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SUPREME COURT, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
On Certiorari to the Boulder County District Court Case No. 10CV716	
DAVID LEE MADISON, JR., Petitioner, v. THE PEOPLE OF THE CITY OF BOULDER on behalf of THE PEOPLE OF THE STATE OF COLORADO, Respondent.	σ COURT USE ONLY σ
MARK G. WALTA*" Reg. No. 30990 Walta Harms & Dingle LLC 1912 Logan Street Denver, CO 80203 (303) 953-5999 (Telephone) (303) 996-8973 (Fax) mwalta@wghd-law.com DAVID B. HARRISON" Reg. No. 12309 Miller & Harrison LLC 2305 Broadway Boulder, CO 80304 (303)449-2830 (Telephone) (303)449-2198 (Fax) dave@millerandharrison.com MARK SILVERSTEIN Reg. No. 26979 Legal Director, ACLU Foundation of Colorado 400 Corona Street Denver, CO 80218 (303)777-5482 (Telephone) (303)777-1773 (Fax) msilver2@att.net * Counsel of Record " Cooperating Attorney, ACLU Foundation of Colorado	Case Number: 11SC307

PETITION FOR WRIT OF CERTIORARI

Supreme Court, State of Colorado **101 West Colfax Avenue, Suite 800, Denver, CO 80202** Name of Lower Court(s): Boulder County District Court Case Number(s): 10CV716 **Appellant(s): DAVID LEE MADISON, JR.,** **v.** **Appellee(s): THE PEOPLE OF THE CITY OF BOULDER on behalf of THE PEOPLE OF THE STATE OF COLORADO**	▲ ▲ ***COURT USE ONLY***
Attorney or Party Without Attorney (Name and Address): MARK G. WALTA, #30990 Walta Harms & Dingle LLC 1912 Logan Street Denver, CO 80203 (303) 953-5999 (Telephone) (303) 996-8973 (Fax) mwalta@wghd-law.com (Email)	Case Number: 11SC____

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The petition **DOES NOT** comply with C.A.R. 53(a).

☐ It contains **5,291** words.

A separate Request for Leave to File a Petition in Excess of C.A.R. 53's Word- and Page-Limits has been filed this day with the Court.

The petition complies with the requirements of C.A.R. 53(a)(1)-(6).

Signature of attorney or party

DAVID LEE MADISON, JR., the Petitioner herein, respectfully requests that this Court grant a writ of certiorari to review the Boulder County District Court's decision below pursuant to C.A.R. 49.

As grounds for his request, Petitioner states as follows:

INTRODUCTION

Petitioner is an involuntarily homeless individual, who was forced to sleep outdoors after being turned away from the City of Boulder's main shelter for lack of bed-space. He was successfully prosecuted under section 5-6-10 of Boulder's Revised Code (B.R.C.) – which prohibits "camping" without permission inside the city-limits – for seeking refuge inside a sleeping bag on a night in which temperatures plummeted to 11 degrees Fahrenheit.[1]

This case presents an issue of first impression as to how far municipalities may go in punishing the involuntarily homeless for engaging in the basic activities of daily living, and exercising their fundamental right to move freely about, and remain in, public places, without running afoul of our state and federal constitutions. This case

[1] A report commissioned by Boulder's City Council indicates that over 1,600 tickets for "camping" were issued from 2006 to 2009. *See* 2/2/10 Agenda Item #5A at 9 (available at http://www.bouldercolorado.gov/files/Clerk/Agendas/2010/5A.pdf) (visited April 29, 2011).

also poses the nettlesome legal question as to when an individual is justified, under the doctrine of "choice of evils," in violating a law that imperils his health and safety.

ISSUES PRESENTED FOR REVIEW

I. Whether the City of Boulder's "anti-camping" ordinance, B.R.C. § 5-6-10, either on its face or as applied to the circumstances of this case, violates state and federal constitutional prohibitions against cruel and unusual punishments, contravenes due process guarantees, and infringes on the constitutionally-protected right to travel and the corollary right to remain.

II. Whether the violation of the "anti-camping" ordinance alleged here was excused or justified under the defense of choice of evils, or necessity.

JUDGMENT BELOW

A copy of the district court's unpublished ruling and order in Case No. 10CV0716, *The People of the City of Boulder v. David Lee Madison, Jr.,* is attached as APPENDIX 1 to this petition pursuant to C.A.R. 53(a)(6).

JURISDICTION

On November 24, 2009, Boulder police issued Mr. Madison a municipal summons for camping without a permit, in violation of B.R.C. § 5-6-10 (2001).[2] (R. at 1-2; Tr. at 2-8).

Petitioner sought dismissal of the charge on grounds that the ordinance is unconstitutional. (R. at 17-18, 33-45). The prosecution, as it must, defended the law. (*Id.* at 22-33, 35-45). On March 23, 2010, the municipal court issued an order denying defendant's motion. *See* APPENDIX 4.

Mr. Madison tried his case to the court on April 7, 2010. (Tr. at 1-136). The parties rested on written submissions. (R. at 55-66). On June 7, 2010, the trial court issued an order rejecting Mr. Madison's defense of "choice of evils" and finding him guilty under the ordinance. *See* APPENDIX 5.

The court proceeded to impose a fine and to assess court costs, but granted Mr. Madison leave to perform community service in lieu of payment. (R. at 86). The sentence was stayed to allow for a direct appeal to the district court. (*Id.*)

Mr. Madison timely-filed his notice of appeal on June 28, 2010. (R. at 88-89). The district court exercised jurisdiction over the appeal pursuant to section 13-10-

[2] The ordinance was amended in 2010. The recent amendments do not appear to have any bearing on the issues before the Court. Both the former and current versions of the ordinance are attached hereto as APPENDICES 2 and 3, respectively.

116(2), C.R.S. (2010), Crim. P. 37, and C.M.C.R. 237(b), and, on April 20, 2011, issued a written ruling and order affirming the municipal court's judgment below. APP. 1.

Mr. Madison now petitions this Court for a writ of certiorari to review the district court's order. Jurisdiction to conduct certiorari review of defendant's case is conferred on this Court by Article VI, Section 2 of the Colorado Constitution and C.A.R. 49.

STATEMENT OF THE CASE

David Lee Madison, Jr. has been involuntarily homeless off and on for the past six years. (Tr. at 101). His path towards homelessness is predictably marked by hardship and economic upheaval: his father was diagnosed with a serious illness; his step-mother lost the ability to support the family after suffering several strokes; and, Mr. Madison, broken and bereft, eventually "turned to loitering." (*Id.* at 103).

Following stints in California and Idaho, Mr. Madison moved to Boulder in hopes of enrolling in school, but once again found himself on the streets. (Tr. at 101-104).

At approximately 7:15 a.m., on November 24, 2009, police officers on foot-patrol in Boulder happened upon a group of five men – one of whom was ultimately identified as Mr. Madison – allegedly sleeping or resting in a wooded area located within the city-limits. (Tr. at 2-3, 8-9, 13-14).

Historical weather data indicate that temperatures during the preceding night had plummeted to 11° Fahrenheit.[3]

There is no dispute that Mr. Madison was lying outdoors under a sleeping bag when contacted by police, and defendant readily admitted that he had sought refuge overnight in the sleeping bag to protect himself against the elements. (Tr. at 6-7, 95, 108). Defendant shivered with cold as he spoke with police, and, at some point, he noticed that his sleeping bag was caked with frost. (*Id.* at 96).

Mr. Madison informed officers – and independent evidence confirmed – that he had gone to Boulder's main homeless shelter the prior evening in search of a bed, but had been turned away after the shelter reached its maximum occupancy-limit.[4] (Tr. at 8, 27, 29, 33, 97, 107; Ex. 1). There is no indication that behavioral problems or suspected drug- or alcohol-use played any role in his rejection from the main shelter that night. (Tr. at 33, 98).

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[3] This Court may take judicial notice of historical weather data collected by authorized governmental agencies pursuant to CRE 201. *E.g.*, *Smallwood v. Foos*, 2008 WL 3338374, *3 & n.2 (D. Colo. 2008) (unpublished disposition) (taking such notice under Fed. R. Evid. 201). Official weather data for Boulder, Colorado on this date can be found at: http://www.ncdc.noaa.gov/(visited April 27, 2011).

[4] The evidence established that there are only 60 beds available for males, and 42 beds available for females, on any given night, and that these beds are assigned to individuals through a random lottery conducted every evening. (Tr. at 23, 25, 33, 43).

An emergency overflow shelter, or "warming center," that operates sporadically, and only under certain weather conditions, was likewise closed that night. (*Id.* at 73, 85). Defendant apparently learned of this when he was turned away from the main shelter. (*Id.* at 98, 112).

Mr. Madison testified that he had no other viable option but to sleep outdoors that night.[5] (Tr. at 98-101, 111-13).

Based on the above facts and circumstances, Boulder police ticketed Mr. Madison for camping without a permit in violation of B.R.C. § 5-6-10. (Tr. at 8, 106).

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[5] There was considerable evidence that Boulder's homeless have few options, in terms of overnight shelter. (Tr. at 18-19, 22-25, 35-35, 40-43, 47, 73-77). Mr. Madison did not qualify for the transitional or long-term housing programs that cater to certain segments of the area's homeless population. (*Id.* at 23, 38, 100-01, 109-11).

REASONS FOR GRANTING THE WRIT

I. THE CITY OF BOULDER'S "ANTI-CAMPING" ORDINANCE, B.R.C. § 5-6-10, EITHER ON ITS FACE OR AS APPLIED TO THE CIRCUMSTANCES OF THIS CASE, VIOLATES STATE AND FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENTS, CONTRAVENES DUE PROCESS GUARANTEES, AND INFRINGES ON THE CONSTITUTIONALLY-PROTECTED RIGHT TO TRAVEL AND THE COROLLARY RIGHT TO REMAIN.

A. *Factual and Procedural Background*

Prior to trial, Mr. Madison challenged the constitutionality of B.R.C. § 5-6-10 on grounds that it: (1) violates federal and state prohibitions against cruel and unusual punishments, by criminalizing one of the essential attributes of homelessness, which is that the basic activities of daily life generally must be conducted outdoors, often in public spaces; and, (2) is impermissibly overbroad, and violates federal and state due process guarantees, by infringing on homeless individuals' fundamental right to travel. (R. at 17-18, 35-45).

The trial court rejected defendant's challenges, reasoning that the ordinance: (1) does not violate the constitutional prohibition against cruel and unusual punishments, because it criminalizes conduct rather than the status of being homeless; and, (2) cannot be deemed unconstitutionally overbroad, because it does not appear facially discriminatory, does not target a suspect class, and does not directly implicate the

exercise of a fundamental right, but rather appears to be a rational response to concerns over public health, safety, and welfare. *See* APP. 4.

Mr. Madison renewed his constitutional challenge on appeal, but the district court rejected his arguments on grounds similar to those relied on by the trial court.[6] *See* APP. 1.

B. *Applicable Law*

Petitioner asserts that B.R.C. § 5-6-10 is unconstitutional, both on its face and as applied to the particular facts and circumstances of this case.[7] This issue appears to raise important questions of first impression.

A party attacking the validity of a statute or ordinance has the burden of proving its unconstitutionality beyond a reasonable doubt. *People v. Hickman*, 988 P.2d 628, 634 (Colo. 1999). A statute is facially unconstitutional only if no conceivable set of circumstances exists under which it may be applied in a constitutionally permissible manner. *People v. M.B.*, 90 P.3d 880, 882 (Colo. 2004). A statute that is constitutional

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[6] It should be noted that the portion of the district court's order addressing the constitutional challenge to the ordinance mirrors exactly an order issued by the Hon. Lael Montgomery on April 6, 2011, rejecting a similar challenge to the ordinance on appeal. *See Boulder Judge Rejects Homeless Man's Appeal, Upholds City's Anti-camping Law*, BOULDER DAILY CAMERA, April 8, 2011 (available at: http://www.dailycamera.com/news/ci_17802451) (linking to Judge Montgomery's order) (visited April 28, 2011).

[7] The full text of the version of B.R.C. § 5-6-10 in effect at the time of Mr. Madison's arrest is set forth in APPENDIX 2.

on its face may nonetheless be unconstitutional as applied to a particular case. *E-470 Public Hwy. Authority v. Revenig*, 91 P.3d 1038, 1045 (Colo. 2004).

The Boulder ordinance prohibits individuals from taking shelter in a sleeping bag overnight on public or private property without prior permission.[8] The forbidden activity that the statute terms "camping" encompasses two elements:

- residing or dwelling temporarily in a place, with "shelter"; and,
- conducting activities of daily living, such as eating or sleeping, in such place.

B.R.C. § 5-6-10(c). The term, "shelter," is broadly-defined and includes "without limitation, any cover or protection from the elements *other than clothing*." *Id.* (emphasis added).

1. The Boulder Ordinance Violates State and Federal Prohibitions Against Cruel And Unusual Punishments.

The Eighth Amendment to the United States Constitution, along with Article II, Section 20 of the Colorado Constitution, collectively prohibit the infliction of "cruel and unusual punishments." This Court has interpreted these state and federal prohibitions to be co-extensive in scope and application. *E.g.*, *People v. Guttierez*, 622 P.2d 547, 556-57 (Colo. 1981).

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[8] Notably, there is no process by which individuals can obtain a permit to camp on public property located with the city-limits. (R. at 44, 49).

Of particular relevance here, the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright,* 430 U.S. 651, 667 (1977); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 217 (Colo. 1984). This principle derives from the United States Supreme Court's pronouncements in *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968). In *Robinson*, the Supreme Court struck down a law criminalizing an individual's addiction to narcotics, finding that the punishment of a person for his involuntary status as a drug addict was cruel and unusual in violation of the Eighth Amendment. 370 U.S. at 666. In *Powell*, a plurality of the Supreme Court declined to overturn a conviction for public drunkenness, finding that it was the defendant's act of being drunk in public, not his status as an alcoholic, that the law criminalized, and therefore was permissible under the Eighth Amendment. 392 U.S. at 532.

Relying on this strain of Eighth Amendment jurisprudence, several courts have concluded that ordinances like B.R.C. § 5-6-10, effectively criminalize homelessness by punishing homeless people for their absolutely involuntary (and innocent) conduct of sleeping outdoors.[9] *See, e.g., Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir.

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[9] For scholarly commentary on the constitutional implications of anti-homeless ordinances, see generally Mary Boatright, *Jones v. City of Los Angeles: In Search of A Judicial Test of Anti-Homeless Ordinances*, 25 LAW & INEQ. 515 (2007), and Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631 (1992).

2006) (holding that "the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter"), *vacated after settlement*, 505 F.3d 1006 (9th Cir. 2007); *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1564 (S.D. Fla. 1992) (holding, in context of action to enjoin enforcement of anti-sleeping and anti-loitering ordinances, that "arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless," in contravention of Eighth Amendment); *Anderson v. City of Portland*, 2009 WL 2386056, **19-20 (D. Or. 2009) (unpublished disposition) (concluding that homeless plaintiffs had stated adequate claim under Eighth Amendment, because "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"); *but see Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000) (finding no Eighth Amendment violation on grounds that anti-camping ordinance targeted conduct, not status); *Lehr v. City of Sacramento*, 624 F.Supp. 2d 1218 (E.D. Cal. 2009) (same); *Joyce v. City and County of San Francisco*, 846 F.Supp. 843 (N.D. Cal. 1994) (denying request for preliminary injunction against enforcement of anti-homeless ordinances, in light of doubts that homelessness could be characterized as a "status"

under *Robinson*); *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995) (finding that anti-camping ordinance punished only conduct, not status).

Because Petitioner's challenge to Boulder's "anti-camping" ordinance appears to present a question of first impression in Colorado, it is appropriate for the Court to look to relevant decisional law from other jurisdictions for guidance. *People v. Weiss*, 133 P.3d 1180, 1187 (Colo. 2006).

Mr. Madison's submits that *Anderson v. City of Portland*, 2009 WL 2386056 (D. Or. 2009), provides the most useful guidance in resolving the key questions arising from his Eighth Amendment challenge to Boulder's "anti- camping" ordinance. *Anderson* confronts head-on – and carefully dissects – the two, seemingly divergent bodies of case law emerging from Eighth Amendment challenges to ordinances similar to Boulder's. The result of this comparative analysis is an even-handed and well-reasoned resolution of the question that has vexed courts in the wake of *Robinson* and *Powell*: where does the line between "status" and "conduct" begin and end for Eighth Amendment purposes, and, in the absence of bright-line distinctions between these two concepts, what factors should courts consider in determining whether criminal laws violate state or federal prohibitions against cruel and unusual punishments? In the end, the *Anderson* court concludes that the relevant inquiry is both "whether the challenged law or its enforcement targets derivative, 'involuntary'

conduct," and "whether and to what degree the City's enforcement of the anti-camping and temporary structure ordinances criminalizes 'conduct that society has an interest in preventing.'" 2009 WL 2386056 at *7 (citations omitted) (emphasis in original). *See also People v. Kellogg*, 14 Cal.Rptr.3d 507, 527 n.10 (Cal. App. - 4 Dist. 2004) (characterizing "linguistic debate regarding scope and meaning of the terms 'status' and 'condition'" as "unhelpful").

Boulder's ordinance is obviously aimed at the homeless, and is clearly designed to prevent them from sleeping overnight within the city-limits.[10] By excluding from its operation recreational activities, such as daytime napping and picnicking, routinely engaged in by the population at-large, the ordinance evinces an intent to single out the homeless and to criminalize the very essence of homelessness. After all, the very notion of homelessness presupposes that an individual lacks an adequate, fixed residence or dwelling to call their own, and therefore must reside or dwell on the

[10] There is empirical and anecdotal support for this assertion. A recent report prepared at the City Council's behest found that: (1) there are markedly fewer citations for violations of section 5-6-10 during those months that the area's homeless shelters offer emergency beds; and, (2) there is a general awareness among municipal court judges that "a significant majority of the people who are cited for camping are homeless." 2/2/10 Agenda Item #5A at 9 (available at http://www.bouldercolorado.gov/files/Clerk/Agendas/2010/5A.pdf) (visited April 29, 2011).

property of others, whether it be public or private property.[11] As a consequence, the homeless are often required to conduct the activities of daily life, including sleeping overnight, outdoors in the public or private spaces they temporarily occupy.

Even more perversely, the ordinance encourages conduct that actually imperils the health and safety of a segment of the population that is already at-risk: by specifically exempting the act of sleeping in one's clothes, without any other form of cover or protection, the ordinance essentially invites individuals to sleep unprotected and exposed to the elements, which carries any number of associated risks.[12] Forcing the homeless to sleep in layers of clothes, rather than innocently seeking shelter under a blanket or sleeping bag, advances no discernible, much less legitimate, public interest; it simply penalizes individuals for being homeless, and ultimately increases the risks and social costs of homelessness.

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[11] Although no single definition suffices, the term "homelessness" is generally understood to "includ[e] a person or persons who lack a fixed, regular, and adequate nighttime residence." 42 U.S.C. § 11302(a)(1) (federal definition of "homeless"); *Washington State Coalition for the Homeless v. Dept. of Soc. Servs.*, 949 P.2d 1291, 1297-98 (Wash. 1999) (same).

[12] There was unrefuted lay testimony from the director of the overflow shelter that "an individual could freeze to death in 40 degrees if the conditions were correct," and that "anytime you're getting below 45 degrees, a human being is in [sic] critical risk of having elements affect their health." (Tr. at 79-80). There was further testimony that frostbite "can occur above 32 degrees." (*Id.* at 83).

2. The Boulder Ordinance Is Impermissibly Overbroad And Infringes On The Fundamental Right To Travel And Remain.

A criminal statute may be deemed unconstitutionally overbroad if it criminalizes a substantial amount of constitutionally protected conduct. *Boos v. Barry*, 485 U.S. 312, 329 (1988); *People v. Baer*, 973 P.2d 1125, 1231 (Colo. 1999). A statute that is "substantially overbroad" may be held facially invalid, *see Houston v. Hill,* 482 U.S. 451, 459 (1987); however, "particularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973).

The United States Supreme Court has recognized the validity of facial attacks alleging overbreadth in cases where the fundamental right to travel is implicated. *See Aptheker v. Secretary of State,* 378 U.S. 500, 507-08 (1964); *accord Ferguson v. People*, 824 P.2d 803, 807-08 (Colo. 1992).

It is well-settled that there exists a fundamental right to interstate travel. *E.g.*, *Saenz v. Roe,* 526 U.S. 489, 500 (1999). Although the Supreme Court has not yet expressly recognized a right to *intrastate* travel, *see Memorial Hospital v. Maricopa County,* 415 U.S. 250, 255-56 (1974), several courts have concluded that such a right – *i.e.,* "a right to travel locally through public spaces and roadways" – not only exists, but must

be regarded as a basic and fundamental attribute of personal liberty.[13] *See, e.g.*, *Williams v. Town of Greenburgh*, 535 F.3d 71, 75 (2d Cir. 2008) ("[I]ndividuals possess a fundamental right to travel within a state."); *accord Johnson v. City of Cincinnati*, 310 F.3d 484, 496 n.3, 498 (6th Cir. 2002) (surveying cases and finding that there exists a fundamental right to travel locally through public spaces and roadways).

Beyond this, it is clear that, as a corollary to the "right to remove from one place to another according to inclination," individuals enjoy "the freedom to loiter for innocent purposes." *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999); *accord Nunez v. San Diego,* 114 F.3d 935, 944-945 (9th Cir. 1997) (finding that federal constitution protects the "fundamental right to free movement"); *Quth v. Strauss,* 11 F.3d 488, 492 (5th Cir. 1993) (assuming that right "to move about freely in public" is fundamental). The right to move freely about, and remain in, public places implicates First Amendment protections. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 164-65 (1972) (characterizing the right to walk, stroll, or wander without any apparent purpose as an aspect of liberty within "the sensitive First Amendment area"); *Johnson*

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[13] This Court has acknowledged, in passing, the existence of a right to both inter- and intrastate travel under the federal constitution. *See Mayo v. National Farmers Union Property and Cas. Co.*, 833 P.2d 54, 58-59 (Colo. 1992). The Court has further held that adults enjoy a fundamental right under our state and federal constitutions to move about freely and to use the public streets and facilities in a manner that does not interfere with the liberties of others. *E.g.*, *People in Interest of J.M.*, 769 P.2d 219, 221 (Colo. 1989).

v. Carson, 569 F.Supp. 974, 976 (M.D. Fla. 1983) (""The rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a manner that does not interfere with the liberties of others' are implicit in the first and fourteenth amendments."). Mr. Madison's challenge therefore falls comfortably within traditional applications of the overbreadth doctrine. *See, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1988) (recognizing limited applicability of doctrine).

Further, when, as here, a statutory proscription threatens the exercise of fundamental rights, the Court is to apply a heightened level of scrutiny. *Ferguson*, 824 P.2d at 807. Under this heightened standard, a statutory proscription will be struck down unless the state can demonstrate that the statute is necessary to promote a compelling governmental interest. *Id.*

Section 5-6-10's overbreadth problems emanate in part from the noticeable lack of a *mens rea* requirement. The prosecution took the position below, and a cursory review of the ordinance confirms, that it establishes a strict liability offense. (Tr. at 93, 94). Strict liability statutes are susceptible to overbreadth problems – particularly when they contain elements with "subjective overtones" – and for this reason must be narrowly drawn. *E.g., City of Englewood v. Hammes*, 671 P.2d 947, 952 (Colo. 1983). Boulder's "anti-camping" ordinance is premised on a number of highly subjective considerations:

- At what point is an individual deemed to be "dwelling" or "residing" temporarily in a public place?
- Beyond "eating and sleeping," what other "activities of daily living" are sufficient to trigger the ordinance?
- Although "clothing" is exempted from the concept of "shelter," does this exemption include anything that can be worn or fashioned into a wearable item? and,
- How far does the concept of "any cover or protection from the elements" extend?

Because individuals are held strictly liable for violations of the ordinance, without possessing any culpable mental state whatsoever, these subjective considerations take on greater significance, particularly given the important rights at stake.

Additionally, the ordinance is unconstitutionally overbroad because it criminalizes all manner of protected conduct that falls squarely within the right to intrastate travel and the even more fundamental corollary right "to remain in a public place of [one's] choice." *Morales*, 527 U.S. at 54. The Supreme Court of Hawaii's decision in *State v. Beltran*, 172 P.3d 458 (2007), which invalidated anti-camping laws on vagueness and overbreadth grounds is instructive in resolving this issue. *Cf. Whiting v. Town of Westerly*, 942 F.2d 18 (1st Cir. 1991) (rejecting facial and as-applied

vagueness and overbreadth challenges to ordinances prohibiting sleeping and lodging in motor vehicles or outdoors).

Like the ordinance at issue in *Beltran*, Boulder's ordinance sweeps within its broad provisions a range of constitutionally-protected conduct that lies at the core of our basic freedoms – the freedom to move to, and remain in, a public place of our choosing; the freedom to live our lives, and the freedom to go about the daily activities that sustain us in public. The Court need look no further than this case to discern the pernicious effects of, and absurd outcomes authorized by, the ordinance. Due to circumstances almost entirely beyond his control, Mr. Madison was forced to spend a night outdoors in which temperatures hovered perilously close to single digits. He was charged under, and found guilty of violating, section 5-6-10 because he moved to, and remained in, a public place under the cover of a sleeping bag. He did so as a matter of necessity, and in response to the basic human need for sleep, warmth, and shelter. If the human compulsion to survive can be deemed criminal under the ordinance, then the law is irretrievably broken.

Boulder's "anti-camping" ordinance, due to the breadth of its provisions, the inherently subjective nature of certain, key elements, and the fact that no culpable mental state is required to incur a violation, has significant potential to encumber a substantial amount of protected activity. Further, the City has not – and cannot –

articulate *any* government interest in differentiating between those who sleep in their parks with several layers of clothes on and those who sleep in their parks under sleeping bags, other than a bare desire to rid Boulder of homeless people, which most decidedly does not constitute a legitimate governmental interest, much less a compelling one.

Because the district court on appeal has decided questions of substance not heretofore decided by this Court, the petition for a writ of certiorari should be granted. *See* C.A.R. 59(a)(1).

II. THE VIOLATION OF THE "ANTI-CAMPING" ORDINANCE ALLEGED HERE WAS EXCUSED OR JUSTIFIED UNDER THE DEFENSE OF CHOICE OF EVILS, OR NECESSITY.

The affirmative defense of choice of evils is set forth under section 5-2-15 of the Boulder Revised Code, which is attached hereto as APPENDIX 6. In all relevant respects, section 5-2-15 tracks the provisions of section 18-1-702, C.R.S. (2010). Case law construing section 18-1-702 is therefore instructive.[14]

It is well-established that the availability of the choice of evils defense is limited to those instances where the defendant's conduct is "necessary because of the sudden

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[14] This Court has not addressed the "choice of evils" defense in over a decade. *See Andrews v. People*, 800 P.2d 607 (Colo. 1990); *cf. In re Pautler*, 47 P.3d 1175, 1181 (Colo. 2002) (considering applicability of defense in context of attorney disciplinary proceedings).

and unforeseen emergence of a situation requiring the actor's immediate action to prevent the occurrence of an imminently impending injury." *People v. Brante*, 232 P.3d 204, 209-10 (Colo. App. 2009) (quoting *People v. Brandyberry,* 812 P.2d 674, 678-79 (Colo. App. 1990)).

In order to make out the defense, the proof must establish that: (1) all other potentially viable and reasonable alternative actions were pursued, or shown to be futile, (2) the action taken had a direct causal connection with the harm sought to be prevented, and that the action taken would bring about the abatement of the harm, and, (3) the action taken was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur. *Andrews v. People,* 800 P.2d 607, 610 (Colo. 1990); *People v. Fontes*, 89 P.3d 484, 486-87 (Colo. App. 2003).

Mr. Madison asserts that he adduced sufficient evidence to satisfy all the elements of the defense of choice of evils, and that the prosecution, in turn, failed to disprove the defense beyond a reasonable doubt.

1. There Were No Viable And Reasonable Alternatives.

Both the trial court and the district court found that Mr. Madison could reasonably have anticipated that he might be denied a bed at the shelter, and furthermore should have foreseen that he might require additional layers of clothing as protection against the elements. *See* APP.1 at 9; APP. 5 at 72.

The suggestion that Mr. Madison should have foreseen the possibility that he might be denied a bed at the shelter, and should have taken the necessary steps to ensure that he had adequate clothing to guard against the elements, is based on a number of misconceptions: Mr. Madison could not have foreseen that the overflow shelter would be closed, and the notion that homeless individuals – who have limited possessions – should be required to have several layers of clothing in reserve, in the event that they are forced to spend the night outdoors, highlights the fundamental absurdity of the ordinance. There were no other reasonable alternatives available to Mr. Madison that evening. Accordingly, this element was satisfied.

2. There Was A Direct Causal Connection To The Harm, And The Action Taken Abated The Harm.

The trial court concluded that this element was not "sufficiently supported by specific evidence that might allow a trier of fact to find a causal connection between the 'cold' weather and the potential for this weather to result in frostbite or hypothermia." APP. 5. The district court did not expressly reach this factor. APP. 1.

All that need be said with respect to this factor is that there there was readily-available historical weather data subject to judicial notice, as well as uncontoverted testimony, that Mr. Madison's act of seeking shelter in a sleeping bag was causally connected to the harm of exposure to the cold weather and that it served to abate this harm. (Tr. at 79-80, 83, 96). This element was satisfied as well.

3. The Action Taken Was An Emergency Measure Pursued To Avoid A Specific, Definite, And Imminent Injury.

The question here is whether Mr. Madison's act of seeking shelter under a sleeping bag was a reasonable and necessary "emergency measure pursued to avoid a specific, definite, and imminent injury about to occur." *Andrews*, 800 P.2d at 610. The record contains specific – and unrebutted – evidence describing the adverse health effects of prolonged exposure to the cold, and there is virtually no question, based on the historical weather data, that Mr. Madison was at serious risk of imminent injury that evening. (Tr. at 79-80, 83). Accordingly, this element was satisfied.

In this case, an involuntarily homeless man was turned away from the city's sole emergency, overnight shelter for no other reason than his number did not come up in a random lottery for bed-space. As Mr. Madison walked away from the shelter on that increasingly frigid November night, he faced a stark choice: do what survival requires, but the law forbids, or do what the law commands, but basic instinct abhors. Petitioner was forced to make this choice because he was homeless; he was prosecuted under the Boulder ordinance because he chose to survive.

The ordinance thus places homeless individuals between Scylla and Charybdis: they can either risk a violation of the ordinance by harmlessly satisfying their involuntary need for warmth and shelter against the elements, or they can risk their own health, safety and welfare by forsaking these basic needs in order to comply with

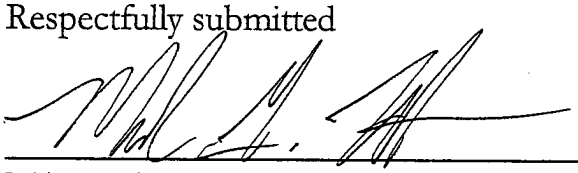
the letter of the law. This is an intolerable choice, and it is one that only the homeless are forced to make.

Because the district court on appeal has decided a question of substance in a way that probably does not accord with controlling law, the petition for a writ of certiorari should be granted. *See* C.A.R. 59(a)(2).

CONCLUSION

For the reasons set forth above, Mr. Madison respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted



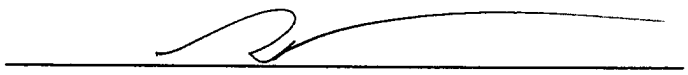
MARK G. WALTA, #30990
Attorney for David Lee Madison, Jr.
Walta Harms & Dingle LLC
1912 Logan Street
Denver, CO 80203
(303) 953-5999 (Telephone)

CERTIFICATE OF SERVICE

I certify that, on May 5, 2011, a copy of this Petition For Writ Of Certiorari was delivered via United States Mail to the attention of:

Office of Boulder City Attorney
Attn: Janet T. Michaels, Esq.
P.O. Box 8015
Boulder, CO 80306

Office of the State Attorney General
Catherine P. Adkisson
Assistant Solicitor General
Appellate Division, Criminal Justice Section
1525 Sherman Street, 5th Floor
Denver, CO 80203



Appendix 1:

District Court Ruling and Order

People v. Madison, No. 10CV716

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO 1777 6th Street P.O Box 4249 Boulder, CO 80302 (303) 441-3744	
THE PEOPLE OF THE CITY OF BOULDER on behalf of THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. DAVID LEE MADISON, JR., Defendant-Appellant	COURT USE ONLY Case No.: 10CV716 Division: 2

RULING AND ORDER

This Matter is before the Court on appeal of the trial court ruling against Appellant David Lee Madison, Jr. ("Mr. Madison"). Having reviewed the parties' briefs, the record on appeal and the applicable law, the Court enters the following Ruling and Order:

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 24, 2009 at approximately 7:15 a.m., police officers arrested Mr. Madison for camping on public property. Mr. Madison was charged with Camping Without Consent, B.R.C. § 5-6-10. Mr. Madison's counsel subsequently filed a motion to dismiss on the grounds that the ordinance was unconstitutional as imposing cruel and unusual punishment and infringing on the right to travel, which the municipal court denied. On April 7, 2010, the case proceeded to trial and on April 30, 2010 the municipal court issued a written order finding Mr. Madison guilty of Camping Without Consent.

Issues on Appeal

In his appeal, Mr. Madison argues the following:

1. The trial court erred in denying Mr. Madison's Motion to Dismiss, because the Camping Without Consent ordinance is unconstitutional in violation of the prohibition against cruel and unusual punishment.

2. The trial court erred in denying Mr. Madison's Motion to Dismiss, because the Camping Without Consent ordinance is impermissibly overbroad for infringing the fundamental right to travel.

3. The trial court erred in concluding that the violation of the Camping Without Consent ordinance was not excused or justified under the defense of choice of evils or necessity.

II. STANDARD OF REVIEW

An appeal taken from a judgment and conviction in a qualified municipal court of record shall be made to the district court of the county in which the municipal court is located, and the practice and procedure shall be the same as that provided in the applicable rules of procedure for appeal of misdemeanor convictions from county court to the district court. C.R.S. § 13-10-116(2); C.M.C.R. 237; *see also Hylton v. City of Colo. Springs*, 505 P.2d 26, 28 (Colo. App. 1973). Therefore, in reviewing the record on appeal from the municipal court, a district court cannot act as a finder of fact. *People v. Gallegos*, 533 P.2d 1140, 1142 (Colo. 1975); *People v. Williams*, 473 P.2d 982, 984 (Colo. 1970). On appeal, questions of law are reviewed *de novo*; questions of fact are reviewed for clear error; and questions of discretion are reviewed for abuse of discretion. *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1988).

III. MERITS

Mr. Madison argues that the Camping Without Consent ordinance violates the prohibition against cruel and unusual punishment and is impermissibly overbroad for infringing the fundamental right to travel. Mr. Madison also argues that the trial court erroneously concluded that the violation of the Camping Without Consent ordinance was not excused or justified under the defense of choice of evils or necessity.

The Court reviews de novo a constitutional challenge to a municipal ordinance. *Kruse v. Town of Castle Rock*, 192 P.3d 591 (Colo. App. 2008). Municipal ordinances, like statutes, are presumed constitutional. *Id.* The party challenging the ordinance must prove that it is unconstitutional beyond a reasonable doubt. *People v. Janousek*, 871 P.2d 1189, 1195 (Colo. 1994).

"A statute is facially unconstitutional only if no conceivable set of circumstances exists under which it may be applied in a constitutionally permissible manner." *Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003). A statute that is constitutional on its face may nonetheless be unconstitutional as applied to a particular case. *E-470 Public Highway Authority v. Revenig*, 91 P.3d 1038, 1041 (Colo. 2004).

The proper interpretation of a statute or ordinance is a question of law that is reviewed de novo. *Alvarado v. People*, 132 P.3d 1205, 1207 (Colo. 2006). "The existence of an affirmative defense is a question to be determined by the trier of fact. Where the trial court is the trier of fact, its factual findings are binding on appeal if adequately supported by the record." *People v. Dover*, 790 P.2d 834, 835 (Colo. 1990).

At the time that Mr. Madison was charged, B.R.C. § 5-6-10 (2001), provided in relevant part as follows:

Camping or Lodging on Property Without Consent.

(a) No person shall camp within any park, parkway, recreation area, open space or other public or private property without first having obtained:

(1) A permit from the city manager, in the case of city property;
(2) Permission of the supervisory officer of other public property; or
(3) Permission of the owner of private property.

(c) For purposes of this section "camp" means to reside or dwell temporarily in a place, with shelter, and conduct activities of daily living, such as eating or sleeping, in such place. But the term does not include napping during the day or picnicking. The term "shelter" includes, without limitation, any cover or protection from the elements other than clothing. The phrase "during the day" means from one hour after "sunrise" until "sunset," . . . .

Mr. Madison contends that the ordinance is unconstitutional, both on its face and as applied to the particular facts of this case.

A. Cruel and Unusual Punishment

Mr. Madison argues that the Camping Without Consent ordinance violates the prohibition against cruel and unusual punishment facially and as applied, because it punishes the status of being homeless. He asserts that the ordinance criminalizes activities of daily living, such as sleeping, which the homeless population is forced to perform outdoors due to the limited availability of shelter. The City maintains, however, that the ordinance passes constitutional muster, because it punishes conduct rather than a person's status.

The Eighth Amendment to the United States Constitution and Article II, Section 20 of the Colorado Constitution prohibit "cruel and unusual punishments." *See People v. Guttierez* (622 P.2d 547, 556-57 (Colo. 1981) (holding that Article II, Section 20 is coextensive with the Eighth Amendment). The Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). This prohibition applies to the states and municipalities through the Due Process Clause of the Fourteenth Amendment.

State laws that criminalize a person's status constitute cruel and unusual punishment. *Robinson v. California*, 370 U.S. 660 (1962). In *Robinson*, the Supreme Court struck down a California statute that criminalized being addicted to narcotics. *Robinson*, 370 U.S. at 667-668. It reasoned that a conviction under the criminal statute was not predicated upon conduct, but rather it was predicated upon a person's "status" of narcotic addition. *Id.* at 665. Because the statute did not target conduct, a narcotic addict could be prosecuted for his "status" of narcotic addiction at any time before he reformed and regardless of whether he had ever taken narcotics within the state. *Id.*

Criminal penalties may be constitutionally imposed, however, when the accused has committed some act which society has an interest in preventing, even if the punished conduct is

related to a person's status. *Powell v. State of Tex.*, 392 U.S. 514, 533 (1968). In *Powell*, the Supreme Court rejected the argument that punishing a chronic alcoholic for public intoxication violated the Eighth Amendment. *Id.* at 536-37. The Supreme Court distinguished its ruling in *Robinson*:

> The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community.
> *Id.* at 532.

Although conduct subject to criminal sanction may be related to a person's status or condition, the Supreme Court declined to formulate a constitutional rule regarding whether a person's conduct was an involuntary product of his status or condition, because the States have historically grappled with the "constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views on the nature of man." *Id.* at 534-37. The dissent, however, contended that it was unconstitutional to punish conduct that was occasioned by a compulsion related to a person's status or condition. *Id.* at 569.

In relation to a person's status of being homeless, some jurisdictions have struck down municipal ordinances that criminalize sleeping in public places, such as streets, sidewalks, and parks. *See, e.g., Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006); *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992). In *Pottinger*, the court determined that a Miami municipal ordinance that provided that "[i]t shall be unlawful for any person to sleep on any of the streets, sidewalks, public places or upon the private property of another without the consent of the owner thereof," violated the Eighth Amendment. *Pottinger*, 810 F. Supp. at 1560 fn.11 & 1565. Relying upon the dissenting opinion in *Powell*, it reasoned that subjecting a homeless person to a criminal sanction for eating, sleeping, or engaging in other life-sustaining activities in public places constituted cruel and unusual punishment, because homelessness is an involuntary condition and a homeless person has no choice but to conduct involuntary, life-sustaining activities in public places. *Id.* at 1565.

In contrast, municipal ordinances that criminalize the conduct of camping in public places have passed constitutional muster. *See Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218 (E.D. Cal. 2009); *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000). While the court in *Lehr* could have distinguished its holding solely by contrasting the language of the municipal ordinance at issue in that case with that in *Pottinger* and *Jones*, it further noted that "neither the Supreme Court nor any other circuit court of appeals has ever held that conduct derivative of status may not be criminalized . . ." and it declined to "couch its own moral beliefs in constitutional terms and to substitute its own judgment as to the morality of the criminal law for that of the states." *Lehr*, 624 F. Supp. 2d at 1232 & 1234.

Mr. Madison contends in a cursory manner that the Camping Without Consent ordinance is facially unconstitutional. However, he fails to develop any argument in support of his

contention. As the People note, the Camping Without Consent ordinance applies to all persons who wish to camp in Boulder, regardless of whether they are homeless, shoestring travelers trying to avoid the cost of accommodations, or persons who merely enjoy the great outdoors. Mr. Madison does not argue that there is no conceivable set of circumstances under which the Camping Without Consent ordinance may be applied in a constitutionally permissible manner. Upon examination of the ordinance, the Court finds that the Camping Without Consent Ordinance is facially neutral and that it does not violate the Eighth Amendment's prohibition against cruel and unusual punishment on its face.

In addition, Mr. Madison argues that the Camping Without Consent ordinance is unconstitutional as applied, because he is homeless and has an involuntary need for warmth and shelter against the elements as he sleeps at night. He urges the Court to adopt the reasoning in *Pottinger* and *Jones* and to hold that criminalizing conduct that is derivative of a person's status or condition constitutes cruel and unusual punishment. However, the Court is not persuaded by *Pottinger* and *Jones* to adopt the dissenting opinion in *Powell*. To formulate a constitutional rule regarding criminalizing derivative conduct threatens to usurp the state's authority to develop its own criminal laws. People are biologically complex beings who dwell in socially complex environments. The courts' understanding of what constitutes a status or condition and to what extent conduct is derivative of a condition evolves with advances in scientific knowledge and fluctuates with changing morals and attitudes over time. Thus, the Court adheres to the Supreme Court precedent in *Powell* and holds that laws that criminalize conduct, even if the punished conduct is related to a person's status, do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Here, the Camping Without Consent ordinance limits the use of shelter for sleeping on public property at night, but it allows people to sleep on public property at any time and to use shelter for daytime napping. Unlike the municipal ordinances in *Pottinger* and *Jones*, the plain language of the Camping Without Consent ordinance does not prohibit sleeping in public places, but rather it targets the conduct of camping. The City of Boulder is constitutionally allowed to set reasonable restrictions on the use of public property, including regulating where and when camping occurs. Because the Camping Without Consent ordinance punishes conduct rather than a person's status as homeless, the Court holds that it does not violate the Eighth Amendment as applied to homeless persons.

B. Overbreadth and Right to Travel

Mr. Madison asserts that the Camping Without Consent ordinance is unconstitutionally overbroad facially and as applied to homeless people, because it impermissibly infringes on a person's fundamental right to interstate and intrastate travel. Specifically, Mr. Madison contends that the Camping Without Consent ordinance is so broadly drawn that it serves to criminalize the fundamental right to travel, as well as the corollary right to remain in public places as guaranteed by the U.S. Constitution and the Colorado Constitution.

When there is a facial challenge to the overbreadth of a statute or ordinance, "a court's first task is to determine whether the enactment reaches a substantial amount of protected

conduct. If it does not, then the overbreadth challenge must fail." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

Municipal ordinances that define camping so as to criminalize germane recreational activities are unconstitutionally overbroad. *State v. Beltran*, 172 P.3d 458, 464 (Haw. 2007). In the ordinance in *Beltran*, camping was defined, in part, as:

> the use of public park for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities.
> *Id.* at 460-61.

As the court discussed, the camping ordinance in *Beltran* criminalized enjoying a day at the beach or the park, because one could be subject to a criminal sanction for merely taking a nap under an umbrella or sun tent. *See id.* at 464.

In contrast, the Camping Without Consent ordinance is narrowly drafted to limit the use of shelter for sleeping on public property. The ordinance allows people to sleep on public property at any time and expressly excludes napping during the day and picnicking from the purview of the ordinance. Therefore, the plain language of the ordinance targets the conduct of camping and does not target a substantial amount of protected conduct. The City of Boulder is constitutionally allowed to set reasonable restrictions on the use of public property, including regulating where and when camping occurs. Thus, the Court finds that the Camping Without Consent ordinance does not reach a substantial amount of protected conduct, and therefore, is not unconstitutionally overbroad on its face.

In deciding whether the Camping Without Consent ordinance passes constitutional muster with regard to the right to travel, this Court must determine whether the ordinance should be subjected to a rational basis analysis or a strict scrutiny analysis. Courts have used a strict scrutiny analysis in cases where a statute or ordinance is facially discriminatory, where a statute or ordinance targets a suspect class, or where the statute or ordinance directly burdens a fundamental right. *See Parrish v. Lamm*, 758 P.2d 1356, 1370 (Colo. 1988) (discussing three-tiered standard of review applicable to equal protection claims); *see also Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (applying strict scrutiny to a statute that "create[d] an 'invidious classification' that impinge[d] on the right of interstate travel by denying newcomers 'basic necessities of life.' "); *Pottinger*, 810 F. Supp. at 1581 (applying strict scrutiny because the statute burdened the right to travel). Other courts have used a rational basis analysis to determine the constitutionality of an ordinance. *See, e.g., Joyce*, 846 F. Supp. at 859-60.

The Court concludes that the Camping Without Consent ordinance is not facially discriminatory. The ordinance, on its face, applies equally to all individuals. Similarly, the plain language of the ordinance does not distinguish between residents and nonresidents, or homeless individuals and those individuals with a home.

The Court also concludes that the Camping Without Consent ordinance does not target a suspect class. The United States Supreme Court has identified race, alienage, national origin,

gender, and illegitimacy as suspect classes. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). The United States Supreme Court has not held that economic status is a suspect class. *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988). Therefore, an ordinance that allegedly targets homeless individuals does not target a suspect class. Mr. Madison does not dispute that the prevailing view is that homelessness is not considered to be a suspect class.

The parties dispute whether the right to intrastate travel is a fundamental right. The United States Supreme Court has recognized a fundamental right to interstate travel. *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972). The United States Supreme Court has not held that there is a fundamental right to intrastate travel. *See, e.g., Mem'l Hosp.*, 415 U.S. at 255-56. Other courts have recognized that the right to intrastate travel, or the right of an individual to move freely within his state, is a constitutionally protected right. *See, e.g., Lutz v. City of York, Pa.*, 899 F.2d 255, 268 (3d Cir. 1990); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971). This Court does not need to conclusively decide whether the right to intrastate travel is a fundamental right for the purposes of this appeal. This Court will assume for purposes of this appeal only that the right to intrastate travel is a constitutionally protected right.

Courts that have applied a strict scrutiny analysis in determining the constitutionality of a statute or ordinance that allegedly burdened an individual's right to travel have done so when the burden on the right to travel was direct and substantial. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 628-38 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). Moreover, in *Pottinger*, the court engaged in a discussion concerning how the right to travel can be burdened. *See Pottinger*, 810 F. Supp. at 1579-81. The court listed cases involving the imposition of residency requirements before individuals are eligible to receive various government services, a law "prohibiting the transportation of 'indigents' into California," and laws that had the "primary objective" of "imped[ing] migration." *Id.* at 1579-80 (citations omitted). The court also discussed how "[o]ne commentator argues persuasively that anti-sleeping ordinances can burden the right to travel of homeless individuals when they create direct barriers to travel, are intended to impede travel or penalize migration." *Id.* at 1580 (citation omitted).

Other courts have applied a rational basis analysis when analyzing the constitutionality of a public sleeping or camping ordinance. *See, e.g., Joyce*, 846 F. Supp. at 859-60 (rejecting the application of strict scrutiny analysis in the context of a preliminary injunction); *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1994).

This Court concludes that the Camping Without Consent ordinance does not directly or substantially burden an individual's right to travel. The ordinance does not involve residency requirements in order to receive government benefits. The ordinance does not prohibit the transport of any individuals within or outside of the state. Similarly, the ordinance does not have the primary objective of impeding migration. Moreover, the ordinance does not create a direct barrier to travel for homeless individuals, does not have the intention of impeding travel, and does not penalize migration. Instead, the ordinance is drafted to limit the use of shelter for sleeping on public property. Individuals are permitted to sleep on public property at anytime without shelter, and daytime napping and picnicking is not within the scope of the ordinance. At

best, there is a tenuous, indirect link between the Camping Without Consent ordinance and the right to travel.

As discussed above, the Camping Without Consent ordinance is not facially discriminatory, does not target a suspect class, and does not directly or substantially burden a fundamental right. Therefore, this Court will analyze the constitutionality of the ordinance using a rational basis standard. Under rational basis review, the ordinance must be rationally related to a legitimate governmental interest in order to pass constitutional muster. *Lyng v. Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 370 (1988); *Ferguson v. People*, 824 P.2d 803, 808 (Colo. 1992).

The City of Boulder presented evidence that the Camping Without Consent ordinance has legitimate governmental purposes, including protecting Boulder's public spaces from environmental damage, as well as the promotion of sanitation, public health, and safety. This Court is persuaded by the City of Boulder's argument that turning public spaces in Boulder into campgrounds would present problems concerning sanitation, public health, safety, and environmental damage. This Court therefore concludes that the Camping Without Consent ordinance is rationally related to these legitimate governmental interests.

In conclusion, this Court holds that the Camping Without Consent ordinance is not unconstitutionally overbroad and does not impermissibly infringe on Mr. Madison's right to travel. Therefore, the Camping Without Consent ordinance is upheld as a constitutionally permissible restriction on the use of public property.

C. Choice of Evils

Mr. Madison asserts that he provided sufficient evidence to satisfy the elements of the defense of choice of evils and that the prosecution failed to disprove the defense beyond a reasonable doubt. However, as noted in the City of Boulder's brief, the trial court found that Mr. Madison failed to meet the threshold for the defense to be invoked. The record supports this position. Therefore, this Court will address whether Mr. Madison met the legal threshold required for choice of evils to be invoked.

The affirmative defense of choice of evils is set forth in B.R.C. § 5-2-15. B.R.C. § 5-2-15 provides as follows:

> (a) Conduct that would otherwise constitute a violation is justifiable and not criminal when it is unavoidably necessary as an emergency measure to avoid imminent public or private physical injury that is about to occur by reason of a situation occasioned or developed through no conduct of the actor and that is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly and convincingly outweigh the desirability of avoiding the injury sought to be prevented by the code section or ordinance defining the violation at issue.

(b) The necessity and justifiability of conduct under subsection (a) of this section do not rest upon considerations pertaining only to the morality and advisability of the code section or ordinance, either in its general application or with respect to its application to a particular class of cases arising thereunder.

(c) Before evidence relating to a defense of justification under this section is presented to a jury, the defendant shall first make a detailed offer of proof to the judge, who shall rule as a matter of law whether the claimed facts or circumstances would, if established, constitute a justification. If the judge admits such evidence, the judge shall again rule as a matter of law on the sufficiency of the evidence that, if believed by the jury, would establish the defense.

(d) Choice of evils under this section is a specific defense. It does not apply to traffic violations.

The defense of choice of evils is to be narrowly construed and "is not available as an instrument" to nullify "unpopular laws." *People v. Brandyberry*, 812 P.2d 674, 677 (Colo. App. 1990). "[L]imitations upon the applicability of the defense have traditionally been recognized and applied to safeguard against its misuse or abuse." *Id.* As described in B.R.C. § 5-2-15(c), the defendant must make an offer of proof, and the Court must "rule as a matter of law whether the claimed facts or circumstances would, if established, constitute justification."

> A sufficient offer of proof must therefore establish: (1) all other potentially viable and reasonable alternative actions were pursued, or shown to be futile, (2) the action taken had a direct causal connection with the harm sought to be prevented, and that the action taken would bring about the abatement of the harm, and, (3) the action taken was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur.
>
> *Andrews v. People*, 800 P.2d 607, 610 (Colo. 1990).

"A reviewing court determines[s], as a matter of law, whether the offer in the record, considered in a light most favorable to defendants, is substantial and sufficient in both quantity and quality to support the statutory defense." *People v. Brante*, 232 P.3d 204, 209 (Colo. App. 2009) (internal quotation marks omitted).

The first factor is that "all other potentially viable and reasonable alternative actions were pursued, or shown to be futile." *Andrews*, 800 P.2d at 610. The choice of evils defense "does not arise from a 'choice' of several courses of action, but rather is based on a real emergency involving specific and imminent grave injury that presents the defendant with no alternatives other than the one taken." *Id.* at 609. Mr. Madison had at least one alternative other than camping. Instead of camping, Mr. Madison could have protected himself from the cold weather by using layers of clothing. While this may not have been the best alternative, Defendant did have another viable and reasonable alternative action other than violating the Camping Without Consent ordinance.

The third factor is that "the action taken was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur." *Id.* at 610. Courts have limited the use of the choice of evils defense to situations "where the defendant's conduct is necessary because

of the sudden and unforeseen emergence of a situation requiring the actor's immediate action to prevent the occurrence of an imminently impending injury." *Brante*, 232 P.3d at 209-10 (internal quotation marks omitted). There was evidence at trial that Mr. Madison used the services of Boulder Shelter for the Homeless in the past. (Trial Tr. at 32.) Mr. Madison was aware that if he did not sleep at the homeless shelter, he might have to sleep outside. (Trial Tr. at 112.) There was also evidence at the trial that Mr. Madison had been in Boulder for approximately a year prior to the violation. (Trial Tr. at 101.) Therefore, it is reasonable to conclude that on the day of the violation Mr. Madison was not new to Boulder and had at least some familiarity with the climate and potential for sudden significant changes in the weather. It is also reasonable to conclude that it would have been foreseeable to Mr. Madison that it may become very cold at night in Boulder in mid to late November. Similarly, it was foreseeable that space at the homeless shelter would not always be available. Therefore, Mr. Madison was not faced with a sudden and unforeseen emergency on November 24, 2009 when the weather became cold at night.

As a matter of law, considered in the light most favorable to the defendant, Mr. Madison has not sufficiently established in both quantity and quality that all other potentially viable and reasonable alternatives were pursued or shown to be futile, nor, that camping was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur. Because the first and third factors have not been established, the Court does not need to address whether the second factor has been established. This Court concludes that Mr. Madison's offer of proof was insufficient and cannot support the defense of choice of evils. Therefore, this Court holds that the trial court did not err in concluding that Mr. Madison failed to meet the threshold requirements necessary to assert the choice of evils defense.

IV. CONCLUSION

For the foregoing reasons, the municipal court's ruling is **AFFIRMED.**

Done this 20th day of April, 2011.

BY THE COURT:

Ingrid S. Bakke
District Court Judge

Appendix 2:

B.R.C. § 5-6-10 (2001)

5-6-10 Camping or Lodging on Property Without Consent. top

(a) No person shall camp within any park, parkway, recreation area, open space, or other public or private property without first having obtained:

(1) A permit from the city manager, in the case of city property;

(2) Permission of the supervisory officer of other public property; or

(3) Permission of the owner of private property.

(b) This section does not apply to any "dwelling" in the city, as defined by section 5-1-1, "Definitions," B.R.C. 1981.

(c) For purposes of this section "camp" means to reside or dwell temporarily in a place, with shelter, and conduct activities of daily living, such as eating or sleeping, in such place. But the term does not include napping during the day or picnicking. The term "shelter" includes, without limitation, any cover or protection from the elements other than clothing. The phrase "during the day" means from one hour after "sunrise" until "sunset", as those terms are defined in chapter 7-1, "Definitions," B.R.C. 1981.

(d) Testimony by an agent of the persons specified in subsection (a) of this section that such agent is the person who issues permits or permission to camp or lodge upon property, that such agent has inspected the records concerning permits, or that in the course of such agent's duties such agent would be aware of permission and that no such permit was issued or permission given is prima facie evidence of that fact.

(Ordinance No. 7129 (2001))

Appendix 3:

B.R.C. § 5-6-10 (2010)

5-6-10 Camping or Lodging on Property Without Consent. top↑

(a) No person shall camp within any park, parkway, recreation area, open space or other city property.

(b) No person shall camp within any public property other than city property or any private property without first having obtained:

(1) Permission of the authorized officer of such public property; or

(2) Permission of the owner of private property.

(c) This section does not apply to any "dwelling" in the city, as defined by section 5-1-1, "Definitions," B.R.C. 1981.

(d) For purposes of this section "camp" means to reside or dwell temporarily in a place, with shelter, and conduct activities of daily living, such as eating or sleeping, in such place. But the term does not include napping during the day or picnicking. The term "shelter" includes, without limitation, any cover or protection from the elements other than clothing. The phrase "during the day" means from one hour after "sunrise" until "sunset", as those terms are defined in chapter 7-1, "Definitions," B.R.C. 1981.

(e) Testimony by an agent of the persons specified in subsection (b) of this section that such agent is the person who grants permission to camp or lodge upon such property, or that in the course of such agent's duties such agent would be aware of permission and that no such permission was given, is prima facie evidence of that fact.

Ordinance Nos. 7129 (2001); 7719 (2010)

Appendix 4:

Municipal Court Order

People v. Madison, No. CR-2009-0016313GE

BOULDER MUNICIPAL COURT, BOULDER COLORADO 1777 6th Street, Boulder, CO 80302	**COURT USE ONLY**
Plaintiff: PEOPLE OF THE STATE OF COLORADO, BY AND THROUGH THE CITY OF BOULDER, COLORADO v. **MADISON, DAVID LEE, Defendant**	Ctrm.: Municipal Case No:CR-2009-0016313GE
ORDER	

This matter comes before the Court on Defendant's Motion to Dismiss.

Defendant claims that the City's camping ordinance is unconstitutional in violation of the cruel and unusual punishment provision of the Eighth Amendment to the U.S. Constitution and Article 2, Section 20 of the Colorado Constitution. Defendant also contends that the camping ordinance is unconstitutionally overbroad as a denial of the right to travel under the Fourteenth Amendment to the U.S. Constitution and Article 2, Section 25 of the Colorado Constitution.

Standing

As a preliminary matter, the Court concludes that Defendant does have standing to assert the cruel and unusual punishment argument at this stage of the proceedings. See *Ingraham v. Wright,* 430 U.S. 651, 667, 97 S.Ct. 1401, 1410 (1977) (Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such"); *Jones v. City of Los Angeles,* 444 F.3d 1118, 1126-1130 (9th Cir. 2006) (protection imposed by the cruel and unusual punishment clause attaches before conviction).

Standard of Review

This Court must presume that the camping ordinance is constitutional and the party challenging the ordinance must prove that it is unconstitutional beyond a reasonable doubt. *People v. Janousek,* 871 P.3d 1189 (Colo. 1994).

Analysis and Discussion

B.R.C. Section 5-6-10 states:

(a) No person shall camp within any park, parkway, recreation area, open space, or other public or private property without first having obtained: (1) A permit from the city manager, in the case of city property;(2) Permission of the supervisory officer of other public property; or (3) Permission of the owner of private property.

Subsection (c) states:

For purposes of this section "camp" means to reside or dwell temporarily in a place, with shelter, and conduct activities of daily living, such as eating or sleeping, in such place. But the term does not include napping during the day or picnicking. The term "shelter" includes, without limitation, any cover or protection from the elements other than clothing.

1. Cruel and Unusual Punishment

The Eighth Amendment's "cruel and unusual punishment" provision sets substantive limits on what type of behavior "can be made criminal and punished as such." *Ingraham v. Wright,* 430 U.S. 651, 667, 97 S.Ct. 1401, 1410 (1977). The prohibitions of the Eighth Amendment apply to the states (and municipalities) through the due process clause of the Fourteenth Amendment. According to Defendant, Boulder's camping ordinance constitutes cruel and unusual punishment because it "forbids the performance of unavoidable, essential, and life-sustaining activities by people whose status is that of being homeless involuntarily..." *Defendant's Motion to Dismiss, para. 4.* The City maintains that this ordinance passes constitutional muster because it punishes conduct rather than a person's status. *People's Response Brief, p. 6.* In resolving this issue, the Court is guided by two significant U.S. Supreme Court cases, *Robinson v. State of California,* 370 U.S. 660, 82. S. Ct. 1417 (1962) and *Powell v. Texas,* 392 U.S. 514, 88 S. Ct. 2145 (1968).

In *Robinson,* the Supreme Court struck down a California statute that made it a criminal offense for a person to be addicted to narcotics. The *Robinson* Court noted that a conviction under the statute was not predicated on *conduct*, but simply on a person's *status* of being addicted to narcotics. *Robinson,* 370 U.S. at 665, 82. S. Ct. at 1420 (emphasis added). The *Robinson* court noted that under the California statute, a conviction could occur, regardless of whether the person charged had ever taken narcotics within the state. *Id. Robinson* established the rule that laws that criminalize status violate the cruel and unusual punishment provision of the Eighth Amendment.

In *Powell,* the Supreme Court rejected the defendant's argument that punishment of an alcoholic for being drunk in public violated the Eighth Amendment. *Powell v. State,* 392 U.S. 514, 88 S. Ct. 2145 (1968). The Court distinguished its ruling in *Robinson,* stating:

The State of Texas thus has not sought to punish a mere status, as

> California did in Robinson; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community.

Powell, 392 U.S. at 532, 88 S. Ct. at 2154. These two cases shape the inquiry for this case. If Boulder's camping ordinance punishes status alone, it violates the Eighth Amendment. If the ordinance punishes conduct rather than status, then it does not violate the Eighth Amendment.

For the purpose of this discussion, the Court takes as true the factual allegations made by Defendant in his Reply Brief, which are:

1. That there is insufficient bed space at the Boulder Shelter for the Homeless to house all of Boulder's homeless persons;
2. That the "alternative shelters" lack room for all homeless persons and are only open when certain conditions exist; and
3. That there is no "permit" process by which an individual can obtain a permit to camp on public property in Boulder.

The Court further assumes for this discussion that Defendant is "involuntarily" homeless. That is, he is homeless not because he chooses to be, but because of circumstances beyond his control.

Defendant's premise is that a homeless person in Boulder has no choice but to sleep on public property and therefore violate the camping ordinance. According to Defendant, such an act is one for which criminal liability should not attach because it is a necessary and unavoidable act that every person must perform to survive. Defendant asserts that punishment for this unavoidable and necessary act amounts to criminalizing his *status* of being homeless, which violates the rule established in *Robinson*. This Court disagrees.

Boulder's camping ordinance does not prohibit an individual from sleeping on public property. In fact, an individual may sleep on public property, day or night, without being subjected to criminal punishment. B.R.C. Sec. 5-4-10(c). It is the "act" of utilizing shelter to sleep at night which must be established before an individual can be cited for violating the ordinance. The ordinance targets the behavior of "camping" rather than the status of being homeless. It is clear from the language of the ordinance that an individual cannot be convicted and punished for a violation merely because of his status.

Defendant points out that the act of sleeping with shelter on a cold night is often necessary for survival. Hence, punishment of this act, which is merely "derivative" of defendant's status, is tantamount to punishing him for status alone. In support of this argument, Defendant cites *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992) and *Jones v. City of Los Angeles*, 444 F. 3d 1118

(9th Cir. 2006). In *Pottinger,* a case out of the Federal District Court in Florida, the court concluded that the City of Miami's practice of arresting homeless persons for performing such activities as sleeping, standing and congregating on public property constituted cruel and unusual punishment. According to the court, "[T]he harmless conduct for which they were arrested is inseparable from their involuntary condition of being homeless." *Pottinger,* 810 F. Supp. at 1564. A similar approach was taken in *Jones v. City of Los Angeles.* In that case, the Ninth Circuit concluded that the City of Los Angeles "could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status." *Jones v. City of Los Angeles,* 444 F. 3d 1118, 1132. Defendant urges this court to follow the reasoning in these two cases and find that Boulder's camping ordinance criminalizes conduct that is inseparable and interwoven into the involuntary status of homeless people and therefore constitutes cruel and unusual punishment.

The facts in *Pottinger and Jones* are distinguishable from the facts in this case. *Pottinger* involved a "campaign" by the City of Miami to "sanitize" the city by rounding up homeless people, destroying their property, eliminating food sources, etc. The various ordinances in question in *Pottinger* prohibited "lying down, sleeping, standing, sitting or performing other essential, life-sustaining activities **at any public place at any time."** *Id* at 1561(emphasis added). Similarly, in *Jones v. City of Los Angeles,* the challenged ordinance prohibited any person from sitting, lying or sleeping on any street, sidewalk or other public way, **at any time of day.** *Jones v. Los Angeles, supra,* 444 F.3d at 1123 (emphasis added). The *Jones* court noted that the Los Angeles ordinance was "one of the most restrictive municipal laws regulating public spaces in the United States." *Id.*

Boulder's camping ordinance, unlike the ordinances in question in *Pottinger and Jones,* does not prohibit individuals from sleeping on public property. In fact, the ordinance allows sleeping on public property at any time, merely limiting the use of shelter at night.

The People cite a number of cases where courts have rejected the approach taken in *Jones and Pottinger.* See *Joyce v. City and County of San Francisco,* 846 F. Supp. 843, 857 (N.D. Cal. 1994)(camping ordinance permits punishment for proscribed conduct, not status and thus does not violate cruel and unusual punishment clause); *Tobe v. City of Santa Ana,* 892 P.2d 1145, 40 Cal. Rptr 2d 402 (Cal. 1995)(same); *Lehr v. City of Sacramento,* 624 F. Supp. 2d 1218, 1232 (E.D. Cal. 2009) ("neither the Supreme Court nor any other circuit court of appeals has ever held that conduct derivative of status may not be criminalized..."). This Court is persuaded by the logic of these opinions. The City of Boulder has the right to set reasonable restrictions on the use of public property for the benefit of all of its citizens. Boulder's camping ordinance limits the use of shelter for sleeping on public property at night, but allows individuals to sleep on public property at any time and allows the use of shelter for daytime napping. The ordinance criminalizes a person's conduct, not his status. Accordingly, the ordinance does not constitute cruel and unusual

punishment and does not violate the Eighth Amendment to the U.S. Constitution or Article 2, Section 20 of the Colorado Constitution.

2. Overbreadth and the Right to Travel

Defendant also claims that Boulder's camping ordinance is unconstitutionally overbroad as applied to homeless people because it impermissibly infringes on a person's right to *interstate* travel under the Fourteenth Amendment to the U.S. Constitution and Article 2 Section 25 of the Colorado Constitution. *Edwards v. California*, 314 U.S. 160, 86 L. Ed. 119 (1941); *Memorial Hospital v Maricopa County*, 415 U.S. 250, 39 L. Ed. 2d 306, 94 S.Ct. 1076 (1974). The Court agrees with Defendant's contention that the right of an individual to move freely within his state, or what has been called the right to *intrastate* travel, is also a constitutionally protected right. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1579-80 (S.D. Fla. 1992); *King v. New Rochelle Municipal Housing Authority*, 442 F. 2d 646, 648 (2nd Cir.), cert. denied, 404 U.S. 863, 92. S.Ct 113 (1971); *Lutz v. City of New York*, 899 F. 2d 255 (3rd Cir. 1990).

The standard for evaluating the constitutionality of an ordinance or statute that allegedly violates a person's right to travel has not been clearly established. A strict scrutiny analysis has been applied in cases where the ordinance is "facially" discriminatory or directly burdens a fundamental right. See *Shapiro v. Thompson*, 394 U.S. 618, 627-35, 89 S.Ct. 1322, 1328-31 (1969) (holding unconstitutional a statute requiring welfare assistance applicants to reside in state at least one year immediately preceding application for assistance); *Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164 (1941) (strict scrutiny applied in evaluating ordinance that limited immigration of new residents). See also *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1579-80 (S.D. Fla. 1992) (strict scrutiny applied based upon fact that statute burdened "fundamental" right to travel).

Other courts have declined to impose a strict scrutiny analysis. See e.g. *Joyce v. City and County of San Francisco*, 846 F. Supp 843, 859-860 (applying rational basis test to challenge by homeless to municipal camping ordinance); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1164, 40 Cal. Rptr. 2d 402, 421 (same); *Roulette v. City of Seattle*, 850 F. Supp 1442 (W.D. Wash. 1994) (rational basis test imposed because ordinance is not "facially" discriminatory and does not impact a "suspect" class).

Boulder's camping ordinance is not facially discriminatory. On its face, the ordinance applies equally to residents and nonresidents, and to those who have a home and those who do not. The camping ordinance does not target a "suspect" class. While race, alienage, national origin and gender have been identified as suspect classes, the U.S. Supreme Court has not held that classifications based on wealth or economic status are "suspect" classes. See *Joyce v. City and County of San Francisco, supra at 860, citing Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 108 S. Ct. 2481) and *Lindsey v. Normet*, 405 U.S. 56, 92 S. Ct. 862 (1972). The homeless population is not a suspect class.

In *Shapiro and Edwards,* the burden on an individual's right to travel was direct and substantial. In those cases, the residency requirements imposed by the statutes in question directly impacted the right of an individual to travel into a state. *Shapiro v. Thompson*, supra; *Edwards v. California, supra.* In this case, the impact of Boulder's camping ordinance on an individual's right to travel is at most indirect and incidental.

Because Boulder's camping ordinance is not "facially" discriminatory, does not target a "suspect class" and does not directly impact a fundamental right, the Court will apply a rational basis test to this constitutional evaluation. Under this standard, the Court must uphold the ordinance unless it lacks a rational relationship to a legitimate governmental interest. *City of Cleburne v. Cleburne Living Center, Inc.* 473 U.S. 432, 446, 105 S.Ct. 3254, 3257-58 (1985); *Ferguson v. People,* 824 P.2d 803 (Colo. 1992).

The City contends that the camping ordinance promotes sanitation, public health and safety, encourages patronage of local businesses and protects public areas from environmental damage. *People's Response Brief, p. 8.* There is no evidence or argument made in this case that the ordinance does not serve these interests. The limitations on sleeping at night "with shelter" imposed by Boulder's camping ordinance are rationally related to the purposes set forth by the City. Accordingly, this Court must uphold the ordinance as a constitutionally permissible restriction on the use of public property.

Conclusion

A defendant who violates Boulder's camping ordinance may lack the "moral" culpability that we often expect when criminal sanctions are imposed. However, the question for this Court is not of moral culpability, but of constitutional law. As Justice Black stated in his concurrence in *Powell:*

> The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of crime. The criminal law is a social tool that is employed in seeking a wide variety of goals, and [the Court] cannot say the Eighth Amendment's limits on the use of criminal sanctions extend as far as this viewpoint would inevitably carry them."

Powell, 392 U.S. at 544-545, 88 S. Ct. 2145. It is not the province of this Court to determine what type of behavior should be subjected to criminal sanction. That is the province of the community and Boulder's City Council.

Defendant has failed to establish that Boulder's camping ordinance is unconstitutional. Therefore, Defendant's Motion to Dismiss is denied.

DATED: March 23, 2010

BY THE COURT:

MUNICIPAL COURT JUDGE
P.O. Box 8015
Boulder, CO 80306
(303) 441-1842

CERTIFICATE OF HAND DELIVERY

I hereby certify that on 3-23-10, a true and correct copy of the foregoing was served by hand delivery to the City Attorney's Office, Prosecution Division, 1777 - 6th Street, Boulder, CO 80302 and to the defendant at the following address:

DAVID HARRISON
1777 6th St.
Boulder, CO 80302

BY: [signature]

Appendix 5:

Municipal Court Order

People v. Madison, No. CR-2009-0016313GE

BOULDER MUNICIPAL COURT, BOULDER COLORADO 1777 6th Street, Boulder, CO 80302	**COURT USE ONLY**
Plaintiff: PEOPLE OF THE STATE OF COLORADO, BY AND THROUGH THE CITY OF BOULDER, COLORADO v. **MADISON, DAVID LEE, Defendant**	Ctrm.: Municipal Case No:CR-2009-0016313GE

ORDER

On November 24, 2009, Defendant was charged with Camping, in violation of B.R.C. Section 5-6-10. Defendant pled not guilty to the charge. Defendant's pre-trial Motion to Dismiss was denied and the case proceeded to trial. Following trial, the Court took the matter under advisement and invited the parties to supplement their oral closing arguments with written argument. The parties have now filed their written arguments and the matter is ripe for resolution.

Facts

At trial, the People offered testimony from Kristin Weisbach, a City of Boulder Police officer and Rene Brodeur, Director of Programs at The Boulder Shelter for the Homeless (the "Homeless Shelter"). Officer Weisbach testified that prior to sunrise on the morning of November 24, 2009, she observed Defendant, David Madison, "camping" in a wooded area near 1300 Rosewood, a location that is just east of Broadway and within Boulder's city limits. According to Officer Weisbach, Defendant was laying on the ground with either a sleeping bag or blanket. Officer Weisbach testified that she believed that the location where Defendant was located was public property.

Officer Weisbach further testified that she had a brief conversation with Defendant at the location. During that conversation, Defendant acknowledged that he had spent the night at that location because he was turned away from the Homeless Shelter the previous evening. Defendant did not suggest to Officer Weisbach that he had obtained permission to sleep at that location.

Mr. Brodeur testified that the Homeless Shelter had indeed been open the previous evening, November 23, 2009, and that Defendant had sought shelter that evening. According to Mr. Brodeur, the Homeless Shelter does not always have sufficient bed space to accommodate everyone seeking shelter on a given

night. On those nights, a lottery occurs. Those who are successful in this lottery are granted accommodation and those who are unsuccessful are denied accommodation. Mr. Brodeur confirmed that, on November 23, 2009, Defendant had sought accommodation at the Homeless Shelter but had been "turned away", presumably because Defendant was not successful in the lottery conducted that night.

Mr. Brodeur also offered testimony discussing the various programs available to the homeless population through the Homeless Shelter, including the Transitional Housing Program. According to Mr. Brodeur, Mr. Madison was not enrolled in the Transitional Housing Program on November 23, 2009.

After the People rested their case, Defendant made an oral motion for judgment of acquittal. In that motion, among other things, Defendant contended that the City had failed to establish that Defendant lacked permission to camp at the location where he was cited by Officer Weisbach. The Court denied Defendant's motion for judgment of acquittal.

In his case, Defendant offered testimony from Jim Budd, Executive Director of the Boulder Outreach for Homeless Overflow ("BOHO"). According to Mr. Budd, BOHO, with the assistance of various churches and synagogues, organizes and staffs overflow warming centers for the homeless population on very cold or wet nights during the winter months. According to Mr. Budd, the overflow warming centers will be open when the temperature is below 25 degrees Fahrenheit or when there exists precipitation **and** the temperature is below 32 degrees Fahrenheit. Mr. Budd testified that on November 23, 2009, the overflow warming centers were not in operation.

Defendant also testified. During his testimony, Defendant acknowledged that he had spent the previous night at the location where he had been contacted by Officer Weisbach. According to Defendant, this area was on or near a construction site approximately 300 yards from Broadway. Defendant admitted that he had slept in a sleeping bag that night and that he did not obtain a permit or any other form of permission to sleep in this location. Defendant further testified that he had been denied a bed at the Homeless Shelter on November 23rd and slept at this site because of its proximity to the Homeless Shelter.

Defendant testified that November 23rd was a cold night and that he had frost on his sleeping bag when he woke up on November 24th. Defendant also testified that he had experienced hypothermia before and believed he needed the shelter of a sleeping bag to protect himself from the cold weather.

Defendant acknowledged that he was not in the Transitional Housing Program offered by the Homeless Shelter. Defendant had no sustainable income on November 23, 2009 and was not receiving governmental assistance.

Issues

Defendant asserts that the City failed to prove that Defendant lacked permission

to camp and that, even if Defendant violated the ordinance, he can not be found guilty of the violation due to the operation of the "choice of evils" or "necessity" defense.

1. **Lack of Permission to Camp**

B.R.C. Section 5-6-10 (a) states:

> No person shall camp within any park, parkway, recreation area, open space, or other public or private property without first having obtained: (1) A permit from the city manager, in the case of city property;(2) Permission of the supervisory officer of other public property; or (3) Permission of the owner of private property.

Defendant contends that the City did not disprove lack of permission in its case in chief. The crux of Defendant's argument is that Officer Weisbach was unable to specifically identify the property as being public or private and that there was no admissible evidence tendered which established that Defendant did not have permission to camp at this location.

Officer Weisbach testified that she was not aware of any permits being issued for any public property in the City of Boulder for November 23, 2009. Moreover, when Officer Weisbach spoke to Defendant on November 24th, Defendant's explanation for why he had slept at that location was because he had been denied accommodation at the Homeless Shelter. Defendant did not suggest to Officer Weisbach that he had obtained a permit or other permission from the owner of the property. If Defendant had obtained a permit or other permission to camp at this location, he likely would have mentioned that to Officer Weisbach during their conversation. At the mid-trial stage of the proceedings, the Court is required to consider the evidence presented in the light most favorable to the prosecution. With this standard in mind, the Court concludes that the evidence presented was sufficient to meet the City's burden on this element.

2. **Choice of Evils**

Defendant also maintains that the City has failed to disprove the affirmative defense of "necessity" or "choice of evils" beyond a reasonable doubt.

B.R.C. Section 5-2-15 reads as follows:

> Conduct that would otherwise constitute a violation is justifiable and not criminal when it is unavoidably necessary as an emergency measure to avoid imminent public or private physical injury that is about to occur by reason of a situation occasioned or developed through no conduct of the actor and that is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly and convincingly outweigh the desirability of avoiding the injury sought to be prevented by the code section or ordinance defining the

violation at issue.

This ordinance tracks C.R.S. Section 18-1-407, the State's codification of the common law "choice of evils" defense. The defense represents a codification of the principle that an individual should not be held criminally accountable for behavior that is necessary to prevent an imminent injury to himself or another. Illustrations of the intended application of the choice of evils defense include blasting buildings to prevent a major fire from spreading, appropriating foodstuffs in time of famine, or forcibly restraining a person infected with a highly contagious and dangerous disease. *Andrews v. People*, 800 P.2d 607 (Colo. 1990), note 2, p. 609 (citation omitted).

The choice of evils defense has been addressed in a number of Colorado cases. See *Andrews v. People*, supra; *People v. McKnight*, 626 P.2d 678 (Colo. 1981); *People v. Handy*, 603 P.2d 941, 198 Colo. 556 (1979); *People v. Fontes,* 89 P. 3d 484, 486 (Colo. App. 2003); *People v. Roberts*, 983 P.2d 11 (Colo. App. 1998); *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

In *Fontes*, the defendant was charged with forgery, criminal impersonation and theft after presenting false identification to a store clerk and attempting to cash a forged payroll check. Defendant's young children suffered from very serious health problems. On the day of the crimes, the children had not eaten for more than twenty-four hours and defendant's requests for food had been turned down at three food banks. Defendant intended to use the money from the forged check to obtain food for his children, fearing that their continued lack of food would exacerbate their health problems and lead to malnutrition and death. Despite these very compelling and sympathetic circumstances, the Court of Appeals ruled, as a matter of law, that Defendant's choice of evils defense could not be asserted. *Fontes,* 89 P.3d at 486. In its holding, the Court made clear that "[A]lthough economic necessity may be an important issue in sentencing...a choice of evils defense cannot be based upon economic necessity." *Id at 486.*

In *Brandyberry,* the defendants were charged with kidnapping as a result of planning and executing the "forcible seizure and asportation of a 29-year-old member of the Unification Church...." *Brandyberry* 812 P.2d at 676. Defendants contended that their actions were legally justified under the choice of evils defense in order to prevent injury to the victim, her parents and the public. *Id.* The trial court allowed defendants to present this information to the jury. *Id.* The Court of Appeals entered an order disapproving the trial court's ruling, concluding that the "evidence was insufficient to support a rational belief that an imminent injury was threatened, that an emergency existed because of any claimed impending injury, or that defendant's action was reasonably necessary to avoid any demonstrable harm." *Id* at 679-80.

In both *Brandyberry* and *Fontes*, the circumstances alleged by the respective defendants were extremely sympathetic. Nevertheless, the choice of evils justification was rejected in both cases. When considering the application of the choice of evils defense, this Court must adhere to the principles and guidelines established by Colorado's appellate courts. Those courts have made clear that

the choice of evils defense is to be narrowly construed and "is not available as an instrument" to nullify "unpopular laws." *Brandyberry,* 812 P. 2d at 677. *See also People v. Andrews,* 800 P.2d at 610, note 7 (General Assembly's intent to narrow application of choice of evils defense demonstrated by including requirement that measure taken to avoid imminent injury must be an emergency measure).

Before the choice of evils defense can be considered, the court must first "rule as a matter of law whether the claimed facts and circumstances would, if established, *constitute justification.*" B.R.C. Section 5-2-15 (c); C.R.S. Section 18-1-702(2). To meet his initial burden, Defendant must establish that: "(1) all other potentially viable and reasonable alternatives were pursued, or shown to be futile, (2) the action taken had a direct causal connection with the harm sought to be prevented, and that the action taken would bring about the abatement of the harm, and, (3) the action taken was an emergency measure pursued to avoid a specific, definite and imminent injury about to occur." *Andrews,* 800 P.2d at 610.

A. Has Defendant established that he pursued all potentially viable and *reasonable alternatives?*

The choice of evils defense can not be applied if a reasonable legal alternative was available to defendant as a means to avoid threatened injury. *See People v. Brandyberry,* 812 P.2d 674 (Colo. App. 1990); *People v. Robertson*, 543 P. 2d 533, 36 Coo. App. 367 (1975). The choice of evils defense "does not arise from a 'choice' of several courses of action, but rather is based on a real emergency involving specific and imminent grave injury that presents the defendant with no alternatives other than the one taken." *Andrews,* 800 P.2d at 609 (citations omitted).

Defendant asserts that the cold weather on November 23rd created an emergency that posed an imminent threat to his physical and emotional well-being. Defendant asserts that after being denied access to the Homeless Shelter, he "had no choice but to sleep outdoors... and in order to keep from dying or being seriously injured he needed to use a blanket or sleeping bag to protect himself from the cold. " Defendant's Written Closing Argument, p.4. Defendant contends that sleeping in his clothing alone that night "most certainly would have resulted in frostbite, hypothermia, disorientation or even death..." Defendant's Written Closing Argument, p.4.

The City claims that Defendant could have avoided being homeless on November 23, 2009 if he had participated in the Homeless Shelter's Transitional Housing Program. People's Closing Argument, p.5. An individual enrolled in this program is guaranteed housing at the Homeless Shelter even on those nights when there are too few beds to accommodate all who seek shelter. The People claim that this was a reasonable alternative that Defendant could have pursued prior to November 23, 2009, but failed to do so. The People also contend that Defendant had another alternative, which was to camp on county lands outside of Boulder's City limits by traveling just one mile north of the location where he camped on November 23, 2009. Finally, the People argue that Defendant could

have bundled himself in warm clothing to protect himself from the night's temperatures. People's Written Closing Argument, p.5.

The Court is not persuaded by the People's claim that Defendant could have participated in the Transitional Housing Program and thus guaranteed himself housing on November 23, 2009. The evidence, taken in the light most favorable to Defendant, demonstrates that Defendant did **not** have a sustainable income at the time of the violation and was thus not eligible for the Transitional Housing Program. Because he was not eligible for the program, this was not a viable alternative for Defendant.

The Court also rejects the City's suggestion that Defendant could simply leave the City and camp in a location not governed by the City's camping ordinance. It is unclear from the sparse evidence offered by the City on this point whether Defendant could legally camp on county-owned property outside the City. Hence, the Court must find that this is not a potentially legal alternative available to Defendant.

However, the Court must agree with the City that Defendant could have utilized layers of clothing to insulate himself from the cold that evening. Defendant's assertion that sleeping in clothing alone would have most certainly resulted in imminent injury is not supported by any concrete evidence. There was evidence presented during the trial indicating that warm clothing is made available to homeless individuals through various charitable organizations throughout the City. Defendant was not new to Boulder and could have reasonably anticipated that he might not be able to secure accommodation at the Homeless Shelter on cold nights when many individuals might be seeking shelter. Knowing this, Defendant could have anticipated the need to utilize layers of clothing, including a hat and gloves, rather than a sleeping bag, to provide protection from the elements.

While a sleeping bag may provide better protection, more comfort and a better night's sleep, this is not the standard that must be applied in a choice of evils analysis. *People v. Brandyberry, supra; People v. Fontes,* 89 P. 3d 484, 486 (Colo. App. 2003). The Court therefore rules as a matter of law that Defendant had another viable and reasonable alternative available to him other than to violate the City's camping ordinance.

B. Was the measure taken by Defendant an emergency measure necessary to prevent a specific, definite and imminent injury?

Defendant testified that November 23, 2009 was a cold night and that his sleeping bag was frozen from frost when he awoke on November 24, 2009. Defendant did not offer any evidence regarding precipitation or the lack of precipitation that evening, nor did he submit any evidence regarding the actual temperature. Mr. Budd testified that the overflow warming centers were not in operation that evening, which suggests that the weather conditions did not meet the weather-defined threshold necessary for operation of these centers. While Defendant testified that he had experienced hypothermia in the past and was

concerned about that possibility that night, there was no evidence offered to specifically indicate the potential for such injury. In *Andrews,* the Colorado Supreme Court stated:

> Evidence of a generalized fear of injury is not sufficient to warrant the invocation of the choice of evils defense. The evidence must affirmatively demonstrate the existence of a specific threat or likelihood of an imminent injury necessitating the actor's conduct.

Andrews, 800 P. 2d at 609. To meet this prong of the *Andrews* test, Defendant must provide specific, concrete evidence regarding the weather conditions and the likelihood that such weather conditions would result in physical injury to Defendant. Defendant's reference to his concern regarding hypothermia and frostbite does not meet this burden. The Court therefore concludes that Defendant has not established that his decision to camp on November 23, 2009 was an emergency measure necessary to avoid a specific, definite and imminent injury about to occur.

Defendant has also failed to establish that the "action taken had a direct causal connection with the harm sought to be prevented, and that the action taken would bring about the abatement of the harm." *Andrews,* 800 P.2d at 610. As discussed above, the generalized assertions by Defendant of his concern about hypothermia were not sufficiently supported by specific evidence that might allow a trier of fact to find a causal connection between the "cold" weather and the potential for this weather to result in frostbite or hypothermia. The Court can not allow assertion of a defense that is based upon speculation, rather than concrete evidence. *Andrews,* 800 P.2d at 611.

Conclusion

The evidence submitted by Defendant fails to meet the threshold requirements necessary to assert the choice of evils defense. The City has established the elements of the camping violation beyond a reasonable doubt. Accordingly, the Court finds Defendant guilty of the charge. The fact that Defendant attempted to obtain shelter at the Homeless Shelter on November 23, 2009 will be considered at sentencing.

Sentencing is set for June 7, 2010 at 1:15pm.

DATED: April 30, 2010

BY THE COURT:

MUNICIPAL COURT JUDGE
P.O. Box 8015
Boulder, CO 80306
(303) 441-1842

CERTIFICATE OF HAND DELIVERY

I hereby certify that on May 3, 2010, a true and correct copy of the foregoing was served by hand delivery to the City Attorney's Office, Prosecution Division, 1777 - 6th Street, Boulder, CO 80302 and to the defendant at the following address:

DAVID HARRISON
1777 6th St.
Boulder, CO 80302

BY:

Appendix 6:

B.R.C. § 5-2-15

5-2-15 Choice of Evils. top↑

(a) Conduct that would otherwise constitute a violation is justifiable and not criminal when it is unavoidably necessary as an emergency measure to avoid imminent public or private physical injury that is about to occur by reason of a situation occasioned or developed through no conduct of the actor and that is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly and convincingly outweigh the desirability of avoiding the injury sought to be prevented by the code section or ordinance defining the violation at issue.

(b) The necessity and justifiability of conduct under subsection (a) of this section do not rest upon considerations pertaining only to the morality and advisability of the code section or ordinance, either in its general application or with respect to its application to a particular class of cases arising thereunder.

(c) Before evidence relating to a defense of justification under this section is presented to a jury, the defendant shall first make a detailed offer of proof to the judge, who shall rule as a matter of law whether the claimed facts or circumstances would, if established, constitute a justification. If the judge admits such evidence, the judge shall again rule as a matter of law on the sufficiency of the evidence that, if believed by the jury, would establish the defense.

(d) Choice of evils under this section is a specific defense. It does not apply to traffic violations.

(Ordinance No. 5099 (1988))