Municipal Court, Fort Collins, Colorado 215 N. Mason, 1st Floor Fort Collins, CO 80524	
PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. Adam Wiemold, Accused	☐ COURT USE ONLY ☐
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REPLY REGARDING MR. WIEMOLD'S MOTION TO DISMISS

Mr. Wiemold, by and through counsel, submits the following reply to the City's response to his Motion to Dismiss:

I. The City's citation of Mr. Wiemold for sleeping outside when he had no access to shelter violates the Eighth Amendment and article II, § 20.

A. The Eighth Amendment permits Mr. Wiemold to bring this claim to challenge his prosecution.

1. The City argues that Mr. Wiemold cannot bring a claim under the Eighth Amendment because he has not yet been convicted. Resp. to Def.'s Mot. to Dismiss at 3-4.

2. It is proper and, in fact, incumbent upon criminal defendants to raise constitutional challenges to the validity of their prosecution in their criminal case. The City is actively prosecuting Mr. Wiemold for sleeping outside when no shelter was available—a prosecution that Mr. Wiemold contends violates the Eighth Amendment. It is ludicrous for the City to

suggest that Mr. Wiemold wait to challenge this prosecution until after conviction, especially without citing a single case holding that a criminal defendant cannot move to dismiss his prosecution on constitutional grounds at the time the charge is filed.

3. The Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). This type of prohibition differs in key ways from other Eighth Amendment challenges to sentences or conditions of confinement—most notably in that it addresses the substantive law, not the punishment for a crime. "If conviction were a prerequisite for such a challenge, 'the state could in effect punish individuals in the preconviction stages of the criminal law enforcement process for being or doing things that under the [Cruel and Unusual Punishments Clause] cannot be subject to the criminal process.'" *Martin v. City of Boise*, No. 15-35845, 2019 U.S. App. LEXIS 9453, at *32 (9th Cir. Apr. 1, 2019) (citing *Jones v. City of L.A.*, 444 F.3d 1118, 1129 (9th Cir. 2006), *vacated due to settlement*, *Jones v. City of L.A.*, 505 F.3d 1006 (9th Cir. 2007)).

4. Mr. Wiemold contends that the conduct alleged in the charging document cannot be made a crime. Contrary to the City's argument, a motion to dismiss at this stage is entirely appropriate and must be heard.

B. This Court should adopt the reasoning of *Martin*, *Pottinger*, *Cobine*, *Anderson*, and *Johnson*.

5. *Martin*, as well as *Pottinger*, *Cobine*, *Anderson*, and *Johnson*, presents persuasive precedent regarding the substantive reach of the Eighth Amendment that this Court should adopt. The City's attempts to undermine the Ninth Circuit's reasoning in *Martin*, as well as that of the other courts to issue similar opinions, are not compelling. Specifically, the City argues that there is a split among Courts of Appeals regarding the application of the Eighth Amendment to camping bans and that the *Martin* and other courts' understanding of the Eighth Amendment is "constitutionally infirm" because they rely in part on a Supreme Court concurrence in a plurality opinion. Resp. to Def.'s Mot. to Dismiss at 5. This argument is incorrect.

i. <u>There is no circuit split about the application of the Eighth Amendment to Mr. Wiemold's situation.</u>

6. Contrary to the City's suggestion, there is no circuit split regarding the application of the Eighth Amendment to this case. The City misrepresents two inapplicable cases in its attempt to manufacture a split, but neither *Joel v. City of Orlando* nor *Manning v. Caldwell* support the City's claim.

7. In *Joel*, the Eleventh Circuit heard a claim by James Joel that the City's camping ban criminalized his homelessness. *Joel v. City of Orlando*, 232 F.3d 1353, 1356 (2000). In holding that the City's ban did not violate the Eighth Amendment, the Eleventh Circuit distinguished the Southern District of Florida's decision in *Pottinger v. City of Miami* and the Northern District of Texas's decision in *Johnson v. City of Dallas* because "the district courts in *Pottinger* and *Johnson explicitly relied on the lack of sufficient homeless shelter space in those cases*, which the courts reasoned made sleeping in public involuntary conduct for those who could not get in a shelter." *Id.* at 1362 (citing *Pottinger*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992); *Johnson*

v. City of Dallas, 860 F. Supp. 350, 351 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995)) (emphasis added).

8. In contrast, the city of Orlando "presented unrefuted evidence that the Coalition, a large homeless shelter, has never reached its maximum capacity and that no individual has been turned away because there was no space available or for failure to pay the one dollar nightly fee." *Id.* Because "the availability of shelter space means that Joel had an opportunity to comply with the ordinance . . . Section 43.52 targets conduct, and does not provide criminal punishment based on a person's status." *Id.* The Eleventh Circuit did not address the question of whether criminalization of involuntary status generally violated the Eighth Amendment or whether cities may constitutionally criminalize sleep when residents have no access to shelter—it only found that Orlando's camping ban did not because shelter space was available to Mr. Joel, therefore making his sleeping in public voluntary. *Id. Joel* is inapplicable in this case because Fort Collins shelters *were* full on the night in question.[1]

9. The City similarly misrepresents the Fourth Circuit's decision in *Manning*.[2] In *Manning*, the Fourth Circuit heard Mr. Manning's claim that Virginia's law criminalizing possession, purchase, or consumption of alcohol by someone whom a court had found to be a 'habitual drunkard' or guilty of driving while intoxicated criminalized his status as a homeless alcoholic. *Id.* at 143. The court upheld the law, but it specifically distinguished *Pottinger* and similar decisions because such cases "deal with a different question from the one presented here, namely the impossibility of controlling a bodily function." *Id.* at 147. In contrast, Mr. Manning's claim related to his addiction and "although states may not criminalize status, they may criminalize actual behavior even when the individual alleges that addiction creates a strong urge to engage in a particular act." *Id.* at 146-47. Sleep is life-sustaining human behavior, not "a strong urge." The court did not consider the criminalization of sleep, much less issue a ruling that governments may criminalize sleep even when people have no access to indoor space.

10. Therefore, neither *Joel* nor *Manning* demonstrate a split from the Ninth Circuit's reasoning in *Martin* that the Eighth Amendment prohibits governments from criminalizing the act of sleeping outside when an individual has no access to inside shelter.

ii. *Martin*, *Pottinger*, *Cobine*, *Anderson*, and *Johnson*'s understanding of the Eighth Amendment is constitutionally sound.

11. The City urges this Court to disregard the conclusions of the Ninth Circuit, the Southern District of Florida, the Northern District of Texas, the Northern District of California, and the District of Oregon that the Eighth Amendment prohibits criminalization of involuntary, life-sustaining conduct. Resp. to Def.'s Mot. to Dismiss at 5 (citing *Powell*, 392 U.S. 514 (1968)); *see Martin*, 2019 U.S. App. LEXIS 9453 (9th Cir. Apr. 1, 2019); *Cobine v. City of Eureka*, 250 F. Supp. 3d 423 (N.D. Cal. 2017); *Anderson v. City of Portland*, No. 08-1447-AA,

[1] Mr. Wiemold will prove at the hearing that Catholic Charities and Fort Collins Rescue Mission were full that evening.
[2] The City also fails to note that the decision was vacated in November 2018, when the Fourth Circuit decided to rehear the case en banc. *Manning v. Caldwell*, 900 F.3d 139 (4th Cir. 2018), *vacated* 741 Fed. Appx. 937 (4th Cir. 2018); 4th Cir. R. 35(c) ("Granting of rehearing or rehearing en banc vacates the previous panel judgment and opinion"). The court has not yet published its en banc decision.

2009 U.S. Dist. LEXIS 67519 (D.Or. July 30, 2009); *Johnson*, 860 F. Supp. 350 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995); *Pottinger*, 810 F. Supp. 1551 (S.D. Fla. 1992).

12. *Martin* and these other decisions are valid, persuasive authority that properly and appropriately rely on the Supreme Court's decisions in *Robinson v. California* and *Powell v. Texas*. To discredit these two Court cases, the City is forced to rely heavily on the view of a small minority of judges who unsuccessfully urged rehearing the *Martin* case en banc. Resp. to Def.'s Mot. to Dismiss at 5.

13. *Martin* correctly applied the Supreme Court's precedent in *Robinson* and *Powell*. In *Robinson*, the Court held that governments may not constitutionally criminalize an individual's status. 370 U.S. 660, 667 (1962). In *Powell*, the Court affirmed its decision in *Robinson*, yet found against defendant Powell, who had been convicted of a law criminalizing public intoxication because of a failure by the defense to provide adequate evidence that his presence in public was involuntary. 392 U.S. 514 (1968).

14. *Powell* was a plurality decision and, as the City notes, is governed by the *Marks v. United States* principle that holdings of "fragmented Court" decisions come from the "position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. 188, 193 (1977). However, after quoting the *Marks* principle, the City ignores it, instead looking to the "entire decision," not to the concurrence on narrowest grounds. Resp. to Def.'s Mot. to Dismiss at 5. Under *Marks*, the Court's 4-1-4 split means that Justice White's concurrence controls—not the understanding of the plurality opinion that the City presents as controlling. *Id.*

15. Justice White wrote that, for homeless alcoholics, "a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible," therefore violating the Eighth Amendment. *Powell*, 392 U.S. at 551 (White, J., concurring in the judgment). This understanding was shared by the four justices writing in dissent. *Id.* at 567 (Fortas, J., dissenting). However, Justice White voted to uphold Mr. Powell's conviction because of insufficient evidence that Mr. Powell was involuntarily in public since "the record strongly suggests that Powell could have drunk at home and made plans while sober to prevent ending up in a public place." *Id.* at 552-53 (White, J., concurring in the judgment). Therefore, "five justices gleaned from *Robinson* the principle 'that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *See Martin*, 2019 U.S. App. LEXIS 9453 at *40. Additionally, not only does *Martin* correctly apply *Robinson* and *Powell*, but Justice White's concerns in *Powell* also do not apply to this case. Unlike Mr. Powell, Mr. Wiemold could not have engaged in the prohibited behavior at home, because he had no home.

16. The *Martin*, *Pottinger*, *Johnson*, *Cobine*, and *Anderson* courts upheld this understanding of the Eighth Amendment, taken from the majority of justices in *Robinson* and *Powell*, in applying it to camping bans that criminalize sleeping outside. Contrary to the City's view, these cases got it right.[3]

[3] Neither party has any knowledge regarding whether certiorari to the U.S. Supreme Court will be sought in *Martin*, therefore the City's raising the potential for an application for or grant of certiorari—or the implication thereof—is

C. Mr. Wiemold had no access to shelter on the morning of September 11, 2018.

17. The City next argues that Mr. Wiemold cannot invoke the protection of the Eighth Amendment because, the City says, he voluntarily chose to sleep outdoors. In an unpersuasive effort to demonstrate that Mr. Wiemold chose to violate the City's camping ban, the City attempts to list alternatives that Mr. Wiemold supposedly could have pursued, such as exiling himself from the City every night.

18. In so doing, the City ignores the relevant inquiry regarding voluntariness—whether shelter space was available to Mr. Wiemold that night. The City also suggests that Mr. Wiemold leave City limits each night, which would violate Mr. Wiemold's right to travel under the U.S. and Colorado Constitutions. None of the City's arguments change the fact that, on the morning of September 11, 2018, Mr. Wiemold had no access to indoor shelter and thus was forced to sleep outside. Because of this, prosecuting Mr. Wiemold for sleeping in his car in a public rest area, when he could not sleep indoors, violates the Eighth Amendment of the U.S. Constitution and article II, § 20 of the Colorado Constitution.

    i. Voluntariness requires a determination of whether shelter space was available—no court has required an examination of the reasons for the individual's homeless status in determining whether his or her sleeping outside was voluntary.

19. Under the inquiry in *Martin* and similar cases, courts have conducted a two-pronged inquiry to determine whether the individual's conduct was involuntary. *See, e.g.*, *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 431 (N.D. Cal. 2017). First, they have looked at whether the conduct for which the individual was cited was benign, necessary conduct;[4] second, they have looked at whether shelter space was unavailable, forcing the individual to be in a public space. *Id.*

20. The City has not cited a single case in which a court probed a homeless person's history to discern whether voluntary choices at some point in the past were responsible for the individual's lack of a place to sleep. Nor could it. None of the courts to hear this issue have required the inquiry the City suggests of examining the reasons for which the individual became homeless. *See Martin*, 2019 U.S. App. LEXIS 9453 (9th Cir. Apr. 1, 2019); *Cobine*,

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irrelevant. Nevertheless, Mr. Wiemold would like to correct the City's uncited statistic regarding the rate at which the Supreme Court reverses decisions by the Ninth Circuit, as it stands in contrast to a Ballotpedia comparison of reversal rates by the Supreme Court of the courts of appeal. *Ballotpedia analysis: Supreme Court case reverals by appeals court*, Ballotpedia, https://ballotpedia.org/Ballotpedia_analysis:_Supreme_Court_case_reverals_by_appeals_court (last visited Apr. 22, 2019). The comparison states that, on average, the Supreme Court reverses 70.1% of all appellate court decisions it reviews. *Id.* The Court reverses 75.5% of Ninth Circuit decisions, fewer than the Sixth, Eighth, and Eleventh Circuits. *Id.*

[4] In *Martin*, the Ninth Circuit explicitly limited its holding to "sitting, lying, or sleeping"—the conduct in which Mr. Wiemold was engaged when ticketed. 2019 U.S. App. LEXIS 9453 at *41. Such human conduct is not only necessary for survival, it also does not implicate the City's concern regarding "human waste" or "bathing in public waters and natural areas and parks"—neither of which were categories of conduct covered by *Martin*'s holding or protected by any of Mr. Wiemold's cited cases. Resp. to Def.'s Mot. to Dismiss at *5-6. Therefore, finding that the camping ban violates the Eighth Amendment because it criminalized sleeping when Mr. Wiemold had no access to shelter will not inevitably lead to the City's inability to enforce other laws regarding different conduct.

250 F. Supp. 3d 423 (N.D. Cal. 2017); *Johnson*, 860 F. Supp. 344 (N.D. Tex. 1994); *Pottinger*, 810 F. Supp. 1551 (S.D. Fla. 1992).[5]

21. Instead, courts' inquiry into the voluntariness of the individual's situation concerns the availability of shelter space. *See, e.g.*, *Martin*, 2019 U.S. App. LEXIS 9453, at *44 ("We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter"); *Johnson*, 860 F. Supp. at 350 (finding that "at any given time there are persons in Dallas who have no place to go, who could not find shelter even if they wanted to—and many of them do want to—and who would be turned away from shelters for a variety of reasons"). In *Pottinger*, the court specifically rejected the city of Miami's suggestion that "even if homelessness is an involuntary condition in that most persons would not consciously choose to live on the streets, 'it is not involuntary in the sense of a situation over which the individual has absolutely no control such as a natural disaster.'" 810 F. Supp. at 1564. The court found that, because "the City does not have enough shelter to house Miami's homeless residents, . . . [it] cannot argue persuasively that the homeless have made a deliberate choice to live in public places or that their decision to sleep in the park as opposed to some other exposed place is a volitional act."[6] *Id.* at 1564-65.

22. None of the Fort Collins shelters were available to Mr. Wiemold. Even if his job did not bar him from staying at a shelter, Fort Collins' two available shelters were full that evening.[7] The fact that the Rescue Mission may not have turned anyone away that evening does not change their lack of available shelter beds. The pertinent fact regarding shelters is the number of available beds*, i.e.*, beds in which the individual could have slept that night. *See, e.g.*, *Martin*, 2019 U.S. App. LEXIS 9453 at *44. If there was no available bed, an individual could not have slept there, regardless of whether anyone made the specific trip to the shelter to request a bed. The fact that no one attempted the pointless exercise of asking for a bed in person at the Rescue Mission when it was full does not change this fact.

23. Therefore, the City's argument that Mr. Wiemold could have lived a different life to avoid the City's unconstitutional enforcement of its camping ban is an unsuccessful distraction

[5] The City includes in its Response advertisements for rental apartments from April 2019, which demonstrate only the presence of such ads in April 2019. This is irrelevant to the current case.

[6] The City misrepresents the voluntariness inquiry when it argues, in a particularly condescending and judgmental portion of its brief, that Mr. Wiemold actively chose to be homeless. The City suggests that that the people it cites, fines, and jails for sleeping outside have chosen to break the law, but the truth is much simpler—people sleep outside because they have no indoor option. Mr. Wiemold was housed until his debt became unsustainable and he was forced out onto the streets. The City casts aspersions on Mr. Wiemold's position at Catholic Charities, saying that he "chooses to be voluntarily employed by an employer who prohibits him from utilizing shelter space." Resp. to Def.'s Mot. to Dismiss at 6. Mr. Wiemold maintained stable employment—the City cannot demand more of its residents just because its housing and rental markets are unaffordable. The City conveniently overlooks the fact that, unlike Catholic Charities, it provides no shelter for its homeless residents. In contrast, Mr. Wiemold and his fellow shelter employees provide vital services to the homeless residents that the City, apparently, would prefer to fine, jail, or expel beyond the city limits. The Eighth Amendment does not permit the City to conduct a detailed and judgmental inquiry into the way a person has lived his or her life in order to excuse its own lack of shelter.

[7] Undersigned counsel regrets the miscalculation in footnote 2 of the Motion to Dismiss. However, his mathematical error does not change the fact that Fort Collins does not have enough shelter beds to accommodate its homeless population. Even under the City's calculations, the number of available beds (284) is woefully inadequate to provide shelter to the City's *long-term* homeless (375), let alone its entire homeless population, which includes additional people experiencing short-term homelessness.

from the pertinent inquiry regarding the availability of a shelter bed, which was unavailable on the night in question.

ii. Forcing Mr. Wiemold to leave city limits because he does not have access to shelter would violate his right to travel under the U.S. and Colorado Constitutions.

24. The City's proposal that Mr. Wiemold leave city limits each night under threat of citation for sleeping violates his right to travel under the U.S. and Colorado Constitutions. The right to travel is a fundamental right guaranteed by the Fourteenth Amendment of the U.S. Constitution and article II, § 3 of the Colorado Constitution. *Kolender v. Lawson*, 461 U.S. 352, 385 (1983) (finding that a criminal loitering statute implicated the right to freedom of movement); *People in Interest of J.M.*, 768 P.2d 219, 221 (Colo. 1989) (noting that "the rights of freedom of movement and to use the public streets and facilities in a manner that does not interfere with the liberty of others are basic values inherent in a free society and are thus protected by article II, section 3 of the Colorado Constitution and the due process clause of the fourteenth amendment to the United States Constitution").

25. The camping ban's language is broad and, by its own terms, encompasses *all* "activities of daily living," including "spending the night." Fort Collins, Colo., Mun. Code § 17-181. Therefore, the City is suggesting that Mr. Wiemold exile himself from Fort Collins each night because he cannot access shelter in the City. This is a gross infringement on Mr. Wiemold's right to travel intrastate. Mr. Wiemold's spending the night in his own vehicle "does not interfere with the liberty of others." *J.M.*, 768 P.2d at 221. Forcing Mr. Wiemold to leave city limits because the City cannot accommodate him in a homeless shelter would mean banishment from the portion of the state within Fort Collins city limits, merely for performing vital human acts, like sleeping or being outside overnight, while being homeless. This is a perverse suggestion that has not been given any weight by any court to hear similar issues.[8]

26. "[A]s long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." *Martin*, 2019 U.S. App. LEXIS 9453, at *41. Because of the unavailability of shelter, Mr. Wiemold was engaged in the "involuntary, life-sustaining activit[y]" of sleeping at the public rest area. *Pottinger*, 810 F. Supp. at 1564. By citing and prosecuting him, FCPS and the City are cruelly punishing Mr. Wiemold for his homeless status in violation of the Eighth Amendment and article II, § 20 of the Colorado Constitution.

[8] Additionally, while many cities have struggled to accommodate their homeless residents, allowing them to banish homeless individuals across city limits would permit the worst actors to address the presence of homeless residents by ejecting them onto neighboring towns. As long as a city's policies were harsher than its neighbors, it could defend laws criminalizing homelessness by arguing that homeless individuals could escape citation by leaving town. This would incentivize cities bouncing their homeless individuals from town to town as governments competed to pass the most stringent laws against homeless individuals.

II. Fort Collins's meritless arguments make clear that the City engaged in discriminatory selective enforcement in violation of the Fourteenth Amendment.

27. "Disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause." *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring). On September 11, 2018, the City enforced its outdoor-sleeping ban against homeless people only, because it disapproves of them, as compared to the similarly-situated truck drivers. This is unconstitutional.

28. The City's fundamentally incorrect premise is clear throughout its response: The City claims it is rational for a city to discriminate against homeless people. The City claims its disparate enforcement of its camping ban is justified by "public safety, aesthetics, hygiene, and public health" and "the greater detrimental effect on the community" that it says homeless people create, as compared to truckers. Resp. to Def.'s Mot. to Dismiss at 10-11. It makes these claims with no evidentiary support, hoping that this Court will share the City's biased, discriminatory, and fundamentally false views about people experiencing homelessness.

29. "A decision to prosecute that is 'deliberately based upon an unjustifiable standard such as race, religion, or *other arbitrary classification*' is a denial of equal protection." *United States v. DeBerry*, 430 F.3d 1294, 1299 (10th Cir. 2005) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)) (emphasis added). If at the upcoming hearing the City presents evidence that the people it ticketed on September 11, 2018 had done things detrimental to the City's "public safety, aesthetics, hygiene, and public health," its argument might hold water. However, if the City's argument is based on nothing more than its baseless biases against the individuals it ticketed that day, this Court must condemn it not only as an unconstitutional arbitrary classification, but also as an offensive affront to some of the City's most vulnerable citizens.

A. The City's enforcement of its camping ban on September 11, 2018 had a discriminatory effect on people experiencing homelessness because the City cited homeless people only and did not cite similarly-situated truck drivers who were not homeless.

30. As the U.S. Supreme Court has explained, "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute *or by its improper execution through duly constituted agents*." *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923) (emphasis added).

31. The Fourteenth Amendment's Equal Protection Clause is a directive "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

32. The City argues that it is "purely speculative" that there were truck drivers sleeping in their trucks at the time of the enforcement action. Response at 8-9. This is incorrect.

33. Mr. Wiemold will establish the facts necessary to state his claims through witnesses at the scheduled hearing. Mr. Wiemold will easily show that truck drivers were sleeping in the parking lot on the night of the enforcement action.

34. In addition, body cam video shows trucks parked in the lot at the time of the police enforcement action. *See* Exhibit 5, 18-14643_FC246-1.mp4 at 00:00:14. When inquiring as to whether two potential defendants were similarly situated for the purposes of a selective enforcement challenge, "[t]he focus of an inquiring court must be on factors that are at least arguably material to the decision as to whether or not to prosecute. Material prosecutorial factors are those that are relevant – that is, that have some meaningful relationship either to the charges at issue or to the accused – and that might be considered by a reasonable prosecutor." *United States v. Lewis*, 517 F.3d 20, 27-28 (1st Cir. 2008).

35. The City argues that the truck drivers are not similarly situated because "they are parked in [a] different parking lot with different signage that does not prohibit parking in excess of 2 hours." Resp. to Def.'s Mot. to Dismiss at 8. This difference is entirely unrelated to the camping ordinance. Mr. Wiemold was not cited for a parking violation; he was cited for "camping on public property," where the gist of the alleged criminal activity was sleeping in his vehicle, the identical criminal activity in which the truckers were obviously engaged. There is no rational link between the 2-hour parking spots and the City's enforcement of the camping ordinance.

36. Additionally, at the time Officer Knudsen contacted Mr. Wiemold to cite him for "camping" on public property, she had no evidence that Mr. Wiemold had been sleeping in excess of the 2-hour parking time limit. Mr. Wiemold could have been engaged in the lawful act of "incidental napping." Fort Collins, Colo., Mun. Code § 17-181.

37. Furthermore, if the City *is* arguing that its enforcement was based on the parking time limits, this demonstrates the irrationality of the City's decision to initiate a criminal prosecution instead of issuing a ticket for overtime parking, the permissible sanction directly geared towards addressing those who violate parking laws.[9] *See Lewis*, 517 F.3d at 27-28.

38. The Tenth Circuit in *United States v. Deberry* states that individuals "are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." 430 F.3d 1294, 1301 (10th Cir. 2005) (quotation omitted).

39. The City states that "citing truckers, who are generally passing through and not long-term residents of Fort Collins does not serve a deterrent in the same manner that citing people who have been long-term camping area does." Resp. to Def.'s Mot. to Dismiss at 8. This statement tacitly concedes that the truck drivers and homeless people are similarly situated; it admits that the truck drivers and the homeless individuals are engaged in the same act at functionally the same location. The only reasons for the disparate treatment are the City's assumptions based on stereotypes and its bias against the homeless. There are no "legitimate prosecutorial factors" that justify citing Mr. Wiemold for "camping on public property" when the truck drivers were violating the same ordinance in the same manner—sleeping in their vehicles.

[9] Perhaps more importantly, this Court should not see this distinction as material. If this Court does, the natural result will be that individuals experiencing homelessness will move to the truck parking lot and this Court will face a similar challenge without that "distinguishing" factor.

40. Although the City repeatedly chastises Mr. Wiemold for making assertions without evidence, the City makes sweeping generalizations about how truck drivers sleeping in the rest area do not present the same "public health and welfare issues" that homeless people do. The offensive stereotypes about homeless people the City deploys in its attempt to justify its illegal actions against Mr. Wiemold reveals that it has no actual *evidence* to refute the fact that Mr. Wiemold and the truck drivers are similarly situated. It is evidence, not stereotypes, that must guide law enforcement's decisions. And it is evidence, not stereotypes, that must guide this Court's ruling.

41. In the section below, Mr. Wiemold will address the City's illogical argument that he and the other individuals are not similarly situated to the truck drivers because the "property owners" never complained about individuals parked the RV/Truck Lot.

42. In sum, the officers' enforcement had a discriminatory effect on Mr. Wiemold. The officers they issued citations only to homeless individuals and did not enforce at all against non-homeless individuals who were similarly situated and parked at the rest area on September 11, 2018.

B. Fort Collins enforced its camping ban on September 11, 2018 with the discriminatory intent of singling out homeless people for ticketing.

43. Discriminatory intent implies that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte v. United States*, 470 U.S. 598, 610 (1985) (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

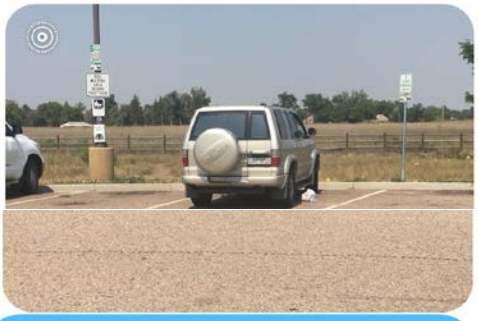
44. In early August 2018, Wes Mansfield, an employee of the Colorado Department of Transportation (CDOT) began regularly contacting Chip Avinger, an officer employed by Fort Collins Police Services (FCPS). In almost every contact, CDOT employee Mansfield contacted Officer Avinger by sending him photographs of cars that Mansfield claimed belonged to homeless people. The photos do not show any illegal or even distasteful activity. They just show parked cars. Exhibit 6.

45. The attached text messages leave no doubt that when FCPS officers carried out their enforcement of the camping ordinance on September 11, 2018, they did so with the explicit purpose of targeting homeless people for citations. *Id.*

46. One photo shows graffiti. Without any evidence, Mr. Mansfield makes the unsupported claim that it was done by a homeless person. *Id.*

This is some of the population of the homeless people at Fort Collins rest area, and their graffiti on the trashcan showed up two days ago, just keeping you in the loop.

47. Despite having observed no illegal conduct by any homeless person, Mr. Mansfield asked Officer Avinger to tell two individuals "to leave and stay gone." Regarding another, he asked Officer Avinger to "ask these people to MoveOn [sic]." The entirety of the correspondence between CDOT employee Mansfield and Officer Avinger consists of Mansfield asking Avinger to run off people Mansfield believes are homeless. Officer Avinger complies whenever he is able. *Id.*



If you see this guy here tomorrow please ask him to leave and stay gone, he is here all the time.

48. These text messages continued up through the planning and execution of the September 11, 2018 enforcement action. On September 4, CDOT employee Mansfield texted Officer Avinger several pictures of legally-parked cars he believed belonged to homeless people with the message, "we really need to hit this in the a.m." Officer Avinger responded that he was setting up an enforcement action "for next Tuesday," *i.e.*, September 11. They discussed what time would be the best time for their raid and settled on between 5:30 and 6:00 am. *Id.*

49. On September 11, Officer Avinger texted an update on the raid, telling Mansfield, "We hit it at 6:00 am this morning. We charged 6 people with Camping and 1 person with Possession of Drug Paraphernalia. Others scattered while we were there." Mansfield replied, "That's freaking awesome." *Id.*

50. In sum, there is no conceivable doubt that the September 11, 2018 enforcement action was done with the intent of issuing citations to people CDOT employee Mansfield and Officer Avinger believed were homeless.

51. Fort Collins attempts to defend its officers' conduct by arguing that the officers were responding to complaints from a "property owner" just as they would respond to any other complaint. This argument fails for two reasons.

52. First, when a police officer receives a complaint that is obviously discriminatory on its face and nonetheless acts on the discriminatory complaint, the officer acts with discriminatory intent. If Mansfield had sent Officer Avinger photos of all the cars he believed were driven by African-Americans and requested that Officer Avinger give them all tickets and tell them to leave, this Court would have no hesitation concluding that Officer Avinger acted with discriminatory intent towards African-Americans. *See Yick Wo v. Hopkins*, 118 U.S. 356, 365, 6 S. Ct. 1064, 1068 (1886) (finding unconstitutional selective enforcement where "[t]he necessary tendency . . . of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese").

53. Here, Mansfield sent Officer Avinger photos of all the cars he believed were driven by homeless people and requested that Officer Avinger give them all tickets and tell them to leave. When Officer Avinger acted on that request, he did so with the discriminatory intent to cite and run off homeless people and to leave others alone. There can be no question that on these facts, Mr. Wiemold has established Officer Avinger's discriminatory intent.

54. The second reason Fort Collins's argument fails is that the "property owner" making the complaints in this case is a government entity. The City glibly asserts, "Unfortunately for Defendant all his motion proves is that the property owner was concerned about the homelessness of the persons camping at the rest area." Resp. to Def.'s Mot. to Dismiss at 9. The City ignores (and hopes this Court will ignore) the fact that the property owner is the Colorado Department of Transportation.

55. Because the property owner is a government agency, the City's underlying argument is: If Government Entity A makes a discriminatory request to Government Entity B and Government Entity B acts on the discriminatory request, there is no governmental discrimination because Government Entity B just did what it was asked. This Court must reject the City's argument.

56. Under this argument, if a State Senator for the Fort Collins area asked a Fort Collins police officer he knew to step up enforcement against Hispanic people and the officer agreed, the officer would be immunized because he simply responded to a constituent complaint. Clearly, that is not the case. If it were, any governmental agent or body that wanted to act in a discriminatory manner would be permitted to do so as long as it asked a separate government body to carry out its dirty work.

C. FCPS's decision on September 11, 2018 to enforce the camping ban only against people officers believed to be homeless fails any form of constitutional scrutiny.

57. The evidence is clear that FCPS' September 11, 2018 enforcement action successfully targeted people experiencing homelessness to the exclusion of anyone else. The question for this Court is whether that decision is constitutionally permissible under the Equal Protection Clause of the Fourteenth Amendment. It is not.

58. "Under the rational basis standard of review, a statutory classification will stand if it bears a rational relationship to legitimate governmental objectives and is not unreasonable, arbitrary, or capricious." *HealthONE v. Rodriguez*, 50 P.3d 879, 893 (Colo. 2002). "A reasonable and non-arbitrary classification, [is one] based upon substantial differences which relate to a public purpose." *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 828 (Colo. 1982). This Court must thus determine (1) whether the City's asserted government interests are legitimate and (2) whether the City's decision to enforce its camping ordinance only against homeless people and not others on September 11, 2018 was rationally related to a legitimate interest. In evaluating whether the City's enforcement decisions were rationally related to a legitimate government interest, this Court must consider whether the classification and resulting different treatment based on whether a person was thought to be homeless is based on substantial differences related to a public purpose.

59. The city asserts that the September 11, 2018 enforcement action only against homeless individuals served the governmental purposes of promoting "public safety, aesthetics, hygiene, and public health." Resp. to Def.'s Mot. to Dismiss at 10. Mr. Wiemold concedes that these are legitimate government purposes. However, the choice to enforce the camping ordinance against homeless individuals only on September 11, 2018 bore no rational relationship to achieving any of these goals. The only way for the City to argue otherwise is to rely on stereotypes and biased, discriminatory, and fundamentally false views about people experiencing homelessness.

60. Regarding public safety, based on no evidence the City asks this Court to assume that the homeless people that were in their cars at the highway rest stop on September 11, 2018 were impeding public safety in a way the truck drivers and others who were not cited did not. This is false, and it is offensive to suggest otherwise.

61. Regarding aesthetics, the City asks this Court to find that the (nonexistent?) aesthetics of a highway rest stop are somehow impeded by the presence of parked cars stationed in marked parking spaces, and that trucks also parked in parking spaces have a lesser negative aesthetic impact. This is equally false. To the contrary, the highway rest stop is designed to have cars parked there; that is its reason for existing.

62. Regarding health, the City asks this Court to find that public health and hygiene are better served by enforcing the camping ordinance against those experiencing homelessness than against those engaged in commercial pursuits. Yet all people have to go to the bathroom, and there is a bathroom at the rest area for just that purpose.

63. The City also asserts its enforcement action against only homeless people was reasonably related to a legitimate government interest because "1) that the other lot was not signed 2 hour parking; 2) the property owner complained specifically about the criminal behavior taking place in that particular parking lot; 3) the police have finite resources and made a choice to allocate them based on the reported activity at the rest stop; and 4) long term camping by transient persons has a greater detrimental effect on the community and the use and availability of the rest area for all travelers than truckers sleeping as they pass through town." Mr. Wiemold will address each of these in turn.

64. Regarding parking signage, this alleged fact bears no relation to any of the government interests the City cited in support of its discriminatory enforcement. There is no connection between a car being parked in a 2-hour parking spot and "public safety, aesthetics, hygiene, and public health." If the city were concerned about overstaying parking times, it would have so stated. It also would have issued parking tickets, not criminal citations. Additionally, as CDOT employee Mansfield's messages to Officer Avinger make clear, he was asking Officer Avinger to target homeless people regardless of which lot they were parked in.[10]

65. Regarding the complaints and the claim that the City allocates resources to respond to complaints, as described above, the City cannot immunize its discriminatory actions by claiming it was only responding to complaints from the property owner. First, that argument fails on its own terms, and where the property owner is a government agency, it fails doubly. *See* ¶¶ 51-56, *supra*.

66. This leaves only the City's true argument and the crux of the issue before the Court: can the City act based on its stereotyped, biased, discriminatory, and fundamentally false views about people experiencing homelessness? The City asserts without evidence that "long term camping by transient persons has a greater detrimental effect on the community and the use and availability of the rest area for all travelers than truckers sleeping as they pass through town." This Court should follow 60 years of precedent from Colorado courts and reject this offensive argument.

67. In 1969, the Federal District Court of Colorado addressed an Equal Protection Clause challenge to a then-existing anti-vagrancy law. In so doing, it confronted the equal protection implications of categorizing people as vagrant and then treating them differently based on that classification. As the Court held:

> The statute also violates the equal protection clause of the Fourteenth Amendment prohibiting discrimination between classes of persons, and requiring . . . classifications to be reasonable. To fulfill this demand a statute must include within the categories created all persons similarly situated with respect to the purpose of the law. However rationalized, the classification used in the Colorado vagrancy statute is arbitrary. *It assumes that idleness and poverty are invariably associated with criminality. In this leisure time-early retirement era, such an assumption is patently unfounded.* But assuming that some vagrants are criminals, the classification is nevertheless unreasonable because it punishes all vagrants as future criminals despite the fact that many never resort to

[10] If the Court looks closely at Mansfield's photos, it will see that some of the photos of vehicles he wants removed are in the truck parking lot, as evidenced by the extremely long parking spaces delineated on the ground by white lines.

> criminality. It is also noteworthy that this vagrancy statute, because of its vast scope, invites arbitrary enforcement. This makes selective enforcement virtually inevitable. Certain sub-classes of individuals within the general vagrancy statutes are certain to become the targets of selective enforcement. It is therefore apparent that the Colorado vagrancy statute offends the equal protection clause of the Fourteenth Amendment.

Goldman v. Knecht, 295 F. Supp. 897, 906-07 (D. Colo. 1969) (three-judge panel opinion) (internal citations omitted) (emphasis added). This holding remains good law. *See, e.g.*, *State v. Adams*, 91 So. 3d 724, 751 (Ala. Crim. App. 2010)(citing *Goldman*).

68. While the *Goldman* Court confronted an anti-vagrancy statute as opposed to discriminatory anti-"vagrant" enforcement of an otherwise-neutral statute, the rationale of the *Goldman* Court's holding applies equally to the arguments the City is making. Just as the State did in 1969, the City asks this Court to falsely assume that homeless people sleepingin their cars are criminals, dirty, and unhygienic—people who should properly be driven out of town. That argument is just as wrong today as it was 60 years ago, and this Court must reject it.

69. Mr. Wiemold is not a criminal. He is not unhygienic. He did not injure the public health by being present at the rest stop. He did not impair the aesthetic of the rest area (to the extent such a thing exists) by his presence. Enforcing the camping ordinance against him but not against others who were present and engaged in the same activities did not in any way serve any of the legitimate government purposes the City has proffered for its actions. The selective enforcement against Mr. Wiemold is therefore an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment as well as the Colorado Constitution.[11]

70. As the Colorado Supreme Court holds, "A reasonable and non-arbitrary classification, [is one] based upon substantial differences which relate to a public purpose." *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 828 (Colo. 1982). As it relates to the City's stated government interests, there are no substantial differences between Mr. Wiemold and the truckers whom the City did not cite. By classifying Mr. Wiemold as homeless and choosing to prosecute him on that basis, the City violated equal protection.

Wherefore, for the reasons stated in Mr. Wiemold's Motion as well as the foregoing reasons stated in this Reply, Mr. Wiemold respectfully requests that this Honorable Court dismiss the charges against him.

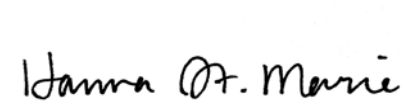
[11] "Although the Colorado Constitution contains no equal protection clause, we have construed the due process clause of the Colorado Constitution to imply a similar guarantee. *See* Colo. Const. art. II, § 25; *People v. Stewart*, 55 P.3d 107, 114 (Colo. 2002); *People v. Estrada*, 198 Colo. 188, 601 P.2d 619, 620 (Colo. 1979)." *Dean v. People*, 2016 CO 14, ¶ 11.

Adam Frank, #38979
Frank & Salahuddin LLC
In cooperation with the ACLU Foundation of Colorado
Dated: April 26, 2019

Certificate of Service
I hereby certify that on 4/26/2019, I served the foregoing document by emailing same to the Fort Collins City Attorney.
_____JE_____

Mark Silverstein, #26979
ACLU of Colorado
Dated: April 26, 2019

Rebecca Wallace, #39606
ACLU of Colorado
Dated: March 22, 2019



Hanna St. Marie, #52630
ACLU Foundation of Colorado
Dated: April 26, 2019