

Municipal Court, Fort Collins, Colorado 215 N. Mason, 1 <sup>st</sup> Floor Fort Collins, CO 80524	<p style="text-align: center;">σ COURT USE ONLY σ</p>
PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. Adam Wiemold, Accused	
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<b>MOTION TO DISMISS</b>	

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

**SUMMARY OF ARGUMENT**

1. On the morning of September 11, 2018, multiple Fort Collins Police Services (FCPS) officers converged on the Colorado Department of Transportation (CDOT) Poudre rest area, located at East Prospect Road and I-25. Their target: homeless individuals committing the “crime” of sleeping overnight in their vehicles. Their plan: issue tickets or orders to move on.

2. FCPS Officer Knudsen issued a citation to Adam Wiemold for violating Fort Collins Municipal Ordinance 17-181, titled “Camping on public property – restricted.” When police found Mr. Wiemold, he was simply sleeping in the back of his truck. Mr. Wiemold was homeless and had no choice but to sleep outdoors that night. Because Mr. Wiemold works as a supervisor at homeless shelter in Fort Collins, he is unable to stay in a shelter there as a guest without grossly violating

professional boundaries. Moreover, on the night of the enforcement action, there were no open beds in the two Fort Collins shelters in which Mr. Wiemold theoretically could have stayed.

3. During the enforcement action, FCPS enforced the camping ordinance only against homeless persons, while leaving commercial truckers sleeping in their vehicles undisturbed. FCPS ticketed five homeless people but did not approach the trucks or issue any citations to truck drivers engaged in precisely the same conduct as the people experiencing homelessness.

4. The pending charges against Mr. Wiemold must be dismissed because the citation was issued in violation of the United States and Colorado Constitutions. First, issuing Mr. Wiemold a camping citation when he had nowhere indoors to sleep is cruel and unusual punishment in violation of the Eighth Amendment and article II, § 20 of the Colorado Constitution. Second, enforcing the ordinance against homeless individuals like Mr. Wiemold, but not against non-homeless individuals engaged in precisely the same conduct, is selective enforcement that violates the Fourteenth Amendment.

## **FACTS**

### **I. Adam Wiemold's Living Situation on September 11, 2018**

5. On September 11, 2018, Mr. Wiemold was homeless. Although he works a full-time job as the shelter supervisor at Catholic Charities, one of the two main homeless shelters in Fort Collins, Mr. Wiemold had, for some time, been unable to afford a place to stay.

6. As the shelter supervisor, Mr. Wiemold manages shelter staff and interacts with homeless individuals staying at the shelter, including managing lunch services, assigning chores, enforcing the rules, disciplining guests, and addressing appeals from guests who disagree with a shelter rule.

7. As a shelter employee, Mr. Wiemold was prohibited from staying at a homeless shelter in Fort Collins. There are two shelters in Fort Collins where Mr. Wiemold could hypothetically have stayed, Catholic Charities and the Fort Collins Rescue Mission.<sup>1</sup> Mr. Wiemold was not eligible to stay at Catholic Charities because shelter policies prohibit staff from receiving services at the shelter.

8. Mr. Wiemold was unable to stay at the Rescue Mission because Catholic Charities policies also bar staff from initiating outside contact with clients. The two shelters' populations overlap, as many homeless individuals will stay at either shelter depending on availability or go to Catholic Charities for lunch while staying at the Rescue Mission. Staying at the Rescue Mission would mean staying with clients, including clients whom Mr. Wiemold may have disciplined or removed from Catholic Charities.

### **II. Insufficient Shelter Space for Fort Collins' Homeless Population**

9. Even if Mr. Wiemold's job did not prevent him from staying at a shelter, there were no open beds in any available shelter in Fort Collins on the night of September 10, 2018. Catholic Charities

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<sup>1</sup> Mr. Wiemold was not eligible to stay at either of the two other shelters in Fort Collins. Faith Family Hospitality only serves families and Crossroads Safehouse only serves victims of abuse. Mr. Wiemold does not have any children and is not a victim of abuse.

had reached capacity and had turned away one person seeking shelter. Fort Collins Rescue Mission was also full.

10. This night is emblematic of the general issue of insufficient shelter space for Fort Collins' homeless population. While there are more than 375 individuals experiencing long-term homelessness in Fort Collins, there are only 266 shelter beds in the city.<sup>2</sup>

### III. The Poudre Rest Area

11. The Poudre rest area is located at East Prospect Road and I-25. The rest area is operated by the Colorado Department of Transportation (CDOT).

12. The rest area has two parking lots adjacent to one another. One lot is dedicated to trucks and RVs, the other to passenger vehicles. People regularly sleep and rest overnight in their vehicles in both lots.

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<sup>2</sup>Fort Collins has four homeless shelters: Catholic Charities, Fort Collins Rescue Mission, Faith Family Hospitality, and Crossroads Safehouse. Catholic Charities has beds for 18 men, 6 women, and 4 families in its permanent shelter; beds for 24 men and 4 women or families in its emergency overflow shelter; and beds for 16 men in its veterans' program. The Mission Shelter, Catholic Charities, <https://ccdenvver.org/larimer-county-services/the-mission-in-fort-collins/> (last visited Mar. 1, 2019). Fort Collins Rescue Mission has space for up to 90 men or women each night. Denver Rescue Mission, *Fact Sheet: Fort Collins Rescue Mission*, [https://www.denverrescuemission.org/sites/default/files/u113/FS\\_FCRM\\_rev01-19-18.pdf](https://www.denverrescuemission.org/sites/default/files/u113/FS_FCRM_rev01-19-18.pdf) (last visited Mar. 1, 2019). Faith Family Hospitality can accommodate up to four families each night, for a total of 22 parents and children. Family Housing Network of Fort Collins, *Our Programs*, <http://www.faithfamilyhospitality.org/our-programs/#1521279252381-274337fd-c199> (last visited Mar. 1, 2019). Finally, Crossroads Safehouse has 104 beds for adults and children who have experienced domestic abuse. Therefore, in total, Fort Collins can shelter approximately 266 people on a given night. In contrast, there are at least 375 individuals experiencing long-term homelessness in Fort Collins. See Housing First Initiative: Addressing Long-Term Homelessness, Homeward 2020, <http://www.homeward2020.org/data-dashboard/> (last visited Mar. 1, 2019) (counting 375 individuals experiencing long-term homelessness in Fort Collins). As this does not account for people experiencing short-term homelessness, the number of homeless individuals itself on a given night is likely higher. *Id.* (stating that “[t]his dashboard does not provide data on all persons experiencing homelessness, but focuses on individuals experiencing chronic and long-term homelessness”).



#### IV. FCPS's September 11 Enforcement Action against Homeless People

13. It is beyond dispute that the exclusive target of the enforcement action was people experiencing homelessness.

14. Prior to the planned enforcement action, FCPS Officer Chip Avinger communicated via text message with CDOT employee Wes Mansfield regarding homeless people at the rest area. Mr. Mansfield complained that homeless people were at the rest area and sent Officer Avinger pictures of cars parked at the rest area that he claimed belonged to homeless individuals. Mr. Mansfield repeatedly asked Officer Avinger to force homeless individuals to leave the rest area permanently.

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

16. During the raid, FCPS officers exclusively targeted homeless individuals for enforcement. Officers did not approach or speak with the commercial truck drivers, although the truck drivers were engaged in the precise behavior for which Mr. Wiemold was targeted—sleeping in a vehicle.

17. In the early morning hours of September 11, 2018, FCPS officers arrived at the rest area. Officers used their vehicles to block the exit from the passenger lot, so that cars parked in the lot could not leave. There were trucks present at the same hour that were clearly visible from the passenger parking lot. Inside the trucks there were almost certainly truckers inside engaged in the same behavior (sleeping) for which Mr. Wiemold was cited. Yet officers did not block the truck parking lot or approach any trucks. Instead, FCPS officers enforced the camping ordinance only against homeless individuals.

18. At 6:07 AM, Officer Knudsen approached Mr. Wiemold's vehicle, which was parked in a parking space, not blocking any other vehicle or any part of the rest area. Mr. Wiemold was sleeping in the back of his truck. Soon he would wake and leave the rest area in order to go to work at the Catholic Charities homeless shelter. Mr. Wiemold was not making any noise, disturbing anyone, littering, or doing anything to attract the attention of law enforcement. According to the discovery provided in Mr. Wiemold's case, FCPS had not received any complaints regarding Mr. Wiemold's car or his actions. Yet Officer Knudsen informed Mr. Wiemold that she was going to cite him for camping on public property.

19. Mr. Wiemold informed Officer Knudsen that he had no choice but to sleep outdoors. He explained that he could not stay in a shelter because he worked at a homeless shelter. Officer Knudsen still issued the citation.

#### **V. Fort Collins Municipal Ordinance 17-181**

20. Fort Collins Municipal Ordinance 17-181, titled "Camping on public property—restricted," states:

It shall be unlawful for any person to camp or pitch a tent, or knowingly permit any person to camp or pitch a tent, on public property within the City. Camping, for the purposes of this Section, shall mean to sleep, spend the night, reside or dwell temporarily with or without bedding or other camping gear and with or without shelter, or to conduct activities of daily living such as eating or sleeping, in such place unless such person is camping in compliance with Chapter 23 in a natural or recreation area. Camping shall not include incidental napping or picnicking.

Fort Collins, Colo., Mun. Ord. § 17-181 (1972).

21. Based on the charges in this case, Mr. Wiemold faces a possible penalty of up to six months in jail and a fine of up to \$2,915. City of Fort Collins, *Misdemeanor Violations*, Fort Collins Mun. Ct., <https://www.fcgov.com/municipalcourt/misdemeanor.php> (last visited Mar. 1, 2019).

## ARGUMENT

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

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

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

24. Though this issue has not yet been the subject of a published decision in Colorado, other courts have followed *Robinson* and *Powell* to find that it is unconstitutional to punish homeless individuals for sleeping outdoors when they cannot access shelter. *See, e.g., Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018) (finding that “the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter,” including people who cannot access shelter for reasons aside from shelter capacity); *Cobine v. City of Eureka*, No. C16-02239 JSW, 2016 U.S. Dist. LEXIS 58228 at \*8 (N.D. Cal. Apr. 25, 2017) (denying a motion to dismiss plaintiffs’ claim that a law banning camping violated the Eighth Amendment because “[t]he Court finds persuasive those courts that have recognized a basis for an Eighth Amendment challenge to an ordinance proscribing conduct that may be involuntary”); *Anderson v. City of Portland*, No. 08-1447-AA, 2009 U.S. Dist. LEXIS 67519 at \*17-18 (D. Or. 2009) (denying a motion to dismiss plaintiff’s claim that a law banning camping and temporary structures was unconstitutional because plaintiffs “allege that the City’s enforcement of the anti-camping and temporary structure ordinances criminalizes them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property”); *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) (upholding a challenge to a law that banned “sitting, lying, or sleeping on public streets and sidewalks” because “the conduct at issue . . . is involuntary and inseparable from status” and “by criminalizing sitting, lying, and sleeping, the City is in fact criminalizing Appellants’ status as homeless individuals”); *vacated due to settlement, Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2006); *Pottinger v. Miami*, 810 F. Supp. 1551, 1562 (S.D. Fla. 1992) (finding for the homeless plaintiffs in their challenge to Miami’s policy and practice of arresting homeless individuals for “basic activities of daily life” conducted outdoors because it was impossible for such individuals to refrain from the violative conduct and the conduct was not harmful to themselves or others); *Johnson v. City of Dallas*, 860 F. Supp. 344, 351 (N.D. Tex. 1994), (noting that “as long as the homeless have no other place to be, they may not be prevented from sleeping in public”), *rev’d on other grounds, Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995) (reversing and

vacating the preliminary injunction because appellees did not have standing). Because homeless individuals are forced to live outdoors, criminalizing sleeping on public property criminalizes their status as homeless individuals. *Johnson*, 860 F. Supp. at 350 (“Because being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless for their status as homeless, a status forcing them to be in public”).

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

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

27. “[A]s long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.” *Martin*, 902 F.3d at 1048 (9th Cir. 2018); *see also Jones*, 444 F.3d at 1136 (noting that “[i]t is undisputed that, for homeless individuals in Skid Row who have no access to private spaces, these acts can only be done in public”).

#### **A. On September 11, 2018, Mr. Wiemold had no choice but to sleep outdoors.**

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

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

30. In *Martin*, homeless individuals sued the City of Boise for enforcing two ordinances restricting camping in public against unhoused people who slept or rested outside when they had

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

31. Like the *Martin* plaintiffs, Mr. Wiemold was homeless and had no choice but to sleep outdoors on the night he was ticketed. First, Mr. Wiemold is the shelter supervisor at Catholic Charities—staying in a shelter would mean sheltering with some of his clients and violating professional boundaries. Second, even if Mr. Wiemold could have stayed in a shelter without violating professional conduct rules, there were no open shelter beds on the night he was ticketed. No shelter was “practically available” for Mr. Wiemold on the morning of September 11. *Id.* at 1049.

**B. Mr. Wiemold could not stay in a shelter in Fort Collins because it would have violated Catholic Charities’ policies and violated professional boundaries.**

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

33. First, Catholic Charities prohibits staff from receiving services at the shelter. Staying there would cost Mr. Wiemold his job.

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

35. Sheltering with his clients would implicate Catholic Charities policies limiting outside interactions between shelter staff and homeless clients and threaten Mr. Wiemold’s authority in the eyes of his clients. Staying at a shelter with his clients would breach professional boundaries and hamper Mr. Wiemold’s ability to manage clients and enforce shelter policies.

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

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

37. Even if Mr. Wiemold were not employed at a shelter, the two shelters in Fort Collins at which he could have stayed were both full on the night of September 10, 2018.<sup>3</sup> Catholic Charities had reached capacity and turned away one person seeking shelter. Fort Collins Rescue Mission was also full.

38. When a city does not have enough shelter beds for its homeless population, it “cannot argue persuasively that the homeless have made a deliberate choice to live in public places or that their decision to sleep in the park as opposed to some other exposed place is a volitional act.” *Pottinger*, 810 F. Supp. at 1563. It is clear that on September 11, 2018 Fort Collins did not have enough shelter capacity to accommodate its homeless population and, specifically, was unable to accommodate Mr. Wiemold. Without the option of staying in a shelter, Mr. Wiemold had no choice but to sleep outdoors.

39. Based on the foregoing, this Court should find that citing Mr. Wiemold for sleeping on public property when he had no other place to go violates the Eighth Amendment and article II, § 20. “[A]s long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.” *Martin*, 902 F.3d at 1048. Because of the unavailability of shelter, Mr. Wiemold was engaged in the “involuntary, life-sustaining activit[y]” of sleeping at the public rest area. *Pottinger*, 810 F. Supp. at 1564. By citing and prosecuting him, FCPS and the City of Fort Collins are cruelly punishing Mr. Wiemold for his homeless status in violation of the Eighth Amendment and article II, § 20 of the Colorado Constitution.

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

40. FCPS’ enforcement of Ordinance 17-181 at the Poudre Rest Area on the morning of September 11, 2018 violated the Fourteenth Amendment, because FCPS officers intentionally targeted and enforced the ordinance against only homeless individuals and chose not to enforce against presumably housed truckers engaged in the same activity of sleeping. The Equal Protection clause of the Fourteenth Amendment mandates that “the decision to prosecute [or enforce] may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.” *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citing *Oyler v. Boies*, 368 U.S. 448, 456 (1962)).<sup>4</sup> Enforcement against people experiencing homelessness who have no choice but to sleep in their vehicle but not against truckers engaged in the same presumably illegal activity is a quintessential arbitrary classification.

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<sup>3</sup> Mr. Wiemold was not eligible to stay at either of the two other shelters in Fort Collins. Faith Family Hospitality only serves families and Crossroads Safehouse only serves victims of abuse. Mr. Wiemold does not have any children and is not a victim of abuse.

<sup>4</sup> Despite being two distinct claims, selective enforcement and selective prosecution claims “are generally evaluated under the same two-part test.” *United States v. Washington*, 869 F.3d 193, 214 (3d Cir. 2017).

41. To succeed on a selective enforcement claim regarding enforcement of a facially neutral statute, a defendant “must show both that the enforcement had a discriminatory effect and that it was motivated by a discriminatory intent.” *People v. Valencia-Alvarez*, 101 P.3d 1112, 1116 (Colo. App. 2004) (citing *Armstrong*, 517 U.S. at 465).

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

42. To demonstrate a discriminatory effect, the defendant must show “that a similarly situated individual . . . could have been subjected to the same law enforcement action as the defendant, but was not.” *Id.* at 1116.

43. When Officer Knudsen cited Mr. Wiemold, there were trucks parked at the rest area that could have been, but were not, subjected to enforcement under Ordinance 17-181.

44. FCPS officers arrived at the rest stop at approximately 6AM on September 11. At the time, there were several semi-trucks parked in an adjacent parking lot clearly visible from the area where FCPS officers were enforcing the ordinance against homeless individuals. Given the early hour and federal and state regulations requiring eight-hour rest periods between long driving stints, it is almost certain that at least some of the drivers of the trucks present at the rest area were “spending the night” in their vehicle in violation of Ordinance 17-181. *See, e.g.*, Dep’t of Pub. Safety, Colo. State Patrol, *Hours of Service (FMCSR Part 395)*, <https://www.colorado.gov/pacific/csp/hours-service-fmcsr-part-395>.

45. Ordinance 17-181 applies to all individuals within Fort Collins city limits. Any person who “sleep[s], spend[s] the night, reside[s] or dwell[s] temporarily with or without bedding or other camping gear and with or without shelter, or . . . conduct[s] activities of daily living” on public property violates the ordinance. Fort Collins, Colo., Mun. Ord. 17-181. When FCPS officers arrived at the rest area, the truck drivers in the truck lot were similarly situated to Mr. Wiemold and the four other homeless individuals who received citations—they were parked and remaining inside of their vehicles. However, officers blocked off only the exit from the passenger car lot, not the truck lot, and issued citations only to homeless individuals.

46. Unlike selective enforcement claims that rest on statistical evidence (which typically struggle to prove the existence of similarly-situated individuals), the claim in this case rests on an “easily identified and limited class” of similarly-situated individuals—the truck drivers. *United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1156 (D. Kan. 2004) (noting the issues with selective enforcement claims that rest on statistical evidence because of the difficulty of using statistics to prove the existence of such a similarly-situated class at the time of enforcement).

47. *Yick Wo v. Hopkins* is instructive. In *Yick Wo*, San Francisco had denied all 200 license applications by Chinese-owned laundries, while granting 89 out of 90 licenses applications by white-owned laundries. 118 U.S. 356 (1886). The Court held that San Francisco’s actions constituted unconstitutional selective enforcement because the petitioners had complied with every regulation and there was no non-discriminatory reason to deny the license. The Supreme Court found that this pattern of enforcement showed a discriminatory effect. *Id.* at 374.

48. Like *Yick Wo*, where all Chinese applicants were denied, this is not a case that requires line-drawing to determine whether enforcement was lopsided enough to be discriminatory. Officers issued citations only to homeless individuals and did not enforce at all against non-homeless individuals who were similarly situated and parked at the rest area on September 11. Like the white laundry owners in *Yick Wo v. Hopkins*, the truck drivers were excused from enforcement because they did not belong to the targeted class. *Id.*

49. By issuing citations only to homeless individuals when there were other individuals present and engaging in the same behavior as the homeless individuals, FCPS officers' enforcement had a plainly discriminatory effect on Mr. Wiemold.

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

50. Second, the defendant must show that the challenged enforcement action constitutes “intentional and purposeful discrimination.” *May v. People*, 636 P.2d 672, 681-82 (Colo. 1981). Such intent implies that “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.” *Wayte v. United States*, 470 U.S. 598, 610 (1985). Evidence of discriminatory intent may be direct or circumstantial. *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006).

51. There is strong evidence that FCPS officers went to the rest area on September 11 with the intent of enforcing the camping ordinance solely against homeless individuals.

52. First, FCPS Officer Chip Avinger's communications with CDOT employee Wes Mansfield demonstrate intent to enforce only against homeless individuals on September 11 because of their homeless status. On August 28, 2018, Mr. Mansfield sent a text message to Officer Avinger stating: “FYI, Chip we need to make a plan to meet at the rest area between 530 and 6 AM we had 12 the [sic] 15 Homeless there this morning here are some pics, let me know what you think.” The reference to “pics” referred to photos of vehicles parked at the rest area that Mansfield believed belonged to homeless persons. Officer Avinger responded: “Yeah, that's a great idea. I'll set that up and let you know.” On September 4, 2018, Officer Avinger sent a message to Mr. Mansfield stating: “I'm setting it up for next Tuesday morning,” which was the morning of September 11, 2018.

53. These text messages show that Officer Avinger arranged the enforcement on September 11 because of a message from Mr. Mansfield stating that there were homeless present at the rest area and showing pictures of vehicles allegedly belonging to homeless individuals. In his text message on August 28, Mr. Mansfield did not make any allegations of camping, behaviors that would violate Ordinance 17-181, or any other problems at the rest stop—just that the individuals were homeless.

54. In addition to the above message, Mr. Mansfield refers to homeless individuals in other messages to Officer Avinger, making it clear that he is asking for enforcement against them. On August 21, 2018, Mr. Mansfield sent Officer Avinger a message saying that there were homeless individuals parked in the passenger parking lot. And on September 26, 2018, Mr. Mansfield sent Officer Avinger a message saying: “Haven't heard from you in a while, as weather gets colder we have more and more homeless showing up at the rest area.”

55. These communications show that FCPS planned enforcement at the rest area because homeless individuals were present there, solely based on information that they were homeless. This is enforcement “‘because of,’ not merely ‘in spite of’” their homeless status. *Wayte*, 470 U.S. at 610.

56. Additionally, FCPS officers’ actions at the rest area reflect a planned enforcement action intentionally aimed solely against homeless individuals. FCPS officers blocked off only the exit from the passenger car lot and did not enter or block the truck lot, even though several trucks were present and clearly visible from the passenger car lot. Text messages from Mr. Mansfield told Officer Avinger that homeless individuals were parking in the passenger lot. Based on this information, FCPS officers targeted the portion of the lot most likely to contain homeless individuals.

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

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

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

59. There is no rational basis for enforcement against homeless individuals sleeping in their vehicle, but not against the truck drivers engaged in the same activity in the same location at the same time. When FCPS officers arrived at the rest area on September 11, Mr. Wiemold was in the same position as the truck drivers—inside his lawfully-parked vehicle. According to the discovery provided in Mr. Wiemold’s case, FCPS had not received any complaints regarding Mr. Wiemold’s car or his actions. Any legitimate interest that the City has in keeping Mr. Wiemold from resting inside of his vehicle at the rest area applies equally to truck drivers in their vehicles. Yet FCPS did not attempt to enforce against truck drivers.

60. Therefore, FCPS officers engaged in selective enforcement that is not rationally related to any legitimate government interest. By selectively enforcing Ordinance 17-181 only against homeless people, FCPS officers violated the Fourteenth Amendment.

Wherefore, for the above reasons, The City of Fort Collins may not prosecute Mr. Wiemold for violation of Ordinance 17-181. Mr. Wiemold therefore requests that this Court dismiss all charges against him in this case.



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Adam Frank, #38979  
Frank & Salahuddin LLC  
Dated: March 22, 2019

**Certificate of Service**

I hereby certify that on 3/22/2019, I served the foregoing document by emailing same to the Fort Collins City Attorney.

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JE\_\_\_\_\_



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Mark Silverstein, #26979  
ACLU of Colorado  
Dated: March 22, 2019



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Rebecca Wallace, #39606  
ACLU of Colorado  
Dated: March 22, 2019



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Hanna St. Marie, #52630  
ACLU of Colorado  
Dated: March 22, 2019