IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02155-WJM-CBS

RAYMOND LYALL, et al.,

Plaintiff,

v.

CITY AND COUNTY OF DENVER,

Defendant.

THE CITY AND COUNTY OF DENVER'S MOTION FOR SUMMARY JUDGMENT

Defendant, the City and County of Denver ("Denver"), through its counsel, moves for summary judgment, pursuant to Fed. R. Civ. P. 56 and WJM Revised Practice Standards III.E(7).

INTRODUCTION

Denver has devoted significant resources to its service-first approach to homelessness. Denver's goal is to connect individuals to emergency shelter, long-term affordable housing, healthcare, and jobs. Denver and its partners have sustained a "no turnaway" policy for shelters since 2015 and current shelter capacity exceeds nightly demand for single adults. Additional shelters are set to open in 2017 as Denver continues to address the growing needs of the homeless population.[1]

This lawsuit arose out of Denver's efforts, in response to significant public health and safety concerns, to clean its river corridor and remove large-scale encumbrances from the public right-of-way. Specifically, in the fall of 2015, after significant public outcry regarding conditions

[1] http://www.denvergov.org/content/denvergov/en/mayors-office/programs-initiatives/office-of-hope.html

around the Triangle Park area (Park Avenue, Lawrence Street, and Broadway), Denver developed a plan to clean up the area while respecting the rights of homeless residents and attempting to connect them with services. This highly publicized cleanup occurred in March 2016. This lawsuit followed soon after.

Plaintiffs attempt to link the March 2016 cleanup with a series of disparate events. Plaintiffs claim that together, these incidents prove that Denver has an unconstitutional custom or practice of immediately seizing and destroying the property of people experiencing homelessness. Simply put, no such policy, practice, or custom exists. On the contrary, Denver has designed and implemented its municipal policies to protect the dignity and rights of homeless individuals, along with their safety, their health, public safety, public health, and the preservation of public space for all residents. As set forth below, the undisputed evidence shows that Denver's policies are constitutional, and that Plaintiffs' claims against Denver fail as a matter of law.

MOVANT'S STATEMENT OF MATERIAL FACTS

Relevant Denver Ordinances, Procedures, and Training

1. Denver Revised Municipal Code (D.R.M.C.) Chapter 38, Article IV, Division 1, § 38-86.2 prohibits unauthorized camping on public or private property. [**Ex. A**, D.R.M.C. Chapter 38, Article IV, Division 1, § 38-86.2.]

2. D.R.M.C. § 38-86.2 also contains a specific procedure for law enforcement officers to follow prior to issuing citations, making arrests, or otherwise enforcing the Ordinance, which includes an oral and written warning and with a requirement to ascertain whether the person needs assistance. [*Id.*]

3. The Denver Police Department (DPD) enforces D.R.M.C. § 38-86.2. [*See id.*]

4. DPD also developed a Training Bulletin to provide guidelines to officers for enforcement of the unauthorized camping ordinance, including the requirement of oral and written warnings. [**Ex. B**, Training Bulletin.]

5. DPD does not have a policy of immediately taking and disposing of property of persons who are in violation of the camping ordinance–even if the person is eventually cited or arrested, photographs or videos are taken of the property or the property is placed into evidence–no property is disposed of. [**Ex. C,** Commander Lopez Suppl. Decl. ¶¶ 6, 11, 12.]

6. D.R.M.C. Chapter 39, Article I, § 39-1, *et seq.*, which applies to the Department of Parks and Recreation (Parks), makes it unlawful to camp or otherwise reside overnight in any park, parkway, or other mountain facility other than in designated campgrounds. [**Ex. D**, D.R.M.C. Chapter 39, Article I, § 39-7(a).]

7. Other sections of Chapter 39 place restrictions on uses and activities of parks or other recreational facilities, including the imposition of curfews and closures, make it unlawful to litter, deposit, or leave anything unattended in such areas. [*Id*. at §§ 39-1 – 39-24.]

8. With respect to unlawful camping and unattended property, Parks staff are trained to follow a protocol that first requires posting through written notice, if property is unattended, or oral notice to persons they encounter along the trails who are in violation of Parks ordinances, without removing any property. [Doc. #58-12, ¶¶ 1-2, 6-7, 10[2]; Doc. #58-13, ¶¶ 1, 10; Doc. 58-14, ¶¶ 1-2, 5-6; **Ex. E**, Depo. of Park Ranger Eric Knopinski, 16:2-18:10.]

9. If a DPD officer finds unattended property or campsite in a park facility, they also leave written notice in a secure and conspicuous area, without removing any property; or if the

[2] Doc. #58 is Denver's Response in Opposition to Plaintiffs' Motion for Class Certification to which numerous declarations were attached.

campsite is occupied, provide oral notice of the violation and attempt to gain compliance without removing any property. [Doc. #58-3, ¶¶ 1-2, 11-13; Doc. #58-4, ¶¶ 1-2, 9-10]

10. Unattended property is not removed unless at least twenty-four hours passes has passed since the oral or written notice was given and the property which was posted is still there. [Doc. #58-3, ¶¶ 12-13; Doc. # 58-4, ¶¶ 9-10; Doc. #58-14, ¶¶ 5-7; **Ex. E** 16:2-18:10.]

11. If after twenty-four hours a person is found to still be in violation of a Parks ordinance, they will be asked for a second time to stop the conduct and most people comply. [Doc. #58-13, ¶ 9; Doc. #58-4, ¶ 9, Doc. #58-3 ¶ 13; **Ex. E** 16:2-18:10.]

12. Neither Parks nor DPD have a policy to immediately take property from individuals who are violating Park ordinances regarding unattended property or unlawful camping. [Doc. #58-3, ¶¶ 12-13; Doc. # 58-4, ¶¶ 7-10; Doc. #58-6 ¶ 16; Doc. #58-13 ¶ 16; Doc. #58-14, ¶¶ 5-7; **Ex. E** 16:2-18:10].

13. D.R.M.C. Chapter 49, Article IX, Encumbrances of the Right-of-Way, prohibits the use of streets, alleys, sidewalks, parkways or other public places for storage, and sets forth procedures for the removal and disposal of encumbrances. [**Ex. F**, D.R.M.C. Chapter 49, Article IX, §§ 49-246-49-254.]

14. The Solid Waste Division of Denver Public Works is responsible for ensuring that the public right-of-way is clear. [Doc. #58-7, ¶¶ 1, 3; Doc. #58-15 ¶ 3.]

15. Solid Waste employees regularly clean the public right-of-way, both on an established schedule and in response to complaints. [Doc. #58-7, ¶ 3; **Ex. G**, Deposition of Jose Cornejo, 5:8-16, 16:8-22.]

16. If someone is blocking the right-of-way when Solid Waste crews arrive to conduct the regular cleaning, that person is asked to move with any property they may have so that area may be cleaned. [Doc. #58-7, ¶ 4.]

17. Once the individual has moved, the right-of-way is cleaned, and any trash left behind is discarded. [*Id*.]

18. If someone refuses to move, crews report it and take no other action. [*Id.*]

19. If DPD officers encounter unattended property in the right-of-way during cleanings, their practice is to attempt to locate the owner or to ask another individual who was present if they were willing to take custody of the property. [Doc. #58-4, ¶ 17.]

20. If a DPD officer finds someone who is blocking a right-of-way with their bodies, property, or both, the officer will make contact and ask the individual to move or remove the property which is blocking the right-of-way so that a passageway exists for all people to use the right-of-way. [Doc. #58-3, ¶¶ 15-16; Doc. #58-4, ¶¶ 11-13.]

21. If the right-of-way is not blocked, the individual may stay. [Doc. #58-3, ¶ 15; Doc. #58-4, ¶12.]

22. Public Works is not responsible for cleanups of parks or greenways, nor does it enforce Denver ordinances regarding parks or greenways; however, Solid Waste will provide a trash truck for cleanups of such areas, if requested. [Doc. #58-7 ¶ 19.]

23. Denver does not have a policy, practice or custom of unlawfully seizing and destroying property. [Doc. #58-3, ¶¶ 12-13, 15-16, 19-20; **Ex. H**, Declaration of Bennie Milliner

¶ 15[3]; Doc. #58-4 ¶ 23; Doc. #58-6 ¶¶ 15-16; Doc. #58-7 ¶ 20; Doc. #58-10 ¶¶ 1-2, 19; Doc. #58-12 ¶ 12; Doc. #58-13 ¶ 16; Doc. #58-14 ¶ 10; Doc. #58-15 ¶¶ 1, 12.]

Homeless Outreach Efforts

24. DPD has Homeless Outreach Unit (HOU) who are specifically trained to contact people who are experiencing homelessness and provide written and oral information regarding available services. [Doc. #58-3 ¶¶ 2-3; Doc. #58-4 ¶¶ 2-4; Doc. #58-6 ¶ 3; **Ex. I**, Amended Depo. of Ligeia Craven, 12:13-16:12; Doc. #58-14 at Exhibit B attached thereto.]

25. HOU officers, patrol officers, and other sworn staff members as well as park rangers are trained how to engage with people who are experiencing homelessness to promote a service-first approach of identifying those in need and connecting them to essential services. [Doc. #58-3, ¶ 3; Doc. #58-4, ¶ 5; Doc. #58-6, ¶¶ 3-4; **Ex. J,** Depo. of Bennie Milliner 18:3-16; **Ex. K,** Depo. of Evan Dreyer 37:20-38:10; 45:13-46:17; **Ex. I** 12:13-13:3.]

Regular Cleanings by Public Works of Public Rights-of-Way

26. For several years, Public Works has received repeated complaints about buildup of trash and other encumbrances in rights-of-way in the Triangle Park area, which is comprised of Park Avenue, Lawrence Street, and Broadway. [Doc. #58-7, ¶ 5; Doc. #58-15 ¶ 5.]

27. As a result, in 2015, Solid Waste in conjunction with the DPD HOU team and the Denver Sheriff Department began to conduct regular cleanings of the sidewalks in the Triangle Park area three days a week. [Doc. #58-4, ¶ 15; Doc. #58-6, ¶¶ 6-7; Doc. #58-7, ¶ 5; Doc. #58-15 ¶ 5; **Ex. I** 65:15-66:9; **Ex. G** 32:18-23; **Ex. L,** Depo. of Terese Howard, 103:4-104:14.]

[3] Bennie Milliner's Declaration was also attached as #58-5 to Denver's Response in Opposition to Plaintiffs' Motion for Class Certification but was not complete due to a clerical error. The complete version is attached hereto as Ex. H.

28. Subsequently, due to a rise in complaints, right-of-way cleanings were increased to five days a week (Monday through Friday). [Doc. #58-4, ¶ 15; Doc. #58-6, ¶ 6; Doc. #58-7, ¶ 5; Doc. #58-15 ¶ 5; **Ex. I** 65:15-66:9; **Ex. L** 103:4-104:14, 105:6-21.]

29. Prior notice of the regular cleanings is provided by DPD HOU team members to area service providers and people in the area. [Doc. #58-4, ¶ 15; Doc. #58-6 ¶ 7; **Ex. M**, Deposition of Raymond Lyall 96:1-97:7; **Ex. N,** Deposition of Fredrick Jackson 150:14-152:11.]

30. Denver employees and agents who participate in the regular cleanings of the right-of-way do not take property or force people to move. [Doc. #58-7, ¶¶ 4-5; Doc. #58-15, ¶¶ 3-4; Doc. #58-4, ¶¶ 16-17.]

31. Any person who is present on the right-of-way during the regularly scheduled cleaning are asked to move with their property so that the area may be cleaned and, once the cleaning is finished, the person may return with their property so long as the area remains clear for others to use. [Doc. #58-4, ¶¶ 12, 16; Doc. #58-6, ¶ 7; Doc. #58-7, ¶ 5; Doc. #58-15, ¶ 5; **Ex. L** 103:4-104:14; **Ex. N** 150:14-152:11; **Ex. O** Depo. of Sophia Lawson, 83:5-84:19.]

32. As part of the cleaning the sidewalks are power washed and trash left behind on the right-of-way, such as empty food containers, wrappers, human waste, wet boxes, and soiled items, are thrown away. [Doc. #58-4 ¶ 16; **Ex. L** 105:22-106:16; **Ex. O** 83:5-84:19.]

33. These cleanings are such a regular practice, people experiencing homelessness in the Triangle Park neighborhood are aware of the cleaning schedule and know to move their belongings from the areas which will be cleaned. [Doc. #58-11 p. 4; Doc. #58-7, ¶ 5; Doc. #58-15, ¶ 5; **Ex.** 150:14-152:11; **Ex. M** 96:16-97:7; **Ex. O** 93:6-12.] Further, these regular cleanup

activities do not involve ten or more City workers or agents. [**Ex. P** Depo. of Alexandra Binder, 65:1-66:1; **Ex. O** 93:13-94:5.]

Unsafe Conditions Along the Platte River and Cherry Creek Greenway & Riverdance

34. In recent years, Denver park facilities along the Platte River and Cherry Creek Greenway have also been plagued with the sale and use of illegal drugs and discarding of trash, including used needles, and, as a result, Denver has received numerous complaints regarding unsafe conditions found along areas of the South Platte River Corridor and the Cherry Creek Greenway. [Doc. #58-4, ¶ 7; Doc. #58-6, ¶ 17; Doc. #58-12, ¶ 5; **Ex. Q,** Declaration of Lt. Kevin Edling, ¶¶ 1-2; **Ex. C** ¶ 15]

35. The South Platte River Corridor is a mix of private property, property owned by Denver, and property owned by other public entities. [Doc. #58-13, ¶¶ 7-8 & Ex. A thereto.]

36. For safety reasons, pursuant to the authority of Parks and Recreation, certain public areas along the Platte River Trail and underpasses along the Cherry Creek Greenway have been closed to the public by posting signs of such closures. [Doc. #58-3, ¶ 10; Doc. #58-12, ¶ 6.]

37. The South Platte riverbank is public land managed and maintained by Parks, and therefore, the Park Curfew contained in D.R.M.C. Chapter 39, Article I, Sec. 39-3 applies to this area. [**Ex. D**; **Ex. A-1**, Deposition of Michael McCown 19: 5-19.]

38. Beginning in mid-2014, DPD HOU coordinated with Parks, Public Works, and community members for a river cleanup called "Operation Riverdance" to address complaints received regarding Commons Park and the surrounding river corridor, located just north of Confluence Park, which included reports of assaults, robberies, drug use, needles, trash and

overgrowth of trees and bushes which concealed illegal activity. [**Ex. Q** ¶¶ 2-5, 9; Doc. #58-4, ¶26; Doc. #58-7, ¶ 18; Doc. #58-12, ¶ 11; Doc. #58-13, ¶¶ 7-8, 11; **Ex. M** 194:12-23.]

39. As part of the cleanup, heavy equipment has been used to remove trees and overgrown bushes while community members and City workers pick up trash and cut back weeds and other vegetation. [**Ex. Q** ¶ 5.]

40. During Riverdance, property is not removed if an individual is present. [Doc. #58-4 ¶ 28; **Ex. Q** ¶ 7.]

41. Property which is left behind will be removed; however, any important documents which are found as part of the cleanup, such as driver's licenses, birth certificates, or other important papers, are given to DPD officers and placed in the DPD Property Bureau. [**Ex. I** 57:12-20; **Ex. E** 53:20-54:3.]

42. Due to the number of hazardous materials found in cleanup areas, including human waste and discarded drug needles, Denver hired Custom Environmental Services (CES), a specialized hazmat contractor, to assist with the cleanup and removal of hazardous items, including large amounts of trash where such items might be found. [Doc. #58-12, ¶ 9; **Ex. R**, Deposition of David Peachey, 29:15-31:7; **Ex. G** 45:2-46:10.]

Incidents of Alleged Unconstitutional Practices in Plaintiff's Amended Complaint

October 24, 2015

43. On October 24, 2015, numerous people, including Plaintiff Lyall, trespassed onto property located at 2500 Lawrence Street and erected illegal structures, which they referred to as "tiny homes." [Doc. #58-1 ¶ 4; **Ex. L** 191:1-194:17; **Ex. M** 141:1-142:11; 144:18-145:12.]

44. The property at 2500 Lawrence Street is private property owned by the Denver Housing Authority–a distinct and separate entity from Denver. [Doc. #58-1, ¶¶ 1, 2-3.]

45. DHA did not give permission or authorization for the individuals or structures to be present on its land. [Doc. #58-1, ¶ 4; Ex. M 144:21-24; **Ex. L** 193:4-194:2.]

46. An employee of DHA informed the individuals that they were trespassing on private property, and that he would call the police if the group refused to leave. [Doc. #58-1, ¶ 5; **Ex. S**, Declaration of Dik Kushdillian, DPD custodian of records at Ex. B, Ryan Tobin Witness Statement; **Ex. M** 141:10-142:11; 146:9-25; **Ex. L** 194:3-17; **Ex. S** at Ex. C, Probable Cause Statement for Arrest of Lyall.]

47. The group did not leave, so DHA called the Denver Police Department. [Doc. #58-1 ¶¶ 5-6; **Ex. S** at Exs. B and C.]

48. The DHA employee advised DPD officers that he needed assistance in removing the trespassing parties and that he wanted to pursue trespassing charges on parties that did not leave the area. [Doc. #58-1 ¶¶ 6-7; **Ex. S** at Exs. B and C.]

49. DPD arrested a handful of trespassers who refused to leave the property, including Plaintiff Lyall and Terese Howard. [Doc. #58-1 ¶¶ 6-8; Doc. #54 ¶¶ 55-56, 64; Doc. #15-9 ¶ 7; **Ex. M** 153:10-12; 153:19-154-18 156:21-157:1; **Ex. L** 195:13-21; **Ex. S** at Ex. C; **Ex. S** at Ex. D, Probable Cause Statement for Arrest of Howard.]

50. After the trespassers left the property, DHA hired a private company to remove the illegal structures and other items left behind. [Doc. #58-1 ¶ 8; **Ex. L** 195:22-196:3.]

December 15, 2015

51. On December 15, 2015, the low temperature in Denver was sixteen degrees and

the metro area received approximately ten inches of snow.[4]

52. Because of the dangerous temperatures and heavy snowfall that day, HOU officers were assigned to find people who were staying outside in the hazardous conditions to check on their welfare and attempt to connect them with services. [Doc. #58-3 ¶¶ 26-27.]

53. The Commander of District 6, Antonio Lopez, worked with dispatch to alert officers to look in alleyways and other areas to find people who might be outside and to assist them with finding shelter and services. [Doc. #58-6 ¶ 15.]

54. HOU Officer Parks encountered some encampments and large piles of property as part of his welfare check, but he did not take any action other than to try to connect the individuals with services. [Doc. #58-3 ¶ 27.]

55. HOU Officer Lombardi contacted individuals who were camping near California and 24th Street and told them they needed to take down their tents and move to one of the homeless shelters in the area; however, he did not take or throw away any personal property, nor did he cite or arrest anyone. [**Ex. L** 185:8-187:17; **Ex. M** 236:1-238:17.]

56. HOU Officer Craven contacted individuals in encampments at Park Avenue and Lawrence Street to advised them that they needed to take everything important with them and go inside the Denver Rescue Mission. [Doc. #58-4, ¶¶ 24, 25; **Ex. O** 105:13-106:6; 113:3-124:4.]

57. The Denver Rescue Mission allows people to place their belongings along the outside of their building while they are inside the shelter and property placed in that area is not removed. [Doc. #58-4, ¶¶ 24-25.]

[4] http://extras.denverpost.com/weather/historical/denver/2015/december/15/daily-weather-denver.html; http://www.denverpost.com/2015/12/14/colorado-snow-totals-for-dec-15-2015/.

58. Unattended items that were left behind after individuals went into the Denver Rescue Mission included wet boxes, spoiled food, food containers, soaked blankets, and soaked sleeping bags, and Officer Craven made the decision to dispose of such items due to their condition. [Doc. #58-4 ¶¶ 24-25.]

59. Officer Craven made this decision on her own–it was not DPD protocol to take any property nor were any instructions given to officers performing welfare checks to take property. [Doc. #58-4 ¶¶ 24-25; Doc. #58-6, ¶¶ 15-16.]

60. At no point on December 15, 2015, were ten or Denver employees or agents sent to the encampment at Park Avenue and Lawrence Street to immediately remove and dispose of property. [**Ex. O** 106:3-107:2; Doc. #58-4 ¶¶ 24-25; **Ex. L** 185:8-187:17; **Ex. M** 236:1-238:17.]

61. At no point on December 15, 2015, did DPD officers cite or arrest anyone pursuant to the unauthorized camping ordinance. [**Ex. C** ¶ 14; **Ex. O** 123:21-124:1.]

March 8-9, 2016

62. Despite regular cleanups, in the fall of 2015, Denver started receiving frequent complaints related to safety concerns, unsanitary conditions, and continuous build-up of trash on the right-of-way in the Triangle Park area and the unsafe and unsanitary conditions for all, including people experiencing homelessness had increased. [Doc. #58-3, ¶ 21; Doc. #58-4, ¶ 18; Doc. #58-6, ¶¶ 5, 8; Doc. #58-7, ¶ 6; Doc. #58-8, ¶¶ 5-6; Doc. #58-9, ¶¶ 6, 8; Doc. #58-10, ¶¶ 10-11; Doc. #58-11, pp. 3-4; Doc. #58-13, ¶¶ 13-14; Doc. #58-15, ¶¶ 5-6; **Ex. G** 5:17-11:22; 33:3-34:11; **Ex. T**, Deposition of Willie Lee Pepper, 34:16-35:24.]

63. For example, when Public Works gathered samples from the Triangle Park drainage system outlet as part of safety testing, the excessive levels of E. coli per 100 milliliters

due to human waste were of serious concern for public health and safety. [**Ex. G** 33:3-34:11.]

64. Many people also continuously blocked the sidewalks in the area with large amounts of items including blankets, clothing, tents, furniture, wood pallets, food, and trash. [Doc. #58-6 ¶ 5; Doc. #58-8 ¶ 6.]

65. Complaints included reports of violent crime against the female homeless population, open drug dealing, and other safety issues, including concerns that the encampments were hiding these issues so they could not be adequately addressed. [Doc. #58-6 ¶ 8; Doc. #58-8 ¶ 5; Doc. #58-10 ¶ 10.]

66. People who were experiencing homelessness complained to service providers about safety concerns. [Doc. #58-10 ¶ 8; Doc. #58-6 ¶ 8.]

67. Staff members of Samaritan House (located at 2301 Lawrence Street) reported being verbally threatened when they were outside the building. [Doc. #58-10 ¶ 10.]

68. Denver Rescue Mission and Ireland's Finest also expressed similar concerns. [Doc. #58-6 ¶ 8; Doc. #58-8 ¶ 5; Doc. #58-10 ¶ 10.]

69. In response, numerous Denver agencies and homeless service providers met over the course of several months to determine how to best address the safety and sanitation issues, including how to connect people who were experiencing homelessness with services. [Doc. #58-6 ¶¶ 9-10; Doc. #58-7 ¶¶ 6-7; Doc. #58-9 ¶¶ 6, 8; Doc. #58-10 ¶¶ 13, 14; Doc. #58-13 ¶¶ 13-14; Doc. #58-15 ¶ 6; **Ex. G** 5:17-11:22; 39:10-21; **Ex. J** 80:23-86:8; **Ex. K** 20:20-22:12.]

70. These discussions resulted in the decision to conduct a coordinated cleanup of the Park Avenue and Lawrence area that took place on March 8 and 9, 2016. [Doc. #58-3 ¶¶ 21-23; Doc. #58-6 ¶¶ 11, 13; Doc. #58-7 ¶¶ 8-10; Doc. #58-9 ¶ 8; Doc. #58-10 ¶ 15; Doc. #58-13 ¶ 15.]

71. The purposes of the March cleanup were to provide services and connect homeless individuals with shelter and housing; protect public safety and the safety of the people living in encampments; and to address environmental health concerns while protecting the dignity and the rights of the people living in encampments. [**Ex. K** 90:19-91:11; **Ex. G** 9:17-11:22; **Ex. J** 83:5-25.]

72. In preparation for the March cleanup, a written protocol was developed to ensure that advance notice of the cleanup was provided by posting signage in an approximate three-block radius around Triangle Park days before the cleanup began and fliers were also handed out. [**Ex. U**, Supplemental Declaration of Charlotte Pitt ¶¶ 4, 5 and Ex. A attached thereto, Encumbrance Removal and Area Cleanup Protocol; **Ex. G** 9:17-11:22, 21:1-22:10, 42:24-43:21, 48:12-19; **Ex. J** 82:6-10, 83:20-25; **Ex. K** 91:4-11; Doc. #58-3, ¶ 22; Doc. #58-4, ¶ 20; Doc. #58-6, ¶¶ 11-12; Doc. #58-7, ¶ 9, Ex. A and B; Doc. #58-8 ¶ 8; Doc. #58-9 ¶ 8; Doc. #58-10, ¶¶ 14-15; Doc. #58-11 p. 4; Doc. #58-13 ¶ 15; **Ex. U** ¶¶ 4, 5 and Ex. A attached thereto; **Ex. G** 27:10-29:10; 30:1-32:12; 35:22-25; 64:2-65:6; **Ex. I** 42:14-43:11; **Ex. K** 41:13-24.]

73. Prior to the cleanup, HOU officers, outreach workers, and service providers also gave verbal notice to individuals. [**Ex. I** 35:4-36:21; Doc. #58-4, ¶ 20; Doc. #58-6 ¶ 12.]

74. To ensure appropriate notice, additional signs were even posted on March 9th when the cleanup area was expanded to account for an expansion in the cleanup area [**Ex. K** 56:15-57:6; **Ex. G** 63:20-65:8.].

75. Witnesses, including some plaintiffs, confirm that they saw signs and/or fliers which gave notice of the cleanup prior to and on the day of the cleanup and also acknowledged that persons in the area knew the cleanup was going to occur. [**Ex. M** 178:10-12, 15-17; 178:20-

179:10, 241:12-13; 242:16-243:9; **Ex. V** Depo. of Brian Keith Cooks, Jr., 102:1-103:22; **Ex. N** 157:25-160:4; **Ex. L** 90:2-12, 153:14-157:7; **Ex. P** 15:22-18:17, 37:13-39:9.]

76. A specific process also was developed to collect and store all personal items removed, including claims tickets, a company was hired to assist with the bagging, tagging and storage of the property. [Doc. # 58-7, ¶¶ 6-9; **Ex. U** ¶¶ 4-5, 7-8 and Ex. A.]

77. Denver rented space in the Emily Griffith building to use as a storage facility so that property collected during the cleanup could be retrieved by the owner–if they chose to do so–within a reasonable period of time. [*Id.*]

78. The advance notice provided regarding the cleanup also included the address of the facility where the property removed during the cleanup would be temporarily stored and the hours when property could be retrieved. [Doc. #58-7 ¶¶ 8-9 and Ex. A attached thereto.]

79. Property taken to the storage facility during the cleanup was originally going to be stored for thirty days, but that timeframe was expanded to sixty days to give individuals even more time to collect their property.[5] [Doc. # 58-7, ¶ 13.]

80. The protocol was given to Solid Waste supervisors/managers and inspectors who were on site during the cleanup to determine what items would be stored and what was trash and could be thrown away and they were the only individuals who were responsible for determining what would be stored and what would be thrown away. [**Ex. U** ¶¶ 6-8; **Ex. R** 22:6-23:25, 25:25-26:16, 29:15-37:13; Doc. #58-4, ¶¶ 18-23; Doc. #58-6, ¶¶ 8-14; Doc. #58-7, ¶¶ 6-14; Doc. #58-10, ¶¶ 10-15; Doc. #58-15, ¶¶ 6-9; **Ex. U** ¶¶ 4-5 and Ex. A.]

[5] A list of individuals who voluntarily stored their property, but failed to retrieve it within thirty days, was provided to Denver's Road Home so that outreach workers could try to find the individuals to remind them to collect their property if they wanted it. [Doc. #58-7 ¶ 13.]

81. Most of the individuals who were encumbering rights-of-way in Triangle Park left the area prior to the March cleanup. [Doc. #58-7, ¶ 10; Doc. #58-10, ¶ 16; Doc. #58-9, ¶ 9.]

82. During the cleanup, DPD stood by to keep the peace [Doc. #58-3, ¶ 23; Doc. #58-4 ¶ 21; Doc. #58-6 ¶ 13.]

83. Prior to starting the cleaning, people who had property in the right-of-way were encouraged to pack it up, or store it at no charge, and to leave behind unwanted property so that it could be disposed of and were given time to do so. [Doc. #58-3 ¶ 24; Doc. #58-4 ¶ 22; Doc. #58-6 ¶ 14; Doc. #58-7 ¶ 11; Doc. #58-8 ¶ 9; Doc. #58-15 ¶¶ 7-9; **Ex. G** 21:1-22:10, 60:3-25; **Ex. I** 39:13-40:7, 42:14-43:11; 44:19-46:4; **Ex. S** at Ex. A attached thereto as Craven Body Camera, "Scheduled Clean Park Ave and Lawrence" and conventionally filed herewith; **Ex. M** 183:8-14; **Ex. L** 161:3-13, 178:17-179:1; **Ex. P** 31:9-21; **Ex. R** 17:23-18:25, 25:1-15.]

84. Unattended property was also stored at Emily Griffith. [Doc. #58-7 ¶ ¶ 8, 11.]

85. Nothing was stored or thrown away without supervisor approval from two Public Works supervisors who were on scene. [**Ex. U** ¶¶ 6-8.]

86. Public Works hired CES to assist with the March 2016 cleanup. [**Ex. U** ¶ 7; Doc. #58-7 ¶¶ 8, 11; Doc. #58-15 ¶ 6; **Ex. G** 45:7-46:10; **Ex. R** 29:15-30:13.]

87. The protocol was communicated to CES prior to the cleanup, but CES did not make any determinations as to what was property or trash. [**Ex. U** ¶¶ 7-8; **Ex. R** 22:6-23:25, 25:25-26:16, 29:15-37:13.]

88. Along with items identified by owners as trash, items that were biohazardous, including used needles and items that were soaked or soiled with human waste, and perishable

food items were considered trash and were also disposed of. [**Ex. R** 17:17-18:25, 22:19-23:25, 29:15-32:18; **Ex. G** 21:20-22:10; **Ex. K** 57:11-22.]

89. DSD inmate crews also disposed of items identified by supervisors as trash into trash trucks operated by Public Works employees. [Doc. #58-7, ¶ 11; Doc. #58-15, ¶ 7; **Ex. I** 61:9-17; **Ex. R** 25:19-27:23.]

90. All personal items collected during the cleanup on March 8 and 9 were placed into bags and tagged by CES (the contractor hired by Denver to assist with the cleanup) and transported to Emily Griffith. [Doc. #58-3 ¶ 24; Doc. #58-7 ¶ ¶ 8-11; Doc. #58-15 ¶ 8; **Ex. R** 32:20-37:13; **Ex. S** at Ex. A attached thereto as Craven Body Camera, "Scheduled Clean Park Ave and Lawrence" and conventionally filed herewith, beginning at 7:25; **Ex. M** 181:9-182:3, Ex. 17 to Ex. M.]

91. Property owners who were present were given a claim receipt and told how to reclaim their property. [Doc. #58-15 ¶ 8; **Ex. R** 35:17-37:11.]

92. Claim receipts were also made for items for which an owner could not be determined by identifying the area where the property was located so that the owner could retrieve property by identifying the location and a description of the property taken. [Doc. #58-15 ¶ 8; **Ex. R** 32:20-37:13.]

93. Most of what was collected was voluntarily stored. [Doc. #58-7, ¶ 11; **Ex. R** 17:17-18:25, 22:6-23:25.]

94. Large green bins placed onto a flatbed truck were used to transport the items that had been collected and tagged to Emily Griffith. [Doc. #58-7, ¶ 11; Doc. #58-1,5 ¶ 8; **Ex. S** at

Ex. A attached thereto as Craven Body Camera, "Scheduled Clean Park Ave and Lawrence" and conventionally filed herewith, beginning at 7:25.]

95. Individuals associated with Denver Homeless Out Loud (DHOL) and other members of the public also used vehicles to collect and remove property from the cleanup area. [**Ex. M** 173:16-175:15; **Ex. L** 180:10-181:14, 182:22-183:7; **Ex. P** 39:10-40:23.]

96. Personal property was not thrown away as part of the cleanup – unless the owner was present and specifically indicated that the property could be thrown away. [Doc. #58-3, ¶ 25; Doc. #58-7 ¶ 12; Doc. 58-15, ¶ 9; **Ex. R** 22:6-23:25.]

97. At no point on March 8-9, 2016, did DPD officers cite or arrest anyone or participate in the cleanup other than to keep the peace. [**Ex. C** ¶ 14.]

98. Only four individuals appeared at the storage facility to retrieve property; one claimed a portion of the property he had stored. [Doc. #58-7 ¶ 14.]

99. On May 5, 2016, the remaining property at the storage facility was sorted through before it was disposed of and any property that appeared to be valuable or contained specific identifying information (such as identification cards or hospital paperwork) were moved to the Public Works' warehouse where they continue to remain. [Doc. #58-7 ¶16.]

July 13, 2016- Third Annual Riverdance

100. On July 13, 2016, the third annual "Riverdance," took place along the South Platte River Corridor. [Doc. #58-7 ¶ 18; Doc. #58-4 ¶ 26.]

101. Individuals found camping along the river were notified by DPD officers or Parks personnel approximately five to seven days before the cleanup. [Doc. #58-4, ¶ 27; Doc. #58-13, ¶ 11; **Ex. I** 52:3-15; **Ex. Q** ¶ 9.]

102. DPD HOU officers and Parks staff posted and handed out notices that stated the date and time of the cleanup, advised that private property could not be stored in a Denver park area, and that camping in a Denver park was prohibited. [Doc. #58-4, ¶ 27; **Ex. E** 51:11-21; Doc. #58-14, at Ex. A.; **Ex. E** 51:1-12.]

103. Outreach workers also provided notification of the cleanup. [**Ex. O** 184:3-20.]

104. Individuals from Denver Homeless Out Loud were also aware of the scheduled July 13 cleanup and handed out fliers to people in the area to inform them about it. [**Ex. L** 148:12-22, 151:19-152:16.]

105. People were allowed several days to remove their property from the area after being notified. [Doc. #58-4, ¶ 27.]

106. During Riverdance, property was not taken if an individual was present and claimed the property; rather, they were asked to move the items. [Doc. #58-4 ¶ 28.]

107. Only items which were left behind were discarded. [Doc. #58-4, ¶ 28.]

108. DPD instructed Public Works and inmates not to discard driver's licenses, birth certificates, other important papers, or weapons but to give such items to DPD officers to be placed in the DPD Property Bureau. [**Ex. I** 57:12-20; **Ex. E** 53:20-54:3.]

109. At no point did DPD officers arrest anyone, or seize and destroy property pursuant to the unauthorized camping ordinance. [**Ex. C** at ¶ 11.]

July 13, 2016 – Arkins Court

110. On July 13, 2016, an unofficial cleanup also took place along Arkins Court near 29th Street, where individuals had set up tents and other encumbrances on the right-of-way. [**Ex.**

I 47:17-48:17; 52:16-55:9; Doc. #58-14, ¶ 8 & Ex. C.][6]

111. The right-of-way along Arkins Court is uphill from the bank of the Platte River and is not part of the jurisdiction of the park rangers. [**Ex. E** 27:1-14; 58:3-10; 30:8-15.]

112. The right-of-way along Arkins Court was previously posted with "No Trespassing" and "No Parking" signs. [**Ex. I** 64:7-16; Doc. #58-14 at Ex. C].

113. People who were camping along Arkins Court were given advance notice of the July 13 cleanup verbally by Officer Craven and other HOU team members. [**Ex. I** 52:8-15.]

114. Denver Homeless Out Loud also circulated a flyer warning of the upcoming cleanup. [**Ex. L** 151:22-152:16.]

115. On July 13, while "Riverdance" was taking place, Officer Craven and her partner Officer Lombardi, along with a clinician from the Mental Health Center of Denver, contacted the individuals camped along Arkins Court. [**Ex. I** 54:2-10; 55:2-56:5; 62:3-63:4.]

116. The officers asked the individuals camped along Arkins Court to leave and to take their belongings with them and allowed the individuals time to pack their tents and belongings. [**Ex. I** 58:3-16; **Ex. Y**, Depo. of Mary Elizabeth Dodson 75:2-77:7.]

117. After the individuals had packed their belongings and departed, Officer Craven made the decision to direct Public Works employees to discard any trash and unattended or abandoned property left behind in the right-of-way. [**Ex. I** 59:8-19; 63:5-12; 68:11-23.]

118. At no point were more than ten police officers or City employees present at Arkins Court on this date. [**Ex. I** 55:2-56:5.]

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[6] *See also* http://www.westword.com/slideshow/homeless-encampment-emerges-near-kerouacs-old-stamping-grounds-8085457/36.

August 20, 2016

119. No organized cleanup or any other operation involving ten or more Denver employees or agents took place on August 20, 2016. [**Ex. U** ¶ 3; **Ex. Z** Supplemental Declaration of Scott Gilmore ¶ 3; **Ex. Q** ¶ 11.]

Undisputed Facts Related to Named Plaintiffs & Specific Incidents

120. Plaintiff Lyall was present during the "tiny home village" protest on October 24, 2015, and was arrested for and convicted of trespassing. [**Ex. M** 141:1-142:11; 144:18-145:12; 153:10-12; 154:1; 156:21-157:1; 161:1-8; Doc. #58-2, certified court record of conviction; Doc. #58-1 ¶¶ 6-8; Doc. #54 ¶¶ 55-56, 64; Doc. #15-8 ¶ 7; Doc. #15-9 ¶ 7; **Ex. S** at Ex. C.]

121. Plaintiff Lyall was present during the December 15, 2015, March 8, 2016, and July 13, 2016 incidents, but he did not have any property taken on any of those dates. [**Ex. M** 180:20-25; 192:5-16; 236:1-240:11; 251:21-253:16.]

122. Plaintiff Jackson claims to have been present during the December 15, 2015 incident, but he does not claim to have lost property. [**Ex. N** 139:14-140:11; 180:25-182:3.]

123. Plaintiff Jackson was not involved in the October 24, 2015 or July 13, 2016 incidents. [**Ex. N** 165:18-166:9; 182:1-3.]

124. Plaintiff Anderson claims he had property taken on March 8 or 9, 2016, but admits that he does not know who took his property, despite that assertion in his Declaration, because he was not present during the cleanup when his property was allegedly taken. [**Ex. X** 4:17-5:9; 112:15-23; 113:3-13; 132:8-24.]

125. Plaintiff Anderson never went to the storage location to find his property. [**Ex. X** 119:20-120:25.]

126. Plaintiff Anderson was not involved in the October 24, 2015, December 15, 2015, or July 13, 2016 incidents. [**Ex. X** 80:10-81:13]

127. Plaintiff Cooks was present during the March 8-9, 2016 cleanup, but had no property taken. [**Ex. V** 103:8-22; 124:2-23.]

128. Plaintiff Cooks claims to have lost clothes, baggage, and paperwork in "late October 2015," near Triangle Park; he was given notice and an opportunity to remove it, but refused because "I felt like I should not be moved anywhere else." [**Ex. V** 96:24-99:24.]

129. Plaintiff Cooks was not involved in the October 24, 2015, December 15, 2015, or July 13, 2016 incidents. [**Ex. V** 117:11-118:4.]

130. Plaintiff Peterson claims that he had property taken from the area of 25th and Lawrence on March 25, 2016. [**Ex. W** 92:9-94:22]

131. Mr. Peterson was not present when his property was taken, but testified that other homeless individuals told him that the police had taken it as part of a "sweep." [*Id.*]

132. Mr. Peterson testified that he asked police officers on the day of the cleanup where his items were and they responded that the property was in the back of the garbage truck; but a few days later, he was told by a city worker that his belongings had been stored at the Glenarm storage location. [**Ex. W** 96:6-97:1; 110:21-111:25.]

133. Mr. Peterson unsuccessfully attempted to retrieve his property at the Glenarm location. [**Ex. W** 111:18-114:25.]

134. Mr. Peterson was present during the December 15, 2015 incident, but did not lose any property. [**Ex. W** 109:9-24.]

135. Mr. Peterson was not involved in the October 24, 2015, or July 13, 2016 incidents. [**Ex. W** 90:8-24.]

136. Mr. Pepper claims that he had property taken when he left it unattended in the area of Park and Lawrence, on an unspecified date in the "Spring of 2016" and he made no attempt to retrieve it, claiming he did not know where to go and admitted he made no attempt to find out. [**Ex. T** 26:6-15; 51:7-25; 67:6-70:9; 69:4-73:2.]

137. Mr. Pepper was not involved in the October 24, 2015, December 15, 2015, or July 13, 2016 incidents. [Doc. #54, p. 25.]

STANDARD OF REVIEW

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson*, 477 U.S. at 248. Once the moving party demonstrates an absence of evidence supporting an essential element of a claim, the burden shifts to the opposing party, who must point to specific facts in an affidavit, deposition, answers to interrogatories, admissions, or other admissible evidence. *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). In analyzing a summary judgment motion, the evidence is viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

ARGUMENT

"[A] local government is liable only when the unconstitutional actions of an employee were representative of an official policy or custom of the municipal institution, or were carried out by an official with final policy making authority with respect to the challenged action." *Bird v. W. Valley City*, 832 F.3d 1188, 1207-08 (10th Cir. 2016) (emphasis and internal quotation marks omitted). Additionally, "[a]n important caveat to any § 1983 claim is that the plaintiff must still prove a violation of an underlying constitutional right." *Id.* at 2108 (brackets and internal quotation marks omitted). Even if a policy could be said to be unconstitutional, a city cannot be held liable if its employees did not commit a constitutional violation. *Trigalet v. City of Tulsa*, 239 F.3d 1150, 1155-56 (10th Cir. 2001) (internal citations omitted); *see City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Here, Plaintiffs claims fail on both accounts.

I. Plaintiffs cannot show their constitutional rights were violated

In their Amended Complaint, Plaintiffs allege three separate constitutional violations: unreasonable seizure under the Fourth Amendment and violation of their due process and equal protection rights under the Fourteenth Amendment. However, the undisputed facts of this case confirm that none of Plaintiffs' constitutional rights were violated by Denver employees during the incidents identified in their Amended Complaint.

A. Plaintiffs are unable to show their Fourth or Fourteenth Amendment procedural due process rights were violated

Plaintiffs generally claim "that the intentional taking and destruction of their personal property violated the Fourth Amendment ban on unreasonable searches and seizures." [Doc. #54, ¶ 18 & ¶ 48.] Plaintiffs also claim that Denver's cleanup efforts "violated and continue to violate

the Class Members' due process rights," through the seizure and destruction of property without a hearing or the chance to address the deprivation of property. [*Id.* at ¶¶ 48, 89.]

"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). To determine whether a government seizure violates the Fourth Amendment, the seizure must be examined for its overall reasonableness and the analysis is based upon "a careful balancing of governmental and private interests." *Soldal v. Cook Cty.*, 506 U.S. 56, 71 (1992). (citation omitted).

To determine whether a plaintiff was denied procedures due process, the court engages in a two step-inquiry: (1) did the individual possess a protected interest to which due process protection was applicable? and (2) was the individual afforded an appropriate level of process? *Ingraham v. Wright*, 430 U.S. 651, 672 (1977). To have a constitutionally protected property interest, a plaintiff must "have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). In *Mathews v. Eldridge*, the Supreme Court held that when determining what level of process is due, courts should consider three factors:

> (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976). Notably, the Supreme Court has not mandated use of the *Mathews* balancing test in all situations. In *Dusenbery v. United States*, the Court opted instead for the "straightforward test of reasonableness under the circumstances" from *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950). 534 U.S. 161, 167 (2002). Under

Mullane, when a § 1983 plaintiff contests the adequacy of notice, the court must determine whether the plaintiff was given "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the proceeding and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314; *see Miller v. Utah*, 638 F. App'x 707, 712 (10th Cir. 2016) (applying *Mullane* to decide plaintiff's § 1983 procedural due process claim).

Under both *Mathews* and *Mullane*, the due process analysis is contextual and hinges on reasonableness. No specific type or method of process is mandated by the Fourteenth Amendment; to the contrary, the Tenth Circuit has "repeatedly emphasized … that the procedural due process analysis is not a technical conception with a fixed content unrelated to time, place and circumstances, but rather is flexible and calls for such procedural protections as the particular situation demands." *Ward v. Anderson*, 494 F.3d 929, 935 (10th Cir. 2007) (quotations omitted, citing cases)). In short, "the Due Process Clause does not require … heroic efforts by the Government; it requires only that the Government's effort be 'reasonably calculated' to apprise a party of the pendency of the action." *Dusenbery,* 534 U.S. at 171 (quoting *Mullane*, 339 U.S. at 315).

1. *Plaintiffs' Fourth and Fourteenth Amendment procedural due process claims fail because they cannot show their property was taken by Denver*

Plaintiffs' unreasonable seizure and procedural due process claims fail because *none* of them had their property taken by Denver during any of the incidents alleged in their Amended Complaint. [SOF ¶¶ at 120-133.] This reason alone entitles Denver to entitled to summary judgment. *See Baker v. McCollan*, 443 U.S. 137, 140 (1979) ("The first inquiry in any § 1983 suit ... is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws....'") (quoting 42 U.S.C. § 1983)).

2. *There is no constitutionally protected right to trespass or store property–whether attended or unattended on public property–in violation of City Ordinances*

There is no dispute that the encampments at issue are on public and private property, including, but not limited to, the Platte River Corridor (which contains both public and private property) and on sidewalks. [SOF ¶ 35.] Plaintiffs have no constitutional right to trespass or otherwise store their belongings on public property contrary to City ordinance and unilateral expectations are not sufficient to show a protected property interest in unattended personal items. *See, e.g.*, *Lindsey v. Normet*, 405 U.S. 56 74, (1972) ("We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill); *see also Church v. City of Huntsville*, 30 F.3d 1332, 1335 (11th Cir. 1994) ("The Constitution does not confer the right to trespass on public lands. Nor is there any constitutional right to store one's personal belongings on public lands" regardless of subjective expectations). Thus, Plaintiffs must rely upon a claim that their property cannot be interfered with unreasonably or without due process of law. However, the undisputed facts show that Denver's method for removing materials illegally left in parks or in the right-of-way is reasonable and complies with due process requirements.

Generally, with respect to Park areas, including locations along the Platte River Corridor, property which is closed or subject to curfew is clearly marked with signs warning individuals that it is against the law for anyone to be in those areas–either during the curfew hours or at all if the area has been closed. [Doc. # 58-13, ¶¶ 3, 6.] Additionally, anyone who is violating a park ordinance, including but not limited to unlawful camping, receives oral notice of the violation and the individual is asked to move their property and is given a reasonable period of time to comply. [SOF ¶ 8.] When the park ranger or DPD officer returns (after the expiration of twenty-

four hours or more), if the person is still present and the ordinance violation continues, the person will again be asked to comply. [SOF ¶¶ 10-11.] Typically, individuals comply during the second encounter so no further action is needed. [SOF ¶11.] Finally, property which is found unattended is posted with written notice of the violation and informed that the property will be considered abandoned and removed if the property is not removed within twenty-four hours. [SOF ¶¶10-11.]

Additionally, as more fully discussed below, notice of the planned cleanup of the Platte River Corridor known as Riverdance, which has taken place annually since mid-2014, is typically provided five to seven days in advance of the cleanup so that illegal campers and others who are illegally storing property along the Platte River Corridor have a reasonable opportunity to move their property. [SOF ¶¶ 38, 100 -101.] Property is not taken from individuals who are still present during the Riverdance cleanup; rather, they may remove any possessions they want to take with them. [SOF ¶ 40.] Only items which are left behind are taken are discarded; but items of value and important documents are still provided to DPD officers to be taken to the property bureau. [SOF ¶ 41.] There can be no dispute that good reason exists for Denver to take these steps to clean up its park and recreation areas, due to the reported assaults, drug use, robberies, drug use, discarded needles and trash, and overgrowth of trees and bushes which may conceal illegal activity.

With respect to the right-of-way, the City conducts regular cleanings, especially in the area of Park Avenue and Lawrence Street, due to unsafe and unsanitary conditions. [SOF ¶¶ 26-29.] Notice is provided of the regular cleanings and no property is taken and discarded. [SOF ¶¶ 29-31.] Rather, individuals are merely asked to move along with their property so that the

sidewalk may be cleaned. [SOF ¶¶ 31-33.] Accordingly, it is also reasonable for Denver to regularly clean its right-of-way, especially areas which have been identified as unsanitary and unsafe.

3. *The incidents in Plaintiffs' Amended Complaint do not show violations of the Fourth or Fourteenth Amendments*

October 24, 2015 – Plaintiffs claim their Fourth Amendment rights were violated when Denver police officers "descended on the area around 2500 Lawrence St.," where homeless individuals including Plaintiff Lyall and former Plaintiff Burton had congregated. [Doc. #54, ¶¶ 55-56, 64.] However, the undisputed facts show that at the time, Plaintiffs were trespassing on private property and DHA, as the property owner, not Denver, had Plaintiffs' property removed. [SOF ¶¶ 43-50.] As such, Plaintiffs cannot rely upon this incident to show a constitutional violation under the Fourth or Fourteenth Amendment.

December 15, 2015 – Plaintiffs allege that on December 15, 2015, numerous people who were experiencing homelessness and were camping at Park Avenue and Lawrence and were told by Denver police "officers" to go inside a shelter without their belongings and when they returned, they found their property discarded without notice. However, the undisputed evidence does not support Plaintiffs' contentions–nor is there any evidence that ten or more Denver employees or agents were present at Park Avenue and Lawrence Street at the time.

Instead, the undisputed evidence shows that because the weather was very cold and dangerous to those staying outside, HOU officers were sent to check on individuals and attempt to assist them with finding shelter. [SOF ¶¶ 51-53.] There were no instructions given to any officer to take property, nor would there have been as that was not DPD's protocol. [SOF ¶¶ 59.]

Officer Craven was the DPD officer who contacted individuals camping at Park Avenue and Lawrence Street and she advised them to take everything important with them and go inside the Denver Rescue Mission. [SOF ¶¶56-57.] Further, the Denver Rescue Mission allows people to place their belongings along the outside of the building while they are inside the shelter, and any items placed in that area were not removed. [SOF ¶ 57.] Only after providing notice and an opportunity to remove their personal property did Officer Craven make the decision to dispose of the items which had been left behind, which included wet boxes, spoiled food, food containers, and soaked blankets and sleeping bags. [SOF ¶¶ 56, 58.] This incident does not clearly demonstrate an unreasonable seizure or procedural due process violation.

March 2016 - The March 8-9, 2016 cleanup was a coordinated effort undertaken by multiple City agencies to remove large-scale encumbrances in the right-of-way, according to written policies and protocols, due to unsafe and unsanitary conditions. [SOF ¶¶ 62-71.] This was the first-time Denver had engaged in such a large-scale right-of-way clean up and the protocols developed were designed to protect the rights of individuals experiencing homelessness. [SOF ¶¶ 69-73.] Notably, it is undisputed that Denver provided advance notice and created post-cleanup procedures for storing and retrieving property. [SOF ¶¶ 72-80.] The written protocol contained numerous constitutional safeguards, including written notice, in the form of both posted street signs and distributed fliers, which was provided in advance to those in the affected area. [*Id.*] Verbal notice of the cleanup was also given by HOU officers as well as outreach workers. [SOF ¶ 73.] On the day of the cleanup, the protocol provided guidance and procedures to Public Works supervisors who were responsible for distinguishing and separating personal property from trash to minimize the risk of erroneous destruction of property. [SOF ¶¶

80, 85, 87, 89.] Finally, Denver provided storage at no cost to those who identified items they wanted to store and stored property whose owners could not be identified. [SOF ¶¶ 83, 84, 90 - 92.] These policies and protocols are constitutionally reasonable, especially when balanced with the important governmental interests of public health and safety. The notice procedures were reasonable and satisfied due process under both *Mullane* and *Mathew* because it was reasonably calculated under these unique circumstances to give Plaintiffs the opportunity to remove their property before the impending cleanup. *See Catron v. City of St. Petersburg*, No. 8:09-cv-923-T-23EAJ, 2009 WL 3837789, at *8 (M.D. Fla. Nov. 17, 2009) (property confiscation ordinance met due process requirements with advance notice, warning sign, and 30-day storage), *aff'd in part, vacated in part on other grounds,* 658 F.3d 1260 (11th Cir. 2011); *Hooper v. City of Seattle*, No. C17-0077RSM, 2017 WL 591112, at *5-6 (W.D. Wash. Feb. 14, 2017). Similarly, under the second *Mathews* factor, providing notice and allowing Plaintiffs during the cleanup to identify property that they wanted to keep, giving them time to remove or store that property, and developing a protocol to guide workers in separating property (for storage) from trash (for disposal) minimized the risk that personal property would be erroneously destroyed. *See Joyce v. City and Cty. of San Francisco*, 846 F. Supp. 843, 863-64 (N.D. Cal. 1994).

The strength of Denver's interest (the third *Mathews* factor) further supports the constitutionality of its policies. Denver, and the public, have a powerful interest in maintaining public health and safety. "The government has a strong interest in acting quickly and efficiently to investigate where public health and safety are concerned, even if doing so creates a greater risk of mistakes." *Ward*, 494 F.3d at 937, *citing Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1220 (10th Cir. 2006).

Plaintiffs cannot show any Denver employee or agent acted unconstitutionally during the March cleanup–the undisputed evidence shows that such individuals followed the protocols. Even Plaintiffs concede that signs were posted in advance, fliers were handed out, and that those in the Triangle Park area were aware of the impending cleanup (many of them leaving the area ahead of time). [SOF ¶¶ 72, 74, 75.] Although some Plaintiffs deny receiving actual notice of the March cleanup, this does not preclude summary judgment because the Due Process Clause does not guarantee *actual* notice; thus, testimony from Plaintiffs or other individuals that they personally did not receive notice (or do not remember seeing any signs) does not create a dispute of *material* fact. *See Dusenbery*, 534 U.S. at 171. Likewise, even Plaintiffs' witnesses testified (and video evidence confirms) that individuals with property on the street were given the opportunity to voluntarily move or store their property. [SOF ¶ 83.] Finally, it is undisputed that CES, on behalf of Denver, tagged, inventoried, transported and stored property in a facility open to the public for 60 days following the cleaning. [SOF ¶¶ 86-87, 90-92, 94, 98-99.] Thus, Plaintiffs cannot show the March cleanup resulted in unreasonable seizures or violated procedural due process rights.

July 13, 2016 "Riverdance 3" – Plaintiffs allege that, on July 13, 2016, a group of homeless individuals "sheltering" next to the Platte River were "unnecessarily confronted by Defendant Denver Police, told to move or be arrested, forced to leave their belongings that they never saw again nor had the opportunity to retrieve." [Doc. #54, ¶ 53.] July 13, 2016 was the third annual "Operation Riverdance," a community cleanup of the in response to increasing complaints about public health and safety along the Platte River corridor; it was not a coordinated encumbrance removal, as in March 2016, or a method to immediately seize and

discard property of people experiencing homelessness. [SOF ¶¶ 34, 38-39, 100, 105-107.] As in prior years, DPD, park rangers, and outreach workers made substantial efforts to contact those camping or storing property in the cleanup area before Riverdance so that individuals could to remove their property. [SOF ¶¶ 101-105.] On the day of the cleanup, people were also given time to move their property, and standard procedures were followed to ensure that valuables and important documents were given to DPD officers to store at the property bureau. [SOF ¶¶ 101, 105, 108.] Thus, Plaintiffs cannot show a constitutional violation during Riverdance.

July 13, 2016 Arkins Court - Likewise, people camping, storing property, and otherwise encumbering the right-of-way along Arkins Court were given reasonable notice of the cleanup. [SOF ¶¶ 113-114.] Officers also provided notice that morning, giving opportunity for those present to pack their belongings and move any property they wished to keep. [SOF ¶¶ 115-116.] Only trash and abandoned belongings were disposed of per the decision of Officer Craven. [SOF ¶¶ 117.] Therefore, Plaintiffs cannot show the July 13, 2016 at Arkins violated their Fourth or Fourteenth Amendment rights.

August 20, 2016 - Plaintiffs do not have any admissible evidence to support their allegation of a cleanup on this date. [*See* Doc. #106, p. 3 ("It is not clear whether any Plaintiff, or any person known to Plaintiffs, witnessed the August 20 Sweep.").] In the absence of evidence of any City action, much less any property loss, Plaintiffs cannot demonstrate any constitutional violation occurred on this date.

B. Plaintiffs' Substantive Due Process Claim is also subject to dismissal

The Fourteenth Amendment due process clause guarantees "not only certain procedures when a deprivation of an enumerated right takes place (procedural due process), but also …

[that] certain deprivations won't take place without a sufficient justification (substantive due process)." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1078 (10th Cir. 2015). Faced with novel substantive due process claims, courts must be mindful of "(1) the need for restraint in defining their scope; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policymaking bodies in making decisions impacting upon public safety." *Allen v. Clements*, 930 F. Supp. 2d 1252, 1270 (D. Colo. 2013) (quoting *Graves v. Thomas*, 450 F.3d 1215, 1220-21 (10th Cir. 2006) (internal citations omitted)).

In this case, Plaintiffs base their substantive due process claim on the same facts and alleged "policies, practices, and conduct" as their Fourth Amendment claim. [*Compare* Doc. #54, ¶¶ 81-82 *with* ¶¶ 87-88.] Because Plaintiffs' claim is covered by the Fourth Amendment, their substantive due process claim should be dismissed. *See County of Sacramento*, 523 U.S. at 843; *see also Becker v. Kroll*, 494 F.3d 904, 19 (10th Cir. 2007).

Moreover, the Tenth Circuit "recognize[s] a § 1983 claim for violation of Fourteenth Amendment substantive due process rights in the narrowest of circumstances … only the most extreme circumstances, typically involving some violation of physical liberty or personal physical integrity." *Becker* 494 F.3d at 922-23; *see A.B. ex rel. B. S. v. Adams-Arapahoe 28J School Dist.*, 831 F. Supp. 2d 1226, 1249 (D. Colo. 2011). Such circumstances do not exist here.

A single allegation in Plaintiffs' Amended Complaint suggests an intent to possibly pursue a substantive due process claim based upon a "state-created danger" theory of liability. [*See* Doc. #54, ¶ 6).] Nevertheless, the state-created danger theory is an exception to the rule that state actors are not liable for the violent acts of third parties. *Moore v. Guthrie*, 438 F.3d 1036, 1042 (10th Cir. 2006) (citing *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1279-80 (10th Cir.

2003). This exception is only available when a special relationship exists between the plaintiff and state actor or when affirmative conduct of the state placed plaintiff in danger. *Id.*

Since Plaintiffs allege no special relationship, only the affirmative-conduct theory arguably remains. This is "a *narrow exception*, which applies only when a state actor affirmatively acts to create, or increases a plaintiff's vulnerability to, danger from private violence." *Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 921-22 (10th Cir. 2012) (internal citations omitted) (emphasis in original). "Affirmative conduct" requires an immediate threat of harm, limited in range and duration, to a discrete plaintiff—not the public at large. *Id.* (citing *Ruiz v. McDonnell*, 299 F. 3d 1173, 1183 (10th Cir. 2002)). Plaintiffs cannot make such a showing because there is no evidence that any action taken by a City employee put any Plaintiff in an inherently dangerous situation, especially when recognizing the generalized dangers of living on the street which necessarily preexisted any of the incidents alleged.

There is no evidence that any of the Plaintiffs were intentionally left out in the cold or that any property was taken from them. In fact, Plaintiffs Anderson, Cooks and Pepper were not even present [SOF ¶¶ 126, 129, 137], Plaintiff Lyall was at a separate encampment at a different location and had no property taken [SOF ¶ 121] and Plaintiffs Peterson and Jackson did not have any property taken. [SOF ¶¶ 122, 134.] As such, Plaintiffs attempt to assert a substantive due process claim under a danger creation theory fails. *See Baker*, 443 U.S. at 140.

D. Plaintiff's Equal Protection Claim Fails as a Matter of Law

Finally, Plaintiffs attempt to assert an equal protection claim, alleging that Denver's "policies, practices and conduct are intended and designed to single out homeless people" and "are based on [Denver's] animus towards this disfavored group and lack a rational relationship to

any legitimate governmental interest." [Doc. #54 ¶ 92.] Initially, it appears that this claim is now moot in light of the Court's order modifying Plaintiffs' proposed class, which specifies that the certified class is not limited to homeless individuals. [Doc. #106, p. 16, 17 n.6.]

Even if the claim is not mooted, Plaintiffs nevertheless fail to state a viable equal protection claim. Specifically, Plaintiffs cannot establish that they are members of a suspect class or that any of their fundamental rights were violated. In fact, the overwhelming weight of authority in the Tenth Circuit and elsewhere holds that "[h]omeless persons are not a suspect class, nor is sleeping out-of-doors a fundamental right." *Joel v. City of Orlando*, 232 F.3d 1353, 1356 (11th Cir. 2000) (collecting cases); *see Brown v. Cooke*, No. 06-CV-01092-MSK-CBS, 2009 WL 641301, at *18 (D. Colo. Mar. 9, 2009), *aff'd*, 362 F. App'x 897 (10th Cir. 2010) ("Plaintiff's … condition of homelessness do[es] not bring him within a suspect class.").[7] Accordingly, Denver's policies are presumptively valid and subject only to rational basis scrutiny. *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993).

Under the rational basis test, a legislative classification will be upheld if it "advance[s] a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Thus, the law must merely be "narrow enough in scope and grounded in a sufficient factual context" for the court "to ascertain some relation between the classification and the purpose served." *Id.* at 632–33; *see also Teigen v. Renfrow*, 511 F.3d 1072, 1083 (10th Cir. 2007) ("An equal protection claim will fail if there is any reasonably conceivable state of facts that could provide a rational basis for the classification") (citation and quotation omitted)).

[7] The Supreme Court has held that classifications based on wealth (*Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988)) or housing status (*Lindsey v. Normet*, 405 U.S. 56 (1972)) are not suspect.

Whether the government action had a rational basis "is a legal question which need not be based on any evidence or empirical data." *Id.*

Here, there is no question that the ordinances at issue and existing procedures governing the administration of such ordinances are rationally related to a legitimate government purpose of protecting public health and safety. Accordingly, Plaintiffs are unable to demonstrate a genuine issue of material fact to overcome the presumption of rationality and their equal protection claim fails as a matter of law. *See, e.g.*, *Teigen,* 511 F.3d at 1083.

E. Plaintiffs Cannot Establish a Municipal Policy or Custom Violated their Constitutional Rights

Even if Plaintiff could show a violation of their constitutional rights, for Denver to be held liable under § 1983, Plaintiffs must be able to establish that an official policy or custom was the moving force behind the constitutional violations they allege. *See Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 694 (1978).

> [I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 405 (1997) (emphasis in original); *see also Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767–69 (10th Cir. 2013). A policy or custom is established by showing 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. City of Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010).

As relevant here, under the certified class, the policy at issue is: 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." [Doc. #106, p. 26, ¶ 2.] Thus, even if Plaintiffs could show a constitutional violation their municipal liability claims nevertheless fail because they cannot show Denver had a policy, custom, or practice of clearing away homeless encampments by immediately seizing and discarding property.

A. Denver has no formal policy or informal custom of "clearing away" encampments by immediately seizing and discarding individuals' property

An official policy can be shown through an official decision or statement or through "the existence of 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." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127 (1988). The Tenth Circuit has established a three-part test for determining when a municipality may be liable for an informal custom, which requires proof of: (1) a "continuing, persistent and widespread practice of unconstitutional misconduct"; (2) [d]eliberate indifference or tacit approval" of such misconduct; and (3) "[t]hat the plaintiff was injured by virtue of the unconstitutional acts pursuant to [the city's] custom and that the custom was the moving force behind the unconstitutional acts." *Gates v. Unified Sch. Dist. No. 449,* 996 F.2d 1035, 1041 (10th Cir. 1993).

1. *Denver's Ordinances do not authorize immediate seizure and destruction of property from encampments of multiple persons*[8]

Certainly, none of Denver's Ordinances at issue in this case endorse any practice of sending ten or more City employees or agents to clear away encampments of multiple homeless persons by immediately seizing and discarding their property. On the contrary, the language of Denver's unauthorized camping Ordinance includes a specific process that Denver law enforcement must follow prior to issuing a citation, making an arrest, or otherwise enforcing the Ordinance. Ex. A, § 38-86.2(c). The process includes oral notification of the violation and written notification if the person fails to comply with the oral request to cease camping activities. The Ordinance does not authorize the immediate seizure or destruction of property.

Further, DPD policy also provides guidelines for its officers to use when enforcing this Ordinance, which include, *inter alia*, how to determine whether a person is camping as defined in the Ordinance, and clarifying that "[c]iting or arresting a person for violating this ordinance *should be the resolution of last resort*." Ex. B, p.1. (emphasis added). The guidelines confirm that officers do not take property and discard it; rather if a person is eventually cited or arrested, an officer photographs, videos, or collects physical evidence of the camping and places the evidence into DPD's Property Bureau. *Id*. at p.4, ¶ II.3(c)(i)(4), p.5, ¶ III(f); p.6); Ex. C, ¶ 13.]

Similarly, D.R.M.C. § 39.1, *et seq.*, which applies to Parks, does not authorize City employees to immediately seize or discard property in response to unlawful camping or when property is left unattended. Ex. D, § 39-7(a) – (c). Pursuant to rules and regulations adopted by the Parks Manager, when a person is found be in violation of a Parks Ordinance, the individual will be advised of the violation and asked to stop the prohibited conduct. [Doc. #58-13, ¶ 9.]

[8] Plaintiffs have not alleged that Denver's Ordinances are facially unconstitutional.

Unless the person is suspected of criminal conduct, as opposed to conduct which could result in the issuance of an administrative citation, no citation will be issued and the police are not contacted. *Id*. Rather, the individual will be advised of the prohibited conduct and asked to stop. *Id*. Parks staff will then return within a reasonable period of time, generally the following day or later, to ensure that the individual has complied. [*Id*.; *see also* Doc. #58-14 ¶ 9.] If the individual is found to still be in violation, the individual will be asked for a second time to stop the conduct. [Doc. #58-13, ¶ 9.] At this point, most people typically comply and nothing further is required. *Id*. There is absolutely no evidence that Parks staff have generally engaged in practice of immediately seizing and destroying property in an encampment–whether attended or unattended–much less in groups of ten or more Denver employees or agents.

When Parks staff encounter unattended personal property (including unoccupied camp sites) policy requires written notice of the violation to be "posted" (meaning that a written paper Notice will be placed in a visible and secure place). The Notice informs the person(s) that it is unlawful to leave anything unattended in that area, that all personal items must be removed immediately, and the failure to remove such items within twenty-four hours will result in the property being deemed abandoned and removed and disposed of. [Docs. ##58-13, ¶10; 58-14, ¶¶ 5-6 & Ex. A thereto.] When staff returns to a posted area after the twenty-four hour notice period has expired, any unattended remaining items will be removed; however, staff are trained to give any items of value, such as money, identification, legal or medical paperwork or medication, to a Denver police officer. [Docs. ## 58-13, ¶ 10; 58-14, ¶ 7.]

Finally, D.R.M.C. Chapter 49, Article IX, Encumbrances of the Right of Way, authorizes the Public Works Manager to remove or to order the removal of anything which encumbers any

street, alley, sidewalk, parkway, or other public way, including prescribing appropriate methods for such removal. [Ex. F, § 49-246.] No evidence exists to show that Denver has ever used this Ordinance as means to immediately "clear away" encampments of multiple persons and destroy their property–especially with a group of ten or more City employees or agents. In fact, as discussed below, the evidence conclusively demonstrates the contrary.

2. *Denver does not have a continuing, persistent, and widespread practice of using ten or more persons to immediately seize and destroy property from encampments of multiple persons*

Regular cleanings of public right-of-way – As discussed above, Denver has a regular practice of cleaning rights-of-way, including the area around Triangle Park, and it is undisputed that advance notice is provided to people in the area. [SOF ¶¶ 15, 27-29, 33.] The cleanings are such a regular practice, people experiencing homelessness in the area are aware of the cleanings and know to move their belongings from the areas which will be cleaned. [SOF ¶ 33.] Additionally, there is no evidence that these regular cleanup activities involve ten or more City workers or agents; however, regardless of the number of people involved, Denver employees and agents who participate in the cleaning do not take any property or force people to move. [Doc. #58-7, ¶¶ 4-5; Doc. #58-15, ¶¶ 3-5; Doc. #58-4, ¶¶ 16-17.] Accordingly, these regular cleanups do not establish an informal custom by Denver to dispatch ten or more persons to immediately seize and destroy property of encampments of people experiencing homelessness.

March 2016 - As discussed above, on March 8-9, 2016, Public Works conducted an organized, large scale cleanup of the Triangle Park area due to significant safety and sanitation issues. [Doc. #58-7, ¶¶6-8; Doc. #58-15, ¶¶ 6-8.] This cleanup is not evidence of a formal policy or informal custom because the March cleanup was the *first* time the conditions in the Triangle

Park area required the City to engage in a large scale clean up, and it is undisputed that personal property was not "immediately removed and discarded."

The written protocol developed included providing advance notice of the cleanup and the location of property stored (through signs and fliers), guidelines as to what items would be stored and what would be thrown away, how items stored would be identified, and storage procedures for property voluntarily stored or left unattended. [SOF ¶¶ 72-80, 90-92, 99.] Additional signs were even posted on March 9th when the cleanup area expanded. [SOF ¶ 74.] Further, property taken to the storage facility was scheduled to be stored for thirty days, but that timeframe was expanded to sixty days to give individuals more time to collect their property.[9] [SOF ¶¶ 79, 99.]

Prior to the cleaning, people who had property were encouraged to voluntarily remove it and were given time to do so [SOF ¶¶ 72-75, 78, 83.] Individuals could dispose of items they did not want and they were also given the option to have any items stored at no cost. [SOF ¶ 83.] Unattended property was also stored. [SOF ¶ 84.] All personal items collected were placed into bags and tagged by CES (the contractor hired by Denver to assist with the cleanup) and transported to the storage facility. [SOF ¶¶ 90, 94] Property owners present were given a claim receipt and told how to reclaim their property and claim receipts were also made for unattended items for which an owner could not be determined by identifying the area where the property was located so that the owner could retrieve property by identifying the location and a description of the property taken. [SOF ¶¶ 91-92.] On May 5, 2016, the remaining property at the storage facility was sorted through and any property that appeared to be valuable or contained

[9] A list of individuals who did not retrieve their property was also provided to outreach workers in an attempt to locate the individuals. [Doc. #58-7 ¶ 13.]

specific identifying information (such as identification cards or hospital paperwork) were moved to the Public Works' warehouse where they continue to remain. [SOF ¶ 99.]

These undisputed facts demonstrate that the March 2016 cleanup does not demonstrate the existence of a widespread unconstitutional practice. Instead, the notice and specific protocols followed, including the storage of property for a reasonable period of time, all demonstrate that Denver did not have or condone a practice which violated the constitutional rights of its citizens, including people experiencing homelessness.

July 13, 2016 ("Riverdance") – The annual event called "Riverdance" also cannot serve as evidence of a "continuing and persistent pattern of misconduct" by Denver. There is no question that advance notice was provided from several different sources. [SOF ¶¶ 102-105, 115-116.] Additionally, property is not removed if the owner is present; rather, only property left behind is removed, and any important documents or valuables which are found during the cleanup are given to DPD officers to be placed in the DPD Property Bureau. [SOF ¶¶ 106-108].

July 13, 2016 (Arkins Court) – Plaintiffs also point to a separate clean up that took place on July 13, 2016 on Arkins Court near 29th Street, where individuals had set up tents and other encumbrances on the right-of-way, including vehicles which were parked in a posted no parking zone. [SOF ¶¶ 110, 112]. Due to the conditions, Officer Craven and other HOU team members decided that the area should be cleaned up and advance notice was given by HOU members and Denver Homeless Out Loud. [SOF ¶¶ 113-115.].

On July 13, DPD HOU Officers Craven and Lombardi (along with a clinician from the Mental Health Center of Denver), contacted the individuals camped along Arkins Court, asked them to move, and gave them time to pack up their belongings and move. [SOF ¶¶ 115-116].

After the unlawful campers left, Officer Craven made the decision to have Public Works discard the trash and any other items which had been left behind. [SOF ¶ 117.]

At no point were there ten or more City employees or agents at Arkins Court on July 13, 2016 and there is no evidence that Officer Craven or anyone who was involved in the Arkins cleanup obtained supervisor approval prior to conducting the cleanup or prior to Officer Craven's decision to throw away the items which had been left behind by the illegal campers. Thus, the Arkins Court cleanup does not show the existence of a "widespread practice" by Denver of sending ten or more employees or agents to clear away an encampment of multiple homeless persons by immediately seizing and discarding their property.

Even if Plaintiffs could raise a genuine issue of material fact regarding whether Officer Craven's decision to have items which were left behind discarded rises to the level of a constitutional violation, at most it is proof of a single incident that is not sufficient to impose municipal liability upon Denver. *See City of Oklahoma City v. Tuttle,* 471 U.S. 808, 823–24 (1985) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by existing, unconstitutional municipal policy"); *see also Eugene v. Alief Indep. Sch. Dist.,* 65 F.3d 1299, 1304 (5th Cir.1995) (two incidents of alleged excessive force insufficient to show policy or custom); *Andrews v. Fowler,* 98 F.3d 1069, 1076 (8th Cir.1996).

October 24 & December 15, 2015 – Nor can Plaintiffs rely upon the events of October 24 or December 15, 2015 to establish an unconstitutional widespread practice by Denver. The October 24 incident involved a trespass onto private property by numerous individuals who

began to construct tiny homes without permission, and Denver was not involved in the removal of the property. [SOF ¶ 50].

Further, the December 15, 2015 incident merely shows that HOU Officer Craven contacted individuals who were camping at Park Avenue and Lawrence Street and advised them to take everything important and go inside the Denver Rescue Mission because of the dangerous weather conditions. [SOF ¶ 56.] There were no instructions given to any officer to remove property, nor would there have been as that was not DPD's protocol; however, Officer Craven decided that items left behind after individuals made their way into the shelter should be disposed of based upon their condition. [SOF ¶¶ 59.] Importantly, the undisputed fact that Officer Craven made the decision to dispose of the items which had been left behind–*in contravention of DPD policy*–demonstrates that this conduct was not a widespread custom of the City.[10]

Moreover, the conduct of other DPD officers on December 15th further undermines Plaintiffs' claim that that Officer Craven's conduct demonstrates a continuing, persistent, and widespread practice by Denver. *See Carney v. City & Cnty. of Denver,* 534 F.3d 1269, 1274 (10th Cir. 2008) (to prove the existence of a custom, a plaintiff must typically "offer evidence suggesting that similarly situated individuals were mistreated by the municipality in a similar way."); *Tuttle,* 471 U.S. at 823–24; *Butler v. City of Norman,* 992 F.2d 1053, 1055 (10th Cir. 1993); *see also Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996). Like Officer Craven, on

[10] Plaintiffs also cannot establish that Officer Craven's decisions on December 15, 2015 and/or July 13, 2016 give rise to municipal liability because she is not a final policymaker. *See Seamons v. Snow*, 206 F.3d 1021, 1029 (10th Cir. 2000) ("[I]t must be shown that the unconstitutional actions of an employee were representative of an official policy or custom of the municipal institution, or were carried out by an official with final policy making authority with respect to the challenged action.").

December 15, 2015, other HOU officers contacted several homeless individuals in encampments to provide assistance due to the dangerous weather conditions; however, the officers did not dispose of any property. [SOF ¶¶ 54-55.]

There is also no evidence that any police officer other than Officer Craven–or ten or more City employees or agents–immediately seized and destroyed property from anyone in an encampment. Thus, the mere fact that Officer Craven may have been involved in two unrelated incidents, on December 15, 2015 and July 13, 2016, in which she determined that property left behind by persons who were engaged in unlawful camping (and other Ordinance violations with respect to the July 13, 2016 incident) is not sufficient to demonstrate the existence of a continuing, persistent and widespread practice attributable to Denver. *See Tuttle,* 471 U.S. at 824; *Randle v. City of Aurora,* 69 F.3d 441, 447 (10th Cir. 1995); *Eugene,* 65 F.3d at 1304.

August 20, 2016 – Finally, since there is no evidence of any Denver cleanup or other operation on August 20, 2016, and there is no evidence that Denver sent ten or more employees "clear away" any encampment of multiple homeless persons by immediately seizing and discarding their property, Plaintiffs cannot rely upon August 20, 2016 to demonstrate municipal liability based upon a widespread practice of unconstitutional misconduct.

3. *Plaintiffs cannot show deliberate indifference or tacit approval of any unconstitutional conduct*

Plaintiffs' municipal liability claim also fails because they cannot show that Denver displayed deliberate indifference to, or tacitly authorized, any alleged violation of their constitutional rights. *See Gates*, 996 F.2d at 1041. The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately

chooses to disregard the risk of harm. In most instances, notice can be established by proving the existence of a pattern of tortious conduct. *Barney v. Pulsipher*, 143 F.3d 1299, 1307-08 (10th Cir. 1998) (internal citations omitted).

Certainly, the October, December and July Arkins Court incidents described in Plaintiffs' Amended Complaint are not sufficient to make this showing. The October 24th incident involved trespass on private property and the removal of personal property by the property owner. There is no evidence that Officer Craven's decisions to dispose of property left behind on December 15, 2015 and July 13, 2016 on Arkins court was sanctioned by the City or that any high-ranking City officials were even aware of Officer Craven's decisions. Finally, there is no evidence of any cleanup by City employees or agents on August 20, 2016. Thus, none of these incidents–either by themselves or collectively–show deliberate indifference or tacit authorization by the City of any alleged unconstitutional conduct.

Similarly, the March 2016 and July 2016 "Riverdance" cleanups also do not show deliberate indifference or tacit approval of conduct which might even arguably be said to be substantially certain to result in a constitutional violation. The March 2016 cleanup involved advance notice, opportunity to remove property or have it stored, and a procedure for storage and retrieval of property after the cleanup. Riverdance also involved advance notice and, because of such notice, persons were provided with a sufficient opportunity to comply. Even during the cleanup, people who were present were merely asked to remove their property so that the area could be cleaned. Only property which had been left behind was removed and there is no recognized constitutional right to store personal belongings on public lands. *See, e.g., City of*

Huntsville, 30 F.3d at 1335; *Roth*, 408 U.S. at 577. Accordingly, Plaintiffs cannot show deliberate indifference by Denver.

B. There is no evidence from which municipal liability may be shown based upon a decision made by a final policymaker or the under a theory of ratification

Plaintiffs also contend that Denver's Mayor, the Chief of Police, and/or the Deputy Chief of Staff "either directed or ratified" the alleged unconstitutional conduct set forth in the Amended Complaint. [Doc. #54 ¶¶ 41, 42, 44.] "[W]hen a municipal official who is 'responsible for establishing final policy with respect to the subject matter in question' makes 'a deliberate choice to follow a course of action...from among various alternatives,' municipal liability will attach to that decision." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986). Further, a municipality will be found liable under a ratification theory only upon a showing that a final decisionmaker ratified the employee's specific unconstitutional actions as well as the basis for the actions. *Bryson v. City of Oklahoma City*, 627 F.3d 784, 790 (10th Cir. 2010). The evidence in this case is not sufficient to demonstrate municipal liability under either theory.

Denver's Mayor – The record is devoid of any evidence that the Mayor established any final policy regarding the alleged incidents set forth in Plaintiffs' Amended Complaint, including establishing a policy 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. The record is also devoid of any evidence that the Mayor ratified the alleged unconstitutional conduct of any Denver employee. `

Chief of Police – There is no evidence that Denver's Police Chief established any final policy from which liability could attach with respect to any of the incidents alleged in their Amended Complaint. Plaintiffs are also unable to show that Chief White is a final decisionmaker

with respect to the conduct of any Denver employee unless they are a member of Denver's police department. While DPD employees were directly involved in the October 24, 2015, December 15, 2015 and July 13, 2016 incidents, there is no evidence that Chief White specifically approved any decisions made on those dates concerning the removal of property or that he adopted the basis for such decisions.

Deputy Chief of Staff[11]– Plaintiffs also cannot show municipal liability based upon any alleged decisions made by Mr. Dreyer as there is no evidence that he is a final policymaker nor is there any evidence that Mr. Dreyer promulgated any policy of sending ten or more employees or agents to clear away an encampment of multiple homeless persons by immediately seizing and discarding their property.

C. There is no evidence of a Failure to Train

Finally, while Plaintiffs' Amended Complaint gives lip service to allegations of municipal liability based upon a failure to train, there is no evidence to support their claims. When a plaintiff's claim is based on a failure to train, "[a] municipality's culpability for a deprivation of rights is at its most tenuous." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). "To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Id.* (alterations in original) (quoting *City of Canton v. Harris*, 489 U.S. 378, 395 (1989)). Plaintiffs inability to establish a genuine issue of material fact that Denver

[11] In their Amended Complaint, Plaintiffs erroneously allege that Evan Dreyer is the Mayor's Chief of Staff; however, at the times relevant to the incidents alleged by Plaintiffs, he was the Deputy Chief of Staff (and continues to hold that position).

inadequately trained its employees with respect to Ordinance enforcement and the incidents set forth in their Amended Complaint requires that this claim also be dismissed.

D. Plaintiffs are also unable to establish causation

In addition to failing to show a custom or policy, Plaintiffs also are unable to present evidence which is sufficient to demonstrate the required direct causal link between the alleged deprivation of their constitutional rights and any official policy or custom of the City. None of the Plaintiffs were harmed by the policies which they claim are unconstitutional. Moreover, because Plaintiffs cannot show the existence of an unconstitutional policy or custom which is attributable to Denver. As such, they are unable to establish a causal link to the alleged conduct. Plaintiffs' inability to demonstrate causation also requires dismissal of their municipal liability claims against Denver. *See Harris,* 489 U.S. at 385.

CONCLUSION

For all the reasons stated herein, Denver respectfully requests that the Court enter Judgment in its favor and dismiss Plaintiffs' Amended Complaint, with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 14th day of August, 2017, I electronically filed the foregoing **THE CITY AND COUNTY OF DENVER'S MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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