District Court, Denver, Colorado Lindsey-Flanigan Courthouse 520 W. Colfax Ave., Denver, CO 80204	DATE FILED: July 18, 2017 8:26 PM FILING ID: 4B3880E03F70D CASE NUMBER: 2017CV31066
PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellant, v. Troy Holm, Defendant-Appellee.	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. 2017CV31066 Division 5H

ANSWER BRIEF

Troy Holm, by and through counsel, hereby submits his Answer Brief. This Answer Brief concerns the county court's order granting Mr. Holm's motion to dismiss all charges against him because the trespass notice issued to Mr. Holm violated the Procedural Due Process Clause of the United States Constitution.

STATEMENT OF THE CASE

On September 1, 2016, the Director of the Denver Department of Parks and Recreation (the "Department") issued a temporary directive, Directive 2016-1. This directive purported to grant Denver police officers virtually unrestricted authority to banish anyone whom they suspect of "illegal drug-related activity" from Denver parks. R. CF, p. 53-57. The banishment was effective immediately, without a hearing or other due process, and lasted for a period of 90 days. Denver primarily used the directive to summarily ban from city parks people like Mr. Holm – people experiencing homelessness and suspected of simple marijuana use or possession.

The underlying 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. R. CF, p. 59. Officer Grier then gave Mr. Holm a ticket for having marijuana in the park, which is a civil infraction per Denver ordinance. R. CF, p. 61. 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. R. CF, p. 52-59. This suspension notice barred Mr. Holm from Commons Park for 90 days. R. CF, p. 59. On October 17, 2016, Officer Grier observed Mr. Holm in Commons Park and served him with a summons under D.R.M.C. § 39-4 for being in the park in violation of the suspension order. R. CF, p. 1. The City Attorney later added a charge of Trespass in violation of D.R.M.C. § 38-115. R. CF, p. 8.

The validity of both charges against Mr. Holm were contingent on the validity of the suspension notice Mr. Holm received on October 14. R. CF, p. 86. 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. *Id.*

On December 23, 2016, Mr. Holm filed a motion to dismiss all charges, in which he made four arguments. R. CF, p. 12-29. First, Mr. Holm argued that the Executive Director of the Department of Parks and Recreation did not have the legal authority to issue Parks Directive 2016-1. *Id.* Second, he argued that Parks Directive 2016-1 violated the Procedural Due Process protection of the Fourteenth Amendment and Article II, Section 25 of the Colorado Constitution. *Id.* Third, he argued that Parks Directive 2016-1 violated 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. *Id.* Fourth, he argued that the suspension was a criminal penalty such that issuing both a suspension notice and a ticket violated Double Jeopardy. *Id.*

On January 13, 2017, the city attorney filed a response to Mr. Holm's motion. R. CF, p. 33. In this response, in addition to arguing against Mr. Holm's positions, the city made the spurious argument that the county court did not have jurisdiction to address Mr. Holm's motion. R. CF, p. 35-37. On January 19, Mr. Holm filed a reply in which he both addressed the city attorney's counterarguments to his initial motion and responded to the city attorney's baseless claim concerning jurisdiction. R. CF, p. 66-76. The city attorney then filed a two-page reply concerning jurisdiction. R. CF, p. 80-81.

On February 22, 2017, Judge Clarisse Gonzales granted Mr. Holm's motion and dismissed all charges against him. *Id.* Judge Gonzales held that Parks Directive 2016-1 violated the procedural component of the Due Process Clause of the United States Constitution. R. CF, p. 83-86. Given this ruling, Judge Gonzales did not address the three other arguments Mr. Holm put forward regarding why the charges against Mr. Holm needed to be dismissed. *Id.* Judge Gonzales found no need to address the city's specious jurisdiction argument. This appeal follows Judge Gonzales' ruling.

STATEMENT OF FACTS

On August 31, 2016, Allegra "Happy" Haynes, the Executive Director for Parks for the Denver Department of Parks and Recreation, issued Directive 2016-1. R. CF, p. 53-57. This Directive went into effect on September 1, 2016 and remained in effect until February 26, 2017. *Id.* The Directive allowed 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. *Id.* 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. 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 did not provide any guidelines for officers to use in determining whether to issue a suspension notice. The Directive also did not describe what standard of proof an officer must apply to "determine" that a person has "committed a Violation."

The Directive was 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 convicted of any crime, infraction, or administrative citation in order for the Suspension Notice to be issued or effective." *Id.* If an officer chose 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.*

Persons wishing to challenge a suspension notice were afforded an extremely limited right of appeal. During the appeal, the suspension notice remained in effect. To appeal a suspension notice, the suspended person had to file an appeal with the Director of the Department of Parks and

Recreation within ten days of receiving it. The person must also have had a mailing address or an email address. If a person could not provide a mailing address or an email address, that person was barred from appealing the suspension notice. *Id.* Once the appeal was filed, the Department of Parks and Recreation would set a hearing to take place within twelve days; the Department had to send notice (presumably via mail or email) of the hearing to the appellant within four days after the appellant filed the appeal. *Id.* If the appellant was unable to attend the hearing date, the appellant forfeited their right to appeal. *Id.* At the hearing, either side could request a continuance of up to ten days. *Id.* After the hearing, the AHO had five days to issue a ruling. *Id.* Thus, even if a suspension notice was appealed the day after it is issued, the City was permitted to delay 27 days before rendering a decision.

The appeal hearing created by the Directive provided extremely limited due process to the banned party. An Administrative Hearing Officer ("AHO") would preside over the hearing. The AHO was not bound by the rules of evidence and could admit hearsay or other ordinarily inadmissible testimony. *Id.* The City's burden of proof was a preponderance of the evidence. *Id.* If the City met this burden, the burden then shifted 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 contained no definition of "countervailing testimony or evidence."

In the event of an unfavorable decision, the person could appeal within 15 days to the Parks Director. *Id.* There was no deadline in the Directive by which the Parks Director must provide her final decision on the appeal. *Id.* The Park Director's final decision could be appealed to the Denver District Court. *Id.* Ultimate resolution of an appeal could occur well past the end of the ninety-day suspension order.

SUMMARY OF ARGUMENT

Mr. Holm's motion to dismiss argued that the City could not, as a matter of law, prove an element of the charges against him. Such a motion is plainly within the jurisdiction of a criminal court. The City of Denver's argument that the county court could not hear Mr. Holm's motion ignores the text of the city's Charter as well as Colorado Municipal Court Rule (C.M.C.R.) 212(c). Finally, even if this Court were to find that Denver's Charter and the municipal rules do not provide the county court with jurisdiction to hear Mr. Holm's motion, these sources of authority must yield to the Colorado Supreme Court's mandate that in a criminal case, Mr. Holm must be allowed to litigate the constitutional issues raised in his motion.

Vested with jurisdiction to address the substantive issues Mr. Holm raised in his motion, the county court properly dismissed the charges against Mr. Holm based on its findings that Directive 2016-1 violated the procedural due process guarantee enshrined in the United States Constitution and that the charges against Mr. Holm were "wholly reliant upon the validity of Temporary Directive 2016-1." R. CF, p. 86. This court should affirm the county court's decision in whole.

ARGUMENT

I. The county court had jurisdiction to hear Mr. Holm's motion to dismiss

It is beyond dispute that the municipal court has the jurisdiction to hear any argument by a criminal defendant that the required elements of the charged offense are not met and that conviction of the charged offenses would violate the Constitution. Mr. Holm's motion to dismiss raised precisely these issues. Mr. Holm's motion was therefore plainly within the jurisdiction of the county court as described in the Denver Revised Municipal Code and in the Colorado Municipal Court Rules.

A. Mr. Holm's motion to dismiss properly challenged an element of the criminal offenses he was charged with violating

Mr. Holm was charged with violating DRMC § 39-4(a), use of a park in violation of a temporary directive, and § 38-115(a), trespass. One element of each of the charged crimes is that the City must establish the lawfulness of the suspension order. As the jury instructions published by the Colorado Supreme Court demonstrate, in a prosecution for trespass on public lands, the city attorney must prove that the trespass order was valid. *Colorado Jury Instructions, Criminal 2014*, F:126 ("A person who, regardless of his [her] intent, enters or remains in or upon premises that are at the time open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated to him [her] by the owner of the premises or some other authorized person." (emphasis added)); *see also Renner v. Williams*, 344 P.2d 966, 967 (1959) (person charged with contempt for violating an order can defend the contempt citation by challenging the validity of the underlying order). Mr. Holm's motion challenged as a matter of law the prosecution's ability to establish an element of the crimes he was charged with committing. Such a motion is plainly the province of any criminal court.

B. Mr. Holm appropriately raised the constitutionality of Directive 2016-1 as a defense to his criminal prosecution

Denver argues that Mr. Holm was obligated to raise his challenge to the suspension order only in the context of the civil appeal proceeding provided for in the Parks Directive. Opening Brief, p. 8. This is incorrect. First, Mr. Holm did not have the right to challenge the constitutionality of the Parks Directive itself through the Department's appeals process, which was focused only on whether there was a sufficient factual basis for a specific suspension order to be issued. *See Colo. State Bd. of Accountancy v. Paroske*, 39 P.3d 1283, 1289 (Colo. App. 2001) ("An agency has no jurisdiction to

rule on the constitutionality of its own organic act.").[1] Second, even if Mr. Holm could have challenged his park suspension under the procedures in the Directive and then brought his constitutional challenge in the district court under Rule 106(a)(4),[2] there is no statute, rule, or case that *required* him utilize that procedure rather than challenge his park suspension in his criminal case.

Indeed, requiring Mr. Holm to utilize a constitutionally deficient civil proceeding to challenge the constitutionality of the trespass order underlying his criminal prosecution would create extreme delay and would be tremendously inefficient. Had Mr. Holm presented this issue solely in the context of the civil appeal, he very likely would have received the civil ruling *after* the criminal trial had concluded,[3] making any attempt at "exhaustion," as urged by the City, futile and highly prejudicial to Mr. Holm. *See Paroske*, 39 P.3d at 1289 (constitutional challenge cannot be raised in agency proceedings.). Indeed, had Mr. Holm failed to raise this constitutional defense in his criminal case and then either not received a timely resolution of the civil appeals process and/or received a negative determination through the appeals process, he likely would be found to have waived his right to raise the constitutional defense in criminal case.

C. Under the Denver Revised Municipal Code, the Denver County Court has jurisdiction to hear constitutional challenges in municipal prosecutions

[1] Additionally, once Mr. Holm was cited in this case, he may have lost the ability to file a petition under Colo. R. Civ. P. 106(a)(4). Under that rule, a petitioner may only bring a case when "there is no plain, speedy, and adequate remedy otherwise provided by law." Once the criminal case began, it afforded Mr. Holm a plain, speedy, and adequate way to challenge his parks suspension. If Mr. Holm had then filed a Rule 106 proceeding, the City would inevitably be arguing that the Rule 106 was barred because of the pending criminal case.

[2] *See Pepper v. Indus. Claim Appeals Office*, 131 P.3d 1137, 1139 (Colo. App. 2005) ("Contrary to the Panel's argument, the constitutionality of a statute need not be raised before the ALJ in order to preserve the issue for consideration by this court.").

[3] If Mr. Holm had appealed through the procedures set forth by the City and under Rule 106(a)(4), he likely would not have received a ruling for at least four months. First, Mr. Holm would have to have gone through the City's appeal process, which can take as long as 27 days. R. CF, p. 19 ¶ 46. Then the Parks Department would have to prepare the record of the decision. Colo. R. Civ. P. 106(a)(4)(III). Mr. Holm has no control over how long this takes. Mr. Holm would then have had 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 somehow provided the record instantly, this would still entail a 118-day delay before any challenge Mr. Holm could have brought would have been ripe for a ruling..

Denver claims that the Denver County Court has limited jurisdiction regarding the motions it can hear in municipal prosecutions. This argument hinges on its claim that the Denver County Court has different jurisdiction depending on whether a prosecution is for the violation of a state statute or a municipal ordinance. Opening Brief, at 6-8. This argument asserts that the titles of Charter §§ 4.2.5 ("Jursidiction; City laws") and 4.2.6 ("Jurisdiction; State laws") dictate the conclusion that § 4.2.5 describes the county court's jurisdiction in municipal ordinance prosecutions, while § 4.2.6 describes the county court's jurisdiction in state statute prosecutions. *Id.* The City therefore argues that Charter § 4.2.6 is the only source for the county court's jurisdiction over municipal prosecutions, and that this section (unlike Charter § 4.2.5) did not permit the county court to address Mr. Holm's motion. Opening Brief, p. 6-7.

The City is wrong. The city charter must be understood in light of the interpretation guidance contained in the D.R.M.C. *See* D.R.M.C. §§ 1-1 to 1-16 (giving guidance for interpretation of city laws). According to D.R.M.C. § 1-4, headings in the Charter are meaningless; it is only the text of the ordinance itself that has substantive meaning. D.R.M.C. § 1-4 ("In this Code, the headings and catchlines are intended as mere catch words to indicate the contents of the sections, and shall not be deemed or taken to be a part of the sections in any substantive sense whatever.").

Looking at the text of Charter §§ 4.2.6 and 4.2.5, both plainly apply in municipal prosecutions because both describe the jurisdiction of the "County Court of the City and County of Denver", which is the very court that hears municipal cases in Denver. Under Charter § 4.2.5, "*The County Court of the City and County of Denver* shall have such . . . criminal . . . jurisdiction as now or hereafter may be provided by the constitution or general laws of the State of Colorado to be had or exercised by County Courts." (emphasis added). Under Charter § 4.2.6,

> *The County Court of the City and County of Denver* shall have original jurisdiction of all cases arising under the Charter or ordinances of the City and County of Denver with full power to enforce the same and to punish violations thereof by the imposition of such fines and penalties as may be thereby provided, and all proceedings in such cases shall be in

> accordance with the procedure established by ordinance, or, with respect to matters of procedure not so established by ordinance, as may be established by rules of said court.

As the City acknowledges, Charter § 4.2.5 provides "sweeping general jurisdiction" to "review all matters of local concern." Opening Brief, p. 7. The combined powers established in Charter §§ 4.2.5 and 4.2.6 plainly include the power to address Mr. Holm's motion challenging the prosecution's ability as a matter of law to establish an element of the charges against him and raising constitutional challenges to the charges.

D. The Colorado Rules of Municipal Procedure dictate that the county court had jurisdiction to hear Mr. Holm's constitutional challenge to his prosecution

Even if D.R.M.C. § 1-4 cited in Part I.C did not exist, Denver's argument about the jurisdiction of the Denver County Court in municipal prosecutions would still be wrong. Even if the county court's jurisdiction were confined to that laid out in Charter § 4.2.6, that section gives the Denver County Court authority to hear Mr. Holm's motion.

Under Charter § 4.2.6, 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." In a prosecution for an ordinance violation, the Colorado Municipal Court Rules of Procedure (C.M.C.R.) are the rules of the court. The Colorado Municipal Court Rules of Procedure specifically invite a criminal defendant to raise "any defense or objection which is capable of determination without the trial of the general issue may be raised by motion." C.M.C.R. 212(c). In the briefs filed before the county court, both parties agreed that Mr. Holm's motion addressed solely legal issues and that the facts were not in question. R. CF, p. 12 ¶ 1; R. CF, p. 35 ¶ 1. As a result, the county court could determine the legal issues raised "without the trial of the general issue." C.M.C.R. 212(c). Mr. Holm's motion was therefore properly brought under C.M.C.R. 212(c).

Furthermore, C.M.C.R. 235 creates a method for municipal courts to consider motions for post-conviction review when a "conviction was obtained . . . in violation of the constitution of the

laws of the United States, or of the constitution or laws of this state." The gravamen of Mr. Holm's motion to dismiss, which was granted by Denver county court, was that conviction in his case would be in violation of the U.S. and Colorado constitutions. If this Court holds that C.M.C.R. 212(c) does not permit the litigation of Mr. Holm's constitutional challenges, the only way for him to raise these constitutional issues would be in post-conviction proceedings. C.M.C.R. 235. This would be absurd, inefficient, and illogical. It therefore cannot be correct. *Montes-Rodriguez v. People*, 241 P.3d 924, 927 (Colo. 2010) ("We avoid interpretations that would . . . lead to illogical or absurd results.").

E. Binding precedent from the Colorado Supreme Court dictates that no matter the content of Denver's municipal code or charter, Mr. Holm must be allowed to challenge the constitutionality of his prosecution

Denver argues that, pursuant to its rights as a home rule jurisdiction, the City has appropriately chosen to limit the jurisdiction of its municipal courts to prohibit consideration of the constitutionality of the suspension order that underlies Mr. Holm's criminal prosecution, because it was issued by the Parks Department. Opening Brief, p. 5-8. Denver thus asks this court to allow the county court to turn a blind eye to unconstitutionality of the suspension order – an order that was the legal predicate to Mr. Holm's criminal prosecution. In making this request, Denver is asking this Court to ignore seventy years of binding precedent from the Colorado Supreme Court. This Court should reject Denver's untenable position.

Since 1958, the Colorado Supreme Court has unwaveringly held that prosecutions for municipal ordinance violations that carry the possibility of incarceration, such as the prosecution of Mr. Holm, must be conducted in a way that does not violate the defendant's constitutional rights. *Canon City v. Merris*, 323 P.2d 614 (Colo. 1958); *Geer v. Alaniz*, 331 P.2d 260 (Colo. 1958); *Toland v. Strohl*, 364 P.2d 588 (Colo. 1961); *Pueblo v. Clemmer*, 375 P.2d 99 (Colo. 1962); *Greenwood Village v. Fleming*, 643 P.2d 511 (Colo. 1982). "A person who is alleged to have committed a crime within the boundaries of a home rule city cannot be deprived of the basic protections guaranteed by the Bill of

Rights simply because the effort to subject him to fine or imprisonment takes the form of an alleged violation of a city ordinance." *Merris*, 323 P.2d at 622.

In *Merris*, the Supreme Court addressed a municipal DUI prosecution that treated the proceedings as civil in nature and therefore afforded the criminal defendant none of the constitutional rights attendant to a criminal prosecution. *Merris*, 323 P.2d at 616. Addressing the municipal ordinance that created this regime, the Supreme Court held:

> Expedience may not override the Constitution of Colorado; it should not dethrone rights guaranteed thereunder. If, one by one, the rights guaranteed by the federal Constitution can and must, for expediency's sake, be violated, abolished, stricken from that immortal document, and from state Constitutions, we will find ourselves governed by expediency, not laws or Constitutions, and the revolution will have come.

Merris, 323 P.2d at 617 (internal quotation omitted).[4] Under *Merris*, no matter the content of a municipality's rules, these rules cannot supersede Mr. Holm's right to challenge the constitutionality of his prosecution.

Though the holding of *Merris* specifically related to the right to basic criminal procedures, the Supreme Court quickly expanded it to encompass the full breadth of a criminal defendant's constitutional rights, including the right to due process. *See, e.g.*, *Geer*, 331 P.2d at 262 (right to a trial by jury, right to counsel, and right against self-incrimination); *Toland v. Strohl*, 264 P.2d at 592-93 (all due process rights). A criminal defendant's due process rights include the right to raise constitutional challenges to the prosecution. *See De Baca*, 447 P.2d at 535 ("It is clearly established that . . . in a criminal case, the court before which [the defendant] is arraigned has power to adjudicate the questions raised by the charge and the pleas entered thereon."). Thus, under *Merris* and its progeny,

[4] Justice Moore's concurring opinion in *Merris* restated the rationale for the Supreme Court's holding in even more explicit terms: "[A]ny person who is accused of committing an act, which is a crime under the general law of the state, is entitled to be tried before a jury for that alleged offense under the time honored and well established rules applicable to criminal cases. [This] means that a person who is alleged to have committed the same act within the boundaries of a home rule city cannot be deprived of the basic protections guaranteed by the Bill of Rights simply because the effort to subject him to fine or imprisonment takes the form of an alleged violation of a city ordinance." *Id.* at 622 (emphasis added) (Moore, J., concurring).

no municipal ordinance stating the jurisdiction of a municipal court can supersede the binding mandate from the Colorado Supreme Court. Mr. Holm must be allowed to litigate the constitutional challenges he brought to his prosecution.[5]

II. This Court should affirm the lower court's dismissal of the charges against Mr. Holm as violative of the federal and state constitutions' guarantees of procedural due process

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. Const., art. II, § 25. As discussed below, both constitutions recognize a liberty interest in moving about in public spaces. As both parties and the trial court agree, by providing for the temporary exclusion of persons from city parks, the Directive authorizes deprivations of this constitutionally-protected liberty interest and is therefore subject to due process review. *Citizen Ctr. v. Gessler*, 770 F.3d 900, 916 (10th Cir. 2014). The lower court applied this analysis and correctly found:

> As the park suspensions under Temporary Directive 2016-1 take effect immediately, within the pure unchecked discretion of any police officer on the scene, and with a complete lack of any predeprivation Due Process, the suspensions violate procedural Due Process protections, and are found unconstitutional for this reason.

R. CF, p. 86. Because "the two counts charged against Defendant in this case are wholly reliant upon the validity of Temporary Directive 2016-1, the lower court dismissed all charges against Mr. Holm. R. CF, p. 86. This Court should affirm the county court's complete dismissal.

A. 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

[5] In 1982, the Supreme Court explicitly turned back Greenwood Village's attempt to have the Court overturn *Merris* and its progeny. Rather than overturn *Merris*, the Supreme Court reaffirmed it. Just as under *Merris*: "[T]he city may prosecute the respondent for violating the speeding ordinance but, as the trial court held, he must be accorded the same rights granted to a defendant charged with violating the statutory counterpart of the ordinance including, as pertinent here, prosecutorial proof of guilt beyond a reasonable doubt and the privilege against self-incrimination." *Fleming*, 634 P.2d at 519; *see also R.E.N. v. Colorado Springs*, 823 P.2d 1359, 1363 (Colo. 1992) (requiring municipal court to "afford the constitutionally mandated procedures that protect an individual's due process rights.").

"Procedural 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); *Bethell*, 60 P.3d at 786.

Following this principle, "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 pre-deprivation 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.

Based on the foregoing, it has been long established that the failure to provide a hearing before deprivation of a protected liberty interest, as occurred here, is a violation of due process except in the most extraordinary circumstances. As detailed further below, and as the trial court in this case found, such extraordinary circumstances do not exist in this case. *See* R. CF, p. 85 (finding "no compelling reasons to support . . . a predeprivation approach that did not include a hearing.").

B. Directive 2016-1 fails the *Matthews* balancing test

Even if the lack of pre-deprivation process were not dispositive (and it is), application of the *Matthews v. Eldridge* balancing test also shows clearly that the Directive violates procedural due process. To assess whether there is a due process violation, courts 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 *Matthews*).

The court's reasoning in *Yeakle v. City of Portland*, 322 F. Supp. 2d 1119 (D. Or. 2004) is particularly instructive. In *Yeakle*, the court considered a Portland ordinance that authorized police officers to temporarily exclude from city parks persons deemed to have violated any local or state law, without a pre-deprivation hearing and with only a limited right of appeal. The City justified the ordinance as necessary to further "the important government interest in enjoyment, convenience, and safety of all park users" by "removing people at or near the time they engaged in illegal behavior." *Id.* at 1125. Re-entry into the park while the suspension order was in effect constituted a violation of the state trespassing statute.

Applying the *Matthews* balancing test, the court found the Portland exclusion ordinance violated procedural due process. The court recognized the plaintiffs' "strong interest in avoiding unjust or unwarranted exclusions from the City's parks," as well as the government's "interest in terminating offensive conduct that creates a safety risk in the parks." *Id.* at 1131. The court also found a "considerable" risk that the ordinance would erroneously deprive park patrons of their liberty interest, given: "the absence of any pre-deprivation process"; that the ordinance "fails to establish any evidentiary standard for any park official . . . to determine whether an exclusion is

warranted"; and 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.

The court found the "deficient appeals procedures and lack of a pre-deprivation hearing" are made even 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.* Moreover, because the government's interests could be served by simply issuing a citation, 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 the foregoing, the court found the ordinance in *Yeakle* failed the *Matthews* balancing test and was, therefore, unconstitutional. *Id.* As detailed below, applying the *Matthews* factors to Directive 2016-1 shows that it suffers from the same basic constitutional deficiencies as those identified in *Yeakle*.

1. Prong 1: Mr. Holm has a federal constitutionally-protected liberty interest and a fundamental Colorado Constitutional right to be in Commons Park

The first *Matthews* factor, the private interest affected – here, access to public parks – weighs heavily in favor of a finding that enforcement of the Directive 2016-1 violates procedural due process. Under the Colorado and United States Constitutions, individuals have a fundamental right to move about in public spaces, including public parks. 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)). 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). 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). This liberty interest has been recognized by courts across the country.[6]

The Colorado Supreme Court has likewise identified this right to move about in public spaces as one of the "natural, essential and inalienable rights" protected by Article II, Section 3 of the Colorado Constitution:

> [T]he 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); *accord Nagl v. Indus. Claim Appeals Office*, 351 P.3d 577, 581 (2015) ("[T]he right of freedom of movement is a basic value protected by article II, section 3 of the Colorado Constitution."); *see also* Colo. Const., art. II, sec. 3 ("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.").

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[6] *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).

The City vaguely attempts to inject uncertainty into whether Colorado's fundamental right to freedom of movement in public spaces extends to public parks, but no uncertainty exists. The Colorado Supreme Court has made clear that the fundamental right to freedom of movement includes the right to "stroll, loiter, loaf, and use the *public streets and facilities* in a way that does not interfere with the personal liberties of others." *In re J.M.*, 768 P.2d at 221 (emphasis added). Under Colorado law, a "public facility" includes a public park. C.R.S. § 37-60-126(f) ("'Public facility' means any facility operated by an instrument of government for the benefit of the public, including, but not limited to, a . . . park.").[7] Thus, Mr. Holm had a constitutionally-protected liberty interest in being in Commons Park. The liberty interest at stake is significant. *See Yeakle*, 322 F. Supp. 2d at 1129-30 ("The public parks are a treasured and unmatched resource to those who live in the City. . . . Aside from serving as vital forums for the exercise of free speech, the parks host a variety of activities including festivals, concerts, and art exhibitions.").

2. Prong 2: The risk of erroneous deprivation under Directive 2016-1 is untenably high

[7] Given the clarity of the Colorado Supreme Court's declaration of the meaning of the Colorado Constitution for the right to be in public parks in *In re J.M.*, Denver's argument regarding how other states have interpreted their various state constitutions, or how other federal courts have interpreted the United States Constitution regarding the right to intrastate travel has no more than tangential relevance. To the extent this Court chooses to dive into the rabbit hole of a fifty-state survey on the various expositions of the right to intrastate travel that do not derive from the Colorado Constitution, this Court should be aware that many of the City's cited cases do not stand for the proposition that the right to interstate travel excludes parks. *See, e.g.*, *City of N.Y. v. Andrews*, 719 N.Y.S.2d 442, 447 (Sup. Ct. 2000) (no statement regarding the constitutionality of banning people from parks); *Brandmiller v. Arreola*, 544 N.W.2d 894 (Wis. 1996) (same); *State v. Dobbins*, 178 S.E.2d 449, 456 (N.C. 1971) (same); *Musto v. Redford Twp.*, 357 N.W.2d 791,791 (Mich. Ct. App. 1984) (same); *State v. Shigematsu*, 483 P.2d 997 (Haw. 1971) (stating that freedom of movement includes the right "to stand under open sky in a public park"). Additionally, an equal or greater number of decisions support holding that the right to intrastate travel includes the right to be in public parks. *See, e.g.*, *State v. Burnett*, 755 N.E.2d 857, 865 (Ohio 2001) ("the right to travel within a state is no less fundamental than the right to travel between the states. Every citizen of this state, much like the citizens of this Nation, enjoys freedom of mobility not only to cross our borders into our sister states, but also to roam about innocently in the wide-open spaces of our state parks or through the streets and sidewalks of our most populous cities."); *State v. Shigematsu*, 483 P.2d 997 (Haw. 1971) (quoted previously in this footnote); *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1270 (11th Cir. 2011) ("If the City has a policy of enforcing the trespass ordinance on sidewalks surrounding public parks as Plaintiffs allege, the alleged City policy limits Plaintiffs' right of intrastate travel."); *Pottinger v. Miami*, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992) ("forcing homeless individuals from sheltered areas or from public parks or streets affects a number of 'necessities of life.'"; "laws penalize travel if they deny a person a 'necessity of life.'").

The second *Matthews* factor is decisive. Despite the broad potential (and actual) application of the Directive, it establishes only the most meager of safeguards to protect against erroneous or improper deprivation. One of the most troubling aspects of the Directive is that for an officer to decide to order banishment that is effective immediately, the individual "need not be charged, tried or convicted of any crime." R. CF, p. 55. Suspension orders are issued and become immediately effective without any pre-deprivation process, input from a neutral arbiter, or supervisory review. Without the Directive in place, an individual could not be punished for illegal drug activity in the park unless that individual was duly charged, prosecuted, and convicted in a court of law of a criminal offense, and after provision of all the due process protections guaranteed to criminal defendants in the Constitution – protections aimed in significant part at avoiding erroneous convictions and punishments. The Directive, however, serves as an end-run around these constitutionally-guaranteed protections, rendering police officers the judge and jury and effectively usurping the criminal court proceedings by fiat.

Even with the enormous power it bequeaths to officers, the Directive provides no meaningful guidance on how officers are to exercise discretion to issue a suspension notice. As the lower court found: "the risk of erroneous deprivation of the liberty interest in using public land is great under Temporary Directive 2016-1, as the 'determination' is made by an officer without standards imposed, allowing for unfettered, unchecked discretion on the part of the officer." R. CF, p. 86. The City suggests, without any support, that the Directive's requirement that an officer "determine" that a person committed a violation "is arguably a greater threshold than merely having probable cause to believe that a violation existed." P. 13. The City's suggestion is dubious and contradicted by the conclusion of the lower court, which found:

> deprivation of the liberty to utilize a public space is immediately imposed upon the ambiguous "determination" ("ambiguous" because no standards for determination are noted – for example requiring the sanctioning officer to witness firsthand the alleged

violation, or with any indication regarding the standard of proof the officer must assert to support such determination) by an officer that a violation has occurred.

R. CF, p. 85.[8] Given these varied deficiencies, there is little in the Directive to prevent officers from erroneously meting out banishment on an incorrect hunch or suspicion of drug activity.

Any erroneous exclusion is unlikely ever to be corrected given the extremely limited opportunity for individuals to challenge their banishment. A challenge can only occur after the suspension, while the banishment remains in effect. During any challenge, the banished person is subject to arrest if he or she re-enters the park. If the individual loses his challenge, then files an appeal to the Parks Director and then to district court, the banishment remains in effect during the entire course of the appeal, which will inevitably last beyond the 90-day banishment period.

Moreover, the post-deprivation process the Directive provides is plainly insufficient to protect against erroneous deprivation. As an initial matter, the post-deprivation hearing is granted only after almost a third of the suspension has elapsed.[9] Additionally, the hearing itself has few procedural safeguards. There is no presumption of innocence and no right to appointed counsel if indigent. The hearing is not governed by the rules of evidence. As a result, the accusing officer may rely on hearsay from another officer, or even from a potentially unreliable citizen. The City's burden of proof is a mere preponderance of the evidence.[10] Plainly, the post-deprivation process makes it easy for a hearing officer to simply rubberstamp a suspension order without meaningful review.

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[8] Given that the Directive emphasizes that no criminal charge is required to issue a suspension, the most reasonable inference is that the Directive authorizes banishment on a standard of proof less than probable cause.

[9] 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. R. CF, p. 56. 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.

[10] Confoundingly, the City touts this lessened burden of proof as constitutionally protective, stating "The risk of error is quite low because the City need only prove by a preponderance of the evidence that the alleged Illegal Drug-Related behavior occurred." Opening Brief, p. 13. Of course, a lessened burden of proof only makes it easier, not harder, for the government to justify deprivation of a constitutionally protected liberty interest.

With so few procedural protections in place, the chance of erroneous or fundamentally unfair banishment under the Directive is intolerably high.

3. Prong 3: The City's interests are greatly outweighed by Mr. Holm's fundamental right to be in public parks and the procedural deficiencies contained in the Directive

The third *Matthews* factor, the government's interest, weighs meagerly in favor of the City. The City proffers a single sentence to justify its extraordinary action of depriving Mr. Holm of his liberty interest without a pre-deprivation hearing: "[R]equiring a predeprivation hearing would place a significant burden on the City which would significantly increase administrative costs, decrease efficiency, and most importantly, prevent the City from promptly removing the safety risk." Opening Brief, p. 15. This paltry offering is surely insufficient to establish the "extraordinary circumstances" under which a post-deprivation hearing may satisfy due process.[11] As an initial matter, the City provides no explanation for why provision of a pre-deprivation hearing is costlier than provision of a post-deprivation hearing. In fact, the lower court found that "considering the City's interest and the relative ease at which the procedures could be changed (*essentially imposing very little difference in cost and time upon the City*) the deprivation of the liberty interest is found to be offensive to the *Matthews* analysis." R. CF, p. 86 (emphasis added). Regardless, the provision of due process often creates administrative inefficiencies, but in this case any purported additional

[11] While the Directive recites a parade of horribles as justification for its existence, there is no evidence in the record that either these hypothetical urban maladies are occurring or that the Directive is being used as a tool to combat them. R. CF, p. 54. The record contains no information from the City concerning any "assaults, shootings, and other acts of violence or threats of violence" that supposedly justify the need for emergency action. R. CF. In addition, even if such problems were rampant in Denver's parks, the extremely loose fit between the Directive and these hypothetical problems dictates the conclusion that enforcement of the Directive is not a civic emergency. Indeed, in practice and by design, the directive was not used to target drug-related activities that pose a public safety threat or impinge on the rights of others. Mr. Holm was banned from the park for – on a single occasion – ingesting legal marijuana while of legal age in the park. He was not engaged in the type of "drug related activity" the directive purportedly seeks to address. 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. R. CF, p. 23-24. The enforcement of Directive 2016-1 lays bare that it is not an emergency measure to combat a public emergency.

administrative burden "is no greater than the pre-deprivation process already in place to handle a variety of non-criminal violations, such as traffic fines." *Yeakle*, 322 F. Supp. 2d at 1131.

Regarding the City's interest in terminating offensive conduct that creates a safety risk in the parks, this interest does not justify extended banishment without any pre-deprivation process. The City has provided no argument explaining why the tools currently available to it are insufficient to address the purported safety risk and why immediate enforcement of a temporary banishment uniquely addresses the safety risk. As the lower court in this case found:

> The infringement upon the right to utilize a public area could easily be delayed until the administrative hearing has been held, the alleged violator has had a meaningful opportunity to be heard, and the hearing officer has made a written determination as to the basis of the deprivation. Essentially, the exact procedures mandated by Temporary Directive 2016-1 could be implemented, but the sanction of banishment from public parks could be imposed after procedural Due Process has been afforded.

R. CF, p. 85. The *Yeakle* court similarly concluded that "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.* Instead, the court found the government interest "can be accomplished either by issuing a citation and/or fine[,] removing the offender from the park if the conduct continues," or staying the suspension notice pending resolution on appeal." *Id.* The City's interest in immediate enforcement is minimal.

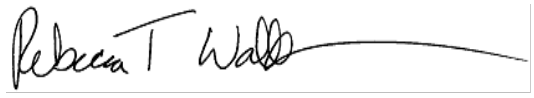
In sum, although the City has a legitimate interest in promoting the safety of city parks, that interest is clearly outweighed by the significant risk that the Directive's deficient procedural protections will erroneously deprive citizens of their right to enjoy Denver's public parks. Based on the foregoing, a balancing of the three Matthews factors should lead this Court to affirm the lower court's dismissal of the charges against Mr. Holm as violative of due process.[12]

[12] The procedural due process 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); *Mackey v. Montrym*, 443 U.S. 1, 10 (1979) (due process challenge

CONCLUSION

For the foregoing reasons, Mr. Holm respectfully requests that this Court uphold the county court's dismissal of all charges against Mr. Holm. In the county court, Mr. Holm advanced four arguments for dismissing all charges against him. Because the county court found Mr. Holm's procedural due process argument persuasive, it made no findings regarding Mr. Holm's other arguments. Should this court disagree with the county court regarding Mr. Holm's procedural due process argument, Mr. Holm requests that this Court remand the case to the county court to enter orders regarding Mr. Holm's other three arguments for dismissal of all charges.

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: July 18, 2017

Certificate of Service
I hereby certify that on 7/18/2017, I served the foregoing document on all parties through ICCES. ____AF_____

to drivers' license suspension); *Dixon v. Love*, 431 U.S. 105, 113, 97 S. Ct. 1723, 1727 (1977) (same). The issues in these cases bear no similarities to those pending regarding Mr. Holm. For example, in *Camuglia*, the plaintiff conceded that the City had to be allowed to close a restaurant "if there's an imminent danger to the public." 448 F.3d at 1221. The plaintiff's concession that a city should be allowed to shut down a restaurant prior to a hearing on health code violations where the violations present an imminent danger to the public has no relevance to this Court's analysis of the parks exclusion in Directive 2016-1. Supreme Court cases permitting immediate drivers' license revocation for accumulating too many speeding violations (*Love*) or refusing a chemical test (*Mackey*) are equally non-germane. *See Dixon*, 431 U.S. at 113; *Mackey*, 443 U.S. at 10. The City's out-of-context quotes therefore provide no meaningful guidance to this Court.