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 ☐
Adam Frank, #38979 FRANK & SALAHUDDIN LLC 1741 High Street Denver, CO 80218 Phone: (303) 974-1084 Fax: (303) 974-1085 E-mail: adam@fas-law.com Mark Silverstein, #26979 Rebecca Wallace, #39606 ACLU Foundation of Colorado 303 E. 17th Ave., Suite 350 Denver, CO 80203 Phone: (303) 777-5482 Fax: (303) 777-1773 Email: msilverstein@aclu-co.org rtwallace@aclu-co.org	Case No. 2018-0240752-MD Division

MOTION TO VACATE CONVICTION AND ENJOIN THE IMPOSITION OF ANY SENTENCE

Mr. Wiemold, by and through counsel, requests that this Court dismiss all charges against him. As grounds, he states the following:

1. Prior to his conviction, Mr. Wiemold argued to this Court that issuing Mr. Wiemold a camping citation when he had nowhere indoors to sleep was cruel and unusual punishment in violation of the Eighth Amendment and article II, § 20 of the Colorado Constitution. This Court held that Mr. Wiemold's motion was not yet ripe. Order, ¶ 1. Now that Mr. Wiemold has suffered a conviction and the imposition of a sentence is before this Court, Mr. Wiemold renews all his prior arguments concerning the Eighth Amendment and article II, § 20 of the Colorado Constitution. He incorporates the testimony adduced at the May 7, 2019 motions hearing by reference.

SUMMARY OF ARGUMENT

2. During the hearing on May 7, 2019, Adam Wiemold met the entirety of his evidentiary burden to show that the City's prosecution of him and any subsequent conviction and punishment violates the Eighth Amendment and article II, § 20 of the Colorado Constitution. Mr. Wiemold presented more than sufficient evidence to support his claim that the City violates the Eighth

Amendment by prosecuting, convicting, and punishing him for sleeping outside when he had nowhere to go. Undisputed evidence at the hearing demonstrated that on the night of September 10, 2018 through the morning of September 11, 2018, Mr. Wiemold was homeless and could not have spent the night in any of the City's shelters. The Court heard ample, unrefuted evidence of the serious professional and safety concerns that prevented Mr. Wiemold from staying at a shelter and of the Catholic Charities policy explicitly barring employees such as Mr. Wiemold from receiving shelter services. Additionally, both Catholic Charities and the Fort Collins Rescue Mission were full that morning. With no shelter for Mr. Wiemold to stay in, prosecuting, convicting, and punishing Mr. Wiemold for sleeping in his car on public property violates the Eighth Amendment and article II, § 20 of the Colorado Constitution.

FACTS

3. On the morning of September 11, 2018, Adam Wiemold was homeless. Hr'g vol. 2 at 00:26:00; 01:16:00.[1]

4. Mr. Wiemold has worked in charitable service for his entire career. *Id.* at 00:22:00. On September 11, 2018, he worked at Catholic Charities, one of the two main homeless shelters in Fort Collins. *Id.* at 00:22:14; 00:24:00. As the shelter supervisor, Mr. Wiemold managed staff and enforced the shelter's rules. *Id.* at 00:24:00. This included disciplining or suspending shelter clients from the shelter if they did not follow the rules. *Id.* at 00:24:50.

5. Mr. Wiemold presented competent evidence unrefuted by the City that, although he was homeless, he could not have stayed at either Catholic Charities or Rescue Mission—the two shelters that accommodate single men—for three separate reasons:

a. First, Catholic Charities' employee policy bars employees from receiving shelter services. *See* Ex. 8; Hr'g vol. 2 at 00:15:30; *Id.* at 00:26:30.

b. Second, staying with his clients would violate the professional boundaries required for him to do his job effectively. Mr. Wiemold is responsible for disciplining and suspending Catholic Charities' clients, many of whom also stay at the Rescue Mission. *Id.* at 00:26:00-00:28:00. Sheltering with his clients would harm Mr. Wiemold's professional authority and efficacy. *Id.*

c. Third, staying with clients, especially those who may have been suspended by Mr. Wiemold, would also endanger his safety. *Id.* at 1:19:30-1:20:04. Mr. Wiemold would be staying in unmonitored rooms with people whom he might have removed from the shelter and who may be angry with or violent towards him. *Id.*

6. Even if Mr. Wiemold's job had not posed such concerns, Catholic Charities and the Rescue Mission were both full the night/early morning he was ticketed. Catholic Charities' daily capacity report stated that capacity for single men was at 100% and that "FCRM [Fort Collins Rescue Mission] was called: they were full." *See* Ex. 9; Hr'g vol. 2 at 00:09:30-00:10:00.

[1] Due to the amount of testimony and the expedited time frame for briefing, this brief contains citations to the audio recording of the hearing where possible.

7. So, without a home or an available indoor shelter, Mr. Wiemold drove to a rest area. Hr'g vol. 2 at 00:26:00; 00:27:00. Once there, he used the public restroom and settled down inside of his vehicle to get some sleep. *Id.* at 00:26:00; 00:58:53. Mr. Wiemold did not make any noise, disturb anyone, or litter. *Id.* at 00:26:00; 00:59:00; 1:02:30.

8. He was just sleeping inside of his vehicle at a rest area, until he was awakened and cited at approximately six o'clock in the morning by Fort Collins Police Services officers. *Id.* at 00:58:20.

ARGUMENT

I. Summonsing, prosecuting, convicting, and punishing Mr. Wiemold for sleeping on public property when he was homeless and could not stay at any shelter violates the Eighth Amendment and article II, § 20 of the Colorado Constitution.

9. When Mr. Wiemold was cited for sleeping in his vehicle at the rest area, he could not stay at a shelter. He had no choice but to sleep outdoors. Prosecuting, convicting, and punishing Mr. Wiemold under these circumstances violates the Eighth Amendment and article II, § 20 of the Colorado Constitution.

10. The Eighth Amendment and article II, § 20 of the Colorado Constitution prohibit the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII; Colo. Const. art. II, § 20. This clause "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). In *Robinson v. California*, the Supreme Court held that the Eighth Amendment barred the imposition of punishment on someone because of his or her involuntary status. 370 U.S. 660, 666 (1962) (finding a law that criminalized addiction to narcotics unconstitutional because it punished a person for the involuntary status of being addicted to narcotics); *accord Powell v. Texas*, 392 U.S. 514, 548 (1968) (White, J., concurring in the judgment) (finding Eighth Amendment bars criminalization of involuntary conduct related to a condition or status).

11. Though this issue has not yet been the subject of a published decision in Colorado, other courts have followed *Robinson* and *Powell* to find that it is unconstitutional to punish homeless individuals for sleeping outdoors when they cannot access shelter. *See, e.g.*, *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018) (finding that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter," including people who cannot access shelter for reasons aside from shelter capacity); *Cobine v. City of Eureka*, No. C16-02239 JSW, 2016 U.S. Dist. LEXIS 58228 at *8 (N.D. Cal. Apr. 25, 2017) (denying a motion to dismiss plaintiffs' claim that a law banning camping violated the Eighth Amendment because "[t]he Court finds persuasive those courts that have recognized a basis for an Eighth Amendment challenge to an ordinance proscribing conduct that may be involuntary"); *Anderson v. City of Portland*, No. 08-1447-AA, 2009 U.S. Dist. LEXIS 67519 at *17-18 (D. Or. 2009) (denying a motion to dismiss plaintiff's claim that a law banning camping and temporary structures was unconstitutional because plaintiffs "allege that the City's enforcement of the anti-camping and temporary structure ordinances criminalizes them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property"); *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) (upholding a challenge to a law that banned "sitting, lying, or sleeping on public streets and sidewalks" because "the conduct at issue . . . is involuntary and

inseparable from status" and "by criminalizing sitting, lying, and sleeping, the City is in fact criminalizing Appellants' status as homeless individuals"), *vacated due to settlement*, *Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2006); *Pottinger v. Miami*, 810 F. Supp. 1551, 1562 (S.D. Fla. 1992) (finding for the homeless plaintiffs in their challenge to Miami's policy and practice of arresting homeless individuals for "basic activities of daily life" conducted outdoors because it was impossible for such individuals to refrain from the violative conduct and the conduct was not harmful to themselves or others); *Johnson v. City of Dallas*, 860 F. Supp. 344, 351 (N.D. Tex. 1994), (noting that "as long as the homeless have no other place to be, they may not be prevented from sleeping in public"), *rev'd on other grounds*, *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995) (reversing and vacating the preliminary injunction because appellees did not have standing). Because homeless individuals are forced to live outdoors, criminalizing sleeping on public property criminalizes their status as homeless individuals. *Johnson*, 860 F. Supp. at 350 ("Because being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless for their status as homeless, a status forcing them to be in public").

12. To determine whether enforcement of such ordinances is unconstitutional, courts have looked at whether the individual is forced to be outdoors and whether the conduct taking place outside is involuntary. *See, e.g.*, *Cobine*, 2016 U.S. Dist. LEXIS 58228, at *7. If the individual is forced to be outdoors because they are homeless, it is unconstitutional to criminalize his or her involuntary conduct.

13. Sleeping is quintessential involuntary conduct. As the Ninth Circuit stated, "[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human." *Martin*, 902 F.3d at 1048; *see also Pottinger*, 810 F. Supp. at 1563 (describing sleeping as a "harmless, involuntary, life-sustaining act[]"); *Anderson*, 2009 U.S. Dist. LEXIS 67519, at *17 (finding that plaintiffs' sleeping on public property was "involuntary and innocent" behavior). When Officer Knudsen approached Mr. Wiemold's vehicle, Mr. Wiemold was sleeping in his truck. His truck was parked in a parking space, not blocking any other vehicle or any part of the rest area. Mr. Wiemold was not making any noise, disturbing anyone, or littering. When he had to use the restroom, Mr. Wiemold exited his car and used the public restroom available at the rest area. The only activity in which Mr. Wiemold was engaged at the time of the citation was sleeping, "a biologic process that is essential for life and optimal health" and from which Mr. Wiemold could not refrain. Goran Medic et al., *Short- and long-term health consequences of sleep disruption*, 9 Nat. & Sci. Sleep 151–61 (May 2017), https://www.dovepress.com/short--and-long-term-health-consequences-of-sleep-disruption-peer-reviewed-article-NSS.

14. "[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*, 902 F.3d at 1048 (9th Cir. 2018); *see also Jones*, 444 F.3d at 1136 (noting that "[i]t is undisputed that, for homeless individuals in Skid Row who have no access to private spaces, these acts can only be done in public").

A. This Court should adopt the reasoning of *Martin*, *Pottinger*, *Cobine*, *Anderson*, and *Johnson* and hold that it violates the Eighth Amendment (as well as the Colorado Constitution) to criminalize sleeping outside when a person has no other choice.

15. *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 previous 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 has argued 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>

16. Contrary to the City's previous suggestion, there is no circuit split regarding the application of the Eighth Amendment to this case. The City has misrepresented 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 prior claim.

17. 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).

18. 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.

19. The City similarly previously misrepresented 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

[2] The City also failed 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.

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.

20. 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.

21. The City previously urged 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, 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).

22. *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 was 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.

23. *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).

24. *Powell* was a plurality decision and, as the City previously noted, 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 ignored 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.*

25. 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.

26. 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]

27. The City later properly acknowledged that its prior understanding of the Supreme Court's decision in *Powell v. Texas* was incorrect, but then asserted a new and equally misguided theory regarding *Powell*. Resp. to Def.'s Post-Hearing Brief at 2-3. The City argued that *Powell* should be confined to its facts because the plurality and the concurrence in *Powell* do not share the same grounds for their decisions. *Id.*

28. This is an utterly novel theory—no judge (even writing in dissent) has endorsed it during the 51 years since *Powell* was decided.

29. While the City's method of analysis is unfounded and wrong, an extended response is unnecessary here.[4] The City's ultimate conclusion that *Powell* is not precedential and is limited to its

---

[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 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] The City's misunderstanding of *Powell* is so off that some response, albeit a limited one, is in order. *Powell* is a fragmented decision and therefore must be interpreted under the rules laid out in *Marks v. United States*. *Marks*, 430 U.S. 188, 193 (1977); *see also* Reply to Resp. to Def.'s Mot. to Dismiss at 4. Under *Marks*, lower courts should look to the narrowest shared grounds between the justices concurring in the judgment. The *Powell* plurality held that alcoholics, including Mr. Powell, are not involuntarily in public when drunk, and therefore there was no Eighth Amendment violation. 392 U.S. 514, 535 (1968). Justice White similarly found no Eighth Amendment violation because Mr. Powell—who was housed—had failed to show that he was involuntarily in public that evening. *Id.* at 552-53. Therefore, under *Marks,* the narrowest shared grounds between the five justices agreeing on the result was the finding that there was no Eighth Amendment violation because Mr. Powell had failed to show that he was involuntarily in public when drunk. *Id.* at 535, 552-53.

The City cited to a subset of the *Marks* doctrine, applied to cases where the court deems a concurrence to rest on distinct grounds from the plurality. Resp. to Def.'s Post-Hearing Brief at 2-3. But the *Powell* plurality did not rest on

facts comports with Mr. Wiemold's arguments throughout this case. Indeed, throughout Mr. Wiemold's briefing, he has explicitly relied on *Powell* as persuasive, rather than precedential, case law.[5] *See* Mot. to Dismiss at 6; Reply at 4.

30. The United States Supreme Court has not yet had the opportunity to address a case with facts like Mr. Wiemold's, and this claim does not fall under any published Colorado court decision. That is why Mr. Wiemold looked to other courts to provide persuasive authority to guide this Court in the instant case. To that end, Mr. Wiemold has offered on-point cases from five other courts that have addressed similar facts. All have found that the Eighth Amendment prohibits summonsing and prosecuting a homeless person for sleeping outside when he or she could not stay at a homeless shelter because such a citation and prosecution criminalizes his or her homeless status. *See* Def.'s Mot. to Dismiss at 6-7 (citing *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019); *Cobine v. City of Eureka*, 2016 U.S. Dist. LEXIS 58228 (N.D. Cal. Apr. 25, 2017); *Anderson v. City of Portland*, 2009 U.S. Dist. LEXIS 67519 (D.Or. 2009); *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992)).

31. The City has yet to present *a single case* that counters the substantive law presented in these cases.[6] Instead, to avoid the import of this failure, the City created a sideshow debate over how

---

distinct grounds from Justice White's concurrence. Although the City failed to include it in its table, the plurality explicitly noted that the record before the court did not show that Mr. Powell was involuntarily outside—the same ground considered by Justice White. *See Powell*, 392 U.S. at 535, 552-53. Therefore, this Court should hold—as all other courts to consider *Powell*'s holding have—that a traditional *Marks* analysis properly determines the holding of *Powell*. Indeed, the City was unable to find any opinion holding that the plurality and the concurrence in *Powell* were decided on disparate grounds.

[5] Although *Powell* is not binding authority in this case, it is worth underscoring here the reasons that *Powell* remains persuasive in Mr. Wiemold's case. In *Powell*, five Supreme Court justices—Justice White and the four dissenting justices—agreed that Mr. Powell could challenge a law as functionally criminalizing status by criminalizing acts that happen because of that status. *See* Mot. to Dismiss at 6; Reply at 4. Mr. Wiemold's case presents a much more straightforward constitutional violation than *Powell*. *Powell* concerned the involuntariness of a housed alcoholic drinking in public. 392 U.S. 514, 516 (1968). Mr. Wiemold's claim regards sleeping, which is undoubtedly both involuntary and a human necessity. Additionally, unlike Mr. Powell, Mr. Wiemold was indisputably homeless when he was cited. As recognized by the courts in *Martin*, *Cobine*, *Anderson*, *Johnson*, and *Pottinger*, this is a much more straightforward case than *Powell* or any others dealing with the link between alcoholism and involuntary public drinking.

[6] The City cites *Robinson v. California,* 370 U.S. 660 (1962) and *Manning v. Caldwell*, 900 F.3d 139 (4th Cir. 2018) for the proposition that criminalization of any act is always constitutionally permissible. Resp. to Def.'s Post-Hearing Brief at 3. This is wrong for two reasons. First, *Robinson* has a *prohibitive*, not affirmative holding—that the Eighth Amendment does not permit governments to criminalize an individual's involuntary status. 370 U.S. at 667 ("We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment."). Confoundingly, the City summarized the "main point" of the case as affirmatively allowing criminalization of all acts and suggests that sleeping is an "act" that can constitutionally be criminalized. *See* Resp. to Def.'s Post-Hearing Brief at tbl. 4. The City provided no pincites in either its argument section or its table regarding *Robinson* to support its statement.

Second, the *Manning* court explicitly distinguishes cases like Mr. Wiemold's that regard criminalization of human bodily functions like sleep—in the exact sentence from which the City quotes. 900 F.3d at 147 (citing *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992))) (noting that there is a "distinct minority" of cases that "deal with a different question than the one presented here, namely the impossibility of controlling a bodily function"). As Mr. Wiemold has repeatedly emphasized, his case is about the involuntary, vital human conduct of sleeping outdoors when there is no available shelter. If a homeless person cannot be inside and cannot refrain from sleeping, criminalizing his sleeping *is* criminalizing his homeless status.

Marks's largely irrelevant doctrine of distinct grounds applies to *Powell*. *See* page 3, n. 2, *supra*. The City's argument represented an irrelevant rabbit hole this Court should simply avoid.

B. This Court's inquiry into whether a person had a choice to sleep outside must focus only on whether the person could have been staying at a shelter the night/early morning he was ticketed.

32. To determine whether an individual has access to inside sleeping space, courts have looked to whether that individual was able to stay in a shelter bed on the evening in question. *Martin*, 902 F.3d at 1042.

33. Importantly, as the *Martin* court made clear, an open shelter bed does not necessarily equate with an "available" shelter bed. *Id.* Even if a city has enough shelter beds to accommodate its entire homeless population (which Fort Collins does not), there are other reasons for which a shelter bed may be "unavailable" to a homeless individual. *Id.* Compliance with the Eighth Amendment and article II, § 20 requires consideration of whether shelter was available for this particular individual. *Id.* at 1046.

34. In *Martin*, homeless individuals sued the City of Boise for enforcing two ordinances restricting camping in public against unhoused people who slept or rested outside when they had nowhere else to go. 902 F.3d 1031. Boise police had "enforced the ordinance against homeless individuals who [had] take[n] the most rudimentary precautions to protect themselves from the elements," including wrapping themselves in blankets and sleeping in public bathrooms. *Id.* at 1049. However, Boise shelters were not available to all of the city's homeless population—one homeless plaintiff had been unable to stay in a shelter because of the shelter's religious programming; another had been refused entry because he had exceeded the number of days a person could stay at the shelter; a third was unable to get off of the waiting list at one shelter and, by the time he arrived at the other shelter, had missed the entry window. *Id.* at 1041-42. Shelter could also be unavailable for other reasons, including policies forbidding reentry if a person voluntarily left the facility for any reason. *Id.* at 1041. Although Boise had amended its policies to limit enforcement to nights when there were open shelter beds, the court found that Boise's policies were still unconstitutionally cruel as applied to the city's homeless residents who could not access those open beds. *Id.* at 1046. If a homeless individual is denied entry to a shelter, then "as a practical matter, no shelter is available." *Id.* at 1041-42. It makes no difference that, theoretically, a different homeless individual could have stayed in a shelter bed that night.

35. 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;[7] second, they have looked at whether shelter space was unavailable, forcing the individual to be in a public space. *Id.*

[7] 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.

36. 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*, 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).[8]

37. 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."[9] *Id.* at 1564-65.

C. On September 11, 2018, Mr. Wiemold had no choice but to sleep outdoors.

38. 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. Like the *Martin* plaintiffs, Mr. Wiemold was homeless and had no choice but to sleep outdoors on the night he was ticketed. First, Mr. Wiemold is the shelter supervisor at Catholic Charities—staying in a shelter would mean sheltering with some of his clients and violating professional boundaries. Second, even if Mr. Wiemold could have stayed in a shelter without violating professional conduct rules, there were no open shelter beds on the night he was ticketed. 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

[8] 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.

[9] 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.

bed. No shelter was "practically available" for Mr. Wiemold on the morning of September 11. *Id.* at 1049.

i. Mr. Wiemold could not stay in a shelter in Fort Collins because of his employment at Catholic Charities.

39. Mr. Wiemold was unable to stay in a homeless shelter in Fort Collins because of his position as the shelter supervisor at Catholic Charities.

40. First, Catholic Charities prohibits staff from receiving services at the shelter. Staying there would cost Mr. Wiemold his job. Sheltering with his clients would implicate Catholic Charities policies limiting outside interactions between shelter staff and homeless clients and threaten Mr. Wiemold's authority in the eyes of his clients. Staying at a shelter with his clients would breach professional boundaries and hamper Mr. Wiemold's ability to manage clients and enforce shelter policies

41. Second, Mr. Wiemold could not stay at any other shelter in Fort Collins. Catholic Charities' and the Fort Collins Rescue Mission's populations overlap as availability fluctuates and shelters bar individuals for rule violations. Sheltering at the Rescue Mission would mean staying with Catholic Charities clients.

42. Third, as he described at the hearing, sheltering with clients, especially those who may have been suspended by Mr. Wiemold, would endanger his safety. Mr. Wiemold would be staying in unmonitored rooms with people whom he might have removed from the shelter and who may be angry with or violent towards him.

43. Fourth, sheltering with clients at Rescue Mission would create conflicts of interest. Mr. Wiemold is responsible for enforcing shelter rules and disciplining guests when necessary. If Mr. Wiemold removed a client from Catholic Charities, the client would need to seek services at other shelters—including Rescue Mission, where he or she would stay with Mr. Wiemold. Enforcing the rules could mean one fewer shelter bed in which Mr. Wiemold could stay. Such conflicts of interest would hamper Mr. Wiemold's ability to do his job.

ii. Even if Mr. Wiemold were not a shelter employee, both of the Fort Collins shelters at which Mr. Wiemold could have stayed were full.

44. Even if Mr. Wiemold were not employed at a shelter, the two shelters in Fort Collins at which he could have stayed were both full on the night of September 10, 2018.[10] Catholic Charities had reached capacity and turned away one person seeking shelter. Fort Collins Rescue Mission was also full.

45. When a city does not have enough shelter beds for its homeless population, 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." *Pottinger*,

[10] Mr. Wiemold was not eligible to stay at either of the two other shelters in Fort Collins. Faith Family Hospitality only serves families and Crossroads Safehouse only serves victims of abuse. Mr. Wiemold does not have any children and is not a victim of abuse.

810 F. Supp. at 1563. It is clear that on September 11, 2018 Fort Collins did not have enough shelter capacity to accommodate its homeless population and, specifically, was unable to accommodate Mr. Wiemold. Without the option of staying in a shelter, Mr. Wiemold had no choice but to sleep outdoors.

46. Based on the foregoing, this Court should find that citing Mr. Wiemold for sleeping on public property when he had no other place to go violates the Eighth Amendment and article II, § 20. "[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*, 902 F.3d at 1048. 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 of Fort Collins are cruelly punishing Mr. Wiemold for his homeless status in violation of the Eighth Amendment and article II, § 20 of the Colorado Constitution.

D. The law does not support this Court making inquiry into the reasons Mr. Wiemold was homeless on the date he was summonsed.

47. Under the Eighth Amendment, the only relevant question regarding voluntariness is whether a homeless individual turned down an available shelter bed and therefore voluntarily put himself in public space. Def.'s Reply at 5-6 (citing *Martin v. City of Boise*, 2019 U.S. App. LEXIS 9453, at *44 (9th Cir. Apr. 1, 2019) ("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 v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995) (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"); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564-65 (S.D. Fla. 1992) (finding 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")).

48. No court has sought to ask or answer whether an individual's status as homeless was "voluntary." Indeed, the City has not pointed to a single case where the court evaluated whether a person's homeless status was voluntary to determine whether the Eighth Amendment applied. *See* Resp. to Def.'s Mot. to Dismiss at 6.

49. Despite a complete lack of legal foundation, the City probed Mr. Wiemold's life choices and financial circumstances at the hearing and repeatedly implied that Mr. Wiemold had voluntarily chosen to be homeless that evening, as if he had decided that morning that it would be fun to sleep in his car instead of in a warm bed in a home. Specifically, the City asked:

d. What kind of debt Mr. Wiemold had;
e. When he got his dog;
f. Whether he was working full time;
g. How long he had been working full time;
h. The amount of money he was making each month in 2018 prior to the enforcement;
i. Whether he had done any work on his vehicle to allow him to sleep in it;

j. How much that work had cost;
k. Where he had showered while he was sleeping in his truck;
l. Whether and when he had looked for rooms to rent;
m. Whether he had sought low-income housing assistance;
n. Why he had not declared bankruptcy;
o. Whether he had been evicted from where he was living;
p. How exactly he had been able to become housed in recent months, including:
    i. Details about his monetary distribution associated with his grandmother passing;
    ii. Where his parents were living;
    iii. Who owns the home in which he currently lives;
    iv. When he became housed;
    v. How much rent he is currently paying; and
    vi. Whether he can afford his current rent;
q. How much debt he had paid off while sleeping in his vehicle, including a breakdown per year of the amount of debt he had been able to pay; and
r. Whether he had looked for a different job than his full-time job as a shelter supervisor. Hr'g vol. 2 at 1:03:00-1:16:00.

50. These questions were laden with subjective judgment regarding how Mr. Wiemold should have managed his fundamental life choices and finances. *See, e.g.*, *id.* at 1:04:18 ("You made the decision to forego renting a room or renting an apartment and instead live in the back of your truck while you paid that off. Is that correct?"); *Id.* at 1:04:40 ("Rather than look for a room to rent, you decided to pay down some credit card debt you had accrued during that time"). Following this analysis to its logical end, this Court would have to make specific findings regarding the voluntariness of Mr. Wiemold's homeless status, such as whether he should have switched career paths by leaving charitable work and moving to a job that paid more money; whether he should have declared bankruptcy; and whether he should have assumed more debt in order to be housed, even if that had forced him into a perpetual cycle of poverty.

51. This invasive inquiry, meant to force the court to make a subjective judgment of an individual's life decisions that led to homelessness, has no foundation in the constitution or caselaw. It is a burdensome and unworkable analysis that leaves the court with a job for which it is ill-suited: to stand in judgment regarding the myriad life choices and financial decisions of homeless individuals who find themselves sleeping outdoors. It is no wonder that courts have steered clear of this analysis.

i. <u>An inquiry into a person's financial and life decisions to determine the voluntariness of their homeless status would have no logical stopping point.</u>

52. Should this Court adopt the City's novel and sweeping expansion of the voluntariness inquiry, there would be no logical stopping point to the inquiry.

53. What is the relevant time range for determining voluntariness of a persons' status as homeless? The City asked questions about Mr. Wiemold's life choices and finances that spanned several years prior to the citation and his homelessness. How far back must the Court look to determine if the individual made a decision that resulted in homelessness? Does a decision to drop

out of high school, take on college debt, or invest in a failed business venture become fair game for determining the voluntariness of homelessness that occurs years later?

54. Even if the inquiry were limited in time to the period surrounding the citation, what evidence would reflect a voluntary choice to sleep outside rather than be sheltered in a home? Consider a homeless addict who could not sleep in any shelter but had enough money for a motel room for one night. Would the City call his homelessness voluntary if he spent money on food or treatment for addiction instead of staying indoors for one night?

55. Is an individual voluntarily sleeping outside if he or she could have spent the day panhandling or selling plasma in order to afford a hotel room?

56. How about a person who was saving money to be able to eat until his or her next paycheck? Or a person who was building up a fund for car repairs so that he or she could reliably get to work every day?

57. If this Court decides to dramatically expand the scope and focus of the voluntariness inquiry under the Eighth Amendment analysis, courts will be forced to conduct a deep evaluation into a prosecuted person's finances, decisions, and life events for an unspecified number of years to determine what was 'voluntary' about his or her homeless status.

58. Unrefuted evidence has already shown that Mr. Wiemold was homeless and could not stay in a shelter in Fort Collins—a successful Eighth Amendment claim under the applicable precedent. This Court should follow established case law and disregard the City's proposed inquiry.

ii. Even if this Court broke from clear case law and adopted the City's proposed inquiry, Mr. Wiemold's status as homeless was not voluntary.

59. As Mr. Wiemold has demonstrated above, the voluntariness of a person's homeless status has no place in case law or any logical test this Court could create. However, even if this Court were to decide to add such an inquiry into the analysis, Mr. Wiemold provided competent evidence at the hearing that he was not voluntarily homeless.

60. The entire time that Mr. Wiemold was unhoused, he worked consistently and diligently to become housed again. His debt was "a large burden" on him and "was something important that [he] needed to take care of and get out of." *Id.* at 1:18:50. While he was homeless, he "worked to get out of debt so that [he] could afford to pay rent and pay my bills at the same time." *Id.* at 1:18:10. Sleeping in his vehicle is just one of the personal sacrifices he made in order to pay it off to avoid being a long-term economic drain on society, unable to pay his debts or secure housing.

61. Mr. Wiemold did not want to be homeless, as he clearly stated at the hearing. *Id.* at 1:18:55. He "had no other option." *Id.* at 1:17:10. With his low credit score and high debt, "renting a room would have just been maintaining the same cycle of debt and [he] would not have been able to get out of that." *Id.* at 1:05:40. Additionally, with his credit score, debt, and dog, Milo, "it was hard to find a landlord that would rent to [him]." *Id.* at 1:19:15.

62. Mr. Wiemold's efforts to become housed further demonstrate that he neither sought nor desired homelessness. While sleeping in his vehicle, Mr. Wiemold worked diligently and efficiently to

become housed—paying off approximately $10,000 over one year to resuscitate his credit score and become a viable rental applicant. *Id.* at 1:10:00; 1:18:10.

63. Finally, as soon as his grandmother's estate was processed, Mr. Wiemold became housed—and has not been homeless since. Once he had a choice between a home and his vehicle, he immediately chose a home.

64. Mr. Wiemold's concerted efforts to pay his debts, work his way out of a financial crisis, and become permanently housed—all while providing vital services to the City's homeless population—exemplify hard work and personal sacrifice. His homelessness was not enjoyed, convenient, or wanted.

65. Therefore, even if this Court diverges from established precedent and conducts this inquiry, Mr. Wiemold still has a successful Eighth Amendment defense. Without a home or shelter bed, he had nowhere to go and prosecuting him for this violates the Eighth Amendment.

66. In its 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.

67. 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.

iii. The Court should ignore the City's *Jones v. City of Los Angeles* red herring.

68. In the City's prior arguments, it misrepresented *Jones v. City of Los Angeles* in attempting to impugn Mr. Wiemold's and undersigned counsels' integrity before this Court.

69. It is undisputed that Mr. Wiemold was homeless the night he was ticketed, that the shelters were full, and that—even if they were not—Mr. Wiemold's job prohibited him from staying at a shelter. These facts, standing alone, support a finding that his prosecution, conviction, and punishment violates Mr. Wiemold's Eighth Amendment rights.

70. To avoid this straightforward conclusion, the City urged this Court to perform an unprecedented, searching analysis of Mr. Wiemold's background and life choices to determine whether his indisputably homeless status was in fact voluntary.

71. Mr. Wiemold stated in his Reply and his Post-Hearing Brief that no court had performed an inquiry into a person's background and life choices to consider whether the person's homeless status was 'voluntary.' The City claimed twice that this statement is "disingenuous." Resp. to Def.'s Post-Hearing Brief at 5. To support its attack on Mr. Wiemold's and his counsels' integrity, the City

selected quotes from *Jones v. City of Los Angeles* that—standing alone—do not accurately represent the court's findings. *Id.*

72. In context and stripped of the City's inflammatory language, none of the City's quotes support its assertion. The *Jones* court never questioned or examined the voluntariness of any plaintiff's status as homeless. *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated due to settlement*, 505 F.3d 1006 (9th Cir. 2006). The quotes selected by the City describing some plaintiffs' backgrounds are contained in the introductory portion of the opinion containing the basic facts of the case and general information about each of the plaintiffs, including how they became homeless, whether they attempt to stay in shelters, and how they received their citations. *Id.* at 1124-25. At no point did the court ask or discuss what any plaintiff's expenses were, whether they had tried leaving town, or whether they could have spent any income on a room on the night of enforcement, to pull a few examples from the City's Response.

73. As emphasized in Mr. Wiemold's Reply and Post-Hearing Brief, courts have consistently applied the voluntariness inquiry *only* to the question of whether the cited individual had rejected available shelter that night. *Jones* is no exception. For example, the court's introductory factual description of one plaintiff is as follows:

> Stanley Barger suffered a brain injury in a car accident in 1998 and subsequently lost his Social Security Disability Insurance. His total monthly income consists of food stamps and $221 in welfare payments. According to Barger's declaration, he "want[s] to be off the street" but can only rarely afford shelter. At 5:00 a.m. on December 24, 2002, Barger was sleeping on the sidewalk at Sixth and Towne when L.A.P.D. officers arrested him. Barger was jailed, convicted of violating section 41.18(d), and sentenced to two days' time served.

Id. This is the entirety of the factual recitation about Mr. Barger's background and ticket. At no point does the court rely on any of these facts to make an assessment regarding the voluntariness of Mr. Barger's status as homeless or suggest that such an inquiry would be appropriate. While Mr. Barger certainly had income, the court never inquires how Mr. Barger was spending his money or asks whether he could have made different life choices to avoid homelessness. Further, *even knowing that Mr. Barger sometimes has sufficient funds to pay for a hotel room*, the court at no point evaluated whether he could have afforded shelter on the night he was ticketed. *Id.*

74. The court's discussion of the other plaintiffs similarly does not probe into their backgrounds or life choices. *See id.* at 1124-25. In fact, the court does not even ascertain for each plaintiff that he or she was unable to stay at a shelter on the night in question. *Id.* The court merely determines that, according to the plaintiffs' own statements, they were (1) homeless, (2) unable to stay at a shelter sometimes, and (3) sleeping on public property. *Id.* at 1124-25, 1137. According to the court's only other statement on this topic outside of the fact section, these findings mean that the plaintiffs were not on the streets "by informed choice." *Id.* at 1137. The court then uses that statement to find that prosecuting them for sleeping on Skid Row when they had nowhere else to go violated the Eighth Amendment. *Id.*

75. Nowhere in *Jones* does the court conduct any type of evaluation of the plaintiff's finances or temporary rooming options on the night of citation to determine whether their status as homeless was involuntary, as the City proposes.

E. The City's proposed inquiry would be convoluted and impossible for a court to conduct consistently; yet even if this Court adopts the proposed inquiry, Mr. Wiemold's prosecution, conviction, and punishment is unconstitutional.

76. The City's real argument involves asking this Court to make the same subjective judgments about homeless peoples' lives and choices that the City has made. As demonstrated above, this inquiry has no basis in law. Mr. Wiemold urges this Court to eschew the City's proposed searching and deeply subjective inquiry into his life and financial choices and, instead, perform the same analysis that the courts have in *Martin*, *Cobine*, *Anderson*, *Johnson*, and *Pottinger*: assess whether (1) Mr. Wiemold was homeless; (2) there was shelter space available to him the night he was ticketed; and (3) he was sleeping on public property. However, to the extent that this Court may choose to engage in the City's inquiry, Mr. Wiemold was nonetheless involuntarily homeless.

77. According to the City, Mr. Wiemold had myriad alternatives, but he voluntarily decided to sleep in his car for two years either for personal gain or out of a desire to break the law. This wrongheaded argument misunderstands homeless people's situations in general and Mr. Wiemold's situation in particular. Not only is the City's inquiry unworkable on a general level, but any searching inquiry into Mr. Wiemold's life and financial choices will ineluctably lead to the conclusion that Mr. Wiemold made extraordinary, laudable, and ultimately successful efforts to become permanently housed. His status as homeless on September 11th, 2018 was not voluntary.

i. Indulging the City's inquiry demonstrates that it is completely unworkable and riddled with subjective judgments about how homeless individuals should conduct their lives.

78. If the Court were to conduct the City's proposed analysis, it appears from the City's briefs and questioning that it might look like this: First, the Court would have to find available apartments in Fort Collins on the night that the person was cited. Then the Court would need to determine whether the landlords for those apartments would have rented to the person cited given the individual's credit score, criminal background, rental record, and living situation, including any pets. Next, the Court would need to determine whether the person could afford the monthly rent, which requires the Court to consider the person's assets and any monthly income and subtract the rental payment. This would also involve the Court assessing whether the landlord required a security deposit, whether this deposit could be paid over time, and whether the landlord required pre-payment of the last month of rent, as many landlords do. The Court would also have to consider the person's other bills and expenses to determine if they were reasonable and necessary expenditures in the Court's judgment, to ensure that the person was not needlessly prioritizing other expenses over housing.

79. The City does not proffer guidelines for making this judgment. That is because any attempt to devise guidelines demonstrates the futility of the project. By way of brief example: From the City's questions to Mr. Wiemold and its briefing arguments, it appears that to the City, expenses associated with dependent family members would qualify as necessary, but the City has certainly not stipulated to this (and in the end, it would ultimately be up to the Court). The Court would have to determine whether Mr. Wiemold's dog, Milo, would count as a "necessary" part of Mr. Wiemold's life—perhaps the City would demand that he give Milo up for adoption. The Court would have to decide whether expenditures for personal health or hygiene count as necessary, given the City's

question about how Mr. Wiemold showered. The Court would have to decide whether, in each individual case, car repairs that were necessary to get to work would count, as well as whether the same would go for car repairs necessary only for visits to family or friends. The Court would have to make its own assessment as to whether debt repayment would count under this inquiry and how much debt repayment (if any) was permissible, including balancing the requirement of finding housing against the effects of leaving the debt unpaid (*i.e.*, causing the person to take on greater debt, enter collections, ravaging the person's credit score, making it harder for him or her to obtain permanent housing in the future). After figuring out all of the person's expenses and sorting them into either necessary expenses or misguided priorities, the Court would then determine whether the person still could have afforded the available rental. If the person could have afforded the rental, then no constitutional protection would attach.

80. The inquiry the City suggests this Court must take on is labyrinthian and layered with subjective judgment about how homeless people should conduct their lives. Once again, the court should sidestep the City's unnecessary rabbit hole and instead follow *Jones v. City of Los Angeles*, which the City erroneously cited as conducting this inquiry, in which the Ninth Circuit limited the inquiry to whether the cited individuals (1) were homeless, (2) could stay in a shelter, and (3) were sleeping on public property.

ii. Even if this Court decides to take on the City's proposed inquiry against the guidance of case law, Mr. Wiemold's prosecution, conviction, and punishment still violates the Eighth Amendment.

81. The City ultimately presents a list of what it deems to be alternatives that Mr. Wiemold should have pursued, which the City posits could have allowed him to avoid this prosecution. *See* Resp. to Def.'s Post-Hearing Brief at 5. The alternatives proposed by the City are: (1) leave the City each night; (2) ask for a shelter bed each night; (3) rent an apartment; or (4) pay for a hotel room each night. *Id.* As explained below, these were not valid alternatives for Mr. Wiemold on September 11th.

82. Before addressing these "alternatives," however, it is worth noting that the evidence presented at the hearing supports a finding that Mr. Wiemold—far from deserving the City's negative judgment about his life and financial choices—spent two years working diligently and effectively to become permanently housed. Hr'g vol. 2 at 1:10:00; 1:18:10. While homeless, he lived extremely frugally to pay off nearly $10,000 in debt in order raise his credit score and place himself in a position never to be homeless again. *Id.* at 01:18:10. While he was working towards a stable financial situation, he slept in the safest, least intrusive place he could have—inside his car at a rest area, arriving late, staying inside his car, using the public restroom, and not bothering anyone. *Id.* at 1:13:00.

1. Requiring that Mr. Wiemold "go elsewhere" violates his right to travel under both the United States and Colorado constitutions.

83. 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").

84. 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.[11]

85. "[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.

86. For example, in 2017, a Colorado county court found that a defendant had a right under the Colorado Constitution to be and remain in public spaces. In *City & Cty. of Denver v. Holm*, in the context of a pending criminal prosecution, the court considered the constitutionality of a city policy allowing exclusion of a homeless criminal defendant from a public park based on an accusation the individual had possessed drugs in the park. No. 16GS013978 at *6 (Denv. Cty. Ct. Feb. 22, 2017). The court concluded: "the Colorado Constitution holds the right to move about in public spaces to be one of the 'natural, essential and inalienable rights.'" Based on this finding, the court invalidated the city directive and dismissed the criminal prosecution. *See id.* at *6 (Denv. Cty. Ct. Feb. 22, 2017), *upheld on appeal by City & Cty. v. Holm*, No. 17CV31066 (Denv. Dist. Ct. Oct. 25, 2017)) (opinions attached).

87. Because Mr. Wiemold has a constitutional right to be present in public spaces, the City cannot require that—to avoid prosecution—Mr. Wiemold must exclude himself from the *entire city* every single night solely because he is homeless and cannot stay in a shelter. Yet this is what the City asks this Court to endorse.

[11] 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.

2. Requiring that someone be "turned away from the shelter" is irrelevant and ignores the undisputed evidence in this case.

88. Second, the City continues to insist that Mr. Wiemold cannot make out an Eighth Amendment claim unless he has been "[t]urned away from the shelter"—an irrelevant standard. It is Mr. Wiemold's burden to show that shelter space was unavailable to him. He has met that burden. First, the shelters were full, as shown by competent, unrefuted evidence. *See* Post-Hearing Brief at 2 (citing Ex. 9; Hr'g vol. 2 at 00:09:30-00:10:00). Even if the shelters were not full (and they were), it is undisputed that Mr. Wiemold could not stay in either one due to safety concerns and his professional responsibilities.[12]

89. Yet, the City also says in its Response that "had Defendant gone to the [R]escue [M]ission and sought a bed, they could have accommodated him as they have done many times when extra space is needed." Resp. to Def.'s Post-Hearing Brief at 6. Mr. Wiemold acknowledges the evidence in the record that the Rescue Mission has sometimes allowed individuals to stay in the shelter even when all beds were full. However, there is no evidence in the record that the Rescue Mission could have or would have accommodated Mr. Wiemold if he had asked on September 11th. To the contrary, the record evidence is that, on September 11th, the Rescue Mission reported to Catholic Charities that the Mission was full. Nonetheless, the City asks this Court to disregard this undisputed documentary evidence that the shelters were full and join the City in speculating that the Rescue Mission would have accommodated Mr. Wiemold if he had asked for shelter.[13]

3. Stating that Mr. Wiemold could have afforded to pay rent or for a hotel room ignores the record in this case and would sentence homeless individuals to enduring poverty and homelessness.

90. Finally, the City argues that Mr. Wiemold can be legally prosecuted because he could have, but had not, paid rent or for a hotel room on the night he was ticketed.

91. First, undisputed evidence in the record shows that Mr. Wiemold did not have the money to be housed for an entire month in either a hotel room or apartment while paying for his necessities, which includes debt repayment, let alone the two-year span it took for him to work his way back into permanent housing.[14] *See* Hr'g vol. 2 at 1:05:40-1:10:00.

---

[12] To avoid the unrefuted evidence that Mr. Wiemold's job prohibited him from staying in the shelters, the City suggests that Mr. Wiemold should have quit his job so that he could sleep in a shelter. Resp. to Def.'s Post-Hearing Brief at 6 ("He did not have to continue working at Catholic Charities."). This disturbing argument underscores the subjective nature of the inquiry the City is pushing. Mr. Wiemold was gainfully employed in a position that performs necessary charitable services for the City's homeless residents. Not only is the City suggesting that this beneficial employment be utterly disregarded, it is doing so without any evidence in the record that there were any other jobs which Mr. Wiemold could have obtained.

[13] Regardless, undisputed evidence in the record demonstrates that all shelters, including the Rescue Mission, were unavailable to Mr. Wiemold because of safety concerns and professional responsibilities.

[14] Mr. Wiemold would like to correct the City's flagrant misquoting of his statements on the stand. On page 5 of its Response, the City states: "Moreover, in his own words, the places he could afford to rent at that time were, in his words, "not to my liking." Resp. to Def.'s Post-Hearing Brief at 5. At no point did Mr. Wiemold say this at the hearing. It is possible that the City means to refer to the following portion of the hearing:

Counsel: "And why didn't you rent an apartment on Craigslist?"

Mr. Wiemold: "Um because most of the apartments on Craigslist that I saw that were in the four to five hundred range turned out to be scams and really nothing was there. Um unless you wanted to live with 4-5 college kids

92. Perhaps more importantly, taken to its logical conclusion, the City's argument would allow Mr. Wiemold to avoid prosecution for sleeping outside while homeless *only* if he had spent all of his money on housing prior to being cited. Mr. Wiemold is apparently to be constitutionally judged for any savings or financial planning he did while homeless, including efforts to pay his debts, improve his credit score, or save money to pay for basic necessities such as food and health care.

93. It seems unlikely the City has thought through the implications of its misguided argument. First, it would sentence Mr. Wiemold to permanent homelessness. Requiring Mr. Wiemold to spend down the entirety of his paycheck each month on housing would have rendered him unable to save any money for a security deposit or pay off any of his debt to improve his credit score. Is the City really arguing that it wants its unsheltered homeless individuals in an inescapable cycle of poverty and homelessness, such that they cannot even attempt short-term budgetary planning to cover expenses until their next income? Second, spending all his money in this way would have continued to increase Mr. Wiemold's debt load and resulting burden on society.

94. On the night he was cited, Mr. Wiemold was sleeping in his car only because he did not have a home and could not stay in a shelter. For the duration of the time he was homeless, he had nowhere else to go. Prosecuting him for this violates the Eighth Amendment.

F. Mr. Wiemold is asking this Court to find that prosecuting, convicting, and punishing him violates the Eighth Amendment and the Colorado Constitution under the particular facts of his case, not to permit anyone and everyone to camp anywhere in the City at any time.

95. While almost too obvious to be worth stating, in case there is any confusion, Mr. Wiemold's motion applies only to the single currently-pending case against Mr. Wiemold. It is not a facial challenge to the camping ordinance. It is not a civil rights lawsuit seeking broad injunctive relief. This Court's ruling will apply to Mr. Wiemold's case and his case alone.

96. The City previously misrepresented Mr. Wiemold's motion as arguing that "all people are involuntarily camping when shelters are full" or requesting the invalidation of the entire camping ordinance. Resp. to Def.'s Post-Hearing Brief at 2, 4. This spurious claim was cited to justify the parade of horribles that the City alleged would happen if the Court finds for Mr. Wiemold. Instead, by grasping at obviously-baseless straws, the City demonstrated to this Court that the realistic repercussions from this Court's potential decision are quite minimal.

97. Mr. Wiemold's briefing makes clear that he is challenging the application of the City's camping ban to himself on September 11, 2018. *See, e.g.*, Mot. to Dismiss at 9; Reply at 1; Post-Hearing Brief at 1-2. Yet, the City has suggested several times that Mr. Wiemold's motion cloaked a

---

> in a 3-bedroom house and kind of squeeze into the pile which is not what I was looking for and also having a dog that was [an] American pitbull was also very difficult to find a landlord that would rent to you for that purpose and with my credit score, it was hard to find a landlord that would rent to me."

Hr'g vol. 2 at 1:19:00. This dialogue does not support the City's assertion that Mr. Wiemold turned down available rooms because they were "not to [his] liking." Instead, Mr. Wiemold competently asserted that the "affordable" rooms were either scams or unworkable for an adult male with a pit bull and with his credit score. The City presented no contrary evidence.

challenge to the camping ban writ large. This is wrong. Mr. Wiemold is asking this Court to find only that the pending criminal prosecution against him, conviction of him, and punishment of him violates the Eighth Amendment under the specific facts of his case, including that he was homeless, that he could not stay at a shelter, and that he was sleeping in his car at the rest area.

98. To support its argument, the City presented outlandish scenarios intended to cause the Court to fear dismissing Mr. Wiemold's prosecution. Resp. to Def.'s Post-Hearing Brief at 4. These scenarios are factually and legally irrelevant to Mr. Wiemold's case. Although the entirety of the cases cited by Mr. Wiemold turn on an individual's status as homeless, five of the City's six examples did not even relate to homeless individuals, such as the millionaire with a six-bedroom house or the students who live in the college dormitories. *Id.* The fact that five out of the City's six hypotheticals are completely irrelevant should tell this Court all it needs to know about the City's line of argument.

99. The City presented only a single scenario related to a person, like Mr. Wiemold, who is actually experiencing homelessness. In the scenario, a homeless person declined to seek shelter, even though a shelter would have made space for him. *Id.* More facts would be needed to know whether or not the Eighth Amendment would prohibit criminalization of this individual sleeping outside. Specifically, even if there was space in the shelter, was there another valid reason the individual could not stay there, thus making shelter space "unavailable" to him? *See, e.g.*, *Martin v. City of Boise*, 920 F.3d 584, 609-10 (9th Cir. 2019) (finding that the Boise Rescue Mission was unavailable to the plaintiffs even though it never reached capacity because its programming was "antithetical to their religious beliefs").

100. In Mr. Wiemold's case, the undisputed evidence shows that shelters were full and that Mr. Wiemold's professional responsibilities and safety concerns rendered all shelter space in Fort Collins unavailable to him. Mr. Wiemold's unique circumstances—that his job prevents him from staying at local shelters—underscore that his case is not easily replicable for all individuals experiencing homelessness. Thus, contrary to the City's argument, a decision invalidating his prosecution will not automatically invalidate the camping ordinance or justify persons willy-nilly camping anywhere in the City.[15]

Wherefore, for the reasons stated in Mr. Wiemold's prior motions and briefs, and the foregoing reasons stated in this motion, Mr. Wiemold respectfully requests that this Honorable Court vacate his conviction, enjoin any imposition of a sentence, and dismiss the charges against him.

Adam Frank, #38979
Frank & Salahuddin LLC
In cooperation with the ACLU Foundation of Colorado
Dated: August 7, 2019

Certificate of Service
I hereby certify that on 8/7/2019, I served the foregoing document by _____ same to the Fort Collins City Attorney.
_____

[15] Indeed, courts have found camping bans constitutional when applied only against people who could have stayed in an empty shelter bed, people blocking public rights of way, or people doing other anti-social acts. There are also myriad other non-criminal mechanisms the City can used to discourage people from sleeping on public property if it deems them necessary, *e.g.*, closing certain public properties for certain hours or issuing parking tickets.

Mark Silverstein, #26979
ACLU of Colorado
Dated: August 7, 2019

Rebecca Wallace, #39606
ACLU of Colorado
Dated: August 7, 2019