County Court, City and County of Denver, Colorado 520 West Colfax Avenue Denver, Colorado 80204	
THE CITY OF DENVER BY AND ON BEHALF OF THE PEOPLE OF THE STATE OF COLORADO v. JERRY BURTON, **Accused**	□ COURT USE ONLY □
KILLMER, LANE & NEWMAN, LLP Andrew McNulty, #50546 1543 Champa Street, Suite 400 Denver, Colorado 80202 Phone: (303) 571-1000 Fax: (303) 571-1001 amcnulty@kln-law.com	Case No. **19GS004399** Courtroom: 4A
MOTION TO DISMISS[1]	

Defendant, Jerry Burton, moves this Honorable Court to dismiss the charges filed against him for Unauthorized Camping, pursuant to D.R.M.C. 38-86.2 (hereinafter the "Camping Ban"), because continued prosecution violates the Fourteenth and Eighth Amendments to the United States Constitution and Article II, Section 20 of the Colorado Constitution.

1. **INTRODUCTION/FACTUAL BACKGROUND**[2]

[1] Defendant requests a hearing so that he may establish the factual basis for this Motion.

[2] Defendant alleges these facts, which are stated in the light most favorable to the Prosecution, for purposes of this Motion to Dismiss only. They do not constitute admissions and, should this Court deny Defendant's motion, Defendant reserves the right to present evidence to establish (or refute, as appropriate) the facts underlying this case at trial.

1.1 **The history and purpose of the Camping Ban.**

Denver enacted the Camping Ban in May of 2012. The Camping Ban criminalized individuals that "camp upon any private property without the express written consent of the property owner or the owner's agent, and only in such locations where camping may be conducted in accordance with any other applicable city law." The Camping Ban defined "camping" as "resid[ing] or dwell[ing] temporarily in a place, with shelter." The Camping Ban went on to define "shelter" as "includ[ing], without limitation, any tent, tarpaulin, lean-to, sleeping bag, bedroll, blankets, or any form of cover or protection from the elements other than clothing." Further, the Camping Ban defined the term "reside or dwell" to "include[], without limitation, conducting such activities as eating, sleeping, or the storage of personal possessions." Finally, the Camping Ban defined "public property" as "any street, alley, sidewalk, pedestrian or transit mall, bike path, greenway, or any other structure or area encompassed within the public right-of-way; any park, parkway, mountain park, or other recreation facility; or any other grounds, buildings, or other facilities owned or leased by the city or by any other public owner, regardless of whether such public property is vacant or occupied and actively used for any public purpose." From the outset, the ban specifically targeted homeless individuals and was aimed at pushing homeless individuals out of Denver. The history of the enactment of the Camping Ban is integral to understanding its purpose.

In July 2011, propelled by complaints about the homeless from his district, then-city councilman Albus Brooks made a trip to the 16th Street Mall at night. Wearing a hoodie and walking with his wife, he counted 178 homeless people on the mall. This trip inspired the future ban. Later, at a meeting with the Inter-Neighborhood Cooperation, Mr. Brooks would tell area representatives his wife and himself once discovered a homeless man sleeping in their garage

and that this also inspired him to seek passage of the Camping Ban. In October 2011, Mayor Hancock and Mr. Brooks both point to Mr. Brooks' July trip to the 16th Street Mall as the impetus for beginning the process of passing the Camping Ban. On March 27, 2012, it was publicly announced that the Camping Ban would be considered by the Denver City Council. Assistant City Attorney David Broadwell aided in crafting the language of the Camping Ban, which was sponsored by city councilmembers Jeanne Robb, Jeanne Faatz, Charlie Brown and Chris Nevitt (and lead by Mr. Brooks). In the days leading up the City Council's final hearing on the Camping Ban, Mr. Brooks stated to the Denver Post that "If we don't do something now, we are going to have a worse spring and summer than we have seen for a long time. . . I would hope we could do something strong enough to prevent individuals from laying out in front of people's businesses and prevent this tent city that has the opportunity to become a violent city . . . We need to put a law in place to prevent that[.]" Jeremy Meyer, *Denver May Pursue Law Cracking Down on Homeless*, THE DENVER POST, October 20, 2011, www.denverpost.com/breakingnews/ci_19160158. Councilman Charlie Brown, who also supported passage of the Camping Ban, stated that the Camping Ban's purpose was "to get [homeless individuals] off of our Main Street, and the 16th Street Mall is our Main Street… [w]e have to stand up for our businesses downtown and our women and children who are afraid to go downtown… [a]re we supposed to just give in?" *Id.*

On May 14, 2012, the City Council held a final vote on the Camping Ban. *See* **Exhibit 1**, *Audio From May 14, 2012 City Council Meeting*. The entirety of the City Council meeting focused on the Camping Ban's effect on the homeless population. During the meeting, those who voted in support of the Camping Ban expressed the purpose of the Camping Ban in explicit terms. Councilman Brooks stated that the City Council did not explicitly put provisions in the

Camping Ban that named Denver's homeless population because they were advised that they could not. But, he made it clear that the Camping Ban was, in fact, specifically targeting Denver's homeless population and that was clear based on the police training bulletins that were put into place to accompany the Camping Ban. Councilman Chris Herndon, who voted for the bill, remarked during the final vote that he supported the bill because Colorado Springs has had a ban in place for several years and had seen its homeless population decline. Later, Councilman Brown read letters from his constituents that demonstrated their disdain for Denver's homeless population. One letter that Councilman Brown read stated "it is a blemish on the city to see camping on the 16th street male. Do not let them [homeless individuals] to continue to tarnish the image of Denver." Another letter that Councilman Brown read stated "the homeless activity is turning the Golden Triangle into an open sewer." After reading the letters, Councilman Brown stated that he was voting for the Camping Ban because "it is time we change the culture of chaos in this city." It was clear from the hearing that the Camping Ban was specifically targeting homeless individuals and that the purpose of the Camping Ban was to drive homeless individuals from the City of Denver.

Since its enactment, Denver police have vigorously enforced the Camping Ban. The police report 12,000 camping ban contacts with homeless people between the summer of 2012 and January of 2019. Donna Bryson, *Enforcing Denver's camping ban: 12,000 encounters since 2012*, DENVERITE, March 22, 2019.[3] Denver police logged 5,055 individual camping ban "contacts" in 2016, and another 4,647 "contacts" in 2017 — "interactions that include, at a minimum, law enforcement telling someone violating the ban to pack their belongings and move

[3] Available at: https://denverite.com/2019/03/22/enforcing-denvers-camping-ban12000-encounters-since-2012/.

to another location." Chris Walker, *Denver Slightly Eased Enforcement of the Urban Camping Ban in 2017*, WESTWORD, January 5, 2018.[4] The number of move-on orders have also increased dramatically from the start of the camping ban's enforcement. From 2014 to 2017 there was a 475% increase in the number of individuals contacted through street checks pursuant to the camping ban, and a 539% increase in the number of overall street checks performed. Michael Bishop, *et al.*, *Too High A Price 2: Move On To Where?*, University of Denver Sturm College of Law: Legal Research Paper Series, p. 8 (May 2018).[5]

Since its enactment, the Camping Ban has been enforced almost exclusively against homeless individuals and there is little evidence that the Camping Ban has been enforced against more than a few non-homeless individuals. In fact, Denver police have turned a blind eye when it was obvious that those not experiencing homelessness violated the Camping Ban. Erin Powell, *Next Question: Why can people in Denver camp for whiskey, but not if they're homeless?*, 9NEWS (November 30, 2018) (reporting on a Stranahan's Whiskey release event where housed individuals camped for days on the streets outside of the distillery but were not cited for violating the Camping Ban).[6]

1.2 **Denver is currently experiencing an affordable housing crisis.**

While average wages have only increased 11.4% since 2011, Denver rents have increased over 50%, and are now 12.6% above national average. HUD data puts the Denver rental market

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[4] Available at: https://www.westword.com/news/denver-slightlyeased-enforcement-of-the-urban-camping-ban-in-2017-9853696.

[5] Available at: https://poseidon01.ssrn.com/delivery.php?ID=963020092123086110014086122075024073033078047010022006094075126002102114011027116007006058039044111113028125003081121064001101123082069048092110124069094109088031035093015123099101122110064009119123109113080121126030093026069070124110001007090120111&EXT=pdf.

[6] Available at: https://www.9news.com/article/news/local/next/next-question-why-can-people-in-denver-camp-for-whiskey-but-not-if-theyre-homeless/73-619242271.

in the top third of the priciest rental markets in America, and Colorado is among the top third of states for share of the workforce with a severe housing cost burden. *See* Center for Housing Policy, *Paycheck to Paycheck*, CENTER FOR HOUSING POLICY (2009).[7] As a result, in 2018, half of Denver's renters paid more than 30% of their income for housing; nearly a quarter paid more than 50% of their income for housing.[8]

More than 80% of low-income Denver renters have an unaffordable rent burden (paying more than 30% of their income for rent), and Denver needs an additional 25,647 low-income housing units to adequately shelter residents earning under $20,000 a year. *See* BBC Research and Consulting, *2006 Denver Housing Market Analysis*.[9] Between 2015-2017, the City of Denver only created 199 new housing units affordable to people below 30% of Area Median Income, though the city has 31,854 renter households at that income level, plus thousands of homeless residents. *See* Denver Office of Economic Development, *Housing and Inclusive Denver: Annual Action Plan*, (2018). Unfortunately, already inadequate low-income housing units are disappearing. Colorado housing units affordable to people making less than half of median income declined by more than 75% between 2010 and 2016 -- one of the biggest decreases in the country. *See* Lydia DePillis, *How Colorado Became One of the Least Affordable Places to Live in the U.S.*, CNN, (November 1, 2017).[10]

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[7] Available at: http://www.nhc.org/media/files/Rental_Rankings0809.pdf

[8] Kurt Sevits, "Report: More than half of Denver renters 'cost-burdened' but it's worse elsewhere in Colorado," The Denver Channel (7). September 25, 2018, https://www.thedenverchannel.com/news/our-colorado/report-more-than-half-of-denver-renters-costburdened-but-its-worse-elsewhere-in-colorado.

[9] Available at: http://mdhi.org/download/files/Final%20Housing%20Market%20Analysis%20111706.pdf.

[10] Available at: https://money.cnn.com/2017/11/01/news/economy/colorado-housing-prices/index.html.

These patterns have led to a homelessness crisis in Denver. Counting, on one winter day, only those homeless persons living in shelters, transitional housing, or in observable locations on the streets (and not counting those who might be in hidden outdoor locations, or "couch-surfing" temporarily with a friend), Denver's official "point-in-time" 2018 tally is that 3,445 people are without any kind of stable housing in Denver. *See* Metro Denver Homeless Initiative (MDHI), *Everyone Counts: Metro Denver's Point in Time Survey*, (2018).[11] And, official HUD data shows that Denver has the third highest rate in the national of homeless families with children having to live without any shelter at all, sleeping in cars, abandoned buildings, or on the street. *See* Department of Housing and Urban Development, *The 2018 Annual Homeless Assessment Report (AHAR) to Congress*, (December 2018).

Ultimately, homelessness is not a choice in Denver. The majority of people become homeless through loss of job, medical bankruptcy, mental illness, or domestic violence. **Exhibit 1**, *Expert Declaration of Dr. Anthony Robinson*, ¶ 6. As documented by the City of Denver's own official reports (such as the Denver area's annual Point in Time Surveys, and the "Denver's Road Home" reports of the Denver Homeless Commission), there are very few beds and inadequate support services available for large subpopulations of the homeless, such as the mentally ill, couples (especially gay couples), fathers with children, and youth. The established cultural bias that homelessness is an optional condition has been thoroughly debunked by social science research and by the City of Denver's own research.

1.3 **Denver has inadequate shelter space.**

In 2012, there were 12,605 homeless individuals residing in the Denver Metro Area, which is a sixty percent growth over the last twenty years. **Exhibit 1**, *Expert Declaration of Dr.*

[11] Available at: https://www.mdhi.org/pit

Anthony Robinson, ¶ 4. Meanwhile, the number of emergency shelter beds has remained nearly constant. *Id.* There were fewer than 2,000 homeless beds and there were roughly 12,695 homeless people in the Denver metro area in 2016. *Id.* There were 125 beds for women, but 850 homeless women every night. *Id.* In 2011, 2000 homeless people who were mentally ill were on a waiting list for services from the Stout Street homeless medical clinic. *Id.* These numbers are roughly the same today. *Id.* Simply put, there is an entirely inadequate number of shelter beds in Denver for the amount of homeless individuals in this area. *Id.*, ¶ 5. This fact has remained constant from 2012 until today. *Id.*

In a 2013 survey of Denver's homeless population, 73% report having been turned away from shelters at various times, and most report frequent turn-aways. Tony Robinson and Marisa Westbrook, *Unhealthy By Design: Public Health Consequences of Denver's Criminalization of Homelessness*, p. 64. (April 13, 2019).[12] Additionally, when comparing the most recent Denver point-in-time survey and the number of shelter beds in Denver, there is clearly a shortage of shelter beds. *Compare* Metro Denver Homeless Initiative (MDHI), *Everyone Counts: Metro Denver's Point in Time Survey* (2013) (finding that there are currently 3,943 homeless individuals living in Denver) *with* Mandy Chapman Semple, *Three-Year Shelter Expansion Plan: Strategic Recommendations For The Enhancement And Expansion Of The Homeless Emergency Sheltering System In The County And City Of Denver*[13] (finding that there are currently 2,349 beds in Denver).[14]

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[12] Available at: https://denverhomelessoutloud.files.wordpress.com/2019/04/unhealthy-by-design-final.pdf.

[13] Available at: https://www.denvergov.org/content/dam/denvergov/Portals/692/documents/Denvers_Road_Home/drh-three-year-shelter-strategy.pdf.

[14] This study was commissioned by the Denver Road Home, the Denver agency tasked with overseeing the city's investments into tools that help people experiencing homelessness. The

In addition, there are very few, if any, shelter beds available for particular categories of homeless individuals, such as: couples, fathers with children, teenagers, people with pets, people dealing with mental health crisis, people who struggle with claustrophobia or crowded conditions, or people with a disruptive record that causes shelters to deny them access. *See* Robinson, *Unhealthy By Design: Public Health Consequences of Denver's Criminalization of Homelessness*, p. 59.[15] Inadequate housing and shelter options for these populations contributes to the growing number of chronically homeless people in the Denver metro region—people who have been homeless for more than a year, or experienced homelessness four times in the last three years. *See* Nathaniel Minor, *Three Takeaways From The 2018 Denver Point-In-Time Homelessness Survey*, Colorado Public Radio, (June 15, 2018).[16]

1.4 **Denver's Camping Ban jeopardizes homeless residents' health and safety.**[17]

As outlined above, droves of homeless individuals are forced to sleep outside because of the inadequacy of Denver's homeless shelters. Denver's Camping Ban makes it a crime for any person to reside with shelter in any outdoors space, without appropriate permission. According to

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report found that there are currently 358 single female shelter beds in Denver and that there is demand for at least 415 female beds. *Id.,* p. 23. The report also found that there are currently 40 youth shelter beds in Denver and that there is demand for at least 172 youth beds. *Id*., p. 24. Finally, the report found that there are currently 172 family shelter beds in Denver and that there is demand for at least 175 family beds. *Id.*

[15] Available at: https://denverhomelessoutloud.files.wordpress.com/2019/04/unhealthy-by-design-final.pdf.

[16] Available at: https://www.cpr.org/news/story/three-takeaways-from-the-2018-denver-point-in-time-homelessnesssurvey.

[17] The National Inter-Agency Council on Homelessness, the U.S. Department of Justice, and the U.S. Department of Housing and Urban Development, have all argued that Camping Bans are cruel and counterproductive to the goal of reducing street living among homeless people or improving their quality of life. *See* U.S. Department of Justice, *Reducing Homeless Populations' Involvement in the Criminal Justice System*; U.S. Department of Housing and Urban Development, *HUD Exchange: Decriminalizing Homelessness*, (available at: https://www.hudexchange); United States Interagency Council on Homelessness, *Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness*.

the law, illegal shelter in Denver includes, "without limitation, any tent, tarpaulin, lean-to, sleeping bag, bedroll, blankets, or any form of cover or protection from the elements other than clothing." D.R.M.C. 38-86.2. In other words, no person residing outdoors in Denver can legally use any form of protection against the elements—snow, rain, wind or sun—other than their clothes.[18]

The danger of not using shelter from the elements is obvious—exposure, frostbite, and even death may result. Just last year, eight homeless residents of Denver died of hypothermia.[19] One study shows that there is a correlation between instructions by Denver police officers to homeless individuals not to use shelter on the streets and frostbite. *See* Robinson, *et al*.,

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[18] Since the Denver camping ban passed, the police have conducted thousands of officially recorded checks for unauthorized camping. In these checks, officers reach out to homeless people who appear to be using shelter in a public place (a blanket, a sleeping bag, a tarp, etc.). *See* Tony Robinson and Marisa Westbrook, *Unhealthy By Design: Public Health Consequence's of Denver's Criminalization of Homelessness*¸ p. 58, (April 13, 2019), https://denverhomelessoutloud.files.wordpress.com/2019/04/unhealthy-by-design-final.pdf. If the homeless person is determined to be using shelter from the elements, they are typically advised to desist from such shelter and often asked to "move along." According to a 2013 survey of homeless residents in Denver, during these "camping checks" (or checks for related code violations like sleeping or sitting in restricted areas), common police actions include:

- Informing campers of the "camping ban" and asking them to "move along" (83% of homeless respondents stated they were asked to "move along")
- Checking the "camper" for arrest warrants (71% of homeless respondents stated they were checked for arrest warrants during a camping check)
- Issuing a citation, or arresting the camper for various violations, or due to an outstanding warrant (26% of respondents said they were ticketed or arrested for some reason following police contact due to camping, sitting, or sleeping in public.

Tony Robinson, *The Denver Camping Ban: A Report from the Street*, April 3, 2013, https://denverhomelessoutloud.files.wordpress.com/2016/03/camping-ban-report.pdf. When people face this kind of police harassment, and worry about warrant checks, citations, and arrests, it is no surprise that our survey data shows that they often choose not to shelter themselves from the weather, in hopes of avoiding police attention.

[19] *We Will Remember 2018: Homeless Death Review, Denver, Colorado*, COLORADO COALITION FOR THE HOMELESS, https://www.coloradocoalition.org/sites/default/files/2018-12/Death%20Review%202018_FINAL%20%282%29.pdf.

Unhealthy By Design: Public Health Consequences of Denver's Criminalization of Homelessness, p. 59. In Denver, of those who police have not ordered out of their shelter, 6.7% have experienced frostbite. *Id.* But among those who have repeatedly been instructed by police to quit using shelter, between 12% and 17% have experienced frostbite. *Id.* These same patterns are replicated among homeless respondents who have chosen not to use shelter, in an effort to avoid police attention. *Id.* Almost 13% of people who chose not to use shelter have experienced frostbite—twice the frostbite rate of those who have not felt forced to remove their shelter. *Id.*

The problem of exposure is not only a cold weather challenge. During the hot summer months, the inability to shelter oneself from the elements (either due to police directive, or fear of attracting police contact) can lead to significantly higher rates of heat stroke and dehydration. The study also demonstrated that homeless residents who have been instructed many times by the police to quit using shelter are more than twice as likely to suffer heat stroke, and 43% more likely to suffer dehydration. *Id.* Once again, the data shows that police enforcement of Denver's camping ban, through directives to quit using shelter, is linked to worsening health outcomes for Denver's homeless residents.

The city's policing strategy has also contributed to increased vulnerability of homeless residents. When Denver police enforce the Camping Ban, it often involves the police breaking up groups of homeless people living downtown (like it did in this case). In a recent study, 83.7% of a survey of Denver's homeless population noted that they sometimes sleep outside with a group. *Id.*, p. 49. When asked why people choose to sleep with a group, personal safety was a prominent response. *Id.* Additionally, 64% of Denver's homeless residents who commonly sleep outside report that they have been separated from their group, due to police telling the group to break up or move along. *Id.*, p. 50. In response to such orders, homeless residents commonly chose

sleeping locations with an aim to avoiding contact with the police. *Id.* Of all those who choose sleeping locations to avoid police contact (87%), most of those (69%) do so frequently. *Id.* Data shows that Denver's homeless residents who move often to avoid police contact experience much higher rates of sexual assault, physical assault, robbery and violent threats than those who do not feel forced to move. *Id.*, p. 51. For example, women who feel forced to move often to avoid police are 60% more likely to be sexually assaulted, and 247% more likely to be physically assaulted, than women who do not move often. *Id.*

Additionally, the enforcement of the Camping Ban has devastating effects on Denver's homeless population's mental and physical health through the interruption of their sleep. Sleep deprivation is linked to a cascade of health problems, such as increased rates of mental illness, diabetes, hypertension, drug abuse, and violence. Schizophrenia-like symptoms are associated with lack of sleep, as are increases in anxiety, memory loss, and depression. And, the data is clear, police contact, and the fear of police contact, substantially undermines the sleeping-related health of Denver's homeless residents. *Id.*, p. 44. Only 29% of Denver's homeless who sometimes sleep outside get more than 6 hours of sleep a night; fully 30% only get three hours or less of sleep each night. In addition to diminished hours of sleep, people experiencing homelessness typically sleep in short bursts, subject to frequent interruption. In Denver, 16% of homeless residents only sleep for 30 minutes on average before being awoken by an interruption; another 24% sleep 1-2 hours at a stretch before interruption. *Id.*, p. 39. Data shows that Denver police constantly wake homeless people up from sleep and are a main contributor to the sleep problems experienced by Denver's homeless population. 83% of people who sometimes sleep outside in Denver have been awakened by police in the last year. *Id.* Of that group, 57% have had their sleep abruptly interrupted more than three times. *Id.* Police interaction and harassment

is also a situation that leads to constant stress and worry among homeless people. *Id.*, p. 40. Even when police aren't waking people up, advising against use of blankets, and urging them to "move on," homeless Denverites are frequently concerned about the possibility, to the point where it causes people to lose sleep and change their behavior. *Id.*

1.5 **Forcing homeless individuals into shelters jeopardizes their health and safety.**

Not only are Denver's homeless shelters unsafe, but the shelter environment significantly jeopardizes homeless individuals' health and well-being. Shelters can heighten exposure to infectious diseases (such as skin, respiratory, and viral diseases), and can complicate recovery from injuries and ailments.[20] Moreover, academic research has demonstrated that the typical homeless shelter actually undermines the mental and emotional well-being of their residents, especially if the shelter has restrictive rules and is perceived by the residents as poorly maintained, and "[t]his [is] commonly due to [shelters'] potential to diminish personhood and autonomy, which are integral to overall well-being as well as to the recovery process from trauma. In addition, shelter rules have been found to be an impediment to parenting practices and family routines that can support mental and emotional well-being." Nishra Beharie, et al., *Assessing the Relationship Between the Perceived Shelter Environment and Mental Health Among Homeless Caregivers*, BEHAVIORAL MEDICINE 41:3 107-14 (2015).[21]

[20] Hauf, A. and M. Secor-Turner, *Homeless health needs: Shelter and health service provider perspective*, JOURNAL OF COMMUNITY HEALTH NURSING 31(2): 103-117 (2014); Davis, R. E., *Tapping into the culture of Homelessness*, JOURNAL OF PROFESSIONAL NURSING 12(3) (1996); O'Connell, J. J., *Dying in the shadows: the challenge of providing health care for homeless people*, CANADIAN MEDICAL ASSOCIATION JOURNAL 170: 1251-1252 (2007).

[21] Available at: https://www.researchgate.net/publication/281516620_Assessing_the_Relationship_Between_the_Perceived_Shelter_Environment_and_Mental_Health_Among_Homeless_Caregivers.

And, a study of Denver's homeless population confirms that homeless residents typically find shelters controlling, and lacking in adequate privacy, space or security, which correlates with poor mental health and stability. Robinson, *et al.*, *Unhealthy By Design: Public Health Consequences of Denver's Criminalization of Homelessness*¸ p. 64. That study asked respondents "How do you feel about the kind of shelters you have recently stayed in?" *Id.* Respondents were allowed to choose numbers between 1 and 7, with 1 meaning "terrible" and 7 meaning "delighted." *Id.* The average perception of shelter conditions was between 2 and 3 (which indicated that most respondents were somewhere between "very unhappy" and "mostly dissatisfied"). *Id.* Respondents were dismayed with the amount of privacy they have in shelters, with their lack of freedom and personal space, and with the noise and lack of sleep possible in the crowded environment. *Id.* Overall, 31.6% of all respondents self-reported that their mental health and stability was "terrible" while staying at shelters—the very lowest possible score. *Id.*

1.6 **Mr. Burton's citation and prosecution for violating the Camping Ban.**

Mr. Burton is currently homeless. Mr. Burton was charged on April 29, 2019 with violating the Camping Ban. At the time of his arrest, Mr. Burton and other individuals were camping in a group on public property near the intersection of 29th Street and Arkins Court in the shadows near the North Platte River, after having been told to "move along" from a number of safer, more-well-lit locations that same day. At the time Mr. Burton was camping, it was 42 degrees outside. The officers on-scene attempted to force Mr. Burton into a shelter, but Mr. Burton refused because he had previous negative experiences at shelters where his health, wellness, and personal autonomy were compromised. Ultimately, Mr. Burton was issued a citation for violating the Camping Ban and released.

2. **CHARGE**

Docket # 19GS004399: On April 20, 2019, Mr. Burton was charged with Unauthorized Camping On Public Or Private Property pursuant to D.R.M.C. § 38-86.2, which states:

> (a) It shall be unlawful for any person to camp upon any private property without the express written consent of the property owner or the owner's agent, and only in such locations where camping may be conducted in accordance with any other applicable city law.
>
> (b) It shall be unlawful for any person to camp upon any public property except in any location where camping has been expressly allowed by the officer or agency having the control, management and supervision of the public property in question.
>
> (c) No law enforcement officer shall issue a citation, make an arrest or otherwise enforce this section against any person unless:
>
> (1) The officer orally requests or orders the person to refrain from the alleged violation of this section and, if the person fails to comply after receiving the oral request or order, the officer tenders a written request or order to the person warning that if the person fails to comply the person may be cited or arrested for a violation of this section; and
>
> (2) The officer attempts to ascertain whether the person is in need of medical or human services assistance, including, but not limited, to mental health treatment, drug or alcohol rehabilitation, or homeless services assistance. If the officer determines that the person may be in need of medical or human services assistance, the officer shall make reasonable efforts to contact and obtain the assistance of a designated human service outreach worker, who in turn shall assess the needs of the person and, if warranted, direct the person to an appropriate provider of medical or human services assistance in lieu of the person being cited or arrested for a violation of this section. If the officer is unable to obtain the assistance of a human services outreach worker, if the human services outreach worker determines that the person is not in need of medical or human services assistance, or if the person refuses to cooperate with the direction of the human services outreach worker, the officer may proceed to cite or arrest the person for a violation of this section so long as the warnings required by paragraph (1) of this subsection have been previously given.
>
> (d) For purposes of this section:
>
> (1) "Camp" means to reside or dwell temporarily in a place, with shelter. The term "shelter" includes, without limitation, any tent, tarpaulin, lean-to, sleeping bag, bedroll, blankets, or any form of cover or protection from the elements other than clothing. The term "reside or dwell" includes, without limitation, conducting such activities as eating, sleeping, or the storage of personal possessions.

> (2) "Designated human service outreach worker" shall mean any person designated in writing by the manager of the Denver Department of Human Services to assist law enforcement officers as provided in subsection (c), regardless of whether the person is an employee of the department of human services.
>
> (3) "Public property" means, by way of illustration, any street, alley, sidewalk, pedestrian or transit mall, bike path, greenway, or any other structure or area encompassed within the public right-of-way; any park, parkway, mountain park, or other recreation facility; or any other grounds, buildings, or other facilities owned or leased by the city or by any other public owner, regardless of whether such public property is vacant or occupied and actively used for any public purpose.

3. **ARGUMENT**

3.1 **The Camping Ban facially violates the Fourteenth Amendment's Equal Protection Clause and Mr. Burton's continued prosecution under the Camping Ban violates his right to equal protection under the law.**

The Equal Protection clause of the Fourteenth Amendment prohibits any state from "denying to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. In other words, it requires that all persons similarly situated be treated alike. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985). "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534–535 (1973). Even when a law is nondiscriminatory on its face, equal protection is violated if the law's purpose is to discriminate against a particular group. *Moreno*, 413 U.S. at 534–535; *Joyce v. City & Cty. of S.F.*, 846 F. Supp. 843, 858 (N.D. Cal. 1994) (finding that "a neutral law found to have a disproportionately adverse effect upon a minority classification will be deemed unconstitutional only if that impact can be traced to a discriminatory purpose")

Although the Camping Ban is neutral on its face, Supreme Court precedent mandates that this Court must look beyond the neutral face of the measure to its underlying purpose and its impact on particular groups. In *Shapiro v. Thompson*, the Supreme Court examined the legislative history of the statutes challenged and rendered its decision that they violated the Fourteenth Amendment based, in part, on the "weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific object of these provisions." 394 U.S. 618, 628 (1969); *see also Arlington Heights v. Metropolitan Housing Corp*, 429 U.S. 252, 265-266 (1977) (recognizing the relevance of discriminatory purpose in assessing the validity of a rezoning decision).

Further, the holding from last term's *Masterpiece Cakeshop* mandates that this Court examine the legislative history of the Camping Ban to determine its underlying purpose. In *Masterpiece*, Justice Kennedy based his decision not on the facially neutral ruling by a panel of the Colorado Civil Rights Division finding that a cake baker had violated Colorado's public accommodations laws, but on the statements of a *single commissioner* that Justice Kennedy determined disparaged the cake baker's religion. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018). The lesson to be drawn from *Masterpiece Cakeshop* is that, even in the face of a facially neutral law or decision, courts must look at the comments of the decisionmakers in determining the true purpose of the law. *Id.* at 1730.

And, the evidence demonstrates that Denver chose to implement the Camping Ban "at least in part 'because of' . . . its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Albus Brooks, the architect of the Camping Ban, admitted as much in public statements. The statements of the other City Councilmembers who voted to enact the Camping Ban echoed Mr. Brooks' motivations: driving Denver's homeless

from visibility (and, they hoped, out of Denver). In accordance with Supreme Court authority, this Court must take these statements as evidence of the true purpose of the Camping Ban.

Moreover, the startling breadth of the Camping Ban illustrates that its true purpose is the subjugation of homeless individuals. In *Romer v. Evans*, the Supreme Court overturned a state constitutional amendment that denied gays and lesbians access to the protection of antidiscrimination laws. 517 U. S. 620, 632, 635 (1996). The amendment, the Supreme Court eld, was "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." *Id.* Similarly, here, the Camping Ban not only criminalizes sleeping with shelter in public places, but also criminalizes sheltered eating and sheltered storage of personal possessions. And, "sheltered" includes, without limitation, protecting oneself while eating or sleeping by tent, tarpaulin, lean-to, sleeping bag, bedroll, blankets, or any form of cover or protection from the elements other than clothing. The breadth of the Camping Ban betrays its true purpose: criminalizing the essential life necessities of homeless individuals, and no one else.

The California Supreme Court has stated it best when discussing a city ordinance that, facially, simply outlawed sitting and lying on public property but was enacted with the specific purpose of driving "hippies" out of the city:

> we cannot be oblivious to the transparent, indeed the avowed, purpose and the inevitable effect of the ordinance in question: to discriminate against an ill-defined social caste whose members are deemed pariahs by the city fathers. This court has been consistently vigilant to protect racial groups from the effects of official prejudice, and we can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than by color.

Parr v. Mun. Court for Monterey-Carmel Judicial Dist., 479 P.2d 353, 360 (Cal. 1971) (holding that such a law violated the Fourteenth Amendment's equal protection clause). That vigilance is

even more important now. Today's pariahs are no longer the relatively carefree "hippies" considered by the Court in *Parr*, many of whom chose that lifestyle, but persons who are homeless largely by necessity.

Even if Denver had not so candidly admitted its purpose, however, the inevitable effect of the ordinance is to rid Denver of homeless individuals the homeless. *See* Waldron, *Homelessness & the Issue of Freedom*, 39 UCLA L.REV. 295, 313 (1991) (stating that anticamping ordinances "have and are known and even intended to have a specific effect on the homeless which is different from the effect they have on the rest of us…. [E]veryone is perfectly well aware of the point of passing these ordinances, and any attempt to defend them on the basis of their generality is quite disingenuous."). Because there are inadequate beds in Denver shelters (and because it is well-known the trauma that being forced to sleep in shelters inflicts), an ordinance outlawing the use of any form of shelter in all public areas effectively accomplishes the purpose of driving out the homeless. And, just as a matter of common sense, it is unlikely that any significant number of Denver residents or visitors other than the homeless would choose to sleep unprotected in a public place or to store personal property in the open. The "practical effect of the law here in question [is] to impose a disadvantage, a separate status, and so a stigma upon" homeless individuals, which the Supreme Court has held is not even a rational basis for a law. *United States v. Windsor*, 570 U.S. 744, 770 (2013).

Additionally, Regardless of the statute's language or even legislative purpose, this Court needs to consider the unequal *effects* of the Camping Ban "because legislation may create impermissible classifications through its application though not by its language." *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1014 (Colo. 1982) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). Specifically, a court should look to objective evidence, i.e. statistical evidence,

to establish discriminatory purpose because objective evidence can characterize violations of the Equal Protection Clause even when the motive behind an action was entirely benign. *People v. Cerrone*, 854 P.2d 178, 194 n.27 (Colo. 1993) (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo*, 118 U.S. 356).

As noted by the Colorado Supreme Court, in both *Gomillion* and *Yick Wo*, the Supreme Court found that statistical evidence was sufficient to establish discrimination. In *Gomillion*, the Supreme Court held a state legislature violated the Fifteenth Amendment when it altered a city's boundaries "from a square to an uncouth twenty-eight-sided figure," thereby excluding 395 of 400 black voters without excluding a single white voter. 364 U.S. at 340-41. In *Yick Wo*, a California ordinance was found neutral on its face but prejudicial in practice when it required laundry operators to obtain a permit and all but one of the white applicants received permits while none of the over 200 Chinese applicants received permits. 118 U.S. at 373-74. Similarly, in *Castaneda v. Partida*, the Court found that a large disproportionate impact could not be justified by any legitimate reason after looking at statistical evidence. 430 U.S. 482 (1977) (finding a prima facie case of discrimination when a population of a county was 79.1% Mexican-American but only 39% of people summoned for the grand-jury were Mexican-American).

Assuming, *arguendo*, that the Camping Ban was neutral on its face and in its purpose, there is substantial statistical evidence that the law is only enforced against the homeless and therefore is prejudicial in practice. Since 2011, twenty-nine citations have been issued for violating the Camping Ban. Twenty-eight of the twenty-nine of those citations were written to people who were homeless at the time of the citation. Likewise, every person arrested since 2011 for illegal camping was homeless. While homeless people are threatened with citations and arrests, non-homeless people have pitched tents in Denver with immunity for commercial sales

and promotional events.[22] This provides further evidence, and legal basis, for this Court to reach the obvious conclusion: the only purpose of the Camping Ban was to target homeless individuals in Denver and criminalize them.

Ultimately, even under the more lenient rational relationship test, discriminatory animus toward a group is not a valid state objective. *Cleburne*, 473 U.S. at 446–447 (irrational prejudice against the "mentally retarded"); *Moreno*, 413 U.S. at 534–535 (discrimination against "hippies"). This Court need not hold, therefore, that homeless persons are members of a "suspect class" in order to invalidate the ordinance on equal protection grounds. As in *Moreno* and *Cleburne*, the purpose of the ordinance--to banish a disfavored group--is plainly not a legitimate state interest. *See Moreno*, 413 U.S. at 534 (invalidating a federal statute that discriminated against "hippies" and "hippie" communes: "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); *Cleburne*, 473 U.S. at 448 (holding city's denial of building permit invalid because the decision discriminated against the "mentally retarded").

3.1(a) **Alternatively, Denver's selective enforcement of the Camping Ban against homeless individuals violates the Equal Protection Clause.**

When the government selectively enforces a law against a certain group of individuals, no matter the group, that law violates the Fourteenth Amendment's Equal Protection Clause. *See* Kincaid v. City of Fresno, No. CV-F-06-1445 OWW, 2008 U.S. Dist. LEXIS 38532, at *28-30

[22] *See, e.g.*, Elisa Wiseman, *Get Your Hands On Stranahan's Once-A-Year Snowflake Whiskey*, 5280 MAGZINE (Nov. 28, 2017) ("Folks will start camping out days in advance to make sure they snag a bottle of this coveted limited-run hooch. . . About 600 people camped out several days in advance last year.") https://www.5280.com/2017/11/get-your-hands-on-stranahans-once-a-year-snowflake-whiskey-this-weekend/; Denver7 – The Denver Channel, *People camping out for Sniagrab,* YouTube (Aug. 28, 2014) (video depicting people camping out for a ski sale).

(E.D. Cal. May 12, 2008) (holding that if the "Plaintiffs establish facts at trial that homeless persons' personal property was immediately destroyed after seizure while the personal property of others who are not within the class was not, Plaintiffs will have established a violation of equal protection under the Fourteenth Amendment"). *Ashbaucher v. City of Arcata*, No. CV 08-2840 MHP (NJV), 2010 U.S. Dist. LEXIS 126627, *47-50 (N.D. Cal. Aug. 19, 2010) (holding that a complaint alleging selective enforcement of ordinances against the homeless states an equal protection claim); *Anderson v. City of Portland*, No. 08-1447-AA, 2009 U.S. Dist. LEXIS 67519, *8 (D. Or. July 30, 2009) (same).

Denver selectively enforces the camping ordinance against homeless persons. Over the past seven years, Denver has engaged in a crusade against the homeless. The Camping Ban has not been enforced against non-homeless individuals. And, Denver police officers have had over 12,000 Camping Ban contact with homeless individuals. Donna Bryson, *Enforcing Denver's camping ban: 12,000 encounters since 2012*, DENVERITE, March 22, 2019.[23] Despite having probable cause to arrest non-homeless individuals for violating the Camping Ban, Denver has purposefully chosen not to. Erin Powell, *Next Question: Why can people in Denver camp for whiskey, but not if they're homeless?*, 9NEWS (November 30, 2018). Every day, people have picnics at City Park, using blankets to sit on and tents to sit under, yet no one is cited (nor even harangued) for violating the Camping Ban. It is clear that the Camping Ban is being selectively enforced against the homeless in violation of the Fourteenth Amendment.

3.1(b) **Alternatively, the Camping Ban violates the Fourteenth Amendment's Equal Protection Clause because homeless individuals are a suspect or quasi-suspect**

[23] Available at: https://denverite.com/2019/03/22/enforcing-denvers-camping-ban12000-encounters-since-2012/.

class and enforcement of the Camping Ban against them cannot withstand strict scrutiny.[24]

When governments discriminate on the basis of a suspect classification, they are subject to strict scrutiny and will be sustained only if they are "suitably tailored to serve a compelling state interest." *City of Cleburne,* 473 U.S. at 439. A classification is suspect if it is directed to a "discrete and insular minority." *Carolene Products Co.,* 304 U.S. at 152. The creation of quasi-suspect and suspect classes in Equal Protection jurisprudence is based on a judicial recognition that certain groups have suffered historical discrimination under American law and need special constitutional protection from the majoritarian political processes that will always disfavor them. In accordance with Supreme Court precedent, when determining whether a classification should be treated as "suspect" or "quasi-suspect" the four factors that courts traditionally analyze are:

> A) whether the class has been historically "subjected to discrimination,"; B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society[]"; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and D) whether the class is "a minority or politically powerless."

United States v. Windsor, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (quotation marks and citations omitted). Of these considerations, the first two are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."). At least one court has noted that the homeless bear "traditional indicia

[24] *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969) ("[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting scrutiny.") (citations omitted); *James v. Valtierra*, 402 U.S. 137, 144 (1971) (Marshall, J., dissenting) ("It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.").

of suspectness[.]" *Pottinger v. Miami*, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992). Homeless individuals in Denver, including Mr. Burton, meet these requirements.

First, the homeless have suffered a long history of deep-seated discrimination. *See e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 161-62 (1972) (charting the development of vagrancy laws); Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities,* 66 TUL. L. REV. 631, 635-45 (1992) (tracing the history of "official attempts to punish and control the displaced poor," noting that between the seventh and beginning of the twentieth century, more than two-hundred statutes against vagrancy existed in England); Robert Teir, *Maintaining Safety And Civility In Public Spaces: A Constitutional Approach To Aggressive Begging,* 54 LA. L. REV. 292-300 (1993) (chronicling anti-vagrancy and like laws from classical Athens to modern times). The homeless are also likely to be segregated because of their condition into "remote, stigmatizing institutions," *Cleburne Living Ctr.,* 726 F.2d at 197, like public shelters. The homeless have been subject to discrimination and should be afforded heightened protection under the law.

Second, homeless status does not bear on an individual's ability to perform in or contribute to society. This is borne out by the facts of this case. Homeless individuals in Denver hold jobs, are military veterans, and pay taxes. They are fathers, brothers, sisters, and sons. Denver clearly would not be permitted to treat people differently based on their homeless status in any other context; why should they be allowed to do so regarding peoples' right to shelter.

Third, homelessness is an "obvious, immutable, or distinguishing" characteristic of personal that defines homeless people as a discrete group. *Windsor*, 699 F.3d at 181. There is no requirement that a characteristic be immutable in a literal sense in order to trigger heightened

scrutiny. Heightened scrutiny applies to classifications based on alienage and "illegitimacy," even though "[a]lienage and illegitimacy are actually subject to change." *Windsor*, 699 F.3d at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable). In a capitalist society that is by definition ordered around property ownership and wealth, homelessness is an obvious, immutable, and distinguishing characteristic.

Fourth, homeless people lack political power to "adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. In today's version of American democracy one thing is clear: money is power. *See Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Homeless individuals lack both. *See* Tom McGhee, *Colorado House committee rejects Homeless Bill of Rights*, DENVER POST (February 24, 2016). Further, if the limited successes homeless people have had in the political arena were sufficient to disqualify a group from the protection of heightened scrutiny, then the Supreme Court would not have applied such scrutiny to sex-based classifications in 1973. By then, Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 to protect women from discrimination in the workplace. *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973). Yet, the plurality applied heightened scrutiny in *Frontiero*, and the Court has continued to do so. The repeated use of majoritarian direct democracy to disadvantage a single minority group is extraordinary in our nation's history. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 257-60 (1997); *see also* Donald P. Haider-Markel et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 307 (2007). As political power has been defined by the Supreme Court for purposes of heightened scrutiny analysis, homeless people do not have it.

In short, classifications based on homelessness demand heightened scrutiny, not just under the two most critical factors, but under all four factors that the Supreme Court has used to identify suspect or quasi-suspect classifications.[25] The homeless have been subjected to a history of unequal treatment and Mr. Burton asks this Court to take this one small step to rectify that history.

And, because the Camping Ban does not even past constitutional muster under rational basis review, it certainly cannot withstand the strict scrutiny that must be applied to laws that burden a suspect or quasi-suspect class. As stated above, the Camping Ban's true underlying purpose - to drive the homeless out of Denver - is not a legitimate governmental interest.

3.2 **The Camping Ban facially, and as-applied to the facts of this Case, violates the Fourteenth Amendment's Substantive Due Process Clause.**

3.2(a) **The Camping Ban facially, and as-applied to the facts of this Case, violates the right to travel.**

The Camping Ban also impermissibly penalizes the fundamental right of indigent homeless persons to travel to or remain in Denver, by denying them the basic necessities of sleeping and storing personal belongings in any public areas. The United States Supreme Court has expressly recognized a fundamental constitutional right to travel. *See Shapiro*, 394 U.S. at 629. The right of travel is a basic constitutional right. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974). People have a constitutional right to move from one place to another as they wish. *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999). Laws that prevent migration from one part of the country to another impinge upon this right. *See Shapiro*, 394 U.S. at 618

[25] Bolstering this conclusion are two Supreme Court decisions holding that it is a well-established violation of Equal Protection clause to deny the poor basic procedural protections because of their inability to pay. *See Douglas v. California*, 372 U.S. 353, 357-58 (1963); *Griffin v. Illinois*, 351 U.S. 12, 17-20 (1956).

(holding unconstitutional a statutory provision requiring welfare assistance applicants to reside in state at least one year immediately preceding application for assistance); *Edwards v. California*, 314 U.S. 160 (1941) (considering law curtailing immigration of new residents). A state law implicates the constitutional right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification that serves to penalize the exercise of that right. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (internal citations and quotations omitted).

The United States Supreme Court has repeatedly rejected statutes designed to exclude the indigent from a particular municipality or state. For example, in *Edwards*, the Court struck down a California statute that prohibited the transportation of indigent nonresidents into California. 314 U.S. at 174. The Court explained that a community may not "gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world." *Id*. at 173. Similarly, in *Shapiro*, the Court held that the right to travel was triggered by any attempt to "fence out" indigents. 394 U.S. at 629; *see also Memorial Hospital*, 415 U.S. 250 (holding that indigents' right to travel and settle in Arizona was impermissibly penalized by durational residency requirements for nonemergency medical care for indigents at county expense).

The right to travel includes the right to stay as well as the right to go. *See, e.g., Kent v. Dulles*, 357 U.S. 116, 126 (1958) ("Freedom of movement is basic in our scheme of values."); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (noting that the right to travel ensures "freedom to enter and abide"); *Soto-Lopez*, 476 U.S. at 903 (holding that the right encompasses burdens on freedom to enter and abide in states); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (finding that vagrancy ordinance offends freedom of movement).

It is clear based on this precedent that the Camping Ban facially violates the Fourteenth Amendment's guarantee of the right to travel. The Camping Ban was enacted with impeding travel as its primary objective. This is clearly demonstrated by Councilman Chris Herndon's remarks during the final vote that he supported the bill because Colorado Springs has had a ban in place for several years and had seen its homeless population decline. Councilman Charlie Brown also stated that the Camping Ban's purpose was "to get [homeless individuals] off of our Main Street[.]"

Additionally, it is clear that the Camping Ban uses the auspices of "camping" to serve a purpose in penalizing homeless individuals who would emigrate to Denver. Criminalizing the harmless act of sleeping in a public place -- when the vast majority of homeless persons in Denver have no legal alternative other than to get out of town by sundown --forbids a necessity of life and thereby effectively penalizes migration. *See Memorial Hospital*, supra, 415 U.S. at 258-259 (holding that laws penalize travel when they deny a person a "necessity of life" such as nonemergency medical care for indigents at the county's expense). Arresting or citing the homeless for sleeping in public also burdens their freedom of movement, because they must either forgo sleep or leave Denver altogether to avoid criminal penalty.[26]

Moreover, as discussed above, the primary purpose for enforcing the ordinance against the homeless was to drive them out of public areas. The indirect effects of the ordinance may prove even more invidious. The Camping Ban encourages an unhealthy and ultimately futile competition among cities to impose comparable restrictions in order to avoid becoming a refuge for homeless persons driven out by other cities. The case at bar provides a striking example of

[26] And, this is exactly what happened the night that Mr. Burton was ticketed. The other individuals who were camping with Mr. Burton and were moved along by the police went to Westminster, Colorado to shelter to avoid the Camping Ban.

this domino effect: in response to the Denver ordinance, surrounding communities quickly enacted similar measures to protect themselves from an influx of Denver's homeless. *See* Andrew Villegas, *Centennial, Like Denver And Boulder Before It, Has Banned Urban Camping*¸CPR NEWS, https://www.cpr.org/2019/07/09/centennial-like-denver-and-boulder-before-it-has-banned-urban-camping/. To carry this effect to its logical conclusion, if all communities followed suit the homeless could effectively be excluded from the entire State of Colorado.

That this case involves intrastate travel does not change the analysis. Courts have repeatedly concluded that the right to travel encompasses intrastate travel. *See, e.g., Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990); *Lutz v. City of York, PA*, 899 F.2d 255, 268 (3d Cir. 1990) ("the right to move freely about one's neighborhood or town … is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history'"); *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646, 648-649 (2d Cir. 1971) (holding that the right to travel includes intrastate travel). As the Second Circuit recognized in *King*, "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not acknowledge a correlative constitutional right to travel within a state." 442 F.2d at p. 648.[27] The Camping Ban substantially impacts homeless persons' right to travel. Homeless persons are not simply "discouraged" from traveling to Denver. They are effectively prevented from doing so, because the ordinance forbids them to sleep or store their personal belongings in any public area in the City. By criminalizing their unavoidable but innocuous conduct of

[27] *See also Kolender v. Lawson* 461 U.S. 352, 358 (1983) (emphasizing that a law prohibiting wandering the streets at night without identification implicated "consideration of the constitutional right to freedom of movement"); *Papachristou*, 405 U.S. at 164 (stating that "wandering or strolling" are "historically part of the amenities of life as we have known them").

sleeping and storing their personal effects, the ordinance has an immediate impact on the right of the homeless to enter or remain in Denver.

On case is particularly instructive. In *Pottinger v. Miami*, a class of homeless individuals alleged that the City of Miami had a "custom, practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities of daily life — including sleeping and eating — in public places where they are forced to live." 810 F. Supp. 1551, 1554 (S.D. Fla. 1992). There, the City of Miami criminalized "thousands of homeless people for such life-sustaining conduct under various City of Miami ordinances and Florida Statutes." *Id*. In *Pottinger*, the court concluded that the City's enforcement practices, which "prevent homeless individuals who have no place to go from sleeping, lying down, eating and performing other harmless life-sustaining activities" burdened their right to travel, because this denies a "necessity of life." *Id*. at 1580. Here, like in *Pottinger*, Denver criminalizes homeless individuals for simply existing. While this case involves the Camping Ban, there are a number of other ordinances that are enforced exclusively against Denver's homeless population (the best example being D.R.M.C. 38-86.1, which criminalizes "any person [who] knowingly sit[s] or lie[s] down in the Downtown Denver Business Improvement District upon the surface of any public right-of-way or upon any bedding, chair, stool, or any other object placed upon the surface of the public right-of-way between the hours of 7:00 a.m. and 9:00 p.m.").

Because the Camping Ban impairs the right to travel of homeless persons, it is subject to strict scrutiny. *See Dunn*, 405 U.S. 339-342; *Shapiro*, 394 U.S. at 634. The applicable test, therefore, is whether the ordinance is withstands strict scrutiny. As outlined *supra*, it does not meet this exacting standard because it does not even satisfy rational basis review.

In sum, in striking down a law that aimed to exclude the indigent of an earlier era, the Supreme Court observed:

> The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division. . . [I]n not inconsiderable measure the relief of the needy has become the common responsibility and concern of the whole nation.

Edwards, 314 U.S. at 173-174. The same principle requires this Court to invalidate the Camping Ban. This Court should hold that the Camping Ban facially violates the Fourteenth Amendment.

3.2(b) **The Camping Ban facially, and as-applied to the facts of this Case, violates the right to bodily integrity.**

Denver has violated all homeless individuals' substantive due process rights by placing them in a known danger with deliberate indifference to their personal, physical safety. *See e.g., Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977). "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *cf. Schmerber v. California*, 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society."). The Fourteenth Amendment right to bodily integrity protects the "right to be free from . . . unjustified intrusions on personal security" and "encompass[es] freedom from bodily restraint and punishment." *Ingraham*, 430 U.S. at 673-74; *see also Davis v. Hubbard*, 506 F. Supp. 915, 930 (N.D. Ohio 1980) ("In the history of the common law, there is perhaps no right which is older than a person's right to be free from unwarranted personal contact." (collecting authorities)). And more broadly, it is beyond debate that an individual's

"interest in preserving her [of his] life is one of constitutional dimension." *Nishiyama v. Dickson Cty.*, 814 F.2d 277, 280 (6th Cir. 1987) (en banc).

It is well established that "although the state's failure to protect an individual against private violence does not generally violate the guarantee of due process, it can where the state action 'affirmatively place[s] the plaintiff in a position of danger,' that is, where the state action creates or exposes an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006) (citations omitted); *Crosetto v. Gillen*, 702 F.3d 1182, 1189 (10th Cir. 2012). Denver's enforcement of the Camping Ban has exposed homeless individuals to dangers that they would not have otherwise faced. The Camping Ban has exposed Denver's homeless residents to a number of dangers that they would not have otherwise faced.

The danger of not using blankets, tents, and other items to shelter from the elements so as to avoid criminalization is obvious—exposure, frostbite, and even death may result. Just last year, eight homeless residents of Denver died of hypothermia.[28] As detailed above, one study shows that there is a correlation between instructions by Denver police officers to homeless individuals not to use shelter on the streets and frostbite. The problem of exposure is not only a cold weather challenge. During the hot summer months, the inability to shelter oneself from the elements (either due to police directive, or fear of attracting police contact) has lead to significantly higher rates of heat stroke and dehydration. Courts have consistently found that forcing individuals into serious danger that results from the weather violates the Fourteenth Amendment's substantive due process clause. For example, in *Munger v. City of Glasgow Police*

[28] *We Will Remember 2018: Homeless Death Review, Denver, Colorado*, COLORADO COALITION FOR THE HOMELESS, https://www.coloradocoalition.org/sites/default/files/2018-12/Death%20Review%202018_FINAL%20%282%29.pdf.

Dep't, police ejected the plaintiff, who was heavily intoxicated, from a bar in Montana after he became belligerent with staff and other patrons. 227 F.3d 1082, 1084 (9th Cir. 2000). The outside temperature that night in early March was recorded at 11 °F. *Id*. Munger wandered away from the bar. *Id.* The following morning, he was found curled up in an alley two blocks from the bar, dead of hypothermia. *Id*. at 1085. The Ninth Circuit concluded the officers affirmatively placed [the decedent] in a position of danger." *Id*. at 1087. And, in *Kneipp v. Tedder*, police officers intercepted a married couple attempting to make their way home from a Philadelphia bar after midnight in January, on a night when temperatures dropped to 34 ° F. 95 F.3d 1199, 1201 (3d Cir. 1996). Because the wife was so intoxicated, the husband had to carry her part of the way to their apartment. *Id*. at 1201. When they were less than a block from home, police officers stopped the couple. *Id*. Officers permitted the husband to walk home to relieve their babysitter. *Id*. at 1201. He did so, assuming the police would either take his wife to the police station or to the hospital. *Id.* However, officers released the wife to make her way home on her own. She never made it home and was later found unconscious in a nearby parking lot, having suffered brain damage as a complication of hypothermia. *Id*. The Third Circuit found that these facts stated a violation of the Fourteenth Amendment. *Id*. at 1208.

Further, data shows that Denver's homeless residents who move often to avoid police contact experience much higher rates of sexual assault, physical assault, robbery and violent threats than those who don't feel forced to move. For example, women who feel forced to move often to avoid police are 60% more likely to be sexually assaulted, and 247% more likely to be physically assaulted, than women who don't move often. Courts have consistently held that government officials who expose individuals to great risk of victimization from other violates the Fourteenth Amendment's substantive due process clause. *See, e.g., L. W. v. Grubbs*, 974 F.2d

119, 120 (9th Cir. 1992) (applying danger creation doctrine where registered nurse was at custodial institution was raped and terrorized by inmate; nurse was assigned to work, unguarded, in proximity with the inmate despite employer's knowledge that inmate's record included attacks upon women); *Wood v. Ostrander*, 879 F.2d 583, 586 (9th Cir. 1989) (applying danger creation doctrine when state trooper arrested driver of vehicle, leaving passenger stranded alone at night in dangerous area and passenger was later raped after accepting ride from a stranger).

Additionally, the enforcement of the Camping Ban has devastating effects on Denver's homeless population's mental and physical health through the interruption of their sleep. Sleep deprivation is linked to a cascade of health problems, such as increased rates of mental illness, diabetes, hypertension, drug abuse, and violence. Schizophrenia-like symptoms are associated with lack of sleep, as are increases in anxiety, memory loss, and depression. Placing individuals at risk of serious danger violates the Fourteenth Amendment's substantive due process clause. *See Chase v. County of Nev.*, 81 Fed. Appx. 92, 93 (9th Cir. 2003) (holding plaintiffs, who were witnesses to a deadly attack at their place of employment, a state-run inpatient facility for individuals with behavioral health problems, had stated a Fourteenth Amendment claim)

Finally, forcing homeless individuals into shelters undermines the mental and emotional well-being of those individuals. Shelters heighten exposure to infectious diseases (such as skin, respiratory, and viral diseases), and complicate recovery from injuries and ailments

3.2(c) **The Camping Ban facially, and as-applied to the facts of this Case, violates the right to privacy.**

The Camping Ban invades a constitutionally protected "zone of privacy created by several fundamental constitutional guarantees." *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). It seeks to achieve its goals "by means having a maximum destructive impact" on homeless individuals' right to privacy. *Id.* Such a law cannot stand in light of the familiar

principle, so often applied by the Supreme Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

"A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *Silverman v. United States* 365 U.S. 505, 511 n.4 (1961). The Camping Ban deprives homeless individuals of this inviolate place. The Camping Ban requires that homeless individuals either spend the night in homeless shelters, where they are endangered/imperiled in various ways and afforded no privacy, or reside outside without any shelter that could provide them with a semblance of privacy.

In *Griswold v. Connecticut*, the Supreme Court of the United States struck down as unconstitutional a state statute effectively barring the dispensation of birth control information to married persons. 381 U.S. at 481-86. Justice Douglas noted that rights protected by the Constitution are not limited to those specifically enumerated in the Constitution and that the Fourteenth Amendment and recognized that the Constitution created "zones of privacy", for example, First Amendment rights of association, Third and Fourth Amendment rights pertaining to the security of the home, and the Fifth Amendment right against self-incrimination. *Id.* at 482-85. The Supreme Court of the United States then proceeded to find a right to privacy which antedates the Bill of Rights and yet lies within the zone of privacy created by several fundamental constitutional guarantees. *Id.* at 486.

If there is any area of human activity to which a right to privacy pertains more than any other, it is the home.

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

Silverman, 365 U.S. at 511 n.4. The importance of the home has been amply demonstrated in constitutional law. Among the enumerated rights in the federal Bill of Rights are the guarantee against quartering of troops in a private house in peacetime (Third Amendment) and the right to be "secure in their . . . . houses . . . . against unreasonable searches and seizures . . . ." (Fourth Amendment). The First Amendment has been held to protect the right to "privacy and freedom of association in the home." *Moreno*, 413 U.S. at 535 n.7 (1973). The Fifth Amendment has been described as providing protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886). The protection of the right to receive birth control information in *Griswold* was predicated on the sanctity of the marriage relationship and the harm to this fundamental area of privacy if police were allowed to "search the sacred precincts of marital bedrooms." *Griswold*, 381 U.S. at 485-486. And in *Stanley v. Georgia*, the Court emphasized the home as the situs of protected "private activities." 394 U.S. 557, 564 (1969). The right to receive information and ideas was found in *Stanley* to take on an added dimension precisely because it was a prosecution for possession in the home: "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id*. "[T]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education." *U.S. v. Orito*, 413 U.S. 139, 142 (1973). And as the Supreme Court pointed out, there exists a "myriad" of activities which may be lawfully conducted within the privacy and confines of the home but may be prohibited in

public. *Id.* at 142-143. Thus, the United States Supreme Court has found a right of privacy to exist as to activities within the home or with reference to values associated with the home, and, additionally, as a right of personal autonomy, to make decisions that shape an individual's personal life.

Silverman and *Rakas* counsel that an individual can have a privacy interest in a place other than a traditional home, and according to *Silverman*, society must allow some place where individuals are free from unreasonable searches. *Silverman*, 365 U.S. at 511 n.4; *Rakas v. Illinois*, 439 U.S. 128, 142-43 (1978). Courts have already recognized zones of privacy for homeless individuals by finding that their closed baggage and containers are protected because it would reveal their personal matters. *See, e.g., State v. Mooney*, 588 A.2d 145, 152, 154 (Conn. 1991) (holding homeless person has legitimate expectation of privacy in contents of duffel bag and cardboard box); *State v. Pentecost*, 825 P.2d 365 (Wash. Ct. App. 1992) (recognizing in dicta that while a trespasser has no legitimate expectation of privacy in the unenclosed items left around a campsite, "[a] different question is presented where items are enclosed in a suitcase or some other container"); *Tukwila v. Nalder*, 53 Wn. App. 746, 770 P.2d 670 (Wash. Ct. App. 1989) (finding reasonable expectation of privacy in toilet stall of a public restroom). Numerous courts have held that tents, and other encampments, are to be considered zones of privacy subject constitutional safeguards. *See United States v. Sandoval*, 200 F.3d 659, 660-61 (9th Cir. 2000) (holding that an individual had a privacy interest in his tent and that the reasonableness of an individual's expectation of privacy is not lessened when he or she wrongfully occupies public property); *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993) (holding that a warrantless search of the interior of a tent on a public camp-ground violated reasonable expectation of privacy); *LaDuke v. Nelson*, 762 F.2d 1318, 1332 n.19 (9th Cir. 1985) (holding that an

individual's "privacy was violated by a flashlight search of his tent."); *State v. Cleator*, 857 P.2d 306, 310-11 (Wash. 1993) (holding that individual legitimate expectation of privacy inside his tent); *People v. Hughston*, 168 Cal. App. 4th 1062, 1069-71 (Cal. 2008) (holding that individual had reasonable expectation of privacy in his tent that was erected on a music festival's grounds).

As the Colorado Supreme Court has so eloquently stated:

> Whether pitched on vacant open land or in a crowded campground, a tent screens the inhabitant therein from public view. Though it cannot be secured by a deadbolt and can be entered by those who respect not others, the thin walls of a tent nonetheless are notice of its occupant's claim to privacy . . . Whether of short or longer term duration, one's occupation of a tent is entitled to equivalent protection from unreasonable government intrusion as that afforded to homes or hotel rooms.

People v. Schafer, 946 P.2d 938, 944 (Colo. 1997).

Under the case law set out above, because Denver homeless individuals' shelters serve as a refuge or retreat from the outside world, their tents (and other belongings within) should be protected and exempted from criminalization pursuant to the Fourteenth Amendment. In this case, Mr. Burton's tent allowed him one of the most fundamental activities that most individuals enjoy in private — sleeping under the comfort of a private roof and enclosure. The tent also gave him a modicum of separation and refuge from the eyes of the world: a shred of space to exercise autonomy over the personal. These artifacts of the personal could be the same as with any of us, whether in physical or electronic form: reading material, personal letters, signs of political or religious belief, photographs, sexual material, and hints of hopes, fears, and desires. These speak to one's most personal and intimate matters. The law is meant to apply to the real world, and the realities of homelessness dictate that dwelling places are often transient and precarious. The temporary nature of Mr. Burton's tent does not undermine his privacy interest in having it as a retreat. Nor does the flimsy and vulnerable nature of an improvised structure leave it less worthy

of privacy protections. For the homeless, this may often be the only refuge for privacy in the world as it is.

Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. *Bates v. Little Rock*, 361 U.S. 516, 524, (1960); *see Roe v. Wade*, 410 U.S. 113, 155 (1973). As previously outlined, Denver cannot make this threshold showing. This Court should hold that the Camping Ban violates the Fourteenth Amendment's guarantee that all citizens are entitled to a private place to which they can retreat.

3.3 **The Camping Ban facially violates the Eighth Amendment and article II, § 20 of the Colorado Constitution and Mr. Burton's continued prosecution under the Camping Ban violates his constitutional rights.**

The "Cruel and Unusual Punishments" clause of the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." *Ingraham*, 430 U.S. at 667-68. Pursuant to that clause, the Supreme Court has held that laws that criminalize an individual's status, rather than specific conduct, are unconstitutional. *Robinson v. California*, 370 U.S. 660 (1962). In *Robinson*, the Court considered a state statute criminalizing not only the possession or use of narcotics, but also addiction. Noting that the statute made an addicted person "continuously guilty of this offense, whether or not he had ever used or possessed any narcotics within the State"—and further that addiction is a status "which may be contracted innocently or involuntarily," given that "a person may even be a narcotics addict from the moment of his birth"—the Court found that the statute impermissibly criminalized the status of addiction and constituted cruel and unusual punishment. *Id*. at 666-67 & n.9.

Six years after *Robinson*, the Court addressed whether certain acts also may not be subject to punishment under the Eighth Amendment if they are unavoidable consequences of

one's status. In *Powell v. Texas*, 392 U.S. 514 (1968), the Court considered the constitutionality of a statute that criminalized public intoxication. A four-member plurality interpreted *Robinson* to prohibit only the criminalization of status and noted that the statute under consideration in *Powell* criminalized conduct—being intoxicated in public—rather than the status of alcohol addiction. The plurality declined to extend *Robinson*, citing concerns about federalism and a reluctance to create a "constitutional doctrine of criminal responsibility." *Id.* at 534 (plurality opinion). Moreover, the plurality found that there was insufficient evidence to definitively say Mr. Powell was incapable of avoiding public intoxication. *Id.* at 521-25. The dissenting justices, on the other hand, found that the Eighth Amendment protects against criminalization of conduct that individuals are powerless to avoid, and that due to his alcoholism, Mr. Powell was powerless to avoid public drunkenness. *Id*. at 567 (dissenting opinion). The dissenters, therefore, would have reversed Mr. Powell's conviction. *Id*. at 569-70.

Justice White provided the decisive fifth vote to uphold Mr. Powell's conviction. Instead of joining the plurality opinion, in a separate concurrence he set forth a different interpretation of Robinson. Justice White did not rest his decision on the status-versus-conduct distinction raised by the plurality. Instead, Justice White considered the voluntariness, or volitional nature, of the conduct in question. *See Powell*, 392 U.S. at 548-51 (White, J., concurring in the judgment). Under this analysis, if sufficient evidence is presented showing that the prohibited conduct was involuntary due to one's condition, criminalization of that conduct would be impermissible under the Eighth Amendment. *Id*. at 551. Notably for the present case, Justice White specifically contemplated the circumstances of individuals who are homeless. He explained that, "[f]or all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and

no place else to be when they are drinking." *Id*. Justice White believed some alcoholics who are homeless could show that "resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible." *Id.* For these individuals, the statute "is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk." *Id*. Ultimately, Justice White sided with the plurality because Mr. Powell did not present evidence to show that he was incapable of avoiding public places while intoxicated. *Id*. at 552. However, Justice White's concurrence articulated the narrowest grounds for the decision; accordingly, it is the only controlling precedent from Powell. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining that the narrowest position controls when no rationale garners the votes of a majority of the Court).

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 there is inadequate shelter space. *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*, 810 F. Supp. at 1562 (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); *see also Manning v. Caldwell*, No. 17-1320, 2019 U.S. App. LEXIS 21084, at *45 (4th Cir. July 16, 2019). 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").

To determine whether enforcement of such ordinances is unconstitutional, courts have looked at whether the conduct taking place outside is truly involuntary and whether the individual is forced to be outdoors and. *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.

3.3(a) **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). The only activity in which Mr. Burton 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. Burton 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. "[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").

The realities facing homeless individuals each day support this application of the Eighth Amendment. Homelessness across the United States remains a pervasive problem. As the *Jones* court observed, "an individual may become homeless based on factors both within and beyond his immediate control, especially in consideration of the composition of the homeless as a group: the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable."

444 F.3d at 1137. Regardless of the causes of homelessness, individuals remain homeless involuntarily, including children, families, veterans, and individuals with physical and mental health disabilities. Communities nationwide are suffering from a shortage of affordable housing. And, in many jurisdictions, emergency and temporary shelter systems are already underfunded and overcrowded.

At least one of the Justices in *Robinson* was concerned with how criminalizing certain conditions (there, addiction to narcotics) may interfere with necessary treatment and services that could potentially improve or alleviate the condition. *See Robinson*, 370 U.S. at 673-75 (Douglas, J., concurring). Those concerns are equally applicable in this context. Criminalizing public sleeping in cities with insufficient housing and support for homeless individuals does not improve public safety outcomes or reduce the factors that contribute to homelessness. As noted by the U.S. Interagency Council on Homelessness, "[r]ather than helping people to regain housing, obtain employment, or access needed treatment and service, criminalization creates a costly revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back." Issuing citations for public sleeping forces individuals into the criminal justice system and creates additional obstacles to overcoming homelessness. Criminal records can create barriers to employment and participation in permanent, supportive housing programs. Not only does legal precedent command that this Court dismiss Mr. Burton's prosecution, but public policy rationales support not criminalizing Mr. Burton for simply attempting to exist within Denver.

Ultimately, it should be uncontroversial that punishing conduct that is a "universal and unavoidable consequence[] of being human" violates the Eighth Amendment. *See id.* at 1136. It is a "foregone conclusion that human life requires certain acts, among them . . . sleeping."

Johnson, 860 F. Supp. at 350. As *Jones* stressed, it is impossible for individuals to avoid "sitting, lying, and sleeping for days, weeks, or months at a time . . . as if human beings could remain in perpetual motion." *Jones*, 444 F.3d at 1136. Once an individual becomes homeless, by virtue of this status certain life necessities (such as sleeping) that would otherwise be performed in private must now be performed in public. *Pottinger*, 810 F. Supp. at 1564; *see also Johnson*, 860 F. Supp. at 350 (finding that "they [homeless individuals] must be in public" and "they must sleep"). Therefore, sleeping in public is precisely the type of "universal and unavoidable" conduct that is necessary for human survival for homeless individuals who lack access to shelter space. *Id*.

3.3(b) **Given the abject lack of shelter beds in the City of Denver, Mr. Burton had no choice but to sleep outdoors.**

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. *Martin*, 902 F.3d at 1042. Importantly, as the *Martin* court made clear, an open shelter bed does not necessarily equate with an "available" shelter bed. *Id*. 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. *Id.* at 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.

Like the *Martin* plaintiffs, Mr. Burton was homeless and had no choice but to sleep outdoors on the night he was ticketed. There are more homeless people than there are available shelter bed to house them. The best evidence demonstrates that there are an inadequate number of shelter beds in Denver for the number of individuals experiencing homelessness. And, there are very few shelter beds at all available for particular categories of homeless people, such as: couples, fathers with children, teenagers, people with pets, people dealing with mental health crisis, people who struggle with claustrophobia or crowded conditions, or people with a disruptive record that causes shelters to deny them access. *See* Robinson, *et al.*, *Unhealthy By Design: Public Health Consequences of Denver's Criminalization of Homelessness*¸ p. 59.

Based on the foregoing, this Court should find that the Camping Ban facially violates the Eighth Amendment and article II, § 20, and that citing Mr. Burton for sleeping on public property when he had no other place to go is unconstitutional. "[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. Burton 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, Denver is cruelly punishing Mr. Burton for his homeless status. Based on this precedent (and its progeny), prosecuting Mr. Burton for his homeless status (under a criminal penalty that makes it illegal to camp in the City of Denver) violates the Eighth Amendment and article II, § 20 of the Colorado Constitution.

3.4 **The Camping Ban facially violates the Americans with Disabilities Act.**

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *Gorman v. Bartch*, 152 F.3d 907, 913 (8th Cir. 1998), *rev'd on other grounds*, 536 U.S. 181 (2002). Title II applies to police interactions with disabled individuals. Courts have broadly defined police conduct under Title II to include "arrests; investigations potentially involving an arrest . . . ; and violent confrontations not technically involving an arrest[.]" *Gohier v. Enright*, 186 F.3d 1216, 1220 n.2 (10th Cir. 1999); *Gorman*, 152 F.3d at 913; *Sheehan v. City & County of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014). The ADA prohibits law enforcement officers from arresting and/or summonsing people who are disabled because of manifestations of their disability. *Gohier*, 186 F.3d at 1220; *see also Jackson v. Town of Sanford*, No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (the ADA is "concerned with unjustified arrests of disabled persons[]"); *Lewis v. Truitt*, 960 F. Supp. 175, 176 (S.D. Ind. 1997) (holding that officers who beat and arrested a deaf man who could not understand their commands, for the offense of resisting arrest, violated Title II of the ADA); *Jackson v. Inhabitants of Town of Sanford*, No. 94-12-P-H, 1994 U.S. Dist. LEXIS 15367 (D. Me. Sep. 23, 1994) (holding that officers who arrested a man for drunk driving who was sober,

and whose unsteadiness and slurred speech resulted from a past stroke, violated Title II of the ADA); *McCray v. City of Dothan*, 169 F. Supp. 2d 1260, 1276 (M.D. Ala. 2001) (holding that individual could show that officers violated Title II of the ADA where a deaf individual was arrested because of a perceived unwillingness to cooperate with the arresting officer, when the perceived unwillingness was simply a manifestation of the deaf individual's disability). Disabilities under the ADA include both physical and mental conditions. *See* 42 U.S.C. § 12102(2) (defining "disability" as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment).

Here, the Camping Ban violates Title II of the ADA because it criminalizes those who, because of their disabilities, cannot access Denver's shelters. A portion of Denver's homeless population suffers from mental and/or physical disabilities that prevent them from safely accessing shelters. As just one example, those with service and emotional support animals cannot stay in Denver's shelters. Because the Camping Ban criminalizes those who cannot access shelter due to their disabilities, it violates Title II of the ADA and this Court should strike it down as invalid. *See* U.S. Const. Art. VI, Cl. 2.

4. **CONCLUSION**

DATED this 10th day of September 2019.

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I certify that on July 10, 2019 I served the foregoing document by faxing same to all opposing counsel.