Municipal Court, Denver, Colorado Lindsey-Flanigan Courthouse 520 W. Colfax Ave., Denver, CO 80204	
PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. Troy Holm, Accused	σ COURT USE ONLY σ
Adam Frank, #38979 Faisal Salahuddin, #40758 Frank & Salahuddin LLC 1741 High Street Denver, CO 80218 Phone: (303) 974-1084 Fax: (303) 974-1085 E-mail: adam@fas-law.com In cooperation with the ACLU Foundation of Colorado Mark Silverstein, #26979 Rebecca Wallace, #39606 ACLU Foundation of Colorado 303 E. 17th Ave., Suite 350 Denver, CO 80203 Phone: (303) 777-5482 Fax: (303) 777-1773 Email: msilverstein@aclu-co.org rtwallace@aclu-co.org	Case No. 16GS13978 Division 3F
REPLY REGARDING MR. HOLM'S MOTION TO DISMISS	

Mr. Holm, by and through counsel, submits the following reply to the City's response to his Motion to Dismiss:

I. This Court has jurisdiction to hear Mr. Holm's motion.

1. The source of this Court's jurisdiction to hear Mr. Holm's motion to dismiss is so obvious that Mr. Holm did not think it necessary to include it in his original motion. However, now that this Court's jurisdiction is under spurious attack, Mr. Holm will make explicit argument regarding what was previously implicit: a criminal court has jurisdiction to hear a motion to dismiss criminal charges filed pursuant to the applicable rules of procedure.

A. Mr. Holm's motion is permitted by C.M.C.R. 212(c).

2. According to Colorado Municipal Court Rule of Procedure (C.M.C.R.) 212(c), "any defense or objection which is capable of determination without the trial of the general issue may be raised by motion."

3. Both parties agree that Mr. Holm's motion addresses solely legal issues and that the facts are not in question. *See* Motion to Dismiss, at ¶ 1; Response, at 3. As a result, this Court can determine the legal issues raised "without the trial of the general issue." C.M.C.R. 212(c). The motion is therefore properly brought under C.M.C.R. 212(c).

4. All proceedings in this case "shall be in accordance with the procedure established by ordinance, or . . . as may be established by rules of [this] court." Denver City Charter § 4.2.6. Mr. Holm filed a motion under the established rules of this Court. Plainly, this Court has jurisdiction to hear it.

B. Mr. Holm's motion properly challenges an element of the criminal offenses he is charged with violating.

5. Mr. Holm is charged with violating DRMC § 39-4(a), use of a park in violation of a temporary directive, and § 38-115(a), trespass.

6. One element of the crime established in DRMC § 39-4(a) is that the City must establish beyond a reasonable doubt that there was a lawful temporary directive in place.

7. One element of the crime established in DRMC § 38-115(a) is that the City must establish that it lawfully withdrew its consent for Mr. Holm to enter Commons Park.

8. Mr. Holm's motion challenges the city's ability to establish these elements as a matter of law. A motion challenging an element of a charged criminal offense is a standard motion in a criminal case. Because the lawfulness of the trespass order issued to Mr. Holm is an element of the crimes Mr. Holm is charged with committing, he must be allowed to challenge it in the criminal court.

9. The City cannot be permitted to use the enormous scope of the constitutional violations it is perpetrating as a reason for this Court to refrain from ruling. Imagine that instead of discriminating against the houseless people who regularly use Commons Park, the Department of Parks and Recreation instead issued a Directive that authorized Denver police officers to issue trespass notices to all African-American people found in the park. Would this Court bar African-American people prosecuted for violating the plainly-illegal trespass notice from challenging the lawfulness of the trespass notice in their criminal case? Clearly, this Court would not.

C. Whether Mr. Holm had other methods of challenging his suspension from Commons Park is irrelevant.

10. As argued above, Mr. Holm brings his motion pursuant to the established rules of this Court. The City cites no case for the proposition that a Rule 106(a)(4) appeal is the exclusive remedy available to Mr. Holm. This is because no such case exists. Even if this Court believes that Mr. Holm could have challenged his park suspension under the procedures in the directive and then under Rule 106(a)(4), there is no statute, rule, or case that requires him utilize that procedure rather than challenge his park suspension in his criminal case.

~~11.~~ Furthermore, under the particular circumstances of Mr. Holm's case, Rule 106(a)(4) was unavailable to Mr. Holm as a potential remedy. Even if Mr. Holm appealed through the City's

procedures, under the procedures set forth by the City and under Rule 106(a)(4), there is no way for a litigant to get a ruling in less than the 90 days of the suspension. First, Mr. Holm would have to go through the City's appeal process, which can take as long as 27 days. *See* Motion to Dismiss, at ¶ 46. Second, the Parks Department would have to prepare the record of the decision. C.R.C.P. 106(a)(4)(III). Mr. Holm has no control over how long this takes. Mr. Holm would then have 42 days to file an opening brief, the City would have 35 days to file a response, and Mr. Holm would have 14 days to file a reply. Even if the Department provided the record instantly (which is unfathomable), this would still entail a 118-day delay before any challenge Mr. Holm could have brought would have been ripe for a ruling. This Court is the only place he can challenge the constitutional violations he suffered.

II. The City's arguments fail to establish that the Director of the Department of Parks had the authority to issue Directive 2016-1.

12. The City begs this Court to look at any anything other than the plain language of the statute establishing the powers of the Department of Parks and Recreation, because the plain language of the statute is not to the City's liking. However, no amount of obfuscation can change the fact that under the plain language of DRMC § 39-1, the Department of Parks and Recreation does not have the power to banish a person from a park.

A. The City's interpretation of DRMC § 39-1 violates fundamental rules of statutory interpretation.

13. The rules of statutory interpretation in Colorado are clear: First, "Our primary purpose is to effectuate the legislature's intent. Therefore, we first consider the plain language of the statute." *People v. Null*, 233 P.3d 670, 679 (Colo. 2010) (internal citations omitted). "Where the statutory language is clear and unambiguous, we do not resort to legislative history or further rules of statutory construction." *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1189 (Colo. 2010); *Candelaria v. People*, 2013 CO 47, ¶ 12.

14. Second, "We attempt to harmonize potentially conflicting provisions. We also avoid interpretations that would render any words or phrases superfluous or would lead to illogical or absurd results." *Null*, 233 P.3d at 679; *Candelaria v. People*, 2013 CO 47, ¶ 12. "We must construe the statute so as to give effect to every word, and we may not adopt a construction that renders any term superfluous or meaningless." *People v. Rice*, 2015 COA 168, ¶ 12.

15. According to DRMC § 39-1: "the manager of the department of parks and recreation ('manager') has the power and authority to adopt rules and regulations for the management, operation and control of parks, parkways, mountain parks and other recreational facilities, and for the use and occupancy, management, control, operation, care, repairing and maintenance of all structures and facilities thereon, and all land on which the same are located and operated."

16. When it comes to regulating occupancy, the plain language of DRMC § 39-1 is clear, and as a result, this Court's analysis ends with the plain language. *Null*, 233 P.3d at 679. With regards to regulating occupancy, the Department has the power to regulate the occupancy of facilities, but not the occupancy of parks.

17. The City attempts to inject ambiguity into this plain language by claiming that the "land on which [structures and facilities] are located and operated" means something other than what it plainly means: the land on which the structures and facilities are operated.

18. The City claims that rather than follow the plain meaning of the words of the statute, this Court should consider the phrase "land on which the same [structures and facilities] are located and operated" to mean the entire park in which the structures and facilities are located. Such an interpretation finds no support in the canons of statutory interpretation.

a. First, the City's interpretation ignores that the statute's language contains no ambiguity. Where there is no ambiguity, the Court's inquiry is over.

b. Second, assuming *arguendo* any ambiguity, the City's proposed interpretation renders half of the statute superfluous. *See Null*, 233 P.3d at 679. If (as under the City's interpretation) the second clause of DRMC § 39-1 grants the Department the power to "adopt rules and regulations . . . for the use and occupancy, management, control, operation, care, repairing and maintenance" of parks in addition to structures and facilities in parks, then the entire first clause granting the power to "adopt rules and regulations for the management, operation and control of parks" is superfluous. An interpretation that renders half a statute superfluous cannot be correct. *Null*, 233 P.3d at 679.

c. Third, assuming *arguendo* any ambiguity, the City's proposed interpretation creates an illogical and absurd result. *See Id.* If the "land on which the same [structures and facilities] are located and operated" extends beyond the exact physical land on which the structures and facilities are located, then there is no end to the breadth of just how far that "land" might extend. Under such a reading, the Department could claim not just the authority to exclude people from facilities and parks, but also sidewalks next to parks, or streets adjacent to parks, or streets within a mile or ten miles of parks, or the City of Denver. After all, each of these areas constitute "land" on which – when claimed broadly enough – the park facilities are located. If this Court is to read "land on which facilities are operated" to mean more land than the precise land on which the facilities are actually operated, there is no limit to how far such land extends. Statutory interpretation cannot countenance such an absurd result. *Id.*

19. Shockingly, the City argues that this Court should *not* follow the plain language of the statute. Response, at 8, part B.I.d (arguing that this Court is not bound by the holding of *Colo. Dep't of Corr. v. Madison*, 85 P.3d 542, 547 (Colo. 2004), which states that "If the plain language of a statute is unambiguous and clear, we need not employ other tools of statutory interpretation."). This Court should take the City's specious argument as an acknowledgement by the City that it is aware that its entire argument hinges on this Court disregarding the bedrock principle of statutory interpretation.

B. This Court should decline the City's invitation to use definitions from park regulations – not statutes – to create statutory ambiguity where none exists.

20. The City makes two other attempts to muddy the waters and distract this Court from its simple task of applying the plain language of DRMC § 39-1. This Court should reject both of them.

21. The City asks this Court to interpret DRMC § 39-1 by looking to non-germane definitions in the Department's own *regulations*, not any *statute*. This is improper for five reasons.

22. First, as argued above, there is no ambiguity in the statutory language of DRMC § 39-1. As a result, this Court's analysis is confined to the plain language of the statute. Where the plain language is clear, this Court cannot look to extrinsic sources to interpret the statute.

23. Second, the definitions the Department asks this Court to look at are contained in regulations created by the Department. They are not in any statute. Even if this Court were to find that the plain language of the statute requires interpretation, this Court's task would then be to determine the legislature's intent in crafting the statute. *St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 2014 CO 33, ¶ 10 ("In conducting statutory interpretation, our primary task is to ascertain and give effect to the legislature's intent -- the polestar of statutory construction."). This court cannot determine the intent of the legislature by looking to a document the legislature did not produce.

24. Third, the definitions the Department asks this Court to look at are not definitions of the word "facility." They are definitions of the phrases "park facility" and "park and recreational facility." This Court would not consider defining the term "court" by referring to a regulation defining "supreme court." Similarly, this court should not define the term "facility" by looking to definitions of the terms "park facility" or "park and recreational facility."

25. Fourth, the City's proposed definitions – if adopted – would render half of DRMC § 39-1 superfluous and would render many words chosen by the legislature meaningless. The City's stated position is that under their proposed definition of "facilities," "parks and facilities are synonymous." Response, at 7. That interpretation is directly contradicted by the plain language of DRMC § 39-1, which (a) grants different regulatory powers over parks than it does over facilities, and (b) contains the explicit choice to use both words. This Court cannot interpret the statute to render the entire first clause superfluous, *Null*, 233 P.3d at 679 ("avoid interpretations that would render any words or phrases superfluous"), nor can it interpret the words "parks" and "facilities" to be synonymous without rendering the legislature's choice to use both words superfluous and meaningless. *Rice*, 2015 COA 168, ¶ 12 ("we may not adopt a construction that renders any term superfluous or meaningless").

26. Fifth, the word "facility" requires no statutory definition because it is a word of common use and understanding. There is no reason for this Court to interpret "facility" to mean anything other than the dictionary definition that was plainly intended: "A place, amenity, or piece of equipment provided for a particular purpose."[1]

C. Where a statute is clear, there is no *Chevron* deference.

27. The City's second attempt at muddying this Court's analysis is its wholly unnecessary foray into *Chevron* deference, as interpreted into Colorado law in *Wine & Spirits Wholesalers v. Colo. Dep't of Revenue*, 919 P.2d 894, 897 (Colo. App. 1996) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

28. Buried in the middle of the City's block quote from *Wine & Spirits* is all this Court needs to conclude *Chevron* deference is unwarranted here: "If the intent of the legislature is clear, that is the

[1] https://en.oxforddictionaries.com/definition/facility.

end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of the legislature." *Id.* at 897 (internal brackets omitted).

29. DRMC § 39-1 is clear about the powers of the Department. There is therefore no need for further analysis under any theory of agency deference. *Id.*

30. Further, assuming *arguendo* any ambiguity, any agency interpretation of a statute must still be reasonable and based on a permissible construction of the statute. *Id.* The City asks this Court to interpret *Chevron* and *Wine & Spirits* to mean that any construction the Department chooses to give DRMC § 39-1 is entitled to deference. Response, at 7 (summarizing rule of Wine and Spirits as meaning that "a court will apply the agency's intent regarding the statute.") This is simply not the law.

31. The Department's construction of DRMC § 39-1 unilaterally arrogates additional powers for itself by rendering half its authorizing statute meaningless. This interpretation is not reasonable, as it is "manifestly contrary to the statute." *Id.* The Department's naked power grab for authority it does not possess is entitled to no deference.

32. Finally, if despite the above argument this Court is inclined to look to the Department's own policies and regulations to interpret DRMC § 39-1 and Directive 2016-1, this Court should know that according to the City Attorney's office, Directive 2016-1 does not apply to marijuana. *See* Appendix C.

D. There is no *Chevron* deference for criminal regulations.

33. While a full exploration of this topic is beyond the scope of the present proceeding, this Court should be aware that there is a significant body of decisions and legal scholarship that holds that because of the rule of lenity's requirement that ambiguous statutes be construed to the benefit of criminal defendants, there can be no *Chevron* deference in a criminal prosecution. *See generally*, Sanford N. Greenberg, *Who Says It's a Crime? Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. Pitt. L. Rev. 1, 13-21 (1996) (summarizing argument and collecting cases).

III. Mr. Holm's procedural due process challenge is not moot.

34. Under the black letter law of Colorado, "An issue becomes moot when any relief granted would have no practical legal effect on the existing controversy." *San Antonio, Los Pinos & Conejos River Acequia Pres. Ass'n v. Special Improvement Dist. No. 1*, 2015 CO 52, ¶ 59 n.5; *accord Archibold v. PUC*, 58 P.3d 1031, 1036 (Colo. 2002); *State Bd. of Chiropractic Exam'rs v. Stjernholm*, 935 P.2d 959, 970 (Colo. 1997); *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426 (Colo. 1990); *Barnes v. District Court*, 199 Colo. 310, 607 P.2d 1008 (1980).

35. Plainly, if this Court declares that the trespass notice given to Mr. Holm was issued in violation of the Constitution and is therefore void, Mr. Holm cannot be found guilty in this case of violating that order. All charges in this case would have to be dismissed. This Court thus has the power to grant relief that will have a practical effect on the outcome of this existing controversy. The issue is therefore not moot.

36. The one case the City cited does not dictate otherwise. In that case, a taxpayer missed a deadline to challenge his tax assessment and the tax assessment became final. There was no other proceeding going on related to the tax assessment. The Colorado Supreme Court held that any challenges to the procedures surrounding the tax assessment were moot because given the finality of the tax assessment and the lack of any other proceeding related to the tax assessment, "there is no existing controversy between Osco and the City regarding the assessment of use taxes owed." *Am. Drug Store, Inc. v. Denver*, 831 P.2d 465, 469 (Colo. 1992).

37. In Mr. Holm's case, it is incontrovertible that that there *is* an existing controversy between the City of Denver and Mr. Holm regarding his suspension notice – this case. Mr. Holm's challenges to the suspension order are therefore not moot.

IV. In choosing procedural due process cases to guide this Court's analysis, this Court should focus on cases concerning exclusions of people from city property, not cases about parking violations, restaurant inspections or fired embezzlers.

38. It is truly rare in any case for there to be a precedent that presents a truly identical factual scenario to the one before this Court. Because of this, it is the province of this Court to look to how other courts have decided cases that pose similar factual scenarios and to use those other courts' decisions to guide this Court's reasoning.

39. While Mr. Holm is aware that there are some factual differences between Directive 2016-1 and the ordinances addressed in *Yeakle v. City of Portland*, 322 F. Supp. 2d 1119 (D. Or. 2004) and *Catron v. City of St. Petersburg*, 658 F.3d 1260 (11th Cir. 2011), these cases – which address automatic exclusion from public places with no pre-deprivation process – provide an enormously closer parallel to the case before this Court than the parking violation, restaurant inspection, and employee termination cases the City proffers. Further, the grounds on which the City would have this Court distinguish *Yeakle* and *Catron* cases do not survive analysis.

40. The City attempts to distinguish *Yeakle* because, in addition to the procedural due process issue, that case also contained First Amendment issues because the ordinance one of the park-goers originally violated prohibited her from putting a sign on a statute. 322 F. Supp. 2d at 1122. However, as one learns from reading the case, the *Yeakle* court analyzed the First Amendment and other constitutional issues separately from the procedural due process issue. *Id.* at 1124-31. In the *Yeakle* court's analysis of Portland's procedural due process violation,[2] it never once referenced or relied on a First Amendment concern. The fact that the *Yeakle* case also contained additional constitutional violations in no way undermines the usefulness of that court's reasoning to this Court, especially given the similarities between the two ordinances. The procedural due process analyses in the two cases address the same liberty interest, the same governmental interest, and a near-identical appeal process. The fact that the City can only point to an irrelevant distinction should confirm for this Court that *Yeakle* is the closest parallel to Mr. Holm's case and is the case this Court should be following.[3]

---

[2] The *Yeakle* court did address the First Amendment issues in its analysis of *substantive* due process violations, but not in its analysis of *procedural* due process violations. *Compare* 322 F. Supp. 2d at 1128-29 *with Id.* at 1129-31.

[3] The other "distinctions" the City cites are equally irrelevant. The City asserts without evidence that a smaller number of agencies are tasked with enforcing Directive 2016-1 than the Portland ordinance. Even if true, this hardly seems

41. As in *Yeakle*, the government interest "can be accomplished either by issuing a citation and/or fine or removing the offender from the park if the conduct continues." 322 F. Supp. 2d at 1131. "However, immediately enforcing the [ninety]-day exclusionary period does not further alleviate any safety risks created by the offensive conduct that purportedly justifies the exclusion." *Id.* "The government's interest in park safety could just as easily be served through a pre-deprivation hearing or other mechanism that would provide the individual an opportunity to prove that she did not violate any ordinance or law." *Id.* The City's interest in immediate enforcement is therefore minimal. Because no extraordinary circumstances justify deprivation without a prior hearing, the Directive flatly violates Due Process.

42. Regarding *Catron*, while *Catron* is not quite as close a parallel to Mr. Holm's case as *Yeakle*, it is in the same ballpark, in that it addresses a city ordinance that allows a city official to immediately bar a person from city property upon observing what the official believes is a law violation. 658 F.3d 1266-69. Given that it addresses the same liberty interest and the same governmental interest (though a different hearing process), the *Catron* reasoning is relevant to this Court's decision.

43. If *Yeakle* is a very close parallel and *Catron* is in the same ballpark, the City's cited cases are in a different universe altogether. The cases the City would have this Court follow have nothing to do with the subject matter before this Court. The only thing they have in common with Mr. Holm's case is that they address procedural due process. *See Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1221 (10th Cir. 2006) (due process challenge to shutting down a restaurant for a failed health inspection before a hearing); *Kirkland v. St. Vrain Valley Sch. Dist. No. RE-1J*, 464 F.3d 1182, 1194 (10th Cir. 2006) (due process challenge to suspending an employee without pay before a hearing when the employee lost or stole millions of dollars); *Patterson v. Cronin*, 650 P.2d 531, 538 (Colo. 1982) (due process challenge to booting a parked car). Each of these cases addressed a drastically different factual posture, liberty interest, and process. They have no relevance to this Court's consideration.

44. As the City acknowledges, an "exception to the general rule that the deprivation of property requires a pre-deprivation hearing" is only justified "in extraordinary circumstances." Response, at 10. In the City's cited case *Camuglia*, the plaintiff conceded and the Court held that the City has to be allowed to close a restaurant "if there's an imminent danger" to the public. 448 F.3d at 1221. In *Kirkland*, the court rightly held that when a high-profile public employee has either lost or stolen millions of dollars such that a school board cannot make payroll, this presents an exceptional situation where the school board can suspend that employee without pay even prior to a hearing. 464 F.3d at 1194. Each of these situations plainly presented extraordinary circumstances, and they have nothing to do with Mr. Holm's case. The City cannot seriously argue that Mr. Holm's presence in Commons Park after receiving a citation for public consumption of marijuana presents an extraordinary circumstance on par with operating a restaurant that presents an imminent danger to patrons, or allowing a high-profile embezzler to continue receiving public pay.

---

outcome-determinative to the *Yeakle* court's decision. The same goes for the fact that the Portland ordinance applied to all law violations, not just drug law violations. If anything, the fact that there would be fewer violators of Directive 2016-1 points to a requirement for more process, not less, as the costs of providing the process would be low. Finally, while it would be even more egregious if people suspended under Directive 2016-1 were not told why they were being suspended, the fact that there was no requirement to give the reason for the suspension in the Portland ordinance did not play a significant role in the *Yeakle* court's reasoning. 322 F. Supp. 2d at 1130 (listing it as one of eight factors weighing against the City on the second prong of the *Matthews* test).

45. In *Patterson*, the City's final preferred case, the court held that booting a car with no appeal process violates due process. *Patterson*, 650 P.2d at 538. It is unclear why the City thinks this holding is helpful to it. While the *Patterson* decision has language potentially blessing a future statute that might do away with a pre-deprivation hearing, the court made this suggestion based on the "650,000 summonses for illegal parking each year" that Denver issued in 1982. *Id.* In contrast, Denver has issued 39 suspension notices under Directive 2016-1. Motion to Dismiss, at ¶ 62(b). The City's assertion that the administrative burdens in *Patterson* are parallel to those created by Directive 2016-1 is ridiculous.

46. Finally, Mr. Holm takes issue with a statement the City makes in its response regarding procedural due process. The City phrases its acknowledgement of the "exceptional circumstances" requirement thusly: "Some case law holds that postdeprivation hearings are permissible 'but only in extraordinary situations;' however, these cases deal with significant constitutional rights . . . ." Response, at 13.

a. First, it's not "some case law" that holds that a post-deprivation hearing is only acceptable when there are exceptional circumstances; it is the clear pronouncement of the United States Supreme Court. *See, e.g.*, *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations."); *accord Parratt v. Taylor*, 451 U.S. 527, 539 (1981).

b. Second, this Court should find it highly troubling that the City takes the position that the freedom to occupy public places is "not as significant as private ownership of a car." Response, at 13. This position is disrespectful to the holding of the Colorado Supreme Court in *In re J.M.*, 768 P.2d 219 (Colo. 1989), in which the Supreme Court designated the freedom to occupy public places a "basic value[] inherent in a free society" that is "responsible for giving our people the feeling of independence and self-confidence," and is therefore protected by the United States and Colorado Constitutions. *Id.* There is no support in case law or logic for the City's claim that Mr. Holm's freedom to exist in public places is somehow a lesser freedom.

V. In Colorado, there is a fundamental right to be in public places established by the United States and Colorado Constitutions.

47. *In Re J.M.* holds that there is a fundamental right to be in public places under the Colorado and United States Constitutions. 768 P.2d 219 (Colo. 1989). The City tries to avoid this inescapable conclusion by using selective quotations. As a result, Mr. Holm will quote the case more fully:

> In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the [Supreme] Court invalidated a Jacksonville vagrancy ordinance. In discussing the acts of walking, wandering, strolling, loafing, and loitering, the Court stated:
>
> "The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformist and the right to defy

submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence."

Id. at 164. See also *Doe v. Bolton*, 410 U.S. 179 (1973) (Douglas, J., concurring opinion, wherein he termed the freedom to walk, stroll or loaf a fundamental freedom). In *Kent v. Dulles*, 357 U.S. 116 (1958), a case dealing with the right to travel abroad, the Court concluded that freedom of movement and the right to travel are "a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment . . . ." and that these rights are "basic in our scheme of values." Many jurisdictions have treated as fundamental the right to freedom of movement and the right to use the public streets and facilities in a way that does not interfere with the liberty of others.[4]

We agree that, as to adults, the rights of freedom of movement and to use the public streets and facilities in a manner that does not interfere with the liberty of others are basic values inherent in a free society and are thus protected by article II, section 3 of the Colorado Constitution and the due process clause of the fourteenth amendment to the United States Constitution. Because these liberty interests are fundamental, the state must establish a compelling interest before it may curtail the exercise of such rights by adults.

Id. at 221 (citations truncated and moved to footnote) (emphasis added).

48. Article II, section 3 of the Colorado Constitution explicitly and exclusively protects "natural, essential, and inalienable rights." COLO. CONST., art. II, § 3.[5] Thus, when the Colorado Supreme Court states that a right is protected under Article II, section 3 of the Colorado Constitution, it is declaring that right to be natural, essential, and inalienable. Given this, there is only one conclusion to draw from the underlined portion of the quote: freedom of movement and to use the public streets and facilities in a way that does not interfere with the liberty of others is a natural, essential, inalienable fundamental right.

49. Furthermore, the language the Colorado Supreme Court used is the language courts use when they declare a fundamental right. In *Loving v. Virginia*, the United States Supreme Court declared that the right to marry is a fundamental right under the Due Process Clause of the United States Constitution. 388 U.S. 1, 12 (1967). It described its holding thusly: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Id.* (internal citations omitted). As *Loving* makes clear, especially in older opinions, there is no talismanic value to the particular phrase "fundamental right." What matters is how the Court describes the right. The manner in which the *J.M.* court described the right to use public places leaves no doubt that it was establishing a fundamental right.

---

[4] *See Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931); *People v. McKelvy*, 23 Cal. App. 3d 1027, 100 Cal. Rptr. 661 (1972); *People v. Kearse*, 56 Misc. 2d 586, 289 N.Y.S.2d 346 (1968); *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971); *Hayes v. Municipal Court*, 487 P.2d 974 (Okla. 1971); *City of Portland v. James*, 251 Ore. 8, 444 P.2d 554 (1968); *Seattle v. Drew*, 70 Wash. 2d 405, 423 P.2d 522 (1967); *Ervin v. State*, 41 Wis. 2d 194, 163 N.W.2d 207 (1968).

[5] The full text of Article II, section 3 is: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness." Colo. const. art. II, § 3.

50. The rulings of the Colorado Supreme Court are binding on this Court. Given that, the City's citations to cases from other jurisdictions are unavailing.

51. This Court should reject the City's request for more time to address the appropriate standard of review when a City enforces a directive that infringes on a fundamental right. There is no additional time. The City's response was the place for the City to make its argument. To its own detriment, the City chose not to. This is likely because there is only one standard for courts to use to evaluate a law that infringes on a fundamental right: strict scrutiny. And the City knows the Directive cannot possibly survive this standard.

52. Finally, the permissibility of content-neutral time, place, and manner regulations for parks that the City cites does nothing to undermine the holding of *J.M.* Just as free speech is a fundamental right that can be subject to content-neutral time, place, and manner restrictions, so too can the right to use the public streets and facilities in a way that does not interfere with the liberty of others.

VI. The City's quote from *Hudson* suggests that Directive 2016-1 creates a criminal sanction, not a civil one.

53. The cornerstone of the City's argument that Directive 2016-1 creates a civil sanction is their claim that under *Hudson v. United States*, 522 U.S. 93, 103 (1997), the entity that is directed to enforce a sanction is a good indicator as to whether the sanction is criminal or civil. Response, at 17. According to *Hudson*, a reviewing Court should look to what government body has "the authority to issue [the relevant] orders." *Id.* Mr. Holm agrees that it is important for this Court to look at what arm of the government is tasked with enforcing Directive 2016-1 to determine whether Directive 2016-1 creates a criminal or civil sanction.

54. This is how Directive 2016-1 is enforced:

> Enforcement: If a Denver Police Officer should determine that a person has committed a Violation, the Denver Police Officer may issue a notice to said violator suspending the right of the violator (the "Suspension Notice") from accessing or using City Parks or the Cherry Creek Greenway, depending on the locations) of the Violation, for a period of ninety (90) days from the date of the Suspension Notice.

Appendix B, at 3 (emphasis added). Directive 2016-1 is designed to be enforced by police officers. There could not be a clearer signal that the Directive is criminal in nature.

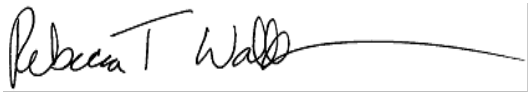
55. The City's argument focusing on DRMC § 39-2 misses the point. Regardless of whether or not the Department has the authority to issue temporary directives, any temporary directive the Department issues could create either a criminal or a civil sanction. This Court is faced with deciding whether one of those temporary directives – Directive 2016-1 – creates a criminal or civil sanction. This Court must therefore look at the Directive itself to determine whether the sanction it creates is criminal or civil, not the statute that authorizes the creation of the Directive.

56. Under the City's logic, any Directive created by the Department would be civil because it is being created by the Department, which is a regulatory agency. This is obviously not correct. For example, if the Department issued a directive that created a new crime of using drug paraphernalia

in a park and proscribed incarceration as a possible penalty, this would plainly be a criminal sanction, regardless of the fact that it was created by a regulatory agency. Throughout government, regulatory agencies create regulations that are criminally enforceable.[6] The City's argument would mean that all these regulations are civil. That is clearly not the case.

Wherefore, Mr. Holm requests that this Court take his reply under consideration and, based on his motion and this reply, dismiss all charges against him.

Adam Frank, #38979
Frank & Salahuddin LLC
In cooperation with the ACLU Foundation of Colorado



Rebecca Wallace, # 39606
Mark Silverstein, # 26979
ACLU Foundation of Colorado

Dated: January 19, 2017

Certificate of Service
I hereby certify that on 1/19/2017, I served the foregoing document by emailing same to the Denver City Attorney.
_____AF_____

[6] Just to name a few, the Environmental Protection Agency (EPA) and Securities and Exchange Commission (SEC) each create regulations that are then enforceable with criminal sanctions.