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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

JOSETT BANKS, KYLA FRIEDENBLOOM, and KRISTINE SHAWANOKASIC, Appellants, v. MUNICIPALITY OF ANCHORAGE, Appellee.	No. 3AN-23-06779CI (lead)
JOENE ATORUK, HEATHER WOLFE ARAGON, LEONLY FRATIS III, SEONE LIMA, DARRELL DEAN MILLER, BEULAH MOTO, LILLIAN SHEAKLEY, GREGORY MICHAEL SMITH, TRACY LYNN THOMPSON, DELLA L. TUNKLE, LARRY C. TUNLEY, BRIAN KEITH VAUGHAN, and LUCILLE JANE WILLIAMS, Appellants, v. MUNICIPALITY OF ANCHORAGE, Appellee.	No. 3AN-23-07037CI (consolidated)

MUNICIPALITY OF ANCHORAGE'S APPELLEE BRIEF

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INTRODUCTION

Appellants seek to challenge the constitutionality of the reasonable procedures set out in the Anchorage Municipal Code ("AMC" or "Municipal Code") by which the Municipality of Anchorage makes case-by-case decisions to clean up, or "abate," particular prohibited encampments on public land. Targeted abatement of prohibited encampments helps ensure that public land—such as parks, playgrounds, trails, snow dumps, and rights of way—may be used by the public for the purposes to which such land has been dedicated. It also helps protect public land from environmental degradation and accumulations of waste, helps protect the public health where it is threatened by particular circumstances in camps, and helps protect public safety from threats that may arise with respect to certain camps, such as fire danger or concentrations of criminal activity that can harm both campers and neighbors. The Municipality carries out targeted abatement of prohibited camps as provided in Municipal Code by posting advance notice—generally 10 days in advance of abatement—that informs campers of the impending abatement and what they must do if they wish to retain any personal property they may have been keeping in the posted abatement area: remove it from the area themselves before the notice period expires, or take certain steps to obtain property storage from the Municipality (such as by filing an appeal of the posted abatement notice).

Appellants in these two consolidated cases took the latter approach and appealed two posted abatement notices and thereby obtained storage of their property. Rather than challenge the notices that are the subject of this appeal and their compliance with Municipal Code, Appellants instead seek in this appeal to raise a slew of constitutional

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challenges to matters beyond the four corners of the abatement notices they have appealed. This Court lacks subject matter jurisdiction over such constitutional challenges in this appeal, as two Superior Courts in materially identical circumstances have already held. This Court should thus dismiss these appeals without reaching the merits of Appellants' constitutional arguments.

In any event, those constitutional arguments are meritless, as another Superior Court recently held in an original action that sought to enjoin a then-impending abatement. Targeted abatement of prohibited encampments on public land does not, contrary to Appellants' assertions, banish Appellants from the Municipality, and it is not unconstitutionally vague. Appellants know how to comply with these abatement notices by removing their property from the abatement area or securing property storage by appealing (as they did here). And the 10 days of advance notice and options for property storage provided by Municipal Code gave Appellants 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 Appellants' challenges.

JURISDICTIONAL STATEMENT

Appellants in these two consolidated cases appeal from posted notices of the Municipality of Anchorage's abatement of prohibited camps on public property that were posted around Cuddy Park on May 24, 2023, and Davis Park on June 22, 2023. [Exc. 1, 17.] Municipal Code provides that "[a] posted notice of campsite abatement is a final

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administrative decision and appeals shall be to the superior court within 30 days from the date the notice of campsite abatement is posted, in accordance with the Alaska court rules."[1] Appellants timely appealed within 30 days of the date the notices were posted. [Exc. 67-68.] For the reasons explained in Part I of the Argument below, this Court lacks subject-matter jurisdiction over the constitutional challenges raised in Appellant's opening brief, which properly could be presented only in an original action in Superior Court.

ISSUES PRESENTED

1. Does the Superior Court have subject matter jurisdiction over constitutional arguments in this appeal from the posting of two abatement notices?
2. Do the Municipality's civil procedures for cleaning up prohibited camps on public property—which reasonably provide 10-days' notice and property storage—comply with applicable constitutional requirements?

STATEMENT OF THE CASE

In these consolidated appeals, Appellants seek review of two 2023 notices of the abatement of prohibited camps on public property.

A. The Municipality of Anchorage Abates Prohibited Camps on Public Land to Protect Public Land, Health, and Safety, with Advance Notice and Options for Property Storage.

The process for abating nuisance encampments is laid out in detail in Municipal Code. Title 15, Chapter 20 creates a civil mechanism whereby the Municipality makes

[1] AMC 15.20.020B.15.e. The Municipal Code is available online at https://library.municode.com/ak/anchorage/codes/code_of_ordinances?nodeId=TIT15ENPR_CH15.20PUNU_15.20.020PUNUPREN. Some provisions have been amended since the abatements at issue in this appeal in 2023, but not in ways that are relevant here.

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case-by-case decisions to abate public nuisances to "ensure that public nuisances are prevented, discontinued, and abated in a timely manner and do not reoccur."[2] 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."[3] As relevant here, Municipal Code specifies in AMC 15.20.020B.15 that a "prohibited campsite" on public property "is subject to abatement by the [M]unicipality."[4]

The camping abatement code requires 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 10 days or where campers have sought appellate review or submitted notice of their intent to seek appellate review.

1. Municipal Code requires notice before abatement—generally 10 days—so campers can protect property they wish to retain.

Code allows the Municipality to choose from several different options for abating prohibited camps on public land. Those options differ from each other based on the duration of advance notice provided to campers. Except in "exigent circumstances posing a serious risk to human life and safety,"[5] a circumstance not at issue in this case, all abatement requires advance notice.[6] Code provides, for example, for abatement in the event of wildfire danger with 24-hours prior notice, and also provides an option for

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2 AMC 15.20.005.
3 AMC 15.20.010.
4 AMC 15.20.020B.15.
5 AMC 15.20.020B.15.h.iii.
6 AMC 15.20.020B.15.a.

abatement of any camp or zone of camps with 72-hours prior notice.[7] As discussed further below, where the Municipality provides less than 10 days of prior notice before an abatement commences, the Municipality is required to store personal property removed from a prohibited encampment for at least 30 days.[8] The most common type of abatement procedure the Municipality uses, and the procedure that gave rise to these consolidated appeals, provides for 10 days of prior notice before an abatement of a zone of prohibited encampments may commence under AMC 15.20.020B.15.b.v, with options for appellate review and storage of property pending such review, as described in more detail below.

Municipal Code prescribes in detail the kind of notice that the Municipality must provide when abating a prohibited campsite or zone of prohibited campsites. "[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."[9] The posted notice must state, among other things, the location of the prohibited encampment on public land, 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 (as discussed below, delay of abatement or storage of property), and the contact information for reclaiming any stored property.[10] Notice shall "[a]lso be given

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7 AMC 15.20.020B.15.b.i-ii.
8 *Id.*
9 *Id.*
10 *Id.*

orally to any persons in or upon the prohibited campsite or who identifies oneself as an occupant of the campsite."[11]

When the Municipality abates a zone of prohibited campsites with 10 days of notice, the Municipality must post notices around the specified geographic zone "stating 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."[12] 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."[13] 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."[14]

In addition to providing written and oral notice to campers, Municipal Code also requires notice to be provided to the Anchorage Health Department, community social service agencies, and community councils.[15] "The purpose of" such notice is to "encourage and accommodate the transition of campsite occupants to housing and the social service community network."[16] 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

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11 AMC 15.20.020B.15.a.v.
12 AMC 15.20.020B.15.b.iv.-v.
13 AMC 15.20.020B.15.b.v.(D).
14 AMC 15.20.020B.15.b.v.(A).
15 AMC 15.20.020B.15.d.
16 *Id.*

multiple providers to operate municipally funded congregate and non-congregate shelters, including food service, as well as a municipally funded warming site.

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."[17] Before property is actively removed, campers are "given at least 20 minutes to gather their personal property and disperse from the area."[18] Municipal employees and contractors then clean up.

2. Municipal Code provides for property storage and judicial review of posted abatement notices.

As noted above, where the Municipality provides less than 10 days of prior notice before an abatement commences, such as with 72-hour notice abatements or 24-hour wildfire abatements, the Municipality is required by Municipal Code to store personal property that remains at a prohibited encampment at the expiration of the notice period.[19]

Where storage is provided, the Municipality will store personal property that is "in fair and usable condition and readily identifiable as such,"[20] but will dispose of "[j]unk, litter, garbage, debris," or similar items, and "items that are spoiled, mildewed, or contaminated with human, biological or hazardous waste."[21] "The municipality may store in any reasonable manner the personal property removed from a prohibited campsite," and

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17 AMC 15.20.020B.15.g.
18 AMC 15.20.020B.15.g.i.
19 AMC 15.20.020B.15.b.i-iii (allowing for "remov[al] and stor[age]" of property).
20 AMC 15.20.020B.15.c.iii.
21 AMC 15.20.020B.15.c.i.

" [a]t the time of removal a notice shall be posted at the location, unless previously posted notices are still visible and accurate," with information for reclaiming personal property.[22] "If no person removes the property" from storage, "the municipality may dispose of the personal property 30 days from the date" notice was first posted.[23]

Municipal Code provides for appeal of posted abatement notices. "A posted notice" is "a final administrative decision and appeals shall be to the superior court within 30 days from the date the notice of campsite abatement is posted."[24] 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,"[25] unless the Municipality "stores it until either the appeal is withdrawn, settled, or a decision is issued and any subsequent appeal rights expire."[26]

Municipal Code does not provide for automatic property storage where the Municipality provides for 10 days of advance notice before an abatement. In such circumstances, Code generally provides that campers must "remove[] property" from the noticed abatement area during the 10 days of pre-abatement notice, and any property remaining in the noticed abatement area after the expiration of that 10-day period may be

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22 AMC 15.20.020B.15.c. Municipal Code also provides for a $10 fee to reclaim stored property, *id.*, but the Municipality does not enforce that provision.

23 *Id.*

24 AMC 15.20.020B.15.e.

25 *Id.*

26 AMC 15.20.020B.15.f.ii.

"disposed of as waste."[27] As noted above, however, campers subject to a 10-day abatement notice have the same right as any other camper to appeal a posted notice of abatement, or simply inform the Municipality of their intent to file such an appeal, and to thereby secure a right under Municipal Code for the Municipality to either not abate the appellant's property for 30 days or store such property pending appeal.[28]

B. Appellants Seek to Raise Constitutional Challenges to Camp Abatement in These Consolidated Appeals from Two 10-Day Abatement Notices Posted in 2023.

These consolidated appeals, *Banks* No. 3AN-23-06779CI and *Atoruk* No. 3AN-23-07037CI, arise from two abatement notices posted in 2023.

1. The *Banks* appeal involves notices posted in an area identified as "Cuddy, Loussac Library & Old Archive Site" on May 24, 2023 ("Cuddy/Loussac"). [Exc. 1.] The camp consisted of 70 structures and 1 van, and campers "warn[ed] that APD would be attacked" and declared "plans to violently protest." [*Banks* Record on Appeal ("ROA") 1.] The abatement started on June 4, 2023. [*Banks* ROA 1.]

The Municipality received a letter from the ACLU on June 5, 2023, [Exc. 2-3] along with thirteen notices of intent to appeal the abatement notice, [Exc. 4-16], contending that abating the camp as provided for in the posted notice would violate the Eighth Amendment under two Ninth Circuit cases, *Martin v. Boise*,[29] and *Johnson v. City*

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27 AMC 15.20.020B.15.b.iv-v.
28 AMC 15.20.020B.15.e & f.
29 *Martin v. Boise*, 920 F. 3d. 584 (9th Cir. 2019).

of Grants Pass.[30] [Exc. 2-3.] Upon receiving those notices of intent to appeal, the Municipality shifted from camp cleanup to storage of any personal property left behind by those potential appellants. [*Banks* ROA 18-23.] The three Appellants before this Court in *Banks* ultimately filed an appeal with this Court on June 16, 2023. The Cuddy/Loussac abatement (with property storage) finished on June 18, 2023. [*Banks* ROA 1.] The *Banks* Appellants' points on appeal, like the earlier letter, primarily allege that the Municipality's abatement was contrary to *Martin v. Boise* and *Johnson v. City of Grants Pass*.

2. The *Atoruk* appeal arises from abatement notices the Municipality posted on June 22, 2023, on two parcels that the Municipality leases from the Department of Defense for use as Davis Park and a snow dump (also known as the area bounded by McCarey to Boniface, and Mountainview Drive to the Glenn Highway). [Exc. 17-18.] The *Atoruk* Appellants filed in this Court a timely notice of appeal of the abatement notice for Davis Park on June 28, 2023. [Exc. 67-68.] (No appeal was filed regarding the snow dump parcel.) Represented by the same counsel as in *Banks*, the *Atoruk* Appellants' points of appeal alleged that the Municipality's abatement was cruel and unusual punishment in violation of the Eighth Amendment under *Martin v. Boise* and *Johnson v. City of Grants Pass*. Appellants moved for a stay of the then-impending abatement of Davis Park.[31] The Municipality opposed, noting that there was no need for expedited consideration of whether to issue a stay of the abatement because the Municipality had removed the posted notices and cancelled the challenged abatement, and any new abatement in that area would

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30 *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022).

31 Appellant's Motion for Stay Pending Appeal (filed June 26, 2023).

be able to proceed only, per Municipal Code, through newly posted notices of abatement.[32] In light of the Municipality's cancellation of the challenged abatement, this Court denied the motion for a stay pending appeal.[33] The previously noticed abatements of Davis Park and the snow dump did not occur. [Exc. 70 (noting abatements were "CANCELED").]

3. After preliminary motions practice and a lengthy delay in the briefing schedule, these consolidated appeals are now proceeding to briefing on jurisdiction and the merits. This Court first consolidated both appeals.[34] Appellants then moved for trial de novo, and this Court denied that request, explaining that "[i]t appears that Appellants wish to engage in the sort of discovery that is more appropriately suited to an original action in superior court rather than an administrative appeal of the Municipality's campsite removal postings."[35] Appellants petitioned the Alaska Supreme Court for review of the denial of their motion for a trial de novo, and the Supreme Court denied that petition.[36] Opening brief deadlines were then further extended pending the U.S. Supreme Court's decision in *City of Grants Pass, Oregon v. Johnson*, which ultimately reversed the Ninth Circuit's Eighth Amendment precedents on which Appellants had relied.[37] Ultimately, Appellants filed their Opening Brief and a Motion to Supplement the Statement of Points on Appeal

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32 Municipality's Opposition to Motion for Expedited Consideration 2-3 (filed July 3, 2023).

33 Order Denying Motion for Stay (March 3, 2025).

34 Order (Sept. 26, 2023).

35 Order 7-8 (Feb. 5, 2024).

36 Order, S-18993 (April 17, 2024).

37 Orders Granting Unopposed Second and Third Motion to Stay Opening Brief Deadline (dated Oct. 30, 2023, March 7, 2024); *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520 (2024).

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(which was granted without opposition) on December 9, 2024, contending that the Municipality's abatement procedures violate the constitutional prohibitions on cruel and unusual punishment, deprivation of property without due process of law, and unreasonable seizure of property.

The Municipality now files this Appellee brief in these consolidated cases.

STANDARD OF REVIEW

Appellate courts review constitutional questions *de novo*, exercising their independent judgment.[38] Even under the independent judgment standard the court "[gives] some weight to what the agency has done, especially where the agency interpretation is longstanding."[39] Further, when a governmental entity interprets its own regulation, as in this case, the Court presumes that "the agency is best able to discern its intent in promulgating the regulation at issue."[40]

ARGUMENT

I. This Court Does Not Have Subject Matter Jurisdiction to Hear Constitutional Claims Outside the Record in This Appeal from Two Abatement Notices.

Appellants' constitutional arguments all fail at the threshold because they are not properly presented in these appeals from the posting of abatement notices. This Court, like all courts, has subject-matter jurisdiction over only those matters for which it has been assigned such jurisdiction by law. The grant of appellate jurisdiction to Superior Courts in

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38 *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 189 (Alaska 2007).
39 *Palmer v. Mun. of Anchorage, Police & Fire Ret. Bd.*, 65 P.3d 832 n.7 (Alaska 2003) (citation omitted).
40 *Id.* (citations omitted).

AS 22.10.020(d) does not include a grant of jurisdiction to hear constitutional claims not themselves presented in the administrative decision below.

As the Alaska Supreme Court has explained, subject matter jurisdiction is "the legal authority of a court to hear and decide a particular type of case."[41] It is "a prerequisite" to any decision on the merits.[42] "Under article IV, section 1, of the Alaska Constitution, [t]he jurisdiction of courts shall be prescribed by law."[43] "Thus, where the legislature has authorized a court to enter judgment in a particular class of cases, the court properly has subject matter jurisdiction."[44] Applying those principles here, the Superior Court lacks subject matter jurisdiction over the claims Appellants seek to present in this appeal. This Court's jurisdiction to hear appeals of abatement notices is derived from state statute and Municipal Code, and those provisions of law limit the scope of appellate review to the compliance of posted abatement notices with the requirements of Municipal Code.

Under AS 22.10.020(d), the Superior Court has jurisdiction "in all matters appealed to it from a[n] . . . administrative agency when appeal is provided *by law*."[45] The jurisdiction of the Superior Court to hear appeals from an administrative agency's final decision is thus limited to the scope provided by the positive law authorizing such decision

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41 *Nw. Med. Imaging, Inc. v. State, Dep't of Revenue*, 151 P.3d 434, 438 (Alaska 2006) (quotation marks omitted).

42 *Id.*

43 *Id.* (quotation marks omitted).

44 *Id.*

45 Emphasis added. Alaska Appellate Rule 601(b) reiterates that "[a]n appeal may be taken to the superior court … from a final decision of an administrative agency." The Appellate Rules are thus consistent with AS 22.10.020(d) and its restriction of appellate review to final decisions as defined by law (such as statutes, regulations, or ordinances).

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and appeal. Here, the existence and scope of appeal is controlled by Municipal Code, which provides that "[a] posted notice of campsite abatement is a final administrative decision and appeals shall be to the superior court."[46] As multiple Superior Courts in this judicial district have consistently held, the Superior Court's jurisdiction in such an appeal provided for under Municipal Code is limited by law "to only the 'posted notice' actions of municipal agents."[47] In other words, Appellants may seek review only of issues related to the four corners of the posted notices at issue here.

An appeal of a posted abatement notice thus properly includes consideration of whether the four corners of the posted notice itself complies with the requirements in Municipal Code governing the content of such notices. An appeal may thus test whether, for example, the posted notice complies with the requirements in Municipal Code to state the location of the prohibited encampment on public land, when abatement will occur, 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 (as discussed below, delay of abatement or storage of property),[48] and, in 10-day abatements, the consequences of leaving personal property in the abatement area by the end of the notice period (disposal of abandoned property unless the owner has filed an

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46 AMC 15.20.020B.15.e.

47 Order Dismissing Appeal for Lack of Subject Matter Jurisdiction 3, *Vaughan v. Mun. of Anchorage*, No. 3AN-21-07931CI (Alaska Super. Ct. June 16, 2022) (attached); *see also* Final Judgment Order, *Smith v. Mun. of Anchorage*, 3AN-22-06805CI (Alaska Super. Ct. April 26, 2023), *pending appeal* No. S-18710 (attached).

48 AMC 15.20.020B.15.a.

appeal or given notice of intent to appeal).[49] Judicial review of a "posted notice of campsite abatement," as provided in Municipal Code,[50] thus serves the important function of ensuring that posted notices conform to the stringent requirements of Municipal Code and provide campers all of the necessary information for a successful abatement.

By the same token, Municipal Code, by providing for appellate review only of a "posted notice of campsite abatement,"[51] necessarily limits the scope of such review. In conjunction with the state statute granting Superior Courts subject matter jurisdiction over appeals only over matters as "provided by law,"[52] the Municipal Code's provision for appellate review of a posted notice of abatement deprives Superior Courts of jurisdiction to stray beyond the boundaries of the posted notice itself. This Court thus lacks jurisdiction to consider the constitutional arguments Appellants seek to raise here regarding the constitutionality of the Municipal Code's abatement provisions.

The Alaska Supreme Court has held that authorization for an appeal regarding constitutional issues may be properly implied without express statutory text only in narrow circumstances—not present here—involving "an adjudicative proceeding" in an administrative agency "producing a record capable of review."[53] The "essential elements" underlying judicial review of constitutional issues in an appeal are "adequate notice to persons to be bound by the adjudication, the parties' rights to present and rebut evidence

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49 AMC 15.20.020B.15.b.iv.-v.
50 AMC 15.20.020B.15.e.
51 *Id.*
52 AS 22.10.020(d).
53 *Welton v. State, Dep't of Corr.*, 315 P.3d 1196, 1198 (Alaska 2014).

and argument, a formulation of issues of law and fact in terms of specific parties and specific transactions, a rule of finality specifying the point in the proceeding when presentations end and a final decision is rendered, and any other procedural elements necessary for a conclusive determination of the matter in question."[54] Where those essential elements are not present in administrative decision-making, the Alaska Supreme Court has squarely held there is no appellate review even of constitutional issues.[55]

Here, the essential elements of implied appellate review of constitutional questions are not present. There was no "adjudicative proceeding" as defined by the Supreme Court. The Municipality determined as an internal matter of executive decision-making to pursue abatement of two specific prohibited camps on public property. That purely internal decision-making process did not include any administrative hearing or quasi-judicial adjudication at all, much less one involving any "parties" or the "present[ation] and rebut[tal] [of] evidence and argument." It did not result in a decision purporting to "b[i]nd by the adjudication" any "person[]." It did not result in the "conclusive determination of [any] matter in question." It was a purely internal executive policy decision regarding whether to pursue abatement on particular parcels of municipally managed land. Nothing in law or precedent provides for appellate review of any constitutional challenges to such non-adjudicatory decisions, where the law providing for appellate review limits the scope of such review to the face of the posted abatement notice itself and the spare administrative record does not facilitate adjudication of matters outside the face of the notice.

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54 *Id.* (quotation marks omitted).

55 *Id.* at 1198-99.

Appellants may thus not pursue their constitutional claims in these appeals from posted abatement notices, as Superior Courts in this district have repeatedly held in similar appeals from posted abatement notices—including other appeals involving several *Atoruk* Appellants in this matter, Gregory Smith, Larry Tunley, and Brian Vaughan.[56] They instead can seek judicial review of those claims only in an original action, just as the ACLU of Alaska has filed in this judicial district on behalf of homeless plaintiffs in the past, leading to a determination on the merits of the constitutional issues raised there,[57] and just as Mr. Smith is currently pursuing in federal district court.[58]

II. The Municipality's Abatement Code Complies with the Constitution by Providing Reasonable Notice and Opportunity to Safeguard Property in Case-by-Case Abatement Actions Targeted at Specific Areas.

If this Court reaches Appellants' constitutional arguments, this Court should reject them because the Municipality's abatement code complies with all applicable constitutional requirements. Constitutional doctrines governing criminal proceedings have no application here, where civil Municipal actions to clean up specific parcels of public land do not criminally punish anyone. The specific abatement notices at issue in these appeals do not banish Appellants, who know very well what they must do to comply with posted abatement signs by removing their property from the posted abatement areas or (as here) securing storage by appealing. And the Municipality's reasonable procedures comply

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[56] *Vaughan v. Mun. of Anchorage*, No. 3AN-21-07931CI (Alaska Super. Ct. June 16, 2022); *Smith v. Mun. of Anchorage*, 3AN-22-06805CI (Alaska Super. Ct. April 6, 2023).

[57] *Engle v. Mun. of Anchorage*, No. 3AN-10-7047CI, 2011 WL 8997466 (Alaska Super. Ct. Jan. 04, 2011).

[58] *Smith v. Mun. of Anchorage*, No. 3:23-cv-00257 (D. Alaska).

with constitutional requirements respecting due process and constitutional prohibitions on unreasonable seizures by providing 10 days of notice before cleaning up a prohibited camp on public land and thus providing adequate opportunity to protect property campers may wish to keep. Nothing more is constitutionally required.

A. Civil Action to Abate Prohibited Camping on Specific Parcels of Public Land Is Not a Criminal Punishment and Does Not "Banish" Anyone from Anchorage.

Appellants assert that the Municipality's case-by-case abatement of specific encampments (by removing property abandoned after the end of a 10-day notice period) using a civil procedure established in Municipal Code that governs the Municipality's control of its own property is somehow criminal punishment whose lawfulness "is proper[l]y analyzed by applying constitutional protections rooted in criminal law."[59] On the basis of that flawed premise, Appellants also contend that targeted abatement of specific encampments to protect the public interest is cruel and unusual punishment that allegedly "banish[es]" the homeless from the entire Municipality, and that the Municipal Code authorizing targeted abatement of prohibited encampments is unconstitutionally vague.[60]

None of that is correct. Prohibited encampments are posted for targeted abatement actions to protect the public interest using a *civil* procedure that does not even civilly fine—much less criminally punish—those who may have previously resided in any such

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59 Appellants' Opening Brief at 13; *see also id.* at 13-21.

60 Appellants' Opening Brief at 21; *see also id.* at 21-35.

encampment. Criminal constitutional protections thus have no application here. In any event, the abatement Code is not unconstitutionally vague because the Municipal Code and posted notices inform campers exactly what they must do if they wish to avoid the unintended loss of any property kept in a noticed abatement area: carry it away themselves during the 10-day notice period, or take the steps set out in Municipal Code to secure property storage—just as Appellants here did. And targeted abatement actions do not "banish" anyone from the Municipality; they simply help clean up specific parcels of Municipal property to protect public health, public safety, and public access to public land for the public purposes to which that land has been dedicated.

1. Civil decisions to remove unauthorized property from specific areas of public land are not criminal punishments.

The Municipality abates specific prohibited encampments or zones of prohibited encampments under AMC 15.20—the chapter of the civil code that addresses public nuisances generally.[61] Under the authority created by that chapter, the Municipality makes case-by-case decisions to abate public nuisances in order to "ensure that public nuisances are prevented, discontinued, and abated in a timely manner and do not reoccur."[62] 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."[63] This chapter of Municipal Code thus creates civil mechanisms to prevent or remedy, among other things, "attractive nuisances

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61 AMC 15.20.020B.15.
62 AMC 15.20.005.
63 AMC 15.20.010.

dangerous to children,"[64] "mold on or in a hotel,"[65] "[u]nsafe buildings,"[66] and actions that "cause the littering of any public or private property."[67]

The civil mechanism at issue in this case, like the other civil mechanisms set out in the public nuisance chapter, is similarly designed to give the Municipality a tool to remedy the harms to the public that can arise from "camping on public land" in violation of other provisions in Municipal Code.[68] These abatement procedures allow the Municipality to make case-by-case determinations to abate specific encampments based on an internal assessment of available resources and the threats various encampments pose to public health, public safety, and the public use of public lands. If the Municipality decides to abate a specific parcel of public land, the Municipality posts prior notice informing campers that particular area of public land will be closed to camping and, if they wish to retain their property, they must remove it themselves or secure storage because any abandoned property remaining in the abatement area at the close of the notice period "may be removed and disposed of as waste" as part of the camp cleanup designed to address a public nuisance.[69]

Nothing in the Municipal Code provisions at issue here provide for civil fines, much less any kind of criminal punishment. Those provisions simply allow the Municipality to post notices of abatement of prohibited encampments and to clean up a prohibited

64 AMC 15.20.020B.2.
65 AMC 15.20.020B.16.
66 AMC 15.20.020B.9.
67 AMC 15.20.020B.6.a.
68 AMC 15.20.020B.15.
69 AMC 15.20.020B.15.b.v.

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encampment at the close of the notice period in order to safeguard public health and the public use of public property for the purposes to which it has been dedicated. Posting notices and removing unauthorized property from public land is plainly not criminal punishment.

Appellants do not contend otherwise. Instead, they assert that posting a specific area of public land for civil abatement of a public nuisance must be "analyzed under a heightened, criminal-law standard" because abatement puts campers "at risk of losing an important right."[70] But Appellants fail to identify what important right is at issue in posting a civil abatement notice at a concededly prohibited encampment on public land. Appellants claim no legal right of occupancy to the particular parcels of public land that were noticed for abatement in the administrative actions that gave rise to these appeals. The "important right[s]" that the Alaska Supreme Court has indicated may sometimes trigger heightened constitutional requirements generally reserved from criminal matters involve, for example, the potential "loss of parental rights."[71] The Municipality's internal policy decision to seek to clean up a particular parcel of public land involves no such rights, just as none of the other public nuisance provisions addressing, for example, unsafe buildings or public littering, implicate such rights or constitutional protections applicable only to criminal enforcement actions.

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[70] Appellants' Opening Brief at 15 (quoting *Dep't of Revenue v. Nabors Int'l Fin., Inc.*, 514 P.3d 893, 900 (Alaska 2022)).

[71] *Williams v. State, Dep't of Revenue*, 895 P.2d 99, 105 & n.14 (Alaska 1995).

As the Alaska Supreme Court has held, in order for criminal constitutional protections, such as a jury trial right or heightened scrutiny for vagueness, to apply outside the criminal code to nominally civil matters, the offense at issue must "still connote criminal conduct in the traditional sense of the term."[72] Appellants advance no developed argument that posting a parcel of public land for cleanup constitutes any "offense" at all, much less one that connotes traditionally criminal conduct. To the contrary, civil procedures regulating the cleanup of public land are at most analogous to (but less restrictive than) the kinds of "relatively innocuous offenses as wrongful parking of motor vehicles, minor traffic violations, and violations which relate to the regulation of property, sanitation, building codes, fire codes, and other legal measures which can be considered regulatory rather than criminal in their thrust, so long as incarceration is not one of the possible modes of punishment."[73]

Appellants assert that constitutional rights applicable only in criminal proceedings should apply in this civil context because the Municipal Code defines a "prohibited campsite" (one that is subject to abatement using civil procedures) as "an area where one or more persons are camping on public land in violation of section 8.45.010, chapter 25.70, or any other provision of this Code."[74] Appellants note that AMC 8.45.010 defines the misdemeanor offense of criminal trespass, and Appellants contend that this cross-reference to a criminal offense in the definition of "prohibited campsite" subject to abatement

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72 *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970).
73 *Id.*
74 AMC 15.20.020B.15.

renders the whole civil regulatory scheme "inescapably based on criminal trespass allegations."[75] They further note that the Municipality takes account of public safety concerns when making case-by-case decisions regarding which prohibited encampments to prioritize for abatement using limited Municipal resources.[76]

Appellants are incorrect that cross-referencing a criminal statute to help define the scope of a separate civil proceeding, or making civil abatement decisions in order to protect public safety, requires the application of criminal constitutional protections. That argument is foreclosed by precedent. The Alaska Supreme Court has "held that a local ordinance defining 'junkyard/refuse area' for conditional land-use permits" was not subject to heightened criminal law protections "despite the regulatory scheme providing criminal penalties for violations" because "the primary enforcement mechanism was an enforcement order rather than criminal penalties."[77] The Court has similarly held that a state tax provision capable of civil enforcement, or criminal enforcement in the event of a willful violation, was subject only to constitutional requirements applicable to civil proceedings where the state invoked only the civil mechanism against a taxpayer.[78] Those principles apply with even greater force here, where the abatement procedures at issue here do not even provide for criminal enforcement of any kind. There is nothing unusual, much

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75 Appellants' Opening Brief at 17.
76 Appellants' Opening Brief at 19-21.
77 *Nabors Int'l Fin., Inc.*, 514 P.3d at 900 (quotation marks omitted).
78 *Id.*

less constitutionally suspect, in Municipal Code defining a civil provision by reference to a related criminal prohibition.[79]

Abatement notices posted under AMC 15.20.020B.15 simply provide campers notice of impending cleanup of particular parcels of public land. They do not "criminally target and punish unhoused persons" who may have previously resided in such a camp, as Appellants incorrectly suggest.[80] The abatement notices at issue here did not charge anyone with a crime of any sort. And the possibility that the Municipality could have instead sought to notify and then criminally trespass Appellants rather than proceed with civil abatement does not, under the binding precedent discussed above, provide any basis for analyzing the civil abatement procedures at issue here under inapplicable criminal constitutional provisions.

2. Cleaning up specific parcels of public land after public notice is neither vague nor cruel and unusual.

This Court should reject Appellants' contentions regarding the prohibition on unconstitutionally vague criminal prohibitions and cruel and unusual criminal punishments because civil camp abatement is not subject to those constitutional restrictions, which are applicable only to criminal punishment. As a Superior Court recently held in dismissing a similar appeal sua sponte (before the Municipality could file a brief identifying the lack of subject-matter jurisdiction over such issues in an appeal), "[a]batement" of a prohibited

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[79] *See, e.g.*, AMC 15.20.020B.14 (providing for civil abatement of the public nuisance of operating "an enterprise involving the unlicensed sale or dispensing of alcoholic beverages or permitting gambling as provided in section 8.60.040").

[80] Appellants' Opening Brief at 20.

encampment on public land "is a civil remedy, and the Eighth Amendment does not bar such action."[81]

In any event, Appellants' contentions rooted in criminal law fail on the merits. A posted notice of impending abatement tells campers that the specific area of public property on which they are encamped is to be cleaned up on a date certain and that campers who wish to retain any property kept in that area of public property without authorization must remove that property themselves or obtain storage as provided in Municipal Code.[82] There is nothing vague about such a notice. A criminal statute or ordinance is unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[83] But Appellants here do not dispute that they resided in a prohibited camp on public land as defined in Municipal Code. And they understand exactly what they must do to comply with a posted abatement notice on such a prohibited camp, as their own affidavits make clear: "I [have] to move myself and all of my belongings within 10 days." [Exc. at ¶ 7 at 23, 28, 33, 38, 43, 48, 53, 58, 63.] They may also obtain property storage by providing notice of intent to appeal or by appealing an abatement notice to this Court—as all Appellants are well aware and have done here. The Municipal Code thus gives Appellants more than "fair notice" of how to "conform [their] conduct to the law," and the clear requirements in posted

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81 Order Denying Appeal, *Gibson v. Mun. of Anchorage*, No. 3AN-24-09491CI (Alaska Super. Ct. Jan. 14, 2025) (attached).

82 AMC 15.20.020B.15.a, b.v.

83 *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

abatement notices forestall any concern regarding "arbitrary and discriminatory enforcement."[84]

Appellants incorrectly assert that posted abatement notices create a "*de facto* banishment regime" that "ban[s] the Appellants from the entire Municipality," allegedly in violation of the prohibition on cruel and unusual punishment.[85] That is incorrect, from premise to conclusion. Eighth Amendment arguments of this type are categorically foreclosed by the U.S. Supreme Court's recent decision in *City of Grants Pass v. Johnson*, which confirmed that the Eighth Amendment applies to punishment imposed after criminal conviction.[86] Appellants invoke cognate provisions of the Alaska Constitution, but there is no compelling reason for Alaska law to diverge from federal law on this point, where, as explained above, Alaska precedent avoids applying constitutional criminal law to these kinds of civil matters.[87] A Superior Court thus recently held in an original action challenging a recent abatement, *Aguila v. Municipality of Anchorage*, that "[i]n following the Supreme Court of the United States in *Grants Pass*, the Court does not have the power for devising responses to these questions, as this is best left in the hands of the legislature."[88]

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84 *City of Chicago v. Morales*, 527 U.S. 41, 42, 56 (1999).

85 Appellants' Opening Brief at 30.

86 *City of Grants Pass v. Johnson*, 603 U.S. 520, 542-43 (2024).

87 *Accord Feet Forward v. City of Boulder*, Order Re Defendants' Mot. to Dismiss Plaintiffs' Amended Complaint, Case No. 2022-cv-30341, 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 to opinion at bottom of page) (page last visited Mar. 31, 2025).

88 Order Denying Plaintiffs' Motion for a Preliminary Injunction 5, *Aguila v. Mun. of Anchorage*, No. 3AN-25-04570CI (Alaska Super. Ct. Feb. 13, 2025).

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In any event, Appellants' banishment arguments proceed from an incorrect premise: they "are not being banished from Anchorage," as the Superior Court also recently explained in *Aguila*.[89] 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 as enforced by police 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."[90]

The specific civil abatement notices at issue in these appeals also do not "banish" anyone from Anchorage. Such abatement notices merely advise that a particular area of public land posted for abatement is closed to camping. The only direct consequence of the posted abatements is that anyone who was residing or storing personal property in the abatement zone may not remain in that zone after the end of the notice period. Appellants have not been banished from "the entire Municipality of Anchorage."[91] The abatement Code does not provide for—and the posted notices at issue in this appeal did not purport to accomplish—simultaneous, universal abatements of all prohibited camping on all public property within the Municipality. Indeed, the Municipality is *prohibited* by Municipal Code from noticing zone abatements in more than 10 "reasonably compact" areas at one

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89 *Id.* at 7.
90 AMC 8.45.010A.3.b.
91 Appellants' Opening Brief at 31.

time.[92] 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 Appellants themselves seem to recognize, Appellants can comply with the civil abatement notice, and avoid any criminal trespass liability, simply by moving themselves and their belongings out of the posted abatement zone.

Rather than seriously contend that they are actually banished from Anchorage, Appellants instead focus on their concern that abatement notices do not specify another location Appellants could go that would never be subject to abatement in the future.[93] But Appellants identify no constitutional requirement that the Municipality must keep a particular patch of public land permanently open to camping regardless of any effects on the public or public land. If Appellants leave a 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[94]) alternative shelter, their next encampment may

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92 AMC 15.20.020B.15.b.v.(D).

93 Appellants' Opening Brief at 33 (emphasizing Appellants' "fear" of "being repeatedly threatened with the dispossession of their belongings").

94 Appellant Gregory Smith recently admitted in public testimony at a recent meeting of the Anchorage Assembly's Housing and Homelessness Committee that he had recently rejected an offer of housing. *See* Municipality of Anchorage, Housing and Homelessness Committee, https://www.youtube.com/watch?v=Ih23RkXPZUE (Feb. 19, 2025). There, Mr. Smith referred to an earlier presentation at the meeting regarding a very promising new private shelter initiative involving small living facilities, In Our Backyard, *see id.* at 1:10:00-1:18:35, and Plaintiff admitted that he "was invited to go" to "this little backyard thing" but declined that offer because he preferred the freedom of camping to the restrictions that come with shelter, *id.* at 1:23:50-1:24:10 ("It's bull****. They wanted me to give up my rights … my integrity … no.").

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ultimately be abated by the Municipality at some point in the future if the Municipality determines that such encampment presents a threat to the public interest such that abatement is warranted under the circumstances. That possibility does not violate any constitutional requirement. If such a series of events were to occur, Appellants would yet again have notice and opportunity to protect their interest in their unabandoned property, just as they had with respect to the abatement of two specific parcels at issue in this appeal. There is no basis in law—and Appellants cite none—for the courts to prevent the Municipality from exercising its policy discretion over civil abatement and grant Appellants an indefinite license to reside on the particular pieces of public land at issue in this appeal.

Appellants also err in suggesting that the cleanup of particular parcels of public land violates anyone's fundamental liberty interests. Appellants rely[95] on inapposite federal caselaw discussing the general right to travel as encompassing the right "to dwell within the limits" of the states, "to move at will from place to place therein, and to have free ingress thereto and egress therefrom,"[96] and on inapposite state caselaw recognizing that "the right[] to move about" is fundamental and upholding a city-wide youth curfew against constitutional challenge and under heightened scrutiny.[97] Neither those cases nor any other of which the Municipality is aware stands for the distinct proposition that there is a fundamental right to indefinitely occupy a particular piece of public property of one's

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95 Appellants' Opening Brief at 32-33.
96 *United States v. Wheeler*, 254 U.S. 281, 293 (1920).
97 *Treacy v. Mun. of Anchorage*, 91 P.3d 252, 264-65 (Alaska 2004).

choosing, regardless of the effects any given encampment may have on public health, public safety, and the ability of the rest of the public to use public property for the public purposes to which it has been dedicated. The Municipality is thus not required to satisfy any heightened form of scrutiny in order to proceed with the abatement of any specific parcel of public land. Appellants' concern that "[t]he paltry administrative record does not reflect" the information that they say would be relevant for conducting the heightened scrutiny they call for only underscores precisely why there is no subject matter jurisdiction to hear claims of this type in appeals from the posting of abatement notices.[98]

B. Cleaning Up Items Left at a Camp After a 10-Day Notice Period Is Not an Unreasonable Seizure of Unabandoned Property.

Both the Fourth Amendment to the U.S. Constitution and the Alaska Constitution protect against "unreasonable searches and seizures."[99] Appellants contend that the Municipal Code is unconstitutional because it allegedly permits the unreasonable seizure of property.[100] But cleaning up property left in a prohibited encampment 10 days after posting notice of such abatement is not an unreasonable seizure of unabandoned property.

First, Appellants do not contend that abating property left in an abatement zone after the close of the notice period is a "search" of such property.[101] And for good reason. As the United States Supreme Court has explained, the physical invasion of a property interest (such as by destroying it in an abatement action) "alone does not qualify" as a

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98 Appellants' Opening Brief at 35.
99 U.S. Constitution, amend. IV; Alaska Constitution, Article 1, Section 14.
100 Appellants' Opening Brief at 45-49.
101 *See* Appellants' Opening Brief at 46-49 (addressing only seizures, not searches).

search where, as here, it is not "conjoined with . . . an attempt to find something or to obtain information."[102] 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 permission and the governmental entity that controls the space has not in some manner acquiesced to the temporary structure."[103]

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."[104] 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." Indeed, Appellants do not contend otherwise and focus instead solely on whether abatement constitutes an unreasonable seizure.

Second, Appellants do not contend that any of their property was actually "seized" at all as a result of the two posted abatement notices that are the subject of these appeals. To the contrary, the abatement of Davis Park that was noticed in the *Atoruk* appeal was subsequently cancelled and did not occur.[105] To the extent the *Banks* Appellants did not

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

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

104 *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.").

105 Municipality's Opposition to Motion for Expedited Consideration 2-3 (filed July 3, 2023).

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remove their own belongings from the Cuddy Park and Loussac Library area before the abatement there commenced, they secured a right for the Municipality itself to remove and store their property (and return it by request) simply by filing notices of intent to appeal. [*Banks* ROA 5-23.] Appellants do not contend that their property was actually destroyed in the noticed abatement, or that they will be unable to similarly protect their property in any future abatement. They thus do not present a justiciable question regarding the constitutional protection of property that this Court could adjudicate. As the Alaska Supreme Court has long emphasized, courts should decide only "real, substantial controvers[ies]" and may not issue "advisory opinions" by reviewing "hypothetical question[s]" and "abstract disagreements," such as the constitutionality of legislative enactments in the abstract where no concrete application to the plaintiff is at issue.[106]

Third, even if Appellants had not secured property storage or otherwise safeguarded their property by removing it, and even if Appellants had instead chosen to leave their property behind in an abatement zone after the expiration of a 10-day notice period, the abatement of such property would not have seized any property interest Appellants would not have already voluntarily relinquished. There is "nothing unlawful in the Government's appropriation of … abandoned property."[107] In Alaska, abandonment can be accomplished by, among other things, leaving property "in a public place where anyone might discover

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[106] *Brause v. State, Dep't of Health & Soc. Servs.*, 21 P.3d 357, 359 (Alaska 2001) (quotation marks omitted); *see also id.* at 360 (explaining that the power of judicial review over legislative enactments "is not a power that should be exercised unnecessarily, for doing so can undermine public trust and confidence in the courts and be interpreted as an indication of lack of respect for the legislative and executive branches of government.").

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

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and take possession of the property."[108] The Municipal Code provisions at issue here expressly provide the circumstances under which property is considered abandoned: "At the expiration of the notice period any personal property in the [noticed abatement] zone may be disposed of as waste."[109] The posted abatement notices at issue in this case give the same warning: "Personal property in or around the posted zone at the end of 10 days shall be removed and disposed of." [*Banks* ROA 2.] Appellants do not deny that they timely received and understood those warnings regarding what leaving property in the abatement area would mean.[110]

Under these circumstances, if a camper chooses to store belongings on public property subject to a noticed abatement (apparently indefinitely) despite advance notice and opportunity to remove any personal property, this Court may reasonably conclude that the Municipality does not interfere with the camper's possessory interests in the property, and thus does not seize property within the meaning of the due process clause and search and seizure provisions, because campers have abandoned that property.[111] The Ninth

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[108] *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").

[109] AMC 15.20.020B.15.b.v.(B).

[110] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (requiring notice "reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the [action] and afford [them] an opportunity" to respond appropriately).

[111] *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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Circuit has expressly declined to identify any "constitutionally-protected property right to leave possessions unattended on public" property *indefinitely*.[112] And a Superior Court recently ruled in *Aguila* that, "as the Plaintiffs do not have a right to the Municipal land and were given timely notice of the abatement in order to move their property, as well as an opportunity to store their personal property, there is no seizure of property."[113]

The same ruling should apply here. Appellants do not contend that 10-day notice before the destruction of remaining property as abandoned is constitutionally inadequate as applied to their circumstances. And Appellants do not specify what longer notice period, if any, would have been required before discarded personal property on public land *could* be deemed abandoned and thus could be destroyed to abate a public nuisance. Appellants thus do not plausibly contend that the abatement actions at issue here resulted in any interference with a protected property interest within the meaning of the Fourth and Fourteenth Amendments or their Alaska equivalents.

Fourth, in any event, even if Appellants have not abandoned their property, and even if abatement of that property brought it within the protections of the due process clause and the constitutional requirements regarding seizures, "[t]he question then becomes whether the [Municipality], in seizing [Appellants'] property, acted reasonably."[114] Assessing the reasonableness of the Municipality's abatement action requires the Court to "balance[] the invasion of [Appellants'] possessory interests in [their]

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112 *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1031 (9th Cir. 2012).
113 *Aguila* Order 8.
114 *Lavan*, 693 F.3d at 1030 (quotation marks omitted).

personal belongings against the [Municipality's] reasons for taking the property."[115] Applying that test here, the Municipality's abatement procedures are reasonable.

Abatement of prohibited camping on public property—such as parks, playgrounds, school grounds, trails, sidewalks, roads, snow dumps, and other rights-of-way, and land set aside for other purposes—serves vital public interests. The abatement procedures at issue here were enacted by the Anchorage Assembly in the 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,"[116] 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."[117]

By occupying public property dedicated to other purposes, prohibited campsites interfere with the public's interest in using public property for the important public purposes to which such property has been dedicated. Abating prohibited camps thus returns public property to public use by all of the public. Abatement protects public property from concentrated accumulations of human excrement and hazardous trash and

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115 *Id.* Nothing in *Lavan* or the cases Appellants cite supports Appellants' assertion that the seizure of property must satisfy strict scrutiny by using "the least restrictive means to further a compelling interest." Appellants' Opening Brief at 49. *Lavan* sets out a simple interest balancing test and requires, like the constitutional provision it interprets, only reasonableness. In any event, destroying property left behind after a lengthy pre-abatement notice period is the least restrictive means of cleaning up property left behind without authorization on public land, and thus serves the governments' vital interests, discussed below, in abatement.

116 AMC 15.20.020A.; AMC 15.20.010.

117 AMC 15.20.005.

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from environmental degradation.[118] And it protects public health and public safety from the well-known threats that can be posed by prohibited camping.[119]

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 10 days of prior notice, combined with all of the other procedural protections of the Municipal Code (including additional oral notice and time to gather belongings when the abatement begins, as well as appeal and associated storage rights). The Assembly explained in prefatory clauses enacting the 10-day period that the Assembly selected that notice period in order to "preserv[e] adequate notice and due process protections for the public."[120] And the memorandum accompanying the ordinance establishing the 10-day period explained that the Assembly "s[ought] a compassionate balance between removal of illegal camps and the rights of the homeless," and reasonably

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[118] *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").

[119] *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/664789/AO%202017-130(S)%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").

[120] AO 2017-130(S).

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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."[121]

Case law supports the Assembly's reasonable conclusion that 10 days of prior notice, combined with the other procedural protections available under Municipal Code, such as the property storage that Appellants here have received, 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.[122] 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.[123] Similarly, a district

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121 AM 685-2017.

122 *See Cobine v. City of Eureka*, No. 16-cv-02239, 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).

123 693 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

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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 the Fourth and Fourteenth Amendments.[124] 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.[125]

These cases 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 less 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

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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. 16-cv-01750, 2016 WL 11519288, at *3, *5 (C.D. Cal. Apr. 13, 2016) (same).

[124] *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).

[125] *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. 17-cv-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 v. City & Cnty. of Honolulu*, No. 12-cv-668, 2013 WL 2285100, at *2, *6 (D. Haw. May 21, 2013) (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.[126] 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.[127]

Perhaps because so few litigated cases involve abatement procedures that provide for a pre-abatement notice period nearly as long as the Municipality's 10-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 Municipal Code, as, again, Appellants have here). But that question is not presented here, as Appellants do not dispute that they had the right to post-abatement storage under Municipal Code by filing these appeals. This Court should thus 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

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126 *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).

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

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 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 10-day notice period and opportunity to secure private property before abatement of a prohibited camp on public property is thus reasonable and constitutionally permissible.[128]

The reasonableness of the 10-day standard is confirmed by the litigation that led to its adoption: *Engle v. Municipality of Anchorage*. The Municipal Code had previously provided for half-day notice when first enacted in 2009 and then five-day notice when amended in 2010, but no property storage.[129] 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 a 5-day pre-abatement notice fell too far below that typical standard.[130] The Municipality should not be faulted for adjusting its pre-abatement notice

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128 *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).

129 *See Engle*, 2011 WL 8997466.

130 *Id.*

to provide for 10-day notice (and the option of property storage) in the way implied by that analysis in *Engle*.

Appellants identify no basis for concluding that the (at least) 10 days of pre-abatement notice they do not dispute they received here (plus post-abatement property storage) falls below any constitutional minimum.[131] No case supports Appellants assertions here. Appellants offer no administrable basis for drawing a line of constitutional significance between 10 or 15 days. Indeed, Appellants offer no notice period after which, in their view, the Municipality *could* proceed to abate a prohibited encampment—an encampment on public property that Appellants admittedly have no right to occupy. The Court should thus recognize that 10 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.

C. Due Process Does Not Mandate a Pre-Cleanup Hearing, and 10-Days' Notice with Property Storage Provides Adequate Opportunity for Campers to Protect Their Property.

Appellants' due process argument also fails for largely the same reasons their unreasonable-seizure argument fails. First, Appellants do not contend the posted abatement notices, or the abatement action that followed on Cuddy Park, actually interfered with any of their property, given that they secured a right to property storage by bringing these appeals.[132] Second, even if Appellants had left property behind in the abatement area after

131 *See* Appellants' Opening Brief at 41-45.

132 *See supra* p. 31-32.

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the end of the notice period, by doing so they would have abandoned any interest in retaining such property when the abatement commenced.[133] And, third, on the merits, the Municipal Code's provision of a 10-day period of pre-abatement notice and opportunities for property removal or storage reasonably protects any interest in retaining unabandoned property without unduly interfering with the Municipality's ability to secure the vital public benefits of engaging in targeted abatement of prohibited camps on public property.[134]

"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."[135] That occurred here. Appellants do not own, lease, or rent the areas noticed for abatement in these appeals; the only potential property interest at stake here is their interest in retaining unabandoned personal property. Municipal Code and the abatement notices at issue in this appeal gave Appellants adequate notice and opportunity to protect that interest. Appellants do not dispute that they were provided with 10 days of advance notice before the abatement actions were scheduled to begin, and that the posted notice specifically warned that any property left in the abatement zone after 10 days would be subject to disposal (absent an appeal) or would be stored (if an appeal were filed or notice of intent to appeal were given, as occurred here). Appellants do not dispute that they actually received that notice. (Indeed, they have appealed from it.) They thus do not dispute their actual knowledge of

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133 *See supra* pp. 32-34.
134 *See supra* pp. 34-41.
135 *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (cleaned up).

what they would have to do to protect their interest in personal property they did not wish to abandon: either remove those possessions from the abatement area themselves or, with the filing of the appeals at issue here, allow the Municipality to store eligible possessions until Appellants retrieved them. Nor do Appellants dispute that 10 days was enough time for them to either remove their property or trigger storage. Appellants thus had every opportunity to protect their property interests. No further process is required.

Appellants principally contend that due process requires "a hearing prior to abatement" and that "[t]en days is inadequate notice."[136] But the litigated cases in this context affirm the reasonableness of municipal abatement procedures that provide significantly *less* advance notice of 1 to 3 days, combined with storage of certain property after an abatement, and no pre-abatement hearing.[137] Appellants do not explain why, in their view, all of those cases were incorrectly decided. Surpassing the municipal procedures upheld in other jurisdictions, the Municipality of Anchorage gives substantially greater pre-abatement notice (here, at least 10 days) and similarly makes property storage available post-abatement.[138] Appellants identify no case going their way or otherwise indicating that 10-day notice combined with the option of property storage strikes a constitutionally unreasonable balance between vital public interests in safety and health and any diminished possessory interest that campers may have at the close of the notice

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136 Appellants' Opening Brief at 36, 40.
137 *See supra* pp. 38-39 & n.125.
138 *See* AMC 15.20.020B.15.b.v; AMC 15.20.020B.15.f.ii.

period. Nor do they identify any case in this context holding that a hearing is required before an abatement may occur.

Rather than identify any case supporting their due process theory, Appellants argue from general first principles that "a pre-deprivation hearing" is generally required and thus must be provided here.[139] But the point of 10-days advance notice and the option for property storage (as Appellants received here) is to avoid any deprivation at all. Moreover, Appellants do not specify what legal or factual matters a "pre-deprivation" hearing would decide in this context. The decision to abate a particular prohibited camp on a specific parcel of public land at a certain time is an internal decision committed to Municipal policymakers, and no case holds that due process principles require individual participation in such internal executive-branch policymaking decisions. Nor do Appellants identify any relevant facts in dispute. They do not dispute that the Municipality owns or controls the public land at issue or that they were camping within the geographic zones identified by the posted abatement notices. Indeed, they do not even seek to raise those issues in these appeals, thereby undercutting any suggestion that such issues are so crucial that they must be the subject of a pre-deprivation hearing.

Appellants do not dispute any of the facts relevant to the Municipality's legal entitlement to post these particular prohibited encampments for abatement. Nor do they dispute any facts relevant to the storage or disposal of any of their property during such an abatement. They do not dispute that their notices of appeal specifically enumerate which

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[139] Appellants' Opening Brief at 39.

items they ask to be stored pending appeal, [*Banks* ROA 5-23] and they do not dispute that they, like any other camper, had the opportunity during abatement to further communicate with those conducting the abatement about which items should be stored, or that they had the opportunity to remove items themselves. In failing to explain what their envisioned "pre-deprivation hearing" would consider and decide, Appellants not only fail to make out their case on the merits, they forfeit any argument that such a hearing is constitutionally required.[140]

Appellants' application of the due process balancing test is similarly flawed. 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 particular situation.[141] 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."[142] That test tilts strongly in favor of upholding the abatement procedure at issue here, as every other court to have considered similar (or less protective) procedures has concluded.

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140 *Berezyuk v. State*, 282 P.3d 386, 398-99 (Alaska Ct. App. 2012) (holding that "forfeiture applies … to claims that receive only cursory discussion in the opening brief").

141 *Mathews*, 424 U.S. at 334.

142 *Id.* at 335.

On the first factor, the Municipality recognizes the interest shared by everyone in "the continued ownership of their [unabandoned] personal possessions."[143] But even if Appellants were not deemed for purposes of the Due Process Clause to have formally abandoned property that they knowingly left in an abatement zone on the expiration of the 10-day notice period, the strength of Appellants' 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, Appellants' private interest in this case—maintaining their possessions on public property for more than 10 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 Municipal Code giving Appellants ample opportunity to remove their personal possessions from a 10-day abatement area or to otherwise secure storage before the abatement is carried out (as Appellants did here). Among other things, the Municipality must provide written and oral notice at least 10 days before the abatement stating the location of the prohibited encampment, 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.[144] During the pre-abatement notice period, campers who wish to retain their 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

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143 *Lavan*, 693 F.3d at 1031.

144 AMC 15.20.020B.15.a & b.iv-v.

noticed, and it must store the property of anyone who has appealed (as occurred here).[145] 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.[146]

Only after forgoing all of those opportunities to retain possession of their personal items would Appellants then face any risk of deprivation of their property upon the commencement of the posted abatement. Appellants do not allege that, in their particular situation, these existing procedures gave them insufficient opportunity to retain their property. (Indeed, they received property storage by filing these appeals.) Nor do Appellants explain how any further process would meaningfully reduce the risk of erroneous deprivation, as they fail to explain how an even-longer notice period or a pre-deprivation hearing of some unspecified variety would have avoided any allegedly erroneous deprivation here. (Indeed, they do not allege they have suffered or would suffer any deprivation.) Appellants speculate that "ten days *may* prove inadequate" for others, such as those "without ready access to communication technology."[147] But Appellants, who are well counseled, do not contend that 10 days of notice was inadequate for them to remove their property from the abatement area or secure property storage (as, indeed, they did by filing these appeals), and they provide no basis on which to conclude that existing

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145 AMC 15.20.020B.15.f & c.
146 AMC 15.20.020B.15.g.
147 Appellants' Opening Brief at 43.

Municipal Code is unconstitutional on its face.[148] Tellingly, Appellants identify no amount of pre-deprivation notice that they would concede to be constitutionally adequate before an abatement could commence, and they identify no basis on which this Court could draw a line of constitutional significance between 10 days, 15 days, or any number of other days.

On the third factor, the Municipality has a vital interest in abating prohibited encampments. As explained above,[149] and as courts have recognized, the government has "a substantial interest in ensuring that public property is available for use by everyone."[150] Abatement also serves important interests of protecting the public health; the environment; and the safety of the public from property and security threats, as noted above. Adding significant new procedural 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."[151] Accordingly, even longer notice and a pre-abatement hearing are not constitutionally required.

Finally, Appellants assert that "[d]etermining the reasonableness of the government's" abatement procedures "requires a detailed, fact-based inquiry."[152] They

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148 "[A] facial challenge means that there is no set of circumstances under which the statute can be applied consistent with the requirements of the constitution." *Ass'n of Vill. Council Presidents Reg'l Hous. Auth. v. Mael*, 507 P.3d 963, 982 (Alaska 2022) (quotation marks omitted).

149 *See supra* pp. 35-36.

150 *De-Occupy Honolulu*, 2013 WL 2285100, at *6.

151 *Id.*

152 Appellants' Opening Brief at 45-46.

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thus seem to assert that resolution of their constitutional claims would stray beyond the four corners of the abatement notices that this Court is authorized to review. Appellants' constitutional arguments all fail on the merits, as explained above. But their assertion about the scope of the inquiry involved in deciding those arguments on the merits only underscores that this Court lacks subject matter jurisdiction over these appeals from posted abatement notices.

CONCLUSION

For all these reasons, these consolidated appeals should be dismissed for lack of subject matter jurisdiction. If this Court reaches the merits, this Court should affirm the constitutionality of the reasonable provisions in Municipal Code governing the abatement of prohibited camps on public land.

Respectfully submitted this 2d day of April, 2025.

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Certificate of Service
I certify that on April 2, 2025, I caused to be emailed a true and correct copy of the foregoing to:

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Certificate of Compliance
I certify that this brief complies with the requirements of Alaska Rule of Appellate Procedure 513.5(c) because it was prepared in Times New Roman 13-point font. It complies with the requirements of Rule 212(c)(4) because it contains 50 numbered pages.

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