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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

Damen Aguila, Mario Lanza Dyer, and Jamie Scarborough, Plaintiff(s), vs. Municipality of Anchorage Defendant(s).	)	Case No. 3AN-25-04570CI

OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Damen Aguila, Mario Lanza Dyer, and Jamie Scarborough (collectively "Plaintiffs") seek immediate court action as they challenge the constitutionality of Defendant Municipality of Anchorage's ("Municipality") abatement of a prohibited encampment on public property. Immediate court action is not required because the Municipality's abatement code serves vital public interests in public health and safety while comporting with constitutional requirements in all relevant respects. Plaintiffs are not irreparably harmed by being required to leave this specific abatement zone and either take their personal property with them or have the Municipality store it free of charge. And the balance of the equities and the public interest are best served by not interfering with the Municipality's routine policy decision to abate this particular camp, which has generated several tons of waste and human feces (including waste spilling over onto municipal sidewalks used by young children walking to a nearby school) and is at the center of a hotspot of public safety issues, property damage, and calls for police service.

Under the abatement code, the Municipality makes case-by-case determinations regarding where and how to use its limited resources to abate specific encampments on particular parcels of public property. Targeted abatement actions protect public property from accumulations of human and other waste and protects public safety where it is endangered by particular camps. The code gives the Municipality the tools it needs to protect the public interest while also building in procedural protections for campers to protect their personal property. Among other things, the code requires the Municipality to provide notice that a prohibited camp on public property is scheduled for future abatement,

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and Plaintiffs here received actual notice at least 10 days in advance of abatement. This notice provides time for campers to remove their property from the abatement area before the abatement begins and information about the opportunity to appeal an abatement notice—in which case the Municipality may complete the abatement but is required by code to store appellants' unremoved personal property pending appeal. These reasonable procedures give campers adequate means to retain their personal property while also facilitating the vital governmental interest in abating the public nuisance of prohibited camping on public property. No precedent calls the constitutionality of the Municipality's abatement procedures into question. If this Court reaches the merits, it should reject Plaintiffs' challenges.

But this Court need not address the merits of Plaintiffs' constitutional claims because Plaintiffs have not met the high bar of showing entitlement to the preliminary equitable relief they seek. In addition to their claims failing on the merits, Plaintiffs have not shown irreparable harm. Plaintiffs may ensure their own continued access to their personal property by removing it from the abatement zone themselves before abatement begins. They also are not irreparably harmed by being required to leave this particular parcel of public property they are not entitled to occupy. Contrary to Plaintiffs' assertion, the Municipality has not "banished" them from the city by closing this sliver of municipal property to camping. Plaintiffs have no constitutional right to permanently occupy a specific parcel of municipal property that the Municipality has posted as closed to camping. Plaintiffs thus fail to show any harm, much less irreparable harm, from being required to leave this particular parcel.

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Plaintiffs further fail to show that the balance of the equities or the public interest favor the extraordinary remedy of a temporary restraining order or preliminary injunctive relief. The Municipality prioritized this zone for abatement because of its proximity to an elementary school and because it had become a health and safety hazard for the surrounding community. Plaintiffs fail to show that their desire to permanently occupy this particular piece of municipal property outweighs these concrete and ongoing harms to the neighborhood caused by the prohibited campsite scheduled for abatement.

In short, the Court should deny Plaintiffs' Motion For a Temporary Restraining Order and Preliminary Injunction because Plaintiffs received actual notice, an opportunity to preserve their personal property, and an opportunity to appeal the municipal abatement action; the Municipality has a vital governmental interest in preserving public health and safety that is demonstrably threatened by this prohibited encampment; and Plaintiffs have not met the high bar required for immediate court action.

BACKGROUND

A. The Encampment Is a Severe Public Health and Safety Threat to Its Occupants and Neighbors that Requires Abatement.

This case involves a prohibited encampment established within Municipal right of way located on the northeast corner of the intersection of Arctic Boulevard and West Fireweed Lane, bordering a parcel owned by a private business.[1] The municipal property at issue contains a narrow sidewalk alongside Arctic Boulevard, a slope rising above the

[1] Municipal Property Information, "Property Information" link available at https://moa-muniorg.hub.arcgis.com/ (last visited February 7, 2025).

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sidewalk, and a narrow, flat strip of land at the top of the rise abutting a chain link fence dividing this municipal parcel from the neighboring privately owned parcel.[2] The encampment is located mostly in the relatively flat area between the slope and the chain link fence. The encampment is under 400 feet from North Star Elementary School,[3] a neighborhood school serving 387 students, from preschool to sixth grade (as of 2023), drawn from the surrounding community.[4] The public sidewalk on Arctic Boulevard that borders the prohibited encampment is used by elementary school children walking to school.

The Municipality has received numerous and continuing complaints regarding threats to public safety and public health associated with this encampment. The Anchorage Police Department reports a high concentration of calls for service in the area, particularly for trespass.[5] A heat map of service calls and reported incidents shows that the encampment is at the center of a hot spot for criminal activity.[6] The Mayor's Office has

[2] Municipality's Ex. C, photos of site.

[3] Plaintiffs' Ex. 6 measured the distance as 583 feet, measuring from the encampment to the school entrance. AMC 15.20.020B.15b.ii.(B) directs that "The separation distance shall be measured from the lot line of the protected land use to the nearest illegal camp structure." Municipal GIS-based measurements indicate 328 feet. *See* Municipality's Ex. D, North Star GIS measurement. The Municipality inadvertently transposed two numbers in its Opposition to Expedited Consideration and reported the distance as 382 feet. The specific distance is immaterial to the issues presented in this case—whether the distance is 328 feet or 583 feet, there can be no dispute that the encampment is *proximate* to the school.

[4] North Star Elementary Profile, State of Alaska Department of Education & Early Development, https://education.alaska.gov/compass/ParentPortal/SchoolProfile?SchoolID=50500 (last visited February 8, 2025).

[5] Municipality's Ex. E, Calls for service.

[6] *Id*. at 2.

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received numerous complaints about this encampment from people who live in the neighborhood.[7] Neighbors report campers using the hillside as a trash can, littering the area with mattresses, buckets full of feces, bicycle parts, blankets, and toilet paper, and taking no effort to properly contain or otherwise dispose of those items and express concern about the fire hazard the site poses, noting one of the tents had installed a wood-burning stove.[8] As one neighbor reported, "Our neighborhood has become a trash pit."[9] Neighbors report that they have taken their own measures, at their own expense and risk, to remove truckloads of uncontained trash.[10]

Parks and Recreation, following up on community complaints, removed 1,180 pounds of trash that had slid down the hill onto Artic Boulevard's sidewalk (thus obstructing the actual right of way) beginning around November 6, 2024.[11] Parks and Recreation estimates that the Municipality alone has removed over 8,500 pounds—over four *tons*—of trash from the area around the encampment in the short window between November and January 31, 2025, at significant expense and use of human resources.[12] When trash from the encampment spills down the hill, it lands on the sidewalk that elementary school children use to get to the nearby school.[13] A neighboring business estimates activity from the encampment has cost it over $450,000 and damaged its

[7] Brown Aff. ¶ 7.
[8] Municipality's Ex. F , Community emails, including costs.
[9] *Id*. at 4.
[10] *Id*.
[11] Municipality's Ex. A at 1, previously filed.
[12] *Id*.
[13] This condition is evident in a video taken by a volunteer during a community cleanup effort on January 26, 2025. Ex. G, Video of sidewalk.

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reputation in the community because the encampment is perceived to be on the business's property.[14]

Physically, the encampment is not comprised solely of "tents" and "tarps."[15] The following excerpt from a February 5, 2025 photo (included together with other site photos in Exhibit C) shows that occupants of the encampment have built decks, fences, and structures on the municipal parcel:[16]

[14] Municipality's Ex. F at 11.

[15] *See* Plaintiffs' Mem. at 3 (Plaintiffs' shelter using "tents, tarps, and other ad hoc protection from the elements"), 13 (Plaintiffs rely on "tents, tarps, and blankets" to stay warm), 15 (referencing "tents, tarps, and other items used to protect themselves from the elements").

[16] This type of construction is in violation of many other portions of Municipal Code, including Title 23, which contains the Municipality's building code and fire code—both of which are designed to ensure that construction is safe for the occupants and the public.

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This photo also shows equipment for splitting wood and a pile of kindling, suggesting that the occupants regularly build woodfires. This occurs quite close to the neighboring business structure, visible at the right of the photograph. Fires in encampments are a well-known safety hazard in Anchorage, both for occupants and the surrounding neighborhood.[17] According to news reports, as recently as last week, a warming fire built too close to a building elsewhere in town caused the building to catch fire.[18]

Overall, by the time the abatement notice was posted, the encampment at issue in this suit had become a public nuisance—a severe public health and safety hazard that required abatement.

B. The Municipality of Anchorage Makes Case-by-Case Decisions to Abate Prohibited Camps on Public Property to Protect the Public Interest, with Prior Notice and Property Storage in Appropriate Circumstances.

The process for abating nuisance encampments is laid out in detail in Anchorage Municipal Code ("AMC").[19] Title 15, Chapter 20 empowers the Municipality to make

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[17] *'It's a wicked problem': AFD says no easy solution to homeless encampment fires*, Lex Yelverton, Alaska's News Source (Sept. 25, 2023), available at https://www.alaskasnewssource.com/2023/09/26/its-wicked-problem-afd-says-no-easy-solution-homeless-encampment-fires/.

[18] *Dozens of residents displaced, one injured in two-alarm apartment fire in Anchorage,* Anchorage Daily News (Feb. 6, 2025), *available at* https://www.adn.com/alaska-news/anchorage/2025/02/06/dozens-displaced-and-1-injured-by-two-alarm-apartment-fire-in-anchorage/. Note that the headline of this article refers to a different fire; the problematic warming fire is addressed at the end of the article and burned a vacant building.

[19] Anchorage Municipal Code is available online at https://library.municode.com/ak/anchorage/codes/code_of_ordinances. Code is frequently updated and changes typically take several months to be incorporated online. However, the version of AMC 15.20 that is available online as of the date of filing this brief is accurate and current.

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case-by-case determinations regarding the abatement of prohibited encampments. AMC 15.20's purpose is to provide a civil mechanism to "ensure that public nuisances are prevented, discontinued, and abated in a timely manner and do not reoccur."[20] Public nuisances are defined, in part, as "any act or condition that annoys, injures or endangers the safety, health, comfort or repose of the public."[21] As relevant here, Municipal code further provides that a "prohibited campsite" on public property "is subject to abatement by the [M]unicipality" of Anchorage.[22]

The camping abatement code requires advance notice of various durations in advance of abatement, an opportunity for appellate review of the abatement notice, and property storage in appropriate circumstances where notice is less than ten days or where appellate review is ongoing.

1. The code requires advance notice before abatement.

Except in "exigent circumstances posing a serious risk to human life and safety,"[23] all abatement requires advance notice.[24] "[A] notice of campsite abatement shall be posted on or near each tent, hut, lean-to, or other shelter designated for removal, or, if no structure for shelter exists, a notice shall be affixed in a conspicuous place near the bedding, cooking site, or other personal property designated for removal."[25] The posted notice must

[20] AMC 15.20.005. The Anchorage Municipal Code is available at https://library.municode.com/ak/anchorage/codes/code_of_ordinances (last accessed February 7, 2025).

[21] AMC 15.20.010.

[22] AMC 15.20.020B.15.

[23] AMC 15.20.020B.15.h.iii.

[24] AMC 15.20.020B.15.a.

[25] *Id.*

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state, among other things, the location of the prohibited encampment on public land, the code provision under which the encampment is prohibited, the specific abatement procedure to be used for the prohibited encampment, the means by which a camper may appeal to superior court and provide the Municipality notice of an intent to appeal, the consequences of filing such an appeal or intent to appeal (delay of abatement, or storage of property), and the "contact and location information for reclaiming" any stored property.[26] Notice shall "[a]lso be given orally to any persons in or upon the prohibited campsite or who identifies oneself as an occupant of the campsite."[27]

In addition to providing written and oral notice to campers, the code also requires notice of zone abatements, such as this instant case, to be provided to the Anchorage Health Department, community social service agencies, and community councils.[28] "The purpose of" such notice is to "encourage and accommodate the transition of campsite occupants to housing and the social service community network."[29] In addition to housing services made available by private partners and charities, this year, as in past years, the Municipality has entered into contracts with multiple providers to operate municipally funded congregate and non-congregate shelters, including food service, as well as a municipally funded warming site. At the time of filing, the Municipality had contracted to

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[26] *Id.*
[27] AMC 15.20.020B.15.a.v.
[28] AMC 15.20.020B.15.d.
[29] *Id.*

ensure the provision of at least 532 shelter beds per night through this winter.[30] The Municipality has also contracted for warming facilities, which are open nightly and provide safe, temporary overnight shelter.[31]

2. The code gives the Municipality multiple options for abatement with varying amounts of prior notice.

When the Municipality is deciding how to abate a specific prohibited encampment or particular zone of prohibited encampments, Municipal Code offers several different paths, depending on the duration of advance notice provided to campers. Where the Municipality provides less than 10 days' notice, the Municipality is required to store personal property removed from a prohibited encampment for at least 30 days.[32] And the Municipality is required to store personal property during the pendency of appellate review, even if the Municipality would otherwise be authorized to destroy such property.

The type of abatement notice relevant to the present case is the ten-day notice, without property storage (unless the abatement is appealed, which triggers a storage requirement). For this type of abatement, the Municipality may post notice on specific prohibited campsites or around a specific geographic zone of prohibited campsites "stating

[30] *See* Assembly Informational Memorandum (AIM) 194-2024 (Nov. 26, 2024), *available at* https://www.muni.org/Lists/AssemblyListDocuments/Attachments/1132714/AM%20951-2024.pdf.

[31] *See* AIM 1023-2024 (Dec. 19, 2024), *available at* https://www.muni.org/Lists/AssemblyListDocuments/Attachments/1141364/AM%201023-2024.pdf.

[32] AMC 15.20.020B.15.h.iii. (no-notice emergencies, with property storage); AMC 15.20.020B.15.h.iv. (one-hour notice for areas posted as closed, with property storage); AMC 15.20.020B.15.b.i. (24-hour notice for wildfire danger, with property storage); AMC 15.20.020B.15.b.iii. and AMC 15.20.020B.15.b.ii. (72-hour notice, with property storage).

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all personal property" at the posted campsite or within the posted zone not removed within 10 days after the notice is posted "may be removed and disposed of as waste."[33] Posted zones "shall be contiguous, reasonably compact, identifiable areas with boundaries that are recognizable," and "[a]t any one time, the municipality shall post no more than ten zones to be abated."[34] Notice of a zone abatement "shall be conspicuously posted under the circumstances and describe in detail the zone to be abated," and "[t]he notices shall be within sight of one another and reasonably maintained for the entire notice period."[35]

After written notice is posted and the prescribed notice period (such as 10 days) expires, and before an abatement commences, campers are given an additional verbal notice that "the campsite is prohibited and to be removed."[36] Before property is actively removed, campers are "given at least 20 minutes to gather their personal property and disperse from the area."[37] Municipal employees and contractors then go about carrying out the abatement of the prohibited encampment.

Where storage of personal property is required by code, the Municipality must store it for 30 days and post notice "with contact and location information for reclaiming personal property or disclaiming an interest in it."[38] "If a person reclaims stored personal property, it shall be released upon payment of an administrative fee not to exceed ten

[33] AMC 15.20.020B.15.b.iv. & v.
[34] AMC 15.20.020B.15.b.v.(D).
[35] AMC 15.20.020B.15.b.v.(A).
[36] AMC 15.20.020B.15.g.
[37] AMC 15.20.020B.15.g.i.
[38] AMC 15.20.020B.15.c.

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dollars."[39] "Junk, litter, garbage, debris, lumber, [and] pallets" are not stored,[40] but other personal property "in fair and usable condition and readily identifiable as such by persons engaged in removing a prohibited campsite, shall be deemed valuable and eligible for storage."[41]

3. The code provides for appellate review and property storage during such review.

Campers at a prohibited encampment or zone for which notice of abatement has been posted may seek appellate review. "A posted notice" is "a final administrative decision and appeals shall be to the [state] superior court within 30 days from the date the notice of campsite abatement is posted."[42] If a camper gives the Municipality notice of the camper's intent to appeal before the expiration of the abatement notice period, "the municipality shall not remove the personal property" of the appealing camper "until at least 30 days have passed from the date the notice was first posted,"[43] unless the Municipality "stores it until either the appeal is withdrawn, settled, or a decision is issued and any subsequent appeal rights expire."[44]

4. The Municipality prioritizes abatement of specific prohibited camps that threaten public safety and public health.

The abatement code generally leaves to the discretion of the Municipality decisions regarding how to use limited Municipal resources to abate specific prohibited

[39] *Id.*
[40] AMC 15.20.020B.15.c.i.
[41] AMC 15.20.020B.15.c.iii.
[42] AMC 15.20.020B.15.e.
[43] *Id.*
[44] AMC 15.20.020B.15.f.ii.

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encampments on public property. In exercising that discretion, the code directs the Municipality to prioritize abatement of prohibited encampments that are "proximate to protected land uses," including, among other things, the greenbelt trail system, schools, playgrounds, and community centers.[45] Internal Municipal policy sets out additional criteria, including, among other things, consideration of "[c]riminal activity," "[q]uantities of garbage, debris, or waste," "[o]ther active health, ecological, or safety hazards to occupants or the surrounding neighborhood," and "[t]he proximity of occupants to uses of special concern, including schools."[46]

C. Plaintiffs' Prohibited Encampment Was Prioritized for Abatement and Posted for 10-Day Zone Abatement Because It Had Become a Public Health and Safety Hazard.

On January 31, 2025, the Municipality posted notices and provided oral notice to individuals in the encampment informing occupants that the area would be abated starting Monday, February 10, ten days later.[47] The posted notice explained that the area was being abated because of its "proximity" to a "protected land use[]," such as the nearby "school[]," and because of "criminal activity" and "quantities of garbage, debris, and waste in the area."[48] The notice explained that campers had a right to appeal, which would secure

[45] AMC 15.20.020B.15.b. & b.ii.(A). "Protected land uses" may also affect timing of the advance notice; if an encampment is within 100 feet of a protected land use, it may be abated on only 72-hour notice, with property storage. AMC 15.20.020B.15.b.ii.

[46] Municipality's Ex. B. Anchorage Policy & Procedure 36-1, Code Enforcement for Public Health, Public Safety, and Ecological Hazards.

[47] Plaintiffs' Mot. for TRO, Exs. 3-4 (posted notices).

[48] *Id.* Ex. 3. The notice inaccurately referenced a 100-foot distance from a protected land use, but as noted *supra* at n.3, Code directs the Municipality to prioritize locations that are "proximate" to protected land uses, and there is no dispute that the encampment is

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their property in storage for the duration of the appeal.[49] The notice further explained that the abatement area is closed to camping and that personal property remaining in the abatement area at the end of the ten-day notice period "shall be removed and disposed of as waste."[50] The site is not zoned for residential use and it is not permitted for camping. The Municipality is thus authorized by code to close this particular piece of public property to camping and abate the public nuisance.

D. Plaintiffs Sued to Halt the Abatement of the Prohibited Encampment, Asserting a Constitutional Right to Occupy Public Property Indefinitely and Regardless of Harm to the Public Interest.

Plaintiffs are three individuals who allege that they are homeless and currently reside in the posted abatement zone. In requesting a temporary restraining order and preliminary injunction against abatement, Plaintiffs do not appear to challenge the consistency of the noticed abatement with the Municipal Code. They instead seem to contend that they have a constitutional right to continue to occupy this particular piece of municipal property regardless of the threat that this encampment poses to public health and safety. Plaintiffs claim that abating this specific prohibited encampment (1) constitutes banishment from the Municipality, violates the Eighth Amendment prohibition on cruel and unusual criminal punishments and its state equivalent, and infringes on a fundamental liberty interest in travel; (2) violates the Due Process Clause of the Fourteenth Amendment and its state equivalent because the Municipality provides no hearing before abatement;

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"proximate" to the protected land use here (North Star Elementary). The 100-foot distance would be relevant only if the Municipality had posted a 72-hour notice. *See supra* at n.45.

[49] Plaintiffs' Mot. for TRO, Exs. 3-4 (posted notices).

[50] *Id.*

and (3) violates the Fourth Amendment protections against unreasonable search and seizure and its state equivalent.

Represented by counsel from the ACLU of Alaska, Plaintiffs filed this suit in Anchorage Superior Court on February 6, 2025, at approximately 4:00 pm, nearly a week after the abatement was posted and requested that the Court immediately issue an *ex parte* temporary restraining order or preliminary injunction to halt the abatement. The Municipality has filed a separate motion opposing expedited consideration of that request. In this filing, the Municipality substantively opposes Plaintiffs' request for a temporary restraining order or preliminary injunction.

E. Plaintiffs' Filings Contain Fundamental Evidentiary Deficiencies.

Plaintiffs' evidence is inconsistent and incomplete and fails to support their extraordinary request for relief. As the Municipality noted in its Opposition to Plaintiffs' Motion for Expedited Consideration, Plaintiffs assert in their briefing that *all* Plaintiffs have resided in the encampment for eight months. This is not supported by their evidence: Mr. Dyer's affidavit states that he "can't remember" how long he has been at the encampment.[51] In fact, publicly-available information from official government sources directly contradicts Plaintiffs' assertion that Mr. Dyer has resided at the encampment for eight months. According to the State of Alaska Department of Public Safety Sex Offender/Child Kidnapper Registry, Mr. Dyer listed his address at a different location several miles away on July 12, 2024, less than seven months ago, undermining Plaintiffs'

[51] Plaintiffs' Ex. 2, ¶ 8.

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allegation that he has been there for eight months.[52] And Plaintiffs' original evidentiary submission did not include any evidence that Mr. Aguila lived at the encampment at all, an omission they did not remedy or even explain until today, when they filed their Motion to Supplement.

These examples show that Plaintiffs have asked this Court to issue an emergency order halting a long-planned, routine, and necessary municipal abatement based on a shaky record.

LEGAL STANDARDS

To obtain a restraining order or an injunction, a plaintiff must first meet the appropriate standard. The showing required to obtain relief depends on the nature of the threatened injury.[53] A party seeking a temporary restraining order carries the same burden as a party seeking a preliminary injunction.[54]

[52] State of Alaska Department of Public Safety Sex Offender/Child Kidnapper Registry Search, *available by searching* https://sor.dps.alaska.gov/Registry/Search (last visited February 11, 2025). Mr. Dyer's status is appropriate for judicial notice under Alaska Rule of Evidence 201(b)(2), as it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Notably, failure to timely update a changed address is a criminal violation. Under AS 12.63.010(c), registered sex offenders are required to update their address "by the next working day" following a change in residence; and, per guidance from the Department of Public Safety, "Offenders without a fixed residence address must provide a description of their physical location. Any changes to the physical location must be reported by the next working day," *available at* https://sor.dps.alaska.gov/ (last visited February 11, 2025).

[53] *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

[54] *See Alaska v. United Cook Inlet Drift Ass'n*, 815 P.2d 378 (Alaska 1991); *see also State v. Norene*, 457 P.2d 926, 934 n.5 (Alaska 1969) (Moody, J. dissenting).

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A plaintiff may obtain an injunction by meeting either 1) the balance of hardships standard, or 2) the probable success on the merits standard.[55] The Alaska Supreme Court adopted the balance of hardships standard as an alternative to the rule requiring a clear showing of probable success on the merits.[56]

The Supreme Court has articulated when the trial courts should apply the two standards:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits."[57]

As the Municipality demonstrates below, Plaintiffs meet neither standard.

ARGUMENT

This Court should deny Plaintiffs' request for a temporary restraining order and preliminary injunction because Plaintiffs have not met their burden of establishing entitlement to it. As the Supreme Court of Alaska has recognized, such preliminary equitable relief is "considered an extraordinary remedy never awarded as of right."[58]

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[55] *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

[56] *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970), *modified in other respects*, 483 P.2d 198 (Alaska 1971).

[57] *Metcalfe,* 110 P.3d at 978 (quoting *State v. Kluti Kaah Native Vill. Copper Ctr.,* 831 P.2d 1270, 1272-73 (Alaska 1992).

[58] *State v. Galvin*, 491 P.3d 325, 338 (Alaska 2021) (quotation marks omitted).

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Here, Plaintiffs have no likelihood of success on the merits of their claimed constitutional right to permanently occupy a specific parcel of public land. They have failed to show they will be irreparably harmed by removing their belongings from this particular abatement area or by allowing the Municipality to store those belongings until Plaintiffs reclaim them. And the balance of the equities and the public interest will be best served by permitting the Municipality to move forward with the abatement of a public nuisance that has created acute harm to the surrounding community. Declining to enjoin the abatement would allow the Municipality to address critical public health and safety concerns that gave rise to this abatement, such as criminal activity localized around the abatement zone, large quantities of trash and human feces some of which have spilled over onto public sidewalks, and the need to protect school children who walk on the sidewalk past that encampment to go to elementary school every day—and who currently do so by walking by one of the Plaintiffs who is a sex offender who has not registered as residing at the encampment.

A. Plaintiffs Are Not Likely to Succeed on the Merits Because There Is No Constitutional Right to Permanently Occupy Public Land with a Prohibited Encampment.

1. Abatement of this specific prohibited encampment on a particular parcel of municipal property does not banish or punish Plaintiffs.

Plaintiffs misconstrue Municipal Code in asserting that they "must violate the criminal code" in order to remain in Anchorage and that the abatement code constitutes a

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prohibited "banishment regime."[59] That is false. Plaintiffs are not being civilly fined, much less criminally punished, and they are not being banished.

The Municipality posted this specific zone for abatement under Title 15 of Anchorage Municipal Code (Environmental Protection), Chapter 20—the chapter of the *civil code* that addresses public nuisances.[60] Criminal trespass is addressed in a separate part of the code.[61] The posted abatement notice at issue here does not itself charge anyone with criminal trespass. It simply provides notice of civil abatement of this particular parcel. The criminal code does not generally criminalize camping per se. Remaining on public property becomes the crime of misdemeanor trespass under the Municipality's criminal code only in certain circumstances specified in code, as enforced by officers in case-by-case determinations. "A person commits the crime of criminal trespass if," for example, "the person … [k]nowingly enters or remains on public premises or property" that "is not open to the public" or "after the person has been requested to leave by someone with the apparent authority to do so."[62] Plaintiffs are thus not being criminally punished by the Municipality's decision to post their prohibited encampment for abatement under the civil code, and they are incorrect in asserting that their very presence in Anchorage is itself a violation of the criminal code.

Nor does this specific civil abatement notice "banish" anyone from Anchorage. The abatement notice merely advises that this particular abatement zone is closed to camping.

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[59] Plaintiffs' Mem. at 25.
[60] Plaintiffs' Ex. 3.
[61] AMC 8.45.010.
[62] AMC 8.45.010A.3.b.

The only direct consequence for Plaintiffs of this posted abatement is that anyone who may currently reside in the abatement zone will not be able to remain there after the end of the notice period. Plaintiffs have not been banished from Anchorage in general. The abatement code creates a civil process in which the Municipality may determine that a specific prohibited encampment on a particular piece of public property must be abated to serve the public interest.

The abatement code does not provide for simultaneous, universal zone abatements of all prohibited camping on all public property within the Municipality. Indeed, the Municipality is *prohibited* by code from noticing abatements in more than ten compact zones at one time.[63] And, in practice, the Municipality simultaneously notices far fewer abatement zones than that due to limited resources and the need to prioritize abating encampments that present the greatest threat to the public interest at any given time.

As Plaintiffs themselves recognize, Plaintiffs can comply with the civil abatement notice at issue here, and avoid any trespass liability, by moving themselves and their belongings out of the abatement zone. They complain that "[e]ven if Plaintiffs were to voluntarily leave their current site, any location they remove themselves to would be equally subject to abatement by the Municipality."[64] But there is no constitutional issue with the possibility that, if Plaintiffs leave the posted abatement zone, do not secure alternative shelter, and move their belongings to another parcel owned by the Municipality and continue to not find (or reject) alternative shelter, their next encampment could be

[63] AMC 15.20.020B.15.b.v.(D).
[64] Plaintiffs' Mem. at 15.

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abated by the Municipality at some point in the future if the Municipality determines that such encampment presents such a threat to the public interest that abatement is warranted under the circumstances (as is the case with the current abatement zone). If that were to occur, Plaintiffs would yet again have notice and opportunity to protect their interest in their unabandoned property, just as they do now.

The Municipality has the responsibility and the power to exercise its policy discretion to use the civil abatement process on a case-by-case basis to protect the public interest to the best of its ability in light of its limited resources and the need to balance competing considerations. There is no basis in law—and Plaintiffs cite none—for the courts to prevent the Municipality from exercising that power here and grant Plaintiffs an indefinite license to reside on this particular piece of public land regardless of the specific harms it causes to the public safety and public health, including the risks it poses to children walking to school.

Because the code does not enact the criminal banishment regime Plaintiffs imagine, none of their arguments concerning the constitutional limitations on criminal punishment, such as the prohibition on cruel and unusual punishment, are relevant here.[65] Initiating a

[65] Such Eighth Amendment arguments have, moreover, been foreclosed by the U.S. Supreme Court's recent decision in *City of Grants Pass v. Johnson*, which confirmed that the Eighth Amendment applies specifically and narrowly to punishment imposed after an actual criminal conviction. 603 U.S. 520, 542-43 (2024). At least one other state court has since dismissed claims brought by the ACLU on behalf of homeless plaintiffs. *Feet Forward v. City of Boulder*, Order Re Defendants' Mot. to Dismiss Plaintiffs' Amended Complaint, Case No. 2022CV30341, at 2, 20 (Boulder Cnty. Dist. Ct., Colo. Dec. 6, 2024), *available at* https://www.aclu-co.org/en/cases/feet-forward-et-al-v-city-boulder-et-al (link at bottom of page) (last visited Feb. 11, 2025).

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civil abatement procedure is not a criminal punishment of any person who previously resided in the abatement zone. It is an exercise of the government's general power to protect the public welfare from the particular nuisance caused by a specific prohibited encampment. Being ordered to abate a particular nuisance is not a punishment at all, much less a cruel or unusual one.[66]

Nor is a case-by-case abatement process a violation of anyone's fundamental liberty interests. Plaintiffs rely on an inapposite case explaining that "the right[] to move about" is fundamental and upholding a *general* youth curfew—applicable throughout the city—against constitutional challenge under heightened scrutiny.[67] Neither that case nor any other of which the Municipality is aware stands for the proposition that indefinitely occupying a particular piece of public property of one's choosing and using it to create public health and safety problems for neighbors is a fundamental right.[68]

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[66] Plaintiffs assert, without explanation, that the abatement code is unconstitutionally vague. *See* Plaintiffs' Mem. at 26. But a statute is unconstitutionally vague only if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). And Plaintiffs understand exactly what they must do to comply with the posted abatement notice, as their Memorandum elsewhere makes clear in stating that Plaintiffs can comply by voluntarily leaving the abatement zone before the close of the notice period.

[67] *Treacy v. Mun. of Anchorage*, 91 P.3d 252, 264-65 (Alaska 2004).

[68] The Municipality is also unaware of any cases holding that civil or criminal laws restricting the public's ability to use specific parcels of public land for particular purposes must be subject to heightened scrutiny. Even were heightened constitutional scrutiny thought to be applicable here, this abatement action would satisfy heightened scrutiny by directly serving a compelling governmental interest by safeguarding public health and safety, as described above.

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2. Due process does not mandate a hearing before the Municipality decides whether to abate, and ten-days' notice provides adequate opportunity to protect Plaintiffs' property.

Plaintiffs do not assert that they own, lease, or rent the property on which they have located their prohibited encampment, and they do not dispute the Municipality's ownership of that property. Accordingly, the only property interest Plaintiffs invoke for purposes of their due-process claim is their interest in retaining unabandoned personal possessions. The Municipality's abatement procedures give Plaintiffs adequate notice and opportunity to protect that interest.

Here, Plaintiffs were provided with ten-days advance notice before the abatement action was scheduled to begin and were specifically informed that any property left in the abatement zone at the time the abatement commences would be subject to abatement (absent an appeal) or would be stored (if an appeal were filed).[69] Indeed, Plaintiffs admit in briefing and affidavits that they were aware of the notices at the time they were posted.[70] Plaintiffs thus received actual notice of what they would have to do to protect their interest in unabandoned personal property: either remove those possessions from the abatement area themselves or, with the filing of the appeal, allow the Municipality to store eligible possessions for a period of time until Plaintiffs retrieve them. Plaintiffs have thus had every opportunity to protect their property interests and have taken steps here to do so by filing this original action, which the Municipality will treat as an appeal for purposes of triggering the property storage requirement in code. No further process is required.

[69] Plaintiffs' Mot. for TRO, Ex. 3-4 (posted notice).

[70] Plaintiffs' Ex. 1 ¶ 19 (Dyer Affidavit); Ex. 2 ¶ 19 (Scarborough Affidavit).

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Plaintiffs do not allege they failed to receive or understand notice. Nor do they contend that, under the circumstances here, they lacked an adequate opportunity to protect their property interests by removing their possessions from the abatement zone in the allotted time. Plaintiffs do assert that, "[i]f forced to leave my current location, I will almost certainly lose some of the possessions that I depend on."[71] But their concern that abatement could result in destruction of any items they "can't carry away *at the time*"[72] says nothing about whether they reasonably could have protected their unabandoned belongings by starting the removal process when they first received notice of the impending abatement ten days before it was scheduled to begin.

Rather than seriously challenge the adequacy of the notice provided here, Plaintiffs instead seem to contend that the state or federal constitutions require that, before the Municipality decides to abate a prohibited encampment on municipal property, the Municipality must first hold a hearing to adjudicate … something. But Plaintiffs do not specify what legal or factual matters such a hearing should decide. Here, for example, Plaintiffs do not identify any relevant facts in dispute. They do not dispute that the Municipality owns the property on which the prohibited encampment is located. They do not dispute that they are camping on that property. They do not dispute that their prohibited encampment is within the geographic zone identified by the posted abatement notice. They thus do not dispute the facts relevant to the Municipality's legal entitlement to abate this particular public nuisance on municipal property.

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[71] Plaintiffs' Ex. 1 ¶ 25 (Dyer Affidavit); Ex. 2 ¶ 25 (Scarborough Affidavit).
[72] Plaintiffs' Ex. 2 ¶ 26 (Scarborough Affidavit) (emphasis added).

Plaintiffs seem to assert that, in their view, this specific prohibited encampment should not have been selected for abatement by municipal policymakers because Plaintiffs would weigh the policy considerations differently.[73] But policymaking is committed to the discretion of municipal officials, not to Plaintiffs or this Court. And Plaintiffs cite no case holding that the Due Process Clause creates a right to individual participation in internal executive-branch policymaking decisions about what to do with municipal property. There is no such due process right to participate in internal executive branch policymaking, and that reality resolves Plaintiffs' due process challenge.

Nor does the application of general due process principles require a pre-abatement hearing. "The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it."[74] The type of notice and opportunity required by due process in a "particular situation" hinges on a three-factor "analysis of the governmental and private interests that are affected" in that situation.[75] The Court must thus consider: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[76]

[73] *See* Plaintiffs' Mem. at 21-24.
[74] *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (cleaned up).
[75] *Id.* at 334.
[76] *Id.* at 335.

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That test tilts strongly in favor of upholding the abatement procedure at issue here. On the first factor, the Municipality recognizes the basic property interest shared by everyone in "the continued ownership of their [unabandoned] personal possessions."[77] But even if Plaintiffs were not deemed for purposes of the Due Process Clause to have formally abandoned property that they knowingly leave in an abatement zone upon the expiration of the ten-day notice period, *see infra*, the strength of Plaintiffs' interest in continued ownership of that property would be diminished in proportion to the duration of pre-abatement notice and the meaningful opportunities available to protect that property. Accordingly, Plaintiffs' private interest in this case–maintaining their possessions on public property for more than ten days after receiving notice of abatement–is, at best, a sharply diminished one.

On the second factor, there is little risk of erroneous deprivation of private property in light of existing procedures that give Plaintiffs ample opportunity to remove their personal possessions from a ten-day abatement area or to otherwise secure storage before the abatement is carried out. Among other things, the Municipality must provide written and oral notice at least ten days before the abatement stating the location of the prohibited encampment, the reason it is prohibited, when abatement will occur, the means by which a camper may appeal to state court, the consequences of filing such an appeal (delay of abatement, or storage of property), and how to reclaim any stored property after an abatement.[78] During the pre-abatement notice period, campers who wish to retain their

[77] *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1031 (9th Cir. 2012).
[78] *See* AMC 15.20.020B.15.a., 15.b.iv., and 15.b.v.

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personal possessions may do so by removing it themselves. Before commencing the abatement, the Municipality must first confirm whether an appeal has been filed or noticed, and it must store the property of anyone who has appealed.[79] When the abatement commences, the Municipality must give campers an additional 20 minutes to gather any remaining items and must not stop campers from removing such items themselves.[80]

Only after forgoing all of those opportunities to retain possession of their personal items would Plaintiffs then face any risk of deprivation of their property upon the commencement of the posted abatement. As noted above, Plaintiffs do not allege that, in their particular situation, these existing procedures gave them constitutionally insufficient opportunity to retain their property if Plaintiffs had begun to remove at the outset of the ten-day notice period. Nor do Plaintiffs explain how any further process would meaningfully reduce the risk of erroneous deprivation without significantly impeding the goals the Municipality seeks to achieve by abating prohibited encampment in the first place.

On the third factor, the Municipality has a vital interest in abating prohibited encampments. As courts have recognized, the government has "a substantial interest in ensuring that public property is available for use by everyone."[81] Encampment abatement serves important interests of protecting the public health; the environment; and the safety of the public from property and security threats. Adding significant new procedural

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[79] *See id.* 15.f.; 15.c.

[80] *See id.* 15.g.

[81] *De-Occupy Honolulu v. City & Cnty. of Honolulu*, No. 12-cv-668, 2013 WL 2285100, at *6 (D. Haw. May 21, 2013).

protections before the Municipality may abate prohibited camping would thus harm the public interest by impeding these objectives. Additional process "would certainly increase the administrative burden of ensuring that public property is available for use by the entire public, and as explained above, would add little procedural safeguard of preventing erroneous deprivation."[82] Accordingly, no pre-abatement hearing is constitutionally required.

3. Abating a nuisance is not an unreasonable search or seizure.

Abating a public nuisance by removing a specific prohibited encampment after a ten-day notice period is not an unreasonable search and seizure.

First, abating property left in an abatement zone after the close of the notice period is not a "search" of such property. As the United States Supreme Court has explained, the physical invasion of a property interest "alone does not qualify" as a search where, as here, it is not "conjoined with . . . an attempt to find something or to obtain information."[83]

Nor does the process of conducting the abatement by removing property left behind constitute a search by invading any reasonable expectation of privacy. Municipal employees and contractors conducting an abatement are seeking to throw away remaining abandoned property (or store any property required to be stored). They are not seeking to gain information from the property they are throwing away. And courts have "uniformly held that a person has no reasonable expectation of privacy in a temporary structure illegally built on public land, where the person knows that the structure is there without

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[82] *Id.*

[83] *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012).

permission and the governmental entity that controls the space has not in some manner acquiesced to the temporary structure."[84]

Accordingly, "where erecting a structure in the public space is illegal and the person has been so informed and told that the structure must be removed, there is no reasonable expectation of privacy associated with the space."[85] Nothing about the Alaska Constitution's express protection for privacy changes that fundamental principle. Where, as here, the Municipality has specifically informed a person that a prohibited encampment is prohibited and must be removed by a date certain, the Municipality's act of removing the encampment at the appointed time does not constitute a "search" in violation of any reasonable expectation of privacy.

Second, the abatement of property left behind after the expiration of a ten-day notice period is not a "seizure" of any property interest. There is "nothing unlawful in the Government's appropriation of … abandoned property,"[86] and municipal law and posted abatement notices expressly provide that "[a]t the expiration of the notice period any

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[84] *State v. Tegland*, 344 P.3d 63, 67 (Or. Ct. App. 2015) (quotation marks omitted); *see id.* at 67-68 (surveying cases).

[85] *Id.* at 69 (quotation marks omitted); *accord Amezquita v. Hernandez-Colon*, 518 F.2d 8, 11 (1st Cir. 1975) ("The plaintiffs knew they had no colorable claim to occupy the land" and "had been asked twice by Commonwealth officials to depart voluntarily. That fact alone makes ludicrous any claim that they had a reasonable expectation of privacy."); *United States v. Ruckman*, 806 F.2d 1471, 1472-73 (10th Cir. 1986) (holding the Fourth Amendment inapplicable because a camper "was admittedly a trespasser on federal lands," the government had "the power to control [the land's] occupancy and use," and the camper had been given no right of occupancy); *United States v. Sandoval*, 200 F.3d 659, 661 (9th Cir. 2000) (holding that the Fourth Amendment could apply to an encampment on federal land where, among other things, the camper may not have been prohibited from camping in that location and where the camper had not been noticed to vacate).

[86] *Abel v. United States*, 362 U.S. 217, 241 (1960).

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personal property in the [noticed abatement] zone may be disposed of as waste."[87] The Municipality may thus reasonably treat any property left in an abatement zone after the close of a reasonable notice period as having been abandoned for purposes of constitutional provisions regarding due process and search and seizure.[88] Plaintiffs allege no facts supporting a conclusion that the notice they received was not "reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the [abatement] and afford [them] an opportunity" to remove their property.[89]

Under these circumstances, where Plaintiffs have chosen to store belongings on public property subject to a noticed abatement (apparently permanently) despite advance notice and adequate opportunity to remove any personal property, this Court may reasonably conclude that the Municipality does not interfere with Plaintiffs' possessory interests in the property, and thus does not seize property within the meaning of the Fourth Amendment or the Due Process Clause, because Plaintiffs had abandoned that property.[90]

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[87] AMC 15.20.020B.15.b.v.(B); Plaintiffs' Ex. 3.

[88] In Alaska, abandonment can be accomplished by, among things, leaving property "in a public place where anyone might discover and take possession of the property." *Young v. State*, 72 P.3d 1250, 1254 (Alaska Ct. App. 2003); *cf. United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983) (finding that suspect abandoned a satchel by leaving it in a publicly accessible space during a police chase because "his ability to recover the satchel depended entirely upon fate and the absence of inquisitive (and acquisitive) passers-by").

[89] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

[90] *See Proctor v. District of Columbia*, 310 F. Supp. 3d 107, 114 (D.D.C. 2018) ("Ms. Braxton's tent and other property appear to have been destroyed when Ms. Braxton walked away from it at the beginning of a cleanup, despite having more than two-weeks' notice that the cleanup would take place.").

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The Ninth Circuit has expressly declined to identify any "constitutionally-protected property right to leave possessions unattended on public" property *indefinitely*.[91] Plaintiffs do not plausibly allege that ten-day notice before the destruction of remaining property as abandoned is constitutionally inadequate as applied to their circumstances. And Plaintiffs do not specify what longer notice period, if any, would have been required before personal property could be deemed abandoned and destroyed. Plaintiffs thus does not plausibly allege any interference with a protected property interest within the meaning of the Fourth and Fourteenth Amendments or their state equivalents.

Third, in any event, even if Plaintiffs have not abandoned their property and, and even if abatement of that property constituted a seizure within the meaning of the Fourth Amendment, "[t]he question then becomes whether the [Municipality], in seizing [Plaintiffs'] property, acted reasonably under the Fourth Amendment."[92] Assessing the reasonableness of the Municipality's abatement action requires the Court to "balance[] the invasion of [Plaintiffs'] possessory interests in [their] personal belongings against the [Municipality's] reasons for taking the property."[93] Applying that test here, the Municipality's abatement procedures are reasonable, and this Court can uphold the challenged portion of the Municipality's abatement code on that basis.

Abatement of prohibited camping on public property serves vital public interests. The abatement procedures at issue here were enacted by the Anchorage Assembly in the

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[91] *Lavan*, 693 F.3d at 1031.
[92] *Lavan*, 693 F.3d at 1030 (quotation marks omitted).
[93] *Id.*

public-nuisance chapter of the title of the Anchorage Municipal Code addressing environmental protection. That chapter prohibits any "public nuisance" that, among other things, "injures or endangers the safety, health, comfort or repose of the public,"[94] and it provides mechanisms for the abatement of such nuisances "to ensure that public nuisances are prevented, discontinued, and abated in a timely manner and do not reoccur."[95] The chapter specifically includes within the definition of a public nuisance "[a] prohibited campsite," defined as "an area where one or more persons are camping on public land in violation of" municipal code.[96]

Prohibited campsites on public property harm the public interest. Abating prohibited encampments protects public property from concentrated accumulations of human excrement and hazardous trash and from environmental degradation.[97] And it protects public health and public safety from the well-known public safety threats that can be posed by prohibited camping.[98] Indeed, those vital public interests are well served by

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[94] AMC 15.20.020A.; AMC 15.20.010.

[95] AMC 15.20.005.

[96] AMC 15.20.020B.15.

[97] *See* Assembly Ordinance ("AO") No. 2018-53(S), As Amended (June 26, 2018), *available at* https://library.municode.com/ak/anchorage/ordinances/code_of_ordinances?nodeId=899034 (recognizing that "the recent growth of illegal campsites necessitates … comprehensively clean[ing]-out hazardous areas in our parks and on other public lands").

[98] *See, e.g.*, *id.* (recognizing that the "presence of illegal campsites on Municipal property creates public health and safety issues for both the campers and the public at large"); AO 2017-130(S) (Dec. 5, 2017), *available at* https://www.muni.org/Lists/AssemblyListDocuments/Attachments/664789/AO%202017-130(S)%20OCR.pdf (whereas clause recognizing that "many homeless people have died along greenbelts at illegal campsites"); Assembly Memorandum ("AM") 685-2017 (Sept. 26, 2017), *available at* https://www.muni.org/Lists/AssemblyListDocuments/Attachments/

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the abatement at issue in this case, where this specific encampment has created a public safety hot spot with unusually high levels of criminal activity centered on the encampment, as well as vast quantities of uncontained trash and human feces that have obstructed municipal right of way on which young children walk to the nearby school.[99]

In light of the vital importance of those government interests, the Anchorage Assembly reasonably decided to allow for abatement of prohibited campsites on public property after ten-days of prior notice, combined with all of the other procedural protections of the code (including additional oral notice and time to gather belongings when the abatement begins, appeal, and storage of property during appeal). The Assembly explained in prefatory clauses enacting the ten-day period that the Assembly selected that notice period in order to "preserv[e] adequate notice and due process protections for the public."[100] And the memorandum to the Assembly accompanying the draft ordinance establishing the ten-day period explained that the Assembly "s[ought] a compassionate balance between removal of illegal camps and the rights of the homeless," and reasonably concluded that "[a] ten-day rule strikes this balance by allowing sufficient notice for a homeless person to protect or remove their possessions but also assuring the community that the prohibition on illegal camping is being effectively enforced."[101]

664788/AO%202017-130%20OCR.pdf (memorandum introducing ordinance to the assembly, explaining that "[m]any community councils… approached the assembly with concerns" that residents "feel unsafe near and sometimes threatened by the people occupying the illegal campsites").

[99] *See supra* Background Part A.

[100] AO 2017-130(S) (for hyperlink see *supra* n.99).

[101] AM 685-2017 (for hyperlink see *supra* n.99).

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Case law supports the Assembly's reasonable conclusion that ten-days of prior notice, combined with the other procedural protections available under the code, adequately protect campers' interest in retaining their personal property when the Municipality decides to abate a prohibited camp to advance the public interest.

A few litigated cases involve procedures in other jurisdictions that far exceed any constitutional minimum of prior notice or storage after abatement, such as over a month of advance notice and three months of storage post-abatement.[102] Other litigated cases involve abatement procedures that fall far below constitutional minimums by providing for no prior notice and either no post-abatement storage or storage for only a few days without prior notice. In *Lavan*, for example, the Ninth Circuit held that immediate abatement and destruction of property without any prior notice and without any post-abatement storage and opportunity to reclaim items violated the Fourth and Fourteenth Amendments.[103] Similarly, a district court in the Ninth Circuit has held that a policy of providing no advance notice and storing seized items for only 2 days before destroying them violated

[102] *See Cobine v. City of Eureka*, No. C 16-02239 JSW, 2016 WL 1730084, at *4 (N.D. Cal. May 2, 2016) (upholding against Fourth and Fourteenth Amendment challenges an abatement with 41-days advance notice and 90-days storage of certain items); *Acosta v. City of Salinas*, No. 15-cv-05415 NC, 2016 WL 1446781, at *2, *5-8 (N.D. Cal. Apr. 13, 2016) (upholding against unspecified constitutional challenge an abatement procedure involving 15-day notice with 90-day storage of certain limited items); *Proctor*, 310 F. Supp. 3d at 110-11 (14-day notice and 60-day storage of unabandoned property).

[103] 693 F.3d at 1029 n.8, 1030-33; *see also Phillips v. City of Cincinnati*, 479 F. Supp. 3d 611, 646-47 (S.D. Ohio 2020) (holding that no prior notice of abatement combined with a failure to explain to property owners how to obtain any property that may have been stored violates due process and the Fourth Amendment); *Mitchell v. City of Los Angeles*, No. CV 16-01750 SJO, 2016 WL 11519288, at *3, *5 (C.D. Cal. Apr. 13, 2016) (same).

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the Fourth and Fourteenth Amendments.[104] Most litigated cases uphold abatement procedures that provide modest advance notice of 1 to 3 days before an abatement action commences and 30 to 90 days of storage of certain property after an abatement.[105]

The case law does not establish a specific constitutional minimum of time that jurisdictions must afford campers to enable them to retain their property. The cases do suggest a sliding scale: jurisdictions that provide for little or no advance notice before an abatement must provide for post-abatement storage to give owners a meaningful opportunity to reclaim abated property. And jurisdictions that provide greater advance notice before an abatement, and thus give property owners a meaningful opportunity to retain their property by removing it themselves before an abatement, may provide little or no post-abatement opportunity to reclaim abated property.

Courts have thus upheld abatement procedures where campers are given *no* advance notice of an abatement but were afforded 30 days to get their property out of storage before

[104] *Riverside All of Us or None v. City of Riverside*, No. 5:23-cv-01536, 2023 WL 7751774, at *5 (C.D. Cal. Nov. 14, 2023).

[105] *See O'Callaghan v. City of Portland*, No. 3:12-CV-201, 2013 WL 5819097, at *4-5 (D. Or. Oct. 29, 2013) (1-day notice and 30-day storage); *Hooper v. City of Seattle*, No. C17-0077, 2017 WL 591112, at *5, *7 (W.D. Wash. Feb. 14, 2017) (3-day notice and 60-day storage of certain items); *Riverside All of Us or None*, 2023 WL 7751774, at *5 (2-day notice and 90-day storage); *Yeager v. City of Seattle*, No. 2:20-cv-01813, 2020 WL 7398748, at *1, *4-5, *6-7 (W.D. Wash. Dec. 17, 2020) (2-day notice and 70-day storage of certain items); *De-Occupy Honolulu*, 2013 WL 2285100, at *2, *6 (1-day notice and 30-day storage); *Miralle v. City of Oakland*, No. 18-cv-06823, 2018 WL 6199929, at *3 (N.D. Cal. Nov. 28, 2018) (3-day notice and 90-day storage); *Phillips*, 479 F. Supp. 3d at 643-44 (3-day notice and storage of unspecified duration).

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it would be destroyed after an abatement.[106] And courts have upheld abatement procedures that provide somewhat greater advance notice and significantly less post-abatement storage. For example, in *Sullivan v. City of Berkeley*, the federal District Court upheld a policy that, "unlike the policy under attack in *Lavan*," gave the plaintiffs "notice that their property will be seized and 72 hours to make arrangements to move their property," with storage generally available for 14 days thereafter before destruction.[107]

Perhaps because so few litigated cases involve abatement procedures that provide for a pre-abatement notice period nearly as long as the Municipality's ten-day notice, to the Municipality's knowledge no litigated case has yet addressed whether a pre-abatement notice period of that duration obviates the need under the Constitution to provide for post-abatement storage for everyone (and not just those who appeal and thereby obtain a right to storage as under the Municipality's code, as, again, Plaintiffs have here). This Court should uphold the 10-day pre-abatement notice period at issue here for the same reason that courts have upheld no-notice abatement combined with post-abatement storage.

What is essential for the reasonableness of any procedure is that a property owner have a reasonable opportunity to protect his or her private property interest—whether before or after an abatement—without unduly interfering with the vital public interest in protecting public property and public safety. Pre-abatement notice gives property owners

[106] *See Russell v. City & Cnty. of Honolulu*, Civil No. 13-00475, 2013 WL 6222714, at *8, *12 (D. Haw. Nov. 29, 2013) (no notice, 30-day storage); *Watters v. Otter*, 955 F. Supp. 2d 1178, 1189-91 (D. Idaho 2013) (no notice, 90-day storage).

[107] *Sullivan v. City of Berkeley*, No. 17-cv-06051, 2017 WL 4922614, at *2, *6 (N.D. Cal. Oct. 31, 2017).

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at least as much opportunity to avoid erroneous destruction of their property as post-abatement storage. Indeed, in the trade-off between pre-abatement notice and post-abatement storage, pre-abatement notice is more valuable because it occurs when campers still have unfettered opportunity to control, use, and move or otherwise dispose of their own property at will, before the Municipality comes into possession of it. A ten-day notice period and opportunity to secure private property before abatement of a prohibited camp on public property is thus reasonable and constitutionally permissible.[108]

The reasonableness of the ten-day standard is confirmed by the litigation that led to its adoption. The Municipal Code had previously provided for twelve-hour notice when first enacted in 2009 and then five-day notice when amended in 2010.[109] When those procedures were challenged on due process and search and seizure grounds, the superior court emphasized that "the State and Municipality typically provide individuals with a minimum of 10 to 15 days before classifying property as abandoned," and, without identifying an absolute constitutional minimum, concluded that five-day pre-abatement notice fell too far below that typical standard.[110] The Municipality should not be faulted for adjusting its pre-abatement notice in precisely the way implied by that prior case.

[108] *Cf. Crane v. City of Dunsmuir*, No. 2:21-cv-0022, 2022 WL 159036, at *2, *3 (E.D. Cal. Jan. 18, 2022), *report and recommendation adopted*, 2022 WL 493123 (E.D. Cal. Feb. 17, 2022) (concluding that 16-day period to remove property from inside a condemned building did not violate Constitution).

[109] *See Engle v. Mun. of Anchorage*, No. 3AN-10-7047 CI, 2011 WL 8997466 (Alaska Super. Ct. Jan. 04, 2011) (unfortunately unpaginated on Westlaw).

[110] *Id.*

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Plaintiffs identify no basis for concluding that the (at least) ten days of pre-abatement notice they concede they received here falls below any constitutional minimum. Plaintiffs offer no administrable basis for drawing a line of constitutional significance between 10 or 15 days. Indeed, Plaintiffs offer no notice period after which, in their view, the Municipality *could* proceed to abate a prohibited encampment—an encampment on public property that Plaintiffs have no right to occupy. The Court should thus recognize that ten days of pre-abatement notice is constitutionally reasonable within the meaning of the Fourth Amendment and its state equivalent, particularly, as here, when paired with the opportunity for appeal and property storage pending the resolution of appeal. At a minimum, this Court should conclude that Plaintiffs have failed to establish any likelihood of success on the merits of the constitutional issues they only briefly address in their motion for extraordinary preliminary equitable relief.

B. Plaintiffs Will Not Be Irreparably Harmed by Leaving the Abatement Area that Is Closed to Camping and Removing Their Belongings (or Allowing the Municipality to Store Them).

Plaintiffs have not shown irreparable harm. Plaintiffs will not have their belongings destroyed if the abatement proceeds. Because Plaintiffs have initiated a legal challenge to the abatement, the Municipality will not dispose of Plaintiffs' property if it remains in the encampment after the ten-day notice period has elapsed. Instead, the Municipality will place Plaintiffs' belongings into storage for the pendency of this litigation, as contemplated by code,[111] for later retrieval by Plaintiffs. Plaintiffs' stated concern in their affidavits

[111] *See* AMC 15.20.020B.15.f.ii. This provision, strictly speaking, applies to administrative appeals of abatement actions, not original actions, but the Municipality

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regarding the potential destruction of property during the abatement is therefore not a valid basis for preliminary injunctive relief.

Indeed, Plaintiffs seem to now agree. In their reply in support of their motion for expedited consideration, Plaintiffs implicitly recognize that storage obviates concerns over potential destruction. Plaintiffs now argue that storage is itself a potential problem because stored items "will not be available for Plaintiffs' use."[112] That contention overlooks that Plaintiffs can recover stored items they wish to use simply by calling the phone number provided on the posted abatement notice.[113] Moreover, Plaintiffs may ensure their own continued access to their property by removing it from the abatement zone themselves before abatement begins.

Plaintiffs will no longer be able to camp in the abatement zone. But they are not irreparably harmed by being required to leave this particular parcel of municipal property, which they are not entitled to occupy and which has now been posted as closed to camping. As explained in Part A.1 of the Argument above, the abatement of the particular property at issue here does not in any sense "banish" Plaintiffs from the city. As they well know, they can comply with the abatement order merely by removing themselves from this particular abatement area. Plaintiffs do not want to do so. But they fail to identify any

considers the present suit similar enough that it will honor the storage provisions provided in AMC 15.20.020B.15.f.ii., and store all items as detailed in AMC 15.20.020B.15.c.

[112] Plaintiffs' Reply in Supp. of Mot. for Expedited Consideration at 2.

[113] Plaintiffs' Ex. 3 (abatement notice stating that "[t]o recover or disclaim an interest in other stored property, call" a provided number); AMC 15.20.020B.15.c. (requiring posted notice to provide "information for reclaiming personal property or disclaiming an interest in it").

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authority for the proposition that their forthcoming inability to continue to camp in their preferred current location constitutes cognizable harm of any kind, much less significant or irreparable harm warranting the extraordinary remedy of preliminary injunctive relief.

C. The Balance of the Equities and the Public Interest Weigh in Favor of Abatement of This Prohibited Encampment, Given Its Threat to Public Health and Safety and Given Plaintiffs' Dilatory Litigation Tactics.

In any event, a temporary restraining order or preliminary injunction is not warranted here because the balance of the equities, and consideration of the public interest, weigh strongly in favor of the Municipality. As the Alaska Supreme Court has explained, "[e]ven if a party requesting preliminary injunctive relief satisfies the requirements of the probable success on the merits standard, a court has the discretion to deny the requested relief if granting it would imperil the public interest."[114] Accordingly, this Court could resolve Plaintiffs' motion by assuming, without deciding, the other matters presented in the motion and denying preliminary equitable relief on the ground that the equities and public interest favor abatement.

As explained above, Plaintiffs' articulated harms are limited to being forced to remove themselves from this particular abatement zone. The magnitude of that asserted harm is diminished by Plaintiffs' own relative lack of urgency in seeking relief. Plaintiffs—represented by sophisticated counsel with extensive experience in this area of law—waited nearly a week to seek relief in this Court after the abatement notice was posted. Even filing one or two days sooner would have allowed the Municipality a better

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[114] *Galvin*, 491 P.3d at 339.

opportunity to respond, the Court a better opportunity to consider the issues and rule further in advance of abatement, and Plaintiffs more time to adapt to a potentially adverse decision. That Plaintiffs did not take that opportunity to advance their own interests by filing earlier speaks to the relative weakness of their underlying articulated harms.

The weightiness of Plaintiffs' interest is further reduced by the inconsistent factual record regarding their residence in the abatement zone. Plaintiff Dyer's affidavit asserting residence at the camp is at the very least in tension with his status as a registered sex offender whose current stated place of residence at the time of writing was in another neighborhood, not this prohibited encampment in close proximity to a neighborhood elementary school and the children who walk to it every school day.[115]

In any event, even if Plaintiffs had articulated cognizable harms supported by an adequate evidentiary record, any such harms would be outweighed by the public interest. Contrary to Plaintiffs' assertions, the harm to the public of allowing the public nuisance created by their prohibited encampment is far from "negligible,"[116] and they have not resided in that prohibited camp "without incident."[117] As explained in Part A of the Background section above, the prohibited encampment at issue here is being abated in light of the encampment's significant and persistent threats to public health and safety. Those threats, as described in more detail above, include an unusually high concentration of reports of criminal activity and calls for police service in the area localized on the

[115] *See supra* Background Parts A and E.
[116] Plaintiffs' Mem. at 13.
[117] Plaintiffs' Mem. at 16.

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encampment; numerous complaints from neighbors regarding vast accumulations of uncontained waste, including bicycle parts and human feces, and waste rolling down the slope from the encampment to obstruct the sidewalk below; the devotion of significant municipal resources to clean up that uncontained waste, including the removal of over four *tons* of waste over just a few months; and the proximity of the encampment and these health and security threats to a neighborhood elementary school and a sidewalk that young children use to walk to school nearly every day.[118]

Plaintiffs may think these harms to the public are of little or no weight. But they are wrong. The Municipality is the public entity charged with making the policy decisions determining the gravity of the threat and protecting the public from such threats. As such, the Municipality is and must remain empowered to protect the public from the harms posed by this prohibited encampment. Plaintiffs identify no basis for concluding that the interests of all the neighbors and children negatively impacted by this encampment, added together, are outweighed by the desire of three particular Plaintiffs to camp in this abatement zone regardless of the encampment's effects on others.

CONCLUSION

As demonstrated by the argument above, Plaintiffs have not met the high bar required to be granted a temporary restraining order or injunction in this case. The Court should deny Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction because Plaintiffs have no likelihood of success on the merits of their claimed

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[118] *See supra* Background Part A.

constitutional right to permanently occupy a specific parcel of public land that has been closed to camping to protect the public interest; Plaintiffs have failed to show they will be irreparably harmed by removing themselves and their belongings from the abatement area (or by allowing the Municipality to store those belongings for them until they retrieve them); and the balance of the equities and the public interest are best served by permitting the Municipality to move forward with the abatement of a public nuisance that has caused significant harm to the surrounding community.

Respectfully submitted this 11th day of February, 2025.

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The Municipality consents to service via e-mail to the above e-mail addresses provided copies are also sent to courtdocs@muni.org.

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Certificate of Service
I certify that on February 11, 2025 I caused to be emailed a true and correct copy of the foregoing to:

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