Denver County Court, State of Colorado Court address: 520 West Colfax Ave., Denver, CO. 80204 Phone Number: 720.337.0847 **People of the City and County of Denver** vs. **Jerry R. Burton,** **Defendant**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #.	Case Number: 19GS004399 Courtroom 4A
ORDER CONCERNING MOTION TO DISMISS	

Defendant seeks dismissal of the above matter because *Denver Revised Municipal Code (DRMC) §38-86.2* violates the 14th Amendment Equal Protection clause (discrimination against a particular group, selective enforcement), Due Process clause (right to travel, right to bodily integrity, right to privacy), the Eighth Amendment prohibition against cruel and unusual punishment, and the Americans with Disabilities Act. Having reviewed the pleadings concerning dismissal, having heard testimony and argument this Court now acts.

I. Facts

The People have brought one charge arising from an alleged April 29, 2019 violation of *DRMC §38-86.2*. Defendant was homeless when he was camping on

public property near 29th Street and Arkins Court near the North Platte River. When the Police contacted the Defendant, he was given the option of going to a homeless shelter. When Defendant refused, he was cited with the ordinance violation at issue. Because Defendant voluntarily took down his camp after being ticketed, he was not arrested.

DRMC §38-86.2 provides:

(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.

II. Constitutional Challenges

Ordinances are presumed to be constitutionally valid. *See People v. Schoondermark, 699 P.2d 411, 415 (Colo. 1985).* Colorado's Supreme Court has held that "declaring a statute unconstitutional is one of the gravest duties impressed upon the courts. To declare an act of the legislature unconstitutional is always a delicate duty, and one which courts do not feel authorized to perform, unless the conflict between the law and constitution is clear and unmistakable." *Greenwood Village v. Petitioners for Proposed City of Centennial, 3 P. 3d 427, 440 (Colo. 2000).* The party challenging the constitutionality of the Ordinance must prove beyond a reasonable doubt that the ordinance is unconstitutional. *People v. Gomez, 843 P. 2d 1321, 1322 (Colo, 1993).*

Defendant raises, primarily, a facial challenge to the constitutionality of *DRMC §38-86.2*. A statute is facially unconstitutional only if no conceivable set of circumstances exists under which it may be applied in a constitutionally permissible manner. *Reno v. Flores, 507 U.S. 292, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993)* and *People v. Ford, 232, P.3d 260, 263 (Colo. App. 2009).* To invalidate a statute, it must be sufficiently infirm so that no limiting construction consistent with the legislature's intent will preserve its constitutionality. *People v. Hickman, 988 P.2d 628, 634 (Colo. 1999)* (citing ***Whimbush*** *v. People, 869 P.2d 1245, 1248 (Colo. 1994)).*

III. Fourteenth Amendment – Equal Protection

Conceding that *DRMC 38-86.2* is neutral on its face, Defendant argues that the *DRMC §38-86.2* violates the *Fourteenth Amendment of the United States Constitution* because its purpose is to harm a politically unpopular group. Defendant argues that

Denver is engaging in selective enforcement which has resulted in the subjugation and removal of homeless individuals from Denver.

Equal protection under the U.S. and Colorado Constitutions requires equal treatment of persons similarly situated. *(Cleburne v. Cleburne Living Center, Inc. (1985) 473 U.S. 432, 439 ,87 L.Ed.2d 313, 320, 105 S. Ct. 3249.* 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. *See, U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534-535 (1973).* "[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." Id.; 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.") At least one District Court has held that a complaint alleging selective enforcement of ordinances against the homeless states an equal protection claim. *See 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).*

The People argue that this Court should apply the "rationally related" test. A party asserting a violation of equal protection "must first demonstrate that a fundamental interest or suspect class is involved." *Lujan v. Colorado State Bd. Of Educa., 649 P.2d 1005-16 (Colo. 1982)* (internal citations omitted). If "no fundamental right, suspect classification, or gender classification is involved [a court] will only inquire whether the state action is rationally related to a legitimate state purpose." *Id. at 1016.* "Under this test, 'a statutory classification is presumed constitutional and does not violate equal protection unless it is proven beyond a reasonable doubt that the classification does not bear a rational relationship to a legitimate legislative purpose.'" *Colorado Ins. Guar. Ass'n, 2016 COA 64 ¶ 21 (quoting Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson, 938 P.2d 504, 506 (Colo. 1997)).*

Defendant, on the other hand, argues the "strict scrutiny" test is appropriate. For

a court to apply strict scrutiny, the legislature must either have passed a law that infringes upon a fundamental right or involves a suspect classification. Suspect classification refers to a class of individuals that have been historically subject to discrimination. Under Equal Protection, when a statute discriminates against an individual based on a suspect classification, that statute will be subject to either strict scrutiny or intermediate scrutiny. There are four generally agreed-upon suspect classifications: race, religion, national origin, and alienage. However, this is not an inclusive list.

In determining whether someone deserves to be considered within a suspect classification, a court will look at whether the person is a "discrete and insular minority." See, *United States v. Carolene Products Co., 304 U.S. 144, 152 (1938)*. In determining whether someone is a discrete and insular minority (and thus the person's claim deserves strict scrutiny), courts will look at a variety of factors, including whether the person belongs to a class historically subjected to discrimination, whether the person belongs to a class that has an inherent trait, whether the person's class has a trait that is highly visible, whether the person is part of a class which has been disadvantaged historically, and whether the person is part of a group that has historically lacked effective representation in the political process. *See, United States v. Windsor, 699 F.3d 169, 181 (2d Cir. 2012), aff'd 133 S. Ct. 2675 (2013).*

Based on the testimony heard, this Court finds that the homeless have historically been subjected to discrimination, that the homeless have a transitory trait that is highly visible, that given their lack of income and lack of a permanent shelter they have been disadvantaged historically. A significant barrier to their participation in the political process is that few are registered to vote. *See* transcript of October 18, 2019 hearing at page 177. On the other hand, this Court (given the testimony given at hearing) cannot find that the homeless lack effective representation in the political process. An ordinance was recently on the ballot to address the efficacy of the "camping ban" and City Council had members who vehemently opposed the passage of *DRMC 38-86.2.* Accordingly, this Court will apply the "rationally related" test.

This Court Finds that *DRMC 38-86.2,* as conceded by Defendant, is neutral on its face. This Court finds that it is not based upon race, ethnicity, or on an unjustifiable arbitrary classification. This Court finds that under the Ordinance people are given a warning and the

opportunity to seek resources before being ticketed. Concerning the resources offered in the matter at hand Defendant received an offer to be taken to a shelter.

Concerning selective enforcement, based on the testimony heard at hearing, this Court finds that since 2011, thirty-one citations have been issued for violating *DRMC §38-86.2.* Of those thirty were written to people who were homeless. *See* transcript of October 18, 2019 hearing, page 38. Of those arrested, this Court finds that all were homeless. "The conscious exercise of selectivity in the enforcement of laws is not in itself a constitutional violation." *People v. Macfarland, 540 P.2d 1073, 1075 (Colo. 1975).* "Equal protection is not denied absent a showing that a prosecutor has exercised a policy of selectivity based upon an unjustifiable standard such as race, religion or any other arbitrary classification." *Id.* A "defendant must show the selective prosecution had a discriminatory effect and was motivated by a discriminatory purpose." *People v. Kurz, 847 P.2d 194, 197 (Colo. App. 1992).* The fact that some people escape prosecution under a statute is not a denial of equal protection unless selective enforcement of the statute is intentional or purposeful." *May v. People, 636 P.2d 672, 681-82 (Colo. 1981).* "On the few occasions where [courts have struck down a policy as illegitimate under rational basis scrutiny], a common thread has been that the laws at issue lack any purpose other than a 'bare … desire to harm a politically unpopular group." *Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).* Given the testimony heard at hearing this Court is unable to find animus on the part of Denver. Defendant's motion to dismiss is denied.

IV. Fourteenth Amendment – Due Process

Defendant argues that *DRMC §38-86.2* violates his right to travel, his right to bodily integrity and his right to privacy in violation of the due process clause.

Right to Travel

The Supreme Court has held that any statute directly penalizing the exercise of the right to travel from **state to state** should be invalidated if it does not pass a heightened scrutiny satndard. ***Shapiro v. Thompson, 394 U.S. 618, 634 (1969)***(emphasis our own). As of now the Supreme Court has not addressed whether the fundamental right to travel includes intrastate movement. Defendant cites *Pottinger v. City of Miami, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992),* which found 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 … in public places where they are forced to live." Defendant argues that Denver, like Miami, enforcement practices criminalizes homeless individual's engagement in the most basic of life's functions: eating, sleeping and possessing property. The *Pottinger* court considered Miami's lack of commitment to ending poverty and homelessness as a factor in adjudicating the constitutionality of its laws. *Id. at 1564-65*. Based on the testimony heard at hearing, this Court finds that, unlike Miami in *Pottinger,* Denver has not had a custom, practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities of daily life and that Denver has implemented programs to end homelessness. See transcript of October 29, 2019 hearing at pages 3-7. There is also no Supreme Court precedent concerning whether the fundamental right to travel includes intrastate movement. Accordingly dismissal based on an infringement of the right to travel is denied.

Right to Bodily Integrity

Defendant argues that *DRMC §38-86.2* violates the right to bodily integrity by placing the homeless in a known danger with deliberate indifference to their personal, physical safety. 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." *Ingaham v. Wright, 430 U.S. 651, 673-74 (1977)*. Defendant contends that Denver's enforcement of *DRMC §38-86.2* affirmatively places the homeless in a position of danger. Specifically Defendant argues that the danger of not using blankets, tents and other items to shelter compromises health. This court finds, after hearing testimony, that Defendant was not arrested and was allowed to load his posessions on a flat bed truck. Given this, Defendant's bodily integrity was not compromised. Defendant's motion to dismiss on this as-applied basis is denied. Concerning Defendant's facial challenge this Court did not hear enough direct testimony to find *DRMC §38-86.2* violates the right to bodily integrity.

Right to Privacy

The Supreme Court first recognized, in *Katzv. United States, 389 U.S. 347 (1967),*

that Fourth Amendment protection against unreasonable searches and siezures could extend beyond traditional concepts of privacy. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But *what he seeks to preserve as private*, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351 (emphasis added). In a concurring opinion a two part test, which has since become the prevailing standard, was set forth. "[T]here is a two fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable. Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, and statements that he exposes to the plain view of outsiders are not protected because no intention to keep them to himself has been exhibited." *Id.* at 361. The right to privacy in public places has been extended to dressing rooms and bathroom stalls. See, *Kroehler v. Scott, 391 F. Supp. 1114, 1117 (E.D. Pa. 1975) and State v. McDaniel, 337 N.E.2d 173, 176, 178 (Ohio Ct. App. 1975).* Concerning the homeless, a lack of legal rights to occupy public or private property has resulted in courts' finding a lack or privacy. See, *Amezquita v. Hernandez-Colon, 518 F.2d 8, 9 (1st Cir. 1975); United States v. Ruckman, 806 F.2d 1471, 1472 (10th Cir. 1986)* and *People v. Thomas, 45 Cal. Rptr. 2d. 610, 611-12 (1995).* This Court agrees with the above precedent and denies Defendant's motion to dismiss.

V. Eighth Amendment

"The Eigth Amendment of the United States Constitution prohibits cruel and unusual punishment and "guarantees individuals the right not to be subjected to excessive sanctions." *People v. Valles, 2013 COA 84, ¶ 71.* The Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways: First it limits the kinds of punishment that can be imposed on those convicted of crimes; second it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright, 430 U.S. 651, 667 (1977).* Defendant cites *Martin v. City of Boise, 902 F.3d 1031, 1048 (9th Cir. 2018)* which initially found "the Eight Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property

for homeless individuals who cannot obtain shelter." The *Martin* court subsequently ruled "… our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it." *Martin v. City of Boise, 920 F.3d 617 n. 8 (2019), Cert denied 589 U.S. __ (2019).* The *Martin* court on the other hand distinguised those individuals from the city's homeless who could not access those open beds. *Id.* at 1046. *Martin* ruled that if a homeless individual is denied entry to a shelter, then "as a practical matter, no shelter is available." *Id.* at 1041-1042. In the matter at hand this Court heard testimony that there has been no shortage of homeless shelters in Denver since January 1, 2018 and that the shelters operate well below capacity on a nightly basis. See transcript of October 29, 2019 hearing , pages 11-13. On the other hand this Court heard testimony that if every single homeless person in Denver attempted to access shelter, they could not do so under the current infrastructure. *See* transcript of October 29, 2019 hearing at pages 99-100 and Defendant's hearing exhibits F (The Denver Camping Ban Report[1]), G and H. this Court also heard testimony that men with children, individuals with serious mental illness, persons banned from shelters, unaccompanied homeless youth, individuals with pets, LGBT individuals, and same sex partners have limited access to adequate shelter. This Court also heard testimony that unless accompanied by a Denver Police Officer persons with swing shift jobs and other persons who seek shelter after curfew are also turned away because of shelter curfews. *See* transcript of October 11, 2019 hearing at pages 25-26, transcript of October 11, 2019 hearing at pages 102 – 103 and transcript of October 28, 2019 hearing at page 125.

Based on the foregoing, *DRMC §38-86.2* facially violates the Eighth Amendment and article II, § 20. "[A]s long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." *Martin, 902 F.3d at 1048.* Defendant's motion to dismiss is granted.

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[1]Two exhibits were marked as Exhibit F at hearing – The Denver Camping Ban Report and the 2019 Point in Time Report.

VI. American with Disabilities Act

Title II of the Americans with Disabilities Act (ADA) provides " 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. Title II applies to police interactions with disabled individuals. These include "arrests; investigations potentially involving an arrest …; and violent confrotations not technically involving an arrest[.]" *Gohier v. Enright, 186 F.3d 1216, 120 n.2 (10th Cir. 1999); Gorman v Bartch, 152 F.3d 907, 913; Sheehan v. City and County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014).* This Court has heard no testimony or received evidence that Defendant is disabled. Furthermore, this Court finds (based on testimony at hearing) that Defendant was not arrested and that his encounter with the Police was not a violent confrontation. Defendant's motion to dismiss on this as-applied basis is denied. Concerning Defendant's facial challenge this Court did not hear enough direct testimony to find the Camping Ban in violation of the ADA.

VII. Other

Defendant has also made argument as it relates to women, disabled homeless individuals and homeless individuals with animals. Defendant's motion to dismiss on this as-applied basis is denied. Defendant does not fit any of those categories. Concerning Defendant's facial challenge on these points this Court did hear testimony such persons have limited access to adequate shelter. Even so, this Court did not hear enough testimony, on its own, to find a basis to dismiss on those grounds alone.

Dated: December 27, 2019

By the Court,

Johnny C. Barajas,
Judge