

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DENVER HOMELESS OUT LOUD,)
et al.,)
)
 Plaintiffs-Appellees,)
)
v.)
)
CITY AND COUNTY OF DENVER,)
et al.,)
)
 Defendants-Appellants.)

On Appeal from the United States District Court for the District of Colorado
The Honorable William J. Martinez
D.C. No. 20-CV-02985-WJM-SKC

**BRIEF OF NATIONAL HOMELESSNESS LAW CENTER, HOUSEKEYS
ACTION NETWORK DENFER, AND THE BUCK FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES’
PETITION FOR REHEARING EN BANC**

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INTEREST OF AMICUS CURIAE

Founded more than thirty years ago, the **National Homelessness Law Center** (“National Law Center”) – a nonprofit organization based in Washington, D.C. – is a national legal organization with the mission to prevent and end homelessness. In connection with this objective, the National Law Center gathers information about state and local laws from across the country that impact homeless people, identifies best practices to address root causes of homelessness, and safeguards the rights of homeless people in the face of government action.

Housekeys Action Network Denver (“HAND”) is a grassroots advocacy organization that strives to recenter the fight for attainable housing in Denver around the priorities of houseless people. HAND works from the foundational understanding that housing policy should be directed by the people who need that housing. To this end, HAND works to shape local housing policy around street outreach – meeting people where they are to gather input and direction on the community’s priorities – and research on public housing in Denver to further the fight for housing as a public resource. HAND works as and with people who are, were, and may become houseless in the Denver community, and shares the goal of protecting the civil rights of houseless people.

The **Buck Foundation** is a family foundation with a commitment to peace

and social justice whose mission is to support children, youth, women, and other marginalized communities. Recognizing that it takes a multipronged approach to create innovative solutions to homelessness and affordable housing, the Buck Foundation invests in organizations that provide dignified housing to those who desperately need it, advocate for policies that prevent homelessness, and educate the public on the root causes of homelessness. The Buck Foundation shares the goal of protecting the civil rights of homeless people.

CORPORATE DISCLOSURE STATEMENT

The National Homelessness Law Center, Homeless Action Network Denver, and the Buck Foundation are each nonprofit organizations that have no parent corporations and in which no person or entity owns stock.

STATEMENT AS TO AUTHORSHIP

The National Law Center certifies that (1) this brief was authored entirely by counsel for amicus curiae and not counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to preparing or submitting this brief; and (3) no person other than amicus curiae contributed money to the preparation or submission of this brief.

INTRODUCTION

Homelessness is a national crisis driven by a persistent lack of affordable housing.¹ Without access to housing, people have few options for meeting their basic human needs and even fewer options for living with stability and dignity.² Emergency shelters are not available in every community and, even where shelters exist, they routinely turn people away,³ or have admission criteria that render them practically inaccessible.⁴ Moreover, emergency shelters offer only temporary placement—often only for a single night at a time—and many prohibit clients from bringing or storing their personal property. Since adequate, appropriate, attainable housing does not exist, that encampments form, “in response to the absence of other, desirable options for shelter.”⁵

In response to the rise of unsheltered homelessness nationwide, cities across the country have passed, and continue to pass, laws that target and ban basic survival acts associated with homelessness.⁶ Encampment evictions, often called

¹ Nat’l Alliance to End Homelessness, *State of Homelessness: 2020 edition* (2020),

<https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2020>.

² Nat’l Homeless L. Center, *Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities* 33 (2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>.

³ Nat’l Alliance to End Homelessness, *supra* note 1.

⁴ Suzanne Skinner and Sara Rankin, *Shut Out: How Barriers Often Prevent Meaningful Access to Emergency Shelter* (2016), <https://ssrn.com/abstract=2776421>.

⁵ Rebecca Cohen et al., *Understanding Encampments of People Experiencing Homelessness and Community Responses: Emerging Evidence As Of Late 2018 4* (2019), <https://www.huduser.gov/portal/publications/Understanding-Encampments.html>.

⁶ For example, a 2019 Law Center survey found that 72% of US cities have laws prohibiting camping in public, like the Denver camping ban at issue in this case. See Nat’l Homelessness L. Center, *supra* note 2, at 12.

“sweeps,” are used with increased frequency and severity to enforce these laws against unsheltered individuals, disperse them, and remove their property from public space.⁷ These sweeps place people experiencing homelessness at constant risk of having their only worldly possessions taken and destroyed without notice.

The right to due process prior to such deprivations is of particular importance in this context. The limited possessions unsheltered individuals have with them are needed to care for their own safety, survival, and mental and physical health.⁸ Yet, despite these acute interests in their property, a three-judge panel for the Tenth Circuit found, *sua sponte*, that a sweeping waiver contained in a prior settlement should effectively preclude *all* unsheltered individuals in Denver from utilizing the federal courts to vindicate their Due Process rights when those rights are violated during sweeps. If let stand, this decision may have staggering consequences for thousands of unsheltered people in Denver and jeopardize Due Process jurisprudence broadly.

SUMMARY OF ARGUMENT

Rule 35 of the Federal Rules of Appellate Procedure governs when a rehearing en banc may be ordered. Pursuant to Rule 35, en banc rehearings are not

⁷ See e.g., Denver Homeless Out Loud, *Swept to Nowhere; Experience and Recommendations from Unhoused People During the COVID-19 Pandemic*, at 7-8 (2022), <https://denverhomelessoutloud.org/swept-to-nowhere/>

⁸ See Chris Herring, *Complaint-Oriented Policing: Regulating Homelessness in Public Space*, 84(5) AM. Sociological Rev. 769-800, 790-793 (2019), <https://journals.sagepub.com/doi/full/10.1177/0003122419872671>.

avored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decision; or (2) the proceeding involves a question of exceptional importance. Fed. R. App. P. 35(a). This brief will focus solely on prong (2) of the Rule and argues that the inquiry at the center of the litigation at this stage in the proceeding– whether unsheltered Denver residents may utilize the federal courts to vindicate their Constitutional rights in the context of sweeps–is one of exceptional importance deserving of en banc review.

ARGUMENT

I. The Issue of Whether Unsheltered Individuals in Denver May Utilize the Federal Courts to Vindicate Their Constitutional Rights is One of Exceptional Importance

En banc review is appropriate under Rule 35 in cases that "raise issues of important systemic consequences for the development of the law and the administration of justice", *Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2009), or where rehearing is necessary "in order to cure a gross injustice." *United States v. Lynch*, 690 F.2d 213, 223 (U.S. App. D.C. 1982). The standard for en banc review is met in this case.

The Court’s decision from which Plaintiffs now seek rehearing en banc would effectively preclude all unsheltered residents of Denver from seeking recourse

through the federal courts when their constitutional rights are violated by Denver, or *any* of its possible agents, during sweeps. Whether the *Lyall* settlement demands such a result is a question of exceptional importance because: (a) encampment sweeps are an escalating national phenomenon that increasingly threatens the constitutional rights of people experiencing homelessness, and (b) the decision would further erode unhoused citizens’ already tenuous access to justice.

A. Encampment sweeps are an escalating national phenomenon that increasingly threatens all unsheltered individuals’ constitutional rights

The three-judge Court’s decision to interpret *Lyall* as precluding all unsheltered individuals in Denver from bringing claims when their constitutional rights are violated during sweeps is a gross injustice which Rule 35 aims to prevent. At a time when encampment sweeps are increasing in severity and frequency, the decision leaves thousands of unsheltered individuals in Denver without access to the federal courts to vindicate their constitutional rights. Denver’s sweeps—as well as the forced displacement, property confiscation and destruction, harassment, threats, and physical violence that accompany them—are increasing. In July 2021, the *Denverite* reported that “the pace of homeless encampment sweeps has reached a new high,” with 17 straight weeks of sweeps between March 9, 2021, and July

2021, and 122 individual sweeps between January 2020 and July 2021.⁹ The City removed 50 encampments in 2020, and 83 between January and October 2021.¹⁰ Almost 90% of a surveyed population of Denver’s unsheltered residents had experienced a sweep or related confiscation of property as of July 2021.¹¹

The trend toward more encampment sweeps is not unique to Denver: The National Law Center’s research, advocacy, and litigation illustrate that as homelessness and the prevalence of encampments increase, so too do camping and sleeping bans and the sweeps that are used to enforce them.¹² 2020 marked the fourth consecutive year that homelessness grew nationwide, and the first time since national homelessness data collection began, that more people experiencing homelessness were unsheltered than sheltered.¹³ Because emergency shelters and

⁹ Kevin Beaty, *Data on Denver’s homeless sweeps show they’re cyclical, and growing*, DENVERITE, July 2, 2021, <https://denverite.com/2021/07/02/data-on-denvers-homeless-sweeps-show-theyre-cyclical-and-growing/?msclkid=1d88320ad09c11ecaf80032068311074>; see also Conrad Swanson, *Denver has cleared out more homeless encampments in 6 months than all of 2020*, THE DENVER POST, June 29, 2021, <https://www.denverpost.com/2021/06/29/denver-homeless-mlb-all-star-game/>.

¹⁰ Chris Vanderveen, *“They sweep, we move back”: A homeless woman in Denver moved 5 times in 3 months*, 9NEWS, November 18, 2021, [Denver sweeps pushing homeless camps farther from city's core | 9news.com](https://www.9news.com/story/news/local/2021/11/18/denver-sweeps-homeless-camps-farther-from-city-core/7544444002/).

¹¹ Esteban L. Hernandez, *Survey: People experiencing homelessness in Denver were shuffled from block to block during pandemic sweeps*, DENVERITE, July 19, 2021, <https://denverite.com/2021/07/19/survey-people-experiencing-homelessness-in-denver-were-shuffled-from-block-to-block-during-pandemic-sweeps/>.

¹² The Law Center has tracked laws criminalizing homelessness across all measured categories since 2006. As of 2019, 72% of cities had at least one law prohibiting camping in public, a 92% increase from 2006 and a 15% increase from 2016. In the same year, 51% of cities had at least one law restricting sleeping in public, a 50% increase from 2006 and an 18% increase from 2016. Enforcement of these types of laws often leads to encampment sweeps, property confiscation, and other activities such as the ones challenged in this action. See Nat’l Homeless L. Center, *supra* note 2.

¹³ U.S. DEP’T OF HOUS. AND URBAN DEV. OFFICE OF CMTY. PLANNING AND DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 2 (2021), <https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf>.

housing are practically unavailable to many people for various reasons, individuals often have no choice but to live in encampments.¹⁴

Sweeps and associated destruction of property are devastating.¹⁵ Not only do they strip unhoused individuals of their dignity, stability, and what few personal belongings they may have, but they also risk violating their constitutional rights. Unsheltered individuals, like anyone else, have “a compelling ownership interest in their personal property” and are entitled to due process of law when facing property deprivation. *See v. City of Fort Wayne*, Case No. 1:16-cv-00105-JVB-SLC, 2016 U.S. Dist. LEXIS 185598, at *27 (N.D. Ind. June 16, 2016), *adopted* 2017 U.S. Dist. LEXIS 49956 (N.D. Ind., Mar. 31, 2017). *see also Lavan v. City of Los Angeles*, 693 F.2d 1022 (9th Cir. 2012). Unsheltered Denver residents have an especially heightened interest in their property being seized and, often, destroyed during sweeps because that property represents the sum of their personal assets and is inclusive of items needed for their survival. This interest outweighs the minor procedural burden on Denver to provide adequate notice and process before conducting sweeps. *See Matthews v. Eldridge*, 424 U.S. 319 (1976).

¹⁴ *See* Skinner and Rankin, *supra* note 4; *see also* Nantiya Ruan et al., *Too High a Price 2: Move on to Where?* 4-5 (2018), <https://ssrn.com/abstract=3174780> (finding, for example, that “[t]here are no known facilities that allow couples to stay together” in Denver).

¹⁵ *See Lavan*, 797 F. Supp. 2d at 1016 (Noting that homeless people’s property, however meager it may seem to an outside, “represent[s] everything they own.”); *see also* Herring, *supra* note 9 (writing that for unsheltered individuals, property loss is “the greatest threat” to their survival.”).

Importantly, the decision from which Plaintiffs now seek rehearing will bar all unsheltered people in Denver, from bringing any future claims against Denver, or any of their possible agents past or present, that might in any way be related to the Lyall suit. *Denver Homeless Out Loud v. Denver*, No. 21-1025, 21 (10th Cir. 2022). This sweeping interpretation of the settlement’s preclusive effect will bar thousands of unsheltered Denver residents from asserting their constitutionally protected rights to have proper notice and opportunity to be heard before their vital property is confiscated or destroyed. Moreover, the 3-judge panel’s broad interpretation will also likely bar these same individuals from asserting their rights to equal protection under the Fourteenth Amendment, to be free from cruel and unusual punishment and excessive fines and fees under the Eighth Amendment, to be free from unreasonable search and seizure under the Fourth Amendment, and other vital rights encompassed in the Constitution and routinely violated by Denver’s sweeps and related practices.

B. The decision, if left intact, jeopardized unhoused individuals’ already tenuous access to justice

Rehearing en banc is appropriate in “cases that raise important systemic consequences for the development of the law and the administration of justice.” *Watson*, 587 F.3d at 160. Here, the question of whether the *Lyall* settlement precludes unsheltered Denver residents from accessing the federal court system to vindicate their constitutional rights raises important systemic consequences for the

development of the law and the administration of justice given that this decision, if left intact, would create dire and unjust consequences for unhoused citizens' access to the courts.

People who are unhoused are 11 times more likely to be arrested than those who are housed.¹⁶ But they are also less likely to retain legal counsel and access the courts because of the many barriers presented by homelessness and poverty. When unhoused individuals are arrested or cited for engaging in life-sustaining activities, such as resting or sleeping outside, they are often not able to physically appear in court because of a lack of funds and lack of transportation. Without a mailing address or access to computers and the internet, it is exceedingly difficult for unhoused individuals to find their case information, pay their fees, or discern the date and time of their scheduled court appearances.¹⁷ Moreover, citations that carry civil penalties do not trigger the right to counsel, meaning that someone experiencing homelessness who is arrested or cited under a civil statute is not appointed a public defender to help them navigate the process,¹⁸ despite the fact that failing to pay these citations may result in the issuance of arrest warrants and possible jail time.¹⁹

¹⁶ Madeline Bailey et al., *No Access to Justice: Breaking the Cycle of Homelessness and Jail*, VERA INSTITUTE, August 2020, at 6, <https://www.vera.org/downloads/publications/no-access-to-justice.pdf>.

¹⁷ *Id.*; see also Nat'l Homelessness L. Center, *supra* note 2.

¹⁸ Bailey et al, *supra* note 16.

¹⁹ See Nat'l Homeless L. Center, *supra* note 2, at 52.

This undoubtedly “raise[s] important systemic consequences for the development of the law and the administration of justice.” *Watson*, 587 F.3d at 160. The number of unsheltered Denver residents has nearly tripled since 2014.²⁰ Among these unsheltered Denver residents are the members of the class of Plaintiffs-Appellees in the instant matter—individuals who were able to prove to a District Court Judge well versed in the legal and factual issues that Denver’s policies and practices of sweeps warranted a preliminary injunction. The decision on appeal that a previous settlement precluded the Plaintiffs-Appellees from bringing this matter and all related future matters has stripped Plaintiffs-Appellees, and thousands of others similarly situated in Denver, of their ability to seek judicial recourse when their constitutionally protected rights to property, liberty, and life are threatened. The systemic consequences of this decision are thus no mere “abstract assertion[s] of universal injustice.” *United States v. Games-Perez*, 695 F.3d 1104, n. 12 (10th Cir. 2012). Rather, for the thousands of unsheltered Denver residents who are subject to criminalization policies, the jeopardization of their already tenuous access to justice is imminent and concrete.

²⁰ DJ Summers, *Denver unsheltered homeless counts have almost tripled since 2014*, KDVR, June 29, 2021, <https://kdvr.com/news/local/denver-unsheltered-homeless-counts-almost-tripled-since-2014/?msclkid=c220094ecfd11ec9d8a5e8d9821f249>.

CONCLUSION

For the foregoing reasons, amicus respectfully asks this Court to grant Plaintiff-Appellees' Petition for rehearing en banc.

Respectfully submitted,

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/s/ Tristia M. Bauman

Tristia M. Bauman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 13, 2022, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to participants in the case.

/s/ Tristia M. Bauman

Tristia M. Bauman