LARIMER COUNTY DISTRICT COURT 201 LAPORTE AVENUE, SUITE 100 FORT COLLINS, CO 80521	
Defendant-Appellant: ADAM WIEMOLD, v. Plaintiff-Appellee: CITY OF FORT COLLINS	Court Use Only
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APPELLEE'S RESPONSIVE BRIEF	

COMES NOW, the City of Fort Collins, by and through its attorneys, the Fort Collins City Attorney's Office and Hall & Evans, LLC, and hereby files Appellee's Responsive Brief.

ISSUES PRESENTED

1. Whether the City of Fort Collins' ordinance prohibiting camping on public property is a violation of the Eighth Amendment prohibiting cruel and unusual punishment on its

face and as-applied to the Appellant who voluntarily chose to camp in violation of the ordinance to pay off credit-card debt?

2. Whether Appellant established the three prongs necessary to show selective enforcement of the law?

STATEMENT OF THE FACTS

On the night of September 10, 2018, Appellant Adam Wiemold drove his vehicle to the public rest area at Prospect and I-25 in the City of Fort Collins ("City"). (Transcript of May 7, 2019 hearing ("Tr."), 28:24-29:3; 50:7-9). Mr. Wiemold did not go to either of the two homeless shelters in the City to request a bed. (Tr., 29:13-15; 30:2-4). He did not look for a room to rent. (Tr. 46:13-14). He instead parked in a 2-hour parking spot at the rest area and went to sleep in his vehicle. (Tr. 49:12-14).

Mr. Wiemold had been following this approach for approximately two years. (Tr. 49:6-8). His reason for doing so was because he had accumulated credit-card debt and wanted to pay it off rather than pay for a rented room or apartment. (Tr. 44:22-45:3). He also chose not to declare bankruptcy out of pride. (Tr. 44:2-3). He paid off approximately $10,000 of his credit-card debt in the year leading up to his citation. (Tr. 48:24-25).

Mr. Wiemold worked at Catholic Charities, one of the two homeless shelters in the City, in a 40-hour-a-week job, making $16 an hour. (Tr. 9:14-21; 27:24-25; 44:4-7). He had no dependents.(Tr. 42:6-11). He also had an operational vehicle. (Tr. 46:15-16).

His stated reason for not staying at one of the City's shelters was because Catholic Charities does not allow its employees to stay at its shelter and its employee handbook forbids fraternization with members of the community served by Catholic Charities. (Tr. 29:13-15). However, Mr. Wiemold testified there were members of the homeless community who regularly camped at the

same rest area where he camped. (Tr. 30:12-13). He often encountered them in shared use of the restroom facilities and in the lobby of the rest area building. (Tr. 39:25-40:7).).

Mr. Wiemold never asked his employer for an exception to the anti-fraternization policy, nor did he go to another nearby city to obtain shelter there. (Tr. 46: 17-18; 49:1-3). He also did not look for a job that would allow him to stay at a shelter in the City during his two years of camping. (Tr. 49:4-5).

That night, the other homeless shelter in the City, Fort Collins Rescue Mission ("FCRM"), was at its usual capacity. (Tr. 18:18-21). However, FCRM frequently stretched its capacity to avoid turning anyone away. (Tr. 147:1-14).

On the morning of September 11, 2018, Fort Collins Police Services ("FCPS") police officers, who were members of a neighborhood enforcement team, conducted an enforcement operation at the rest area. (Tr. 101:10-13; 114:3-5). They did so at the request of the rest area's owner, the Colorado Department of Transportation ("CDOT"), and in accordance with FCPS' established procedure when receiving complaints of ongoing criminal activity from any property owner. (Tr. 131:20-134:13). CDOT requested the enforcement because of ongoing problems with long-term campers at the rest area causing damage to the facility, excess refuse, and continuous violation of the City's prohibition on camping on public property. (Tr. 84:20-25; 109:12-19).

Mr. Wiemold was contacted that morning and issued a ticket for violating the City's no-camping ordinance, as were several other individuals in the same 2-hour limit parking area. (Tr. 28:24-29:1). Almost every person for whom police had probable cause to believe was camping in the 2-hour parking lot was issued a ticket, regardless of housing status. (Tr. 137:6-18).

The rest area also has a separate 12-hour parking area for trucks, but Mr. Wiemold did not remember the specifics of the night of September 10, 2019, and did not remember a single specific

truck being parked in the 12-hour truck parking area nor did he know if any of the trucks parked in it that morning were parked there overnight. (Tr. 30:7-11; 50:20-51:9).

SUMMARY OF ARGUMENT

This Court need not look further than the individual facts of this case to deny this as-applied constitutional challenge to the City's camping ordinance. Even accepting the broad and unprecedented reasoning of Martin v. City of Boise, Mr. Wiemold does not fall within the class of people contemplated by Martin because it specifically excludes those who have the means to secure housing and choose instead to camp. 920 F.3d 584, 617 (9th Cir.), cert. denied sub nom. City of Boise, Idaho v. Martin, 140 S. Ct. 674, 205 L. Ed. 2d 438 (2019).

Moreover, the Court should recognize disallowing camping on public property is a legislative policy decision and, under well-established separation of powers principles, it should defer to the legislature to exercise this long-held power. The advocates representing Mr. Wiemold in this case have long sought this legislative change to no avail and now turn to the Court to enforce their view of public policy under the guise of a constitutional challenge. The Court should not be used in this fashion – to force a policy change that is rightfully within the purview of the elected officials answerable to their constituents.

While Mr. Wiemold's claim of cruel and unusual punishment is here styled as an as-applied constitutional challenge, the label does not fit. Because of its broad-reaching implications, this should be treated as a facial challenge and subject to the standard for facial challenges. The United States Supreme Court is clear on this: if it walks like a facial challenge, talks like a facial challenge, and affects other cases like a facial challenge, it is a facial challenge regardless of any parties' demarcation otherwise. Here, the breadth of Appellant's Eighth Amendment challenge, essentially

asking this Court to declare the City's no-camping ordinance unconstitutional related to all homeless persons, presents a facial challenge.

If the Court elects to look further, it is apparent that the reasoning of the Ninth Circuit in Martin is flawed and Powell v. Texas, 392 U.S. 514 (1968), actually controls. Under Powell, government may regulate conduct but not status. Powell, 392 U.S. at 533. Under this directly applicable precedent appropriately interpreted and applied, the City's no-camping ordinance clearly regulates conduct not status and, therefore, survives constitutional scrutiny under the Eighth Amendment.

Similarly, Mr. Wiemold's equal protection challenge to the ordinance also fails. No selective enforcement of the ordinance to Mr. Wiemold or to homeless persons occurred either on September 11, 2018, or generally. Mr. Wiemold has not and cannot meet the stringent requirements for an equal protection selective enforcement claim under the applicable rational basis review. Also, insufficient evidence exists of any discriminatory intent in enforcing the ordinance or of any discriminatory effect from enforcing the ordinance.

ARGUMENT

I. STANDARD OF REVIEW

While the Appellant is generally correct that questions of constitutionality are reviewed *de novo* on appeal, the applicable type of review is also at issue here.

A. The Eighth Amendment Claim is Actually a Facial Challenge, Not an As-Applied Challenge.

The standard for an as-applied challenge is much different than for a facial challenge. Here, although Appellant claims to be making an as-applied challenge, the ruling would reach much further than this single case.

"An as-applied challenge consists of a challenge to the statute's application only as-applied to

the party before the court." Minnesota Majority v. Mansky, 708 F.3d 1051, 1059 (8th Cir. 2013) (internal quotation marks omitted). "If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable." Id. (internal quotation marks omitted).

Because of its individual nature, as-applied challenges are heavily fact-dependent. Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165, 173 (4th Cir. 2009) (quoting Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1331 (2000)). If the Appellant has not elicited sufficient facts to make out a claim, the Court properly declines to rule in his favor because an as-applied challenge is "based on a developed factual record [showing the] application of a statute to a specific person." Educ. Media Co. at Va. Tech, Inc. v. Insley, 731 F.3d 291, 298 n. 5 (4th Cir. 2013) (internal citation omitted).

Although this appeal is couched in terms of Mr. Wiemold's individual circumstances, the relief sought is much broader. Appellant asks this Court to rule that camping for homeless persons is always involuntary and therefore anytime the City's shelters are full, the City's public camping prohibition is unenforceable regardless of the individual's financial or other circumstances. This is clear from the pleadings. The constitutional challenge was raised prior to trial and the development of any facts, and before any punishment. The essential argument is the City's inherent police power is limited by the Eighth Amendment concerning individuals experiencing homelessness. "That type of pretrial challenge, inviting a court to limit that state's police power proscriptively due to class membership, obviously carries with it legal effects beyond the individual litigant." State v. Barrett, 302 Or.App. 23; 460 P.3d 93, 112 (Or. App. 2020, *en banc*) (Judge James, concurring).

Appellant demands a ruling applicable to a broad group of individuals, not just Mr. Wiemold. For example, Appellant titles an entire section "[t]his Court's inquiry into **whether a person had**

a choice to sleep outside must focus only on whether the person could have been staying at a shelter the night/early morning he was ticketed." (*See* Opening Brief ("OB"), at 13 (emphasis added)). Not the Court's inquiry into whether Mr. Wiemold had a choice, but the Court's inquiry into whether "a person" had a choice. This formulation clearly requests a wide-sweeping ruling that all homeless persons cannot be cited under the City's no-camping ordinance. Appellant further erroneously states: "courts have looked only to whether that individual was able to stay in a shelter bed on the evening in question." Id. Appellant openly encourages a rule whereby courts should only ask two things: was the conduct "benign, necessary conduct" and whether "shelter space was unavailable." Id. at 15. This reveals the true nature of the challenge. The Appellant wants a rule applicable to every homeless individual if the City's shelters are full, regardless of the actual, individual circumstances of a specific person cited for violation of the ordinance. Appellant is not arguing the ordinance is unconstitutional as applied to him, based on his unique situation, but rather it is unconstitutional when applied to a broad class of persons including him.

The Supreme Court has held calling something an as-applied challenge does not make it so. "The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow reach beyond the particular circumstances of these plaintiffs." Doe v. Reed, 561 U.S. 186, 194 (2010). *Compare,* United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) ("A facial challenge is a head-on attack on the legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications. An as-applied challenge concedes the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of this case."), *vacated on other grounds by,* 552 U.S. 1306 (2008).

The caution expressed by the Supreme Court in Bucklew v. Precythe, —— U.S. ——, 139 S.

Ct. 1112, 1127-28, 203 L. Ed. 2d 521 (2019), concerning an as-applied challenge under the Eighth Amendment to an execution protocol is instructive:

> "Here's yet another problem with Mr. Bucklew's argument: It invites pleading games. The line between facial and as-applied challenges can sometimes prove 'amorphous,' Elgin v. Department of Treasury, 567 U.S. 1, 15, 132 S. Ct. 2126, 183 L. Ed. 2d 1 (2012), and 'not so well defined,' Citizens United, 558 U.S. at 331, 130 S. Ct. 876. Consider an example. Suppose an inmate claims that the State's lethal injection protocol violates the Eighth Amendment when used to execute anyone with a very common but not quite universal health condition. Should such a claim be regarded as facial or as-applied? In another context, we sidestepped a debate over how to categorize a comparable claim—one that neither sought 'to strike [the challenged law] in all its applications' nor was 'limited to plaintiff's particular case'—by concluding that '[t]he label is not what matters.' Doe v. Reed, 561 U.S. 186, 194, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). To hold now, for the first time, that choosing a label changes the meaning of the Constitution would only guarantee a good deal of litigation over labels, with lawyers on each side seeking to classify cases to maximize their tactical advantage. Unless increasing the delay and cost involved in carrying out executions is the point of the exercise, it's hard to see the benefit in placing so much weight on what can be an abstruse exercise."

Writing a concurrence in the Oregon Court of Appeals' case Barrett, where the challenge to the law was the same as in this case, Judge James wrote: "[t]his case presents that same trap of 'pleading games' prophesized in Bucklew. While the case has been pleaded as an as-applied challenge, and while the specific remedy sought in this case was the dismissal of charges, no one involved in this litigation sought a ruling applicable only to Appellant. Here, Appellant was the face of a constitutional challenge that was intended to prevent enforcement of the PCC ordinance against the homeless as a community. When a party makes the decision to frame the litigation in this manner, they cannot avoid the consequences of those choices by labeling their challenge 'as applied.' Rather, when a case exists in the grey area of both a facial and an as-applied challenge, the litigant must 'satisfy our standards for a facial challenge to the extent of that reach.'" Barrett. at *59 (citing Doe, 561 U.S. at 194).

Therefore, based on this Supreme Court precedent, the Court here should treat this as a facial

challenge. Under that standard, the claim easily fails. Appellant only succeeds in a facial challenge by showing that "no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications." Washington State Grange, 552 U.S. 442, 449 (2008) (internal citation omitted). Pursuant to Robinson v. California, 370 U.S. 660, 667 (1962), and Powell, a city's prospective exercise of police power only violates the Eighth Amendment "in all of its applications" when the statute on its face penalizes *status*. Here, the ordinance on its face plainly targets acts, not status. Therefore, the Appellant's properly understood facial challenge here entirely fails.

A statute is presumed to be constitutional, and the party challenging its validity has the burden of proving unconstitutionality beyond a reasonable doubt. People v. Janousek, 871 P.2d 1189, 1195 (Colo. 1994); People v. Martinez, 165 P.3d 907, 912 (Colo. App. 2007).

To strike down an ordinance as facially unconstitutional, the Court must determine that no "conceivable sets of circumstances exist under which [the ordinance] may be applied in a constitutionally permissible manner." People v. Montour, 157 P.3d 489, 499 (Colo. 2007). "If a challenged ordinance lends itself to alternate constructions, one of which is constitutional, the constitutional interpretation must be adopted." People ex rel. City of Arvada v. Nissen, 650 P.2d 547, 550 (Colo. 1982) (citations omitted). The party challenging an ordinance on constitutional grounds must prove unconstitutionality beyond a reasonable doubt. Id.

"There is an important difference between a facial challenge to the constitutionality of a statute or rule and an 'as applied' challenge." Sanger v. Dennis, 148 P.3d 404, 410 (Colo. App. 2006). "[A] facial challenge alleges that there are no circumstances to which a statute can be applied constitutionally. In contrast, an as-applied challenge alleges that the statute is unconstitutional as

to the specific circumstances under which an Appellant acted." People v. Ford, 232 P.3d 260, 263 (Colo. App. 2009).[1]

B. Standard of Review for Appellant's Selective Enforcement Claim

A rational basis standard of review applies to Appellant's selective enforcement claim. Notably, homelessness is not a suspect class and sleeping outdoors is not a fundamental right thereby triggering more stringent review. *See* D'Aguanno v. Gallagher, 50 F.3d 877, 879 n. 2 (11th Cir.1995) (homeless not a suspect class); Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1269 n. 36 (3rd Cir. 1992) (same); Davison v. City of Tucson, 924 F.Supp. 989, 993 (D. Ariz. 1996) (same); Johnson v. City of Dallas, 860 F.Supp. 344, 355 (N.D. Tex. 1994) (same), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995); Joyce v. City and County of San Francisco, 846 F.Supp. 843, 859 (N.D. Cal. 1994) (declining to be the first court to recognize fundamental right to sleep), dismissed, 87 F.3d 1320 (9th Cir. 1996); State of Hawaii v. Sturch, 921 P.2d 1170, 1176 (Haw. Ct. App. 1996) (noting there is "no authority supporting a specific constitutional right to sleep in a public place" unless it is expressive conduct within the ambit of the First Amendment or is protected by other fundamental rights).[2] Consequently, the standard for review is rational basis. Joel v. City of Orlando, 232 F. 3d 1353 (11th Cir. 2000).

[1] Appellant misstates the standard of review by claiming *de novo* review of constitutional questions "includes reviewing factual determinations." [*See* Opening Brief, at 7]. The quote he supplies is in contradiction with his own statement noting reviewing courts continue to hold to the principle that facts found by the trial court will not be disturbed absent a lack of competent evidence in the record. The application of the facts to the law is subject to review, but not the facts themselves as Appellant suggests. In fact, Colorado law is to the contrary: "When exercising appellate review, the court may affirm, reverse, remand, or modify the county court judgement," but it "cannot alter or depart from the county court's findings of fact in any way." Bovard v. People, 99 P.3d 585, 589 (Colo. 2004) (citing People v. Williams, 473 P.2d 982, 984 (Colo. 1970); People v. Gallegos, 533 P.2d 1140, 1142 (1975) (where the district court is exercising its power of review, it cannot act as a fact finder)).

[2] But see, Pottinger v. City of Miami, 810 F.Supp. 1551, 1578 (S.D. Fla. 1992) (indicating in dicta that homeless might constitute a suspect class), remanded for limited purposes, 40 F.3d 1155 (11th Cir. 1994), and directed to undertake settlement discussions, 76 F.3d 1154 (1996).

II. THE COURT NEED GO NO FURTHER THAN THE FACTS OF THIS CASE TO AFFIRM THE LOWER COURT

Appellant's version of the "issues presented" is problematic at best, insincere at worst. It suggests facts were elicited simply not presented at the hearing. First, Appellant suggests Mr. Wiemold had "no indoor shelter…available to him…." (OB, at 1). This is simply not true. Mr. Wiemold did not attempt to secure indoor shelter even though he had the economic means to do so. (Tr. 46:13-14). Moreover, Mr. Weimold also never tried to access any shelter that night. (Tr. 29:13-15; 30-2-4). Further, Mr. Wiemold's working vehicle provided him access to shelters in nearby cities, or to park outside the City limits to camp in his car. (Tr. 46:15-16). Finally, Mr. Wiemold has the economic means, through the income from his employment, to purchase shelter, but affirmatively chose not to do so because he wanted to use his income for other purposes. (Tr. 44:2-3; 44:22-45:3).

Second, the Appellant's characterization of the selective-enforcement issue is even more misleading. The hearing did not establish only homeless individuals were cited by police. The hearing never established any trucker was sleeping at the rest area on the date of the offense and, in any event, the 12-hour truck parking lot is separate from the 2-hour car parking lot where the enforcement actually occurred. (Tr. 28:24-29:1; 30:7-11; 50:20-51:9, 137:6-18)

The Appellant's need to obfuscate the actual facts established at the lower court illustrates his problem: he did not and cannot establish facts supportive of his argument, even if his argument had merit. Thus, the Court need go no further than the first step of the analysis: even if this Court accepts and follows Martin, the Appellant's argument fails on the facts established at the hearing.

Also, this Court should decline to address constitutional questions if unnecessary. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 157–58 (1984); Adams Sch. Dist. No. 50 v. Heimer, 919 P.2d 786, 790 (Colo. 1996). Instead, this Court should

follow the long-standing rule of judicial restraint that if it does not have to make an all-encompassing constitutional ruling that will gut municipalities' ability to make their own legislative decisions, it should refrain from doing so.

Mr. Wiemold did not attempt to stay at a shelter. So, there is no way of knowing whether he would have been turned away. (Tr. 18:18-21; 29:13-15; 30-2-4; 147:1-4). Moreover, Mr. Wiemold made a choice: he could afford a place to stay but wanted to prioritize his credit-card debt. He testified to paying off about $10,000 in credit-card debt in the year leading up to his citation – this is more than enough disposable income to afford renting a room or apartment. (Tr. 44:22-45:3). It is incorrect to suggest Mr. Wiemold's lack of housing was involuntary. Even applying Martin, the Eighth Amendment is not violated when an individual has the means to secure housing. The Ninth Circuit stated: "Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it." Martin, 920 F.3d at 617 (emphasis in original). Mr. Wiemold had the means for housing and chose not to spend his money in this fashion. Thus, even under Martin, Appellant's Eighth Amendment claim fails.

III. THE ORDINANCE DOES NOT VIOLATE THE EIGHTH AMENDMENT PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT.

a. The Court Should Decline to Follow the Reasoning of the Ninth Circuit.[3]

i. The Ninth Circuit Misapplied Powell.

[3] The City provides this analysis of Martin, Powell and related cases interpreting the Eighth Amendment so this Court can make its own determination as to the validity of Martin. After all, this Court need not follow Martin as it is only persuasive authority for this Court. *See, e.g.*, People v. Dunlap, 975 P.2d 723, 748 (Colo. 1999) ("We note first that this court is not bound by a federal circuit court's interpretation of federal constitutional requirements."); People v. Barber, 799 P.2d 936, 940 (Colo. 1990) ("Lower federal courts do not have appellate jurisdiction over state courts and their decisions are not conclusive on state courts, even on questions of federal law.").

Six judges dissented from the Ninth Circuit's decision not to rehear Martin *en banc*. In their dissent, they not only highlighted the ripeness issue discussed *supra*, but noted a major error in the underlying panel's reliance on Powell.

In Martin, the Ninth Circuit determined, after adopting a completely novel legal theory, that laws barring public camping and sleeping are unconstitutional if the conduct is involuntary and inseparable from status. Nonetheless, the Supreme Court has never found that the Eighth Amendment exempts individuals from a general law based on purportedly involuntary conduct and has never invalidated a law under that theory. Rather, the Supreme Court has repeatedly upheld the authority of state and local governments to promulgate and enforce laws that they determine are in the interest of public health, safety and welfare, without contemplating the voluntariness of the conduct regulated.

A. *Powell* and *Robinson* and the *Marks* doctrine.

Powell was decided based on Robinson, 370 U.S. 660 (1962). In Robinson, an individual convicted of the crime of addiction to narcotics challenged the conviction under the Eighth Amendment. The Supreme Court determined addiction itself could not be the basis for punishment. Id. at 667. However, in so concluding, the Court also clarified conduct stemming from the status of addiction could be criminalized. Id. at 666-68.

Subsequently, in Powell, Mr. Powell was found guilty at trial of public drunkenness. 392 U.S. 514 (1968). He appealed his conviction under the Eighth Amendment, claiming his status as an alcoholic meant he was not voluntarily publicly drunk, but his drunkenness was a natural consequence of his alcoholic status. Id. The Court upheld the conviction, although only four justices joined in the main opinion. Id. A fifth concurred only in the judgment and four justices dissented.

Despite Powell being over 60 years old, Martin newly interpreted its holding. It relied on the reasoning of the **concurring** Justice White in Powell, concluding his concurrence in affirming only the judgment could be combined with the four dissenters to create the new holding: "involuntary" behavior cannot be criminalized. Martin v. City of Boise, 2019 WL 1434046 at *5. Nonetheless, Martin acknowledged the plurality opinion in Powell held Robinson precludes only criminalizing status and does not prohibit criminalization of "involuntary" conduct including conducting arising from status. Martin, 2019 WL 1434046 at *26.

Since Powell was a 4-1-4 decision, under Supreme Court precedent regarding "a fragmented Court," the holding thus becomes the position taken by the narrowest **concurrence**. Marks v. U.S., 430 U.S. 188 (1977). Reviewing Powell in its entirety, "the holding is clear: The Appellant's conviction was constitutional because it involved the commission of an act. Nothing more, nothing less." Martin v. City of Boise, 2019 WL 1434046 at *5 (dissent from denial of rehearing en banc). A decision falling within Marks' analysis is referred to as "a consensus of concurrences." E.g. Nichols v. United States, 511 U.S. 738, 745 (1994); U.S. v. Williams, 891 F.2d 212 (9th Cir. 1989). Under this rule, the dissent does not and cannot form part of the holding. The Ninth Circuit in Martin departed from this rule.

In circumstances where the concurrences do not have common ground, as in Powell, "no national standard derives from the plurality decision and the only binding aspect of the decision is its specific result." United States v. Munoz-Gomez, No. 07-CR-00172-EWN, 2008 WL 11384129, at *5 (D. Colo. Aug. 20, 2008). See, e.g., United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003) ("When it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of the majority of the Supreme Court."). The

Tenth Circuit explained this approach: "Applying Marks becomes problematic '[w]hen the plurality and concurring opinions take distinct approaches, and there is no narrowest opinion representing the common denominator of the Court's reasoning." United States v. Sedillo, 509 F. App'x 676, 686 (10th Cir. 2013) (citing U.S. v. Carrizales–Toledo, 454 F.3d 1142, 1151 (10th Cir. 2006) (quoting King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc))). Consequently, this court "do[es] not apply Marks when the various opinions supporting the Court's decision are mutually exclusive." Id. See also, Large v. Fremont Cnty., Wyo., 670 F.3d 1133, 1141 (10th Cir. 2012). The Ninth Circuit in Martin departed from this proper analysis.

The above analysis represents the proper approach to understanding and applying Powell. The Powell plurality held the government can criminalize conduct and not status and a public drunkenness law did not violate the Constitution's prohibition on cruel and unusual punishment. Powell, 392 U.S. at 533-35. The concurring opinion determined the conviction was constitutional because Mr. Powell did not establish his conduct was involuntary. Id. at 540-41 (White, J. concurring). Under Marks, Powell's holding is what the four-justice plurality and Justice White agreed upon, not what Justice White and the dissenting justices agreed upon. Because Justice White's concurrence and the plurality opinion do not share the same bases for the decision, the holding is confined to the case.

Notably, in applying Marks, the Tenth Circuit makes clear only opinions "supporting" the Court's decision are considered in determining a case's holding in a non-majority Court. This is what occurred in Powell – the holding was Powell's conviction stood but the plurality and concurrence reached this result on disparate grounds. Therefore, Powell changes nothing precedentially and this Court must look to Robinson for the Supreme Court's most recent pronouncement on the topic. Robinson is quite clear – it is cruel and unusual punishment to convict

a person for a status but not for conduct, however closely related to the status that conduct may be. 370 U.S. at 660.

If the ordinance challenged here stated it was illegal to be homeless, then it punishes one's status. But it does not. Instead, the City's ordinance punishes the act of camping on public property—and makes no distinction based on any status of anyone subject to the ordinance.

ii. Under the Robinson conduct/status analysis, the ordinance is constitutional as applied.

There is no question that the City's no-camping ordinance criminalizes only conduct and not status. The ordinance, City Code §17-181, states: "It shall be unlawful for any person to camp or pitch a tent, or knowingly permit any person to camp or pitch a tent, on public property within the City. *Camping*, for the purposes of this Section, shall mean to sleep, spend the night, reside or dwell temporarily with or without bedding or other camping gear and with or without shelter, or to conduct activities of daily living such as eating or sleeping, in such place unless such person is camping in compliance with Chapter 23 in a natural or recreation area. *Camping* shall not include incidental napping or picnicking." (Emphasis in original.)

The ordinance applies whether the individual is housed or unhoused. A college student trying to save on rent, an adventurous traveler on his way to the nearby mountains, the frugal visitor trying to avoid paying for a hotel, a devoted music fan following his band's cross-country tour, and a homeless individual are all equally in violation of the ordinance if they camp on public property. Therefore, the ordinance is valid under Robinson.

iii. The Consequences of Applying the Martin Reasoning to Municipal Ordinances Would be Disastrous.

Adopting the Ninth Circuit's reasoning in Martin would severely limit the City's ability to enforce many ordinances essential to the health and well-being of its residents and visitors. The

Martin court quoted with approval a decision from the Southern District of Florida which stated: "resisting the need to eat, sleep or engage in other life-sustaining activities is impossible." Martin, 910 F.3d. at 617 (*quoting* Pottinger v. City of Miami, 810 F. Supp. 1551, 1565 (S.D.Fla. 1992)). Following the logic of this statement, the dissent from the rehearing *en banc* in Martin noted: "[w]hat else is a life-sustaining activity? Surely bodily functions. By holding that the Eighth Amendment proscribes the criminalization of involuntary conduct, the panel's decision will inevitably result in the striking down of laws that prohibit public defecation and urination." Id. at 590. The City has already experienced contamination of the Poudre River due to human waste.[4] Under Martin, City ordinances against bathing in public waters and natural areas and parks violations would be constitutionally suspect. This is clearly not the intent of the Eighth Amendment.

In Powell, the Court expressed similar concerns, warning of the practical implications of the dissent's suggested constitutional interpretation: "the most troubling aspects of this case, were Robinson to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility." Powell 392 U.S. at 534. For example, "[i]f [the Appellant] cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill." Id. Applying this standard would require the courts to increasingly step into a legislative role, essentially overriding duly empowered state and local lawmakers in broad swaths of criminal law. As the Court further explained, "unless Robinson is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from

[4] E.g. https://www.coloradoan.com/story/news/2018/04/20/poudre-river-cleanup-canceled-amid-safety-concerns-homeless-camps/537269002/; https://www.fcgov.com/utilities/img/site_specific/uploads/2017_uclp_trendreport_final.pdf?1530650851.

becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." Id. at 533. Such a result would be irreconcilable with "[t]raditional common-law concepts of personal accountability and essential considerations of federalism." Id. at 535.

The Powell concurrence agreed Robinson was "explicitly limited … to the situation where no conduct of any kind is involved." Id. at 542 (White, J., concurring). The "revolutionary doctrine of constitutional law" advocated in Powell and by Appellant would "significantly limit the States in their efforts to deal with a widespread and important social problem" and would take the Court "far beyond the realm of problems for which we are in a position to know what we are talking about." Id. at 537–38. The concurrence therefore also declined to "depart[] from … the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow." Id. at 548.

Even if Marks permitted the dissent's position in Powell to create sweeping rules of constitutional law, Martin still erred because the agreement between Justice White and the dissent was mere dicta and did not affect the disposition of the case. As Justice White explained, "[w]hether or not [the appellant] established that he could not have resisted becoming drunk …, nothing in the record indicates that he could not have done his drinking in private." Powell, 392 U.S. at 552–53 (White, J., concurring). Thus, "[f]or purposes of" deciding Powell, it was "necessary to say only that [the appellant] showed nothing more than that he was to some degree compelled to drink and that he was drunk at the time of his arrest. He made no showing that he was unable to stay off the streets on the night in question." Id. at 554–55.

The Supreme Court itself has never endorsed either Robinson or Powell as standing for the broad and novel interpretation advanced by the Ninth Circuit in Martin. On the contrary, "Powell

turned out to be the end of the Court's flirtation with the possibility of a constitutional criminal law doctrine." Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Cal. L. Rev. 943, 966 (1999). "That flirtation ended where it began—with the power to regulate conduct, including purportedly involuntary conduct, reposed in state and local authorities. Thus, 'Robinson, though of great theoretical interest, has no practical importance today' because '[n]othing has come of it, and th[is] Court has not gone on to find a 'voluntary act' principle in the Constitution.'" Peter W. Low, *Criminal Law* 361 (1990). The Ninth Circuit's decision in Martin breathes new life into an argument rejected by the actual holdings in Powell and Robinson more than half a century ago.

b. Contrary to Appellant's Assertion, Other Courts Have Upheld Camping Prohibitions.

Appellant asserts in his brief that "…all other courts to address the issue have followed Robinson and Powell to find that it is unconstitutional to punish homeless individuals for sleeping outdoors when they cannot access shelter." (Appellant's Brief, p. 8) (citations omitted). This is untrue. In fact, advocates have been attempting this theory of the Eighth Amendment in the courts for years, perhaps decades, and it has failed. Multiple examples belie the Appellant's assertion including the following cases litigated by the same organization representing Appellant here.

i. People v. Madison, Boulder County District Court Case No. 10CV716 (Order Affirming Conviction attached hereto as Exhibit A)

Mr. Madison was arrested for camping on public property and his counsel filed a motion to dismiss in municipal court on the grounds Boulder's no-camping ordinance violated the Eighth Amendment's prohibition on cruel and unusual punishment. The municipal court denied the motion and the case proceeded to trial where Mr. Madison was found guilty. He appealed to Boulder District Court. The Boulder District Court reasoned correctly that under both Robinson

and Powell, Boulder could properly punish conduct but not status and the no-camping ordinance[5] (which was similar to the one at issue here) was a constitutional exercise of the City's power to criminalize conduct. Judge Bakke wrote in that opinion: "[a]lthough 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.'" (Order, p. 4) (citing Powell at 534-37).

In Madison, the District Court went on to state: "[t]he Court is not persuaded … 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." Id. at p.5.

ii. Portland

In a January 29, 2020, opinion, the Oregon Court of Appeals similarly upheld a municipal no-camping ordinance rejecting the Appellant's arguments. In State v. Barrett, the homeless appellant argued that her conviction for camping violated the Eighth Amendment's prohibition of cruel and unusual punishment. 460 P.3d 93 (Or. App. 2020). She alleged her camping was involuntary and an unavoidable consequence of being homeless. Id. at 25. The Oregon court rejected the as-applied challenge based on the failure to establish the necessary supporting facts.

[5] Boulder's ordinance read: "(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…."

Id. at 30. Key to this determination was the lack of evidence that she attempted to access shelter. Id.

Because Ms. Barrett had not established that she attempted to gain shelter, the Oregon Court of Appeals did not reach the question of whether her conduct was involuntary and whether the ordinance was constitutionally suspect. Similarly here, Mr. Wiemold did not try to access shelter and had an operative vehicle that would have allowed him to camp in a legal location.

The court in Barrett properly did what the City here asks this Court to do: decline to answer a question that does not need to be answered. In doing so, the Oregon Court of Appeals stated "[i]n similar cases, we have declined to address constitutional questions where the record was "too inconclusive to justify the adoption of the constitutional rule urged by Appellant." Id. at *31(citing City of Portland v. Juntunen, 6 Or. App. 632, 635, 488 P.2d 806 (1971) (declining to conclude that punishing an alcoholic for his appearance in public while drunk constitutes cruel and unusual punishment absent evidence that the Appellant was unable to avoid appearing in public while drunk)). Further, the Oregon Court of Appeals acknowledged the value of judicial restraint, noting their Supreme Court's recent reiteration that, "'[a]s a general matter, [the] court will avoid reaching constitutional questions in advance of the necessity of deciding them.'" Id. at 31 (internal quotations omitted) (citing Vasquez v. Double Press Mfg., Inc., 437 P.3d 1107 (Or. 2019) (quoting State v. Barrett, 255 P.3d 472 (Or. 2011)). As noted above, Colorado follows the same rule of avoiding addressing unnecessary constitutional questions. Heimer, 919 P.2d at 790.

Prior to Barrett, the United States District Court for the District of Oregon addressed the argument that camping ordinances violate the Eighth Amendment by criminalizing involuntary conduct in Anderson v. City of Portland, 2011WL 6130598 (Dec. 7, 2011). There, the court found the city had legitimate government interests in safety and sanitation in regulating camping and the

plaintiffs failed to establish that the enforcement criminalized status rather than conduct. Id. at *4.

iii. Houston

In Kohr v. City of Houston, plaintiffs sought a preliminary injunction against enforcement of Houston's no-camping ordinance (amongst others) on the basis of the Eighth Amendment (and other constitutional arguments). 2017 WL 6619336 (S.D. Tex. 2017). Their primary claim was enforcement of the camping ban in Houston violated their right to be free from cruel and unusual punishment under the Eighth Amendment because it criminalized their homeless status. The United States District Court for the Southern District of Texas rejected their claim that the ordinance punished involuntary conduct. Id. at *4. The court further found the camping was a facially valid exercise of the city's discretionary police power as it applied to everyone, not just those that were homeless. Id. The court concluded there was no cognizable claim under the Eighth Amendment. Id. at *6.

iv. Other Courts and Circuits

Adopting the Appellant's view of the Eighth Amendment would require this Court to ignore the persuasive precedent of many other courts, including the California Supreme Court and the First, Fourth, Seventh, and Eleventh Circuit Courts of Appeals.

A. The California Supreme Court and the Eleventh Circuit have upheld ordinances virtually identical to the City's ordinance against substantively indistinguishable attacks under the Eighth Amendment.

In Tobe v. City of Santa Ana, 892 P.2d 1145 (Cal. 1995), the California Supreme Court upheld an ordinance making it "'unlawful for any person to camp, occupy camp facilities or use camp paraphernalia in … any street [or] any public parking lot or public area.'" Id. at 1150. As the court explained, "[t]he ordinance permits punishment for proscribed conduct, not punishment for status," id. at 1166, and thus does not contravene the Eighth Amendment." The California Court

of Appeals determined the camping ordinance criminalized the status of homelessness, but the California Supreme Court rejected that reasoning, stating that "[n]o authority [wa]s cited for the proposition that an ordinance which prohibits camping on public property punishes the involuntary status of being homeless or … is punishment for poverty," and recognizing that this "Court has not held that the Eighth Amendment prohibits punishment of acts derivative of a person's status," id. (See also Allen v. City of Sacramento, 183 Cal. Rptr. 3d 654, 670–71 (Cal. Ct. App. 2015) ("Sacramento's ordinance punishes the act of camping, occupying camp facilities, and using camp paraphernalia, not homelessness.… Because the Eighth Amendment does not prohibit the punishment of acts, plaintiffs' challenge based on cruel and unusual punishment lacks merit" (citations omitted))).

The Eleventh Circuit reached a similar result in Joel v. City of Orlando, 232 F.3d 1353 (11th Cir. 2000), where it considered the constitutionality of Orlando's ordinance providing that "[c]amping is prohibited on all public property, except as may be specifically authorized by the appropriate governmental authority." Id. at 1356. As the court explained, "[a] distinction exists between applying criminal laws to punish conduct, which is constitutionally permissible, and applying them to punish status, which is not." Id. at 1361. Based on the conduct/status distinction, the court "h[e]ld that [the ordinance] does not violate the Eighth Amendment." Id. at 1362. Martin inappropriately recharacterized the Eleventh Circuit's holding, suggesting it was based on the fact that the homeless shelters in Orlando were not demonstrably overcapacity. However, this was not the basis for the decision. Rather, the Eleventh Circuit made clear the ordinance was constitutional because it "target[ed] conduct, and d[id] not provide criminal punishment based on a person's status"—expressly citing Justice Marshall's plurality opinion in Powell. Joel, 232 F.3d at 1362. In short, every other appellate court to consider challenges to public-camping laws under the Cruel

and Unusual Punishment Clause has upheld the laws. The Ninth Circuit in Martin is the only court to reach a contrary conclusion. Martin is an outlier and should not be followed by this Court.

B. The Ninth Circuit's unprecedented interpretation of the Eighth Amendment also conflicts with decisions from the First, Fourth, and Seventh Circuits.

In United States v. Sirois, 898 F.3d 134 (1st Cir. 2018), the First Circuit considered whether the Eighth Amendment "precludes incarceration for [the appellant's] use of illegal drugs because that use is compelled by his addiction, which is a disease.' Id. at 137. Although the appellant relied on Justice White's concurrence in Powell (as did the Martin Court), the First Circuit reasoned:

> Justice White's Powell concurrence is both good news and bad news for [the appellant]." Id. at 138. "While that opinion 'express[es] skepticism that the compulsive use of narcotics can even be a crime,' 'it is only a concurring opinion' and, '[e]ven worse, it is one that has yet to gain any apparent relevant traction, as [the appellant] is unable to point us to any federal court of appeals case in the fifty years since the Court decided Powell and Robinson that has either interpreted those cases to hold that the Eighth Amendment proscribes criminal punishment for conduct that results from narcotic addiction, or has extended their reasoning to this effect. Whatever Powell holds, it does not clearly establish a prohibition on punishing an individual, even an addict, for possessing or using narcotics. Id. at 138.

The Seventh Circuit addressed a similar argument. In United States v. Black, 116 F.3d 198 (7th Cir. 1997), that court rejected the appellant's argument his child-pornography conviction violated the Cruel and Unusual Punishment Clause because his conduct was the result of an involuntary compulsion. Id. at 201. In Black, the Seventh Circuit noted the "[d]efendant's principal reliance [wa]s on the concurring opinion of Justice White in Powell," (as is the case with Martin). However, the court explained that "since no other Justice joined in that opinion, it need not be discussed further." Id. at 201 n.2. The Seventh Circuit upheld the conviction, reiterating the conduct/status distinction from Robinson is the relevant test. Id. at 201 (see also United States v. Stenson, 475 F. App'x 630, 631 (7th Cir. 2012) ("As in Powell, Stenson was not punished for his

status as an alcoholic but for his conduct. Therefore, his claim for cruel and unusual punishment fails.")).

Even when the Fourth Circuit concluded the involuntariness of conduct may conceivably provide an exemption from punishment under an Eighth Amendment argument, they did so only where the law was not generally applicable but applied only to a group of individuals for whom the conduct was involuntary. In Manning v. Caldwell, 930 F. 3d 264 (4th Cir. 2019), individuals (who were homeless) were classified as habitual drunkards by the state. Id. They were then subject to laws that were not applicable to other citizens. Id. There was a civil interdiction order entered against specific individuals labelling them as "habitual drunkards," a term which was not defined. Id. at 268-269. Once so labeled, it became illegal for those specific individuals to possess or attempt to possess alcohol or to be drunk in public. Id. at 269. Other individuals who had not been so labeled were not subject to the law even when they engaged in the identical conduct. Id.

The fact that the laws applied **only** to these individuals and not to other people of legal drinking age was the issue. In fact, the Manning court wrote: "[o]ur Eighth Amendment holding is narrow." Id. at 284. Further, in explaining the narrowness, the Fourth Circuit stated: "the challenged statutory scheme threatens them with arrest and incarceration for conduct that is not proscribed as a consequence of a prior criminal conviction, does not rest on even a single volitional element, and is lawful for all others of legal drinking age." Id. Here, the City's no-camping ordinance applies to everyone – there is no prerequisite classification of status (based on homelessness or otherwise) required before one is subject to the law. A millionaire who sleeps in his car or camps in the park is just as much in violation as a homeless individual. Manning concluded it reached the holding only because "Plaintiffs…wisely confine[d] their Eighth

Amendment challenge to conduct that is an involuntary manifestation of the very illness that triggers the [statutory] scheme." Id.

Finally, the Fourth Circuit clearly stated: "Plaintiffs do not seek an exemption from generally applicable criminal laws, and our reasoning **does not offer them one.** A state undoubtedly has the power to prosecute individuals, even those suffering from illnesses, for breaking laws **that apply to the general population.**" Id. at 284-285 (emphasis added). "[O]ur holding neither creates nor supports the notion of a nonvolitional defense against generally applicable crimes." Id. at 285. This is simply not analogous to the case here – camping is generally prohibited for all persons – there is no exception to the rule.

c. The Denver Decision Cited by Appellant is Poorly Reasoned and Carries No More Weight than the Fort Collins Decision that is Appealed here.

People v. Burton, the Denver County Court case (with a pending appeal) which the Appellant relies on is a poorly reasoned, non-binding decision based on flawed logic. The County Court first incorrectly determines Martin is persuasive, then misapplies Martin on multiple levels.

First, Martin was an as-applied challenge, with a holding by its own terms was a "narrow" one. Nevertheless, in Burton, the Denver County Court decided, with no explanation, Martin is a facial holding. Burton then, in a two-paragraph discussion, speculatively reasons that if **every** homeless person in Denver tried to access shelter, then the shelters would be full. (Ex. A to Opening Brief, p.9). Therefore, under Burton, Denver's shelters *could possibly under some circumstance* be full and therefore the entire Denver no-camping ordinance was facially invalid. Burton offers nothing to explain this jump in reasoning which defies principals of logic. Burton goes even further, stating even if there were enough beds, because shelters may turn people away due to their own behavioral issues or pets or desire to stay with their sexual partners or because

they missed the intake time, there might be someone who does not have access to shelter every night and Denver's ordinance would be struck down even if there were enough beds. Id.

Burton's incredibly shallow reasoning goes even farther afield than Martin. Burton did not even identify the standard for upholding a facial challenge to an ordinance, much less apply it. Nor did Burton cite any Colorado decisions or binding precedent for its departure from well-established principles of law.

Essentially, Burton did exactly the reverse of what a facial challenge requires: instead of determining if there was any circumstance under which the ordinance would be constitutional, Burton reasoned there were circumstances under which it might be unconstitutional and struck it down as facially invalid. This is not what the law requires. *E.g.*, Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008) ("Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." (internal quotations omitted)); Sanger v. Dennis, 148 P.3d 404 (Colo. App. 2006) ("Facial challenges must be rejected 'unless there exists *no set of circumstances* in which the statute can constitutionally be applied.'" *citing* Olmer v. City of

Lincoln, 23 F.Supp.2d 1091, 1104 (D.Neb.1998) (citations omitted; quoting Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting)).

A facial challenge requires proof beyond a reasonable doubt the ordinance cannot be constitutionally applied in any circumstances. Because Burton provides no explanation for its reasoning and because its reasoning is fatally flawed, this Court should disregard it.

d. Even Under the Reasoning of Martin, the Appellant's Claim Fails.

i. The Appellant's Camping was Voluntary.

The City disagrees with Appellant's contention this Court should follow the erroneous and non-binding reasoning of Martin. However, this Court does not even have to decide that issue in this case, because even under Martin, Appellant's conviction must be affirmed.

In Martin, the Ninth Circuit explicitly stated: "Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside." (Emphasis in original.) 920 F.3d at 617.

Appellant is not arguing the ordinance itself is unconstitutional but that it is unconstitutional as applied in Mr. Wiemold's circumstances. However, a close review of these circumstances reveals that Mr. Wiemold's conduct was a result of his choice and it was well within his power to conform his behavior to the law.

Mr. Wiemold was employed full time with a working vehicle and was camping to get out of debt in his own words. That is not a necessity of life. Further, Mr. Wiemold chose employment by an employer who prohibits him from utilizing shelter space. Appellant states he had no choice, yet he had many choices. He could prioritize housing over his decision to pay-off his self-incurred

debt. He could drive to Loveland and stay in one of the many shelters there. Or he could drive a mere mile or two outside the City, and legally camp.

This case is not an instance of a person having no other options, but rather a perfect example of making choices in knowing violation of the law. The ordinance here punishes conduct, not status. And the ordinance here is not punishing Mr. Wiemold's status either, it is simply punishing him for making choices violative of the City's no-camping ordinance.

a. As-Applied Challenges are Analyzed under the Individual's Specific Factual Situation.

Appellant characterizes his Eighth Amendment claim as an as-applied challenge requiring analyzing the specific facts surrounding his particular situation. And, Appellant encourages this Court to adopt a definition of involuntariness defying both common sense and every definition generally used for the term and to ignore his actual circumstances to effectuate a blanket rule. As an as-applied challenge, Appellant's claim also still fails.

In an as-applied challenge, "to show that a facially constitutional statute is unconstitutional as applied to a particular individual, the individual must develop facts at trial that show why his interest should overcome the determination of Congress and the President that the conduct be proscribed." United States v. Goings, 72 M.J. 202, 207 (C.A.A.F. 2013). "[A]n as-applied challenge is specific to the facts of the particular individual involved in the suit." Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1311 (Fed. Cir. 2008).

b. The Court Should Adopt the Commonly Understood Definition of Involuntary.

Appellant argued to the municipal court if it adopted "the City's novel and sweeping expansion of the voluntariness inquiry, there would be no logical stopping point…." (*See* OB, at 50). However, to adopt Appellant's definition of voluntariness is to abandon logic and common sense entirely. The starting point is the facts of the individual case as this standard (if as-applied)

would be applied on a case-by-case basis. This again highlights the Appellant's desire for a sweeping rule applicable to many cases rather than a detailed analysis of Appellant's specific and individualized factual circumstances.

Merriam-Webster Dictionary defines involuntary as: "(a) Done contrary to or without choice; (b) Compulsory; (c) Not subject to control of the will: reflex." Cambridge Dictionary defines involuntary as "not done willingly; not done intentionally." Here in Colorado, the Colorado Supreme Court's model jury instructions for criminal cases defines a voluntary act as one "performed consciously as a result of effort or determination." COLJI-Crim F:391.

Contrarily, the Appellant's definition is essentially that his conduct is involuntary if there is one specific choice unavailable to him and asks the Court to ignore the actual meaning of involuntariness and the multiple options Appellant actually had available to him. Following this reasoning, if a person is drunk and tries Uber but it cannot be accessed because the person's credit card is rejected, he is driving home drunk involuntarily. If the bathroom at Starbucks is occupied and a person needs to urinate, they can do so on the floor of the store and it is involuntary. This is ludicrous. The simple truth is that if there are options available other than breaking the law, even if they are not a person's preferred options, the person is not involuntarily breaking the law.

Under the Appellant's proposed definition, every student at Colorado State University (which has over 33,000 students) could decide to camp. The City would never have enough shelter space for them, and their behavior would be "involuntary." A millionaire with a six-bedroom house could decide to camp and if shelters are full, it is involuntary. A citizen could decide he wants to test out his new tent and camping equipment in City Park and if shelters are full, it is involuntary. In fact, a homeless person could decline to even seek shelter at one of the available shelters and if it was "full" there could be no prosecution even if the shelter would have made

space for them. These examples are endless and demonstrate Appellant's attempt to put blinders on the Court in analyzing voluntariness is absurd.

In fact, Appellant's proposed interpretation flies in the face of the whole premise of an as-applied challenge. While purporting to be about Appellant's specific circumstances, Appellant asks the Court to adopt the rule all people are involuntarily camping when shelters are full, without regard to the person's actual situation. (*See* OB, at 15). The Appellant testified he did not, and had never, sought a bed at a shelter. (Tr. 29:13-15; 30:2-4; 46:13-18; 49:6-8). Thus, in Appellant's individual circumstances, the fact of whether the shelters were full or not is irrelevant. Mr. Wiemold said he did not go to the shelter because of his job. The same job that paid him enough to rent a room had that been his priority.

Mr. Wiemold argues he cannot go to the shelters because he works at one. Another person will say, "I cannot go to the shelters because I have a pet" or "I cannot go to the shelters because of my mental health problems." The millionaire will say, "I am not paying for a house because I prefer to make my yacht payments and camp in my RV," or in the Appellant's suggested rule, will not even be asked why he or she chose to camp rather than stay at their home. The college student will say, "I prefer to pay for my bar tab on the weekends rather than pay rent."

Appellant claims "[n]one of the courts to hear this issue have required examining the reasons for which the individual became homeless," but this claim is highly misleading. (*See* OB, at 15). Many courts have analyzed the circumstances leading to homelessness as well as the individual's ability to secure housing outside of shelters.

In Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006), the court stated: "Appellants declarations **demonstrate they are not on the streets of Skid Row by informed choice.**" 444 F.3d at 1123 (emphasis supplied). Moreover, the court discussed each individual's

specific individualized circumstance, discussing jobs held, traumatic brain injury leading to homelessness, and noting that one "cannot afford a room at a[]…hotel" another had a "total monthly income" of food stamps and "$221 in welfare payments," a third "had not worked for approximately two years," and others received not enough assistance to afford hotels throughout the month. Id. at 1124-25. Going further, the court stated: "[u]ndisputed evidence in the record establishes that at the time they were cited or arrested, Appellants had no choice other than to be on the streets." Id. at 1137. The court detailed the reasons for the appellant's homelessness generally and the reasons for being on the streets on the night. Moreover, Martin itself states it does not apply where an individual has the means to secure shelter. Appellant's suggestion no such analysis is appropriate is both wrong and disingenuous.

Interestingly, Powell also supports this position. The concurrence decided as it did specifically because the Appellant did not demonstrate he had no other choice. Powell, 514 U.S. at 552-53 (White, J. concurring) ("Whether or not Powell established that he could not have resisted becoming drunk on December 19, 1966, nothing in the record indicates that he could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street. Indeed, the evidence in the record strongly suggests that Powell could have drunk at home and made plans while sober to prevent ending up in a public place.").

The question is whether, at the time of the citation, Appellant had a choice. The Court does not need to inquire into why he initially became homeless or analyze Appellant's history. As an as-applied challenge, each issue to be determined, including voluntariness, is specific to the Appellant's individual circumstances. Nevertheless, Appellant's multiple "what if" arguments in

his brief reveal the true nature of his challenge – he wishes to invalidate the City's no-camping ordinance as applied to everyone, not just the Appellant.

ii. The Appellant Did Not Establish There Was No Available Indoor Shelter.

Appellant did not actually establish he could not have obtained shelter on the night of September 11, 2018. A failure to develop an adequate factual record upon which a finding can be made is fatal to an as-applied challenge. This Court simply does not have the evidence before it to determine whether there was available shelter. The record deficit is attributed to Appellant as it is his burden, not the City's. Nothing in the record exists regarding whether the FCRM would have opened another bed for the Appellant because he did not go there. There is no evidence in the record regarding the status of the Appellant's bank account on the date of the offense. There is simply no testimony of Appellant seeking indoor shelter and being unable to obtain it.

IV. THE CAMPING ISSUE IS A POLICY DECISION BY THE LEGISLATIVE BODY OF THE CITY AND THE COURT SHOULD NOT INTERFERE WITH THEIR JUDGMENT BECAUSE OF THE SEPERATION OF POWERS DOCTRINE.

Courts have long held that issues of political, social and economic policy are generally non-justiciable and that constitutional principles of separation of powers require courts to exercise judicial restraint. "Just as most legislation is a compromise between opposing views of public policy, the courts must be ever alert not to sit as a superlegislature [] in weighing the wisdom of legislation or in striking down state laws, regulations or customs because they may be out of harmony, unwise or improvident with a particular philosophy or school of thought." Powers v. Mancos Sch. Dist. Re-6, Montezuma Cty., 539 F.2d 38, 44 (10th Cir. 1976); North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U.S. 156 (1973); Ferguson v. Skrupa, 372 U.S. 726 (1963).

Appellant's claim is nothing more than a thinly-veiled policy argument cloaked in constitutional window dressing. Appellant's advocates have long fought to establish right-to-rest provisions in law and failed to convince elected bodies in Colorado to adopt those policy preferences.[6] The Court should not allow itself to be used as an end-run around the proper fora for this argument: the Colorado General Assembly, the Fort Collins City Council and the state and City voters.

The Fort Collins City Council passed its current ordinance prohibiting camping in public in 2006. In doing so, the Council specifically found "camping within the City, except as permitted under the City Code, is a nuisance and should be prohibited since unregulated camping poses a health and safety threat to the citizens of the City due to sanitation, noise and other behavioral issues…." Further, it found the ordinance is "in the best interest of the City and promote the public health, safety and welfare of the citizens of the City of Fort Collins."[7]

Having failed to convince the lawmakers and voters, the Appellant's advocates now ask this Court to substitute its judgment for the City Council and its constituents and to dictate to the City their policy preferences, something this Court should not do.

V. NOT SELECTIVE ENFORCEMENT

a. Standard of Review – Rational Basis

[6] In fact, bills attempting to statutorily preempt camping ordinances have been introduced, and failed, here in Colorado in 2015 (HB15-1264), 2016 (HB16-1191), 2017 (HB17-1314), 2018 (HB18-1067), and 2019 (HB19-1096). Last year, Denver voters rejected a ballot measure, Initiative 300, to allow camping in the city. Appellant's advocates endorsed the measure stating it would "end[] the Denver camping ban…." See, https://www.denverpost.com/2019/05/07/camping-ban-denver-homeless-initiative-300/. The measure was defeated with 82.8% of voters voting against it. Frustrated by their inability to convince the lawmakers and voters, Appellants' advocates now turns to the courts, asking them to override the will of the people and their elected representatives.

[7] https://citydocs.fcgov.com/?cmd=convert&vid=3&docid=1037116&dt=ORDINANCE&doc_download_date=DEC-19-2006&ORDINANCE_NO=199.

Ordinances prohibiting camping, similar to the one at issue, have frequently been challenged without success. Initially, Appellant states correctly if he establishes **both** discriminatory effect and discriminatory intent, the burden shifts to the City to show the action was not discriminatory.

Appellant's problem is he has not and cannot establish any part of his Equal Protection selective enforcement claim. Not only does the evidence contradict the claim, but Appellant fails to establish even the most basic part of his premise: he did not and cannot establish all the individuals who **were** cited were homeless, nor can he show there were similarly situated persons who were not cited. Appellant also fails to provide evidence of discriminatory intent on the part of officers, and even if he were to establish these things, he cannot show that there is not a rational basis for the enforcement decision.

A. The Appellant Cannot Show Discriminatory Effect Because He Cannot Establish that Everyone Cited Was Homeless or that Similarly Situated Persons Were Not Cited.

The standard for a selective prosecution claim is "a demanding one." United States v. Armstrong, 517 U.S. 456, 463, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687 (1996); United States v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006). The requirement the Appellant show similarly situated people is absolute. Armstrong, 517 U.S. at 467. "To establish discriminatory effect in a motion for discovery on a selective enforcement claim…, the Appellant must provide credible evidence that a similarly situated individual … could have been subjected to the same law enforcement action as the Appellant, but was not." People v. Valencia-Alvarez, 101 P.3d 1112, 1116 (Colo. App. 2004) (citing Armstrong, 517 U.S. at 465); United States v. James, 257 F.3d 1173, 1179 (10th Cir. 2001).

Although the record supports other individuals in the same parking lot were cited that day, there is no evidence that the other individuals were homeless. Officer Avinger repeatedly testified he did not know the housing status of those cited. (Tr. 102:1-15; 110:17-21: 125:10-11; 137:3-5).

Other than Mr. Wiemold, the record lacks evidence of anyone else's housing status (parked in either the 12-hour truck parking lot or the 2-hour car parking lot). Appellant presented no evidence concerning the other summonses issued that day. Thus, Appellant now must argue the lower court erred by not extrapolating from the fact he was homeless on the date at issue to the conclusion that the other people in the parking lot who were cited that day were also homeless.

Further, Appellant claims truckers were at the rest stop and were "presumably" engaged in the same activity thereby making them similarly situated. (Appellant's Br. p. 16). However, there is no supporting evidence in the record. Appellant asks the Court to engage in multiple levels of speculation, requiring this Court assume:

a. That there were truckers in their trucks at the time of enforcement;
b. That these truckers were sleeping; and
c. That these truckers were not homeless.

We know none of these things for certain based on the actual factual evidence developed at the hearing. While trucks were present in the 12-hour parking lot, no evidence exists concerning when any truck arrived or if any truck was there all night. Appellant has not identified a single individual person present that morning other than himself and the police officers. No one saw any trucker sleeping in a truck or arriving at the truck parking lot at night and staying until the morning. A person was apparently seen walking in the truck area in the video, but there is no way of knowing whether this was a trucker or someone else and, in any event, the person was obviously not sleeping at the time of enforcement. The person might have arrived at the rest area 15 minutes before the enforcement or 15 hours. The trucks seen in the video similarly might have arrived at any time. Appellant argues it is "almost certain" that "at least some" of the truckers spent the night. (*See* OB,

at 16).[8] Almost certain some unidentified person probably engaged in the same activity does not meet the high standard required and does not factually establish a similarly situated person against whom the ordinance was not enforced.

In addition, the claim the truckers were similarly situated is especially tenuous when it comes to their housing status. Appellant was employed full-time yet homeless. The Court cannot assume any truckers who may have been in their trucks and may have been sleeping were also otherwise housed. There was not a scintilla of evidence showing the "presumed" and "argued" truckers' housing status was different from Appellant's own status.

Appellant's closing arguments claim Appellant testified the same trucks were present both when he arrived around midnight and when he awoke at dawn. (Appellant's Post-Hearing Brief, at 11). This is untrue. Mr. Wiemold admitted he could not be sure whether any one particular truck was there at the time he went to sleep and the time he awoke. (Tr. 30:7-11; 50:20-51:9). He could not testify as to how many trucks were there and did not see anyone in them. Appellant repeatedly states police chose not to contact truckers who were sleeping, however, no evidence was introduced any truckers **were** sleeping in their trucks and the burden to establish this fact is Appellant's, not the City's.

No one has any idea how many (if any) people were inside the trucks. Nor does anyone know what they were doing. They might have been sleeping. They might have been watching television, talking on the phone, playing cards, reading a book, eating breakfast, or any other of a number of conceivable things. There simply is no evidence of what, if anything, they were doing

[8] It is axiomatic argument of counsel is not evidence. ***City of Fountain v. Gast,*** 904 P.2d 478, 482 n. 5 (Colo. 1995); ***People v. Pesis,*** 536 P.2d 824, 826 (Colo. 1975). Thus, this Court must focus on the actual evidence presented by Appellant, not on the speculative and unsupported arguments of counsel either before the lower court or this Court on appeal.

in their trucks at the time of enforcement. Accordingly, no basis exists to conclude any of the purported truckers were similarly situated to Appellant.

Notably, Appellant does not even argue there was any evidence the truckers were not homeless. Appellant refers to "presumably housed truckers" in his brief. (OB, at .42). But the Court cannot simply presume a material fact without evidence. Since no trucker was identified, there is no way to know whether any of them were not homeless. Similarly situated analysis requires proof the person is not in the same class of persons who could have been ticketed but was not.[9] Appellant has not and cannot establish any truckers were there, sleeping in their trucks and were not homeless and, therefore, part of the same class of persons as the Appellant.

Moreover, the truckers are not similarly situated for another important reason. The truckers were not parked in the same parking lot. There are two separate parking lots with differing regulations. Appellant glosses over the separation of these lots, but ignoring unhelpful facts does not make them go away. The 12-hour parking lot is a separate space and individuals parked there are not similarly situated to Appellant who was parked in the 2-hour car parking lot.

Appellant states, without citation to the record, that four other homeless individuals received citations the same day as Mr. Wiemold. (OB, at 17). He points to no facts in the record establishing any other homeless individual received a citation. In fact, Officer Avinger testified the individuals receiving citations were "[n]ot necessarily homeless" that he was "not sure" of the housing status of individuals. (Tr. 102:1-16; 110:17-21; 125:10-11; 137:3-5). There was no testimony about any other tickets issued or the housing status of any other ticket recipients, nor was there any witness that testified to also being there and receiving a ticket.

[9] Appellant also did not demonstrate that the other people who were cited were, in fact, homeless. An assumption they were homeless does not make it so.

Moreover, one part of the analysis relating to discriminatory effect is whether that effect is a result of legitimate factors related to enforcement priorities, enforcement resources, and deterrence value. E.g. U.S. v. Lewis, 517 F. 3d 20 (11th Cir. 2008); U.S. v. Olvis, 97 F.3d 739, 744 (4th Cir. 1996); U.S v. Magana, 127 F.3d 1, 9 (1st Cir. 1997); United States v. Lewis, 517 F.3d 20, 27 (1st Cir. 2008). Here the testimony established there were six officers involved in the enforcement, working in teams of two for safety. Officer Avinger testified they previously used resources to enforce the camping ordinance in the truck parking lot and it seemed to have abated. At the time of this enforcement, officers were seeing more litter and camping-related issues in the car parking lot. In looking at the City's Exhibit A from the hearing, it is clear enforcement in both parking lots at the same time would have been difficult for just six officers, given the distance between them and the number of contacts they would need to make.

When we look at these three things: resources, prioritization, and deterrence value, it is clear the alleged truckers are not similarly situated to the Appellant. Resources are limited and, therefore, the officers must use discretion in determining their allocation. Priorities, including making the rest area safer and cleaner and addressing the ongoing issues in the car parking lot, were appropriately set. And finally, deterrence value would be much greater in citing those camping in cars and vans in the car parking lot versus citing truckers who were passing through the area. Officer Avinger testified they made many changes to deter camping and went to the area on multiple occasions to warn and get the word out that camping was not permitted in that location. It appeared to deter camping in the truck lot but not in the car lot, making further enforcement in that lot necessary.

B. The Appellant Failed to Establish Discriminatory Intent.

Initially, only the intent of the enforcing officers is relevant. The officers issued the citation and the claim is selective enforcement, not selective request for enforcement, so CDOT's intent in asking for police assistance is irrelevant. The intent of the "decisionmaker" is at issue. United States. v. Mesa-Roche, 288 F.Supp.2d 1172, 1192 (D. Kan. 2003). That case went on to note, "[t]o establish discriminatory intent, the Appellant must produce some evidence tending to show that **the law enforcement officer** acted with discriminatory purpose…." Id. (Emphasis added.)

Appellant has not and cannot establish discriminatory intent of FCPS. Despite multiple efforts to put words into Officer Avinger's mouth, Officer Avinger clearly and repeatedly reiterated he did not know, nor did he care, about the housing status of the individuals receiving citations that day. A few examples:

Q: And that this was targeted toward people that were believed to be homeless and staying there. Correct?

A: Targeted toward people who were staying there, camping there. (Tr. 102:25-103:2).

Q: When Mr. Mansfield sent you those (inaudible) you believe he was complaining that these people were homeless and living in the parking lot.

A: I believe he was complaining that these people were there a lot and causing problems for the rest area and problems for him.

Q: Did you believe that these people were not homeless?

A: I don't – I had no idea. I don't know their homes. (Tr. p. 107:11-16).

Q: And the people who you gave summonses to you believe were homeless.

A: Not necessarily. (Tr. p. 125:10-11).

The only question for the Court here is whether the officers, in making the decision to initiate an enforcement action in the car parking lot, did so with discriminatory intent. They did not. Despite the repeated effort to lead Officer Avinger into testifying housing status had anything to

do with his decision to deploy a FCPS neighborhood enforcement team at the rest area that morning, Officer Avinger unequivocally and repeatedly testified he was responding to ongoing issues he witnessed in the area and complaints from the property owner without regard to the housing status of anyone. He further testified this was a standard procedure, employed in similar situations such as noise enforcement when parties are happening regularly and trespass enforcement when property owners complain it is happening regularly.

Discriminatory intent requires "more than an intentional act done with knowledge of the … impact…." Id. at 1192. Simply put, the law enforcement officer must undertake the action "because of" the discriminatory effect. Id.; see also, McCleskey v. Kemp, 481 U.S. 279 (1987).

Appellant claims "the only vehicle (other than the green minivan) to ever be parked at the rest area two days in a row was a truck, not a vehicle belonging to a homeless person." (OB at 25). However, even if it was the same truck (which was not established), Mr. Mansfield rarely took photos two days in a row and testified he usually did not take a photo the first time he saw a car – only if he saw it repeatedly. He also testified when trucks broke down and remained in the parking lot, he took action to ensure they were removed.

C. The Enforcement had a Rational Basis.

Appellant admits that *if* he were able to show discriminatory effect *and* discriminatory intent, he would still have to show that there is no rational basis. But, to even get to the rational basis question, Appellant must first show both discriminatory effect and discriminatory intent. If he fails on either of those prongs (and he has failed on both as discussed *supra*), the Court need not inquire further.

Rational basis requires a legitimate government purpose and a rational basis for the government to believe the legislation furthers that purpose. Importantly, under a rational basis

analysis, the government's action is entitled to a strong presumption of validity. This presumption is so strong that courts are to be a "paradigm of judicial restraint" in analyzing the government's rational basis. Joel v. City of Orlando, 232 F.3d 1353, 1358 (11th Cir. 2000) (*citing* F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 314–315 (1993) (*citing* Lyng v. Int'l Union, United Auto., Workers, 485 U.S. 360, 370 (1988)).

The rational basis test, which is often characterized as "a paradigm of judicial restraint" is not a license for the courts to judge "the wisdom, fairness, or logic of legislative choices." Federal Communications Commn. v. Beach Communications, Inc., 508 U.S. 307, 313–314 (1993). Moreover, the legislature is not required to "actually articulate at any time the purpose or rationale supporting its classification." Nordlinger v. Hahn, supra, at 15.

In Joel, the Eleventh Circuit specifically found that a camping ordinance "easily survive[d] rational basis review," noting that prohibiting camping served the legitimate government purposes of promoting aesthetics, sanitation, public health, and safety. Id. at 1358-59. There is no question the City's no-camping ordinance itself has a rational basis.[10]

The question of whether the decision to enforce in the car lot and not the truck lot had a rational basis is also easily decided. Officer Avinger specifically testified there were previous enforcements in the truck lot. The issues associated with camping had abated in the truck lot as a result. Officer Avinger further testified he saw issues increase in the car parking lot. There was substantial damage to the rest area in the preceding months and Mr. Mansfield testified to seeing people sleeping in the lobby and bathrooms as well as observing a man bathing in the sink. Based

[10] In fact, courts have repeatedly held no-camping ordinances constitutional even under a First Amendment strict scrutiny standard. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); Watters v. Otter, 955 F.Supp. 1178 (D. Idaho 2013).

on these circumstances, the decision to deploy a six-officer enforcement team in an area where officers reasonably believed people to be long-term camping was eminently reasonable.

Contrary to Appellant's assertion, the question is not whether Appellant did anything specifically related to the government's purpose. That is irrelevant. The only inquiry is whether there was a legitimate purpose (looked at with great deference) and whether the action was rationally related to that interest. Lyng v. Int'l Union, United Auto., Workers, 485 U.S. 360, 370 (1988).

Mr. Mansfield testified to people sleeping in the lobby and stalls of the restroom, to damage far and beyond that which would be incurred by the use of the rest area as designed (sinks pulled off of walls, flushed needles, and feces outside of the facilities). He further testified to walking into the restroom and seeing a person bathing in the sink, naked. Trash bins were routinely filled with substantial amounts of trash, littering was rampant and toilet paper frequently stolen. The rest area had trouble keeping contract maintenance people on the job because of the conditions. (Tr. 81:20-82:15). Officer Avinger testified these issues were centered on the car parking lot, not the truck parking lot. (Tr. 136:2-9; 137:1-2).

Appellant's Opening Brief lacks supporting cases in his rational basis argument. (OB, at 20-21). This is because courts have consistently and repeatedly found there is a rational basis for government regulation of camping. Homelessness is not a protected class nor is camping a constitutionally protected activity. The reasons underpinning the enforcement of the camping ordinance at this particular location are quite different than simply saying the people were problematic. The rest area was the location of reported and observed illegal activity on a repeated basis. The enforcement took place in the specific and identified location where the trash was accumulating and where people appeared to be violating the ordinance. It was conducted without

regard to status. Citations were issued to each person for whom probable cause was found without regard to housing status or any other sort of status.

CONCLUSION

Under no manner of analysis can Appellant prevail on either of his claimed bases for overturning his conviction. First, the Eighth Amendment claim is truly a facial challenge regardless of its as-applied characterization and under the facial challenge analysis there are certainly circumstances under which the ordinance could be constitutionally applied and, therefore, this claim fails.

Second, even under an as-applied analysis, using the proper precedent holding conduct may be criminalized and status may not, the claim fails because the City's no-camping ordinance criminalizes only the conduct of public camping. And third, even if this Court were to adopt the novel and unsupported voluntariness standard from the Ninth Circuit in Martin, the Eighth Amendment claim fails because the Appellant camped voluntarily.

Similarly, respecting Appellant's Equal Protection selective enforcement claim, Appellant has not and cannot demonstrate either discriminatory effect or discriminatory intent, much less overcome the rational basis review of the enforcement action that took place here. The record before the lower court and this Court on appeal is devoid of any such evidence.

Ultimately, what Appellant and his advocates truly seek is to obtain from the Court is a judicially-dictated policy change. After seeking support from lawmakers and voters alike, and failing to garner that support, they now ask the Court to override the will of the people and the policy decisions of the people's elected representatives. The Court should decline to do so.

For these reasons, the Court should affirm the judgment of the municipal court and the Appellant's conviction for violating the City's no-camping ordinance.

DATED: May 20, 2020.

Respectfully submitted,

CITY OF FORT COLLINS, COLORADO

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CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **APPELLEE'S RESPONSIVE BRIEF** was filed via the Colorado Courts E-Filing System and served this 20th day of May 2020, on the following:

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[The original certificate of electronic filing signed by Cary J. Carricato is on file at the Fort Collins City Attorney's Office)