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2 UNITED STATES DISTRICT COURT  
3 IN THE DISTRICT OF COLORADO

4 RAYMOND LYALL, ET AL;

5 Plaintiffs,

6 vs.

7 CITY OF DENVER.

8 Defendant

Case No.: 16-CV-2155 WJM-CBS

**CLASS ACTION**

**DEMAND FOR JURY TRIAL**

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13 ***MOTION IN LIMINE FOR ORDER SUSPENDING CAMPING BAN***  
14 ***ENFORCEMENT DURING TRIAL***

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16 *IN ORDER to resolve substantial evidentiary questions* that likely require more careful  
17 consideration than is normally possible in the middle of a trial—quoting Honorable William J.  
18 Martinez Practice Standards Section III. F, *Motions in Limine*—Plaintiff Class respectfully  
19 moves this Honorable Court for an order mandating that Defendant Denver suspend Camping  
20 Ban Enforcement from March 12, 2019 through March 29, 2019 on the grounds that the  
21 ordinance violates Plaintiff Class’ right of access to the court and fair trial pursuant to the First,  
22 Fourth and Fourteenth Amendments to the U.S. Constitution and that enforcement of DRMC 38-  
23 86.2, if unaddressed prior to trial, will continually implicate Federal Rules of Evidence 801 and  
24 804 throughout its course. As grounds therefore, Plaintiff Class states:

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28 **CERTIFICATE OF CONFERRAL**

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30 Pursuant to D.C.COLO.LCivR 7.1(A) undersigned counsel conferred with Defense  
31 Counsel on two occasions concerning this Motion: the first was several months ago in which  
32

1 Denver expressed Opposition to this Motion; and, second, out of an abundance of caution,  
2 January 30, 2019, to which there was no response. This Motion is therefore Opposed.  
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5 CERTIFICATE OF COMPLIANCE WITH REGARD TO THE HONORABLE WILLIAM J.  
6 MARTINEZ’S PRACTICE STANDARDS AS TO *MOTIONS IN LIMINE*  
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8 Pursuant to the practice standards of the Honorable William J. Martinez, this *Motion in*  
9 *Limine* is: (1)being filed more than 21 days prior to the final pre-trial conference on March 1,  
10 2019; (2)is the first and only *Motion in Limine* filed by Plaintiff Class; (3)not longer than the 12  
11 pages allotted to matters with multiple Plaintiffs; (4)[*P*]resents a substantial evidentiary question  
12 that likely requires more careful consideration than is normally possible in the middle of a trial.  
13  
14 See *Infra—Evidentiary Issues At Trial. Emph. added.*  
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16  
17 INTRODUCTION  
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19 There is a virtual fence around Downtown Denver.<sup>1</sup> Plaintiffs are harassed and detained  
20 on the way to the Courthouse. Plaintiffs are chased from the Downtown area to the outer reaches  
21 of the City so that they cannot get to the Courthouse to provide evidence and testimony.  
22  
23 Plaintiffs’ property is seized so that that they are forced to choose between using their voice or  
24 losing their possessions.  
25

26 The First, Fourth and Fourteenth Amendments to the United States Constitution emanate  
27 to form a vigorous right of access to our Courts. No citizen can be denied the right to litigate  
28 matters of federal constitutional concern. This right of access goes beyond the initial petition to  
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<sup>1</sup> Exhibits A, B, C: Declarations of Jerry Burton, Terese Howard and Amanda McDougald, respectively.

1 the litigation itself where it joins with the right to fair trial, ensuring that all persons are given  
2 full opportunity to be heard.

3  
4 The Plaintiff Class does not ask that the Court review the constitutionality of DRMC 38-  
5 86.2, but rather to uphold the rights of access and fair trial, by ordering that Denver suspend  
6 enforcement of “The Camping Ban” from one week prior to trial, March 12<sup>th</sup>, through the end of  
7 trial on March 29<sup>th</sup>, 2019, so that Plaintiff Class can prepare, present and petition their cause.<sup>2</sup>  
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9

### 10 11 EVIDENTIARY ISSUES AT TRIAL

12 This *Motion in Limine* attempts to resolve specific evidentiary issues that threaten to  
13 disrupt trial. If a witness is lost due to Camping Ban Enforcement, Plaintiff Class would be  
14 compelled to argue unavailability or forfeiture by wrongdoing in order to admit the declarant’s  
15 hearsay while Defendant would posit that no such harassment occurred and that the witness has  
16 simply chosen not to appear and so their testimony should be excluded. There would be trials  
17 within trial concerning the interpretation and application of Federal Rules of Evidence 801, 804,  
18 and 806. Unless addressed prior to opening argument, these evidentiary issues will be faced  
19 routinely, which is why it is the proper subject of a *Motion in Limine*.  
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28 <sup>2</sup> Trial begins March 19, 2019. Plaintiff Class is seeking suspension of Camping Ban Enforcement one week prior to  
29 this date so that they can come to the Downtown area in which the Federal Courthouse sits, meet with their  
30 attorneys, rest, and prepare their testimony. Without suspending the Camping Ban during trial, key witnesses will  
31 attempt to come to the courthouse area the night prior to their scheduled testimony, try to rest somewhere, and be  
32 arrested for it pursuant to 38-86.2. Furthermore, as this Court knows, trials don’t occur on a set schedule so that a  
homeless witness will have to “hang around” the Courthouse until called, which would expose her to move along  
orders and harassment that would push her out of the city. It is an untenable situation with direct implications on the  
Rules of Evidence at trial.

1 PRAYER<sup>3</sup>

2 The Court has wide ranging discretion to ensure the orderly administration of justice.  
3  
4 Again, Plaintiff Class does not seek review or even consideration of the constitutionality of the  
5 Camping Ban, but a simple order that Defendant Denver suspend Camping Ban enforcement for  
6 one week prior to trial through end of trial on March 29, 2019, pursuant to the Plaintiff Class'  
7 forward-looking right of access to the Court. *This does not require complex judicial intervention*  
8 *nor would it burden the Defendant.* After blankets were taken from Plaintiff Class members in  
9 Winter 2017, Mayor Michael Hancock issued a short statement that property would not be seized  
10 from homeless persons for the remainder of the Winter, which was a necessary and pragmatic  
11 suspension, or modification, of the law. [See Doc. 67, Judicial Notice concerning Mayoral  
12 Announcement, which was ultimately denied.] Plaintiff Class is only seeking a similar order  
13 from Defendant, mandated by this Court, suspending Camping Ban Enforcement for the three-  
14 week period of March 12, 2019 through March 29, 2019.  
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19 Without this simple order protecting the integrity of this adjudication, which a besieged  
20 Plaintiff Class has struggled for three years to achieve, a trial regarding the most fundamental of  
21 rights will be overshadowed by evidentiary questions and concerns.  
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24

25 THE CAMPING BAN INFRINGES ON THE PLAINTIFF CLASS' CONSTITUTIONAL  
26 RIGHT OF ACCESS TO THE COURTS & FAIR TRIAL  
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32 <sup>3</sup> For clarity's sake, Plaintiff Class elects to place the Prayer toward the beginning of this Motion, rather than at the end where it is customarily situated.

1            “In civil as well as criminal cases, the right to a fair trial is fundamental.” *Davidson v.*  
2 *Riley*, 44 F.3d 1118, 1122 (2<sup>nd</sup> Cir. 1995), *citing In re International Business Machines Corp.*,  
3 618 F.2d 923, 932 n. 11 (2<sup>nd</sup> Cir. 1980); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98 (3<sup>rd</sup>  
4 Cir. 1988) (“[F]airness in a jury trial, whether criminal or civil in nature, is a vital constitutional  
5 right.”); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7<sup>th</sup> Cir. 1975) (“the right to a  
6 fair trial [is] guaranteed by the Sixth Amendment to criminal defendants and to all persons by the  
7 Due Process Clause of the Fourteenth Amendment”), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3201  
8 (1976).

9            “The right to sue and defend in the courts is the alternative of force. In an organized  
10 society it is the right conservative of all other rights, and lies at the foundation of orderly  
11 government. It is one of the highest and most essential privileges of citizenship, and must be  
12 allowed by each state to the citizens of all other states to the precise extent that it is allowed to its  
13 own citizens. Equality of treatment in this respect is not left to depend upon comity between the  
14 states, but is granted and protected by the Federal Constitution.” *Chambers v. Baltimore &*  
15 *Ohio Railroad*, 207 U.S. 142, 148, 28 S. Ct. 34 (1907).

16            “[C]ourts have recognized the right of access to the courts as being rooted in the Due  
17 Process Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment,  
18 the Equal Protection Clause of the Fourteenth Amendment, the privileges and immunities  
19 provisions of Article IV and the Fourteenth Amendment, and the Petition Clause of the First  
20 Amendment.” *A.M. v. N.M. Dep’t of Health*, 148 F. Supp. 3d 1232, 1268 (D.N.M. 2015), *citing*  
21 *Christopher v. Harbury*, 536 U.S. 403, 415, 122 S. Ct. 2179 (2002) (a very recent case from this  
22 Circuit that provided a detailed treatment and explanation of the law of right to access the  
23 courts); *Smith v. Maschner*, 899 F.2d 940, 947 (10<sup>th</sup> Cir. 1990); *Ryland v. Shapiro*, 708 F. 2d

1 967, 971-972 (5<sup>th</sup> Cir. 1983); U.S. Const. amend. XIV; U.S. Const. amend. I; U.S. Const. amend.  
2 V; U.S. Const. art. IV, § 2, cl. 1.

3  
4 Although “[t]he right of access to the courts emerged primarily in the prisoners’ rights  
5 context,” *A.M.*, *supra* at 1268, “[t]he Fourteenth Amendment right to court access began to  
6 develop beyond the prisoner setting in the early 1970’s, particularly in the context of civil  
7 indigents’ inability to pay court fees.” *Id.* at 1271. In *Boddie v. Connecticut*, 401 U.S. 371, 91 S.  
8 Ct. 780 (1971), the Supreme Court “recognized that the possibility of a due process court access  
9 claim in the civil context was novel, and noted the importance of court access when a judicial  
10 proceeding is the only available remedy.” *Id.* at 1271-1272, *citing Boddie, supra* at 375-376.

11  
12 And this is the exact situation that the Plaintiff Class members find themselves in today—  
13 a judicial proceeding is their only available remedy with regard to matters of constitutional  
14 significance. See *infra*.

15  
16 “The Supreme Court explained that two important principles were embedded in due-  
17 process jurisprudence: (i) due process requires, at minimum, a ‘meaningful opportunity to be  
18 heard’ for persons whose claims must be settled through the judicial process; and (ii) a statute or  
19 a rule may be held constitutionally invalid ‘when it operates to deprive an individual of a  
20 protected right.’” *Id.* at 1272, *quoting Boddie, supra* at 377-379.

21  
22 While “subsequent civil indigent filing fee cases [have] limited the right of court access  
23 in the civil context to issues of ‘constitutional significance,’” *id.* at 1272, that is of no moment;  
24 the Amended Complaint in this case certainly raises numerous claims of constitutional  
25 deprivations.

26  
27 Although “much of the case law focused on a right to court access under the Fourteenth  
28 Amendment, a separate strand of jurisprudence recognized a right to court access rooted in the

1 First Amendment's 'right to petition' language.” *Id.* at 1273. In *California Motor Transport Co.*  
2 *v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609 (1982), “the Supreme Court recognized that  
3 ‘the right of access to courts is indeed but one aspect of the right to petition,’ concluding: ‘[I]t  
4 would be destructive of rights of association and of petition to hold that groups with common  
5 interests may not, without violating the antitrust laws, use the channels and procedures of state  
6 and federal agencies and courts to advocate their causes and points of view respecting resolution  
7 of their business and economic interests vis-a-vis their competitors.’” *Id.*, quoting *California*  
8 *Motor Transport*, 404 U.S. at 510-511.

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12 A.M. summarized, “The Supreme Court has recognized that the basis for the  
13 constitutional right of court access is ‘unsettled,’ but has identified the Privileges and Immunities  
14 Clause of Article IV, the First Amendment Petition Clause, the Fifth Amendment Due Process  
15 Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses as sources.”  
16  
17 *Id.* at 1280 (citation omitted).

18  
19 The Court continued, “Despite the uncertainties of the right’s constitutional roots, the  
20 present framework for the analysis of a court access claim is grounded in decades of case law in  
21 the prisoner and civil context. The Honorable Stephanie K. Seymour, now Senior Judge for the  
22 Tenth Circuit, has noted that the right of court access is ‘basic to our system of government’ and  
23 that it is well established as a fundamental right that the Constitution protects.” *Id.* at 1280,  
24 quoting *Smith v. Maschner*, 899 F.2d 940, 947 (10<sup>th</sup> Cir.1990) (quoting *Nordgren v. Milliken*,  
25 762 F.2d 851, 853 (10<sup>th</sup> Cir. 1985)).

26  
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28  
29 “The right of court access under the Fourteenth Amendment’s due-process right is  
30 substantive rather than procedural; [i]ts exercise can be shaped and guided by the state, but  
31 cannot be obstructed, regardless of the procedural means applied.” *Id.* at 1280, quoting *Morello*  
32

1 v. *James*, 810 F.2d 344, 346 (2<sup>nd</sup> Cir. 1987) (citing *Bounds v. Smith*, 430 U.S. 817, 823-824, 97  
2 S. Ct. 1491 (1977)).

3  
4 “The Supreme Court has divided court access claims into two categories: ‘forward  
5 looking claims’ and ‘backwards looking claims.’” *Id.* at 1281 (citations omitted). “Forward  
6 looking claims involve official action that ‘frustrates a plaintiff’s ability to bring a suit at the  
7 present time,’ and backwards looking claims ‘arise when plaintiffs allege that a specific claim  
8 cannot be tried [. . .] because past official action causes the loss or inadequate settlement of a  
9 meritorious claim.” *Id.*

10  
11  
12 This case is a *forward-looking claim*. “The objective of a forward-looking claim is to  
13 ‘place the plaintiff in a position to pursue a separate claim for relief once the frustrating  
14 condition has been removed.” *Id.* at 1281, quoting *Christopher v. Harbury*, 536 U.S. 403, 413,  
15 122 S. Ct. 2179 (2002). Put another way, a forward-looking claim seeks to “remove roadblocks  
16 to future litigation.” *Christopher*, 536 U.S. at 415.

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18  
19 And that is what the Plaintiff class seeks with this motion, to have the Court put the class  
20 in a position to pursue its (separate, i.e., underlying) claim for relief, as contained in the  
21 Amended Complaint, once the frustrating condition (i.e., the Camping Ban) has been removed.

22  
23 “Whether a claim turns on ‘a litigating opportunity yet to be gained or an opportunity  
24 already lost,’ the purpose of recognizing a court access claim ‘is to provide some effective  
25 vindication for a separate and distinct right to seek judicial relief for some wrong.’” *A.M., supra*  
26 at 1281, quoting *Christopher*, 536 U.S. at 414-415.

27  
28  
29 And, again, that is exactly what Plaintiff Class is doing here: seeking effective  
30 vindication for a separate and distinct right to seek judicial relief for some wrong (i.e., the  
31 Camping Ban that serves as a roadblock to future litigation). *Christopher*, 536 U.S. at 415.



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3 SUMMARY

4 This *Motion in Limine* respectfully provides this Honorable Court with the opportunity to  
5 clarify and resolve evidentiary questions that will negatively impact trial. It is pragmatic, highly  
6 necessary, and easily accomplished. Plaintiff Class is seeking a straightforward order suspending  
7 Camping Ban enforcement for a three-week period in March. Defendant has issued these orders  
8 before in the exact same context when the Mayor mandated that Police not take blankets during  
9 Winter. *That* order was for a longer duration than the order being sought here and Defendant  
10 issued that order within a day of the video of police seizing blankets going viral. Federal Courts  
11 around the country are issuing orders regarding the treatment of homeless, especially with regard  
12 to property seizures and evictions from camping sites that result in displacement of persons and  
13 the violation of rights. Whether the Camping Ban is constitutional is of no concern to this  
14 litigation, but what *is* of concern to this litigation are Plaintiff Class members' rights of access  
15 and fair trial. Thousands of hurting and exhausted homeless people have believed and struggled  
16 for three years to provide evidence and testimony to this Court. Now, all they are asking for is  
17 three weeks so that they can do so with dignity. Three weeks to provide evidence, three weeks to  
18 give their testimony, three weeks in which they aren't treated as the unwanted, nor harassed, nor  
19 tired, nor poor, nor any of the things that this country used to welcome and now abuses, but  
20 citizens going to their Courthouse with the rights afforded everyone else.<sup>4</sup>  
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32 <sup>4</sup> A stroll through Downtown Denver parks on a warm Spring day reveals hundreds of people violating the Camping ban with their blankets spread all over and their hammocks slung between the trees...

1 Respectfully Submitted this Fourth Day of February 2019,

2  
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CERTIFICATE OF SERVICE

I certify that on this 4th day of February 2019, I emailed this *Motion in Limine* to Representative Class Members and electronically filed the foregoing *Motion in Limine* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of the City Attorney's Office:

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