District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3750	DATE FILED: February 23, 2023 10:33 PM CASE NUMBER: 2022CV30341
FEET FORWARD – PEER SUPPORTIVE SERVICES AND OUTREACH d/b/a FEET FORWARD, a nonprofit corporation; JENNIFER SHURLEY, JORDAN WHITTEN, SHAWN RHOADES, and JENNIFER LIVOVICH, individuals, **Plaintiffs,** **v.** **CITY OF BOULDER and MARIS HEROLD, Chief of Police for the City of Boulder,** **Defendants**	**▲ COURT USE ONLY ▲**
	Case Number: **2022CV30341** Division 2 Courtroom I
ORDER RE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT	

Plaintiffs contend that the City of Boulder's Blanket Ban[1] and Tent Ban[2] violate three provisions of the Colorado Constitution. They maintain that the City's enforcement of these Ordinances against unhoused people who cannot access shelter on a given night (1) transgresses the state's prohibition against cruel and unusual punishment, (2) violates the individuals' substantive due process right not be to affirmatively placed into danger by the state, and (3) contravenes a constitutional right to use public lands in a manner that does not harm other Colorado citizens. Defendants counter that the Colorado Constitution does not require Boulder to permit Plaintiffs, or unhoused members of the public in general, to reside on public property. They assert

[1] B.R.C. § 5-6-10. The Blanket Ban proscribes living or sleeping outside while using "any cover or protection from the elements other than clothing."
[2] B.R.C. § 8-3-21(a). The Tent Ban proscribes sheltering or storing property outside under "any tent, net, or other temporary structure."

the Plaintiffs' Complaint is an attempt to remove the debate on the best policy to address homelessness out of the political arena.

Defendants therefore filed a Motion to Dismiss on June 17, 2022, moving to dismiss all three constitutional claims under C.R.C.P. 12(b)(5) (failure to state a claim upon which relief can be granted). Plaintiffs filed a Response on July 29, 2022, and Defendants filed a Reply on August 12, 2022. Upon review of this briefing, Judge Hartman ordered supplemental briefing on standing as it relates to Colorado political question and separation of powers doctrines. August 26, 2022 Order.

The parties' supplemental briefing on these issues concluded on October 28, 2022. On November 11, 2022, the undersigned judicial officer issued a Judicial Disclosure, and no party filed a motion by the November 25, 2022 deadline. The Court has since reviewed the briefing, supplemental briefing, file herein, and pertinent legal authorities, and commends counsel for the outstanding and thorough briefing of these important issues.

As a threshold matter, this Order addresses the standing and ripeness issues, and concludes that Plaintiffs have standing and that this matter is ripe for judicial resolution. The Order next analyzes each of the three claims for relief and concludes that the Motion to Dismiss should be denied as to the first claim for relief (Blanket Ban only), and granted as to the first claim for relief (Tent Ban), second claim for relief, and third claim for relief.

I. PARTIES & RELIEF SOUGHT

Plaintiffs are three individuals experiencing homelessness, a non-profit organization, and a Boulder taxpayer. In particular, Plaintiff Feet Forward – Peer Supportive Services and Outreach d/b/a Feet Forward, is a Colorado non-profit organization whose mission is to provide low-barrier, housing-focused peer support and navigation services to individuals experiencing homelessness in

Boulder. Complaint, ¶ 10. Plaintiffs Jennifer Shurley, Jordan Whitten, and Shawn Rhoades are individuals who are involuntarily experiencing homelessness, each of whom received a citation from City of Boulder law enforcement for allegedly violating the Blanket Ban or Tent Ban, or both. Complaint, ¶ 9. Plaintiff Jennifer Livovich is a City of Boulder resident and the founder and Executive Director of Feet Forward who asserts taxpayer standing. Complaint, ¶ 11. Former Plaintiff Lisa Sweeeny-Miran voluntarily dismissed her claims without prejudice on January 31, 2023.

Defendant City of Boulder ("Boulder" or "City") is a home rule municipality. Defendant Maris Herold was named in her official capacity as the Chief of Police for the City of Boulder ("Chief Herold"). Complaint, ¶ 14. Defendants are referred to collectively as "Defendants" or "City of Boulder Defendants")

Plaintiffs' Complaint requests the following relief:

a. A declaration that as applied to the Individual Plaintiffs when they cannot access indoor shelter, the Blanket Ban, B.R.C. § 5-6-10, amounts to cruel and unusual punishment prohibited by article II, section 20 of the Colorado Constitution; violates their substantive due process right to be free from state-created danger under article II, section 25 of the Colorado Constitution; and unduly infringes upon their fundamental rights, secured under article II, section 3 of the Colorado Constitution, to access Boulder's public spaces;

b. A declaration that as applied to the Individual Plaintiffs when they cannot access indoor shelter and when protection from the elements requires the use of an enclosed tent or similar structure, the Tent Ban, B.R.C. § 8-3-21(a), amounts to cruel and unusual punishment prohibited by article II, section 20 of the Colorado Constitution; violates

their substantive due process right to be free from state-crated danger under article II, section 25 of the Colorado Constitution; and unduly infringes upon their fundamental rights, secured under article II, section 3 of the Colorado Constitution, to access Boulder's public spaces;

c. That under color of law, the City subjected or caused the Individual Plaintiffs to be subjected to the deprivation of individual rights secured by article II of the Colorado Constitution; and

d. To enter a permanent injunction prohibiting Defendants, and all persons and entities acting under their direction or on their behalf, from enforcing the Cover Bans against the Individual Plaintiffs when they cannot access indoor shelter.

II. STANDARD OF REVIEW

C.R.C.P. 12(b)(5) provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. The purpose of a motion under Rule 12(b)(5) is to test the formal sufficiency of the complaint. *Dorman v. Petrol Aspen, Inc.*, 914 909, 911 (Colo. 1996). When reviewing a motion to dismiss, the Court must accept the material allegations of the complaint as true and draw all inferences in favor of the plaintiff. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). To survive a C.R.C.P. 12(b)(5) motion to dismiss, the complaint must state a plausible claim for relief by alleging facts sufficient "to raise the right to relief above the speculative level." *Warne v. Hall*, 2016 CO 50, ¶ 9. The plaintiff has the burden to frame a complaint with "sufficient factual matter, accepted as true" to suggest that the plaintiff is entitled to relief. *Id.* Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010).

Ordinances are presumed to be constitutional, and the party challenging an ordinance bears the burden of proving the ordinance unconstitutional beyond a reasonable doubt. *Mosgrove v. Federal Heights*, 543 P.2d 715, 717 (Colo. 1975); *McCarville v. City of Colorado Springs*, 2013 COA 169, ¶ 16.

III. ANALYSIS – THRESHOLD ISSUES

Judge Hartman requested the parties to brief the issues of political question and standing. Additionally, Defendants raised a brief ripeness challenge in their Motion to Dismiss. The Court first addresses these issues, because a lack of standing or ripeness would deprive the Court of jurisdiction to hear the merits of the case.

A. Political Question Doctrine – Second Claim for Relief

Defendants contend that the second claim for relief (state-created danger claim) is barred by the political question doctrine. This doctrine arises from separation of powers principles, and counsels courts to refrain from questioning the wisdom of a policy decision made by another branch of government. Defendants note that Plaintiffs' Response to the Motion to Dismiss relies in part on the City Council's debate and votes on the topic, to the extent Plaintiffs argue that the City's conduct shocks the judicial conscience. (Response, pp. 17-18). Further, Defendants reason that the court could not fashion a judicially manageable standard to determine when legislative action on legislative matters becomes conscience-shocking conduct without making policy decisions committed to the legislative branch.

Plaintiffs respond that political question deference is not unlimited, and that when the interpretation of a state constitutional provision is implicated, the political question doctrine does not bar the courts from resolving the claim at issue. In response to the City Council's actions, Plaintiffs point out that they do not assert claims against any council members for language used

during City Council meetings and argue that conscience-shocking behavior is not a necessary element of their claims.

Separation of powers principles require the judicial branch "to afford a certain berth of deference to the decisions and judgments of [its] sister branches [of] government." *Markwell v. Cooke*, 2021 CO 17, ¶ 1 (holding that whether the legislature complied with the bill reading requirement requires constitutional interpretation and is therefore a prime candidate for judicial resolution). Deference is not unlimited, however. Where "the interpretation of a provision in our state constitution is implicated, it is both [the courts'] prerogative and responsibility to wade into the fray." *Id.* Indeed, evaluating the constitutionality of legislative enactments is "squarely within the judiciary's wheelhouse." *Id.* at ¶ 23. Unlike a policy decision or value judgment, constitutional interpretation is not an issue "best left for resolution by the other branches of government, or to be fought out on the hustings and determined by the people at the polls." Rather, it is one that is "peculiarly within the province of the judiciary." *Id.* at ¶ 30, quoting *Colorado Common Cause v. Bledsoe*, 810 P.2d 201, 205-06 (Colo. 1991). In fact, the Colorado Supreme Court has never invoked [the political question doctrine] "to preclude judicial review of a statute's constitutionality." *Lobato v. People*, 218 P.3d 358, 368 (Colo. 2009) (holding that whether public school district financing system violated constitutional mandate was a justiciable issue).

Here, Plaintiffs' second claim for relief asks the Court to do more than weigh the wisdom of the City Council's policy decision in enacting the Blanket Ban and Tent Ban. Rather, Plaintiffs allege that the City Council's passage of the Blanket Ban and Tent Ban and their consequent enforcement by Chief Herold violate the Colorado Constitution's due process clause (Colo. Const. art. II, § 25) by creating a state-created danger. Evaluating this claim requires the Court to analyze this state constitutional provision and apply it to the facts alleged in the Complaint. Because

constitutional interpretation is the responsibility of the judicial branch, it is the Court's duty and obligation "to wade into the fray" and determine whether the second claim for relief states a claim upon which relief can be granted. In so doing, it is not the Court's task to determine whether the City Council made the best policy decision in enacting the Ordinances, but rather, whether the enforcement of the Ordinances as alleged in the Complaint creates a state-created danger proscribed by the state constitution's due process clause.

Plaintiffs' reference to City Council debate and voting on the Blanket Ban and Tent Ban and resulting appropriations does not transform the issue into a non-justiciable political question. Courts may consider legislative history in assessing the constitutionality of a statute or ordinance. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* 138 S. Ct. 1719, 1721 (2018) (relying on comments made by a commissioner to hold that the CCRD's decision violated the First Amendment). Plaintiffs have not brought claims against individual Council members for speech made during deliberations, and legislative immunity from suit is not an issue. Lastly, to the extent judicial conscience-shocking is a required element of the second claim for relief, the Court may avoid considering the City Council debate in determining whether Defendants' conduct amounts to a state-created danger.

In short, because the second claim for relief invokes the due process clause of the Colorado Constitution and requires the Court to interpret that constitutional provision and related caselaw, the second claim for relief presents a justiciable question that is not barred by the political question doctrine.

B. Political Question Doctrine – Claims Against Chief Herold

Defendants next argue that the separation of powers doctrine prohibits the Court from viewing Chief Herold's exercise of discretion regarding how the Blanket Ban and Tent Bans are

enforced as violating Plaintiffs' constitutional rights. While a court can order a member of an executive branch to exercise her discretion, it cannot prescribe how that discretion must be exercised. *Rocky Mountain Animal Defense v. Colorado Division of Wildlife*, 100 P.3d 508, 517 (Colo. App. 2004) (mandamus order can direct a party to act, but not how discretion is authorized). Because Plaintiffs ask the Court to hold Chief Herold liable for the manner in which she exercises her discretion as to how the Ordinances are to be enforced under a variety of conditions and individual situations (see Complaint, ¶¶ 83-107), Defendants reason that the Court cannot perform this task without transgressing the separation of powers.

Plaintiffs respond that while the enforcement of criminal laws involves the exercise of discretion by the executive branch, the discretion must be exercised within constitutional norms. The authority relied on by Defendants held that separation of powers concerns prevented the judiciary from compelling a coordinate branch of government to exercise legislative or executive power. Plaintiffs essentially ask the Court to do the converse here – to prohibit alleged unconstitutional conduct where the government official violates the constitution while exercising otherwise lawful discretion. Through their Complaint, Plaintiffs ask the Court to prevent Chief Herold from violating unhoused residents' constitutional rights.

Here, Plaintiffs have not brought a mandamus claim. They are not asking the Court to direct Chief Herold to affirmatively exercise power or to exercise discretion in a certain manner. Rather, Plaintiffs are requesting an Order that Chief Herold cease enforcing the Blanket Ban and Tent Ban against unhoused residents who have no access to indoor shelter, because this enforcement violates several constitutional provisions. As set forth above in section A, this determination is a quintessentially judicial function. Defendants have not cited to authority

holding that a court cannot prohibit unconstitutional conduct when the government representative allegedly violating the constitution does so while exercising otherwise lawful discretion.

In short, because the Plaintiffs' as-applied challenge to the constitutionality of the Blanket Ban and Tent Ban requests the Court to issue an Order prohibiting Chief Herold from violating the individual Plaintiffs' constitutional rights by enforcing the alleged unconstitutional Ordinances, the claims against Chief Herold do not amount to a non-justiciable political question.

C. Standing

Through the supplemental briefing, Defendants challenge the standing of the taxpayer Plaintiff[3] and Feet Forward. They do not challenge the standing of the individual Plaintiffs.

Critically, because standing represents a challenge to the court's subject matter jurisdiction, "it is not necessary to address the standing of parties bringing the same claims as parties with standing." *Lobato*, 218 P.3d at 368. In *Lobato*, the Colorado Supreme Court reversed the trial court's ruling that plaintiff school districts lacked the standing to sue, reasoning that because there was no dispute that plaintiff parents had standing and the plaintiff groups' claims overlapped, the Court need not evaluate the school districts' standing. The school districts were therefore permitted to continue as plaintiffs in the case. *Id.* at 367-68.

Here, the taxpayer Plaintiff and Feet Forward maintain the same claims as the individual unhoused Plaintiffs, with the exception that the individual unhoused Plaintiffs also assert claims for individual nominal damages. Complaint, Prayer for Relief. Accordingly, like the school districts in *Lobato*, the taxpayer Plaintiff and Feet Forward may continue as plaintiffs because their

[3] As noted above, Plaintiff Lisa Sweeney-Maran voluntarily withdrew her claims on January 31, 2023. As there remains only one taxpayer Plaintiff (Jennifer Livovich) reference to taxpayer plaintiffs is therefore in the singular.

role is similar to the role of permissive intervenors and does not require standing independent of the Plaintiffs that undisputedly have standing. *Lobato*, 218 P.3d at 368.

This analysis notwithstanding, for the sake of completeness for purposes of review, the Court analyzes the standing of the taxpayer Plaintiff and Feet Forward.

1. Taxpayer Plaintiff Standing

Colorado plaintiffs benefit from "relatively broad taxpayer standing." *Hickenlooper v. Freedom from Religion Foundation*, 2014 CO 77, ¶ 12; *Reeves-Toney v. School District No. 1*, 2019 CO 40, ¶ 23. A plaintiff asserting taxpayer standing must show (1) an injury-in-fact (2) to a legally protected interest. *Hickenlooper*, ¶ 12 (citing *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977)). Because a constitutional claim is sufficient to meet the second prong of the test, *Hickenlooper*, ¶ 8, only the first prong is in dispute. To meet the injury-in-fact requirement, a plaintiff seeking taxpayer standing must demonstrate "a clear nexus between her status as a taxpayer and the challenged government action." *Reeves-Toney*, ¶ 23; *Hickenlooper*, ¶ 12.

Here, accepting the pled facts as true, the taxpayer Plaintiff has satisfied the test for taxpayer standing. Plaintiffs allege that the enforcement of the Ordinances costs significant taxpayer money. Complaint, ¶¶ 87-88, 124-29. In particular, Plaintiffs have alleged that the City allocated an additional $2.7 million in taxpayer money to fund enforcement of the Ordinances in May 2021. Complaint, ¶ 127. Of this amount, Plaintiffs allege that about $1.7 million was allocated to fund additional resources for purposes of enforcing the Ordinances. Complaint, ¶¶ 128-29. Plaintiff taxpayer alleges that her City tax dollars are being used in an unconstitutional manner through the enforcement of the Ordinances. She therefore has taxpayer standing.

Defendants' reliance on *Hickenlooper* is unavailing. In *Hickenlooper*, the Colorado Supreme Court held that the taxpayer plaintiffs lacked standing to challenge the Governor's

Colorado Day of Prayer honorary proclamation. Although the Court presumed that issuing the proclamations involved the use of some public funds, in the form of paper, hard-drive space, postage, and personnel necessary to issue the proclamation every year, the Court held that the "incidental overhead costs" were too tenuous a connection to taxpayer dollars to confer taxpayer standing. *Id.* at ¶ 15. Here, according to the Complaint, the City Council appropriated more than $1 million relating to enforcement of the challenged Ordinances. There is thus both a direct connection and significantly more than a nominal expenditure at issue.

In the supplemental briefing, Defendants also maintain that taxpayer standing exists only when the transfer or expenditure of funds itself is alleged to violate the constitution, as opposed to the activity funded with taxpayer money. (Supplemental Brief, p. 6, citing *Hickenlooper*; *Reeves-Toney*; *Tabor Foundation v. Colorado Department of Health Care Policy & Finance*, 2020 COA 156, ¶ 17; *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008)). Defendants urge that it is not the amount of money that invokes taxpayer standing, but rather the unconstitutional transfer or expenditure of funds itself. Plaintiffs respond that Defendants have misconstrued the jurisprudence in this area, and that no Colorado court has drawn the distinction Defendants ask this Court to make.

On this point, the Court agrees with Plaintiffs. The Court is unable to discern the distinction advanced by Defendants from the cited caselaw. For instance, the cases which deny taxpayer standing generally rely on the lack of any material taxpayer dollars being expended or used to fund the challenged activity. *See, e.g.*, *Hickenlooper*, at ¶¶ 12-15 (no taxpayer standing because plaintiff did not allege unlawful expenditure of taxpayer funds used in an unconstitutional manner); *Reeves-Toney*, at ¶ 28 (plaintiff failed to establish a clear nexus between teacher salaries and statute in question; did not meet requirement to show tax dollars spent in an unconstitutional manner); *Tabor*

Foundation, at ¶ 17 (no nexus because funding came from hospitals and matching federal funds, not state taxpayers). Moreover, there is binding authority for the proposition that use of taxpayer dollars to support unlawful or unconstitutional activity is sufficient to invoke taxpayer standing. *See, e.g., Nash v. Mikesell*, 2021 COA 148M, at ¶¶ 18 & 22 (plaintiffs had standing based on use of taxpayer dollars to support alleged unlawful agreements with ICE); *Conrad v. City and County of Denver*, 656 P.2d 662, 668 (Colo. 1983) (Denver's use of taxpayer dollars for nativity creche sufficient for taxpayer standing).

Therefore, based on the allegations in the Complaint, the taxpayer Plaintiff has standing.

2. Feet Forward Standing

Defendants also contend that Feet Forward lacks organizational standing. In particular, Feet Forward is a non-profit organization and does not pay City taxes. Further, it is not a membership organization which may assert claims on behalf of its members. Instead, it relies on the allegations that its mission has been made more difficult, and it has been forced to expend resources, as a result of the City's enforcement of the Ordinances. (Complaint, ¶¶ 108-120). Even if these allegations are true, Defendants argue they are not injuries to a legally protected interest protected by the Colorado Constitution. The organization may not vindicate the rights of others. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427 (Colo. 2000) (Greenwood Village did not have "third party standing" to assert a claim based on alleged impairment of voting rights of its citizens). Further, Defendants urge that none of the three exceptions to third party standing exist here.

Plaintiffs counter that Feet Forward has independent standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). An organization has Article III standing in federal courts if it can show it has diverted its resources to counter the effects of alleged unlawful conduct that

frustrates the organization's mission. *Id.* at 379. Here, Plaintiffs have alleged that enforcement of the challenged ordinances has caused Feet Forward to "divert resources it would otherwise use to further its mission" and "prevent Feet Forward from distributing the life-saving gear it would otherwise provide." Complaint, ¶¶ 118, 121.

The Court concludes that based on the allegations, which must be accepted as true for purposes of the Motion to Dismiss, Feet Forward has organizational standing under *Havens*. Although *Havens* addressed standing before Article III federal courts, Colorado courts "have broader jurisdiction than their federal counterparts." *Lobato,* 218 P.3d at 370. Parties to Colorado lawsuits "benefit from a relatively broad definition of standing." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). Feet Forward has alleged concrete injury to its mission through the diversion of resources caused by the City's challenged actions. Complaint, ¶¶ 118-122. These allegations are sufficient to show injury-in-fact under *Havens* and Colorado standing jurisprudence. *See also Langley v. City of San Luis Obispo*, 2022 WL 18585987, (C.D. Cal. Feb. 7, 2022) (concluding that Hope's Village, a non-profit organization similar to Feet Forward, established standing to challenge the city's ordinances because the challenged actions frustrated its mission and forced it to divert resources).

Based on this analysis, it is unnecessary to determine whether one of the three exceptions to third party standing apply here. Feet Forward has direct organization standing based on alleged injury to the organization's mission and resources.

Therefore, based on the allegations in the Complaint, Feet Forward has standing.

D. Ripeness/Justiciability

Although not part of the supplemental briefing, the Court addresses Defendants' ripeness and justiciability argument before turning to the merits of the Motion to Dismiss. In their Motion

to Dismiss, Defendants argue that Plaintiffs' first claim for relief (article II, § 20) is not ripe or justiciable because none of the individual Plaintiffs were sentenced for violating the Blanket Ban or Tent Ban. (Motion, ¶ 13). Instead, they seek prospective injunctive relief regarding application of the Bans. Defendants rely on *People v. Stark*, 400 P.2d 923, 928 (Colo. 1965) and *People v. Summit*, 517 P.2d 850, 854 (Colo. 1974) for this proposition.

In *Stark*, the defendant argued that Colorado's marijuana statutes violated the prohibition on cruel and unusual punishment. The Colorado Supreme Court held that "until some person has been convicted of a crime and a sentence has been imposed which is then asserted to be 'cruel and unusual' there is no justiciable question presented." *Id.* at 928. Defendants posit that because Plaintiffs have not alleged that any plaintiff was sentenced for violating the Blanket Ban or Tent Ban, their allegations are insufficient to present a justiciable question regarding alleged imposition of cruel and unusual punishment.

While Defendants' argument holds superficial appeal, upon closer scrutiny, Plaintiffs have presented a justiciable question. The proposition relied on by Plaintiffs applies in cases, like *Stark* and *Summit*, challenging the excessiveness of punishment. It does not apply in circumstances, like here, where the litigation challenges the cruel and unusual punishment clause's substantive limits on "what can be made criminal and punished as such." *See, e.g., Martin v. Boise*, 920 F.3d 584, 613-14 (9th Cir. 2019), *cert denied*, 140 S. Ct. 674 (2019) (a conviction is not a prerequisite for the rare challenges concerning the government's power to criminalize a particular behavior in the first instance); *Phillips v. Cincinnati*, 479 F. Supp. 3d 611, 656-57 (S.D. Ohio Aug. 13, 2020) (harm under the clause's substantive limitation on a state's ability to criminalize conduct may begin well before conviction – "at arrest; at citation; or even earlier.") Requiring a conviction first would permit government to "punish individuals in the pre-conviction stages of the criminal law

enforcement process for being or doing things that under the [Cruel and Unusual Punishment Clause] cannot be subject to the criminal process." *Martin*, 920 F.3d at 614.

Here, the individual Plaintiffs have alleged that they were ticketed and summoned to appear in the Boulder Municipal Court for violating BMC § 5-6-10 and/or BMC § 8-3-21(a). (Complaint, ¶¶ 9, 141, 154, 166 & 167). Because each individual Plaintiff received a summons, they have presented justiciable claims under the substantive limitation contained in the state constitution's cruel and unusual punishment clause. *See Martin*, 920 F.3d at 614 (a plaintiff need only demonstrate initiation of the criminal process to present a ripe claim under this theory). Additionally, a plaintiff presenting a claim for prospective relief may allege a substantial risk of future harm, so long as there is fear of imminent harm**.** *Phillips*, 479 F. Supp. 3d at 650.

The Court thus concludes that Plaintiffs' claims are ripe and justiciable.

IV. ANALYSIS – MOTION TO DISMISS CLAIMS 1 – 3

Plaintiffs have demonstrated that they have standing, their claims are ripe or justiciable, and that the claims are not barred by the political question doctrine. The analysis next turns to the merits of Defendants' Motion to Dismiss. Defendants contend that even accepting all of Plaintiffs' factual allegations as true, Plaintiffs have not stated any claims upon which relief can be granted, under existing Colorado law. Plaintiffs counter that they have stated plausible claims for relief under three provisions of the Colorado Constitution – (1) the cruel and unusual punishment clause (art. II, § 20), (2) due process clause (art. II, § 25), and (3) inalienable rights clause (art. II, § 3).

A. First Claim – Cruel and Unusual Punishment Under Colo. Const. art. II, § 20

Plaintiffs allege that the Blanket Ban and Tent Ban violate the Colorado Constitution's cruel and unusual punishment clause (art. II, § 20). Its language is identical to the better-known federal counterpart, the Eighth Amendment to the U.S. Constitution.

The Eighth Amendment "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, imposes substantive limits on what can be made criminal and punished as such. . . We have recognized the last limitation as one to be applied sparingly." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (internal citations omitted).

As set forth above, Plaintiffs maintain that the Ordinances violate the third limitation of the clause (substantive limits) because they essentially criminalize the status of homelessness. Complaint, ¶¶ 175-87. In particular, Plaintiffs contend that it is cruel and unusual to criminalize conduct that is the unavoidable consequence of being unhoused. Plaintiffs also note that Colorado's cruel and unusual punishment clause is at least as protective as the Eighth Amendment.

Defendants have moved to dismiss this claim. In support, Defendants point out that there is no binding authority in Colorado (or the Tenth Circuit) regarding the constitutionality of ordinances that impose criminal sanctions for camping on public property. Defendants note that the few U.S. Supreme Court cases addressing this portion of the Eighth Amendment hold that a law that sanctions conduct and not status is permissible under the Constitution. Further, Defendants argue that the majority of the legal authority relied on by Plaintiffs arises from the Ninth Circuit, and that the cases relied on should not be followed and/or are distinguishable. In particular, unlike the ordinance struck by the Ninth Circuit in *Martin v. Boise*, the Boulder Ordinances do not penalize "sitting, sleeping, or lying outside on public property." Defendants contend that the subject Ordinances are more narrowly defined, in that they do not criminalize homelessness, but rather regulate conduct, which is a valid exercise of police power.

When a plaintiff proceeds exclusively under the state constitution, cases construing analogous federal provisions are persuasive, but not binding, authority. *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶¶ 35-38. In *Rocky Mountain Gun Owners*, the Colorado Supreme Court specifically identified jurisprudence under article II, § 20 as an area where it "has leaned on federal analysis." *Id.* at ¶ 37. The protections afforded by state constitutions often extend beyond those required by the Supreme Court's interpretation of federal law. *People v. McKnight*, 2019 CO 36, ¶ 38 (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977)). However, in *Rocky Mountain Gun Owners*, the Colorado Supreme Court emphasized that interpretations of federal constitutional counterparts are not controlling, noting that "[w]hen interpreting our own constitution, we do not stand on the federal floor, we are in our own house." *Id.* at ¶ 36. In observing that two recent U.S. Supreme Court decisions regarding gun control were a departure from Second Amendment precedent, the Colorado Supreme Court stated that when interpreting the state constitution, courts need not "lock in on the moving target of federal jurisprudence." *Id.* at ¶ 45.

Thus, in evaluating whether Plaintiffs have stated a plausible claim for relief under article II, § 20, there is little if any binding appellate authority. However, U.S. Supreme Court, Circuit Court, and District Court cases assessing the constitutionality of comparable legislation and ordinances under the Eighth Amendment are instructive.

1. U.S. Supreme Court Authority

Robinson v. California, 370 U.S. 660 (1962) is the seminal U.S. Supreme Court decision interpreting the substantive limitation category of the Eighth Amendment. A California statute outlawed not only the use of narcotics but also the status of "being addicted to narcotics." *Id.* at 666. Although the Supreme Court upheld the portion of the statute that criminalized the conduct

of using drugs, the Court struck down the portion that criminalized "being addicted to narcotics," observing that the law "is not one which punishes a person for the use of narcotics . . . or for antisocial or disorderly behavior," but rather punishes status. *Id.* The Court reasoned that narcotic addiction was comparable to physical disease and determined that the criminalization of such broad status offenses contravened the Eighth Amendment. *Id.* at 666-67.

In *Powell v. Texas*, 392 U.S. 514 (1968), the defendant was convicted under a Texas statute that prohibited public drunkenness. Evidence presented at trial described the defendant as a chronic alcoholic. *Id.* at 519-20. In a 4-4-1 opinion, the plurality distinguished the status of chronic alcoholism with the conduct of being drunk in a public place. The plurality opinion observed that "Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public." *Id.* at 532. The Court concluded that a law that sanctions conduct, and not status, is permissible under the Constitution. *Id.* at 535-36.

Powell was a 4-4-1 decision in which Justice White concurred in the result alone. Justice White observed that many chronic alcoholics are also homeless, and that for those individuals, public drunkenness may be unavoidable as a practical matter. *Id.* at 551. However, there was insufficient evidence in the record to support the fact that Powell frequented public places while intoxicated, and Justice White therefore joined the plurality opinion upholding the Texas law. *Id.* at 550.

2. Circuit Court Authority

Plaintiffs place primary reliance on *Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 674 (2019). A City of Boise ordinance criminalized all sleeping in public, by prohibiting sitting, sleeping, or lying outside on public property. The ordinance defined camping broadly, as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence." Boise City Code § 9-10-02. The *Martin* plaintiffs challenged the constitutionality of this ordinance, contending that as applied to unhoused individuals who could not obtain indoor shelter, the ordinance criminalized status as opposed to conduct.

The *Martin* Court majority agreed with plaintiffs, holding that the Eighth Amendment proscribes "punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Id.* at 616. In particular, the *Martin* Court applied this principle to compel "the conclusion that the [Clause] prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain indoor shelter." *Id.* Further, the government may not "criminalize indigent, homeless people for sleeping outdoors on public property, on the false premise they had a choice in the matter." *Id.* at 617. According to the *Martin* Court, at least as it regards unhoused residents who cannot obtain indoor shelter, "the conduct at issue is involuntary and inseparable from status." *Id.* at 616-17.

The *Martin* holding was premised on the situation where no alternative shelter is available. In particular, the Court wrote:

We hold only that so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public." *Id.* at 617.

Following the core briefing in this case, the Ninth Circuit extended the holding in *Martin* by partially sustaining an injunction against city ordinances which imposed criminal sanctions on sleeping with shelter. *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022). The city of Grants Pass, Oregon had enacted anti-camping ordinances, one of which prohibited the use of bedding supplies, such as a pillow, blanket, sleeping bag, or cardboard box, when sleeping in public. *Id.* at 792. The district court noted that the city may still "ban the use of tents in public parks" and pursue other options "to prevent the erection of encampments that cause public health and safety concerns." *Id.* at 797.

The Circuit Court struck down the bedding supplies ordinance as violating the Eighth Amendment when applied to individuals who were involuntarily experiencing homelessness and who had no access to indoor shelter. Is so doing, the Court noted that the "formula established in *Martin* is that the government cannot prosecute homeless people for sleeping in public if there is a greater number of homeless individuals in [a jurisdiction] than the number of available shelter spaces." *Id.* at 795. The Court held that the distinction between sleeping without bedding materials, which was permitted under the anti-camping ordinances, and sleeping with bedding, which was not, was insufficient to distinguish the anti-camping ordinances from *Martin* and the two Supreme Court precedents underlying *Martin*. *Id.* at 808. It upheld the district court's grant of summary judgment, in which the court concluded the ordinances violated the Eighth Amendment because they prohibited homeless persons from "taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available." *Id.* The Court observed it was adhering to the narrow holding of *Martin,* adopting the narrowest ground shared by five justices in *Powell*: a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status. *Id.* at 811. While the decision reaches

beyond *Martin* slightly, *Id.* at 813, the Court partially reversed and remanded for a more fully developed record, noting that beyond prohibiting bedding, the ordinances also prohibited the use of stoves or fires, as well as erection of structures, and the record did not establish that these prohibitions deprived homeless persons of sleep or the most rudimentary precautions against the elements. *Id.* at 812.

While the more recent Circuit Court decisions from the Ninth Circuit have sustained Eighth Amendment challenges, it should be noted that Circuit Courts have not unanimously held this view. *See, e.g., Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000) (anti-camping ordinance did not violate Eighth Amendment because shelters were never full and it targeted conduct and did not provide criminal punishment based on a person's status). Along the same lines, both *Martin* and *Grants Pass* were divided opinions, with strong dissenting opinions. *See, e.g., Martin* dissenting opinion, 920 F.3d at 590 (stating that the majority's holding misread Eighth Amendment precedent and will wreak havoc on local governments); *Grants Pass* dissenting opinion, 50 F.4th at 814 (assuming that *Martin* remains good law, the majority decision misreads and greatly expands *Martin's* holding, and is egregiously wrong).

3. District Court Decisions

In the briefing, Plaintiffs identified numerous federal district court decisions that have held that the substantive limitations clause of the Eighth Amendment prohibits imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain indoor shelter. Response, p. 5, n.4. Many of these decisions arise from the Ninth Circuit. *See, e.g., Warren v. City of Chico*, 2021 WL 2894648 (E.D. Cal. July 8, 2021) (enjoining enforcement of ordinance prohibiting homeless persons from resting on all public property when there is not enough practically available shelter within the city); *Cobine v. City of Eureka*, 250

F.Supp.3d 423, 430-32 (N.D. Cal. April 25, 2017) (denying motion to dismiss challenge and recognizing Eighth Amendment challenge if proscribed conduct is involuntary, to be determined based on factual record); *Anderson v. City of Portland*, 2009 WL 2386056 (D. Or. July 31, 2009) (denying motion to dismiss anti-camping ordinances which proscribed use of bedding material).

A few other decisions have issued from other Circuits post-*Martin*. *See, e.g., McArdle v. City of Ocala*, 519 F. Supp. 3d 1045 (M.D. Fla. Feb. 8, 2021) (enjoining city from enforcing camping ban absent inquiry into shelter availability); *Phillips v. City of Cincinnati*, 479 F. Supp. 3d 611, 649-53 (S.D. Ohio Aug. 13, 2020) (plaintiffs stated a claim under the Eighth Amendment where they alleged perpetual shortage of shelter, shelter rules that created barriers to entry, and policy that did not require determination of shelter bed availability before camping ban enforcement).

4. Application of Federal Caselaw to First Claim for Relief

The Blanket Ban proscribes living or sleeping outside while using "any cover or protection from the elements other than clothing." B.R.C. § 5-6-10(d). The Tent Ban prohibits sheltering or storing property outside under "any tent, net, or other temporary structure." B.R.C. § 8-3-21(a).

According to the Complaint, the Blanket Ban and Tent Ban penalize Boulder's unhoused residents' right to exist in any of the City's public property at any time of day or night by "targeting the unavoidable trappings of extreme poverty." (Complaint, ¶ 2). Plaintiffs allege that the City fails to ensure that there is adequate and available indoor shelter before enforcing these Bans, and at night, "indoor shelter capacity cannot support the size of the local population of people experiencing homelessness." Aside from bed space, "program rules, restrictions, and structural realities exclude many unhoused residents from accessing the limited shelter that exists." (Complaint, ¶ 3). The Complaint further alleges that there "are not nearly enough overnight shelter

beds available for the number of people experiencing homelessness in the City." (Complaint, ¶ 29). According to the Complaint, when enforced against unhoused individuals, the Bans "punish the unavoidable consequences of being homeless in Boulder, endanger lives, and seek to exclude an entire segment of the community from collective space." (Complaint, ¶ 4).

The Complaint further alleges that the individual unhoused Plaintiffs are involuntarily unhoused. (Complaint, ¶ 9). The Bans "prohibit conduct that is essential to being human, necessary for survival, and unavoidable for many of Boulder's unhoused residents." (Complaint, ¶ 61). The Complaint alleges that because of Chief Herold's directive, BPD officers do not inquire into a person's ability to access indoor shelter before enforcing the Bans, and the Bans have been enforced on days and nights when BSH has reached capacity and turned people away, and when the temperature was below freezing, when it was raining, and/or when it was snowing. (Complaint, ¶¶ 92-100).

The individual unhoused Plaintiffs each allege that, for different reasons, they are unable to stay at BSH. (Complaint, ¶¶ 132-170). They have each received summons for violating one or both of the Bans. (Complaint, ¶¶ 132-170).

Plaintiffs are bringing an as-applied challenge to the Ordinances. (Plaintiffs' Supplemental Response, p. 6, n.4). A plaintiff bringing an as-applied challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposes to act. *Sanger v. Dennis*, 148 P.3d 404, 410 (Colo. App. 2006). In their first claim for relief, Plaintiffs allege that the indoor shelter in the City is inadequate to support the population of people experiencing homelessness in the City, including the individual Plaintiffs. (Complaint, ¶ 177). Plaintiffs therefore have no choice but to sleep and spend their days outdoors in the City's public spaces. (Complaint, ¶ 180). When the Bans are enforced against the Plaintiffs when they cannot

obtain indoor shelter, Plaintiffs allege that the Bans punish them for their status of being homeless. (Complaint, ¶¶ 182-83). Therefore, Plaintiffs contend the Ordinances violate article II, § 20 of the Colorado Constitution. (Complaint, ¶ 184).

In assessing the Motion to Dismiss, the Court must accept the factual allegations as true. As set forth above, for purposes of this ruling, the Court must assume that (1) the number of individuals experiencing homelessness in the City of Boulder often exceeds the number of available shelter beds at BSH, the only shelter in the City; (2) the individual unhoused Plaintiffs are not eligible to stay at BSH or access indoor shelter for a variety of reasons; and (3) the individual unhoused Plaintiffs have received summons to attend the Boulder Municipal Court because of alleged violations of the Blanket Ban and/or Tent Ban.

In evaluating whether these facts allege plausible claims for relief under the state constitution's cruel and unusual punishment clause, the Court notes that none of the federal authorities cited by Plaintiffs has invalidated a city's ordinance prohibiting tents or temporary structures. Most of the ordinances which were declared unconstitutional prohibited sitting, sleeping, or lying down on public property. The *Grants Pass* Court went the furthest in this regard, in declaring unconstitutional the City's ban on coverings, including blankets, pillows, and sleeping bags. In noting that it was slightly extending *Martin*'s reach, the Court pointed out that it was not upholding the trial court's injunction of tents and temporary structures and remanded for further proceedings.

In the absence of any Colorado or federal authority striking down a city's tent ban under the Eighth Amendment or comparable state constitutional provision, the Court concludes that Plaintiffs have not stated a claim upon which relief can be granted regarding the Tent Ban.

Conversely, although Colorado has yet to address this issue, the Court notes that at least one Circuit Court of Appeals has upheld a trial court's ruling enjoining the city's blanket ban as violative of the Eighth Amendment. *Grants Pass*, 50 F.4th at 808. This ruling was premised on plaintiffs' status as involuntarily unhoused, and unable to access the city's shelter, which had fewer beds than the number of unhoused city residents. Similarly, here, the Complaint alleges, in extensive detail, the individual Plaintiffs' inability to access indoor shelter on a consistent basis, due in part to the number of available beds and other circumstances. Based on these well-pled factual allegations, the Court concludes Plaintiffs have adequately stated a claim upon which relief can be granted as to the constitutionality of the Blanket Ban.

The Court also notes that as this is an as-applied challenge, a factual record on this claim is appropriate and will facilitate appellate review on this particular claim.

The Motion to Dismiss Plaintiffs' First Claim for Relief is therefore GRANTED as to the Tent Ban and DENIED as to the Blanket Ban.

B. Second Claim – State-Created Danger Under Colo. Const., art. II, § 25

Plaintiffs' second claim for relief alleges that the Ordinances violate their substantive due process rights not to be subjected to state-created danger. Complaint, ¶¶ 188-199. All Plaintiffs bring this challenge under Colo. Const. art. II, § 25 (Colorado Constitution's due process clause) and the individual Plaintiffs also invoke C.R.S. § 13-21-131(1).[4]

[4] This subsection provides that a peace officer who, under color of law, subjects or causes to be subjected, including failing to intervene, any other person to the deprivation of any individual rights that create binding obligations on government actors secured by the bill of rights, article II of the state constitution, is liable to the injured party for legal or equitable relief or any other appropriate relief. Further, the Enhance Law Enforcement Integrity Act provided that the Colorado Governmental Immunity Act does not apply to claims for deprivations of rights brought under this new law. C.R.S. § 13-21-131(2)(a).

Under the state-created danger doctrine, the State may be liable for failing to protect an individual from harm when the State creates the harm through affirmative conduct or increases the individual's vulnerability to the harm. *Henderson v. Gunther*, 931 P.2d 1150, 1155-56 (Colo. 1997). The Colorado Supreme Court has maintained a narrow construction of the state-created danger exception in holding that "state actors must do more than merely create an environment in which harm occurs. Rather, the state actors must abuse their governmental power by subjecting a person to harm that would not have occurred in the absence of the state actor's conduct." *Id*. at 1159. The conduct by the state must be "affirmative" to sustain application of the state-created danger theory. *Gray v. University of Colorado Hospital Authority*, 672 F.3d 909, 925 (10th Cir. 2012).

Critically, a precondition to the application of the state-created danger theory is that the plaintiff suffered injury as a result of "private violence" made possible by the affirmative acts of the governmental defendant. *Id.* at 927-28. Further, the Colorado Supreme Court has observed that the doctrine of judicial self-restraint requires the Court to exercise "the utmost care whenever we are asked to break new ground in this field." *Henderson*, 931 P.2d at 1156 (*quoting Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

To assess the state-created danger claim, the Court begins with the factual allegations of the Complaint, which must be accepted as true and from which the Court must draw all inferences in favor of the Plaintiffs. The Complaint alleges that "the Blanket and Tent Bans make it a crime for unhoused persons who cannot access indoor shelter, including the Individual Plaintiffs, to use cover that is necessary to protect themselves from immediate danger from the elements." Complaint, ¶ 190. Plaintiffs claim that "the City knows that requiring unhoused individuals who cannot access indoor shelter to live exposed to the elements, without protection from cold, wind,

and rain, places them in immediate danger." Complaint, ¶ 193. Therefore, Plaintiffs allege that the enforcement of the bans by the City violates unhoused individuals' substantive due process rights. Complaint, ¶¶ 194-95.

Henderson and *Gray* arose from challenges based on the federal substantive due process clause and 42 U.S.C. § 1983. Plaintiffs emphasize that their state-created danger claim is premised on the Colorado Constitution's due process clause (article II, § 25), which is not co-extensive with and may be more protective than the federal due process clause. *See People ex rel. Juhan v. District Court*, 439 P.2d 741, 745 (Colo. 1968); *Rocky Mountain Gun Owners*, at ¶ 35). Plaintiffs therefore argue that their state-created danger claim should be analyzed using conventional tort principles. This argument is premised on *Leake v. Cain*, 720 P.2d 152, 160 (Colo. 1986), which held that a public official's liability for causing harm must be determined in the same manner as that of a private party for purposes of determining negligence liability. From *Leake*, the Plaintiffs urge that there is a duty owed where one might foresee or reasonably foresee that an act or failure to act would involve an unreasonable risk of harm to another.

Plaintiffs also rely on several cases arising from the Ninth Circuit to argue that danger can come from the environment and need not arise from private violence. For instance, Plaintiffs cite to *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1093 (E.D. Cal 2012) where the court denied the city's motion to dismiss, finding that the plaintiff plausibly alleged that the defendant knew or should have known that depriving him of shelter in extreme weather conditions would threaten his survival. Plaintiffs argue that this and other federal district court cases from the Ninth Circuit should be applied here because Defendants know or should know that prohibiting unhoused persons from using shelter leaves them exposed to the elements and involves a reasonable risk of harm. From there, Plaintiffs argue that the Court would not be impermissibly expanding the state

created danger doctrine, but rather, would be applying recognized conventional tort principles in denying Defendants' motion to dismiss the second claim for relief.

In response, Defendants argue that both the Colorado Supreme Court and Tenth Circuit have explicitly warned about the expansion of the state-created danger doctrine. Defendants contend that *Leake* does not apply because *Leake* concerns common law torts and Plaintiffs create an unworkable foreseeability test for the state-created danger doctrine by combining it with *Leake*. Defendants argue that if the Court adopts the foreseeability test as suggested by Plaintiffs, well settled government immunity precedent would be upended by the possibility that the government could be held liable for any common law tort that was foreseeable.

Defendants also argue that Plaintiffs ignore Tenth Circuit precedent that holds that there needs to be an act of private violence for a state to be held liable under the state-created danger doctrine. *Gray,* 672 F.3d at 922. Defendants note that *Henderson* limits the state-created danger doctrine to two situations: (1) when the state has taken a person into custody, and (2) when the state is responsible for creating the danger. *Henderson,* 931 P.2d at 1155-56. Defendants posit that the City is not responsible for the danger alleged here - the cold weather.

Further, Defendants note that the BSH is not an agent of the City and it is BSH that is allegedly not allowing certain unhoused people into the shelter. Defendants argue that to find the state liable under the state-created danger doctrine there must be some encounter between the state and the plaintiff, and if BSH is turning away unhoused people, the City has no involvement in that process. Finally, Defendants urge that the City's enforcement of the camping and tent bans is not conscience shocking and that Plaintiffs cite to no specific conduct or action that would shock the judicial conscience. Defendants maintain that by describing the enforcement of the bans as "conscience shocking" the Plaintiffs invite the court to second-guess legislative judgments.

The Court begins by determining whether the state-created danger doctrine should be analyzed under conventional tort principles. In *Leake,* the Colorado Supreme Court overturned the public duty rule which had previously held public officials liable for a duty owed to the public and thus limited governmental immunity. On the issue of liability for public entities, the Court ultimately held that "the duty of a public entity shall be determined in the same manner as if it were a private party." *Leake,* 720 P.2d at 160 (holding superseded by C.R.S. § 24-10-106.5). *Leake* concerned negligence actions against the government, rather than the government's constitutional duties.

Under *Leake,* Plaintiffs ask the Court to assess the state-created danger doctrine through a foreseeability negligence standard. The Court concludes that Plaintiffs' reliance on *Leake* is misplaced, however, as they attempt to inject a common law tort analysis into a doctrine intended to protect persons from constitutional deprivations. The Colorado Supreme Court has not previously applied a common law tort analysis to the state-created danger doctrine. Based on the admonition to tread carefully in judicially expanding the state-created danger doctrine, this Court declines to graft the foreseeability negligence standard into the state-created danger doctrine. As Defendants argue, expanding the constitutional doctrine in this manner could upend years of precedent interpreting the Colorado Governmental Immunity Act, permitting common law tort claims to be recast into state constitutional violations.

Plaintiffs disagree with the application of *Henderson* to their state constitutional claim because *Henderson* interprets the U.S. Constitution's substantive due process clause, rather than article II, section 25 of the state constitution. The Court agrees with Defendants, however, that *Henderson* is highly persuasive as to how the Colorado Supreme Court would evaluate the state-created danger claim under the state constitutional provision. In *Henderson,* the Court noted that

the constitutional guarantee of due process is meant to protect persons from the arbitrary exercise of government power, but that due process "does not convert all common law duties owed by government actors into constitutional torts." *Henderson,* 931 P.2d at 1155. Based on the foregoing analysis, this Court concludes it is appropriate to evaluate Plaintiffs' state-created danger claim under existing Colorado and Tenth Circuit caselaw that has applied the state-created danger doctrine to federal substantive due process claims, rather than applying conventional tort law principles.[5]

The Court therefore concludes that Plaintiffs' Complaint fails to state a claim under the state-created danger doctrine because Plaintiffs fail to allege facts that they suffered a harm resulting from *private violence* created by the affirmative actions of the City. *See Gray,* 672 F.3d at 927-28; *Henderson*, 931 P.2d at 1155-56. In *Gray*, the plaintiffs (family members of the decedent) alleged that the decedent was deprived of due process when he died at the defendant hospital following a seizure. *Id*. at 911-12. The plaintiffs posited that because decedent was in the care of the defendant, and defendant's policies and customs constituted affirmative conduct that put the decedent at risk, defendant was liable under a state-created danger theory. *Id*. at 927. The Tenth Circuit observed that "a precondition to our application of the state-created danger theory is an act of "private violence." *Id.* The plaintiff did not allege that precondition, but rather that the cause of decedent's death was negligence on behalf of the state actors. *Id.* Further, the Tenth

[5] In making this determination, the Court is cognizant that article II, § 25 is to be interpreted at least as broadly, if not more broadly, than its federal counterpart. *Air Pollution Variance Board v. Western Alfalfa Corp.*, 553 P.2d 811, 816 (Colo. 1976) (requires "at a minimum, the same guarantees as those protected by the due process clause of the federal constitution."). However, for the reasons set forth herein and in the absence of precedent applying a foreseeability negligence test to claims arising under the state constitution, the Court declines to expand the doctrine as Plaintiffs seek.

Circuit held that "under the state-created danger theory, a constitutional deprivation is *dependent* on a private act that deprives the victim of life, liberty, or property." *Id.* at 928 (emphasis added).

The Court notes that much of the authority relied on by Plaintiffs arose from the Ninth Circuit, which does not apply the private violence criteria to the state created danger doctrine. *See, e.g., Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000) (the danger creation exception applies "when there is affirmative conduct on the part of the state in placing the plaintiff in danger"). Due to the Colorado Supreme Court and Tenth Circuit precedent noted above, the Court declines to apply the more expansive state created danger test from the Ninth Circuit.

Thus, Plaintiffs' claim that enforcement of the Ordinances amounts to a state-created danger fails, even if all the allegations are accepted as true, and all inferences are drawn in Plaintiffs' favor. Under binding precedent, a state-created danger occurs when a plaintiff suffers a harm by private violence made possible by the affirmative actions of the government. Here, there are no factual allegations that the City's passage of the Ordinances or the City Defendants' enforcement of the Ordinances results in Plaintiffs' exposure to private violence.

Based on this analysis, it is unnecessary to reach Defendants' alternative arguments that it was BSH, and not the City, that created any danger and that Defendants' actions do not shock the conscience.

Because Plaintiffs have not stated a claim upon which relief can be granted under Colo. Const. art. II, § 25, the individual unhoused Plaintiffs' statutory claim under C.R.S. § 13-21-131 also fails as a matter of law.

Defendants' motion to dismiss Plaintiffs' second claim for relief is therefore GRANTED.

C. Third Claim – Right to Use Public Space Under Colo. Const., art. II, § 3

Article II, section 3 of the Colorado Constitution provides:

> All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.

This provision protects fundamental rights from abridgement by the state absent a compelling government interest. *City of Longmont v. Colorado Oil and Gas Association*, 2016 CO 29, ¶ 58.

Plaintiffs' third claim for relief asserts that the City's Blanket and Tent Bans curtail unhoused individuals' fundamental rights to freedom of movement and to use the public streets and facilities by denying them the necessity of a safe place "to sleep, rest, and recuperate." Complaint, ¶¶ 204-05. Relying on article II, section 3 of the Colorado Constitution, Plaintiffs ask the Court to recognize a right to use public land for camping and/or sleeping with covers. Plaintiffs primarily rely on *People in the Interest of J.M.*, 768 P.2d 219 (Colo. 1989), which held that the rights of freedom of movement and the use of public streets and facilities are basic values protected by article II, section 3.

In their Motion to Dismiss, Defendants maintain that Plaintiffs are asking the Court to recognize an unenumerated right to use public property "to sleep, rest, and recuperate." Motion, p. 9. Defendants argue that the Tenth Circuit has held there is no right to occupy public land without a colorable claim of title in *Double J. Land & Cattle Co. v. United States Dep't of Interior*, 91 F.3d 1378, 1382 (10th Circ. 1996), and though there is a recognized right to access public highways, it can be curtailed through reasonable police power. *People v. Brown*, 485 P.2d 500 (Colo. 1971). Defendants also distinguish *J.M.*, arguing that that decision was about freedom of movement, not a right to settle down and occupy land.

In *J.M.*, the Colorado Supreme Court determined that adults have a constitutional right to the freedom of movement and to use public streets and facilities in a manner that does not interfere with the liberty of others. *J.M.*, 768 P.2d at 221. This constitutional right arises from both the due process clause of the Fourteenth Amendment and article II, section 3 of the Colorado Constitution. *Id.* Because these liberty interests are fundamental, the state must establish a compelling interest before it may curtail the exercise of such rights by adults. *Id.* The Court, however, upheld the ordinance in question, which limited the loitering of minors between 10 p.m. and 6 p.m. In so doing, the Court determined that the fundamental liberty and rights afforded to adults was not the same as for minors because the state has a broader authority to supervise the activities of children. *Id.* at 222. Because the minor's liberty interest in the freedom of movement did not constitute a fundamental right or create a suspect classification, the ordinance was measured by the rationality standard, in which the government merely needs to establish a legitimate purpose and a rational relation between the means employed and the goals to be obtained. *Id.* at 223.

The Court does not read *J.M.* to provide for a constitutional or fundamental right to settle down and occupy public lands. As argued by the Defendants, the Pueblo ordinance in question prohibited loitering, defined as "remaining idle in essentially one location, to be dilatory, to dawdle, and shall include but not be limited to standing around, hanging out, sitting, kneeling, sauntering or prowling." *Id.* at 221 (citing Pueblo Municipal Code § 11-1-703). The *J.M.* Court considered cases that dealt with "the freedom of movement and the right to travel" in its analysis. *Id.* Movement, travel, and loitering are different actions than laying down and camping on public property, the type of actions that the Blanket Ban and Tent Ban prohibit.

Defendants' Motion also relies on *People v. Brown*. In *Brown*, the Colorado Supreme Court held that the implied consent statute did not violate the right to travel upon state highways or

infringe upon due process rights. The Court concluded that though there was a right to use of the highways under article II, section 3 "limitations may be placed upon an inalienable or inherent right based upon a proper exercise of police power." 485 P.2d at 503. Thus, *Brown* is similar to *J.M.*, in that both decisions announce a general right to access public highways and facilities for movement and travel. However, this right of movement and access is not unfettered, and the government retains police powers to regulate the use of public spaces. *Id.*

Here, Plaintiffs are asking the Court to recognize the constitutional right to *occupy* public land, for purposes of maintaining a residence. As Defendants observe, each unhoused Plaintiff alleges circumstances that prevent them from accessing BSH. (Motion, p. 12). An unrestrained constitutional right to erect tents and shelter on public property would inevitably result in semi-permanent occupations of public land in the City. The Court is unaware of any Colorado precedent which establishes the fundamental, inalienable right to camp upon or indefinitely occupy public property under article II, section 3.

Moreover, *Brown* provides that even within the context of movement, a reasonable exercise of police power can limit such rights. Thus, even if article II, section 3 was construed to create a fundamental, inalienable right to camp on or indefinitely occupy public land, the City retains police powers to limit that right to protect the health and safety of the community. Defendants have set forth and established a reasonable basis for the Ordinances. *See* Motion, p. 11 (the widespread erection of tents would deprive other citizens of the use of the occupied portion of the public lands and increase the potential for public health problems); *Wright v. Littleton*, 483 P.2d 953, 955-56 (an exercise of the police powers is sustained if it is "reasonably related to public health, safety, morals, or general welfare").

In short, neither Tenth Circuit nor Colorado precedent creates a fundamental right to settle down and occupy public lands "to sleep, rest, and recuperate" under Colorado Constitution article II, section 3. The right to freedom of movement and right to travel are not synonymous with the right to camp on or indefinitely occupy public land, as Plaintiffs seek through their third claim for relief. In the absence of a fundamental constitutional right, Defendants need not demonstrate a compelling state interest supporting the Ordinances. The enactment of the Ordinances is a reasonable exercise of the City's police power to regulate the use of public lands and public health. Accordingly, Plaintiffs fail to state a plausible claim for infringement of a right to use of public space under the Colorado Constitution's inalienable rights clause.

Defendants' motion to dismiss Plaintiffs' third claim for relief is therefore GRANTED.

V. CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiffs have standing, and that the matters presented are ripe, justiciable questions. Defendants' Motion to Dismiss the first claim for relief is denied as to the Blanket Ban and granted as to the Tent Ban. Defendants' Motion to Dismiss the second and third claims for relief is granted.

SO ORDERED this 23rd day of February, 2023.

BY THE COURT:

/s/ Robert R. Gunning
Robert R. Gunning
District Court Judge