District Court, Larimer County, Colorado 201 LaPorte Ave. Fort Collins, CO 80521	
Appeal from the Fort Collins Municipal Court The Honorable Kathleen M. Lane Case No. 2018-0240752-MD	
PEOPLE OF CITY OF FORT COLLINS, Plaintiff-Appellee, v. Adam Wiemold, Defendant-Appellant	▯ COURT USE ONLY ▯
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REPLY BRIEF	

SUMMARY OF REPLY ARGUMENT

Mr. Wiemold's appeal asks this court to make a simple, narrow, and plainly righteous holding: it violated the Eighth Amendment to impose a criminal sanction on Mr. Wiemold, a homeless person, for sleeping in his vehicle at a public rest area when no alternative shelter was available. It was cruel and unusual to punish him with a criminal conviction for sleeping outdoors when he had no indoor place to sleep.

A homeless person must sleep. And if a person has no home and cannot stay in a shelter, making it criminal for that person to sleep outside criminalizes that person's existence. Doing so is a cruel and unusual punishment that violates the Eighth Amendment. This was the Ninth Circuit's holding in *Martin v. City of Boise*, and it is what this Court should hold here. 920 F.3d 584, 604 (9th Cir. 2019) (holding "that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.").

The Fort Collins "camping" ordinance is violated when a person merely sleeps in a vehicle that is parked on public property. Contrary to the City's assertion, *see* Answer Brief at 19, Mr. Wiemold's stated correctly in his Opening Brief that all courts to address this issue have held that it is unconstitutional to impose a criminal sanction on a homeless person for sleeping on public property when the person could not access shelter. Each of the City's cited cases is distinguishable in one of two important ways: it either did not reach the merits of the question this case presents and is therefore inapposite, or it addressed an ordinance that, unlike the Fort Collins ordinance, did not prohibit mere sleeping, but instead prohibited camping-adjacent conduct like setting up a tent. Importantly, by spotlighting cases that uphold ordinances prohibiting conduct closely related to sleep but that is not involuntary, the City accidentally demonstrated that this Court should have no fear from its slippery slope argument. The only issue before this Court, and the only issue this Court's ruling will apply to, is whether it is unconstitutionally cruel to make it criminal for a homeless person to sleep outdoors when that person has no option to shelter indoors. There is no question it is. This Court must reverse the municipal court's order and remand the case with instructions to vacate Mr. Wiemold's conviction and dismiss the charge against him.

REPLY ARGUMENT

I. Mr. Wiemold's Eighth Amendment claim is not a facial challenge.

The City's argument that Mr. Wiemold's Eighth Amendment claim represents a facial challenge is wrong. In its brief, the City admits that "Appellant is not arguing the ordinance itself is unconstitutional but that it is unconstitutional as applied in Mr. Wiemold's circumstances." Appellee's Responsive Brief, p. 28. Mr. Wiemold could not have said it better himself. Mr. Wiemold asserts that, under his particular circumstances, where (1) he was homeless, (2) he worked at one of the two homeless shelters in Fort Collins that accepted single males, and (3) the shelter where he worked had policies forbidding him from staying in a homeless shelter such that there was no shelter available to him in Fort Collins, it is unconstitutional to impose a criminal sanction on him for sleeping in his vehicle at a rest area. He does not assert that the ordinance is always unconstitutional, or even that it is often unconstitutional. He is likely the only homeless shelter employee in Fort Collins who was also homeless, such that this Court's ruling will apply only to him. He seeks no relief beyond the vacatur of his conviction and sentence. His Eighth Amendment challenge is an as-applied challenge.

II. Mr. Wiemold's statement of facts in the issues presented is accurate, and those facts mandate granting him relief.

Under Mr. Wiemold's specific circumstances, he was homeless and not able to stay in any of the homeless shelters in Fort Collins. Further, at the time he was cited, he did not make enough money to both pay his bills and afford a home. CF p. 64:24-25. As correctly stated in the issue presented, Mr. Wiemold had no indoor shelter available to him.[1]

[1] The parties have debated how this Court should determine whether a person had a choice whether to sleep outside, and in the event this Court finds that line of reasoning relevant to its decision, Mr. Wiemold responds to the City's arguments below. However, given Mr. Wiemold's employment at the Catholic Charities shelter and that shelter's policies that forbade him from sheltering at either Catholic Charities or the Fort Collins Rescue Mission, this Court can put off the delineation of that test for another day. Based on employment conditions specific to Mr. Wiemold, it is beyond debate that he could not stay at any shelter in Fort Collins. That is sufficient to settle the question of whether Mr. Wiemold had an option to shelter indoors in Fort Collins.

It is no answer to tell Mr. Wiemold that he could have left Fort Collins and sought shelter elsewhere. The City's proposal that Mr. Wiemold leave city limits each night, *see* Answer Brief, at 12 & 29, under threat of citation for sleeping violates his right to travel under the U.S. and Colorado Constitutions. The right to travel is a fundamental right guaranteed by the Fourteenth Amendment and article II, section 3 of the Colorado Constitution. *Kolender v. Lawson*, 461 U.S. 352, 385 (1983) (finding that a criminal loitering statute implicated the right to freedom of movement); *In Re J.M.*, 768 P.2d 219, 221 (Colo. 1989) (noting that "the rights of freedom of movement and to use the public streets and facilities in a manner that does not interfere with the liberty of others are basic values inherent in a free society and are thus protected by article II, section 3 of the Colorado Constitution and the due process clause of the fourteenth amendment to the United States Constitution"). The City's suggestion that Mr. Wiemold exile himself from Fort Collins each night because he cannot access shelter in the City would be a gross infringement on Mr. Wiemold's right to travel within Colorado, equivalent to banishment from Fort Collins for being homeless. This is a perverse suggestion that has not been given any weight by any court to hear similar issues.[2]

Contrary to the City's assertion (*see* Answer Brief, at 11), Mr. Wiemold's presentation of the selective enforcement issue is also accurate. At a motions hearing in a criminal case, the party with the burden of proof must establish the facts needed to meet the party's burden by a preponderance of the evidence. *See, e.g.*, *People v. Travis*, 2016 COA 88, ¶ 31; *People v. Gennings*, 808 P.2d 839, 847 (Colo. 1991). As with all presentations of evidence, the party may accomplish this with both direct and circumstantial evidence, as well as reasonable inferences from that evidence. *Cf.* COLJI D:01 (direct and circumstantial evidence – no distinction); COLJI D:11 (inferences – general). Because the

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

municipal court did not make any findings of fact to support its ruling, it is unfortunately incumbent on this Court to review the record in this case for the relevant facts. Mr. Wiemold's statements concerning the facts in this case are firmly grounded in the record and reasonable inferences therefrom. For example, this Court would have to bury its head in the sand to conclude it is more likely than not that there were no truckers sleeping at the rest area when Mr. Wiemold was cited. While the City is free to argue for a different interpretation of the facts presented, its ad hominem attacks on counsel are misplaced.

III. *Martin v. City of Boise* was correctly decided, and this Court should follow it.

The City's analysis of *Martin* does nothing more than repeat the argument of the *Martin* dissenters. The City's position lost in the *Martin* decision, *Martin v. City of Boise*, 902 F.3d 1031, 1046-50 (9th Cir. 2018), *modified at* 920 F.3d 584, 615-18 (9th Cir. 2019), lost at the denial of en banc rehearing, 920 F.3d 584, 588 (9th Cir. 2019), and lost at the Supreme Court, *City of Boise v. Martin*, 140 S. Ct. 674 (2019). The City's argument has lost at every level because it is unpersuasive. This Court should follow the compelling reasoning of the *Martin* majority opinion. Rather than attempt to paraphrase it, Mr. Wiemold will quote it at length:

> The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways." *Ingraham*, 430 U.S. at 667. First, it limits the type of punishment the government may impose; second, it proscribes punishment "grossly disproportionate" to the severity of the crime; and third, it places substantive limits on what the government may criminalize. *Id.* It is the third limitation that is pertinent here.
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> "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 660, 667 (1962). Cases construing substantive limits as to what the government may criminalize are rare, however, and for good reason — the Cruel and Unusual Punishments Clause's third limitation is "one to be applied sparingly." *Ingraham*, 430 U.S. at 667.
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> *Robinson*, the seminal case in this branch of Eighth Amendment jurisprudence, held a California statute that "ma[de] the 'status' of narcotic addiction a criminal offense" invalid under the Cruel and Unusual Punishments Clause. 370 U.S. at 666. The California law at issue in *Robinson* was "not one which punishe[d] a person for the use of narcotics, for their

purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration"; it punished addiction itself. *Id.* Recognizing narcotics addiction as an illness or disease — "apparently an illness which may be contracted innocently or involuntarily" — and observing that a "law which made a criminal offense of . . . a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment," *Robinson* held the challenged statute a violation of the Eighth Amendment. *Id.* at 666-67.

As *Jones* [*v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006)] observed, *Robinson* did not explain at length the principles underpinning its holding. *See Jones*, 444 F.3d at 1133. In *Powell v. Texas*, 392 U.S. 514, 88 S. Ct. 2145 (1968), however, the Court elaborated on the principle first articulated in *Robinson*.

Powell concerned the constitutionality of a Texas law making public drunkenness a criminal offense. Justice Marshall, writing for a plurality of the Court, distinguished the Texas statute from the law at issue in *Robinson* on the ground that the Texas statute made criminal not alcoholism but *conduct* — appearing in public while intoxicated. "[A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. 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." *Id.* at 532 (plurality opinion).

The *Powell* plurality opinion went on to interpret *Robinson* as precluding only the criminalization of "status," not of "involuntary" conduct. "The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' . . . ." *Id.* at 533.

Four Justices dissented from the Court's holding in *Powell*; Justice White concurred in the result alone. Notably, Justice White noted that many chronic alcoholics are also homeless, and that for those individuals, public drunkenness may be unavoidable as a practical matter. "For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. . . . For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment — the act of getting drunk." *Id.* at 551 (White, J., concurring in the judgment).

The four dissenting Justices adopted a position consistent with that taken by Justice White: that under *Robinson*, "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," and that the defendant, "once intoxicated, . . . could not prevent himself from appearing in public places." *Id.* at 567 (Fortas, J., dissenting). Thus, five Justices gleaned from *Robinson* the principle that "that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Jones*, 444 F.3d at 1135; *see also United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017).

> This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. As *Jones* reasoned, "[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human." *Jones*, 444 F.3d at 1136. Moreover, any "conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." *Id.* As a result, just as the state may not criminalize the state of being "homeless in public places," the state may not "criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets." *Id.* at 1137.
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> Our holding is a narrow one. Like the *Jones* panel, "we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place." *Id.* at 1138. We hold only that "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]," the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public." *Id.* That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.
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> We are not alone in reaching this conclusion. As one court has observed, "resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible. . . . As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment — sleeping, eating and other innocent conduct." *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992); *see also Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994) (holding that a "sleeping in public ordinance as applied against the homeless is unconstitutional"), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995).

Martin v. City of Boise, 920 F.3d 584, 615-18 (9th Cir. 2019) (emphasis added; duplicative citations truncated). This Court should interpret *Robinson* and *Powell* as the *Martin* court did and follow the well-reasoned, narrow holding of *Martin*: Under the Eighth Amendment, **"as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."** *Martin*, 920 F.3d at 617. It is unconstitutionally cruel to criminalize a homeless person for sleeping on public property when the person cannot stay in a shelter. This Court should recognize that fundamental constitutional truth.

As further support for the *Martin* court's reasoning, the City's argument for its interpretation of *Robinson* and *Powell* also lost in *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019). The City argues, as did the dissenters in each stage of *Martin*, that pursuant to *Marks v. United States*, 430 U.S. 188 (1977), Justice White's opinion in *Powell* can set no precedent. Answer Brief, at 15. In *Manning*, the Fourth Circuit rejected this argument, just as the Ninth Circuit in *Martin*. *Manning*, 930 F.3d at 281 n.13 ("Under the rule set forth in *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977), Justice White's opinion constitutes the holding of the Court.").

In *Manning*, the Fourth Circuit analyzed the Supreme Court's decisions in *Robinson* and *Powell* and came to the same conclusion as the *Martin* court about their meaning. *Manning* addressed a law that "criminalizes the possession, purchase, or consumption of alcohol" by someone who had been found to be a "habitual drunkard" or has been convicted of driving while intoxicated. 930 F.3d at 268. The plaintiffs, homeless individuals suffering from alcoholism, argued that the law violated the Eighth Amendment prohibition on cruel and unusual punishment by criminalizing their status as alcoholics. *Id.* at 269. The *Manning* court held that the plaintiffs had stated a claim that the law violated the Eighth Amendment. In reaching this holding, the Fourth Circuit found that under *Marks v. United States*, 430 U.S. 188 (1977), Justice White's concurrence was the holding of *Powell v. Texas*, agreeing with the Ninth Circuit in *Martin*. *Manning*, 930 F.3d at 281 n.13.[3]

Furthermore, prior to his appointment to the United States Supreme Court, now-Justice Kavanaugh similarly wrote that, to interpret a divided Supreme Court decision, lower courts must follow any dictates of a majority of Supreme Court justices, regardless of whether the individual opinions were written in concurrence or dissent. *United States v. Duvall*, 740 F.3d 604, 616 (D.C. Cir.

[3] As the *Manning* court stated, "The *Marks* rule teaches that '[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' *Id.* at 193 (internal quotation marks and alterations omitted); *cf. Hughes v. United States*, 138 S. Ct. 1765, 1771-72 (2018). . . . [T]his rule requires us to treat Justice White's concurrence, the narrowest ground supporting the Court's judgment, as 'the holding of the Court.' *Marks*, 430 U.S. at 193." *Manning*, 930 F.3d at 280 n.13 (internal citations truncated).

2013). This is what the Ninth Circuit properly did in *Martin*, and what the Fourth Circuit properly did in *Manning*. As then-Judge Kavanaugh wrote:

> The core of the *Marks* principle cannot be sidestepped simply because the multiple opinions supporting the Supreme Court's judgment did not produce a single narrowest opinion for all future cases. As explained above, in those rare no-narrowest-opinion cases, the lower court still must strive to reach the result that a majority of the Supreme Court would have reached in the current case, if such a result can be ascertained. The simplest way to do that, again, is to run the facts and circumstances of the current case through the various tests articulated by the Supreme Court in the binding case. Using that approach, lower courts can still reach a *result* consistent with the decision of a majority of the Supreme Court. That is what *Marks*, common sense, and vertical stare decisis all require.

Duvall, 740 F.3d at 616 (italicized emphasis in original; underlined emphasis added). This Court should follow common sense, stare decisis, and the reasoning of *Martin*, *Manning*, and now-Justice Kavanagh in *Duvall*. Justice White's opinion is the holding of *Powell*.

IV. All Courts to consider the issue have held it is unconstitutional to punish a homeless person for sleeping on public property when the person could not access shelter.

There is a crucial fact present in each of the cases the City has cited in its attempts to argue that ordinances such as Fort Collins's have been upheld: each of those cases addressed an ordinance that did not criminalize mere sleeping on public property, or it did not reach the merits of the question presented here and is therefore irrelevant. Mr. Wiemold first addresses the City's cited cases that criminalized conduct beyond mere sleeping.

Where courts have considered the application of ordinances that prohibit mere sleeping on public property (such as Fort Collins's) to homeless people, they have found them unconstitutional as applied. *See, e.g.*, *Martin*, 920 F.3d at 615-18. Where courts have considered ordinances that prohibit voluntary conduct that is related to sleeping but not sleeping itself, they have often upheld the ordinance as applied. This important distinction makes two points relevant to this appeal: First, granting Mr. Wiemold's appeal will place this Court in line with every other court to consider the specific issue presented: the constitutionality of an ordinance that bans mere sleeping on public property as applied to a homeless person who could not otherwise access shelter. Second, because

ordinances such as those at issue in the cases the City has cited have been held constitutional even as applied to a homeless person, ruling for Mr. Wiemold will not substantially impact the City's ability to enact and enforce common municipal ordinances. The City's own cited cases demonstrate the failure of its slippery slope argument.

What makes Fort Collins's ordinance different from those at issue in the cases the City cited is that Fort Collins's ordinance criminalizes mere sleeping on public property. Under Fort Collins Municipal Ordinance 17-181, "It shall be unlawful for any person to camp . . . on public property within the City. Camping, for the purposes of this Section, shall mean to sleep [or] spend the night . . . ." F.C.M.O. § 17-181 (emphasis added). It criminalizes mere sleeping on public property.

The cases the City cites involved ordinances that criminalized conduct adjacent to sleeping, but not mere sleeping itself. In *People v. Madison*, 10CV716, the Boulder ordinance at issue prohibited camping on public property, but defined camping very differently from the Fort Collins ordinance. There, the relevant ordinance defined "camp" as "to reside or dwell temporarily in a place, with shelter, and conduct activities of daily living, such as eating or sleeping, in such place. . . . The term 'shelter' includes, without limitation, any cover or protection from the elements other than clothing." B.C.M.O. § 5-6-10 (2009) (attached as Exhibit 1) (emphasis added). The ordinance thus did not criminalize the involuntary act of mere sleeping. It criminalized setting up a shelter on public property and sleeping in that shelter. The ordinances at issue in *Kohr v. City of Houston*, 2017 U.S. Dist. LEXIS 212428 (S.D. Tex. 2017)[4] and *Allen v. City of Sacramento*, 183 Cal. Rptr. 3d 654 (Cal. Ct.

[4] *Kohr* concerned Houston Code of Ordinances §§ 21-61 to 21-62. Under § 21-62, "Encampment in a public place in the city is unlawful." Under § 21-61, "Encampment means any one or more of the following: (a) The unauthorized use of fabric, metal, cardboard, or other materials as a tent or other temporary structure for living accommodation purposes or human habitation; or (b) The unauthorized use of a heating device; or (c) The unauthorized accumulation of personal property (other than durable medical equipment) that would not fit in a container three feet high, three feet wide, and three feet deep." The *Kohr* court based its ruling on this distinction, reasoning, "Thus, the ordinance does not criminalize 'homeless' status but rather prohibits obstructions that hinder the City from preserving public property for its intended purpose." *Kohr*, 2017 U.S. Dist. LEXIS 212428, at *9.

App. 2015)[5] each also prohibited acts adjacent to sleeping on public property, but not mere sleeping. Thus, far from assisting the City's argument, *Madison*, *Kohr*, and *Allen* demonstrate that ruling in Mr. Wiemold's favor will not open the floodgates to lawlessness among the City's homeless population.

The Eleventh Circuit's holding in *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000) is easily distinguishable from Mr. Wiemold's case. There, the court concluded that "the availability of shelter space means that Joel had an opportunity to comply with the ordinance," and that as a result, his act of sleeping outside was not involuntary. *Id.* at 1362. As Mr. Wiemold did not have an opportunity to comply with the ordinance, the holding of *Joel* is not germane. Furthermore, *Joel* is not contrary to the limited holding of *Martin*: it is unconstitutional to make it criminal to engage in the involuntary act of sleep in a public place when there are no non-public places available.[6] *Joel* provides no reason for this Court to rule against Mr. Wiemold.

In a similar vein, granting Mr. Wiemold relief will have no effect on the City's ability to bar public urination, defecation, or bathing. First, because Mr. Wiemold's case presents an as-applied challenge to the enforcement of one statute against one person at one point in time, granting Mr. Wiemold relief will have no effect on Fort Collins's general ability to enforce ordinances. Second, given that publicly accessible bathrooms exist throughout Fort Collins – including at the Poudre rest area – urination or defecation outside such bathrooms would not be involuntary. As for bathing, it plainly does not present the same urgency as sleep and can be accommodated in myriad ways. *See,*

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[5] *Allen* concerned Sacramento City Code §§ 12.52.020 and 12.52.030. Under § 12.52.030, "it is unlawful and a public nuisance for any person to camp, occupy camp facilities, or use camp paraphernalia . . . ." Under § 12.52.020, "'Camp' means to place, pitch or occupy camp facilities; to live temporarily in a camp facility or outdoors; to use camp paraphernalia. 'Camp facilities' include, but are not limited to, tents, huts, vehicles, vehicle camping outfits or temporary shelter. 'Camp paraphernalia' includes, but is not limited to, bedrolls, tarpaulins, cots, beds, sleeping bags, hammocks or cooking facilities and similar equipment." Like in *Madison* and *Kohr*, the ordinance does not prohibit mere sleeping; it prohibits putting up a shelter or fully living on public property. This fact was outcome-determinative for the case: the plaintiffs in that case lost because "Sacramento's ordinance punishes the acts of camping, occupying camp facilities, and using camp paraphernalia, not homelessness." *Allen*, 183 Cal. Rptr. 3d at 670.

[6] Regarding the *Joel* court's engagement with the meaning of *Powell*, the Eleventh Circuit in *Joel* gave it three sentences. *Joel*, 232 F.3d at 1362. This led the Fourth Circuit in *Manning* to deride *Joel* as "cursory and unpersuasive" regarding the proper interpretation of *Powell*. *Manning*, 930 F.3d at 281 n.17. This Court should take the same approach.

e.g., CF, p. 65:22-66:2 (describing how Mr. Wiemold bathed while homeless). These hypotheticals are red herrings designed to scare this Court with an imagined parade of horribles that a ruling for Mr. Wiemold would in no way permit.[7]

As for *Tobe v. City of Santa Ana*, 982 P.2d 1145 (Cal. 1995) and *State v. Barrett*, 460 P.3d 93 (Or. App. 2020), these cases explicitly declined to address the question in front of this Court and are therefore not relevant. In *Tobe*, the court construed the case as presenting only a facial challenge to the city's ordinance, not an as-applied challenge.[8] The *Tobe* court therefore did not discuss whether the ordinance at issue could be constitutionally applied to a homeless person sleeping outside who could not access shelter.[9] Similarly, in *Barrett*, the court "refrains from addressing whether enforcement of [the relevant ordinance] could violate the Eighth Amendment on an as-applied basis in the absence of a factual record needed to properly present that question. By refraining from addressing that question, we do not imply an answer."[10] 460 P.3d at 94. While the City tells this

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[7] The City's discussion of *United States v. Sirois*, 898 F.3d 134, 138 (1st Cir. 2018) and *United States v. Black*, 116 F.3d 198, 200-01 (7th Cir. 1997) demonstrate the degree to which the City is grasping at straws in its attempt to persuade this Court that anarchy somehow waits around the corner if this Court were to rule for Mr. Wiemold. *Sirois* and *Black* stand for the unremarkable propositions that the government may punish people for drug use and the possession of child pornography. Mr. Wiemold agrees. Such conduct is not involuntary. The issue presented here is whether mere sleeping is involuntary. It clearly is, and the City has presented no authority that suggests otherwise.

[8] *Tobe*, 982 P.2d at 1152 & 1158 ("We also conclude that, if the Tobe petition sought to mount an as applied challenge to the ordinance, if failed to perfect that type of challenge." As a result, "[t]his court's consideration will, therefore, be limited to the facial validity of the ordinance.").

[9] *Tobe*, 982 P.2d at 1104 n.19 ("The court [of Appeal] assumed that an involuntarily homeless person who involuntarily camps on public property may be convicted or punished under the ordinance. That question, which the Court of Appeal and the dissent address, and which might be raised in an as applied challenge to the ordinance, is not before us because plaintiffs offered no evidence that the ordinance was being applied in that manner. We express no opinion on the proper construction of the ordinance, in particular on whether the conduct it prohibits must be 'willful,' or on whether or in what circumstances a necessity defense is available.")

[10] In *Barrett*, like in Mr. Wiemold's case, the defendant filed a motion before her trial arguing that because she was homeless, it violated the Eighth Amendment to punish her for violating Portland's anti-camping ordinance. However, unlike in Mr. Wiemold's case, Ms. Barrett's counsel failed to secure an evidentiary hearing for her to present evidence concerning Ms. Barrett's circumstances that would render her conviction for violating the ordinance unconstitutional. This lack of a factual record was what caused the *Barrett* court to not address Ms. Barrett's as-applied challenge. *Barrett*, 460 P.3d at 95-98. As the court stated, "We begin and end with the recognition that, with her pretrial motion, defendant did not develop a factual record that was sufficient to permit the court to determine whether conviction of the defendant under [the relevant statute] would violate the Eighth Amendment as applied to her. . . . The record was devoid of general information about the availability of shelter and devoid of any personal information about defendant's attempts to be among those sheltered. In short, the record did not indicate whether defendant's acts of camping were involuntary acts. . . . [As a result, w]e need not, and we do not, address the Eighth Amendment – either directly or

Court that *Barrett* rejected the defendant's challenge on the merits of her as-applied Eighth Amendment challenge, the *Barrett* court's explicit language disclaims any such holding.

Finally, *Anderson v. City of Portland*, 2011 U.S. Dist. LEXIS 140728 (D. Or. Dec. 7, 2011) is equally unhelpful to the City. There, homeless plaintiffs brought an Eighth Amendment challenge to the enforcement of an anti-camping ordinance against them. At the outset of the case, the court denied the city's motion to dismiss, finding that based on the plaintiffs' complaint, they had plausibly alleged a constitutional violation, because "it seems a reasonable proposition under the Eighth Amendment that homeless persons should not be subject to criminal prosecution for merely sleeping in public at any time of day." *Anderson v. City of Portland*, No. 08-1447-AA, ECF No. 16, slip op. at 15 (D. Or. July 31, 2009) (attached as Exhibit 2). Later, when the plaintiffs moved for summary judgment, the court found that they "[did] not submit evidence of the specific manner in which the ordinances are enforced or the specific conduct which led to the enforcement actions" against them, and that therefore they were not entitled to summary judgment. *Anderson v. City of Portland*, 2011 U.S. Dist. LEXIS 140728, at *5-*9 (D. Or. Dec. 7, 2011). In short, somewhat parallel to *Barrett*, the party challenging the enforcement of the camping ordinance against homeless people did not present the court with evidence concerning how the contested ordinance was being enforced, and as a result the court could not definitively find a constitutional violation for the purposes of summary judgment. This decision has no relevance to Mr. Wiemold's case, which has the necessary factual record that *Barrett* and *Anderson* lacked.

implicitly." Given this lack of a factual record, it was appropriate for the *Barrett* court to avoid the constitutional question presented; without the relevant facts, it had no way to do so. As Mr. Wiemold did present the necessary evidence at a motions hearing, there are no grounds for this Court to avoid the constitutional question presented in this appeal.

V. Convicting and punishing Mr. Wiemold for sleeping on public property when he was homeless and could not stay at a shelter violates the Eighth Amendment.

Under the Eighth Amendment, it is unconstitutional to prosecute a homeless person for sleeping outside when he or she could not stay at a shelter. *See* Opening Brief, part II; parts III and IV, *infra*. To determine whether a specific prosecution violates the Eighth Amendment, courts consider: (1) whether the individual is forced to be without shelter and (2) whether the conduct taking place outside is involuntary. *See, e.g.*, *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 431 (N.D. Cal. 2017). At the hearing, Mr. Wiemold met every requisite evidentiary burden for this argument: he showed through undisputed evidence that he was homeless and was unable to stay at a shelter.

Mr. Wiemold could not stay at either of the two shelters in Fort Collins that house single men, for several reasons. First, staying at Catholic Charities would have violated clear policy barring staff from staying at the shelter. CF p. 34:21-35:4; CF v2 p. 73; CF p. 35:16-25; 49:13-50:6; 75:2-9. Second, sheltering with his clients, as Mr. Wiemold would have done at either Catholic Charities or the Rescue Mission since the two shelters' populations overlap, would have violated the professional boundaries Mr. Wiemold must maintain with his clients in order to effectively do his job as the shelter supervisor. CF p. 29:9-24; 49:13-50:6; 75:2-9. Third, sleeping in an unmonitored room at either shelter alongside people he may have suspended or disciplined would have posed serious safety risks. CF p. 49:13-50:6; 75:2-9. For these reasons, each of which is sufficient standing alone, Mr. Wiemold could not stay at either shelter. In addition, according to their own reporting, both Catholic Charities and the Rescue Mission were full on the relevant night. CF v2 p. 151; CF p. 36:1-37:19; 38:18-21; 43:18-45:4. Mr. Wiemold thus presented unrefuted evidence that he was homeless and unable to stay in a shelter on the morning he was ticketed. Under these facts, prosecuting him for sleeping outside violates the Eighth Amendment.

VI. This Court should reject the City's unprecedented and unworkable proposed voluntariness inquiry.

The City posits a novel Eighth Amendment inquiry into voluntariness that is unprecedented and unworkable. Rather than asking whether Mr. Wiemold voluntarily rejected an available shelter bed, as other courts have done, the City insists on a searching inquiry into whether Mr. Wiemold's homeless status itself could be considered "voluntary." In doing so, the City apparently seeks to establish that if he were "voluntarily" homeless, he would not merit Eighth Amendment protection. The City's proposed inquiry has no support in case law and has no logical stopping point.

A. No court to address the question whether a homeless person may be prosecuted for sleeping outside when he has no place to go has considered whether the person's homeless status itself was voluntary.

Under the Eighth Amendment, the only relevant question regarding voluntariness is whether a homeless individual turned down an available shelter bed and therefore voluntarily put himself in public space. *Martin*, 920 F.3d at 618 ("We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter"); *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994) (finding that "at any given time there are persons in Dallas who have no place to go, who could not find shelter even if they wanted to—and many of them do want to—and who would be turned away from shelters for a variety of reasons") *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564-65 (S.D. Fla. 1992) (finding that because "the City does not have enough shelter to house Miami's homeless residents, . . . [it] cannot argue persuasively that the homeless have made a deliberate choice to live in public places or that their decision to sleep in the park as opposed to some other exposed place is a volitional act")). No court has sought to ask or answer whether an individual's status as homeless was "voluntary."

Despite a complete lack of legal foundation, at the evidentiary hearing in this case, the City probed Mr. Wiemold's life choices and financial circumstances and repeatedly implied that Mr.

Wiemold had voluntarily chosen to be homeless that evening, as if he had decided that morning that it would be fun to sleep in his car instead of in a warm bed in a home. The City continues the same offensive argument in this appeal. Specifically, the City asked at the hearing:

- What kind of debt Mr. Wiemold had;
- Whether he was working full time;
- How long he had been working full time;
- The amount of money he was making each month in 2018 prior to the enforcement;
- Whether he had done any work on his vehicle to allow him to sleep in it;
- How much that work had cost;
- Where he had showered while he was sleeping in his truck;
- When he got his dog;
- Whether and when he had looked for rooms to rent;
- Whether he had sought low-income housing assistance;
- Why he had not declared bankruptcy;
- Whether he had been evicted from where he was living;
- How he had been able to become housed in the months after receiving the citation in this case, including:
    - Details about his monetary distribution associated with his grandmother passing;
    - Where his parents were living;
    - Who owns the home in which he currently lives;
    - When he became housed;
    - How much rent he is currently paying; and
    - Whether he can afford his current rent;
- How much debt he had paid off while sleeping in his vehicle, including a breakdown per year of the amount of debt he had been able to pay; and
- Whether he had looked for a different job than his full-time job as a shelter supervisor.

CF p. 41-48. These questions were laden with subjective judgment regarding how Mr. Wiemold should have managed his fundamental life choices and finances. *See, e.g.*, CF p. 42:24-25 ("You made the decision to forego renting a room or renting an apartment and instead live in the back of your truck while you paid that off. Is that correct?"); CF p. 43:22-23 ("Rather than look for a room to rent, you decided to pay down some credit card debt you had accrued during that time"). Following this analysis to its logical end, the trial court would have had to make specific findings regarding the voluntariness of Mr. Wiemold's homeless status, such as whether he should have switched career paths by leaving charitable work and moving to a job that paid more money; whether he should

have declared bankruptcy; and whether he should have assumed more debt in order to be housed, even if that had forced him into a perpetual cycle of poverty. This invasive inquiry, meant to force trial courts to make a subjective judgment of an individual's life decisions that may have led to homelessness, has no foundation in the Constitution or caselaw. It is a burdensome and unworkable analysis that leaves trial courts with a job for which they are ill-suited: to stand in judgment regarding the myriad life choices and financial decisions of homeless individuals who find themselves sleeping outdoors. It is no wonder that courts have steered clear of this analysis.

Contrary to the City's argument, *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated due to settlement*, 505 F.3d 1006 (9th Cir. 2006) says no different. The *Jones* court never questioned or examined the voluntariness of any plaintiff's status as homeless. While the introductory portion of the opinion contained the basic facts of the case and general information about each of the plaintiffs, including how they became homeless, whether they attempted to stay in shelters, and how they received their citations, at no point did the court ask or discuss what any of the plaintiffs' expenses were, whether they had tried leaving town, or whether they could have spent any income on a room on the night of enforcement. *Id.* at 1124-25. For example, the *Jones* court's introductory factual description of one plaintiff is as follows:

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

Id. This is the entirety of the factual recitation about Mr. Barger's background and ticket. At no point did the court rely on any of these facts to make an assessment regarding the voluntariness of Mr. Barger's status as homeless or suggest that such an inquiry would be appropriate. While Mr. Barger plainly had income, the court never inquired how Mr. Barger was spending his money or asked

whether he could have made different life choices to avoid homelessness. Further, *even knowing that Mr. Barger sometimes had sufficient funds to pay for a hotel room*, the court at no point evaluated whether he could have afforded shelter on the night he was ticketed. *Id.*

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

Should this Court adopt the City's novel and sweeping expansion of the voluntariness inquiry, there would be no logical stopping point to the inquiry. For example, what is the relevant time range for determining voluntariness of a persons' status as homeless? At the evidentiary hearing in this case, the City asked about Mr. Wiemold's life choices and finances that spanned several years prior to the citation and his homelessness. How far back must a trial look to determine if the individual made a decision that resulted in homelessness? Does a decision to drop out of high school, take on college debt, or invest in a failed business venture become fair game for determining the voluntariness of homelessness that occurs years later?

The City attempts to mitigate the obvious problems with the sweeping voluntariness inquiry it had proposed by suggesting, for the first time on appeal, that the inquiry could be limited to whether the person had a choice on the day of the citation. This suggestion does nothing to blunt the intrusiveness or impossibility of courts carrying out the City's proposed inquiry. Even if the inquiry were limited in time to the period surrounding the citation, what evidence would reflect a voluntary choice to sleep outside rather than be sheltered in a home? Consider a homeless person who could not sleep in any shelter but had enough money for a motel room for one night. Would the City call his homelessness voluntary if he spent money on food, medicine, or treatment for addiction instead of staying indoors for one night? Is an individual voluntarily sleeping outside if he or she could have spent the day panhandling or selling plasma to afford a hotel room? How about a person who was saving money to be able to eat until his or her next paycheck? Or a person who was building up a fund for car repairs so that he or she could reliably get to work every day? The City's

proposed voluntariness inquiry will pose these unanswerable questions to every municipal court faced with the prosecution of a homeless person for sleeping outside. In addition to the fundamental cruelness of telling a homeless person that he is "voluntarily" homeless because he saved $30 for food for a week that he could have spent on one night at a motel, the City's proposed inquiry is unworkable. This Court must reject it.

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

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

Mr. Wiemold did not want to be homeless, as he clearly stated at the hearing. CF p. 54:18-19. He "had no other option." CF p. 53:14. The entire time that Mr. Wiemold was unhoused, he worked consistently and diligently to become housed again. His debt was "a large burden" on him and "was something important that [he] needed to take care of and get out of." CF p. 54:16-17. While he was homeless, he "worked to get out of debt so that [he] could afford to pay rent and pay my bills at the same time." CF p. 54:7-9. With his low credit score and high debt, "renting a room would have just been maintaining the same cycle of debt and [he] would not have been able to get out of that." CF p. 43:24-44:1. Additionally, with his credit score, debt, and dog, Milo, "it was hard to find a landlord that would rent to [him]." CF p. 54:24-55:1. Mr. Wiemold's efforts to become housed further demonstrate that he neither sought nor desired homelessness. While sleeping in his vehicle, Mr. Wiemold worked diligently and efficiently to become housed, paying off approximately $10,000 over one year, CF p. 48:13-14, resuscitating his credit score and making himself viable rental applicant. Finally, as soon as his grandmother's estate was processed, Mr. Wiemold became housed

and has not been homeless since. CF p. 28:8-10. Once he had a choice between a home and his vehicle, he immediately chose a home.

Mr. Wiemold's concerted efforts to pay his debts, work his way out of a financial crisis, and become permanently housed—all while providing vital services to the City's homeless population—exemplify hard work and personal sacrifice. His homelessness was not enjoyed, convenient, or wanted. Even if this Court diverges from established precedent and conducts the City's proposed voluntariness inquiry, the City's prosecution and conviction of Mr. Wiemold still violates the Eighth Amendment.

D. The City's hypotheticals about millionaires and college students are easily addressed by the *Martin* analysis Mr. Wiemold urges this Court to adopt.

The City's argument that a ruling for Mr. Wiemold under the rationale of *Martin* would open the floodgates to millionaires and college students asserting the Eighth Amendment as a defense to a citation for sleeping in public is nonsensical. As the *Martin* court stated clearly, "We hold only that so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters], the jurisdiction cannot prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public." *Martin*, 920 F.3d at 617. Such a holding here could not possibly affect the City's ability to enforce an ordinance against millionaires sleeping on public property in the ridiculously unlikely event that became a problem in Fort Collins.

VII. This Court's sole consideration must be correctly applying the law

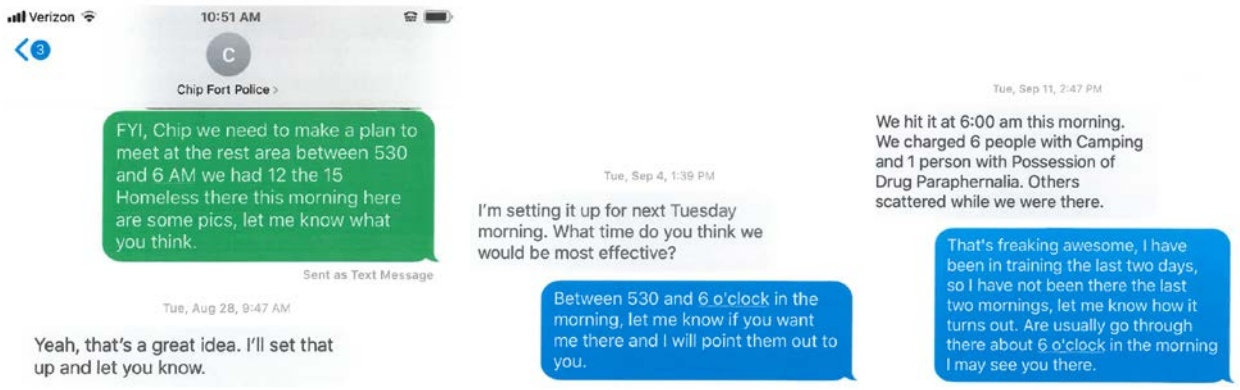
When the application of a statute potentially violates a person's constitutional rights, it is the job of courts to hear the issue and decide the case solely on the merits of the legal arguments presented. Mr. Wiemold's appeal presents a question about the meaning of the Eighth Amendment. It is a legal question that, as the cases cited throughout this litigation demonstrate, is eminently capable of and appropriate for resolution by courts. In part IV of its Responsive Brief, the City suggests to this Court that, even if the City has violated Mr. Wiemold's constitutional rights, this

Court should give Mr. Wiemold no remedy because Fort Collins voters and politicians would prefer to see his rights violated rather than remedy the unconstitutional effects of their ordinance. This authoritarian argument that Courts should not enforce constitutional rights when they are politically unpopular is shocking, and this Court must not give it credence.

VIII. Based on reasonable inferences from the evidence, this Court should find that FCPS engaged in selective enforcement against Mr. Wiemold

As detailed in part II, *infra*, at a motions hearing in a criminal case, the burden of proof for the moving party is a preponderance of the evidence, and the factfinder may draw inferences from the evidence presented in addition to relying on the evidence itself. The City's Responsive Brief attempts to raise Mr. Wiemold's burden of proof to what this Court can know "for certain," Responsive Brief, at 36, but that is not the correct standard. Viewing the testimony from Officer Avinger and CDOT employee Wes Mansfield as a whole, the only reasonable conclusion this Court can draw is that on September 11, 2018, FCPS officers went to the Poudre rest area to enforce the City's camping ordinance against people they believed were homeless.

As the record demonstrates, CDOT employee Mansfield messaged Officer Avinger for weeks, sending him picture after picture of cars Mr. Mansfield believed belonged to homeless people and asking Officer Avinger to run them off. CF v2, p. 1-45. Officer Avinger complied with Mr. Mansfield's requests, including on the morning Mr. Wiemold was cited. CF v2, p. 37 & 41 & 45. The agreement could not have been clearer. As they texted:



CF v2, p. 37 & 41 & 45. Mr. Mansfield was even clearer when he testified:

Q BY MR. FRANK: When you were texting with Officer Avinger in August and September of 2018 you were taking pictures of cars you believe belonged to homeless people, right?
A I didn't believe (inaudible).
Q So you were taking pictures of cars that belonged to homeless people?
A Yes, Sir.
Q And you were sending them to Officer Avinger?
A Yes, Sir.
Q You were asking him to come by and tell those people to leave the rest area.
A Yes, Sir.
Q And that was the explicit reason why you were sending these pictures to Officer Avinger, right?
A Yeah, that's my job.

CF, p. 80. Officer Avinger confirmed that his purpose was the same as Mr. Mansfield's:

Q So the long-term goal that you and Mr. Mansfield shared was clearing out the people who you believed were staying long-term at the rest area. Right.?
A Correct. Yes.

CF, p. 130. Similarly, Officer Avinger testified:

Q BY MR. FRANK: So your goal in the September 11, 2018 enforcement was not simply general municipal code enforcement, but instead municipal code enforcement against the people who Mr. Mansfield had complained about who were parked in the two-hour and thirty-minute parking areas. Right?
A I would – I would agree with that.

CF p. 160. Mr. Mansfield asked Officer Avinger to run off the homeless people from the Poudre rest area, so he did.

Similarly, this Court would have to ignore reality to review the record concerning whether there were truckers sleeping in their trucks at the rest area and decide that there were none. Mr.

Mansfield testified that truck drivers slept at the rest area every day. CF p. 70:21-71:3. On the morning Mr. Wiemold received a summons, there were many trucks parked at the rest area at dawn when the police arrived. CF v2, p. 152, 155, 157, 159, 161. Officer Avinger presumed they had been there all night and that there were at least some truckers who were sleeping there. CF p. 135:1-24.

23	Q	So your presumption that some were sleeping there. Right?
24	A	They may have. Yeah.

CF p. 135:1-24. The City asks this Court to credit Officer Avinger's verbal gymnastics. Mr. Wiemold asks this Court to follow the plain truth of what happened. Mr. Wiemold established by a preponderance of the evidence that the City had the discriminatory intent to enforce the camping ordinance against only people the City believed were homeless and not against the similarly situated truckers who were also sleeping in their vehicles at the Poudre rest area. They then followed through on this discriminatory intent, creating a discriminatory effect by citing Mr. Wiemold based on believing he was homeless and not citing any of the truckers. This was clear selective enforcement.

The City attempts to avoid this conclusion by asserting that Mr. Wiemold should have presented the trial court with evidence it was plainly impossible to secure. How could Mr. Wiemold find the housing status of the truckers who were present that morning when the City did not contact them to record their names? *See* CF p. 158:12-15. How could Mr. Wiemold present the trial court with definitive information about the housing status of the other people the City cited when their identities are not in the police file provided? This is why the burden of proof is a preponderance and not beyond a reasonable doubt, and this is why factfinders are allowed to draw inferences. Mr. Wiemold established by a preponderance of the evidence that there was both a discriminatory intent and a discriminatory effect in the City's September 11, 2018 enforcement action.

IX. There was no rational basis for the City's selective enforcement

The City's rational basis argument is simple: (1) there were problems at the rest area; (2) the City assumes without evidence that homeless people caused the problems; so (3) there is a rational basis to only run them off and not the similarly situated truckers. This argument only works if the Court shares the City's unwarranted bias against people experiencing homelessness. The record contains no evidence that any of the issues that existed at the rest area were caused by homeless people. The question for this Court is whether, without basis, it is rational for the City to make that assumption. Mr. Wiemold submits that it is not.

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

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

Goldman v. Knecht, 295 F. Supp. 897, 906-07 (D. Colo. 1969) (three-judge panel opinion) (internal citations omitted) (emphasis added). This holding remains good law. *See, e.g.*, *State v. Adams*, 91 So. 3d 724, 751 (Ala. Crim. App. 2010) (citing *Goldman*). While the *Goldman* Court confronted an anti-vagrancy statute as opposed to discriminatory anti-"vagrant" enforcement of an otherwise-neutral

statute, the rationale of the *Goldman* Court's holding applies equally to the arguments the City is making. Just as the State did in 1969, the City asks this Court to falsely assume that homeless people sleeping in their cars are criminals, dirty, and unhygienic – people who should properly be driven out of town. That argument is just as wrong today as it was 60 years ago, and this Court must reject it.

Mr. Wiemold is not a criminal. He is not unhygienic. He did not litter or damage the rest stop. He did not impair the aesthetic of the rest area (to the extent such a thing exists) by his presence there. Enforcing the camping ordinance against him but not against others who were present and engaged in the same forbidden behavior (sleeping) did not in any way serve any legitimate government purpose.[11] As the Colorado Supreme Court holds, "A reasonable and non-arbitrary classification, [is one] based upon substantial differences which relate to a public purpose." *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 828 (Colo. 1982). As it relates to the any legitimate government interests, there are no substantial differences between Mr. Wiemold and the truckers whom the City did not cite. By classifying Mr. Wiemold as homeless and prosecuting him on that basis, the City violated the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons as well as the reasons detailed in Mr. Wiemold's Opening Brief, Mr. Wiemold requests that this Honorable Court reverse the orders of the municipal court and remand to the municipal court with instructions to vacate Mr. Wiemold's conviction and dismiss the charge against him.

[11] The City's alternative argument in support of only enforcing against those experiencing homelessness is that the City had previously conducted an enforcement action in the long-term parking lot against the homeless population that was staying in their vehicles there, and that as a result of the prior enforcement action, these homeless individuals had begun parking in the other part of the rest area. CF p. 147:8-149:14; 156:2-18. Thus, when the homeless people moved to a different area, the City moved its enforcement to where they were. Far from helping the City, this demonstrates the City's discriminatory intent in its enforcement and shows that the City's only basis for its enforcement is its biased beliefs about people experiencing homelessness.

Adam Frank, #38979
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In cooperation with the ACLU Foundation of Colorado
Dated: June 23, 2020

Mark Silverstein, #26979
ACLU Foundation of Colorado
Dated: June 23, 2020

Rebecca Wallace, #39606
ACLU Foundation of Colorado
Dated: June 23, 2020

Certificate of Service

I hereby certify that on June 23, 2020, I served a true and correct copy of the foregoing electronically via the CCE e-filing system upon the following individuals, either through CCE:

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