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
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MOTION TO DISMISS	

Mr. Holm, by and through counsel, requests that this Court dismiss all charges against him. As grounds, he states the following:

SUMMARY OF ARGUMENT

1. The facts of this case are not in dispute. On October 14, 2016, Denver Police Department Officer Masztalics observed Mr. Holm, who is 23 years old, smoking marijuana in Commons Park. Officer Grier then gave Mr. Holm a ticket for having marijuana in the park. Officer Grier also gave Mr. Holm a "suspension notice" that he believed was authorized by Parks Directive 2016-1, which provides officers authority to immediately banish anyone whom they suspect engaged in "illegal drug-related activity" from the park for 90 days. ("Directive 2016-1"). *See* Appendix A, Suspension Notice; Appendix B, Directive 2016-1. This suspension notice barred Mr. Holm from Commons Park for 90 days. On October 17, 2016, Officer Grier observed Mr. Holm in Commons Park and served him with a summons under DRMC § 39-4 for being in the park in violation of the suspension order. Since then, the City Attorney has added a charge of Trespass in violation of DRMC § 38-115.

2. The pending charges against Mr. Holm, which are predicated on his alleged violation of the October 14 suspension notice must be dismissed, because the suspension notice was issued unlawfully. There are four separate reasons why Officer Grier did not have legal authority to issue Mr. Holm the suspension notice.

a. First, the Executive Director of the Department of Parks and Recreation did not have the legal authority to issue Parks Directive 2016-1.

b. Second, Parks Directive 2016-1 violates the Procedural Due Process protection of the Fourteenth Amendment and Article II, Section 25 of the Colorado Constitution.

c. Third, Parks Directive 2016-1 violates Mr. Holm's fundamental right to use public streets and facilities guaranteed by Article II, Section 3 of the Colorado Constitution and the Substantive Due Process protection of the Fourteenth Amendment.

d. Fourth, the suspension is a criminal penalty, such that issuing both a suspension notice and a ticket to Mr. Holm violated Double Jeopardy.

3. Because Mr. Holm was not legally barred from Commons Park, his presence in Commons Park on October 17 was not Trespass and was not a Prohibited Use of a Park. As a result, these charges must be dismissed.

FACTS

I. Law Enforcement's Interactions with Troy Holm on October 14 and 17

4. On October 14, 2016, while undercover, Officer Masztalics sat with a group of people on a hill in Commons Park to observe which people in the group were smoking marijuana. One of these people was Mr. Holm. Officer Masztalics then told Officer Grier, who was in plainclothes, that he believed Mr. Holm had been smoking marijuana.[1]

5. Officer Grier approached Mr. Holm. First, he gave Mr. Holm a ticket for having marijuana in the park.[2] Officer Grier then served Mr. Holm with a "suspension notice" pursuant to Directive 2016-1. Appendix A. This suspension notice informed Mr. Holm that "under the authority of the Executive Director of Parks and Recreation, you are immediately suspended for a period of 90 days from the following park property: . . . Commons Park."

6. On October 17, Officer Grier observed Mr. Holm in Commons Park, hanging out with friends. He did not observe Mr. Holm engaged in any illegal conduct. Believing that Mr. Holm was present in the park in violation of the suspension notice, Officer Grier served Mr. Holm with the

[1] Mr. Holm, who is 23 years old, is of legal age to possess and ingest marijuana in the state of Colorado.
[2] That ticket was adjudicated in case 2016GS013872 and is not the subject of this case.

summons in this case for a violation of DRMC § 39-4.[3] The City Attorney later added a charge of Trespass for violation of DRMC § 38-115.[4]

7. Both charges against Mr. Holm are contingent on the validity of the suspension notice Mr. Holm received on October 14. If that suspension notice was invalid, then Mr. Holm's presence in Commons Park on October 17 was legal – without a valid suspension notice, Mr. Holm was not in violation of a park directive and he was not trespassing.

8. Based on the charges in this case, Mr. Holm faces a possible penalty of up to a year in jail and a fine of up to $999. DRMC § 1-13(a).

II. Parks Directive 2016-1

9. On August 31, 2016, Allegra "Happy" Haynes, the Executive Director for Parks for the Denver Department of Parks and Recreation, issued Directive 2016-1. Appendix B. This Directive went into effect on September 1, 2016 and will remain in effect until February 26, 2017. *Id.* at 2. The Directive allows Denver police officers virtually unrestricted authority to banish anyone whom they suspect engaged in "illegal drug-related activity" from Denver parks for a period of 90 days. Appendix B, p. 2.

10. According to Directive 2016-1:

> Illegal Drug-Related Activity, as defined below, is prohibited in City Parks and in the Cherry Creek Greenway. The prohibition of Illegal Drug-Related Activity shall be enforced, among other legal means and for the Duration of this Directive 2016-1, by suspending the right of a person engaged in Illegal Drug-Related Activity from accessing or using the City Parks and the Cherry Creek Greenway in which the Illegal Drug-Related Activity occurred for a period of ninety (90) days ("Suspension").

Id. (emphasis added).

11. A Denver Police Officer "may issue a [suspension] notice" to a person if the officer "determine[s] that a person has committed a Violation." *Id.* The Directive does not provide any guidelines for officers to use in determining whether or not to issue a suspension notice. The Directive also does not describe what standard of proof an officer must apply in order to "determine" that a person has "committed a Violation."

12. However, the Directive is clear that issuance of a suspension notice need not be predicated on commission of a crime. According to the Directive, a person "need not be charged, tried or

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[3] Under DRMC § 39-4(a), "It shall be unlawful for any person, other than authorized personnel, to engage in any use of or activities in any area or part of any park, parkway, mountain park, or other recreational facility in violation of any temporary directive issued by the manager restricting or prohibiting such use or activities."

[4] Under DRMC § 38-115(a), "It is unlawful for any person knowingly to enter or remain upon the premises of another when consent to enter or remain is absent, denied, or withdrawn by the owner, occupant, or person having lawful control thereof."

convicted of any crime, infraction, or administrative citation in order for the Suspension Notice to be issued or effective." *Id.*

13. If an officer chooses to issue a suspension notice, "[t]he Suspension shall be immediately in effect upon issuance of the Suspension Notice," without a hearing or even supervisory review. *Id.*

14. Persons wishing to challenge a suspension notice are afforded an extremely limited right of appeal. During the appeal, the suspension notice remains in effect.

15. In order to appeal a suspension notice, the suspended person must file an appeal with the Director of the Department of Parks and Recreation within ten days of receiving it. To appeal, the person must have a mailing address or an email address. If a person cannot provide a mailing address or an email address, that person is barred for appealing the suspension notice. *Id.*

16. Once the appeal is filed, the Department of Parks and Recreation will set a hearing to take place within twelve days, and the Department must send notice (presumably via mail or email) of the hearing to the appellant within four days after the appellant files the appeal. *Id.*

17. If the appellant is unable to attend the hearing date, the appellant forfeits their right to appeal. *Id.*

18. An Administrative Hearing Officer ("AHO") presides over the hearing. There are no requirements for being appointed as an AHO. *Id.* The AHO has essentially unfettered discretion to hear or disregard evidence. *Id.* at 3-4.

19. At the hearing, either side may request a continuance of up to ten days. The suspension remains in effect for these days. *Id.* at 4.

20. At the hearing, the burden of proof is on the City. The City must show by a preponderance of the evidence that the appellant violated Directive 2016-1 and that the suspension notice was lawfully issued. *Id.* If the City successfully does this, the burden then shifts to the appellant to establish "by countervailing testimony or evidence" that the appellant did not violate Directive 2016-1 or that the suspension notice was not legally issued. *Id.* The Directive contains no definition of "countervailing testimony or evidence."

21. Within fifteen days of the AHO's decision, the appellant may file a written appeal to the Director of the Department of Parks and Recreation. The appellant may also appeal the AHO's decision in the Denver District Court pursuant to Colo. R. Civ. P. 106. *Id.*

III. The Effect of the Parks Exclusion on Mr. Holm

22. Commons Park is extremely important to Mr. Holm. First and foremost, Commons Park is Mr. Holm's chief source of community. Mr. Holm, like many of the people who often spend their days in Commons Park, is houseless. Commons Park represents a gathering point for Mr. Holm and his community – a place to spend time with friends who have become his only family. Depriving Mr. Holm of this community effectively uproots Mr. Holm from a central feature of his familial life.

23. Additionally, because houseless people are known to congregate around Commons Park, the park represents a key locus for the distribution of food and services to houseless people. For example, for the past two years, the group 180 Outreach regularly comes to Commons Park to distribute snacks, toiletries, and warm clothing to the houseless community. Stand Up For Kids also uses Commons Park as a key location for dispensing services; they give out clothes, warm coats, good food, and gifts around the holidays. Similarly, a wonderful man named Dale Swan and his two children regularly bring beverages and snacks to the Commons Park houseless community. By banning Mr. Holm from Commons Park, Denver has taken away a key means for Mr. Holm to get warm clothing, warm food, and community.

ARGUMENT

I. Directive 2016-1 is void and unenforceable because the Department of Parks and Recreation did not have the legal authority to issue it.

A. The Department of Parks and Recreation can only issue a directive if Denver law explicitly grants the Department the power to do so.

24. "[N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

25. This fundamental principle is enshrined in both Colorado and Denver law. In Colorado, "No rule shall be issued except within the power delegated to the agency and as authorized by law." C.R.S. § 24-2-103(8)(a). In Denver, "No officer, employee, agent or agency, board or commission or member thereof of the city shall have power or authority to adopt any rules or regulations save and except by and under the authority of the Charter or ordinances of the city." DRMC § 2-92.

26. Any rule that is promulgated without statutory authority is void and unenforceable. DRMC § 2-99(1) ("Rules and regulations shall not be enforced unless they are adopted pursuant to [the DRMC]"); *see also* 5 U.S.C. § 706(2)(C) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."); C.R.S. § 24-4-103(8)(a).

27. Under black letter law, the Executive Director of the Department of Parks and Recreation can only issue a directive if the power to do so has been explicitly delegated to her under law. C.R.S. § 24-2-103(8)(a); DRMC § 2-92. If the Director issues a directive that is not authorized by law, it is void and unenforceable. DRMC § 2-99(1).

B. Denver law does not grant the Department of Parks and Recreation the power to ban people from public parks.

28. While the Director of the Parks Department has the right to manage, operate, and control the parks by prohibiting certain *activities* in the parks including the use of illegal drugs, nothing in Denver law provides the Director with the authority to prohibit certain *people* from entering the parks. To the contrary, Denver law explicitly withholds that power from the Department. *Id.*

29. The Department of Parks and Recreation is entrusted with the "management, operation, and control" of Denver parks. DRMC § 2.4.4. To carry this out, the Department is authorized to:

> [A]dopt 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.

DRMC § 39-1 (emphasis added).

30. Under DRMC § 39-1, the Department has one set of powers to regulate parks, and different set of powers to regulate the structures and facilities that exist in parks. The Department has the authority to adopt rules and regulations for the "occupancy" of facilities within parks. *Id.* However, under the plain language of Denver law, the Department does not have the power to adopt regulations for the "occupancy" of the parks themselves – only the structures and facilities. *Id.*

31. Directive 2016-1 regulates the "occupancy" of a park, not of a facility within a park. The Directive therefore exceeds the Department's statutory grant of authority under DRMC § 39-1.

32. This was a sagacious choice by Denver legislators. Had Denver chosen to give the Department this authority, the grant would have been unconstitutional, inevitably embroiling the City in costly litigation. *See* parts II and III, *infra.*

33. The Department cannot resort to statutory interpretation to save its illegal regulation. It is a "well-established statutory construction rule that words omitted by the Legislature may not be supplied as a means of interpreting a statute." *Miller v. City & Cnty. of Denver*, 2013 COA 78, ¶ 21. To the contrary, "If the plain language of a statute is unambiguous and clear, we need not employ other tools of statutory interpretation." *Colo. Dep't of Corr. v. Madison*, 85 P.3d 542, 547 (Colo. 2004). Here, the plain language of the statute is clear – the Department has the authority to regulate the occupancy of facilities within the parks, but not the occupancy of the parks themselves. No amount of legal gymnastics can change the fact that Denver law does not give the Department the authority to promulgate 2016-1.

34. Furthermore, "Where [the legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).

35. Because Directive 2016-1 was promulgated without authority, it is void and unenforceable. DRMC § 2-99(1). As a result, Mr. Holm was not in violation of any valid order on October 17 when he was present in Commons Park.

II. Directive 2016-1 violates the United States Constitution's guarantee of procedural due process.

A. Mr. Holm has a constitutionally-protected liberty interest in being in Commons Park.

36. It is beyond dispute that enforcement of Directive 2016-1, *i.e.* the issuance of suspension notices, implicates park-goers' constitutionally-protected liberty interest "to be in parks or on other city lands of their choosing that are open to the public generally." *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) (citing *City of Chicago v. Morales*, 527 U.S. 41, 53-54 (1999)).

37. According to the United States Supreme Court:

> We have expressly identified [the] right to remove from one place to another according to inclination as an attribute of personal liberty protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage.

City of Chicago v. Morales, 527 U.S. 41, 53-54 (1999) (internal citations and quotations omitted).

38. This liberty interest dates to the founding of the country, and has been recognized for more than a century. As the Supreme Court declared in 1900, "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty." *Williams v. Fears*, 179 U.S. 270, 274 (1900).

39. This liberty interest has been recognized by courts across the country. *See, e.g.*, *Vincent v. City of Sulphur*, 805 F.3d 543, 548 (5th Cir. 2015) ("Supreme Court decisions amply support the proposition that there is a general right to go to or remain on public property for lawful purposes."); *Kennedy v. City Of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010) (recognizing that man excluded from a public pool had a "clearly established right to remain on public property."); *Johnson*, 310 F.3d at 495 (holding "that the Constitution protects a right to travel locally through public spaces and roadways."); *City of New York v. Andrews*, 186 Misc. 2d 533, 545 (N.Y. Sup. Ct. 2000) ("The Federal Constitution . . . protects a person's right to remain in the public area of his or her choice, and to loiter there for innocent purposes, according to inclination."); *Yeakle v. City of Portland*, 322 F. Supp. 2d 1119 (D. Or. 2004); *Catron v. City of St. Petersburg*, 658 F.3d 1260 (11th Cir. 2011).

B. Under the federal and state constitutional guarantees of procedural due process, a person cannot be deprived of a liberty interest unless the person is first given notice of the potential deprivation and an opportunity for a hearing.

40. The United States and Colorado Constitutions both bar state actors from depriving a person of a liberty interest without due process of law. U.S. Const. amend. XIV; Colo. Cont. art. II, § 25.

41. Under both the Colorado and United States Constitutions, to evaluate whether a state actor has deprived a person of a liberty interest without due process of law, this court must weigh three factors: (1) the "private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used," and (3) "the Government's

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976); *Van Sickle v. Boyes*, 797 P.2d 1267, 1273-74 (Colo. 1990) (citing the *Matthews v. Eldridge* test).

42. Under the *Matthews* test, "[p]rocedural due process requires an opportunity to be heard before the state deprives an individual of a constitutionally protected liberty or property interest." *Colo. Dep't of Pub. Health v. Bethell*, 60 P.3d 779, 786 (Colo. App. 2002); *See also Am. Drug Store, Inc. v. Denver*, 831 P.2d 465, 468 n.5 (Colo. 1992) ("Due process, grounded in concerns of fundamental fairness, requires adequate advance notice and an opportunity to be heard prior to state action resulting in deprivation of a property interest."). Indeed, as the United States Supreme Court has stated, "[a]lthough many controversies have raged about the cryptic and abstract words of the Due Process Clause . . . there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971) (emphasis added); see also *Bethell*, 60 P.3d at 786.

43. "We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). Those rare situations where predeprivation process can be justified must be "truly unusual"—the simple fact that the provision of a prior hearing "imposes some costs in time, effort, and expense…cannot outweigh the constitutional right" to a prior hearing. *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972). This is because, "[i]f the right to notice and a hearing is to serve its full purpose . . . it is clear that it must be granted at a time when the deprivation can still be prevented." *Id.* at 81.

C. Directive 2016-1 does not provide constitutionally adequate process before depriving people, including Mr. Holm, of their liberty interest in being in a public park.

44. Because park suspensions under Directive 2016-1 take effect immediately without any pre-deprivation process, the suspensions violate the due process clause.

45. Directive 2016-1 does not provide for any predeprivation process, and there is no emergency justifying that failure. Even assuming that an officer's determination that an individual had engaged in drug-related activities was sufficiently urgent to justify ordering the individual to leave the park, there is no emergency justification for prohibiting that individual's return to the park to engage in even innocent activities. Yet, in Mr. Holm's case, this is precisely what occurred.

46. Even if there were legal justification for the absence of a pre-deprivation hearing, which there is not, the post-deprivation hearing is woefully insufficient to protect park goers' liberty interest in being in a public park. The post-deprivation hearing is granted only after almost a third of the suspension has elapsed. If a person wants to challenge their suspension, the person must file an appeal with the Department of Parks and Recreation within 10 days. The Department will then set a hearing within 12 days. The appeal will be heard by an AHO employed by the Department. On the day of the hearing, the City is allowed to request a further 10-day extension of time. The AHO then has five days to render a decision. Appendix B, p. 4. Even if the person who received the suspension filed their appeal the day after they receive it, the City is permitted to delay 27 days before rendering a decision. As described below, this regime is plainly unconstitutional.

47. Though no Colorado ordinance similar to the Directive has been previously challenged, those courts that have considered substantially similar ordinances have held that the ordinances are unconstitutional because they fail to provide the process required by the Due Process Clause. In *Yeakle v. City of Portland*[5] and *Catron v. City of Petersburg*,[6] for example, the United States District Court for the District of Oregon and the Eleventh Circuit analyzed city ordinances which authorized police officers to temporarily exclude from city parks persons whom they deemed to have violated any local or state law. In each case, there was no pre-deprivation process and re-entry onto the pertinent city property while the suspension order was in effect constituted a violation of the state trespassing statute. Both *Yeakle* and *Catron* provide a template for this Court's ruling.

48. In *Yeakle*, the Court recognized the plaintiffs' "strong interest in avoiding unjust or unwarranted exclusions from the City's parks," employed the *Matthews* balancing test, and determined that, though the "government [had] an interest in terminating offensive conduct that creates a safety risk in the parks," the procedural protection offered by the ordinance was insufficient. 322 F. Supp. 2d at 1131. The court reasoned that the "risk of erroneous deprivation" under the ordinance was "considerable given the list of entities authorized to issue exclusions, the lack of appropriate notice to those excluded, and the absence of any pre-deprivation process." *Id.* at 1130. Moreover, because the government's interests could be served by simply issuing a citation, or by removing the person from the park if the conduct continued, or even by staying the no-trespass warning while appeal was pending, there was no evidence that the denial of a pre-deprivation hearing was necessary; quite to the contrary, the government's interest in denying a pre-deprivation hearing was "minimal." *Id.* at 1131. Based on this, the court found the ordinance in *Yeakle* unconstitutional. *Id.*

49. Similarly, in *Catron*, the Eleventh Circuit employed the *Matthews* balancing test and found that the ordinance "lack[ed] constitutionally adequate procedural protections." 658 F.3d at 1269. First, the court recognized the plaintiffs' "constitutionally protected liberty interest to be in parks or on other city lands of their choosing that are open to the public generally" as sufficient both to satisfy the first element of a procedural due process claim and to sway the first *Matthews* consideration in their favor. *Id.* at 1266-67. The court then reasoned that though the "City's interest in discouraging unlawful activity and in maintaining a safe and orderly environment on its property is substantial," the risk of erroneous deprivation presented by the ordinance was simply too great to justify its enactment. *Id.* The ordinance provided "no guidance to city officials . . . in exercising their discretion to determine whether a person has actually committed a violation," and that the "lack of specificity suggests that whenever an authorized city employee thinks a violation has occurred, he may issue a trespass warning." *Id.* at 1268. Based on this, the court found the ordinance in *Catron* unconstitutional. *Id.*

50. The reasoning of *Yeakle* and *Catron* apply equally to Directive 2016-1. Regarding the first *Matthews* prong regarding the private interest affected by Directive 2016-1, all people in Denver "possess a private liberty interest in lawfully visiting city property that is open to the public." *Catron*, 658 F.3d at 1267. Furthermore, in Denver just as in Portland, "[t]he public parks are a treasured and

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[5] 322 F. Supp. 2d 1119 (D. Or. 2004) (quoting Portland City Code § 20.12.265).
[6] 658 F.3d 1260, 1264 (11th Cir. 2011) (citing St. Petersburg City Code § 20-30).

unmatched resource to those who live in the City." *Yeakle*, 322 F. Supp. 2d at 1129. They "serv[e] as vital forums for the exercise of free speech [and] host a variety of activities including festivals, concerts, and art exhibitions." *Id.* at 1129-30. Thus, the first factor weighs in favor of finding that Directive 2016-1 violates procedural due process.

51. Regarding the second *Matthews* prong, the risk of an erroneous deprivation through the procedures established in Directive 2016-1, "the risk of erroneous deprivation under the present procedure is considerable." *Id.* at 1130. Just as in *Yeakle*, this is due to: "the lack of appropriate notice to those excluded"; "the absence of any pre-deprivation process"; the fact that "[t]he exclusion ordinance fails to establish any evidentiary standard for any park official . . . to determine whether an exclusion is warranted before issuing the exclusion"; the fact that "[t]he ordinance does not provide that the entity issuing the exclusion actually witness the alleged violation or have any other reliable information that a violation in fact occurred." *Id.* at 1130-31. Also as in *Yeakle*, the Denver Directive's "deficient appeals procedures and lack of a pre-deprivation hearing" are made all the more onerous because "a person excluded from a park is subject to arrest for reentry as soon as she receives the exclusion notice." *Id.* This means that "even if the exclusion is ultimately found to be invalid, the individual has been kept from the public park(s) for at least a significant portion of the thirty days." *Id.* The second *Matthews* factor thus also weighs in favor of finding that Directive 2016-1 violates procedural due process.

52. Regarding the third *Matthews* prong, the government's interest in easing its administrative burden, while the Court may find "[t]he government has an interest in terminating offensive conduct that creates a safety risk in the parks," this governmental interest does not justify extended banishment without any predeprivation process. This Court should find, as did the *Yeakle* court, that 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." *Id.* at 1131. Furthermore, "immediately enforcing the thirty-day exclusionary period does not further alleviate any safety risks created by the offensive conduct that purportedly justifies the exclusion." *Id.* The City's interest in immediate enforcement is therefore minimal.

53. This Court should follow the reasoning of the *Yeakle* and *Catron* courts and find Directive 2016-1 similarly unconstitutional.

III. Directive 2016-1 violates Mr. Holm's fundamental right under the Colorado and United States Constitutions to use public facilities.

A. Mr. Holm has a fundamental constitutional right to use Commons Park under both the United States and Colorado Constitutions.

54. Under both the United States and the Colorado Constitutions, Mr. Holm has the fundamental right to use public streets and facilities – such as Commons Park – so long as his use of these facilities does not interfere with the liberty of others. As the Colorado Supreme Court holds:

> 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.

In Re J.M., 768 P.2d 219, 221 (Colo. 1989).

55. This fundamental right includes the freedom to "stroll, loiter, loaf, and use the public streets and facilities in a way that does not interfere with the personal liberties of others." *Id.*; *see also Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) (describing the "freedom to walk, stroll, or loaf" as a "fundamental" right); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (describing walking, strolling, and wandering as "historically part of the amenities of life as we have known them.").

56. The fundamental right established in *In Re J.M.* remains good law. *See Nagl v. Indus. Claim Appeals Office*, 2015 COA 51, ¶ 22 (citing *In Re J.M.* as establishing that "the right of freedom of movement is a basic value protected by article II, section 3 of the Colorado Constitution.").

B. The City of Denver's infringement on Mr. Holm's fundamental right to use Commons Park does not survive strict scrutiny.

1. Strict scrutiny is the required standard.

57. Denver must justify any infringement on Mr. Holm's fundament right to freedom of movement in public spaces by establishing that the directive which allows officers to ban Mr. Holm from the park is narrowly tailored to serve a compelling state interests – in other words, it must survive strict scrutiny. *In Re J.M.*, 768 P.2d at 221 ("Because these liberty interests [in freedom of movement in public places] are fundamental, the state must establish a compelling interest before it may curtail the exercise of such rights by adults."); *People v. Young*, 859 P.2d 814, 818 (Colo. 1993) ("When a statute infringes on some fundamental liberty or property interest, the state must prove that the challenged legislation is necessary to promote some compelling governmental interest."). *Regency Services Corp. v. Board of Cnty. Comm'rs*, 819 P.2d 1049, 1056 (Colo. 1991) ("When a regulatory scheme affects the exercise of a fundamental right . . . a standard of strict judicial scrutiny must be applied."). In addition to proving that the law promotes a compelling governmental interest, the government must also prove "that less drastic alternatives would be unavailing." *People v. Becker*, 759 P.2d 26, 29 (Colo. 1988).

58. The Colorado Court of Appeals recently stated the proper test succinctly:

> [L]aws that impinge on constitutionally protected personal rights are subject to strict scrutiny and will be sustained only if they are narrowly tailored to serve a compelling state interest. This review standard is the most exacting. Strict scrutiny places the burden on the government to show that the statute is supported by a compelling state interest and that it is narrowly drawn to achieve that interest in the least restrictive manner possible. When a plausible, less restrictive alternative is offered, the government bears the burden of proving that the alternative will be ineffective to achieve its goals.

Students for Concealed Carry on Campus, LLC v. Regents of the Univ. of Colo., 280 P.3d 18, 27-28 (Colo. App. 2010).

59. The United States Supreme Court similarly holds that where a regulation infringes on a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment, that regulation must pass strict scrutiny. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (describing the Supreme Court's "line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.").

60. Though the burden of proof to establish that the Directive passes strict scrutiny is on the City, in anticipation of the City's response, Mr. Holm will make argument regarding what he believes the City will assert. He reserves the right to reply to the City's filing once he receives it.

2. Directive 2016-1 fails strict scrutiny.

a. Directive 2016-1 is not narrowly tailored.

61. Assuming arguendo Denver has a compelling interest in deterring illegal drug activity in its parks, and the violence and obstruction that purportedly comes along with that activity, Directive 2016-1 is certainly not "narrowly drawn to achieve the interest in the least restrictive manner possible." *Students for Concealed Carry*, 280 P.3d at 28.

62. First, the directive does not narrowly target drug related activities that pose a public safety threat or impinge on the rights of others.

a. Mr. Holm, who was banned from the park for – on a single occasion – ingesting legal marijuana while of legal age in the park, was not engaged in the type of "drug related activity" the directive purportedly seeks to address.

b. Because of the breadth of the directive and the wide discretion granted officers in banishing park goers, enforcement of the Directive has proven wildly ineffective at targeting the type of behavior it was drafted to address. In the City's enforcement of the Directive to date, Denver Police have focused not on contending with the "huge epidemic of heroin use"[7] or wave of "assaults, shootings, and other acts of violence" the Department claims plague downtown Denver, but instead have targeted mainly simple marijuana use and possession of marijuana paraphernalia. Appendix B, p. 2. According to records of enforcement provided by the City, out of the 39 cases in which suspension notices were issued, 28 (or 72%) involved allegations of marijuana use or display. Only 6 cases (15%) involved suspected heroin use.[8] Moreover, out of the 39 cases in which Denver Police issued

[7] *See* Jon Murray, *3,500 Needles Collected in 2016 at Denver Parks Prompt Drug-User Ban*, The Denver Post, August 31, 2016, http://www.denverpost.com/2016/08/31/denver-parks-drug-user-ban/.

[8] One case involved suspected illegal use of a prescription drug, and 6 cases involved suspected use of crack cocaine. In 3 cases, persons were alleged to have possessed heroin or crack cocaine in addition to possessing marijuana. In one case, an individual was suspended simply for "using suspected narcotics."

suspension notices, not a single case involved allegations of "assaults, shootings…other acts of violence or threats of violence."[9]

63. Second, the Directive prohibits innocent and even beneficial conduct wholly unrelated to illegal drugs.

a. The Directive allows police to banish people from the park even when they are not engaged in any action that threatens the beauty or safety of the park and without regard for the person's reasons for being in the park. For instance, because of the suspension notice, Mr. Holm is unable to meet with his friends who congregate in the park for companionship, something he sorely needs as he struggles with being houseless.

b. The Directive allows police to banish people from the park even when they are engaged in socially beneficial activities. For instance, because Mr. Holm has been banished from Commons Park, he has been prevented from receiving food, clothing and services from homeless providers who regularly do outreach in the park.

c. The Directive allows Denver to exclude people from the park without any consideration of whether or not that person is likely to engage in illegal activities in the park in the future.

64. Third, the Directive serves to simply move undesirable conduct from one public space to another, rather than to curb the conduct.

a. At best, banishment from one park simply pushes drug users and drug sellers to another park or public space. The exclusion orders generally banish an individual – such as Mr. Holm – from only one park.

b. For houseless people (who account for 72% of those who have been excluded from parks under the Directive), banishment from one park will simply push the individual (and their undesirable conduct) to another park or public space. And because there is "no evidence that any offense occurring within a park poses a greater risk to the public than the same offense occurring on a public street or in another public place," *Yeakle*, 332 F. Supp. 2d at 1129, any assurances of public safety made by the Directive ring hollow.

65. Addressing a Cincinnati ordinance very similar to Directive 2016-1, the Sixth Circuit held that the ordinance was not narrowly tailored for precisely these reasons:

a. The ordinance "excludes individuals from [a neighborhood] without regard to their reason for travel in the neighborhood." *Johnson v. City of Cincinnati*, 310 F.3d 484, 503 (6th Cir. 2002).

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[9] Documents reflecting Denver's enforcement of the directive were gathered through open records request by the ACLU of Colorado. Because they are voluminous, they are not included in the appendix, but can be provided at the court's request.

b. The ordinance "prohibits [people] from engaging in an array of not only wholly innocent conduct, but socially beneficial action like caring for [one's] grandchildren and walking them to school." *Id.*

c. "[T]he Ordinance bans [people] from seeking food, shelter, [and] social services." *Id.*

d. The Ordinance "metes out exclusion without any particularized finding that a person is likely to engage in recidivist drug activity in [a neighborhood]." *Id.*

66. Each of these rationales for striking down the ordinance applies equally to Directive 2016-1. This Court should follow the sound logic of the Sixth Circuit and hold that Directive 2016-1 is not narrowly tailored and is therefore unconstitutional.

b. Directive 2016-1 is not the least restrictive means of achieving the City's goal.

67. There are innumerable less restrictive measures than Directive 2016-1 that would serve the City's interest. Most obviously, the City could serve its interest in park beautification and safety simply by enforcing existing laws against drug use in the park, as it did with Mr. Holm on October 14.

a. Between city ordinances and state laws, the use, possession and distribution of illegal drugs and drug paraphernalia are all illegal in Denver Parks, as are assault, shooting, harassment, and obstruction of passageway. The City may aggressively enforce these laws.

b. Further, the criminal justice system already has the means and often does banish individuals from public spaces, including parks, for engaging in repeat illegal conduct. Specifically, Denver judges with some frequency, and often at the request of Denver officers or Denver city attorneys, have imposed "geographical restrictions" from public areas as a condition of probation.[10]

c. Under United States Supreme Court precedent, any facial claim by the City that it already "tried other laws already on the books" and found them insufficient, without documented proof of these efforts and quantified measures of their successes and failures cannot overcome strict scrutiny. *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014). In *McCullen*, even applying the lower standard of intermediate scrutiny, the Supreme Court held that the City's facial claim that it "tried other laws already on the books" did not establish that the City "seriously undertook to address the problem with less intrusive tools readily available to it." *Id.* As a result, the law in question in *McCullen* failed even the lower standard of intermediate scrutiny because the City had not "shown that it considered different methods that other jurisdictions have found effective." *Id.*

[10] *See* http://www.denverpost.com/2015/02/21/banned-from-16th-street-dozens-ordered-by-court-to-stay-away/.

d. Here, Denver cannot show that existing Denver and Colorado laws are insufficient to establish the City's purpose. Directive 2016-1 fails even intermediate scrutiny, and certainly fails strict scrutiny.

68. In addition to simply enforcing existing laws, if Denver is concerned with removing drug use from city parks, it could offer drug treatment to anyone found using drugs in a city park. It could offer housing and resources to the people who, without a place to go, spend their days in Denver's parks. Such interventions are proven to both work and save money. *See* Alana Samuels, *The Best Way to End Homelessness*, The Atlantic, July 11, 2015, http://www.theatlantic.com/business/archive/2015/07/the-best-way-to-end-homelessness/398282/.

69. Instead of taking any of these less drastic paths, the Department of Parks and Recreation issued Directive 2016-1, which authorizes an officer to exercise his or her discretion to immediately ban a person from a park for 90 days and creates criminal penalties if the person violates the ban, even if when the person returns to the park the person does not use or possess drugs. Because a less drastic measure would serve the City's interest while respecting the fundamental rights of people in Denver, Directive 2016-1 fails strict scrutiny.

IV. By banishing Mr. Holm from Commons Park and also initiating criminal proceedings against him, Denver's enforcement actions violated Double Jeopardy.

70. Under the Fifth Amendment, "No person . . . [shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "The Double Jeopardy Clause prohibits the government from criminally punishing, or attempting to punish, an individual twice for the same offense." *Deutschendorf v. People*, 920 P.2d 53, 56-57 (Colo. 1996).

71. "In order to establish that the State has imposed multiple punishments in violation of the Double Jeopardy Clause, an individual must demonstrate that: (1) the State has subjected the individual to separate proceedings; (2) the conduct precipitating the separate proceedings consisted of one offense; and (3) the penalties in each of the proceedings may be considered 'punishment' for the purposes of the Double Jeopardy Clause." *Id.* at 57.

72. Plainly, the City subjected Mr. Holm to a criminal proceeding related to his single offense of possession of marijuana in Commons Park when it charged him with a violation of DRMC 39-10(c), Marijuana Prohibited in Parks in case 16GS013872. The question for this Court is whether, when the City simultaneously banned Mr. Holm from Commons Park, it subjected Mr. Holm to a second proceeding that imposed punishment on him, or whether the banishment order was a civil sanction, not a criminal one.

A. Directive 2016-1 creates a proceeding that imposes criminal punishment.

73. To determine whether the suspension notice is a criminal sanction or a civil one, the United States Supreme Court described the analysis this Court must undertake in *United States v. Ward*:

> [T]he question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction. Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether [the body that established the law or

> regulation], in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where [the body that established the law or regulation] has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

United States v. Ward, 448 U.S. 242, 248-49 (1980).

74. In the case of Directive 2016-1, there is no need for this Court to proceed to the second step of the *Ward* analysis. Directive 2016-1 is a criminal sanction, not a civil one. First, Directive 2016-1 never indicated – either expressly or impliedly – whether the parks exclusion was a criminal or civil sanction. Appendix B. Second, the language of Directive 2016-1 is plainly punitive. In describing the suspension, the Directive uses the language of crime and punishment. According to the Directive:

> Suspension: Illegal Drug-Related Activity, as defined below, is prohibited in City Parks and in the Cherry Creek Greenway. The prohibition of Illegal Drug-Related Activity shall be enforced, among other legal means and for the Duration of this Directive 2016-1, by suspending the right of a person engaged in Illegal Drug-Related Activity from accessing or using the City Parks and the Cherry Creek Greenway in which the Illegal Drug-Related Activity occurred for a period of ninety (90) days ("Suspension").

Exhibit B (emphasis added). As the Directive states on its face, the suspension notice is designed to be an additional legal tool for the enforcement of the prohibition on illegal drug-related activity in the park. Prohibition of illegal drug activity is the province of the criminal law. Further, violation of a banishment order under Directive 2016-1 is punishable by a year in jail and a $999 fine. Directive 2016-1 is therefore a criminal sanction.

75. Because suspension under Directive 2016-1 is a criminal sanction, the City cannot both prosecute Mr. Holm (as it did) for Marijuana Prohibited in Parks in case 16GS013872 and also, in a separate case, issue an order barring Mr. Holm from Commons Park for 90 days because of his use of marijuana in the park. In case 16GS013872, the City sought and received a default judgment against Mr. Holm. The imposition of a second criminal sanction in the form of the 90-day suspension therefore violates the Double Jeopardy Clause of the Colorado and United States Constitutions.

B. Directive 2016-1 is so punitive that, even if this Court were to find that Denver intended Directive 2016-1 to create a civil penalty, this Court should nonetheless construe the Directive as a criminal sanction.

76. Even if this court were to find that the City intended banishment under Directive 2016-1 to be a civil penalty, the punitive nature of the sanction nonetheless triggers the protections of the Double Jeopardy Clause. *See Johnson v. City of Cincinnati*, 119 F. Supp. 2d 735, 748-49 (S.D. Ohio 2000).

77. In determining whether Directive 2016-1 is so punitive as to be a criminal sanction, the Supreme Court has directed lower courts to examine:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment -- retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Hudson v. United States, 522 U.S. 93, 99 (1997).

78. Even if this Court were to somehow find that in establishing Directive 2016-1 the Department of Parks and Recreation intended to designate a civil penalty, this Court should follow the lead of the *Johnson* court and find that the parks suspension scheme is so punitive in purpose and effect as to be a criminal sanction. *Johnson*, 119 F. Supp. 2d at 748-49.

a. First, it is incontrovertible that a park exclusion order under Directive 2016-1 is an affirmative restraint. *Id.* at 748 ("[E]xclusion involves an affirmative restraint. It is a restraint against the liberty of those arrested or convicted for the drug-abuse crimes.").

b. Second, "exclusion is analogous to banishment, a penalty historically regarded as punishment." *Id.* (citing *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 474 (1977) (stating that banishment is historically considered to be punishment); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963) (same)).

c. Third, while there is no mens rea requirement for a banishment order, neither is there a mens rea requirement in the Denver statute that prohibits marijuana use in parks. *See* DRMC § 39-10(c).

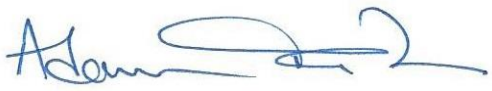
d. Fourth, the purpose of the ordinance is to promote a typical aim of the criminal law: deterrence of drug use in Denver Parks.

e. Fifth, the directive addresses itself only to criminal conduct.

f. Sixth and seventh, to the extent that the directive can be argued to aim only for beautification of parks, the sanction it creates is wildly excessive as compared to this aim. *See Hudson*, 522 U.S. at 99.

79. Under *Ward*, *Hudson*, and *Johnson*, Directive 2016-1 creates a punitive, criminal sanction. By applying this sanction in combination with the original sanction of criminal prosecution, the City violated Mr. Holm's right to be free from Double Jeopardy.

Wherefore, for the above reasons, The City of Denver may not prosecute Mr. Holm for violation of the illegally-imposed parks suspension. Mr. Holm therefore requests that this Court dismiss all charges against him in this case.



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Dated: December 23, 2016

Certificate of Service
I hereby certify that on 12/23/2016, I served the foregoing document by faxing same to the Denver City Attorney.
_____AF_____