District Court, Larimer County, Colorado 201 LaPorte Ave. Fort Collins, CO 80521	DATE FILED: March 30, 2020 10:14 AM FILING ID: 76CC0C1BBBCAA CASE NUMBER: 2019CV30889
Appeal from the Fort Collins Municipal Court The Honorable Kathleen M. Lane Case No. 2018-0240752-MD	
PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. Adam Wiemold, Defendant-Appellant	☐ 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 In cooperation with the American Civil Liberties Union Foundation of Colorado 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. 2019 CV 30889
OPENING BRIEF	

ISSUES PRESENTED

Whether citing, prosecuting, convicting, and sentencing a homeless person for sleeping in his truck in a rest area, in violation of a Fort Collins "camping ban" ordinance, when no indoor shelter is available to him, violates the ban on cruel and unusual punishment contained in the Eighth Amendment and article II, § 20 of the Colorado Constitution.

Whether, by issuing "camping ban" citations only to people suspected of being homeless who are sleeping in their vehicles and not to truckers sleeping in their trucks at the same rest area, Fort Collins Police Services engaged in selective enforcement, in violation of the Fourteenth Amendment.

STATEMENT OF THE CASE

In the early morning of September 11, 2018, Fort Collins Police Services (FCPS) officers went to the Colorado Department of Transportation (CDOT) Poudre rest area, located at East Prospect Road and I-25, with the goal of issuing tickets to people who were sleeping in their cars, for alleged violations of Fort Collins Municipal Ordinance 17-181, which is titled "Camping on public property – restricted."[1] Mr. Wiemold received such a summons. CF p. 633.[2]

On March 22, 2019, Mr. Wiemold filed a motion to dismiss the charge against him, advancing two arguments: (1) that summonsing and prosecuting Mr. Wiemold for sleeping on public property when he was homeless and could not stay at any Fort Collins shelter violated the Eighth Amendment and article II, section 20 of the Colorado Constitution, and (2) that FCPS's enforcement of Ordinance 17-181 on that day constituted selective enforcement, in violation of the Fourteenth Amendment, because the ordinance was enforced only against people thought to be homeless and not against truckers engaged in the same activity at the same rest area. CF p. 499-523.

[1] Fort Collins Municipal Ordinance 17-181, titled "Camping on public property—restricted," states: "It shall be unlawful for any person to camp or pitch a tent, or knowingly permit any person to camp or pitch a tent, on public property within the City. Camping, for the purposes of this Section, shall mean to sleep, spend the night, reside or dwell temporarily with or without bedding or other camping gear and with or without shelter, or to conduct activities of daily living such as eating or sleeping, in such place unless such person is camping in compliance with Chapter 23 in a natural or recreation area. Camping shall not include incidental napping or picnicking." F.C.M.O. § 17-181.

[2] Throughout this Opening Brief, Mr. Wiemold refers to pages from the record in this manner, including pages from various transcripts that are included in the digital court file the municipal court uploaded in this case. He *does not* refer to pages in transcripts by their page number in the transcript; instead, he refers to pages in transcripts by their page number in the record. He does so to make it easier for this Court to find the cited pages in the court file; if the Court goes to the page number of the relevant pdf listed in Mr. Wiemold's citation, the cited material will be on that page.

The City filed a response, CF p. 451-98, and Mr. Wiemold filed a reply. CF p. 419-49. On May 7, 2019, the municipal court conducted an evidentiary hearing on Mr. Wiemold's motion. CF p. 21-173. In lieu of argument, Mr. Wiemold filed a hearing brief, CF 389-403, the City filed a response CF 357-78, and Mr. Wiemold filed a reply. CF 295-355. On May 30, 2019, the municipal court issued its order. CF p. 291-93. In that order, the municipal court denied Mr. Wiemold's Eighth Amendment argument as not yet ripe. It denied Mr. Wiemold's Fourteenth Amendment selective enforcement argument on the merits. In making its ruling, the municipal court did not make specific factual findings or engage in significant legal reasoning to support its ruling. CF p. 291-93.

On August 7, 2019, the case proceeded to a court trial. CF p. 277-79; 175-85. On August 9, the municipal court entered an order finding Mr. Wiemold guilty of violating Fort Collins Municipal Ordinance 17-181, "Camping on public property – restricted." CF p. 221-23.

In response to the municipal court's May 30 order denying Mr. Wiemold's Eighth Amendment argument as not yet ripe, after he was found guilty Mr. Wiemold filed a motion to vacate his conviction and enjoin the imposition of any punishment. CF p. 231-75. Mr. Wiemold also filed a supplemental brief to address an error in this motion. CF p. 215-20. The City filed a response, CF p. 205-213, and Mr. Wiemold filed a reply. CF p. 203-04. On September 6, 2019, the municipal court issued its order denying Mr. Wiemold's motion. CF p. 199-201. Again, the municipal court did not make specific factual findings or engage in significant legal reasoning to support its ruling. CF p. 199-201. Mr. Wiemold timely filed his notice of appeal, and this appeal follows.

STATEMENT OF FACTS

On September 11, 2018, Mr. Wiemold was homeless. CF p. 46:2-5. Although he worked a full-time job as the supervisor of the homeless shelter at Catholic Charities, one of the two main

homeless shelters in Fort Collins, Mr. Wiemold had, for some time, been unable to afford a place to stay. CF p. 47:13-25.

As the shelter supervisor at Catholic Charities, Mr. Wiemold managed shelter staff and interacted with the homeless individuals staying at the shelter. CF p. 48:1-5. This involved managing the daily operations of the shelter, making sure the clients who used the shelter followed the shelter's rules, enforcing the rules at the shelter, which included suspending people from the shelter for rule violations, and enforcing any suspensions. CF p. 48:1-23.

As a shelter employee, Mr. Wiemold could not stay at a homeless shelter in Fort Collins. CF p. 49:13-50:6. There are two shelters in Fort Collins that provide overnight shelter for single men like Mr. Wiemold, Catholic Charities and the Fort Collins Rescue Mission. CF p. 29:9-24; 49:13-50:6. Mr. Wiemold was not eligible to stay at Catholic Charities because Catholic Charities shelter policies prohibit staff from receiving services at the shelter. CF p. 34:21-35:4; CF v2 p. 73; CF p. 35:16-25; 49:13-50:6; 75:2-9. Mr. Wiemold was unable to stay at either Catholic Charities or the Rescue Mission because Catholic Charities policies also barred staff from having outside contact with shelter clients. CF v2 p. 82; CF p. 49:13-50:6; 75:2-9. The two shelters' populations overlap, as many homeless individuals will stay at either shelter depending on availability. CF p. 29:9-24; 49:13-50:6; 75:2-9. Additionally, staying at the Rescue Mission would mean staying with his erstwhile clients, including clients whom Mr. Wiemold may have disciplined or removed from Catholic Charities, which would have been unsafe for Mr. Wiemold. CF p. 49:13-50:6; 75:2-9. Further facts detailing why Mr. Wiemold was not able to stay at any shelter in Fort Collins are discussed in greater detail below in part II.B.1.

Even if Mr. Wiemold's job did not prevent him from staying at a shelter, there were no open beds in any shelter Mr. Wiemold could have stayed at in Fort Collins on the night of September 10, 2018. CF v2 p. 151; CF p. 36:1-37:19; 38:18-21; 43:18-45:4. Catholic Charities had reached capacity

and had turned away one person seeking shelter. Fort Collins Rescue Mission was also full. CF v2 p. 151; CF p. 36:1-37:19; 38:18-21; 43:18-45:4. *See also* part II.B.2, *supra*.

Without a home or available indoor shelter, on the night of September 10, 2018, Mr. Wiemold drove to the Poudre rest area. CF p. 48:24-49:1; 58:10-11. Once there, he used the public restroom and settled down inside of his vehicle to get some sleep. CF p. 58:17-19. Mr. Wiemold was asleep in his truck when, in the early morning of September 11, Fort Collins Police Services (FCPS) woke him up around 6am and cited him for an alleged violation of Fort Collins Municipal Ordinance 17-181, titled "Camping on public property—restricted." CF p. 633; CF v2 p. 159.[3]

The Poudre rest area is located at East Prospect Road and I-25. It is operated by the Colorado Department of Transportation. CF p. 76:18-77:13. The rest area has two parking lots adjacent to one another; one lot is designed for commercial trucks, the other for passenger vehicles. CF p. 50:9-11; 150:7-14. People regularly sleep and rest overnight in their vehicles in both lots. CF p. 50 12-19. Truckers slept in their trucks in the truck lot every night. CF p. 90:11-91:3.

FCPS officers issued a summons to Mr. Wiemold that morning as part of an enforcement action at the Poudre rest area designed to ticket people believed to be homeless. CF p. 80:2-14; 81:9-82:5; 122:17-123:9; 130:22-24; 136:17-137:5. FCPS officers explicitly chose not to contact truckers who were sleeping at the same rest area in their commercial trucks. CF p. 136:17-137:5. Prior to the planned enforcement action, FCPS Officer Chip Avinger communicated via text message with CDOT employee Wes Mansfield regarding homeless people at the rest area. CF v2 p. 1-45. Mr. Mansfield complained that homeless people were at the rest area and sent Officer Avinger pictures of cars parked at the rest area that he claimed belonged to homeless individuals. CF v2 p. 1-45. He repeatedly asked Officer Avinger to force homeless individuals to leave the rest area permanently. CF v2 p. 1-45. Specific to the FCPS enforcement action that resulted in Mr. Wiemold receiving a

[3] The "Z" in the time listed in CF v2 p. 159 stands for Zulu time, which is 6 hours ahead of Mountain time.

summons, on August 28, 2018, Mr. Mansfield told Officer Avinger via text message that they "need[ed] to make a plan to meet at the rest area between 530 and 6 AM [because] we had 12 the [sic] 15 Homeless there this morning." CF v2 p. 37. Officer Avinger responded that he would arrange it and, on September 4 and 5, confirmed that officers would be coming to the rest area on the following Tuesday, which was September 11. CF v2 p. 37-41.

In the early morning hours of September 11, 2018, FCPS officers arrived at the rest area. CF p. 134:3-5. There were trucks parked in the truck parking lot at the same hour that were clearly visible from the passenger parking lot. CF v2 p. 155-61; CF p. 51:3-56:13. Inside the trucks there were truckers inside engaged in the same behavior (sleeping) for which Mr. Wiemold was cited. CF p. 391-92; 134:22-135:24; 51:3-56:13. Officers did not approach any trucks. CF p. 136:23-137:1; 145:7-9; 146:20-21. Instead, FCPS officers enforced the camping ordinance only against homeless individuals.

SUMMARY OF ARGUMENT

Summonsing, prosecuting, convicting, and punishing Mr. Wiemold, a homeless man, for sleeping in his vehicle at a public highway rest area when he had no indoor place to sleep violates the prohibition on cruel and unusual punishment contained in the Eighth Amendment and article II, § 20 of the Colorado Constitution. On the night of September 10, 2018, into the morning of September 11, 2018, Mr. Wiemold was homeless and could not have spent the night in any of Fort Collins's homeless shelters. Under those circumstances, prosecuting, convicting, and punishing Mr. Wiemold for sleeping in his car on public property is unconstitutional.

Mr. Wiemold's citation and prosecution were conducted as a part of a scheme of selective enforcement by the Fort Collins Police Service (FCPS) that violated the Fourteenth Amendment. On September 11, 2018, FCPS officers went to a highway rest area where truckers were sleeping in

the cabs of their trucks and people believed to be homeless were sleeping in their vehicles. The officers went with the specific plan of only contacting and summonsing people suspected of being homeless; similarly situated truckers who were engaged in identical activity (sleeping in a vehicle) were left alone. This disparate treatment of similarly situated individuals bore no rational basis to any legitimate government interest and was therefore unconstitutional.

For both these reasons, this Court should reverse the order of the municipal court denying Mr. Wiemold's motions to dismiss and remand the case with instructions to vacate Mr. Wiemold's conviction and dismiss the charge against him.

ARGUMENT

I. Standards of review

Because the two issues presented in this appeal are constitutional questions, this Court's review of each is de novo. This Court's de novo review includes reviewing factual determinations. As the Colorado Supreme Court holds,

> [A]s we recently clarified in *People v. Matheny*, 46 P.3d 453 (Colo. 2002), the appellate courts have an enhanced role in examining a trial court's application of law to fact, particularly in the arena of constitutional rights. *Id.* at 461-62. After acknowledging the traditional deference afforded a trial court on purely factual issues, *see People v. Quezada*, 731 P.2d 730, 732 (Colo. 1987), we ruled in *Matheny* that the application of the legal standard to the facts, an exercise that resolves the "ultimate constitutional question," merits de novo review. *Matheny*, 46 P.3d at 462. Thus, where the historical facts are supported by competent evidence in the record, we will not disturb them. But interpreting the significance of those facts to resolve the constitutional question at hand we undertake as if for the first time. *See id.*

People v. Al-Yousif, 49 P.3d 1165, 1169 (Colo. 2002); *see also People v. Foster*, 2013 COA 85, ¶ 74 (citing *Al-Yousif* for the proposition that "[T]he application of the legal standard to the facts, an exercise that resolves the 'ultimate constitutional question,' merits de novo review."); *People v. Wingfield*, 2014 COA 173, ¶ 13 (constitutional questions require de novo review).

II. 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

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. Summonsing, prosecuting, convicting, and punishing Mr. Wiemold under these circumstances violates the Eighth Amendment and article II, § 20 of the Colorado Constitution.

A. The Eighth Amendment and article II, § 20 of the Colorado Constitution prohibit the government from criminalizing sleeping outdoors when the person is sleeping outdoors involuntarily because the person is homeless

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).

Reasoning from decisions grounded in *Robinson* and *Powell*, the municipal court for the City of Denver recently ruled Denver's camping ban ordinance unconstitutional. *People v. Burton*, 19GS004399, slip op. at 8-9 (Denver Mun. Ct. Dec. 27, 2019) (attached as Exhibit A). Furthermore, all other courts to address the issue 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), *cert. denied*, 140 S. Ct. 674

(2019) (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"). As the above cases have universally held, this is unconstitutional. This Court should follow that clear line of persuasive precedent.

Under this line of precedent, to determine whether enforcement of such ordinances is unconstitutional as applied to a particular person, courts have looked at two factors: (1) whether the individual is forced to be outdoors and (2) 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. The first prong of this test involves looking to the facts related to the person challenging the constitutionality of the ordinance as applied to that person; Mr. Wiemold addresses that prong below. Regarding the second prong, there can be no question that the act of sleeping represents involuntary conduct.

Sleeping is quintessential involuntary conduct. As the Ninth Circuit has recently 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). "[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"). Sleeping is "a biologic process that is

essential for life and optimal health" that humans plainly cannot avoid. 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. Sleeping is involuntary conduct.

B. When Mr. Wiemold was cited on September 11, 2018, he was homeless and had no choice but to sleep outdoors

It is undisputed that on September 11, 2018, Mr. Wiemold was homeless. CF p. 46:2-5. In addition to being homeless, Mr. Wiemold could not stay at any of the Fort Collins homeless shelters. First, Mr. Wiemold's job as the shelter supervisor at Catholic Charities prevented him from staying at either of the two homeless shelters in Fort Collins that accepted single men. Second, even if that were not the case, Fort Collins' two shelters that accept single men were full that evening and early morning. Like the plaintiffs in *Martin*, Mr. Wiemold was homeless and had no choice but to sleep outdoors on the night he was ticketed. *See Martin*, 902 F.3d at 1037-38.

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

Based on his employment at the Catholic Charities homeless shelter, Mr. Wiemold was unable to stay in either of the two homeless shelters in Fort Collins that accept single men. *See* CF p. 29:13-23 (Catholic Charities and Rescue Mission were only two homeless shelters in Fort Collins that accepted single males). Mr. Wiemold could not stay at the Catholic Charities shelter because of his position as the shelter supervisor there. First, Catholic Charities prohibits staff from receiving services at the shelter. CF p. 34:21-35:4; CF v2 p. 73; CF p. 35:16-25; 49:13-50:6; 75:2-9. Second, sheltering with his clients would also have violated Catholic Charities' policies limiting outside interactions between shelter staff and homeless clients. It would also have undermined Mr. Wiemold's authority in the eyes of his clients. CF v2 p. 82; CF p. 49:13-50:6; 75:2-9. Third, staying at

a shelter with his clients would breach professional boundaries and hamper Mr. Wiemold's ability to manage clients and enforce shelter policies. CF p. 49:16-22.

Furthermore, Mr. Wiemold could not stay at the Rescue Mission, the only other homeless shelter in Fort Collins that accepted single males. *See* CF p. 29:13-23. The populations of the two shelters overlap, both as availability fluctuates and as each shelter temporarily bars individuals for rule violations. CF p. 29:9-24; 49:13-50:6; 75:2-9. Sheltering at the Rescue Mission would have meant staying with Catholic Charities clients. CF p. 49:13-50:6; 75:2-9. Sheltering with clients, especially those who may have been suspended by Mr. Wiemold, would endanger his safety. CF p. 49:13-50:6; 75:2-9. Mr. Wiemold would have had to stay in unmonitored rooms with people whom he might have removed from the Catholic Charities shelter and who may be angry with or violent towards him. CF p. 49:13-50:6; 75:2-9. Additionally, sheltering with clients at Rescue Mission would create conflicts of interest for Mr. Wiemold that would make it impossible for him to do his job at Catholic Charities. Mr. Wiemold is responsible for enforcing shelter rules at Catholic Charities and disciplining and suspending guests when necessary. CF p. 48:1-23. If Mr. Wiemold removed a client from Catholic Charities, the client would need to seek services at the Rescue Mission, where he would stay with Mr. Wiemold. CF p. 29:9-24; 49:13-50:6; 75:2-9. Such conflicts of interest would be untenable.

2. Even if Mr. Wiemold were not a shelter employee, both of the Fort Collins shelters that accept single men were full.

When it comes to determining whether a person was sleeping outside voluntarily, the pertinent fact regarding shelters is the number of available beds*, i.e.*, beds in which the individual could have slept that night. *Martin*, 902 F.3d at 1048. If there was no available bed, an individual could not have slept there, regardless of whether the individual went to the shelter to request a bed. No shelter was "practically available" for Mr. Wiemold on the morning of September 11. *Id.* at 1049.

On the night of September 10 into the morning of September 11, 2018, the two shelters in Fort Collins which accept single men were both full. CF v2 p. 151; CF p. 36:1-37:19; 38:18-21; 43:18-45:4. Catholic Charities had reached capacity and had turned away one person seeking shelter. CF v2 p. 151; CF p. 36:1-37:19; 38:18-21; 43:18-45:4. Fort Collins Rescue Mission was also full. CF v2 p. 151; CF p. 36:1-37:19; 38:18-21; 43:18-45:4.

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*, 810 F. Supp. at 1563. On September 11, 2018, Fort Collins did not have enough shelter capacity to accommodate its single male homeless population and, specifically, was unable to accommodate Mr. Wiemold. Without the option of a shelter, Mr. Wiemold had no choice but to sleep outdoors.

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 violated the Eighth Amendment and article II, § 20. Because of the unavailability of shelter, Mr. Wiemold was forced to engage in the "involuntary, life-sustaining activit[y]" of sleeping at the public rest area. *Pottinger*, 810 F. Supp. at 1564. Citing, prosecuting, convicting, and punishing Mr. Wiemold for this is cruel and unusual such that it violates the Eighth Amendment and article II, § 20 of the Colorado Constitution.

C. 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.

To determine whether an individual has access to inside sleeping space, courts have looked only to whether that individual was able to stay in a shelter bed on the evening in question. *Martin*, 902 F.3d at 1042. 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, 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 the particular individual who is challenging the application of the ordinance to him. *Id.* at 1046.

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 be admitted 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.

Under *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.* None of the courts to hear this issue have required examining the reasons for which the individual became homeless. *See Martin*, 902 F.3d 1031; *Cobine*, 250 F. Supp. 3d 423; *Johnson*, 860 F. Supp. 344; *Pottinger*, 810 F. Supp. 1551.

Instead, courts' inquiry into the voluntariness of the individual's situation concerns the availability of shelter space. *See, e.g.*, *Martin*, 902 F.3d at 1049 ("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." *Id.* at 1564-65. This Court should follow these well-reasoned arguments.

III. FCPS' enforcement of Ordinance 17-181 at the Poudre Rest Area on September 11 constituted selective enforcement in violation of the Fourteenth Amendment.

FCPS' enforcement of Ordinance 17-181 at the Poudre rest area on the morning of September 11, 2018 violated the Fourteenth Amendment, because FCPS officers intentionally targeted and enforced the ordinance against only homeless individuals and chose not to enforce

[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.

against presumably housed truckers engaged in the same activity of sleeping. The Equal Protection clause mandates that "the decision to prosecute [or enforce] may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citing *Oyler v. Boies*, 368 U.S. 448, 456 (1962)).[5] Enforcement against people experiencing homelessness who have no choice but to sleep in their vehicle but not against truckers engaged in the same activity at the same time in the same rest areas is a quintessential arbitrary classification. To succeed on a selective enforcement claim regarding enforcement of a facially neutral statute, a defendant "must show both that the enforcement had a discriminatory effect and that it was motivated by a discriminatory intent." *People v. Valencia-Alvarez*, 101 P.3d 1112, 1116 (Colo. App. 2004) (citing *Armstrong*, 517 U.S. at 465).

A. FCPS officers' enforcement at the rest area had a discriminatory effect because officers enforced only against homeless people and not against similarly situated truck drivers present at the rest area that morning.

To demonstrate a discriminatory effect, Mr. Wiemold must show "that a similarly situated individual . . . could have been subjected to the same law enforcement action as the defendant, but was not." *Id.* at 1116. The facts bear out that this is exactly what happened.

FCPS officers arrived at the rest stop at approximately 6AM on September 11. CF p. 134:3-5; 633. At the time, there were several semi-trucks parked in an adjacent parking lot clearly visible from the area where FCPS officers were enforcing the ordinance against homeless individuals. CF v2 p. 155-61; CF p. 51:3-56:13. Given the early hour and federal and state regulations requiring eight-hour rest periods between long driving stints, it is almost certain that at least some of the drivers of the trucks present at the rest area were "spending the night" in their vehicle in violation of Ordinance 17-181. *See, e.g.*, Dep't of Pub. Safety, Colo. State Patrol, *Hours of Service (FMCSR Part*

[5] Despite being two distinct claims, selective enforcement and selective prosecution claims "are generally evaluated under the same two-part test." *United States v. Washington*, 869 F.3d 193, 214 (3d Cir. 2017).

395), https://www.colorado.gov/pacific/csp/hours-service-fmcsr-part-395. Truckers slept in that lot every day. CF p. 90:11-91:3. When FCPS cited Mr. Wiemold, there were trucks that contained sleeping truckers parked at the rest area that could have been, but were not, subjected to enforcement under Ordinance 17-181. CF p. 391-92; 134:22-135:24; 51:3-56:13; 136:23-137:1; 145:7-9; 146:20-21.

Fort Collins Municipal Ordinance 17-181 applies to all individuals within Fort Collins city limits. Any person who "sleep[s], spend[s] the night, reside[s] or dwell[s] temporarily with or without bedding or other camping gear and with or without shelter, or . . . conduct[s] activities of daily living" on public property violates the ordinance. Fort Collins, Colo., Mun. Ord. 17-181. When FCPS officers arrived at the rest area, the truck drivers in the truck lot were similarly situated to Mr. Wiemold (and the four other homeless individuals who received citations)—they were parked and remaining inside of their vehicles. This constituted unconstitutional selective enforcement.

Unlike selective enforcement claims that rest on statistical evidence (which typically struggle to prove the existence of similarly-situated individuals), the claim in this case rests on an "easily identified and limited class" of similarly-situated individuals—the truck drivers. *United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1156 (D. Kan. 2004) (noting the issues with selective enforcement claims that rest on statistical evidence because of the difficulty of using statistics to prove the existence of such a similarly-situated class at the time of enforcement). *Yick Wo v. Hopkins* is an instructive parallel. In *Yick Wo*, San Francisco had denied all 200 license applications by Chinese-owned laundries, while granting 89 out of 90 licenses applications by white-owned laundries. 118 U.S. 356 (1886). The Court held that San Francisco's actions constituted unconstitutional selective enforcement because the petitioners had complied with every regulation and there was no non-discriminatory reason to deny the license. The Supreme Court found that this pattern of enforcement showed a discriminatory effect. *Id.* at 374.

Like *Yick Wo*, where all Chinese applicants were denied, this is not a case that requires line-drawing to determine whether enforcement was lopsided enough to be discriminatory. Officers 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. Like the white laundry owners in *Yick Wo v. Hopkins*, the truck drivers were excused from enforcement because they did not belong to the targeted class. *Id.* By issuing citations only to homeless individuals when there were other individuals present and engaging in the same behavior as the homeless individuals, FCPS officers' enforcement had a plainly discriminatory effect on Mr. Wiemold.

B. FCPS officers had the discriminatory intent of enforcing Ordinance 17-181 only against homeless people at the rest area on September 11, 2018.

To demonstrate a discriminatory intent, Mr. Wiemold must show that the challenged enforcement action constitutes "intentional and purposeful discrimination." *May v. People*, 636 P.2d 672, 681-82 (Colo. 1981). Such 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)). Evidence of discriminatory intent may be direct or circumstantial. *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006).

There is strong evidence that FCPS officers went to the rest area on September 11 with the intent of enforcing the camping ordinance solely against homeless individuals. First, FCPS Officer Chip Avinger's communications with CDOT employee Wes Mansfield evidence an intent to enforce only against homeless individuals on September 11. CF v2 p. 1-45. On August 28, 2018, Mr. Mansfield sent a text message to Officer Avinger stating: "FYI, Chip we need to make a plan to meet at the rest area between 530 and 6 AM we had 12 the [sic] 15 Homeless there this morning here are some pics, let me know what you think." CF v2 p. 37. The reference to "pics" referred to photos of vehicles parked at the rest area that Mansfield believed belonged to homeless persons. CF

v2 p. 31-37. Officer Avinger responded: "Yeah, that's a great idea. I'll set that up and let you know." CF v2 p. 37. On September 4, 2018, Officer Avinger sent a message to Mr. Mansfield stating: "I'm setting it up for next Tuesday morning," which was the morning of September 11, 2018. CF v2 p. 41. These text messages show that Officer Avinger arranged the enforcement on September 11 because of a message from Mr. Mansfield stating that there were homeless people present at the rest area and showing pictures of vehicles allegedly belonging to homeless individuals. In his text message on August 28, Mr. Mansfield did not make any allegations of camping, behaviors that would otherwise violate Ordinance 17-181, or any other problems at the rest stop—just that the there were homeless people present and he wanted them gone.

In addition to the above messages, Mr. Mansfield referred to homeless individuals in other messages to Officer Avinger, making it clear that he is asking for enforcement against them. On August 21, 2018, Mr. Mansfield sent Officer Avinger a message saying that there were homeless individuals parked in the passenger parking lot. CF v2 p. 15-17. These communications show that FCPS planned enforcement at the rest area because homeless individuals were present there, solely based on information that they were homeless. 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. CF v2 p. 1-47. This is enforcement "'because of,' not merely 'in spite of'" their homeless status. *Wayte*, 470 U.S. at 610.

Additionally, FCPS officers' actions at the rest area reflected a planned enforcement action intentionally aimed solely against homeless individuals. FCPS officers did not enter the truck lot, even though several trucks were present and clearly visible from the passenger car lot. CF v2 p. 155-61; CF p. 51:3-56:13. Text messages from Mr. Mansfield to Officer Avinger complained of homeless individuals parking in the passenger lot. CF v2 p. 37-41. Based on this information, FCPS officers

targeted the portion of the lot most likely to contain homeless individuals and did not approach anyone in the truck parking lot. CF p. 136:17-137:5.

Based on the foregoing, it is clear that FCPS enforced Ordinance 17-181 "because of, not in spite of" Mr. Wiemold's homeless status. *Id.* By choosing not to enforce against similarly situated truck drivers, and instead planning and executing the enforcement as a means of targeting homeless individuals, FCPS showed discriminatory intent and selectively enforced Ordinance 17-181 against Mr. Wiemold as a homeless individual.

C. There is no rational basis for FCPS' discrimination against Mr. Wiemold for being homeless.

Selective enforcement based on arbitrary classifications, like housing status, that "do[] not impact a traditionally suspect class or implicate a fundamental right" are subject to rational basis review. *Dean v. People*, 366 P.3d 593, 597 (Colo. 2016). Under rational basis review, Mr. Wiemold "must prove that the statute's classification bears no rational relationship to a legitimate legislative purpose or government objective, or that the classification is otherwise unreasonable, arbitrary, or capricious." *Id.*

There is no rational basis for enforcement against homeless individuals sleeping in their vehicle, but not against the truck drivers engaged in the same activity in the same location at the same time. When FCPS officers arrived at the rest area on September 11, Mr. Wiemold was in the same position as the truck drivers—inside his lawfully-parked vehicle. There is no evidence in the record that FCPS had ever received any complaints regarding Mr. Wiemold's car or his actions. Any legitimate interest that the City had in keeping Mr. Wiemold from resting inside of his vehicle at the rest area applied equally to truck drivers in their vehicles. Yet FCPS did not attempt to enforce against truck drivers. FCPS officers engaged in selective enforcement against Mr. Wiemold that was not rationally related to any legitimate government interest. By selectively enforcing Ordinance 17-

181 only against homeless people and specifically against Mr. Wiemold, FCPS officers violated the Fourteenth Amendment.

CONCLUSION

For the above reasons, Mr. Wiemold requests that this Honorable Court reverse the orders of the municipal court and remand to the municipal court with instructions to vacate Mr. Wiemold's conviction and dismiss the charge against him.

Adam Frank, #38979
Frank & Salahuddin LLC
In cooperation with the ACLU Foundation of Colorado
Dated: March 30, 2020

Mark Silverstein, #26979
ACLU Foundation of Colorado
Dated: March 30, 2020

Rebecca Wallace, #39606
ACLU Foundation of Colorado
Dated: March 30, 2020

Certificate of Service

I hereby certify that on March 30, 2020, I served a true and correct copy of the foregoing electronically via the CCE e-filing system upon the following individuals, either through CCE:

Jill Hueser
For Collins City Attorney
jhueser@fcgov.com

Adam Frank
FRANK AND SALAHUDDIN LLC
Attorney for Mr. Wiemold