THIEVES IN THE NIGHT? PRE-DEPRIVATION REQUIREMENTS FOR REMOVAL OF HOMELESS PERSONS' PROPERTY FROM PUBLIC AREAS

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A homeless person's unabandoned personal property is protected by the Fourteenth Amendment's due process clause.[1] "The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.'"[2] In *Lavan v. City of Los Angeles*, the Ninth Circuit Court of Appeals condemned the city's practice of summarily seizing and destroying homeless persons' belongings found on city sidewalks.[3] The court held that homeless persons retain a constitutionally protected property right to their possessions.[4] A city therefore "must comport with the requirements of the Fourteenth Amendment's due process clause if it wishes to take and destroy them."[5] The court held that the same rules apply when the government takes a Cadillac or a homeless person's cart.[6] It wrote that a city could no more seize and destroy unattended personal property left on sidewalks by homeless persons in violation of a city ordinance than it could

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1. Lavan v. City of Los Angeles, 693 F.3d 1022, 1032-33 (9th Cir. 2012); Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1103 (E.D. Cal. 2012); Kincaid v. City of Fresno, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at *37, ¶¶ 16-17 (E.D. Cal. Dec. 8, 2006) (statement of decision and findings re: plaintiffs' application for a preliminary injunction).

2. Hooper v. City of Seattle, No. C17-0077RSM, 2017 WL 591112, at *3 (W.D. Wash. Feb. 14, 2017) (order denying plaintiffs' motion for temporary restraining order) (quoting U.S. CONST. amend. XIV, § 1).

3. 693 F.3d at 1027-33.

4. *Id.* at 1031-33.

5. *Id.* at 1032.

6. *Id.*

"seize and destroy cars parked in no-parking zones left momentarily unattended."[7]

The court in *Lavan* did not elaborate upon the extent of the procedural protection required by the Fourteenth Amendment, because the city in that case admitted "that it failed to provide any notice or opportunity to be heard" before it seized and destroyed property belonging to homeless persons.[8] Supreme Court "precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property."[9] Many lower courts nonetheless hold that a pre-seizure hearing is not required before removing items owned by homeless persons from public property if adequate post-seizure safeguards are provided.[10] However, not all judges agree.[11]

The United States District Court for the Western District of Washington wrote in *Ellis v. Clark County Department of Corrections* that "post deprivation remedies [cannot] save an otherwise unconstitutional act from unconstitutionality in cases in which the [governmental actor] acted pursuant to some established procedure."[12] The court explained that acts committed pursuant to an institutionalized practice are predictable and within the power

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7. *Id.*

8. *See id.*

9. United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993) (commenting upon Fifth Amendment due process requirements); *see also* Kincaid v. City of Fresno, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at *37, ¶ 18 (E.D. Cal. Dec. 8, 2006) (statement of decision and findings re: plaintiffs' application for a preliminary injunction).

10. *See* Hooper v. City of Seattle, No. C17-77RSM, 2017 WL 4410029, at *12 (W.D. Wash. Oct. 4, 2017) (order denying plaintiffs' motion for class certification and denying plaintiffs' motion for preliminary injunction) (holding that a pre-seizure hearing was not required for removal of obstructions and immediate hazards when post-seizure procedures provided an opportunity to recover removed property), *aff'd sub nom.* Willis v. City of Seattle, No. 18-35053, 2019 WL 6442929 (9th Cir. Nov. 29, 2019); *see* Russell v. City of Honolulu, No. 13-00475 LEK-RLP, 2013 WL 6222714, at *7-12 (D. Haw., Nov. 29, 2013) (order granting in part and denying in part plaintiffs' motion for preliminary injunction) (holding that pre-deprivation notice and hearing was not required for removal of sidewalk nuisances when post-deprivation property reclamation procedures were provided); Watters v. Otter, 955 F. Supp. 2d 1178, 1190-91 (D. Idaho 2013) (holding that post-removal remedies were sufficient to satisfy due process requirements).

11. *See* Ellis v. Clark Cty Dep't of Corr., No. 15-5449 RJD, 2016 WL 4945286, at *12 (W.D. Wash. Sept. 16, 2016); *cf.* Jeremiah v. Sutter Cty., No. 2:18-cv-00522-TLN-KJN, 2018 WL 1367541, at *4 (E.D. Cal. Mar. 16, 2018) (order granting temporary restraining order) (indicating that a post-deprivation hearing may be inadequate unless justified by a sufficient governmental interest); Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, at 1018-19 (C.D. Cal. 2011) (writing that efficiency must take a backseat to pre-deprivation due process), *aff'd*, 693 F.3d 1022 (9th Cir. 2012); *Kincaid*, 2006 WL 3542732, at *37-39, ¶¶ 16-23 (holding that the absence of an adequate and effective pre-deprivation procedure violates due process particularly when no post-deprivation process is provided).

12. 2016 WL 4945286, at *11-12 (*quoting* Zimmerman v. City of Oakland, 255 F.3d 734, 738 (9th Cir. 2001)).

of government to control.[13] The court therefore opined that post-seizure remedies cannot save clean-up activities undertaken in accordance with an official policy if they deprive homeless persons of their property without reasonable advance notice.[14]

Another judge from the same court, nevertheless, later upheld the facial validity of cleanup policies that, in many instances, provided only post-deprivation remedies.[15] The United States District Court for the Western District of Washington ruled in *Hooper v. City of Seattle* that posting of post-seizure notice at cleanup sites, when coupled with an opportunity to recover property that had been seized and stored, was adequate for immediate removal of obstructions and hazards.[16] The court recognized that due process requires an opportunity to be heard at a meaningful time, but noted that such hearing may be postponed in extraordinary situations.[17] It commented that failure to provide pre-seizure notice has the potential to fail constitutional analysis, but the court concluded that post-deprivation safeguards provide sufficient due process in some situations despite the absence of a pre-seizure notice.[18]

Due process requirements applicable to homeless encampment cleanups are therefore unsettled. There are authorities that indicate pre-deprivation notice and remedies must be provided.[19] There are others that hold post-deprivation safeguards may suffice.[20] This article reviews pre-deprivation due process requirements for removal of homeless persons' property from public areas. It examines leading cases that discuss pre-deprivation due process requirements when dealing with homeless persons' property. It reviews constitutional tests developed by the United States Supreme Court and how they have been applied in analogous situations. Lastly, the article suggests a framework for evaluating pre-deprivation due process requirements in regularly encountered situations.

I. CASES RE: HANDLING OF HOMELESS PERSONS' PROPERTY

An Idaho statute was challenged in the wake of *Lavan v. City of Los Angeles* that authorizes officials to remove property left unattended on state-

13. *Id.* at *12.
14. *Id.*
15. *Hooper*, 2017 WL 4410029, at *12-13.
16. *Id.* at *12.
17. *Id*.
18. *See id.*
19. *E.g.*, *Ellis*, 2016 WL 4945286, at *11-12.
20. *E.g.*, *Hooper*, 2017 WL 4410029, at *12-13.

owned land after its owner is issued a citation for unauthorized camping.[21] Section 67-1613A of the Idaho Code provides that property removed by officials shall be held "in a secure location for a period of not less than ninety (90) days."[22] It further provides that a notice providing contact information must be posted for that period at "the nearest reasonable location to the place of removal."[23] A person whose property has been removed can reclaim his or her property during the ninety (90) day period upon "swearing that the property belongs to the claiming party" and may be assessed a reasonable storage fee.[24]

Aggrieved property owners argued in *Watters v. Otter* that Idaho Code section 67-1613A violates due process since owners are not provided a pre-deprivation hearing before their property is removed by state officials.[25] The United States District Court for the District of Idaho recognized that due process requires both notice and an opportunity for a hearing, but it explained that due process requirements must be assessed "case-by-case based on the total circumstances."[26] The court held a statutory provision that property is taken from owners who are present only if their property remains after they have been cited, combined with its post-removal notification procedures for unattended property, satisfied due process notice requirements.[27] In addition, the court ruled that an owner's ability to reclaim property by simply picking it up, coupled with the opportunity to contest any storage fees, obviated the need for a post-deprivation hearing.[28]

The United States District Court for the Central District of California declined to follow *Watters* in *Los Angeles Catholic Worker v. Los Angeles Downtown Industrial District Business Improvement District*.[29] Homeless persons complained in *Los Angeles Catholic Worker* that officials from a downtown improvement district took their unattended property, sometimes leaving a note indicating where it could be reclaimed, and sometimes not.[30] The district court disapproved, writing that "[d]ue process requires that individuals are provided 'notice and an opportunity to be heard at a

21. Watters v. Otter, 955 F. Supp. 2d 1178, 1188-91 (D. Idaho 2014).

22. IDAHO CODE § 67-1613A (2014); *Watters*, 955 F. Supp. 2d at 1189.

23. IDAHO CODE § 67-1613A (2014).

24. *Id.*

25. 955 F. Supp. 2d at 1190-91.

26. *Id.* at 1190 (quoting Miranda v. City of Cornelius, 429 F.3d 858, 866 (9th Cir. 2005)).

27. *Id.*

28. *Id.* at 1191.

29. L.A. Catholic Worker v. L.A. Downtown Indus. Dist. Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *4 (C.D. Cal. Jan. 13, 2015).

30. *Id.* at *1.

meaningful time and in a meaningful manner,' before they are deprived of their property."[31]

Los Angeles has a long recorded history with regards to its handling of the property of homeless persons.[32] A California State Superior Court entered a temporary restraining order in 1987 requiring city officials to post a prominent notice in a conspicuous place twelve (12) hours before removing improperly stored personal property.[33] In 2000, the United States District Court for the Central District of California enjoined the city from "[c]onfiscating the personal property of the homeless when it has not been abandoned and destroying it without notice."[34] That court again addressed complaints in 2011 that the city was confiscating and immediately destroying homeless persons' property without notice.[35] The district court in *Lavan v. City of Los Angeles* was troubled that the city failed to provide any meaningful pre-deprivation or post-deprivation process,[36] and it enjoined the city from seizing property "absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband."[37] The court did not mandate a particular pre-deprivation process, but it rejected the argument that impracticality should excuse providing such process.[38] In addition, the court directed the city to "leave a notice in a prominent place for any property taken on the belief that it is abandoned, including advising where the property is being kept and when it may be claimed by the rightful owner."[39] However, the court in *Los Angeles Catholic Worker* did not ground its ruling on disobedience of the *Lavan* injunction, or one of the other prior orders directed at the city, and instead based it on violations of federal and state law.[40]

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31. *Id.* at *5 (quoting Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, 1016-17 (C.D. Cal. 2011)).

32. *See, e.g.*, *L.A. Catholic Worker*, 2015 WL 13649801; *Lavan*, 797 F. Supp. 2d 1005; Justin v. City of Los Angeles, No. CV-00-12352 LGB (AIJx), 2000 WL 1808426 (C.D. Cal. Dec. 5, 2000) (order granting plaintiffs' ex parte application for temporary restraining order); Temporary Restraining Order, Bennion v. City of Los Angeles, No. C637718 (L.A. Cty. Super. Ct. filed Feb. 25, 1987) [hereinafter TRO, Bennion].

33. TRO, Bennion, No. C637718, at *2-3, ¶ III.

34. *Justin*, 2000 WL 1808426, at *13, ¶ 5.

35. *Lavan*, 797 F. Supp. 2d at 1009.

36. *Id.* at 1016-17.

37. *Id.* at 1020, ¶ D.1.

38. *Id.* at 1018-19.

39. *Id.* at 1020.

40. *See* L.A. Catholic Worker v. L.A. Downtown Indus. Dist. Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *7 (C.D. Cal. Jan. 13, 2015). An additional injunction was later issued in *Mitchell v. City of Los Angeles*, No. CV 16-01750 SJO (GJSx), 2016 WL 11519288, at *7 (C.D. Cal. Apr. 13, 2016) (order granting plaintiffs' application for preliminary injunction).

The court in *Los Angeles Catholic Worker* explained that "[t]he failure to provide pre-deprivation notice is only excused in 'extraordinary situations where some valid governmental interests is at stake that justifies the postponing of the hearing after the event.'"[41] The court held that enforcement of a city ordinance prohibiting personal property from being left on public sidewalks likely did not "constitute[] an extraordinary circumstance that warrants this exception."[42] It further wrote that the improvement district's inconsistent post-deprivation notification practices did not satisfy due process requirements even if pre-deprivation notice was not required.[43]

The parties in *Los Angeles Catholic Worker* later settled and the district court entered a stipulated judgment.[44] It provides that officials may not seize or remove personal property from sidewalks or other public spaces except in limited situations.[45] They may immediately move travel obstructions but no more than necessary to provide clear passage.[46] They may remove trash and dumped items that appear to be placed for trash removal.[47] They may remove unattended bulky items such as furniture and mattresses.[48] They may remove unattended property to respond to public health or safety emergencies, but must first contact the police or sanitation bureau to address and document those issues.[49]

Special pre-removal notice requirements apply to the handling of apparently abandoned property.[50] Officials must attempt to identify the owner of the property and affix notice to it if the owner cannot be found.[51] If the property is not packed up in a manner that provides minimum travel clearance, the notice must indicate that the property will be removed if it is not moved within twenty-four (24) hours.[52] If the property is packed up, officials must wait twenty-four (24) hours before posting it and may remove the property only if it has not been moved after another twenty-four (24) hours has passed.[53] In addition, written notice of removal must be posted

41. *L.A. Catholic Worker*, 2015 WL 13649801, at *5 (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993)).

42. *Id.*

43. *Id.*

44. Stipulated Judgment, L.A. Catholic Worker v. L.A. Downtown Indus. Dist. Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx) (C.D. Cal. Mar. 15, 2017), ECF No. 126.

45. *Id.* at 2-6.

46. *Id.* § I.2.a-b., at 2-3.

47. *Id.* § I.2.c., at 3.

48. *Id.* § I.2.d., at 3.

49. *Id.* § I.2.e., at 3-4.

50. *Id.* at 4-6.

51. *Id.* § I.2.g., at 5-6.

52. *Id.* § I.2.f.ii.3, at 4, § I.2.g.ii, at 5.

53. *Id.* § I.2.giii., at 5-6.

whenever packed up property is removed at the location the property was found that indicates where the property was taken for storage and how it may be retrieved.[54]

Similar due process concerns as those expressed in *Los Angeles Catholic Worker* were also addressed in *Ellis v. Clark County Department of Corrections*.[55] Homeless persons alleged in *Ellis* that work crews had disposed of their property often with little or no advance notice.[56] The policy at issue in that case instructed workers to immediately clean sites if they had been abandoned or there was no one currently present.[57] If a camp was occupied, the policies directed workers to notify those present to clean and vacate the area and further inform them that workers would leave and return in an hour to discard any property still remaining.[58] The United States District Court for the Western District of Washington held that the disposal of property in accordance with the policies violated the due process rights of homeless persons who had lost their belongings.[59] The court wrote that "[g]enerally, 'individuals must receive notice and an opportunity to be heard before the Government deprives them of property.'"[60] It further questioned the reasonableness of ten (10) minutes advance notice given to one individual and explained that due process requires officials "to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return."[61]

The parties in *Ellis* later settled, and the case was dismissed.[62] The settlement agreement provided for adoption of an amended property removal policy requiring workers to allow individuals present at cleanup sites to remove their property.[63] Work crews are required to post notice and take pictures if any property remains.[64] The notice must inform owners that property remaining at the site after forty-eight (48) hours will be removed, and it must also notify owners who they may contact to reclaim property.[65]

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54. *Id.*

55. No. 15-5449 RJD, 2016 WL 4945286, at *10-12 (W.D. Wash. Sept. 16, 2016).

56. *Id.* at *2-5.

57. *Id.* at *2.

58. *Id.*

59. *Id.* at *11-12.

60. *Id.* at *11 (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993)).

61. *Id.* (quoting Lavan v. City of Los Angeles, 693 F.3d 1022, 1032 (9th Cir. 2012)).

62. Stipulated Order of Dismissal with Prejudice, Ellis v. Clark Cty. Dep't of Corr., No. 15-5449 RJD (W.D. Wash. Oct. 24, 2016), ECF No. 67.

63. Settlement Agreement, exhibit A, Ellis v. Clark Cty. Dep't of Corr., No. 15-5449 RJD (W.D. Wash. Sept. 28, 2016).

64. *Id.*

65. *Id.*

After passage of seventy-two (72) hours, work crews may treat any remaining property at the site as abandoned, but they must transport property—reasonably identifiable as belonging to a particular owner—to a storage provider for possible reclamation.[66]

Another judge from the United States District Court for the Western District of Washington reached a different conclusion in *Hooper v. City of Seattle* than the one previously reached in *Ellis*.[67] Seattle's cleanup policies were challenged on due process grounds in *Hooper*.[68] Those policies provided that seventy-two (72) hours advance notice be posted at or near each tent or structure in an unauthorized encampment that is slated for removal.[69] However, they contained an exception that obstructions and immediate hazards were not subject to advance notice requirements and could be removed immediately.[70] In addition, the policies authorized officials to designate emphasis areas in which any encampment associated property could be treated as an obstruction and removed.[71] Homeless persons argued in *Hooper* that the combination of provisions authorizing emphasis areas and those allowing removal of obstructions without advance notice left very few areas throughout the city where pre-seizure notice would be required.[72] However, the court held that requirements for post-seizure notice, coupled with other post-deprivation safeguards providing an opportunity for recovery of removed property, satisfied due process.[73]

The United States District Court for the Middle District of Florida reached a similar conclusion as the court in *Hooper* and upheld a St. Petersburg property storage ordinance against a due process challenge in *Catron v. City of St. Petersburg*.[74] The ordinance provided for removal of property after thirty-six (36) hours advance notice unless the property was

66. *Id.*

67. *See* Hooper v. City of Seattle, No. C17-77RSM, 2017 WL 4410029, at *12-15 (W.D. Wash. Oct. 4, 2017).

68. *Id.* at 12; *see also* Hooper v. City of Seattle, No. C17-0077RSM, 2017 WL 591112, at *3-7 (W.D. Wash. Feb. 14, 2017).

69. Declaration of Breanne Schuster in Support of Plaintiffs' Motion for Preliminary Injunction, exhibit C, City of Seattle Dep't of Fin. and Admin. Serv. Rules Regarding: Unauthorized Camping on City Prop. Enforcement Proc.; and Removal of Unauthorized Prop., §§ 6.1, 6.3, at 4, Hooper v. City of Seattle, No. 2:17-cv-00077-RSM (W.D. Wash. June 14, 2017), ECF No. 94.

70. *Id.* § 4.0, at 2-3.

71. *Id.* § 13.0, at 7.

72. *Hooper*, 2017 WL 4410029, at *13.

73. *Id.* at *12-13.

74. *See* Catron v. City of St. Petersburg, No. 8:09-cv-923-T-23EAJ, 2009 WL 3837789, at *7-8 (M.D. Fla. Nov. 17, 2009). The Eleventh Circuit Court of Appeals also later held in *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1271-73 (11th Cir. 2011) that the ordinance was not unconstitutionally vague.

left in an area posted with a warning sign that it could be immediately removed.[75] The court held that those provisions, when combined with a retrieval procedure through which persons could recover their property for thirty (30) days, provided adequate safeguards.[76] The court wrote that the procedure "considerably reduces the risk of erroneous confiscation and furthers the government's interest in protecting the public's health, safety, and welfare. Requiring an additional safeguard creates an unnecessary burden."[77] The court additionally ruled that state tort law provided an adequate remedy for negligent loss of confiscated property.[78]

The State of Oregon by statute requires municipalities and counties to develop policies for humane removal of homeless persons who camp on public property.[79] The policies must provide that notice be posted and also delivered to a local agency that provides social services to homeless persons at least twenty-four (24) hours prior to removal of a campsite.[80] Exceptions may be made for emergencies or immediate dangers to human life or safety, and situations where law enforcement officials believe illegal activities other than camping are occurring.[81] The policies must also require storage of any removed personal property, other than items that either have no apparent value or are in an insanitary condition, for a minimum of thirty (30) days.[82] The United States District Court for the District of Oregon held in *O'Callaghan v. City of Portland* that notice given in accordance with the statute meets due process requirements.[83] It further held that the property storage and reclamation process provided by the statute satisfies due process.[84]

The City of Portland agreed when settling another case to adopt implementation protocols regarding its removal policies that further

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75. *Catron*, 2009 WL 3837789, at *8.

76. *Id.*; *see also* Russell v. City of Honolulu, No. 13-00475 LEK-RLP, 2013 WL 6222714, at *8 (D. Haw., Nov. 29, 2013) (order granting in part and denying in part plaintiffs' motion for preliminary injunction). *But see* Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, 1017 (C.D. Cal. 2011) (finding obscured and hard to read signage inadequate).

77. *Catron*, 2009 WL 3837789, at *8.

78. *Id. But see* Ellis v. Clark Cty. Dep't Of Corr., No. 15-5449 RJD, 2016 WL 4945286, at *12 (W.D. Wash. Sept. 16, 2016) (holding that a post-deprivation tort claim remedy is not sufficient to satisfy due process when property has been seized without advance notice as part of an institutionalized practice).

79. OR. REV. STAT. § 203.077 (2017).

80. *Id.* § 203.079(1).

81. *Id.* § 203.079(2).

82. *Id.* § 203.079(1)(d).

83. No. 3:12-CV-00201-BR, 2013 WL 5819097, at *4 (D. Or. Oct. 29, 2013).

84. *Id.*

elaborate its pre-deprivation process requirements.[85] Portland agreed that any notices will warn that a campsite will be cleared no less than twenty-four (24) hours and within seven (7) days after it is posted.[86] Portland also agreed to photograph and make a written inventory of all confiscated property, and, in addition, to photograph each campsite to make record of what has been disposed of rather than confiscated for storage.[87] It promised to store "any item that is reasonably recognizable as belonging to a person and that has apparent use."[88] Portland additionally agreed to include information in any posted notice directing owners where confiscated property is being stored and how they can obtain additional information.[89]

The most robust discussion about due process requirements arose from consideration of ordinances enacted by the City of Honolulu.[90] Honolulu adopted a series of ordinances regulating use of its sidewalks.[91] Honolulu Ordinance 10-26 provides with limited exceptions that only pedestrians may use a pedestrian use zone,[92] and it formerly provided that objects and items could not be left in a pedestrian use zone except personal baggage.[93] Ordinance 11-29 was later enacted to deal specifically with property storage and provides that personal property stored on public property, including sidewalks, may be impounded.[94] The property storage prohibitions provide that unauthorized personal property may be removed by the city if it is left on a sidewalk twenty-four (24) hours after it has been posted with notice or its owner has been served with notice.[95] Impounded property, other than perishable items, is stored for thirty (30) days, after which it may be discarded

85. Release and Hold Harmless Agreement, § B(2), at 2-3, Anderson v. City of Portland, No. 6:08-CV-01447-AA (D. Or. Sept. 12, 2012), ECF No. 91-1.

86. *Id.* § B(2)(a), at 2.

87. *Id.* § B(2)(c)-(e), at 2.

88. *Id.* § B(2)(b), at 2.

89. *Id.* § B(2)(f), at 3.

90. *See generally* Martin v. City of Honolulu, No. 15-00363 HG-KSC, 2015 WL 5826822 (D. Haw. Oct. 1, 2015) (order denying plaintiffs' application for temporary restraining order); Russell v. City of Honolulu, No. 13-00475 LEK-RLP, 2013 WL 6222714 (D. Haw. Nov. 29, 2013); De-Occupy Honolulu v. City of Honolulu, No. Civ. 12-00668 JMS, 2013 WL 2285100 (D. Haw. May 21, 2013) (order denying plaintiffs' superseding motion for preliminary injunction).

91. Honolulu, Haw., Ordinance 13-8 (Apr. 19, 2013); Honolulu, Haw., Ordinance 11-29 (Dec. 9, 2011); Honolulu, Haw., Ordinance 10-26 (Oct. 27, 2010).

92. Honolulu, Haw., Ordinance 10-26, at 3-5 (Oct. 27, 2010) (codified as amended at HONOLULU, HAW., REV. ORDINANCES OF HONOLULU §§ 29-18.1 and 29-18.4 (2019)).

93. *Id*. at 3-4 (Oct. 27, 2010) (codified as former HONOLULU, HAW., REV. ORDINANCES OF HONOLULU § 29-18.2, *repealed by* Honolulu, Haw., Ordinance 11-29, § 5 (Dec. 9, 2011)).

94. Honolulu, Haw., Ordinance 11-29, at 2 (Dec. 9, 2011) (codified as amended at HONOLULU, HAW., REV. ORDINANCES OF HONOLULU § 29-19.3 (2019)).

95. HONOLULU, HAW., REV. ORDINANCES OF HONOLULU §§ 29-19.3-29-19.4 (2019).

or sold.[96] Ordinance 13-8 was lastly enacted to deal with sidewalk nuisances.[97] It provides that any "object or collection of objects constructed, erected, installed, maintained, kept, or operated on or over any sidewalk, including but not limited to structures, stalls, stands, tents, furniture, and containers, and any of their contents or attachments" may be summarily removed by the city.[98] The sidewalk nuisance removal provision does not require advance notice before a nuisance is abated, but it instead directs that removed property be stored for thirty (30) days and provides that post-removal notice be posted.[99] Property unclaimed after that period may be destroyed or sold unless its owner has appealed.[100]

Honolulu's sidewalk regulations were challenged in *Russell v. City of Honolulu* and *De-Occupy Honolulu v. City of Honolulu*.[101] *Russell* dealt with summary removal of property under the ordinance prohibiting sidewalk nuisances.[102] Homeless persons alleged in *Russell* that procedures allowing summary abatement sidewalk nuisances violated due process by failing to provide for a pre-deprivation hearing.[103] *De-Occupy Honolulu* dealt with impoundment of property under the ordinance that prohibited storage of personal property on public property.[104] Homeless persons claimed in *De-Occupy Honolulu* that the procedures authorizing impoundment of illegally stored property violated due process by failing to provide a hearing.[105]

The United States District Court for the District of Hawai'i noted in *De-Occupy Honolulu* that authority exists which suggests a hearing is generally required, but it concluded that a formal hearing is not required when notice is given before a seizure and a simple post-seizure opportunity for return of impounded property is provided.[106] The court acknowledged that due process requires an opportunity to be heard at a meaningful time in a meaningful manner.[107] It recognized, however, that the inquiry into the sufficiency of a particular process focuses upon whether there are adequate

96. *Id.* §§ 29-19.5.

97. Honolulu, Haw., Ordinance 13-8, § 1 (Apr. 19, 2013).

98. HONOLULU, HAW., REV. ORDINANCES OF HONOLULU §§ 29-16.2 (definition of a "sidewalk-nuisance") and 29.16.3 (summary removal procedures) (2019).

99. *Id.* § 29-16.3(b).

100. *Id.* § 29-16.3(b)(3).

101. Russell v. City of Honolulu, No. 13-00475 LEK-RLP, 2013 WL 6222714 (D. Haw., Nov. 29, 2013); De-Occupy Honolulu v. City of Honolulu, No. Civ. 12-00668 JMS, 2013 WL 2285100 (D. Haw., May 21, 2013).

102. *Russell*, 2013 WL 6222714, at *1.

103. *Id.* at *7.

104. *De-Occupy Honolulu*, 2013 WL 2285100, at *1-2.

105. *Id.* at *5.

106. *Id.* at *6 n.6.

107. *Id.* at *5.

safeguards against erroneous deprivations of property.[108] The court pointed to procedures in the Honolulu storage ordinance providing for advance notice of any seizure and post-seizure notice describing where property had been taken and could be retrieved.[109] It held those opportunities made the impoundment process reasonable and that a hearing was not required since it "would add little to prevent an erroneous deprivation."[110]

The Hawai'i District Court commented in *Russell* that Honolulu's sidewalk nuisance ordinance "does not provide for either pre-deprivation notice or a pre-deprivation hearing."[111] It did not find this omission fatal, however, because of the ordinance's post-deprivation notice and hearing procedure.[112] The court opined that it could "consider the adequacy of the post-deprivation notice and hearing procedure if the interest at stake is small relative to the burden that providing pre-deprivation notice and a pre-deprivation hearing would impose."[113] It acknowledged concerns that necessities of life could be seized under the sidewalk nuisance ordinance, but it held that enforcement guidelines allowing for timely recovery without paying any fee satisfied due process requirements.[114] In light of those safeguards, the court found "that pre-removal notices and hearings are not required because the interests at stake are relatively small in comparison to the fiscal and administrative burdens that the City would incur."[115]

The United States District Court for the Central District of California wrote in *Mitchell v. City of Los Angeles* that it was persuaded by the reasoning of *De-Occupy Honolulu* and applied similar principles.[116] Homeless persons alleged in *Mitchell* that Los Angeles officials seized their property without pre-deprivation notice or an adequate post-deprivation process.[117] The city contested the sworn allegations, but the court accepted them as being true for purposes of considering whether to grant a preliminary

108. *See id.* at *5-6.

109. *Id.* at *6.

110. *Id.*; *accord* James v. City of Honolulu, 125 F. Supp. 3d 1080, 1093-95 (D. Haw. 2015).

111. Russell v. City of Honolulu, No. 13-00475 LEK-RLP, 2013 WL 6222714, at *8 (D. Haw. Nov. 29, 2013).

112. *Id.* at *8-12.

113. *Id.* at *10.

114. *Id.* at *11-12. The court did however find that in some instances, notices issued by Honolulu were inadequate to notify homeless persons. *Id.* at 14-15. It therefore ruled that those who received inadequate notification regarding their remedies would likely succeed on a due process challenge, because those aspects of the process were critical to its constitutionality. *Id.*

115. *Id.* at *12.

116. No. CV 16-01750 SJO (GJSx), 2016 WL 11519288, at *5 (C.D. Cal. Apr. 13, 2016) (order granting plaintiffs' application for preliminary injunction).

117. *Id.* at *1.

injunction.[118] The court recognized that the city had significant public health and safety interests, but it ruled that those interests did not outweigh interests of homeless persons in keeping possession of their personal property which included essentials such as medications and medical equipment.[119] The court found that the city's property removal protocols were inadequate but opined that they would not contravene due process if additional procedures were adopted that (1) provided advance notice of cleanup activities, (2) allowed confiscation only of property that posed an immediate risk to the public, and (3) better catalogued the property that was seized to facilitate reclamation by its owner.[120] The *Mitchell* court therefore enjoined Los Angeles from engaging in mass cleanup efforts in its skid row area without giving at least twenty-four (24) hours advance notice or confiscating property without an objectively reasonable belief that the property was either abandoned, an immediate threat to public health or safety, evidence of a crime, or contraband; and the court required the city to improve its post-deprivation property recovery process.[121]

The parties in *Mitchell* ultimately settled.[122] The *Mitchell* settlement provides, with exceptions, that the city will not seize property as part of a cleanup effort in skid row and its surrounding downtown area without providing at least twenty-four (24) hours advance notice to affected persons.[123] In addition, the city must provide a thirty (30) minute warning and an opportunity for individuals to remove their property when a cleanup is imminent.[124] If an owner arrives while property is still being screened during a cleanup process, he or she must be given an opportunity to reclaim that person's property rather than having the property sent to storage by the city.[125] The agreement does not prohibit the city from performing routine sanitation services or removing property that is either abandoned, contraband, evidence of a crime, or presents an immediate threat to public health or safety.[126] It also does not prevent the city from removing large

118. *Id.* at *4.

119. *Id.* at *6.

120. *Id.*

121. *Id.* at *6-7; *see also* Mitchell v. City of Los Angeles, No. CV 16-01750 SJO (JPRx), 2017 WL 10545079, at *2-4 (C.D. Cal. Sept. 25, 2017) (order denying defendants' motion for clarification of order) (discussing provisions of the preliminary injunction).

122. *See* Stipulated Order of Dismissal, exhibit A, Settlement and Release Agreement, at 6-24, Mitchell v. City of Los Angeles, No. CV 16-01750 SJO (JPRx) (C.D. Cal. May 31, 2019), ECF No. 119.

123. *Id.* § 4(b)(i), at 9.

124. *Id.* § 4(b)(ii), at 9.

125. *Id.* § 4(b)(iv), at 9-10.

126. *Id.* § 4(b)-(c), at 9-10.

items, like couches, mattresses, wood pallets, and refrigerators, and allows officials to move obstructions that impede passage.[127] Notice must be prominently posted that advises affected individuals where removed property may be reclaimed, and seized property must be stored in a secure location for no less than ninety (90) days in a manner that makes it available for recovery by its owner within seventy-two (72) hours after its seizure.[128] In addition, a special provision declares that living essentials, such as medication, medical equipment, uncontaminated tents, sleeping bags, and blankets, must be accessible within twenty-four (24) hours.[129]

The decisions of lower courts demonstrate a wide array of opinions on the question of due process. At one extreme, some cases have held that post-deprivation remedies, alone, may satisfy due process.[130] On the other extreme, some cases indicate that post-deprivation remedies, by themselves, might never be enough.[131] Many cases fall somewhere in between.[132] All, however, appear to agree that the primary issues with respect to due process involve (1) the timing and sufficiency of notice, and (2) the timing and type of opportunity provided for being heard.[133]

II. CONSTITUTIONAL TESTS

The owner of an undivided interest in a parcel of land challenged the extinguishment of that interest in *Grannis v. Ordean*.[134] The interest was extinguished in a partition action in which owner's predecessor in interest had not been personally served and the name of the owner's predecessor-in-interest was misspelled.[135] Service by mail and publication was attempted,

127. *Id.* § 4(e)-(f), at 11-12.

128. *Id.* § 4(d), at 10-11.

129. *Id.* § 4(d)(v), at 11.

130. *See* Russell v. City of Honolulu, No. 13-00475 LEK-RLP, 2013 WL 6222714, at *7-12 (D. Haw., Nov. 29, 2013); Watters v. Otter, 955 F. Supp. 2d 1178, 1190-91 (D. Idaho 2013).

131. *See* Ellis v. Clark Cty. Dep't of Corr., No. 15-5449 RJD, 2016 WL 4945286, at *11-12 (W.D. Wash. Sept. 16, 2016); L.A. Catholic Worker v. L.A. Downtown Indus. Dist. Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *4-5 (C.D. Cal. Jan. 13, 2015).

132. *See, e.g.*, Hooper v. City of Seattle, No. C17-77RSM, 2017 WL 4410029, at *12-13 (W.D. Wash. Oct. 4, 2017); Mitchell v. City of Los Angeles, No. CV 16-01750 SJO (GJSx), 2016 WL 11519288, at *4-7 (C.D. Cal. Apr. 13, 2016); De-Occupy Honolulu v. City of Honolulu, No. Civ. 12-00668 JMS, 2013 WL 2285100, at *6 (D. Haw. May 21, 2013); Catron v. City of St. Petersburg, No. 8:09-cv-923-T-23EAJ, 2009 WL 3837789, at *7-8 (M.D. Fla. Nov. 17, 2009).

133. *See, e.g.*, *L.A. Catholic Worker*, 2015 WL 13649801, at *5; *Russell*, 2013 WL 6222714, at *7; *Watters*, 955 F. Supp. 2d at 1190-91.

134. 234 U.S. 385, 386-91 (1914).

135. *Id.* at 387-88.

but the predecessor's name was also misspelled on the those notices.[136] The Supreme Court was called upon to determine whether this defective constructive service satisfied due process to bind the misnamed predecessor with the judgment in the partition action.[137]

The Supreme Court wrote in *Grannis* that "[t]he fundamental requisite of due process of law is the opportunity to be heard."[138] It also recognized, however, that States have inherent authority over property within its borders and may adjudicate ownership upon providing constructive notice to interested parties who reside outside its jurisdiction.[139] The Court further explained that "[t]he 'due process of law' clause . . . does not impose an unattainable standard of accuracy."[140] It therefore held that the underlying question was a practical one—whether the constructive notice substantially complied with the State statute authorizing it and provided adequate constructive notice.[141] The Court determined there was a "reasonable probability" that the mailed notice would have reached its intended recipient despite the misnomer and would have "sufficiently warned" about the proceedings affecting ownership of the property.[142]

The Supreme Court later explained in *Mullane v. Central Hanover Bank & Trust Co.* that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[143] The Court recognized that due process does not place impossible or impractical obstacles.[144] It commented, however, that the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[145] "[W]hen notice is a person's due, process which is a mere gesture is not due process."[146] The Court wrote that "notice must be of such nature as reasonably to convey the required information . . . and it

136. *Id.* at 388-89.

137. *Id.* at 391-92.

138. *Id.* at 394.

139. *Id.* at 394-95.

140. *Id.* at 395.

141. *Id.* at 397.

142. *Id.* at 397-98.

143. 339 U.S. 306, 314 (1950); *see also* Milliken v. Meyer, 311 U.S. 457, 463 (1940) (holding that constitutional adequacy depends upon whether the form of notice is reasonably calculated to give actual notice and an opportunity to be heard).

144. *Mullane*, 339 U.S. at 313-14.

145. *Id.* at 314.

146. *Id.* at 315.

must afford a reasonable time for those interested to make their appearance . . . ."[147] The Court left room for due consideration of the "practicalities and peculiarities" of a particular situation and did not impose a one-size-fits-all notification requirement.[148] It held that:

> The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.[149]

Mullane dealt with the right of trust beneficiaries to receive notice of proceedings regarding the management of trust assets.[150] The Supreme Court found that notification by publication, alone, was inadequate, because such notice was not reasonably calculated to apprise known beneficiaries that their rights were being adjudicated, and other practical means of providing notice were available.[151] It distinguished the type of notice required for trust management issues from the notice needed when tangible property interests are at stake.[152] The Court wrote that "[t]he ways of an owner with tangible property are such that he usually arranges to learn of any direct attack upon his possessory or proprietary rights."[153] It therefore commented that "[a] state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, . . . or that he has left some caretaker under a duty to let him know that it is being jeopardized."[154] The *Mullane* Court quoted an older opinion in which Chief Justice Marshall wrote, "[i]t is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it."[155]

Later authority clarifies that the assumption indulged by *Mullane* does not eliminate the need to give reasonably effective notice when tangible property interests are at issue.[156] Notice of an action to condemn real property interests was published and posted as provided by statute in

147. *Id.* at 314 (citations omitted); *see also* Roller v. Holly, 176 U.S. 398, 409-13 (1900) (notice must provide reasonable time to respond).

148. *Mullane*, 339 U.S. at 314-15.

149. *Id.* at 315 (citations omitted).

150. *Id.* at 307. Due process also unquestionably protects tangible personal property. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 86-87 (1972) (goods).

151. *See Mullane*, 339 U.S. at 315-19.

152. *Id.* at 316.

153. *Id.*

154. *Id.*

155. *Id.* (quoting The Mary, 13 U.S. (9 Cranch) 126, 144 (1815)).

156. *See, e.g.*, Jones v. Flowers, 547 U.S. 220, 233 (2006).

Schroeder v. New York, but no personal notice was given despite the property owner's address being readily ascertainable.[157] The Court recognized the practical impossibility of giving personal notice to missing or unknown persons, but ruled that constructive notice by publication is inadequate when the identity and whereabouts of someone is known.[158] It held that due process requires a good faith effort to provide personal notice when feasible.[159]

Mullane remains the standard for evaluating due process claims regarding the adequacy of notice when property interests are at issue.[160] The Supreme Court commented in *Dusenbery v. United States* that *Mullane* provides a "straightforward test of reasonableness under the circumstances."[161] *Dusenbery* involved forfeiture of property used in illegal drug transactions.[162] Notice was given by certified mail sent to various locations connected with the owner of the property including the prison where the owner was incarcerated.[163] The Court rejected the property owner's argument that the notice should be analyzed to determine whether better notification should have been given.[164] It wrote that a method of giving notice is sufficient if it is reasonably calculated to provide notice, and actual notice is not constitutionally required.[165]

The Supreme Court confirmed in *Jones v. Flowers* that "[d]ue process does not require that a property owner receive actual notice before the government may take his property."[166] The government need only provide notice reasonably calculated to reach a recipient before it takes property.[167] The government cannot, however, sit on its hands if it learns that notice has been ineffective.[168] The Court wrote that it would not mandate a particular method for providing notice,[169] but it explained the government cannot ignore information that notification failed if such information is promptly

157. 371 U.S. 208, 209-10 (1962).

158. *Id.* at 212-13; *see also* City of New York v. New York, N.H. & H.R.R., 344 U.S. 293, 296 (1953) (holding that notice by publication is a "poor and sometimes hopeless" method of giving notice which may be resorted to only by necessity when the "names, interests and addresses of persons are unknown . . . .").

159. *See Schroeder*, at 213-14.

160. *See, e.g.*, Taylor v. Yee, 136 S. Ct. 929, 929 (2016) (Alito, J., concurring in denial of cert.).

161. 534 U.S. 161, 167 (2002).

162. *Id.* at 163-64.

163. *Id.* at 164.

164. *Id.* at 167-71.

165. *Id.* at 169-73.

166. 547 U.S. 220, 226 (2006).

167. *Id.*

168. *Id.* at 227-34.

169. *Id.* at 234-39.

learned.[170] The Court was not receptive to suggestions that the government's responsibility to give notice could be excused by a recipient's lack of diligence.[171] The *Jones* Court explained that *Mullane* "directs that 'when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'"[172]

The adequacy of a notice form was addressed in *City of West Covina v. Perkins*.[173] In that case, the City had seized personal property pursuant to a warrant and left general notice listing the property that had been seized and indicating where interested parties could inquire.[174] The owners of the property acknowledged receiving the notice but argued that it deprived them of due process by failing to provide detailed information regarding their remedies.[175] The Supreme Court recognized the importance of providing individualized notice that property had been taken "because the property owner would have no other reasonable means of ascertaining who was responsible for his loss."[176] However, the Court wrote that "[n]o similar rationale justifies requiring individualized notice of state-law remedies" that were generally available in published statutes and case law.[177] It explained that additional special notice is required only if procedures are "arcane and are not set forth in documents accessible to the public . . . ."[178] Otherwise, only reasonable steps must be taken to provide notice, and interested parties are capable of informing themselves about particular remedies when further information is publicly available.[179]

In addition to guaranteeing a right to notice, due process requires that a person be given an opportunity to be heard before being finally deprived of property.[180] The Supreme Court held in *Phillips v. Commissioner* that postponement of a property rights determination is not a denial of due process "if the opportunity given for the ultimate judicial determination of liability is

170. *Id.* at 230-31.
171. *See id.* at 231-34.
172. *Id.* at 238 (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950)).
173. 525 US 234, 240-41 (1999).
174. *Id.* at 236-37.
175. *Id.* at 240.
176. *Id.* at 241.
177. *Id.*
178. *Id.* at 242.
179. *See id.* at 241-43.
180. Mathews v. Eldridge, 424 U.S. 319, 333 (1976); *see also* Grannis v. Ordean, 234 U.S. 385, 394 (1914).

adequate."[181] The *Phillips* Court noted that a State may order summary destruction of property without advance notice or hearing to protect public health.[182] It also recognized that public property may be summarily seized during war-time due to public necessity.[183] However, later authority indicates that these are "rare and extraordinary situations . . . ."[184]

The Supreme Court wrote in *Armstrong v. Manzo* that due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner."[185] It further explained in *Boddie v. Connecticut* that only an opportunity needs to be provided, and the right to a hearing may be lost by failure to timely exercise it or violation of procedural rules.[186] In addition, the formality and procedural requisites for a hearing can vary depending upon the nature of a case.[187] However, the root requirement of due process is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."[188] A meaningful opportunity to be heard must therefore be provided "within the limits of practicality."[189]

Due process does not always require a pre-deprivation hearing.[190] The Supreme Court established a standard in *Mathews v. Eldridge* to determine

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181. 283 U.S. 589, 597 (1931); *see also* Mitchell v. W.T. Grant Co., 416 U.S. 600, 611-12 (1974).

182. *Phillips*, 283 U.S. at 597; *see also* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598-99 (1950).

183. *Phillips*, 283 U.S. at 597; *cf.* Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921) (writing "[t]here can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy . . . .").

184. Bd. of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972); *see also* United States v. $8,850, 461 U.S. 555, 562 n.12 (1983); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678-80 (1974); Fuentes v. Shevin, 407 U.S. 67, 91-92 (1972).

185. 380 U.S. 545, 552 (1965).

186. 401 U.S. 371, 378-79 (1971).

187. *Id.* at 378; *see also* Bell v. Burson, 402 U.S. 535, 539-40 (1971); Goldberg v. Kelly, 397 U.S. 254, 266-67 (1970); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 894-95 (1961).

188. *Boddie*, 401 U.S. at 379 (emphasis added); *see also $8,850*, 461 U.S. at 562 n.12; *Fuentes*, 407 U.S. 67, 80-86; *Goldberg*, 397 U.S. at 260-66; Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

189. *Boddie*, 401 U.S. at 379; *see also* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 318 (1950).

190. Parratt v. Taylor, 451 U.S. 527, 540-41 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327, 330-31 (1986); *see also* Mitchell v. W.T. Grant Co., 416 U.S. 600, 611-12 (1974); Arnett v. Kennedy, 416 U.S. 134, 154-58 (1974) (plurality opinion). The Supreme Court held in *Parratt* that a post-deprivation tort claim remedy may provide sufficient due process in some instances involving unauthorized conduct by governmental agents. *Parratt*, 451 U.S. at 543-44; *see also* Hudson v. Palmer, 468 U.S. 517, 533 (1984). *Parratt* does not however immunize systematized deprivations of property. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36

when due process requires a pre-deprivation opportunity to be heard.[191] *Mathews* dealt with termination of Social Security disability benefits without a hearing under procedures that provided post-termination recourse.[192] The *Mathews* Court recognized that procedural due process protected such benefits and that some form of hearing must be provided before someone could be finally deprived of them.[193] It wrote however that due process is flexible, and the question whether certain procedures "are constitutionally sufficient requires analysis of the governmental and private interests that are affected."[194] It explained:

> [T]hat identification of the specific dictates of due process generally requires consideration of three distinct factors: 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.[195]

Post-*Mathews* cases indicate that an opportunity to be heard may be delayed in limited circumstances.[196] It wrote in *Gilbert v. Homar* that the "Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."[197] The *Gilbert* Court indicated that a hearing may be delayed until after a deprivation under the *Mathews* standard when an important

(1982). The Supreme Court explained in Zinermon v. Birch, 494 U.S. 113, 128 (1990), that "*Parratt* and *Hudson* represent a special case of the general *Mathews v. Eldridge* analysis, in which post-deprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide."

191. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

192. *See id.* at 323-26, 335-39.

193. *Id.* at 332-33.

194. *Id.* at 334.

195. *Id.* at 335. Judge Henry Friendly presaged the *Mathews* test in *Frost v. Weinberger*, 515 F.2d 57, 66 (2d Cir. 1975), writing that the Supreme Court's "decisions can be fairly summarized as holding that the required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it."

196. Gilbert v. Homar, 520 U.S. 924, 930 (1997); Fed. Deposit Ins. Co. v. Mallen, 486 U.S. 230, 240-41 (1988).

197. *Gilbert*, 520 U.S. at 930; *see also* Zinermon v. Birch, 494 U.S. 113, 128 (1990) (collecting cases).

government interest demanding prompt action is accompanied by substantial assurance that a deprivation is not baseless or unwarranted.[198]

Pre-deprivation notice may also be excused in some circumstances.[199] The Supreme Court wrote in *Fuentes v. Shevin* that extraordinary situations could justify postponing both notice and hearing, but those situations must be truly unusual.[200] The Court recognized in *Fuentes* that property may be summarily seized to collect taxes, to meet the needs of war efforts, to protect against bank failure, and to protect the public from misbranded drugs and contaminated food.[201] It later held in *Calero-Toledo v. Pearson Yacht Leasing Co.* that seizure of property used to facilitate crimes is also an extraordinary situation where pre-seizure notice is not required.[202] The Court in *Fuentes* described the limited situations where immediate seizure of property may be constitutionally permissible:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[203]

The *Fuentes* exception for extraordinary situations is distinguishable from mere delay of a hearing under *Gilbert*.[204] *Fuentes* applies when analyzing summarily executed outright seizures where both notice and an opportunity for hearing are postponed.[205] In contrast, *Gilbert* has been applied to evaluate hearing delays under the *Mathews* framework when the

198. *Gilbert*, 520 U.S. at 930-31; *see also* City of Los Angeles v. David, 538 U.S. 715, 717-19 (2003); *Mallen*, 486 U.S. at 230, 240-41 (1988). *But see* Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982) (stating that a post-deprivation hearing is inadequate absent the "necessity of quick action by the State or the impracticality of providing any predeprivation process . . . .") (quoting Parratt v. Taylor, 451 U.S. 527, 539 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327, 330-31 (1986)).

199. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 676-80 (1974).

200. Fuentes v. Shevin, 407 U.S. 67, 90 (1972).

201. *Id.* at 91-92.

202. *Calero-Toledo*, 416 U.S. at 676-80. *But see* United States v. James Daniel Good Real Prop., 510 U.S. 43, 52-62 (1993) (disallowing *ex parte* seizure of real property).

203. *Fuentes*, 407 U.S. at 91; *see also Calero-Toledo*, 416 U.S. at 678-80 (applying *Fuentes*); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969) (recognizing that summary procedures may satisfy due process in extraordinary situations).

204. *Compare Fuentes*, 407 U.S. at 91 (criteria for extraordinary situations) *with* Gilbert v. Homar, 520 U.S. 924, 930-31 (1997) (criteria for hearing delay) (*quoting* FDIC v. Mallen, 486 U.S. 230, 240 (1988)).

205. *See Fuentes*, 407 U.S. at 90-92; *see also Calero-Toledo*, 416 U.S. at 678-80.

government must act quickly or it would be impractical to provide a pre-deprivation hearing.[206]

Due process issues regarding handling of homeless persons' property involve the interplay between three constitutional tests.[207] *Mullane v. Central Hanover Bank* dictates a reasonable effort, considering practicalities and peculiarities of a situation, to provide notice to affected persons that their property interests are at stake.[208] *Mathews v. Eldridge* evaluates the sufficiency of the particular process utilized to decide issues affecting property rights by examining the competing governmental and private interests at issue and the value of additional procedural safeguards.[209] *Fuentes v. Shevin* determines when overriding governmental interests may warrant extraordinary exceptions.[210]

III. VEHICLE TOWING CASES

Lower court cases do not agree upon how to apply the pertinent Supreme Court tests to issues involving homeless persons' property. For example, the court in *Los Angeles Catholic Worker v. Los Angeles Downtown Industrial District Business Improvement District* held that a local prohibition against storing personal property on city sidewalks did not constitute an extraordinary situation justifying an exception to providing pre-deprivation notice.[211] In contrast, the court in *Russell v. City of Honolulu* reached the opposite conclusion because the personal interests at stake were outweighed by fiscal and administrative burdens that would be placed upon the public.[212] Despite their apparent disagreement about the ultimate result, the courts in both instances consulted vehicle towing cases.[213]

Vehicle towing is another situation where the government removes private property from public rights-of-way, and many cases dealing with

206. *Gilbert*, 520 U.S. at 930-35; *see also* City of Los Angeles v. David, 538 U.S. 715, 716-19 (2003).

207. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (balancing test); *Fuentes*, 407 U.S. at 91 (exception for extraordinary situations); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950) (notice sufficiency test).

208. 339 U.S. at 314-15.

209. 424 U.S. at 334-35.

210. 407 U.S. at 91. *Fuentes* arguably might not provide an independent third test and may instead be another means to determine under the *Mathews* framework when governmental interests override other factors when summarily executed *ex parte* seizures are involved. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 56-58 (1993).

211. No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *5 (C.D. Cal. Jan. 13, 2015).

212. No. 13-00475 LEK-RLP, 2013 WL 6222714, at *7-12 (D. Haw., Nov. 29, 2013).

213. *L.A. Catholic Worker*, 2015 WL 13649801, at *5; *Russell*, 2013 WL 6222714, at *10-11.

homeless persons' property resort to them for guidance.[214] The Supreme Court recognized in *City of Los Angeles v. David* that it would be impossible for a city to enforce parking rules if it was required to provide pre-deprivation hearings before towing vehicles.[215] Circuit court cases have consistently held that a hearing is not required before an unlawfully parked car may be towed from a public right-of-way.[216] These situations are however distinguishable from impoundment of vehicles found on private property where community caretaking considerations may not be implicated.[217]

The cases have varied in approach. Some analyze the issue under the *Fuentes v. Shevin* exception for extraordinary situations.[218] In *Breath v. Cronovich*, the court wrote:

> The three *Fuentes* requirements for postponed notice and hearing are satisfied. First, the towing is necessary to protect the interest of local governments in regulating the use of their streets and other public places. Second, public convenience and safety normally require the prompt removal of illegally parked vehicles. Third, a police officer must make some determination that the statute is being violated before the vehicle can be towed.[219]

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214. *See, e.g.*, Lavan v. City of Los Angeles, 693 F.3d 1022, 1032 (9th Cir. 2012); *L.A. Catholic Worker*, 2015 WL 13649801, at *5; *Russell*, 2013 WL 6222714, at *10-11; Watters v. Otter, 955 F. Supp. 2d 1178, 1190 (D. Idaho 2013); Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, 1018 (C.D. Cal. 2011), *aff'd*, 693 F.3d 1022 (9th Cir. 2012).

215. 538 U.S. 715, 719 (2003).

216. *E.g.*, Soffer v. City of Costa Mesa, 798 F.2d 361, 362-63 (9th Cir. 1986); Allen v. City of Kinloch, 763 F.2d 335, 336-37 (8th Cir. 1985); Johnston v. City of Ann Arbor, No. 84-1699, 1985 WL 13405, at *1 (6th Cir. June 10, 1985); Breath v. Cronovich, 729 F.2d 1006, 1010-11 (5th Cir. 1984) (dictum); Cokinos v. Dist. of Columbia, 728 F.2d 502, 502 (D.C. Cir. 1983); Sutton v. Milwaukee, 672 F.2d 644, 645-46 (7th Cir. 1982); *cf.* DeFranks v. Mayor of Ocean City, 777 F.2d 185, 187-88 (4th Cir. 1985) (towing of unauthorized vehicle parked in private lot at lot owner's request); Weinrauch v. Park City, 751 F.2d 357, 359-60 (10th Cir. 1984) (holding that a "City need not provide a hearing before requiring that the owner of an impounded vehicle pay the fees to recover the car."). Lower courts in the First, Second, Third, and Eleventh Circuits have indicated that vehicle impoundments do not require a pre-deprivation hearing. Barcena v. Dep't of Off-Street Parking, 492 F. Supp. 2d 1343, 1353-54 (S.D. Fla. 2007); Shipley v. Orndoff, 491 F. Supp. 2d 498, 507-08 (D. Del. 2007); Bricker v. Craven, 391 F. Supp. 601, 604-06 (D. Mass. 1975); *cf.* Tedeschi v. Blackwood, 410 F. Supp. 34, 43-45 (D. Conn. 1976) (writing that towing of abandoned, unregistered or dangerously parked cars without a prior hearing might be justified if an opportunity for a prompt post-deprivation hearing is provided, but finding a statutory scheme unconstitutional that provided no hearing). *But see* Graff v. Nicholl, 370 F. Supp. 974, 983 (N.D. Ill. 1974) (holding that "due process requires that notice and an opportunity for a hearing be accorded to owners of abandoned vehicles prior to towing.").

217. *E.g.*, Miranda v. City of Cornelius, 429 F.3d 858, 867-68 (9th Cir. 2005); *see also* Clement v. City of Glendale, 518 F.3d 1090, 1092 (9th Cir. 2008) (unregistered car parked in parking lot).

218. *See, e.g.*, Breath v. Cronovich, 729 F.2d 1006, 1010-11 (5th Cir. 1984); Remm v. Landrieu, 418 F. Supp. 542, 545 (E.D. La. 1976); *Bricker*, 391 F. Supp at 604-06.

219. 729 F.2d at 1010.

Others utilize the *Mathews v. Eldridge* cost-benefit test.[220] The court in *Sutton v. Milwaukee* explained:

> On the benefit side of the ledger in this case, the first thing to be noted is that the property interest is a slight one. It is not the car itself but the use of the car for a short period, usually a few hours, that is at stake . . . .
>
> Second, the additional safeguard of pre-towing notice and opportunity to be heard is not required in this case to prevent frequent errors. The determination that a car is illegally parked is pretty cut and dried . . . . Since the procedural safeguard sought here would avert few errors, and those of small magnitude in terms of the cost to the car's owner, the benefits of the safeguard would be very small.
>
> We turn to the costs of the safeguard. They are not in this case limited, as one might expect, to the expense of notice and hearing . . . . There is no way that the city or state can notify the owners of illegally parked cars that their cars will be towed and provide them then and there with an opportunity to challenge the lawfulness of the towing. To require notice and hearing in advance is, as the appellees concede, to prevent all towing of illegally parked cars.[221]

Many do not provide much additional independent analysis.[222] Despite their different approaches to the issue, the cases share concern about the feasibility of providing a pre-deprivation hearing and the impact that enforcement delay would have upon unimpaired use of public rights-of-way.[223]

The Ninth Circuit Court of Appeals in *Lavan v. City of Los Angeles* held that a city could not seize and destroy a homeless person's unattended personal property any more than it could seize and destroy an illegally parked car.[224] It cited *Clement v. City of Glendale* which dealt with towing an unregistered car that was lawfully parked in a hotel parking lot.[225] *Lavan* involved immediate seizure and destruction without "any process before

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220. *See, e.g.*, *Sutton*, 672 F.2d at 645-46; Soffer v. City of Costa Mesa, 607 F. Supp. 975, 981-83 (C.D. Cal. 1985), *aff'd*, 798 F.2d 361 (9th Cir. 1986).

221. 672 F.2d at 646 (citation omitted).

222. *See, e.g.*, Johnston v. City of Ann Arbor, No. 84-1699, 1985 WL 13405, at *1 (6th Cir. June 10, 1985); Cokinos v. Dist. of Columbia, 728 F.2d 502, 502-03 (D.C. Cir. 1983).

223. *See, e.g.*, *Breath*, 729 F.2d at 1010-11; *Sutton*, 672 F.2d at 646 ("The cost of notice and hearing is therefore the cost of abandoning towing as a method of dealing with illegal parking. It is clearly prohibitive . . . ."); Barcena v. Dep't of Off-Street Parking, 492 F. Supp. 2d 1343, 1353 (S.D. Fla. 2007) ("I conclude it is not feasible . . . to provide a 'pre-tow hearing' to all persons whose vehicles are towed in the city of Miami."); *Remm*, 418 F. Supp. at 545 ("[P]ublic safety and convenience normally require the prompt removal of illegally parked vehicles.").

224. 693 F.3d 1022, 1032 (9th Cir. 2012).

225. *Id.*; *see generally* Clement v. City of Glendale, 518 F.3d 1090, 1092 (9th Cir. 2008).

permanently depriving" homeless persons of their property.[226] It is therefore unclear whether *Lavan* would have excused either pre-deprivation notice or hearing in accordance with the court's other towing precedents if a post-deprivation property recovery process had been provided.[227] Those precedents may nonetheless be instructive.[228]

Ninth Circuit towing precedents differentiate between situations justifying immediate action and those that might not.[229] The court in *Clement v. City of Glendale* distinguished situations involving illegally parked cars from those involving cars that are legally parked.[230] The court wrote in *Stypmann v. City of San Francisco* that "[t]he 'extraordinary situation' standard justifying immediate removal without prior notice and hearing is clearly satisfied in some circumstances (a vehicle blocking a busy street during commuting hours, for example) . . . . In other circumstances the need for summary action is not so clear."[231] It similarly explained in *Miranda v. City of Cornelius*:

> Impoundment of a vehicle left in a public place or a vehicle for which there is no licensed driver . . . presumably would not require pre-deprivation notice and a pre-seizure hearing because the burden of such procedures would vitiate the legitimate purposes of the impoundment. Impoundments in such cases are likely justified by the need to respond immediately to the hazard or public safety threat caused by the location of the vehicles, which would be incompatible with a requirement of notice and a hearing beforehand.[232]

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226. 693 F.3d at 1032.

227. *See generally* Lone Star Sec. & Video, Inc. v. City of Los Angeles, 584 F.3d 1232, 1238-39 (9th Cir. 2009) (holding that due process did not require individualized notice before towing commercial trailers parked in violation of time restrictions by repeat violators); Scofield v. City of Hillsborough, 862 F.2d 759, 762-64 (9th Cir. 1988) (holding that due process did not require notice before towing an unregistered car parked on a public street); Soffer v. City of Costa Mesa, 798 F.2d 361, 362-63 (9th Cir. 1986) (holding that due process did not require hearing before city could tow an automobile from a public street); *cf.* Goichman v. Rheuban Motors Inc., 682 F.2d 1320, 1323-24 (9th Cir. 1982) (assuming that towing an unlawfully parked car constitutes an extraordinary situation excusing prior notice and hearing).

228. There are instances where due process issues involving vehicle towing and handling of a homeless person's property overlap. *See* Gates v. Alameda Cty. Sheriff's Dep't, No. C-12-1429 EMC, 2012 WL 3537040, at *7-8 (N.D. Cal. Aug. 14, 2012) (impoundment of van in which a person resided).

229. *See* Miranda v. City of Cornelius, 429 F.3d 858, 867-68 (9th Cir. 2005); Stypmann v. City of San Francisco, 557 F.2d 1338, 1342 n.10 (9th Cir. 1977).

230. 518 F.3d at 1094-96; *see also Scofield*, 862 F.2d at 763-64.

231. 557 F.2d at 1342 n.10; *see also* Tedeschi v. Blackwood, 410 F. Supp. 34, 44-45 (D. Conn. 1976).

232. 429 F.3d at 867.

Consequently, there may not be a one-size-fits-all due process test for dealing with homeless persons' property. It may depend upon the particular situation and the public interest that is implicated.

IV. SUGGESTED DUE PROCESS FRAMEWORK

There are three principal types of property addressed by homeless persons' property cases: (1) abandoned property,[233] (2) property that obstructs other uses or poses some sort of hazard or threat to public safety,[234] and (3) property that fits in neither of those categories but nonetheless is kept or left in violation of a regulatory prohibition.[235] Due process should nonetheless be assessed on a case-by-case basis on the total circumstances.[236] The following framework is therefore suggested with the caveat that it should not be blindly applied.[237]

A. Abandoned property

There is a distinction between property that has been abandoned and property that has been merely left unattended.[238] Truly abandoned property is not constitutionally protected.[239] The principal question then with respect to unattended property is whether it has been abandoned.[240] If any reasonable doubt exists regarding the status of an item, it should be treated as not having

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233. *See, e.g.*, Stipulated Judgment at 4-6, L.A. Catholic Worker v. L.A. Downtown Indust. Dist. Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx) (C.D. Cal. Mar. 15, 2017), ECF No. 126.

234. *See, e.g.*, Hooper v. City of Seattle, No. C17-77RSM, 2017 WL 4410029, at *12 (W.D. Wash. Oct. 4, 2017)*, aff'd sub.nom.* Willis v. City of Seattle, No. 18-35053, 2019 WL 6442929 (9th Cir. Nov. 29, 2019); Russell v. City of Honolulu, No. 13-00475 LEK-RLP, 2013 WL 6222714, at *7-12 (D. Haw. Nov. 29, 2013).

235. *See* Miralle v. City of Oakland, No. 18-cv-06823-HSG, 2018 WL 6199929, at *3 (N.D. Cal. Nov. 28, 2018) (order denying motion for preliminary injunction); Sullivan v. City of Berkeley, No. C 17-06051 WHA, 2017 WL 4922614, at *5-6 (N.D. Cal. Oct. 31, 2017) (order re: motion for preliminary injunction); Watters v. Otter, 955 F. Supp. 2d 1178, 1188-91 (D. Idaho 2013); De-Occupy Honolulu v. City of Honolulu, No. Civ. 12-00668 JMS, 2013 WL 2285100, at *1-2, *5-7 (D. Haw. May 21, 2013); Catron v. City of St. Petersburg, No. 8:09-cv-923-T-23EAJ, 2009 WL 3837789, at *8 (M.D. Fla. Nov. 17, 2009).

236. Gilbert v. Homar, 520 U.S. 924, 930 (1997); *Miranda*, 429 F.3d at 866.

237. *See* Bell v. Burson, 402 U.S. 535, 539-40 (1971) (explaining that a procedure that satisfies due process in one case does not necessarily satisfy due process in every case).

238. Lavan v. City of Los Angeles, 693 F.3d 1022, 1032 (9th Cir. 2012) (a homeless person's unabandoned possessions are protected by the Fourteenth Amendment's due process clause).

239. *See* Abel v. United States, 362 U.S. 217, 241 (1960) ("There can be nothing unlawful in the Government's appropriation of . . . abandoned property.").

240. *See generally* Tim Donaldson, *Abandoned or Unattended? The Outer Limit of Fourth Amendment Protection for Homeless Persons' Property*, 46 HASTINGS CONST. L. Q. 793 (2019).

been abandoned.[241] However, if property has been abandoned, due process considerations are inapplicable and should not restrict its removal, impoundment, or discard.[242]

An attempt to provide pre-deprivation notice should nonetheless be attempted when dealing with apparently abandoned property in non-urgent situations. Many factors must be taken into consideration when determining whether or not property is abandoned.[243] A risk of error therefore exists that unattended property may not be properly categorized.[244] In non-urgent situations, pre-seizure notice is feasible and consistent with the public's desire for removal of the apparently abandoned property.[245] Giving pre-deprivation notice in such situations encourages removal of the apparently abandoned property by its owner.[246] It also provides some assurance that any property still remaining after notice has been attempted is actually abandoned.

B. Obstructions, Hazards, and Threats to Public Safety

"Governmental authorities have the duty and responsibility to keep their streets open and available for movement."[247] In addition, "[t]he authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge."[248] Municipal authority over sidewalks falls under the same category as its

241. *Cf.* Lavan v. City of Los Angeles, No. CV 11-2874 PSG (AJWx), 2014 WL 12693524, at *8-9 (C.D. Cal. July 24, 2014) (reviewing multiple fact situations that precluded entering summary judgment on abandonment issues).

242. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 316 (1950) (stating that proceedings against abandoned property deprive its former owner of nothing). *But see* Stipulated Judgment, § I.2.f.-g., at 4-6, L.A. Catholic Worker v. L.A. Downtown Indus. Dist. Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx) (C.D. Cal. Mar. 15, 2017), ECF No. 126 (court endorsed agreement between parties regarding process to be used when identifying and dealing with abandoned property).

243. Donaldson, *supra* note 240, at 815-17.

244. *See* Perry v. Village of Arlington Heights, 905 F. Supp. 465, 468-69 (N.D. Ill. 1995) (discussing risk of error when abandoned vehicle determinations are made).

245. *See* Sutton v. City of Milwaukee, 672 F.2d 644, 647 (7th Cir. 1982); Tedeschi v. Blackwood, 410 F. Supp. 34, 44-45 (D. Conn. 1976); Graff v. Nicholl, 370 F. Supp. 974, 982-83 (N.D. Ill. 1974).

246. *See* Scofield v. City of Hillsborough, 862 F.2d 759, 764 (9th Cir. 1988).

247. Cox v. Louisiana, 379 U.S. 536, 554-55 (1965); *see also* Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Schneider v. New Jersey, 308 U.S. 147, 160-61 (1939); Richmond, F. & P.R.R. v. City of Richmond, 96 U.S. 521, 528 (1877).

248. South Dakota v. Opperman, 428 U.S. 364, 369 (1976); *see also* Sullivan v. City of Berkeley, 383 F. Supp. 3d 976, 986 (N.D. Cal. 2019) (A city "has a legitimate interest in enforcing its penal and municipal statutes and in removing unsafe or hazardous conditions from its public spaces.").

control over streets.[249] Removal of obstructions, hazards, and threats to public safety are circumstances where the public's need for immediate action is greatest.[250] For that reason, it seems most appropriate for application of the extraordinary situation exception recognized in *Fuentes v. Shevin*.[251] Procedures for removal of obstructions, hazards, and threats to public safety should therefore be evaluated to determine whether: (1) the removal is directly necessary to keep a public place or right-of-way open and available for other uses, (2) very prompt action is needed, and (3) the removal is initiated by a governmental official responsible for determining, under narrowly drawn standards, that the removal is necessary and justified in the particular instance.[252] However, the constitutionality of such summary removals also likely depends upon providing post-deprivation notice and a timely remedy.[253]

C. Other Unauthorized Property Storage

The Supreme Court acknowledges that municipalities rightfully exercise a great deal of control over public streets and sidewalks in the interest of traffic regulation and public safety.[254] It also recognizes government has a substantial interest in maintaining publicly owned property for its intended use.[255] The Supreme Court wrote in *Adderley v. Florida* that "[t]he State, no

249. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969).

250. *See* Miranda v. City of Cornelius, 429 F.3d 858, 867 (9th Cir. 2005) (recognizing that vehicle impoundments to eliminate hazards or public safety threats would be incompatible with a requirement of notice and hearing beforehand); *see also* Breath v. Cronovich, 729 F.2d 1006, 1010 (5th Cir. 1984); *cf.* OR. REV. STAT. § 203.079(2) (2019) (authorizing local policies that allow summary removals in emergency situations, when there is immediate danger to human life or safety, or illegal activities are occurring); Mitchell v. City of Los Angeles, No. CV 16-01750 SJO (GJSx), 2016 WL 11519288, at *6 (C.D. Cal. Apr. 13, 2016) (suggesting that "[t]he City . . . could carefully enforce its public health mandate, only seizing property that clearly poses an immediate risk to the public."). The Supreme Court recognizes that "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action. Indeed, deprivation of property to protect the public health and safety is '[o]ne of the oldest examples' of permissible summary action." Hodel v. Va. Surface Mining and Reclamation Ass'n, 452 U.S. 264, 300 (1981) (quoting Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950)).

251. *See* Hooper v. City of Seattle, No. C17-77RSM, 2017 WL 4410029, at *12-13 (W.D. Wash. Oct. 4, 2017). *But see* L.A. Catholic Worker v. L.A. Downtown Indust. Dist. Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *5 (C.D. Cal. Jan. 13, 2015) (holding that removal of property left on a sidewalk in violation of a city ordinance did not constitute an extraordinary situation).

252. *See* Fuentes v. Shevin, 407 U.S. 67, 91 (1972).

253. *See Hooper*, 2017 WL 4410029, at *12; Russell v. City of Honolulu, No. 13-00475 LEK-RLP, 2013 WL 6222714, at *10-12 (D. Haw. Nov. 29, 2013); *cf.* OR. REV. STAT. § 203.079(1)(d) (2019) (requiring storage of property removed even when pre-deprivation notice is not required).

254. *Shuttlesworth*, 394 U.S. at 152.

255. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296 (1984).

less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[256] Therefore, persons who use public property "must abide by otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace."[257] A city therefore may validly enact restrictions upon the use of public property, sidewalks, and rights-of-way.[258]

Absent circumstances requiring urgent action, removal of property stored or left somewhere in violation of a valid restriction or prohibition should be evaluated under the *Mathews v. Eldridge* test.[259] Three factors should be considered: (1) the interests of the homeless persons who will be affected by the removal; (2) the risk of an erroneous removal occurring, and the value of additional or substitute procedural safeguards; and (3) the governmental interest at stake, including the function involved and the fiscal and administrative burdens that would result from additional or substitute procedural requirements.[260] When evaluating governmental interests,

256. 385 U.S. 39, 47 (1966).

257. *Clark*, 468 U.S. at 298.

258. *See, e.g.*, Sullivan v. City of Berkeley, 383 F. Supp. 3d 967, 986 (N.D. Cal. 2019) ("The Constitution does not prohibit the City from removing items stored on its property where a homeless resident, if given an indefinite amount of time, would eventually return to collect them."). The court in *Church v. City of Huntsville*, 30 F.3d 1332, 1345 (11th Cir. 1994) explained that "[t]he Constitution does not confer the right to trespass on public lands. Nor is there any constitutional right to store one's personal belongings on public lands." A municipality must however exercise its authority to regulate within constitutional limits. *See, e.g.*, *Shuttlesworth*, 394 U.S. at 152-53 (1969). There may be situations where a restriction is susceptible to constitutional challenge if it overburdens the ability of homeless persons to survive. *See, e.g.*, Martin v. City of Boise, 920 F.3d 584, 603-18 (9th Cir. 2019) (holding enforcement of an anti-camping ordinance violated the Eighth Amendment); Pottinger v. City of Miami, 810 F. Supp. 1551, 1578-80 (S.D. Fla. 1992) (ruling that targeted enforcement of ordinances against homeless persons violated the right to travel and other constitutional rights), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir. 1994), *and directed to undertake settlement discussions*, 76 F.3d 1154 (11th Cir.1996). *But see, e.g.*, Kohr v. City of Houston, No. 4:17-CV-1473, 2017 WL 6619336, at *4 (S.D. Tex. Dec. 28, 2017) (order denying preliminary injunction) (ruling that anti-encampment ordinance was valid exercise of police power that did not unconstitutionally criminalize homelessness). Those issues are beyond the scope of this article which assumes the validity of property storage restrictions for purposes of considering due process requirements, but they are important considerations. *See generally* Tim Donaldson, *Criminally Homeless? The Eighth Amendment Prohibition Against Penalizing Status*, 4 CONCORDIA L. REV. 1 (2019) (discussing Eighth Amendment requirements); Tim Donaldson, *A Teasing Illusion? Homelessness and the Right to Interstate Travel*, 28 U. FLA. J.L. & PUB. POL'Y 401 (2017) (discussing right to travel issues).

259. *See, e.g.*, Mitchell v. City of Los Angeles, No. CV 16-01750 SJO (GJSx), 2016 WL 11519288, at *5-7 (C.D. Cal. Apr. 13, 2016); L.A. Catholic Worker v. L.A. Downtown Indust. Dist. Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *5 (C.D. Cal. Jan. 13, 2015); De-Occupy Honolulu v. City of Honolulu, No. Civ. 12-00668 JMS, 2013 WL 2285100, at *5 (D. Haw. May 21, 2013); Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, 1016-17 (C.D. Cal. 2011).

260. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

particular attention should be paid to whether there is a need to act quickly or it would be impractical to provide pre-deprivation process.[261] Opinions vastly differ about how to compare and weigh competing private and governmental interests when removal of property belonging to homeless persons is concerned.[262] Cases involving no pre-deprivation notice or ineffective notice give greater emphasis to private interests.[263] Those where procedures require pre-deprivation notice attribute more weight to governmental interests.[264]

An attempt should be made to provide pre-deprivation notice in non-urgent situations.[265] Posting of general warning signs, alone, may be ineffective unless they are reasonably calculated to inform those who may be affected.[266] Signs giving advance notice of specifically planned removal actions may however be effective if they are prominently posted at an encampment site.[267] As a general rule, a good faith effort should be undertaken to provide personal notice when feasible.[268] Opinions differ regarding how much advance notice is required.[269] However, the primary

261. *See* City of Los Angeles v. David, 538 U.S. 715, 718-19 (2003); Gilbert v. Homar, 520 U.S. 924, 930-31 (1997).

262. *Compare L.A. Catholic Worker*, 2015 WL 13649801, at *5 (stressing the importance of continued possession of personal property by homeless persons due to their precarious living situations), *with De-Occupy Honolulu*, 2013 WL 2285100, at *6 (recognizing the strong private interest homeless persons have in continued ownership of their possessions but finding that Honolulu also had "a substantial interest in ensuring that public property is available for use by everyone.").

263. *See, e.g.*, Ellis v. Clark Cty. Dep't of Corr., No. 15-5449 RJD, 2016 WL 4945286, at *11 (W.D. Wash. Sept. 16, 2016); *L.A. Catholic Worker*, 2015 WL 13649801, at *5; *Lavan*, 797 F. Supp. 2d at 1017-18.

264. *See, e.g.*, Acosta v. City of Salinas, No. 15-cv-05415 NC, 2016 WL 1446781, at *9 (N.D. Cal. Apr. 13, 2016); *De-Occupy Honolulu*, 2013 WL 2285100, at *6.

265. *See* Lavan v. City of Los Angeles, 693 F.3d 1022, 1032-33 (9th Cir. 2012); *see also* City of West Covina v. Perkins, 525 U.S. 234, 240-41 (1999); Mullane v. Cent. Hanover Bank & Tr., Co., 339 U.S. 306, 313-15 (1950).

266. *See Lavan*, 797 F. Supp. 2d at 1013, 1017; *see also* Schroeder v. City of New York, 371 U.S. 208, 213 (1962); Catron v. City of St. Petersburg, No. 8:09-cv-923-T-23EAJ, 2009 WL 3837789, at *8 (M.D. Fla. Nov. 17, 2009) (finding warning signs adequate for certain areas of public property).

267. *See* Sullivan v. City of Berkeley, 383 F. Supp. 3d 976, 981-83 (N.D. Cal. 2019).

268. *Schroede*r, 371 U.S. at 213-14; *see also Lavan*, 693 F.3d at 1032-33; *cf*. Le Van Hung v. Schaaf, No. 19-cv-01436-CRB, 2019 WL 1779584, at *6 (N.D. Cal. Apr. 23, 2019) (order granting preliminary injunction) (expressing concern about the adequacy of notice that directed those concerned to a phone number leading to a voice mailbox that allegedly was frequently full).

269. *Compare* Ellis v. Clark Cty. Dep't of Corr., No. 15-5449 RJD, 2016 WL 4945286, at *11 (W.D. Wash. Sept. 16, 2016) (finding that ten (10) minutes advance notice was not reasonable), *with* Watters v. Otter, 955 F. Supp. 2d 1178, 1188-90 (D. Idaho 2013) (finding notice given at time of issuance of a citation was adequate). The court in *De-Occupy Honolulu* found that twenty-four (24) hours advance notice provided adequate safeguard. 2013 WL 2285100, at *6; *see also* OR. REV. STAT. § 203.079(1)(a) (2019). The court in *Catron* found that thirty-six (36) hours advance

governmental interest in a non-urgent situation is cooperative and expeditious removal of the offending property, and that interest is advanced by giving enough notice to encourage the property's owner to do so before a more serious problem develops.[270] The test is "reasonableness under the circumstances."[271]

A city has an important public health responsibility to keep public areas clean and uncluttered.[272] "Very unsanitary conditions can develop quickly . . . ." if areas are not regularly kept clean.[273] Violation of a property storage prohibition is analogous to leaving a vehicle in a no parking zone, and there is small risk of an erroneous determination that property is illegally stored, because the determination is pretty cut and dried.[274] The procedural safeguard of a pre-deprivation hearing would therefore avert few errors.[275] For practical purposes, the cost of such a hearing would be elimination of property removal as an effective public health and safety remedy, because it is unrealistic to believe that violations could be rectified before they became

notice was adequate time for an owner to remove unlawfully stored property. *Catron*, 2009 WL 3837789, at *8. The court in *Hooper* found that seventy-two (72) hours advance notice satisfied the *Mathews v. Eldridge* test. Hooper v. City of Seattle, No. C17-77RSM, 2017 WL 4410029, at *15 (W.D. Wash. Oct. 4, 2017); *see also Sullivan*, 383 F. Supp. 3d at 982; Shipp v. Schaaf, 379 F. Supp. 3d 1033, 1037-38 (N.D. Cal. 2019).

270. *See* Scofield v. City of Hillsborough, 862 F.2d 759, 763-64 (9th Cir. 1988) (commenting on removal of an apparently abandoned vehicle).

271. Dusenbery v. United States, 534 U.S. 161, 167 (2002); *see also* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314-15 (1950); Carr v. Or. Dep't of Transp., No. 3:13-cv-02218-MO, 2014 WL 3741934, at *4-5 (D. Or. Jul. 29, 2014).

272. Mitchell v. City of Los Angeles, No. CV 16-01750 SJO (GJSx), 2016 WL 11519288, at *6 (C.D. Cal. Apr. 13, 2016); Love v. City of Chicago, No. 96-C-0396, 1996 WL 627614, at *6 (N.D. Ill. Oct. 25, 1996) (denying motion for preliminary injunction); *see also* Acosta v. City of Salinas, No. 15-cv-05415 NC, 2016 WL 1446781, at *9 (N.D. Cal. Apr. 13, 2016) (describing the public interest as "weighty"); *cf*. Anderson v. City of Portland, No. 08-1447-AA, 2011 WL 6130598, at *3-4 (D. Or. Dec. 7, 2011) (recognizing the legitimacy of safety and sanitation concerns in the context of Eighth Amendment claims).

273. *Love*, 1996 WL 627614, at *3; *see also* Love v. City of Chicago, No. 96-C-0396, 1998 WL 60804, at *4 (N.D. Ill. Feb. 6, 1998) (denying motion for preliminary injunction).

274. *See* Sutton v. Milwaukee, 672 F.2d 644, 646 (7th Cir. 1982); Soffer v. City of Costa Mesa, 607 F. Supp. 975, 981-82 (C.D. Cal. 1985), *aff'd*, 798 F.2d 361 (9th Cir. 1986); *see also* Lone Star Sec. & Video, Inc. v. City of Los Angeles, 584 F.3d 1232, 1239 (9th Cir. 2009); *cf*. City of Los Angeles v. David, 538 U.S. 715, 718 (2003) ("[T]he straightforward nature of the issue—whether the car was illegally parked—indicates that initial towing errors, while they may occur, are unlikely."). *But see Mitchell*, 2016 WL 11519288, at *5 (engaging in a broader inquiry and concluding that omission of an effective post-seizure property recovery process also creates a risk of an erroneous deprivation).

275. *See Sutton*, 672 F.2d at 646.

more serious problems if offending property had to be left in place pending pre-removal hearings.[276]

The impact upon a homeless person when his or her personal possessions have been removed can however be devastating, especially when the removed property includes medications or other items needed for daily survival.[277] Owners are protected by due process against even loss of use of their property.[278] In situations involving temporary deprivation of use, "[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved."[279] Mitigation measures are therefore important to reduce the impacts that property removal may have upon its owner. Advance notice safeguards an owner by providing warning and an opportunity to remove his or her property before it will be taken.[280] In addition, a timely post-

276. *Cf. David*, 538 U.S. at 719 (stating with respect to a requirement that vehicle towing hearings be held within at least five (5) days after a vehicle was towed that "a hearing is impossible if the city is to be able to enforce the parking rules . . . ."). The Court in *David* found it would be impossible for Los Angeles to annually schedule 1,000 or more vehicle towing hearings within a 48-hour (or 5-day) time limit. *Id.* at 718-19. By way of comparison, the Los Angeles Times reported that the City of Los Angeles cleaned up 16,500 homeless encampments between 2015 and early 2017. Ben Poston and Doug Smith, *Homeless Cleanups in L.A. Have Surged, Costing Millions. What Has Been Gained?*, L.A. TIMES, June 30, 2017, at A1. The court in *Sullivan v. City of Berkeley*, F. Supp. 3d 976, 987 (N.D. Cal. 2019) explained the situation in that case as follows:

> For all that can be gleaned from the record, the encampments had sufficient notice to move yet declined to do so until they were forced out by the police. In those circumstances, members are essentially given the option of moving their items away from public property to avoid seizure or retrieving them post-seizure. The City's removal of unattended items for placement into storage (or its disposal of items reasonably believed to be abandoned or trash) in these instances does not violate the Fourth or the Fourteenth Amendments. Otherwise, the City would never be able to enforce its laws or clear entrenched encampments that block public spaces without running afoul of the Constitution . . . .

277. De-Occupy Honolulu v. City of Honolulu, No. Civ. 12-00668 JMS, 2013 WL 2285100, at *7 (D. Haw. May 21, 2013); Pottinger v. City of Miami, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992); *see also Mitchell*, 2016 WL 11519288, at *5-6; L.A. Catholic Worker v. L.A. Downtown Indust. Dist. Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *5 (C.D. Cal. Jan. 13, 2015); Kincaid v. City of Fresno, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at *37 (E.D. Cal. Dec. 8, 2006) (statement of decision and findings re: plaintiffs' application for a preliminary injunction).

278. Fuentes v. Shevin, 407 U.S. 67, 84-85 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring) (stating that due process must be provided before a person "can be deprived of his property or its unrestricted use.").

279. Mackey v. Montrym, 443 U.S. 1, 12 (1979); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982) (recognizing the importance of the length or finality of a deprivation).

280. *See, e.g.*, *De-Occupy Honolulu*, 2013 WL 2285100, at *6; Catron v. City of St. Petersburg, No. 8:09-cv-923-T-23EAJ, 2009 WL 3837789, at *8 (M.D. Fla. Nov. 17, 2009); *cf. Mitchell*, 2016 WL 11519288, at *6 (indicating that advance notice allows homeless persons "to separate essential property such as medications and medical equipment from other property that might be confiscated."); Love v. City of Chicago, No. 96-C-0396, 1998 WL 60804, at *11 (N.D. Ill. Feb. 6, 1998) ("By allowing the homeless ample opportunity to move items to the safe areas, the City provides them an adequate opportunity to be heard.").

deprivation opportunity to recover property or otherwise be heard reduces the length of any deprivation and provides an additional safeguard.[281] A pre-deprivation hearing therefore should not be required if reasonable pre-seizure notice has been attempted and a prompt post-deprivation opportunity is provided for recovery of property that has been removed.[282]

CONCLUSION

A homeless person's personal possessions are often the only property that he or she owns.[283] It often consists of keepsakes, medicine, personal identification, and items needed for daily survival.[284] Removal of such property from a public area can have a devastating impact upon the precarious living situation of a homeless person.[285] The public also has important health, safety, and welfare reasons to preserve public areas for their intended use.[286] Streets, sidewalks, parks, and other public property dedicated to public use are meant for shared use by all for specific intended purposes.[287] Private uses that interfere with those shared purposes can obstruct travel, create safety risks, and unduly disturb the public's right to use the areas where the interference exists.[288] Even in the absence of a direct obstruction, unsanitary conditions can quickly develop if a public area is not

281. *See De-Occupy Honolulu*, 2013 WL 2285100, at *6-7; Cobine v. City of Eureka, No. C 16-02239 JSW, 2016 WL 1730084, at *4 (N.D. Cal. May 2, 2017) (order granting in part and denying in part temporary restraining order); *see also* FDIC v. Mallen, 486 U.S. 230, 241-42 (1988); Barry v. Barchi, 443 U.S. 55, 66 (1979); Coleman v. Watt, 40 F.3d 255, 260-61 (8th Cir. 1994); Stypmann v. City of San Francisco, 557 F.2d 1338, 1343-45 (9th Cir. 1977).

282. *E.g.*, *De-Occupy Honolulu*, 2013 WL 2285100, at *5-6; Watters v. Otter, 955 F. Supp. 2d 1178, 1190 (D. Idaho 2013); *cf.* O'Callaghan v. City of Portland, No. 3:12-CV-00201-BR, 2013 WL 5819097, at *4 (D. Or. Oct. 29, 2013) (holding that property removal in accordance with OR. REV. STAT. § 203.079 (2019) satisfied due process). *But see* Jeremiah v. Sutter County, No. 2:18-cv-00522-TLN-KJN, 2018 WL 1367541, at *4 (E.D. Cal. Mar. 16, 2018); Ellis v. Clark Cty. Dep't of Corr., No. 15-5449 RJD, 2016 WL 4945286, at *11-12 (W.D. Wash. Sept. 16, 2016).

283. Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, 1016 (C.D. Cal. 2011); Kincaid v. City of Fresno, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at *37 (E.D. Cal. Dec. 8, 2006); Pottinger v. City of Miami, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992).

284. *Kincaid*, 2006 WL 3542732, at *38.

285. *See De-Occupy Honolulu*, 2013 WL 2285100, at *6; L.A. Catholic Worker v. L.A. Downtown Indust. Dist. Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *5 (C.D. Cal. Jan. 13, 2015).

286. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296 (1984); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965).

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

288. *See* Hooper v. City of Seattle, No. C17-77RSM, 2017 WL 4410029, at *16 (W.D. Wash. Oct. 4, 2017).

kept clean.[289] Private and public interests can therefore conflict when homeless persons' property is stored or left in public areas.

Due process protects a person against even temporary deprivation of his or her property.[290] As a general rule, due process favors pre-deprivation notice and an opportunity to be heard.[291] Notice is the most fundamental requirement of due process.[292] However, exceptions are recognized when there is a public need for immediate action.[293] In addition, actual notice is not always required, and an attempt to provide notice is sufficient if it is reasonably calculated to inform.[294] Due process requirements are not absolute and are instead measured by balancing the public and private interests at stake.[295]

Lower courts have expressed profound disagreement upon the due process requirements applicable to removal of property belonging to homeless persons from public areas.[296] The judge in *Ellis v. Clark County Department of Corrections* opined that post-seizure remedies may be inadequate to satisfy pre-deprivation due process requirements.[297] However, another judge from the same court later concluded in *Hooper v. City of Seattle* that post-deprivation safeguards may provide sufficient due process in some situations despite the absence of pre-seizure notice.[298]

"[P]rocedural due process varies from case to case in accordance with differing circumstances . . . ."[299] It is therefore important to identify the competing private and public interests at stake when determining what procedural requirements should apply. The Supreme Court stated in *Mullane v. Central Hanover Bank & Trust Co.* that "proceedings against [a person's abandoned property] deprive him of nothing."[300] Due process requirements therefore should not apply when removing property that has truly been

289. Love v. City of Chicago, No. 96-C-0396, 1996 WL 627614, at *3 (N.D. Ill. Oct. 25, 1996).

290. Fuentes v. Shevin, 407 U.S. 67, 84-85 (1972).

291. United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993).

292. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

293. *E.g.*, Sutton v. Milwaukee, 672 F.2d 644, 645-46 (7th Cir. 1982); Russell v. City of Honolulu, No. 13-00475 LEK-RLP, 2013 WL 6222714, at *8 (D. Haw. Nov. 29, 2013).

294. Dusenbery v. United States, 534 U.S. 161, 169-73 (2002).

295. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

296. *Compare* L.A. Catholic Worker v. L.A. Downtown Indust. Dist. Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *5 (C.D. Cal. Jan. 13, 2015) (highlighting private interests), *with* De-Occupy Honolulu v. City of Honolulu, No. Civ. 12-00668 JMS, 2013 WL 2285100, at *6 (D. Haw. May 21, 2013) (emphasizing public needs).

297. No. 15-5449 RJD, 2016 WL 4945286, at *12 (W.D. Wash. Sept. 16, 2016).

298. *See* No. C17-77RSM, 2017 WL 4410029, at *12 (W.D. Wash. Oct. 4, 2017).

299. FCC v. WJR, 337 U.S. 265, 276 (1949).

300. 339 U.S. 306, 316 (1950).

abandoned.[301] Care must however be taken when determining whether property has been abandoned, because a homeless person's unabandoned possessions are entitled to due process protection.[302]

Pre-deprivation notice and hearing may both be excused when urgent public needs arise.[303] Those situations must be evaluated to ensure that: (1) property removal is directly necessary to keep a public area open and available for other uses, (2) very prompt action is needed, and (3) the removal is made under narrowly drawn standards by a governmental official responsible for determining that the removal is necessary and justified.[304] In addition, post-deprivation due process must be provided in urgent situations involving removal of unabandoned property, because,

> [H]owever weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero—that is, the government is never relieved of its duty to provide *some* notice and *some* opportunity to be heard prior to final deprivation of a property interest."[305]

Procedures allowing summary removal of obstructions, hazards, and nuisances may therefore satisfy due process requirements if timely post-deprivation remedies are provided.[306]

When prompt action is not needed, due process requirements for the removal of personal property stored or left in a public area should be evaluated under the *Mathews v. Eldridge* test.[307] A pre-deprivation hearing may not be required if a meaningful opportunity to vindicate property rights is ultimately provided and only temporarily delayed.[308] Three factors should

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301. *See* Abel v. United States, 362 U.S. 217, 241 (1960).

302. Lavan v. City of Los Angeles, 693 F.3d 1022, 1032 (9th Cir. 2012).

303. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678-80 (1974).

304. Fuentes v. Shevin, 407 U.S. 67, 91 (1972).

305. Propert v. District of Columbia, 948 F.2d 1327, 1332 (D.C. Cir. 1991); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982) ("To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.").

306. *See* Hooper v. City of Seattle, No. C17-77RSM, 2017 WL 4410029, at *12 (W.D. Wash. Oct. 4, 2017), *aff'd sub nom.* Willis v. City of Seattle, No. 18-35053, 2019 WL 6442929 (9th Cir. Nov. 29, 2019); Russell v. City of Honolulu, No. 13-00475 LEK-RLP, 2013 WL 6222714, at *10-12 (D. Haw. Nov. 29, 2013). *But see* L.A. Catholic Worker v. L.A. Downtown Indust. District Bus. Improvement Dist., No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *5 (C.D. Cal. Jan. 13, 2015) (holding that removal of property found in violation of an ordinance prohibiting property from being left on city sidewalks does not constitute an extraordinary situation sufficient to excuse giving pre-deprivation notice).

307. *See, e.g.*, Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, 1016-17 (C.D. Cal. 2011).

308. *See* Gilbert v. Homar, 520 U.S. 924, 930 (1997); De-Occupy Honolulu v. City of Honolulu, No. Civ. 12-00668 JMS, 2013 WL 2285100, at *5-6 (D. Haw. May 21, 2013). *But see* Jeremiah v. Sutter County, No. 2:18-cv-00522-TLN-KJN, 2018 WL 1367541, at *4 (E.D. Cal. Mar. 16, 2018) (indicating that a pre-deprivation hearing may be excused only if justified by the governmental

be considered: (1) the interests of homeless persons in continued possession of their personal property that will be affected by its removal, (2) the risk that an erroneous deprivation may occur, and the value of additional or substitute procedural safeguards; (3) the governmental interest at stake, including the function involved and the burdens that would result from additional or substitute procedural requirements.[309] However, a reasonable attempt should be made to give notice before the property is removed.[310] In addition, a prompt and effective post-deprivation opportunity should be given for the owners of removed property to be heard or otherwise recover their property.[311] As the court in *Lavan v. City of Los Angeles* admonished, "[t]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking."[312]

interest at stake); Ellis v. Clark Cty. Dep't of Corr., No. 15-5449 RJD, 2016 WL 4945286, at *12 (W.D. Wash. Sept. 16, 2016) (holding post-deprivation remedies may not cure a faulty pre-deprivation process).

309. *See* City of Los Angeles v. David, 538 U.S. 715, 716-19 (2003); Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

310. *See* Lavan v. City of Los Angeles, 693 F.3d 1022, 1032 (9th Cir. 2012); *see also* City of West Covina v. Perkins, 525 U.S. 234, 240-41 (1999); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314-16 (1950).

311. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 611-12 (1974); Mitchell v. City of Los Angeles, No. CV 16-01750 SJO (GJSx), 2016 WL 11519288, at *5 (C.D. Cal. Apr. 13, 2016); *De-Occupy Honolulu*, 2013 WL 2285100, at *6-7; *Lavan*, 797 F. Supp. 2d at 1016-19; *see also* Stypmann v. City of San Francisco, 557 F.2d 1338, 1343-45 (9th Cir. 1977).

312. 693 F.3d at 1032 (quoting Clement v. City of Glendale, 518 F.3d 1090, 1093 (9th Cir. 2008)).