IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-2155-WJM-CBS

RAYMOND LYALL, on behalf of himself and all other similarly situated, et al.,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER,

Defendant.

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

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1. **Introduction**

Plaintiff Class Members are homeless residents of Defendant City and County of Denver ("Denver") who have continuously been targeted and unconstitutionally treated by Denver, its officials, and its agents. Denver—through its Motion for Summary Judgment [Doc. No. 125]—demonstrates its continuous and callous misunderstanding of its own treatment of the certified class. By stressing its purported devotion of resources, reiterating its publicly stated goals, and pointing to its "Office of HOPE" campaign, Denver's sleight of hand tactics only serve to shine a light on its unconstitutional treatment of Plaintiff Class Members. Despite the City's lip service, the day-to-day reality for Denver's most vulnerable population is that their myriad of complaints and systematic, decidedly unconstitutional treatment at the hands of Defendant is patently ignored. Highly disputable facts pervade Denver's latest attempt to shrug off its duty to treat each member of society as constitutional equals. The tone-deaf nature of Denver's Motion

highlights once again its policy and practice of systematic unconstitutional treatment of Plaintiff Class Members.[1]

And when Denver is faced with undisputed facts that are too brutal and unwieldy for reframing, then it embarks down the well-worn path of trying to characterize state actions as *unofficial*, so that despite clear evidence of planning and coordination from the Mayor's Office to Denver Parks—we are asked to believe that the homeless sweeps, though injuring and traumatizing thousands of our most vulnerable citizens, were a series of discrete units for which the City should not be liable. So that along with Hobson's Choices, we have also Zeno's Paradox, where events are strategically fractured to create to the illusion that they are not caused by the policies, conduct and ratifications that set them into place.

Put simply, Denver's Motion does not pass summary judgment muster, but rather serves to demonstrate that *Plaintiffs'* pending motion for summary judgment should be granted. At the very least, Denver's recitation of the material facts are highly disputable and its cited law distinguishable from the facts here. Accordingly, Plaintiff Class Members respectively request that this Court deny Denver's Motion for Summary Judgment in its entirety.

2. **Response to Movant's Material Facts**

[1] The best example of Denver's tone-deafness is its repeated attempts to characterize coercive and unconstitutional property seizures as voluntary interactions in which homeless persons were provided a full and fair opportunity to collect their belongings. Repeatedly, we see Defendant trying to reframe the most brutal of Hobson's Choices as respectful exchanges where homeless persons—as though leisurely culling apples at the farmer's market—are afforded time and assistance in gathering themselves and their property; when in reality they are confronted by Denver Police with weapons, insulted, threatened, ordered immediately to take whatever property they can carry in their arms and move on (to where?) or face arrest, in freezing weather, broken, tired and exhausted, in the early morning hours when the fewest people are present for fear of shocking the conscience of the community.

1. Admit, but largely irrelevant as the constitutionality of Denver Municipal Code 38-86.2 is not expressly challenged here. As stated in Plaintiff Class Members' First Amended Complaint [Doc. 54], the overbreadth of this ordinance—as well as the fact that it is expressly directed toward homeless persons and contain no property forfeiture clause provision — encourages the arbitrary and unconstitutional policies and practices carried out by Defendant against Plaintiff Class Members. Should this Court determine *sua sponte* to review the constitutionality of the ordinance as written—and not just how it is being enforced by Defendant—Plaintiff Class Members would be pleased to submit briefs as to its *prima facie* constitutionality.

2. Admit, but Plaintiff Class Members' Response to Denver's Fact Number 1, *supra*, is incorporated herein.

3. Admit, but Plaintiff Class Members' Response to Denver's Fact Number 1, *supra*, is incorporated herein.

4. Admit, but the existence of a supposed training bulletin is irrelevant. Defendants do not allege, nor can they show, whether any such department wide training actually took place, nor have Plaintiff Class Members benefitted from any such training. For example, Plaintiff Class Members aver that no notices, oral, written, or otherwise were provided prior to the sweeps, directly contravening any such training protocol. [Doc. # 124-8], 62:20-63:11; [Doc. # 124-8A]; [Doc. # 124-19], 35:24-36:2; [Doc. # 124], *passim*.

5. **Deny**. Plaintiff Class Members have experienced firsthand Denver Police Department's ("DPD") policy of seizing and disposing of property of persons who are allegedly in violation of the camping ordinance during its homeless sweeps. [*See* [Doc. # 124-2], 87:9-17, 117:14-118:17, 125:16-25, 191:21-25; [Doc. # 124-10], 184:6-21, 187:21-188:8; [Doc. # 124-

12], ¶ 8; [Doc. # 124-13], ¶ 5; [Doc. # 124-14], ¶¶ 5-7; [Doc. # 124-15], ¶ 2; *see generally* . [Doc. # 124], ¶ 1-137.

6. Admit, but see Plaintiff Class Members' Response to Movant's Fact Number 1, *supra*, as it applies equally to Denver Municipal Code §§ 39-1, *et seq.*

7. Admit, but see Plaintiff Class Members' Response to Movant's Fact Number 1, *supra*, as it applies equally to Denver Municipal Code §§ 39-1, *et seq.*

8. **Deny**. Plaintiff Class Members aver that no notices, oral, written, or otherwise, were not provided prior to sweeps. [Doc. # 124-8], 62:20-63:11; [Doc. # 124-8A]; [Doc. # 124-19], 35:24-36:2; *see generally* [Doc. # 124], ¶ 1-137.

9. **Deny**. Plaintiff Class Members aver that no notices, oral, written, or otherwise, were not provided prior to sweeps. [Doc. # 124-8], 62:20-63:11; [Doc. # 124-8A]; [Doc. # 124-19], 35:24-36:2; *see generally* [Doc. # 124], ¶ 1-137.

10. **Deny**. Plaintiff Class Members have experienced firsthand DPD's policy of taking and disposing of property of persons who are allegedly in violation of the camping ordinance during its homeless sweeps. *See* [Doc. # 124-2], 87:9-17, 117:14-118:17, 125:16-25, 191:21-25; [Doc. # 124-10], 184:6-21, 187:21-188:8; [Doc. # 124-12], ¶ 8; [Doc. # 124-13], ¶ 5; [Doc. # 124-14], ¶¶ 5-7; [Doc. # 124-15], ¶ 2; [Doc. # 124-26], ¶ 5; *see generally* [Doc. # 124], ¶ 1-137.

11. **Deny**. Plaintiff Class Members have experienced firsthand DPD's policy of taking and disposing of property of persons who are allegedly in violation of the camping ordinance during its homeless sweeps. [*See* Plaintiffs' Mot. for Summ. J. at: Ex. 2, S. Lawson Dep. Tr. At 87:9-17, 117:14-118:17, 125:16-25, 191:21-25; [Doc. # 124-10], 184:6-21, 187:21-

188:8; [Doc. # 124-12], ¶ 8; [Doc. # 124-13], ¶ 5; [Doc. # 124-14], ¶¶ 5-7; [Doc. # 124-15], ¶ 2; [Doc. # 124-26], ¶ 5.

12. **Deny**. Plaintiff Class Members have experienced firsthand DPD's policy of taking and disposing of property of persons who are allegedly in violation of the camping ordinance during its homeless sweeps. [*See* [Doc. # 124-2], 87:9-17, 117:14-118:17, 125:16-25, 191:21-25; [Doc. # 124-10], 184:6-21, 187:21-188:8; [Doc. # 124-12], ¶ 8; [Doc. # 124-13], ¶ 5; [Doc. # 124-14], ¶¶ 5-7; [Doc. # 124-15], ¶ 2; [Doc. # 124-26], ¶ 5.

13. Admit, but herby incorporate by reference Plaintiff Class Members' Response to Movant's Material Fact Number 1, *supra*, as it applies equally to DENVER MUN. CODE §§ 49, *et seq.*

14. Admit.

15. Admit.

16. **Deny**. Denver Public Works employees and agents such as Solid Waste (and inmates acting as agents of either the City or DPD) seized and/or discarded property of the Plaintiff Class Members on more than one occasion. [Doc. # 124-8], 19:10-25 (outlining coordination between Denver agencies); [Doc. # 124-14], ¶¶ 5-6; [Doc. # 124-23], 25:19-22.

17. **Deny**. Denver Public Works employees and agents such as Solid Waste (and inmates acting as agents of either the City or DPD) seized and/or discarded property of the Plaintiff Class Members on more than one occasion. [Doc. # 124-8], 19:10-25 (outlining coordination between Denver agencies); [Doc. # 124-14], ¶¶ 5-6; [Doc. # 124-23], 25:19-22.

18. **Deny**. Denver Public Works employees and agents such as Solid Waste (and inmates acting as agents of either the City or DPD) seized and/or discarded property of the

Plaintiff Class Members on more than one occasion. [Doc. # 124-8], 19:10-25 (outlining coordination between Denver agencies); [Doc. # 124-14], ¶¶ 5-6; [Doc. # 124-23], 25:19-22.

19. **Deny**. Denver officials' regular practice is to seize and discard unattended property in the downtown Triangle Park area, along Cherry Creek and the Platte River, and elsewhere. [Doc. # 124-30], 12:13-14:10; [Doc. # 124-2], 175:7-176:17; [Doc. # 124-23], 22:19-23:6.

20. **Deny**. Plaintiff Class Members have experienced numerous encounters with DPD officers where they themselves are told to move along, regardless of right-of-way concerns. One such encounter included officers taunting Plaintiff Class Members, saying to them "Who cares where you go… I don't care… Why did you even come to Denver?" [Doc. # 124-2], 152:19-153:5. Another such example included Plaintiff Class Members being treated like "animals" by the Denver officers [Doc. # 124-1], 71:2-8. And at least one officer threatened Plaintiff Class Members with arrest if they did not quickly leave the area. [Doc. # 124-29], 97:16-98:11.

21. **Deny**. Plaintiff Class Members incorporate herein its Response to Movant's Material Facts Number 20.

22. **Deny**. Public Works, Solid Waste, and other third-party trash management companies, such as CES, have all been observed participating in the homeless sweeps. Moreover, Public Works employees and their agents such as Solid Waste (and third-party trash companies and inmates acting as agents of either the City or DPD) seized and/or discarded property of the Plaintiff Class Members on more than one occasion. [Doc. # 124-8], 19:10-25 (outlining coordination between Denver agencies); [Doc. # 124-14], ¶¶ 5-6; [Doc. # 124-23], 25:19-22; [Doc. # 124-21], 18:4-11.

23. **Deny**. Denver has a patterned and systematic policy and practice of unlawfully seizing and discarding or destroying property. [Doc. # 124-2], 86:8-21. These sweeps, which are different than a simple cleanup, involve a coordinated effort between multiple Denver agencies, including the DPD, Public Works, and the Mayor's Office. [Doc. # 124-8], 19:10-25. The sweeps are essentially the same in form each time, and an annual sweep is even stylized after a traditionally festive Irish jig, named Operation Riverdance. [Doc. # 124-2], 86:8-21.

24. Plaintiff Class Members admit that DPD has a Homeless Outreach Unit ("HOU"). Plaintiffs **deny**, however, that they are adequately trained and assist in providing information and direction regarding services. [Doc. # 124-10], 186:1-6, [Doc. # 124-14], ¶ 7.

25. **Deny**. Plaintiffs dispute that HOU officers, patrol officers, park rangers, and other agents are adequately trained and assist in providing information and direction regarding essential services. [Doc. # 124-10], 186:1-6, [Doc. # 124-14], ¶ 7.

26. Plaintiff Class Members admit that Public Works may have received complaints regarding Denver's homeless population in the Triangle Park area. Plaintiffs state, however, that historical complaints about (subjectively determined garbage) and encumbrances does in no way relieve Denver's duty to act in a constitutional manner towards its homeless population.

27. Plaintiff Class Members admit that Denver officials began to conduct regular cleanings of the area; however, Plaintiffs state that the homeless sweeps—which is the focus of their First Amended Complaint [Doc. 54]—are different than the simple cleanup activities that every city in the nation must undertake. [Doc. # 124-2], 82:3-83:4.

28. Plaintiff Class Members admit that the frequency of sidewalk cleanings may have been increased as economic investment poured into Downtown Denver, but Plaintiff Class Members have no knowledge and therefore dispute whether the increase was "due to a rise in

complaints." An equally—if not more—persuasive inference for the increased frequency of the simple cleanings would be attributable to the gentrification of the Downtown Denver area in which the Defendant formed partnerships with real estate development groups like the Downtown Denver Partnership, stressing economic interests and development over the constitutional rights of the poor, dispossessed and those who could no longer afford the rising rents. *See* **Exhibit 1**, *Denver Parks & Recreation 20-year Plan Project Overview*.

29. Plaintiff Class Members admit that notice of the simple, regular cleanings are occasionally provided by HOU. Plaintiff Class Members, however, aver that no notices, oral, written, or otherwise were provided prior to the homeless sweeps by Denver and its agents. [Doc. # 124-8], 62:20-63:11; [Doc. # 124-8A]; [Doc. # 124-19], 35:24-36:2.

30. **Deny**. Again, Denver is attempting to conflate the simple, regular cleanings with the distinguishable unconstitutional homeless sweeps that are the subject of Plaintiffs' First Amended Complaint. Plaintiff Class Members have experienced firsthand Denver and its agents' policy of taking and disposing of property of persons during its homeless sweeps on numerous occasions. [Doc. # 124-2], 87:9-17, 117:14-118:17, 125:16-25, 191:21-25; [Doc. # 124-10], 184:6-21, 187:21-188:8; [Doc. # 124-12], ¶ 8; [Doc. # 124-13], ¶ 5; [Doc. # 124-14], ¶¶ 5-7; [Doc. # 124-15], ¶ 2; [Doc. # 124-26], ¶ 5.

31. **Deny**. Plaintiffs hereby incorporate its Response to Movant's Material Fact Number 30, *supra*.

32. Plaintiff Class Members admit that the sidewalks are power washed and some garbage is disposed of by Denver during its homeless sweeps. However, Plaintiff Class Members aver that whatever Denver deems is "trash" can and often does include Plaintiff Class Members' possessions—whether or not it is deemed valuable in Denver's subjective opinion is irrelevant.

33. Plaintiff Class Members admit that some homeless people are aware of the sidewalk cleaning schedule, but certainly dispute that ***all*** members of the Class—due to its transitory nature—would be aware of Denver's sidewalk cleaning schedule and respectfully request the Court take judicial notice of this reality. Further, Plaintiff Class Members aver that it is wholly irrelevant whether the supposed "regular cleanup activities" involve ten or more Denver agents.

34. Plaintiff Class Members admit that Denver may have received complaints regarding the sale and use of illegal drugs and discarding of trash. However, painting Denver's homeless population with this broad brush of illegality is just another thinly veiled attempt to criminalize the homeless, and not address the root cause. [Doc. # 124-4], pp. 6-9; **Exhibit 2**, *Denver Parks & Recreation 20-year Plan Presentation*. Further, vague, historical complaints regarding alleged drug use and subjectively determined garbage does in no way relieve Denver's duty to act in a constitutional manner towards its homeless population, rendering this fact irrelevant at best.

35. Admit.

36. Admit, but irrelevant. Areas of a public trail will have of course, at some point, been closed for general safety reasons.

37. Admit, but hereby incorporate by reference Plaintiff Class Members' Response to Movant's Material Fact Number 1, *supra*, as it applies equally to Denver Municipal Code §§ 39, *et seq.*

38. Plaintiff Class Members admit that Denver and its agents conduct Operation Riverdance on an annual basis, beginning in 2014. Answering further, Plaintiff Class Members

aver that stylizing the unconstitutional homeless sweeps after a traditionally festive Irish jig only adds insult to injury.

39. Admit. Answering further, Defendant also uses brush burning devices or flamethrowers in its cleanup activities, especially when homeless are present. [Doc. # 124-29], 74:9-22, 75:2-9, 80:20-85:11; [Doc. # 124-31], ¶ 2.

40. **Deny**. Denver officials seized any property that was remaining after the Plaintiff Class was forced out of their location along the Platte River and discarded it, throwing it into garbage trucks with no plans to store it. [Doc. # 124-21], 32:4-23, 33:6-14; [Doc. # 124-19], 59:8-60:8, 72:22-73:10; *see also* [Doc. # 124], pp. 14-19 (concerning Operation Riverdance 3).

41. **Deny**. Plaintiffs incorporate herein by reference their Response to Movant's Material Facts Number 40, *supra.*

42. **Deny**. Plaintiff Class Members admit that Custom Environmental Services was hired as an agent by Denver to assist in the unconstitutional taking and discarding of Plaintiffs' property.

Tiny Home Raid

43. **Deny**. It was by no means clear to Plaintiff Class that this was private property and Plaintiff Class was not given meaningful opportunity to retrieve their belongings. [Doc. # 124-12], ¶ 7; [Doc. # 124-10], 193:7-14.

44. **Deny**. Denver Housing Authority is a body corporate and politic in the state of Colorado. A housing authority is not an independent governmental entity; it is a political subdivision of the state, existing only for the convenient administration of the state government. *See* C.R.S. § 29-4-708.

45. **Deny**. It was by no means clear that this was private property. Plaintiffs had been in contact with Denver Housing Authority and not advised that this was a trespass. [Doc. # 124-12], ¶ 7; [Doc. # 124-10], 193:7-14.

46. **Deny**. [Doc. # 124-12], ¶ 7.

47. Admit.

48. Plaintiff Class Members lack information to admit or deny this factual allegation. Even if this factual allegation is true, it is irrelevant to the dispute.

49. Admit.

50. **Deny**. Incorporating Response to Movant's Fact Number 43 by reference. Answering further, if Plaintiff Class were not clearly trespassers, then removal and destruction of Plaintiff Class property without hearing is an unconstitutional seizure as alleged in Plaintiff's Amended Complaint [Doc. # 54], ¶¶ 80-90.

The December 15, 2015 Sweep

51. Plaintiff Class Members admit that it was freezing cold and snowing on December 15, 2015, with a recorded low temperature of 16 degrees and approximately 10" of snowfall. *See* [Doc. # 124-16], ¶ 2; [Doc. # 124-17], 39:19-40:16, 42:823, 48:19-52:8.

52. **Deny**. During the entirety of the December 15, 2015 sweep, no Denver police officer checked to see if Plaintiff Class Members were warm or safe, or offered anyone useful services or assistance. [Doc. # 124-10], 186:1-6; [Doc. # 124-14], ¶ 7; *see also* [Doc. # 124], ¶¶ 16-33 (outlining Plaintiff Class Members' experiences of the December 15, 2015 sweep).

53. Plaintiff Class Members lack information to admit or deny this factual allegation. Even if this factual allegation is true, it is irrelevant to the dispute. Plaintiff Class Members have no independent knowledge of Commander Antonio Lopez's actions on December 15, 2015.

54. **Deny**. During the entirety of the December 15, 2015 sweep, no Denver police officer checked to see if Plaintiff Class Members were warm or safe, or offered anyone useful services or assistance. [Doc. # 124-10], 186:1-6; [Doc. # 124-14], ¶ 7; *see also* [Doc. # 124], ¶¶ 16-33 (outlining Plaintiff Class Members' experiences of the December 15, 2015 sweep).

55. **Deny**. During the entirety of the December 15, 2015 sweep, no Denver police officer checked to see if Plaintiff Class Members were warm or safe, or offered anyone useful services or assistance. [Doc. # 124-10], 186:1-6; [Doc. # 124-14], ¶ 7; *see also* [Doc. # 124], ¶¶ 16-33 (outlining Plaintiff Class Members' experiences of the December 15, 2015 sweep). Moreover, at least forty members of the Plaintiff Class had their property seized and discarded during the December 15, 2015 sweep. [Doc. # 124-12], ¶ 8; [Doc. # 124-14], ¶ 7.

56. **Deny**. During the entirety of the December 15, 2015 sweep, no Denver police officer checked to see if Plaintiff Class Members were warm or safe, or offered anyone useful services or assistance. [Doc. # 124-10], 186:1-6; [Doc. # 124-14], ¶ 7; *see also* [Doc. # 124], ¶¶ 16-33 (outlining Plaintiff Class Members' experiences of the December 15, 2015 sweep). Instead, Officer Craven forced Petar L/n/u to attempt to pack up all of his life's possessions, and—despite pleading for more time—had his possessions thrown into a garbage truck by Officer Craven and another city worker. [Doc. # 124-2], 104:13-107:7, 113:15 – 116:20, 117:14 – 118:17, 125:16-25, 191:21-25; [Doc. # 124-15], ¶ 2.

57. Plaintiff Class Members admit that the Denver Rescue Mission allows people to place their belongings along the outside of their building. Plaintiff Class Members dispute, however, that property placed in that area is not removed. In fact, at least forty members of the Plaintiff Class had their property seized and discarded during the December 15, 2015 sweep alone. [Doc. # 124-12], ¶ 8; [Doc. # 124-14], ¶ 7. Moreover, on March 25, 2016, named Plaintiff

Thomas Peterson's property was seized by Denver officials while he was eating breakfast inside the Denver Rescue Mission. [Doc. # 124-26], ¶ 5; [Doc. # 124-3], 90:21-97:1.

58. Plaintiff Class Members admit that Officer Craven—among other officers and city agents—disposed of Plaintiff Class Members' belongings, including tents, tarps, and sleeping bags into the trash. [Doc. # 124-10], 184:16-21.

59. **Deny**. Officer Craven's actions on December 15, 2015 were, if anything, wholly consistent with DPD and Denver's patterned and systematic practice of homeless sweeps. [Doc. # 124-2], 86:8-21; [Doc. # 124-4], pp. 6, 8-9.

60. Admitted, but Plaintiff Class Members aver that it is wholly irrelevant whether the December 15, 2015 sweep involved ten or more Denver agents as the sweep was part of an overall policy of unconstitutional property seizure. [Doc. # 124-2], 86:8-21; [Doc. # 124-4], *passim*.

61. Plaintiff Class Members admit that DPD officers did not cite or arrest anyone pursuant to the unauthorized camping ordinance during the December 15, 2015 sweep.[2]

The March 8, 2016 and March 9, 2016 Sweeps

62. Admit, but answering further, irrelevant. A public complaint that a restaurant is dirty would not justify warrantless seizure of the restaurant.

63. **Deny**. Defendant admits that they did not even attempt to remediate the alleged contamination. [Doc. # 124-8], 34:12-15. Moreover, Denver's public safety argument was undermined when Executive Director of The Denver Road Home program, Bennie Milliner, stated: "I think the unauthorized camping ordinance has had a positive effect on the community.

[2] Though seizure of property combined with orders by law enforcement could constitute custody. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

I think without it, we would be looking like LA right now." **Exhibit 3**, *Deposition of Bennie Milliner*, 109:18-24.

64. **Deny**. While members of the Plaintiff Class were camped on the sidewalks throughout Denver, and particularly at the corner of Park Avenue and Lawrence Street, they camped in a way that ensured passage along the sidewalk was not blocked (always making sure to leave a path for those using the sidewalk to walk on) and kept their area clean and neat. [Doc. # 124-1], 47:3-19, 50:23-51:3.[3]

65. Admit, but irrelevant. Again, Defendant's attempt to justify mass constitutional violations out of an alleged concern for public safety is legally inappropriate and does not reflect the evidence of Denver's intent and motivations that served as the basis for the homeless sweeps. **Exhibit 3**, *Deposition of Bennie Milliner*, 109:18-24; [Doc. # 124-28]; *see also* **Exhibit 4**, *Denver's Road Home Performance Audit*.

66. Plaintiff Class Members lack information to admit or deny this factual allegation. Even if this factual allegation is true, it is irrelevant to the dispute. *See also* Response to Movant's Fact Number 69 *infra*.

67. Plaintiff Class Members lack information to admit or deny this factual allegation. Even if this factual allegation is true, it is irrelevant to the dispute.

68. Plaintiff Class Members lack information to admit or deny this factual allegation. Even if this factual allegation is true, it is irrelevant to the dispute.

[3] Denver's seemingly innocuous statement here – that "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"—is telling of how Denver views its homeless and home-insecure population. The City paints the residents themselves as encumbrances in the same vein as furniture and trash, a fact that should not be overlooked by this Court.

69. Admit. Establishes proof of planning and conduct. Answering further, Custom Environmental Services, the private corporation that Denver hired, along with inmates, to carry out the actual sweeps, was not part of the planning. [Doc. # 124-8], 14:8-16:6; **Exhibit 5**, *Dreyer Email; see also* **Exhibit 4,** *Denver's Road Home Performance Audit*. Finally, Denver used publicly-donated funds meant to help the homeless to fund the homeless sweeps, which speaks to the Defendant's approach to addressing these sensitive issues. *See* [Doc. # 124-11].

70. Plaintiff Class Members admit that Denver conducted homeless sweeps on March 8 and 9, 2016, but Plaintiff Class Members have no knowledge and therefore dispute whether the homeless sweeps were conducted as a result of the discussions outlined in Movant's Material Fact No. 69. Plaintiff Class Members also aver that whatever reasoning that purportedly prompted the unconstitutional homeless sweeps would not render the sweeps any less unconstitutional. Further, as stated in Response to Movant's Fact Number 69 *supra*, Custom Environmental Services and the inmates used by the city to actually perform the sweeps were not part of any planning, training or preparation, so that assuming arguendo, that Defendant planned the sweeps perfectly, the actual execution of the sweeps remains in dispute.[4]

71. **Deny**. *See* **Exhibit 3**, *Deposition of Bennie Milliner*, 109:18-24; [Doc. # 124-28],

72. **Deny**. Denver officials did not put up any notice signs in the areas where the sweeps were conducted prior to the sweeps on March 8, 2016 and March 9, 2016. [Doc. # 124-8], 62:20-63:11; [Doc. # 124-8]; [Doc. # 124-19], 35:24-26:2.

[4] Custom Environmental Services—www.customsvcs.com—is an industrial hazardous waste removal company that has no experience in dealing with civil rights. Pairing CES with inmates to perform the sweeps speaks volumes as to how Denver approached the fundamental constitutional rights of Plaintiff Class.

73. **Deny**. Denver officials did not put up any notice signs in the areas where the sweeps were conducted prior to the sweeps on March 8, 2016 and March 9, 2016. [Doc. # 124-8], 62:20-63:11; [Doc. # 124-18]; [Doc. # 124-19], 35:24-26:2.

74. **Deny**. Denver officials did not put up any notice signs in the areas where the sweeps were conducted prior to the sweeps on March 8, 2016 and March 9, 2016. [Doc. # 124-8], 62:20-63:11; [Doc. # 124-8A]; [Doc. # 124-19], 35:24-26:2.

75. **Deny**. Denver officials did not put up any notice signs in the areas where the sweeps were conducted prior to the sweeps on March 8, 2016 and March 9, 2016. [Doc. # 124-8], 62:20-63:11; [Doc. # 124-8A]; [Doc. # 124-19], 35:24-26:2.

76. **Deny**. During the sweep on March 8, 2016, Denver officials were seizing the property of Plaintiff Class Members and throwing it into the back of garbage trucks. [Doc. # 124-2], 154:13-23, 167:24-168:2; [Doc. # 124-10], 160:17-161:2, [Doc. # 124-21], 9:24-10:8, 15:7-10, [Doc. # 124-22], ¶ 2. Further, multiple members of the Plaintiff Class had their property—tents, backpacks, and blankets—seized during the March 8, 2016 sweep, including named Plaintiff Thomas Peterson. [Doc. # 124-10], 161:25-166:7; *see also* [Doc. # 124-2], 167:20-23. Further still, questions from Plaintiff Class Members regarding how they could reclaim their property after the March 8, 2016 sweep were not answered by Denver officials, including Denver police officers and Denver Public Works officials, during the sweep. *Id.*, 171:1-172:2.

77. **Deny**. *See* Response to Movant's Fact Number 76, *supra*.

78. **Deny**. *See* Response to Movant's Fact Number 76, *supra*.

79. **Deny**. *See* Response to Movant's Fact Number 76, *supra*.

80. **Deny**. *See* Response to Movant's Fact Number 76, *supra*.

81. **Deny**. Plaintiff Class Members are transitory, as recognized by this Court, and therefore any statement alleging that "most of the individuals" is impossible to determine. And yet again, Denver reiterates its view that its homeless population constitutes nothing more than mere encumbrances to the city. *See* Response to Movant Fact Number 34.

82. **Deny**. Answering further, the alleged fact is an irrelevant and subjective statement. *See* **Exhibit 6**, *Marcus Hyde Declaration*, ¶ 2 (describing the Denver Police Department response and harassment).

83. **Deny**. *See* Response to Movant's Fact Number 76; *supra*. *See also* Response to Movant's Fact Number 70, *supra,* that Custom Environmental Services and inmates were used to actually perform the homeless sweeps so that facts regarding the execution of the sweeps are in dispute.

84. **Deny**. Some unattended property was indiscriminately thrown away. [Doc. # 124-23], 23:7-25, 31:13-25; [Doc. # 124-22], ¶ 3. And property that may have been stored, was often irretrievable. [Doc. # 124-3], 111:18-116:6; [Doc. # 124-27]. Another Plaintiff Class Member went multiple times to the location that Defendant's officials said was designated for storage, and during the hours he was given to retrieve his property, only to find that there was no one at the facility. [Doc. # 124-1], 40:15-20. This resulted in items that had essential importance to Plaintiff Class Members being thrown away, including memorabilia, paperwork needed for medical care, medicines, artwork, and personal journals. [Doc. # 124-12], ¶ 9.

85. **Deny**. [Doc. # 124-23], 23:7-25, 31:13-25; [Doc. # 124-22], ¶ 3. Answering further, it was not for Public Works Supervisors to determine what was Plaintiff Class property and what was trash.[5]

86. Admit.

87. **Deny**. Response to Movant Fact Number 69 incorporated by reference.

88. Admit, however this factual allegation is irrelevant to the dispute.

89. **Deny**. [Doc. # 124-14], ¶ 5-6; [Doc. # 124-13], ¶ 6. Answering further, this statement is a legally inappropriate admission—it is not for City Supervisors to determine what is, and isn't, "trash."

90. **Deny**. [Doc. # 124-13], ¶ 6; [Doc. # 124-2], 154:13-25, 155:1-25, 156:1-4.

91. **Deny**. [Doc. # 124-10], 161:14-18.

92. **Deny**. [Doc. # 124-10], 161:14-18.

93. **Deny**. Answering further, if a person is given a Hobson's Choice between having their property thrown away or stored, then "electing" to store one's property cannot be considered "voluntary."

94. Admit. Answering further, this was the only homeless sweep referenced in the Amended Complaint [Doc. 54] where some storage was provided. *Infra, throughout.*

95. Admit.

96. **Deny**. *See* **Exhibit 6,** *Marcus Hyde Declaration*, ¶ 2; [Doc. # 124-2], 154:13-25, 155:1-25, 156:1-4.

[5] This was a traumatic event for Plaintiff Class, as being forcibly confronted and displaced by an entire city apparatus would be traumatic for any citizen. Public Works Supervisors, along with inmates and hazardous waste removal technicians, lack the sensitivity and mental health training to make these determinations.

97. **Deny**. **Exhibit 6,** *Marcus Hyde Declaration*, ¶ 2.

98. Admit. Answering further, this is an admission that 75 percent of the Plaintiff Class members who attempted to retrieve property were unable to do so.

99. Plaintiff Class Members lack information to admit or deny this factual allegation. Even if this factual allegation is true, it is irrelevant to the dispute.

The July 13, 2017 Sweep

100. Admit. Answering further, Plaintiff Class Members aver that stylizing the annual homeless sweep after a traditionally festive Irish jig only serves to add insult to injury.

101. **Deny**. Plaintiff Class Members received no notice prior to Operation Riverdance 3. [Doc. # 124-1], 74:14-17; [Doc. # 124-29], 74:9-22, 74:23-75:9. Moreover, Denver park rangers did not distribute any notice prior to Operation Riverdance 3. [Doc. # 124-30], 27:5-10, 46:13-15. Finally*, assuming arguendo* and notice was given, the notice was deficient as it provided no post deprivation information with regard to where to retrieve their property. *See* [Doc. # 124], p. 46; [Doc. # 124-30], 16:8-12.

102. **Deny**. Plaintiff Class Members' Response to Movant's Fact Number 101, *supra*, is incorporated herein.

103. **Deny**. Plaintiff Class Members' Response to Movant's Fact Number 101, *supra*, is incorporated herein.

104. Admit. Answering further, Denver Police waited for members of Denver Homeless Out Loud—citizen group who monitors treatment of homeless persons in Denver—to leave the area before conducting the sweep. [Doc. # 124-10], 148:12-22.

105. **Deny**. Plaintiff Class Members' Response to Movant's Fact Number 101, *supra*, is incorporated herein.

106. **Deny**. [Doc. # 124-1], 68:7-14; [Doc. # 124-31], ¶ 2.

107. **Deny**. Plaintiff Class was woken up at 6 a.m., given only ten minutes to retrieve all of their possessions, so that they *were forced* to leave property behind. [Doc. # 124-1], 68:4-24.[6]

108. **Deny**. Answering further, all illegally seized property was thrown into garbage trucks. The only trucks that were present on this day were garbage trucks, so that there was no apparatus for saving or storing property of any kind. [Doc. # 124-23], 45:9-46:1; [Doc. # 124-1], 70:13-19; [Doc. # 124-19], 68:3-10. Answering further, Defendant cites to [Doc. #125-5], 53:20-54:3. Knopinski's statement was not made in reference to this date, but made to describe his general practice of seizing homeless property as a Park Ranger, which he admits to having done more than 1,000 times with deficient notice. [Doc. # 124-30], 16:8-12; *see generally* [Doc. # 124], pp. 45-46; *see also* [Doc. # 124-32].

109. **Deny**. Plaintiffs were threatened with arrest. [Doc. # 124-29], 97:16-98:11. Property was seized and destroyed. [Doc. # 124-1], 72:15-22; [Doc. # 124-21], 15:7-12.

110. **Deny**. Answering further, the use of the word "unofficial" here is an attempt to avoid liability for the conduct, policy and practice of the homeless sweeps. Deputy Chief of Staff to the Mayor, Evan Dreyer, was noticed and ratified the unconstitutional homeless sweep that occurred July 13, 2016 along the South Platte Corridor-Arkins Court. **Exhibit 7**, *Deposition of Evan Dreyer*, 48:16-21, 49:25, 50:1-19; *see also* [Doc. # 124-28]; [Doc. # 124-19], 50:13-22 (showing that along with numerous email exchanges, at least one specific planning meeting

[6] Throughout its Motion, Defendant tries to represent Hobson's Choices as volitional. When police set upon a group who have nowhere to go and no means to transport their possessions and order them to leave and take everything with them in ten minutes or consider it abandoned and surrendered, there is no voluntariness.

along with prior planning protocols, *supra*, passim, was organized and conducted with members of Denver Police, Denver Parks and with knowledge of City Officials prior to the homeless sweep that occurred on this day along the South Platte Corridor-Arkins Court). Further, see Movant's Fact Numbers 110-118, which admit that DPD, HOU, and Public Works Employees were all present at the South Platte Corridor-Arkins Court sweeps of July 13, which took city planning and coordination. Finally, Defendant is attempting to break the July 13 sweep into discrete units in order to avoid liability, which Plaintiffs dispute. The homeless sweep that occurred on July 13, 2016 on the South Platte Corridor-Arkins Court ended with a city-planned barbecue in sight of the homeless persons that the city had disseized and dispossessed. [Doc. # 124-21], 33:15-34:21; **Exhibit 8**, *Photo of July 13, 2017 Barbeque*; *see also* [Doc. # 124-10], 27:8-17; 27:21-25; 28:1-25; 29:1-25; 30:1-25; 31:1-4; 34:23-25; 35:1-6; 35:224-25; 36:1-24 (referring to meetings with Mayor and Mayor Chief of Staff regarding the injuries and deprivations to Plaintiff Class resulting from the homeless sweeps).

111. **Deny**. Denver Park Rangers monitor the area and were involved the sweeps that took place there. [Ex. 30, Knopinski Dep. Tr. 27:8-14].

112. Plaintiff Class Members lack information to admit or deny this factual allegation. Even if this factual allegation is true, it is irrelevant to the dispute.

113. **Deny**. [Doc. # 124-1], 74:14-17; [Doc. # 124-29], 74:9-22, 74:23-75:9. In any event, same day—or contemporaneous—"verbal notice" with regard to seizure of property does not constitute notice.

114. Plaintiff Class Members lack information to admit or deny this factual allegation. Even if this factual allegation is true, it is irrelevant to the dispute. Denver Homeless Out Loud circulating a flyer out of concern for the homeless community does not, obviously, satisfy the

due process notice requirements of a State Actor. Furthermore, attempting to assign the notice responsibility of a state actor to a group of private citizens concerned with the actions of that state actor fails as a matter of public policy.

115. **Deny**. This statement is an attempt, again, to make the July 13th homeless sweep along the river into discrete units in order to avoid liability. A review of the email leading up to July 13 exemplify that it was a coordinated and ratified city action. **Exhibit 9**, *Craven Email*, **Exhibit 5**, *Dreyer Email*, **Exhibit 10**, *Knopinski Email*, **Exhibit 11**, *Zeppelin Email*; [Doc. # 124-28].

116. **Deny**. Response to Movant's Fact Number 115 incorporated by reference. Further disputed, sufficient notice not given. [Doc. # 124-1], 72:2-14, 72:15-22, 76:6-18; [Doc. # 124-21], 15:7-12.

117. **Deny**. [Doc. # 124-1], 72:2-14, 76:6-18; [Doc. # 124-21], 72:2-14, 76:6-18. *Plaintiffs stood by as city burned property*. [Doc. # 124-1], 73:18-74:10; [Doc. # 124-29], 74:9-22, 75:29, 80:20-85:11.

118. **Deny**. Answering further, irrelevant. Response To Movant's Fact Number 115 incorporated by reference. The July 13, 2017 sweep along the river was organized by the Denver Police Department. **Exhibit 8**, *Photo of July 13, 2017 Barbeque*.

August 20th Sweep

119. **Deny**. Denver Police Department went to the area with a private clean-up crew that they ordered to perform, therefore acting as agents of the DPD. **Exhibit 12**, *Declaration of Rafael Blanes*; **Exhibit 13**, *Photograph of Pipetown*.

120. Admit.

121. **Deny**. Denver waited until 6:00 a.m. to begin the river sweep on July 13, 2017, so that Mr. Lyall was not present. [Doc. # 124-10], 148:12-22.

122. **Deny**. *See* [Doc. # 124-18], 147:13-17.

123. Admit.

124. **Deny**. [Doc. # 124-25], ¶ 4.

125. Plaintiff Class Members lack information to admit or deny this factual allegation. Even if this factual allegation is true, it is irrelevant to the dispute. Also, Defendant attempts to improperly shift the burden onto a citizen to remediate violation of fundamental constitutional rights.

126. Admit, answering further, the homeless sweeps as a policy and practice have resulted in a climate of fear, causing emotional injury to Mr. Anderson and the Plaintiff Class.[7] [Doc. # 124-25], ¶ 5, 6; [Doc. # 124-2], 115:15-25, 116:1-25, 117:1-25, 118:1-25, 119:1-25, 120:1-2; [Doc. # 124-13], ¶ 10; *see also* [Doc. # 124-4], ¶ 3 ("Defendants' systematic policy and practice of confiscating property from this class of citizens has profoundly deleterious effects on homeless persons' legal standing, emotional well-being and medical health, while providing no demonstrable benefits to the City and County of Denver.").

127. Admit. Answering further, Plaintiff Brian Cooks moved his property so that it could not be taken. [Doc. # 125-23], 103:14-19.

128. **Deny**. Verbal notice does not satisfy the notice requirements for property seizure. *See* [Doc. #54], ¶¶ 80-90.

[7] Once a Plaintiff Class member experiences a homeless sweep, or witnesses a homeless sweep, or hears of a sweep around the shelters or areas where they are trying to survive, the natural tendency is to go into hiding, which is why so many Class members were attempting to exist on the outer reaches of the City at Arkins Court or in Pipetown.

129. Admit. Response to Movant's Fact Number 126 incorporated by reference.

130. Admit.

131. Admit.

132. Admit.

133. Admit.

134. Admit. *But see*, Response to Movant's Fact Number 126 incorporated by reference.

135. Admit. *But see*, Response to Movant's fact Number 126 incorporated by reference.

136. Admit, answering further, Mr. Pepper is a senior citizen without means of transportation. Response to Movant's Fact Number 125 incorporated by reference.

137. Admit. *But see*, Response to Movant's Fact Number 126 incorporated by reference.

3. **Statement of Additional Undisputed Material Facts**

138. Plaintiff Class Members hereby incorporate and restate its Statement of Undisputed Material Facts as contained in their Motion for Summary Judgment, [Doc. #124], ¶¶ 1-137.

4. **Legal Standard**

Summary judgment is appropriate only if the record contains no evidence of a genuine issue of material fact and demonstrates that the moving party is entitled to judgment as a matter of law. *Woodman v. Runyon*, 132 F.3d 1330, 1337 (10th Cir. 1997). "The party that moves for summary judgment bears the burden of proving that no genuine issue of material fact exists on all claims for which it seeks summary judgment." *Trujillo v. Atmos Energy Corp.*, No. 11-cv-

01151-RBJ-MEH, 2012 U.S. Dist. LEXIS 87273, at *4 (D. Colo. June 25, 2012). The Tenth Circuit has emphasized that the nonmovant is given "wide berth to prove a factual controversy exists." *Ulissey v. Shvartsman*, 61 F.3d 805, 808 (10th Cir. 1995). In making this determination, the district court must view the record and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Thomas v. Int'l Bus. Machines*, 48 F.3d 478, 484 (10th Cir. 1995). "Where different ultimate inferences may be drawn from the evidence presented by the parties, the case is not one for summary judgment." *Brown v. Parker-Hannifan Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984). Critically:

> The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Adickes v. S. H. Kress & Co., 398 U.S. 144, 176 (1970) (Black, J., concurring); *see also Fisher v. Shamburg*, 624 F.2d 156, 162 (10th Cir. 1980).

5. **Argument**

5.1 Defendant's officials deprived Plaintiff Class Members of their property.

There is ample evidence in the record demonstrating that Defendant officials seized Plaintiff Class Members' property. [Doc. # 124-10], 160:17-161:2, 162:25-166:7, 179:4-181:7, 184:6-21, 187:21-188:8, 36:16-24, 184:6-21, 187:21-188:8; [Doc. # 124-12], ¶ 8; [Doc. # 124-13], ¶ 5; [Doc. # 124-2], 117:14-118:17, 125:16-25, 154:13-23, 191:21-25; [Doc. # 124-14], ¶ 7; [Doc. # 124-15], ¶ 2; [Doc. # 124-3], 97:14-21; [Doc. # 124-26], ¶ 5; [Doc. # 124-1], 37:15-20, 39:17-40:20, 74:18-75:3, 72:15-22; [Doc. # 124-21], 15:7-12; [Doc. # 124-29], 42:8-43:18,

77:22-78:2. In fact, the evidence in the record demonstrates that Defendant's officials summarily discarded the property that they seized from Plaintiff Class Members. [Doc. # 124-10], 184:6-21, 187:21-188:8, 36:16-24, 184:6-21, 187:21-188:8; [Doc. # 124-12], ¶ 8; [Doc. # 124-13], ¶ 5; [Doc. # 124-2], 117:14-118:17, 125:16-25, 191:21-25; [Doc. # 124-14], ¶ 7; [Doc. # 124-2], 125:16-25, 191:21-25; [Doc. # 124-15], ¶ 2. Simply because Denver scorns the notion that Plaintiff Class Members could regard used blankets, family heirlooms, and pictures of loved ones as property, does not make Plaintiff Class Members' belongings any less property than the belongings of other, housed individuals. Simply put, Plaintiff Class Members had their property taken by Defendant.

5.2 Plaintiff Class Members have a protected property interest in their belongings.[8]

It is clear that Plaintiff Class Members have a possessory interest in their property. Some of their property is sentimental. Some of their property is necessary for survival. It is undisputed that Plaintiff Class Members have possession over their property, protecting it from theft and taking it with them as they move. *Id.*

It is well-established that "a possessory interest is all that is needed for the Fourth Amendment's reasonableness requirement to apply to a *seizure*." *United States v. Paige*, 136 F.3d 1012, 1021 (5th Cir. 1998); *Lenz v. Winburn*, 51 F.3d 1540, 1550 n.10 (11th Cir. 1995) ("It is true that a possessory interest is all that is needed for the Fourth Amendment's reasonableness requirement to apply to a *seizure*.") (citing *Soldal v. Cook County*, 506 U.S. 56 (1992); *Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994) ("[O]ur finding that [plaintiff] had no

[8] The arguments and authority as to why Plaintiff Class Members not only have a possessory interest in their property, but a heightened possessory interest in their property, as set forth in Plaintiff Class Members' Motion for Summary Judgment are incorporated by reference herein. *See* [Doc. # 124], p. 27-28, 33.

reasonable expectation of privacy in the house at 4174 Dunn Avenue does not affect our conclusion that [plaintiff] has standing to challenge the seizure of her property.").

Simply because Plaintiff Class Members do not have private property on which to store their belongings does not mean that they are any less their belongings. For example, Defendant could not simply tow a car parked on the street, from a non-tow-away zone, when the owner does not have a garage to store. Even if that hypothetical person receives a ticket, Defendant would not tow away the vehicle. As every garage-less resident of Denver's Capitol Hill neighborhood knows, when she or he leaves her or his car on the street during the first Thursday of the month, and consequently violates the street-sweeping notice, her or his car is not impounded. It is certainly not sent to the salvage yard to be crushed. *See Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th Cir. 2005 (holding that, even though the plaintiffs admitted that they had no reasonable expectation of privacy in their parked car, their possessory interest in the car allowed them to enjoy the protections of the Fourth Amendment and that "[t]he Fourth Amendment protects against unreasonable interferences in property interests regardless of whether there is an invasion of privacy.").

Yet, Defendant argues that storing property *in a public place* in violation of the law entitles Defendant to seize and destroy property. This is simply not the case. The Supreme Court has recognized individuals have a protected possessory interest even when the property at issue is *contraband*, and seizure of such property is subject to the Fourth Amendment's reasonableness analysis. In *United States v. Jacobsen*, the Court found that the government's testing of illegal cocaine (which resulted in the destruction of a portion of the cocaine) was a "seizure" that "affect[ed] respondents' possessory interests protected by the [Fourth] Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation of

possessory interests into a permanent one." 466 U.S. 109, 124-125 (10th Cir. 1984). Moreover, the Fourth Amendment protected the cocaine from unreasonable seizures despite the lack of any reasonable expectation of privacy in concealing the contraband nature of the powder. *See id*. at 123 ("Congress has decided . . . to treat the interest in 'privately' possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine . . . compromises no legitimate privacy interest."). Not only do common sense and practical reality run counter to Defendant's assertions, but the law does as well. Defendant would not attempt to make such arguments if its adversary were an individual with even a modicum of power in our society.

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

> Even if we were to assume, as the City maintains, that Appellees violated LAMC § 56.11 [which provides that "No person shall leave or permit to remain any

> merchandise, baggage or any article of personal property upon any parkway or sidewalk"] by momentarily leaving their unabandoned property on Skid Row sidewalks, the seizure and destruction of Appellees' property remains subject to the Fourth Amendment's reasonableness requirement. Violation of a City ordinance does not vitiate the Fourth Amendment's protection of one's property. Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment.

Id. at 1029.

Every violation of the trespassing or curfew ordinance does not result in the seizure of the violator's property. Defendant officials do not rummage through the pockets of those violating curfew to take their belongings. Instead, they issue a citation and move on. Only Plaintiff Class Members, because they are homeless individuals, receive this treatment from Defendant. Plaintiff Class Members ask that this Court follow *Lavan* and hold that Plaintiff Class Members had a possessory interest in their attended and unattended, but unabandoned, property and that Defendant's seizure of their property implicates the Fourth Amendment.

5.3 Defendant's officials violated Plaintiff Class Members' Fourth Amendment rights.

Seizures of property are unlawful if they are unreasonable. *Jacobsen*, 466 U.S. at 113. A seizure is deemed unreasonable if the government's legitimate interest in the search or seizure does not outweigh the individual's interest in the property seized. *See Edmundson v. City of Tulsa*, 152 F. App'x. 694, 698 (10th Cir. 2005) ("In determining whether a government seizure violates the Fourth Amendment, the seizure must be examined for its overall reasonableness."); *see also Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1058-59 (7th Cir. 2000). Numerous courts have held that seizing homeless individuals' property, whether attended or unattended, without notice and discarding (or destroying) it is unreasonable and violates the Fourth Amendment. *See e.g., Lavan*, 693 F.3d at 1029; *Acosta v. City of Salinas*, No. 15-cv-05415 NC, 2016 U.S. Dist. LEXIS 50515, 2016 WL 1446781, at *5 (N.D. Cal. April 13, 2016);

See v. City of Fort Wayne, No. 1:16-cv-00105-JVB-SLC, 2016 U.S. Dist. LEXIS 185598, at *21 (N.D. Ind. June 16, 2016); *Pottinger v. Miami*, 810 F. Supp. 1551, 1570-73 (S.D. Fla. 1992); *Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 U.S. Dist. LEXIS 93464, at *94 (E.D. Cal. Dec. 8, 2006).

The evidence shows, or there is at the very least a hotly disputed fact as to whether, Defendant's officials summarily destroyed Plaintiff Class Members' property (or seized and then destroyed at a later date without giving Plaintiff Class Members an opportunity to retrieve their property). "The destruction of property by state officials poses as much of a threat, if not more, to people's right to be secure in their effects as does the physical taking of them." *San Jose Charter of Hells Angels Motorcycle Club v. San Jose*, 402 F.3d 962, 975 (9th Cir. 2005) (internal quotation marks and citations omitted); *see Jacobsen*, 466 U.S. at 124-125 ("[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'"). The government cannot simply destroy property that it deems is in violation of some law or ordinance because "[w]ere it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment." *Lavan*, 693 F.3d at 1029. Testimony from Defendant officials demonstrates that property was only stored when flatbed trucks were present. [Doc. # 124-8], 25:10-16. During a large number of the sweeps, the evidence shows that no flatbed trucks were present and, consequently, Plaintiff Class Members' property was thrown directly into garbage trucks and discarded. The below chart outlines the evidence showing the unconstitutionality of numerous sweeps that occurred throughout 2015 and 2016.

DATE	**LOCATION**	**PRIOR NOTICE?**	**EFFECTIVE RETRIEVAL NOTICE?**	**TRUCK TYPE(S)**	**PROPERTY SEIZED?**	**ARRESTS?**
12/15/15	Denver Rescue Mission (at least 40 Class Members affected)[9]	No[10]	No[11]	Garbage trucks only[12]	Yes (e.g. tents, tarps, sleeping bags)[13]	No[14]
***Week of 3/1/16** – Homeless advocates attempt to meet with Mayor Hancock to discuss their concerns about the camping ban and homeless sweeps; he refuses to meet with them until January of 2017.[15]						
3/8/16 & 3/9/16	Samaritan House (hundreds of Class Members affected)[16]	No[17]	No[18]	Garbage & flatbed trucks[19]	Yes (e.g. tents, sleeping bags, blankets, backpack)[20]	No[21]
3/25/16	Denver Rescue Mission (Thomas Peterson only)[22]	No[23]	No[24]	Garbage trucks only[25]	Yes (e.g. clothes, laptop, blankets)	No[26]

[9] [Doc. # 124-12], ¶ 8; [Doc. # 124-14], ¶ 7
[10] [Doc. # 124-10], 184:6-21, 187:21-188:8.
[11] [Doc. # 124-10], 36:16-24, 184:6-21, 187:21-188:8; [Doc. # 124-12], ¶ 8; [Doc. # 124-13], ¶ 5; [Doc. # 124-2], 117:14-118:17, 125:16-25, 191:21-25; [Doc. # 124-14], ¶ 7.
[12] [Doc. # 124-16], ¶ 1; [Doc. # 124-17], 39:19-40:16, 42:8-23, 48:19-52:8; [Doc. # 124-10], 36:16-24, 184:6-21, 187:21-188:8; [Doc. # 124-12], ¶ 8; [Doc. # 124-13], ¶ 5; [Doc. # 124-2], 117:14-118:17, 125:16-25, 191:21-25; [Doc. # 124-14], ¶ 7.
[13] [Doc. # 124-18], 140:3-11, 148:3-8; [Doc. # 124-16], ¶ 1; [Doc. # 124-17], 39:19-40:16, 42:8-23, 48:19-52:8; [Doc. # 124-10], 184:6-21, 187:21-188:8
[14] [Doc. # 124-10], 187:9-12.
[15] [Doc. # 124-10], 24:13-25:17, 26:6-24.
[16] [Doc. # 124-10], 158:18-159:2; [Doc. # 124-2], 137:19-23
[17] [Doc. # 124-8], 62:20-63:11; [Doc. # 124-8A]; [Doc. # 124-19], 35:24-26:2; [Doc. # 124-25], ¶ 4
[18] [Doc. # 124-2], 171:1-172:2, 131:9-13; [Doc. # 124-8], 60:3-17; [Doc. # 124-14], ¶ 6
[19] [Doc. # 124-2], 154:13-23; [Doc. # 124-10], 160:17-161:2, 181:8-14.
[20] [Doc. # 124-14], ¶ 5-6; [Doc. # 124-2], 167:20-23
[21] [Doc. # 124-2], 151:20-22; [Doc. # 124-19], 40:24-41:7; [Doc. # 124-10], 182:2-8
[22] [Doc. # 124-26], ¶ 5; [Doc. # 124-3], 90:21-97:1
[23] [Doc. # 124-26], ¶ 5; [Doc. # 124-5], 90:21-97:1
[24] [Doc. # 124-3], 96:6-24
[25] [Doc. # 124-3], 95:1-20
[26] [Doc. # 124-3], 90:21-97:1

7/13/16 ("Riverdance 3")	Arkins Court/ South Platte River (approximately 100 Class Members affected)[27]	No[28]	No[29]	Garbage trucks only[30]	Yes (e.g. blankets, tarps, clothes, photo album)[31]	No[32]
8/6/16 – Plaintiff Class Members file the Complaint in this lawsuit challenging the constitutionality of the sweeps.[33]						
11/15/16	Denver Rescue Mission (approximately 150 Class Members affected)[34]	No[35]	No[36]	Garbage trucks only[37]	Yes[38]	No[39]
11/28/16	Samaritan House[40]	No[41]	No[42]	Garbage & flatbed trucks[43]	Yes (Burton: tent, sleeping bag, blankets)[44]	No[45]

[27] [Doc. # 124-10], 148:23-149:17
[28] [Doc. # 124-30], 27:5-10, 46:13-15
[29] [Doc. # 124-1], 78:2-7; [Doc. # 124-21], 30:14-31:4; [Doc. # 124-20], 47:8-18; [Doc. # 124-19], 59:8-60:8; [Doc. # 124-20], 51:17-25; [Doc. # 124-32], Ex. A.
[30] [Doc. # 124-23], 45:9-46:1; [Doc. # 124-1], 70:13-19; [Doc. # 124-19], 68:3-10; [Doc. # 124-23], 45:9-46:1; [Doc. # 124-19], 68:3-10.
[31] [Doc. # 124-1], 37:15-20, 39:17-40:20, 74:18-75:3; [Doc. # 124-29], 42:8-43:18, 77:22-78:2.
[32] [Doc. # 124-30], 46:16-17; [Doc. # 124-19], 64:17-23, 65:6-14
[33] *See* [Doc. #1].
[34] [Doc. # 124-10], 95:19-96:7
[35] [Doc. # 124-10], 99:22-100:11
[36] [Doc. # 124-10], 123:21-25
[37] [Doc. # 124-10], 98:24-100:11
[38] [Doc. # 124-10], 99:22-100:11
[39] [Doc. # 124-10], 99:22-100:11
[40] [Doc. # 124-10], 48:6-49:8
[41] [Doc. # 124-10], 48:6-49:8
[42] [Doc. # 124-10], 125:20-126:4
[43] [Doc. # 124-10], 125:20-126:4
[44] [Doc. # 124-10], 117:1-118:8, 221:18-21
[45] [Doc. # 124-10], 117:1-118:8

January 2017 – Homeless advocates finally meet with Mayor Hancock and ask him to (1) repeal the camping ban, (2) to stop the sweeps and to end the practice of seizing people's property. The Mayor stated, "We're going to continue doing what we're doing."[46]

The evidence shows that it was pervasive for Denver officials to conduct sweeps of the homeless without notice, wherein any property Plaintiff Class Members could not carry was discarded (or summarily destroyed). *See* [Doc. # 124-31], 27:5-10, 46:13-15; [Doc. # 124-1], 74:14-17; [Doc. # 124-29], 74:9-22, 74:23-75:9. And no one was arrested during these sweeps, so these seizures of Plaintiff Class Members property cannot be accounted for as incident to arrest. *See* [Doc. # 124-2], 87:18-19, 151:20-22; [Doc. # 124-31], 46:16-17.

The unreasonableness, and unconstitutionality, of Defendant's officials' actions is illustrated by sweeps that they conducted systematically along the river front. During these sweeps, no notice, or deficient notice that simply told Plaintiff Class Members that their property was about to be (or already was) summarily destroyed, was posted. [Doc. # 124-31], 27:5-10, 46:13-15, 15:24-16:1, 11:21-12:1; [Doc. # 124-32], Ex. A. Then, Denver officials would seize and discard the property of Plaintiff Class Members outside of their presence and not leave any notice that the property had been seized, who had seized it, and whether it could be retrieved. [Doc. # 124-30], 54:4-8; [Doc. # 124-21], 15:7-12.

The best example, however, demonstrating that Defendant's officials violated Plaintiff Class Members Fourth Amendment rights is the sweep that occurred on July 13, 2016, along the Platte River and at Arkins Court.[47] First, the only notice that was given prior to the sweep was

[46] [Doc. # 124-10], 29:1-22.

[47] Defendant, based on the evidence cited in its own motion, seemingly admits to the unconstitutionality of this sweep, at least with respect to the sweep that occurred at Arkins Court. Instead of attempting to justify the clearly unconstitutional conduct that occurred during this sweep, Defendant attempts to explain away the unconstitutional actions that took place by pinning them on one, supposedly rogue, Denver police officer. As demonstrated, *supra* Section 5.5, this couldn't be further from the truth.

upon commencement of the sweep. Those who had left their belongings for the morning would return to their property destroyed. Then, Plaintiff Class Members were given less than an hour to gather their life's belongings; anything that couldn't be carried in two handfuls was destroyed. [Doc. # 124-1], 78:2-7, 37:15-20, 39:17-40:20, 72:15-22, 73:18-74:10, 74:18-75:3. The July 13, 2016 sweep at Arkins Court is perfectly analogous to the sweep the Ninth Circuit found unconstitutional under both the Fourth and Fourteenth Amendments in *Lavan*. 693 F.3d at 1024-33.

Given the totality of the above-outlined actions by Denver officials, the seizure of Plaintiff Class Members property violated the Fourth Amendment.

5.4 Defendant's officials violated Plaintiff Class Members' Fourteenth Amendment rights.

5.4(a) *Defendant's officials violated Plaintiff Class Members' procedural due process rights.*

The arguments and authorities cited in Plaintiff Class Members' Motion for Summary Judgment extensively outline, and demonstrate, how Defendant's officials violated their procedural due process rights. Plaintiff Class Members' Motion for Summary Judgment demonstrates that Plaintiff Class Members are entitled to summary judgment on this claim or, at the very least, that there are hotly disputed factual issues that preclude summarily judging this case in Defendant's favor. Plaintiff Class Members' incorporate the arguments and authorities cited in their Motion for Summary Judgment herein.

5.4(b) *Defendant's officials violated Plaintiff Class Members' substantive due process rights.*

The Supreme Court of the United States has held that the Fourteenth Amendment's provision that "no State shall . . . deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1, "guarantee[s] more than fair process,"

Washington v. Glucksberg, 117 S. Ct. 2258 (1997), it covers a substantive sphere as well. *See Daniels v. Williams*, 474 U.S. 327, 331, (1986); *see also Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (noting that substantive due process violations are actionable under Section 1983). Substantive due process is violated when a government official deprives a person of life in a way that "shocks the conscience." *See City of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998); *Breithaupt* v. *Abram,* 352 U.S. 432, 435 (1957) (reiterating that conduct that "'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency" would violate substantive due process); *Whitley v. Albers,* 475 U.S. 312, 327 (1986) (same); *United States* v. *Salerno,* 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty'") (quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325-326 (1937)). "[W]hen a government official has enough time to engage in 'actual deliberation,' conduct that shows 'deliberate indifference' to a person's life or security will shock the conscience and thereby violate the Fourteenth Amendment." *Perez v. Unified Gov't of Wyandotte Cty./Kan. City*, 432 F.3d 1163, 1166 (10th Cir. 2005) (quoting *Lewis*, 523 U.S. at 851).

Defendant's seizure of Plaintiff Class Member's blankets, sleeping bags, and shelter when high temperatures are in the single digits is a "course of proceeding by agents of government... [that] is bound to offend even hardened sensibilities." *Rochin v. California*, 342 U.S. 165, 172 (1952). It is conduct that "[affords] brutality the cloak of law." *Id.* at 173. It certainly "shocks the conscience" and is so "brutal" and "offensive" that it does not comport with traditional ideas of decency. *Id.* at 172; *see also Breithaupt v. Abram*, 352 U.S. 432, 435 (1957). There is evidence in the record that Defendant's officials seized Plaintiff Class Members

belongings (including items necessary for survival out in the elements) on one of the coldest nights of winter in 2015, when there was almost a foot of snow on the ground. [Doc. # 124-10], 184:6-21, 187:21-188:8; [Doc. # 124-2], 100:15-101:15; [Doc. # 124-12], ¶ 8; [Doc. # 124-13], 36:16-24; [Doc. # 124-14], ¶ 7. During, and after, they seized Plaintiff Class Members property necessary for survival, none of Defendant's officials checked to see if Plaintiff Class Members were warm or safe, or offered anyone useful services or assistance. [Doc. # 124-10], 186:1-6; [Doc. # 124-14], ¶ 7. This conduct "shocks the conscience."

Defendant's officials conduct is also deliberately indifferent to Plaintiff Class Members' right to life (and deliberately indifferent conduct violates the guarantees of Fourteenth Amendment substantive due process). *See Perez*, 432 F.3d at 1166. The risk of harm to Plaintiff Class Members by seizure of their only means of shelter in frigid temperatures, death, is objectively "sufficiently serious" to constitute a deprivation of constitutional proportions. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Further, Defendant's officials knew of, and disregarded, an excessive risk to Plaintiffs health and safety in their seizure of Plaintiff Class Member's only means of survival in frigid conditions. *See Tafoya v. Salazar*, 516 F.3d 912 (10th Cir. 2008). The obviousness of the risk of seizing every form of shelter from a homeless individual (leaving them literally out in the cold) in freezing temperatures itself proves deliberate indifference. *Id.* at 916 ("a jury is permitted to infer that a[n] official had actual knowledge of the constitutionally infirm condition based solely on circumstantial evidence, such as the obviousness of the condition."). Defendant's officials deliberately indifferent conduct "shocks the conscience" in violation of the Fourteenth Amendment.

5.4(c) *Defendant's officials violated Plaintiff Class Members' equal protection rights.*

Importantly, Defendant never disputes that it is targeting homeless individuals, likely because it is clear that the sweeps do, in fact, target the homeless.[48] Defendant's only argument is that Plaintiff Class Members are not a suspect class, and that the sweeps satisfy the rational basis analysis. Plaintiff Class incorporates herein by reference the arguments and authorities contained in Plaintiffs' Motion for Summary Judgment, which demonstrate that Plaintiff Class Members are a suspect class for purposes of the Fourteenth Amendment, that the sweeps perpetrated by Defendant, and its officials, were aimed directly at mistreating Plaintiff Class in an attempt to drive them from the Denver, and that Defendant's actions were not narrowly tailored to a compelling government interest.

Even assuming, *arguendo*, that this Court does not determine that Plaintiff Class Members are a suspect class, Defendant's actions had no rational basis. Plaintiff Class concedes that there is certainly a government interest in ensuring that public health and safety is protected, and that sanitary conditions in a city do not harm its residents. However, the sweeps, as perpetrated by Defendant, are not rationally related to this purpose. Cleaning the areas where Plaintiff Class Members rest most certainly relates to preserving public health, but seizing Plaintiff Class Members property does nothing to improve the sanitation of Denver. This is particularly true given the nature of the property Defendant has seized from Plaintiff Class Members, which includes pictures, documentation, and family heirlooms. It is difficult to imagine a scenario wherein it would advance public health and safety for Defendant to seize these items from a citizen without so much as issuing that citizen a citation. Denver has taken some steps to improve public health and safety as it relates to Plaintiff Class Members (i.e.

[48] The Mayor himself admitted that the sweeps target homeless individuals, and that the sweeps are aimed at sweeping homeless individuals off the streets, during a meeting with representatives of organizations who advocate for homeless rights in January of 2017. [Doc. # 124-10], 29:1-22.

increasing the number of public restrooms available throughout the downtown area), but seizing Plaintiff Class Members property is not one of them. Even under rational basis review, Defendant's officials violated Plaintiff Class Members right to equal protection of the laws.

5.5 Defendant is municipally liable for the violation of Plaintiff Class Members constitutional rights.

To prevail on a Section 1983 municipal liability claim, a plaintiff must show (1) the existence of a municipal policy or custom or the failure to train/supervise employees, (2) a direct causal link between the policy or custom (or inaction) and the constitutional injury alleged, and (3) that the municipal action (or inaction) was taken "with 'deliberate indifference' to its known or obvious consequences," i.e., constitutional violations. *Kramer v. Wasatch Cnty. Sheriff's Office*, 743 F.3d 726, 759 (10th Cir. 2014). For the purposes of Section 1983 municipal liability, a policy or custom encouraging or condoning unconstitutional behavior may take the form of:

> (1) a formal regulation or policy statement of the municipality, e.g., a City council resolution;
> (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is the standard operating procedure of the local governmental entity;
> (3) the decisions of employees with final policymaking authority;
> (4) approval/ratification of a series of decisions by a subordinate official of which the supervisor must have been aware.

See Bryson v. City of Okla. City, 627 F.3d 784, 788 (10th Cir. 2010) (alterations omitted) (internal quotation marks omitted); *Mitchell v. City & Cnty. of Denver*, 112 F. App'x 662, 672 (10th Cir. 2004) (internal quotation omitted).

Alternatively, in the absence of an explicit policy or a custom, a municipality may be also held liable under Section 1983 for its *failure to act* in face of constitutional violations, as a municipality's "policy of inaction" in light of actual or constructive notice that its policies will cause (or have caused) constitutional violations "is the functional equivalent of a decision by the

city itself to violate the Constitution." *Connick v. Thompson*, 563 U.S. 51, 61-62 (2011) (citing *Canto*n, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part)). Specifically, a municipality may be held liable because it failed to adequately train or supervise employees who commit tortious acts, so long as that failure results from "deliberate indifference" to "the rights of persons with whom the police [and/or other officials] come into contact." *Canton*, 489 U.S. at 385; *see also id.* at 390, n. 10 (noting that a municipality could be liable "[if] the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers," but the policymakers did nothing to change the policy or the training).

5.5(a) *Defendant's officials violated Plaintiff Class Members' constitutional rights pursuant to Defendant's custom, policy, and practice.*

As described in Plaintiffs' Motion for Summary Judgment,[49] Plaintiffs have provided sufficient evidence for a reasonable juror to conclude that Denver officials were acting pursuant to a *de facto* custom under which Denver officials (or individuals acting at their behest) violated Plaintiffs' Constitutional rights by:

1. Seizing homeless individuals' personal property, including their bedding, sleeping bags, tents, and other basic means of survival, and summarily/subsequently destroying it;
2. Seizing homeless individuals' personal property without adequate notice or an adequate post-deprivation process for retrieving property;

[49] Plaintiff Class Members incorporate herein the argument and authorities that demonstrate Defendant is municipally liable for the violation of Plaintiff Class Members' constitutional rights. *See* [Doc. #124].

3. Providing complete discretion and control to low-level officials as to what constitutes property that was "valuable" and that should be stored and property which was "useless" and should be discarded or destroyed; and
4. Intentionally and specifically targeting homeless individuals for property seizure/ destruction.

[Doc. # 124], pp. 45-47.[50]

Denver's Response first notes that none of the Denver Ordinances or enforcement guidelines at issue specifically "endorse" the unconstitutional customs alleged by the Plaintiff Class here. (Resp. at 39-41). This is true – but also entirely irrelevant. *See Panaderia La Diana, Inc. v. Salt Lake City Corp.*, 342 F. Supp. 2d 1013, 1038 (D. Utah 2004) ("Defendants point to several City policy statements . . . . These policy statements do little more than instruct officers to follow the constitution. A city cannot shield itself from all liability for potential constitutional violations by the simple expedient of enacting a general policy statement"); *Herrera v. Santa Fe Pub. Sch.*, 41 F. Supp. 3d 1188, 1270 (D.N.M. 2014) ("That there was no formal policy is not,

[50] Defendants assert that Plaintiffs need to show that the homeless "sweeps" were conducted pursuant to Denver's practice 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. # 125], p. 38 (emphasis added). Plaintiff disagrees; this summary description of merely *one aspect* of the alleged custom alleged here, and is derived not from the Complaint, but rather from the class definition the Court crafted in certifying the class. Not incidentally, the Court's class certification order specifically noted was subject to further refinement throughout the litigation. Indeed, amendment of the class definition is something that is well within the discretion of the district court up until final judgment. Accordingly, requiring Plaintiffs to adhere to the Court's high-level summary of the Complaint's "policy or custom" from the class definition as the full description of the alleged custom would be both prejudicial and arbitrary; this definition was crafted without the benefit of the summary judgment briefings and full discovery, and it could very well be amended at a later point. *See In re Integra Realty Resources, Inc.*, 354 F.3d 1246, 1261 (10th Cir. 2004) ("[A] trial court overseeing a class action retains the ability to monitor the appropriateness of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment." (citing Fed. R. Civ. P. 23(c)(1))).

however, the end of the inquiry. As the parties substantially agree, the [Motion] focuses on whether, *despite the paper policy*, . . . [d]efendants had a *de facto* custom or practice that caused the [p]laintiffs' injuries.").

However, Plaintiffs have presented sufficient evidence for a reasonable jury to find the sweeps conducted by Denver officials (and those acting at Denver's behest) constituted a "continuing, persistent, and widespread practice" of Denver, i.e., that the sweeps were conducted pursuant to an unwritten Denver custom or practice. Specifically, Plaintiff Class Members have submitted sufficient evidence for a reasonable juror to conclude that:

- From December of 2015 until November of 2016, approximately every four months, Denver engaged in a larger-scale sweeps of homeless encampments and/or areas where larger numbers (fifteen or more) homeless individuals congregated (it also conducted smaller sweeps, of fewer individuals, on a more regular, intermittent basis);
- The unconstitutional methods used in each sweep were almost identical: Denver officers would descend, unannounced, on an area in which homeless individuals had congregated, and, without any prior notice, order those individuals to move – both their bodies and any property they may have had with them – but without giving them a reasonable opportunity to actually do so.
- Most of the property at issue in the sweeps was quickly seized by the City, placed in garbage trucks, and discarded (or burned); with regard to any property allegedly stored, no notice was provided directly to any affected individuals.

Far from being an isolated incident, then, Denver's pattern of repeatedly allowing officers and representatives to act in violation of the Fourth and Fourteenth Amendment rights of

Plaintiff Class Members was a pattern of conduct that was both repeated and consistent. One example in particular is demonstrative. An upper level city official testified that the discretion of what property was trash, and should be summarily destroyed, and what property should be stored was completely in the discretion of Denver officials. [Doc. # 124-23], 23:7-25, 31:13-25. This comports with the evidence in the record, which shows that what Denver officials considered refuse, and ordered the destruction of, many Plaintiff Class Members considered valuable possessions. *See* [Doc. # 124-2], 114:8-118:17; [Doc. # 124-15], ¶ 2; [Doc. # 124-16], ¶ 1; [Doc. # 124-12], ¶ 9.

Denver's pattern of Constitutional violations is blatantly obvious; Denver's *modus operandi* was almost exactly the same during every single sweep it conducted. Even more significant, however, is the fact that Denver's rosy conclusions about what occurred during the sweeps are premised not on undisputed facts, but on its own version of the facts – a version that is materially and specifically disputed by Plaintiffs. For example, Denver points to the extensive protocol governing the March 2016 sweeps, boasting that the written protocol provided for

> 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. . . . Prior to the cleaning, people who had property were encouraged to voluntarily remove it and were given time to do so. Individuals could dispose of items they did not want and they were also given the option to have any items stored at no cost. Unattended property was also stored.

[Doc. # 125], p. 42.

These assertions are plainly contradicted by Plaintiffs' summary judgment evidence, which indicates that what actually occurred in the sweeps on March 8th and 9th was vastly different than what officers were instructed to do in Denver's written protocol. Specifically, Jose Cornejo and Ligera Craven both admitted that Denver officials did not place notice signs in the

area where the sweeps were conducted prior to the sweeps occurring on March 8th and March 9th. [Doc. #124-8], 62:20-63:11; [Doc. #124-8A]; [Doc. # 124-19], 35:24-26:2. Also contrary to Denver's written protocol, Plaintiff Class Members sworn testimony indicates that, in fact, officers entirely cordoned off the area where they were conducting the March 8th and March 9th sweeps and did not allow homeless individuals affected to retrieve their property, Plaintiff Class Members also testified under oath that this "unattended" property was then thrown into garbage trucks. [Doc. # 124-2], 147:6-9, 149:10-151:19, 167:20-168:2, 175:7-176:17.

A close examination of Denver's other assertions regarding the sweeps shows that most are ultimately based on accepting Denver's version of material factual disputes. For example, with respect to "Operation Riverdance 3" (on July 13, 2016), Denver repeatedly claims that "only property left behind" was removed, and also that "Officers Craven and Lombardi . . . contacted the individuals camped along Arkins Court, asked them to move, and *gave them time to pack their belongings* and move. After the unlawful campers left, Officer Craven made the decision to have Public Works and any other items *which had been left behind*." *See* [Doc. # 125]. However, such allegations are specifically contradicted by testimony by Plaintiff Class Members. *See, e.g.,* [Doc. # 124-1], 68:4-24 (stating that with no prior notice, on July 13, 2016, officers woke up homeless individuals camping near Arkins Court at approximately 6:00 am and announced they had only ten minutes to gather their property and leave the area); [Doc. # 124-31], ¶ 2 (stating that on July 13, 2016, it was impossible for Ms. Dotson, one of the Plaintiff class members who used a wheelchair, to gather her possessions in time, even with the help of her husband, before cleanup crews began throwing their belongings into garbage trucks). Even if this Court does not find that Plaintiff Class Members have demonstrated in their Motion for Summary Judgment that Defendant is municipally liable for its policies, customs, practices, and

inaction that violated Plaintiff Class Members constitutional rights, factual disputes certainly preclude summarily judging this case in Denver's favor.

5.5(b) *The policies, customs, and practices of Defendant were deliberately indifferent to Plaintiff Class Members constitutional rights.*

When a municipality "has *actual or constructive notice* that its action or failure is substantially certain to result in a constitutional violation, and it *consciously and deliberately chooses to disregard* the risk of harm" it is deliberately indifferent for purposes of *Monell* liability. *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1999) (emphasis added). In "most instances," such notice can be established by showing "the existence of a pattern of unconstitutional conduct." *Bd. of Cnty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 407–08 (1997); *see also Barney,* 143 F.3d at 1308 (same, and affirming summary judgment ruling against plaintiff in part because "no pattern of violations existed to put the County on notice that its training program was deficient").

In providing evidence showing a clear pattern of similar constitutional violations, Plaintiff Class Members have also submitted sufficient evidence that Denver acted with "deliberate indifference" toward class members' constitutional rights. *See Barney*, 143 F.3d at 1308. The constitutional violations in this lawsuit occurred during at least seven separate systematic and coordinated sweeps, conducted by multiple Denver agencies, including Denver Public Works, Police Department, Parks Department, and Sheriff's Department, over the span of two years. And the unconstitutionality of the sweeps was no secret. From day one, there was

public outcry and journalism documenting the human rights violations that Defendant's officials were inflicting upon Denver's homeless residents.[51]

Although Denver blames much of the property seizure on individual, low level decisionmakers, for example, Officer Craven,[52] the actual evidence presented in the summary judgment record indicates that high level officials were both involved in planning the sweeps, coordinating them, and receiving reports about their execution. [Doc. # 124-9]; [Doc. # 124-5]; [Doc. # 124-6]; [Doc. # 124-7]. Moreover, a significant swath of Denver departments were represented in both coordinating and conducting the sweeps – including employees of the Denver Police Department, Public Works, Parks Department Waste Management, and Sheriff's Department, along with the Mayor's Office, City Attorney's Office, and City Council. [Doc. # 124-9]; [Doc. # 124-5]; [Doc. # 124-6]; [Doc. # 124-7]; [Doc. # 124-2]¸ 149:10-150:4; [Doc. # 124-19], 37:1-2, 39:4-19; [Doc. # 124-1], 72:23-73:9; [Doc. # 124-2]¸ 91:23-92:14; [Doc. # 124-8], 19:10-25; [Doc. # 124-21], 9:24-10:8, 15:7-10; [Doc. # 124-30], 31:11-32:13. Denver simply cannot dispute that its policymakers were aware of the unconstitutional actions that were being undertaken during the sweeps, particularly because homeless advocates have been meeting with

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[51] *See e.g.,* Chris Walker, *Homeless: Denver Police Officers Threw Away Possessions Without Warning*, WESTWORD (December 22, 2015), http://www.westword.com/news/homeless-denver-police-officers-threw-away-possessions-without-warning-7443603.

[52] *See, e.g.* [Doc. # 125], pp. 43-44, with regard to the July 13, 2016 incident: "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." *See also id.* at 45, with regard to the 12/15/15 incident: "*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." While Officer Craven may have been the individual on-scene making these decisions, the violation of Plaintiff Class Members' constitutional rights cannot be ascribed solely to her. There were multiple agencies, including Denver Public Works, the Denver Police Department, and the Denver Sheriff's Department (which oversaw the use of inmates), that implemented a coordinated and systematic sweep on July 13, 2016. This Court should give no credence to Defendant's assertions that the July 13, 2016 sweep was undertaken solely because of the actions of a rogue officer.

them regularly and informing them as much over the last few years. **Exhibit 14**, *Terese Howard Deposition*, 21:19-29:22 (noting that homeless rights advocates had met with Councilmembers Ortega, New, Kashmann, Lopez, Clark, Gilmore, and Brooks, along with Mayor Hancock, to discuss the issues that homeless individuals were encountering during the sweeps over the past few years). The evidence shows that knowledge of the sweeps, and the practices that were employed to execute them, permeated every level of Denver government.

5.6 Single Incident Liability

The particularly egregious nature of the July 13, 2016 sweep, which was conducted in part by prison inmates, and in which class members' property was burned – in front of them – with flamethrowers, warrants the imposition of "single incident" liability here. "Deliberate indifference may be found [even] absent a pattern of unconstitutional behavior if a violation of federal rights is a 'highly predictable' or 'plainly obvious' consequence of a municipality's action." *Barney*, 143 F.3d at 1307 (internal citations omitted). In *Bd. Of the Cnty. Comm'rs v. Brown*, the Supreme Court noted that this may occur if a municipality fails "to equip law enforcement officers with specific tools to handle recurring situations." 520 U.S. 397, 407, 409-10 (1997). Specifically, "[t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected 'deliberate indifference' to the obvious consequence of the policymakers' choice—namely, a violation of a specific constitutional or statutory right." *Id.* at 410. It is obvious that dealing with homeless individuals and their occupation of public space – especially in light of the lack of shelter beds in Denver – constitutes a "recurring situation" that its law enforcement officers, and other officials, will predictably face.

Moreover, for liability to center on a single incident, the plaintiff must also show "that the particular illegal course of action was taken pursuant to a decision made by a person with authority to make policy decisions on behalf of the entity being sued." *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996). Plaintiffs can do so; as has already been noted, high-level officials *with decision-making authority* have been involved in planning these events, and also received notice of them. [Doc. # 124-8], 19:10-25; [Doc. # 124-9]. The operation and execution of the sweeps, including Operation Riverdance 3 and the corresponding sweep at Arkins Court, were no secret among the government. They were deliberately planned and orchestrated government action by multiple agencies. [Doc. # 124-30], 31:11-32:13 (Denver Park Rangers); [Doc. # 124-21], 18:4-11 (Denver Waste Management); [Doc. # 124-19], 47:16-24 (Denver Police Department). In fact, during the sweep, Denver officials told Plaintiff Class Members that they were simply following the orders of Mayor Hancock in conducting the sweep, seizing Plaintiff Class Members' property, and forcing them to leave the area. [Doc. # 124-1], 101:24-102:5. Operation Riverdance 3, and the corresponding sweep at Arkins Court on July 13, 2016, provide a basis for liability based on a singular incident, if a sweep (wherein hundreds of violations of Plaintiff Class Members' rights occur) is deemed by this Court to be a "single" incident.[53]

6. **Conclusion**

For the foregoing reasons, Plaintiff Class Members respectfully ask this Court to deny Denver's Motion for Summary Judgment in its entirety.

Respectfully submitted this 26th day of September 2017.

[53] Each sweep contains hundreds of "incidents" that violate Plaintiff Class Members constitutional rights. Each constitutional violation (i.e. each personal effect of each Plaintiff Class Members that is seized unreasonably) is a single incident. Therefore, the collective incidents that occurred during each single highly-coordinated and systemic sweep constituted custom and practice and form the basis for municipal liability themselves.

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CERTIFICATE OF SERVICE

I certify that on this 26th day of September, 2017 I filed a true and correct copy of this **PLAINTIFFS' RESPONSE TO THE CITY AND COUNTY OF DENVER'S MOTION FOR SUMMARY JUDGMENT** via CM/ECF which will generate notice to the following via e-mail:

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