bond under Rule 65(c) is required.”). It should also waive bond because the requested interim relief is in the public interest. *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002) (“minimal bond amount should be considered” in public interest case). 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2954 n.29 (3d ed., Apr. 2016 update) (citing public rights cases where the bond was excused or significantly reduced). Moreover, it should waive bond because there is no likelihood of harm to Defendants should an injunction issue. *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987) (internal quotation marks omitted) (holding that “a trial court may, in the exercise of discretion, determine a bond is unnecessary to secure a preliminary injunction if there is an absence of proof showing a likelihood of harm”); *see also McDonnell v. City & Cty. of Denver*, 238 F. Supp. 3d 1279, 1306 (D. Colo. 2017); *Verlo v. City & Cty. of Denver*, 124 F. Supp. 3d 1083, 1096 n.9 (D. Colo. 2015). And, finally, this Court should waive bond because the injunction is necessary to vindicate constitutional rights. *See Complete Angler, L.L.C. v. City of Clearwater*, 607 F.Supp.2d 1326, 1335 (M.D. Fla. 2009) (“Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right.”).

6. CONCLUSION

For the foregoing reasons, Plaintiffs’ Motion For Preliminary Injunction should be granted in its entirety.

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