Court of Appeals, State of Colorado 2 East 14th Avenue Denver, CO 80203	DATE FILED September 27, 2024 4:47 PM FILING ID: B4CE6395FED56 CASE NUMBER: 2024CA683
District Court, County of Denver State of Colorado The Honorable Stephanie Scoville Case No. 2022CV33434	
Plaintiff-Appellee: **RUBY JOHNSON**, v. Defendant-Appellants: **GARY STAAB**, an officer of the Denver Police Department, in his individual capacity and **GREGORY BUSCHY**, an officer of the Denver Police Department, in his individual capacity.	Court Use Only
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APPELLEE RUBY JOHNSON'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with the applicable word limits set forth in C.A.R. 28(g) because it has **9490** words.

The brief also complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) or C.A.R. 28(b). In response to each issue raised, the appellee has provided under a separate heading before the discussion of the issue a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Timothy R. Macdonald

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2: Whether sufficient evidence supported the jury's verdict.

3: (REFRAMED) Whether the evidence supported the jury's damages award.

4: (REFRAMED) Whether Defendants were properly held jointly and severally liable for the injury they caused Ms. Johnson.

5: (REFRAMED) Whether Defendants' equal protection argument was waived and is nonetheless meritless.

SUMMARY OF ARGUMENT

Plaintiff Ruby Johnson, a 78-year-old retiree, was alone watching television in her robe, bonnet, and house shoes when her quiet world was pierced by the sound of a police bullhorn commanding that anyone at her address immediately come outside. TR 2/27/24, 19:8-24; EX 168. Bewildered and scared, she opened her front door to the sight of a Denver Police Department SWAT team descending upon her home, officers in tactical gear pouring out of an armored vehicle, guns drawn her way. TR 2/27/24, 20:22-25, 22:7-9; EX 167-68. She was placed in the back of a locked police car and driven down the block away from her home. TR 2/27/24, 30:12-15; 2/29/24, 36:6-14; EX 165, 307.

EX 168. Ms. Johnson's life would never be the same. TR 2/26/24, 227:5-6; 2/29/24, 86:10-87:1.

Police searched Ms. Johnson's home for an iPhone that had been stolen the day before in a truck theft downtown along with guns, drones, and cash. EX 118-122. But the officers were in the wrong place. There was no basis to suspect that Ms. Johnson or her home was connected to the theft. The raid on her home was unreasonable, unjustified, and succeeded only in traumatizing Ms. Johnson and destroying her sense of security in her home of forty years. TR 2/26/24, 216:19-217:13; 2/27/24, 18:5-12, 35:15-25; 36:6-22; 37:1-8, 50:21-52:1; EX 344, 349-357. It never should have happened.

The warrant authorizing the search issued on a misleading affidavit submitted by Defendants Detective Gary Staab and Sergeant Gregory Buschy. EX 118-22. Defendants swore in the affidavit that a Find My iPhone ("FindMy") screenshot signified that the phone was inside Ms. Johnson's home. EX 118. It meant no such thing. TR 2/29/24, 189:12-15, 190:22-191:20; 193:22-194:13. On the contrary, the image displayed a large blue circle encompassing about six properties in the general vicinity. A quick internet search or check-in with DPD resources would have revealed that the screenshot meant the device could *not* locate itself more precisely than that large area with any accuracy or reliability. EX 338–43, TR 2/27/24, 279:21-280:15.

Though the *sole* purported nexus to Ms. Johnson's address rested on (mis)interpretations of FindMy, the officers chose not to disclose in the affidavit their total ignorance of the technology. TR 2/27/24, 250:7-252:6; 2/28/24, 48:2-11; 72:13-73:2, 76:9-12. They did, however, include a host of other falsehoods and omissions relevant to probable cause. EX 118-122; 259:10-260:8, 261:20-23; 2/28/24, 39:21-40:5, 93:1-6. The officers were concerned they lacked probable cause but pressed forward nonetheless with a search that would turn Ms. Johnson's world upside down. TR 2/27/24, 235:13-16, 241:22-24.

This case is a civil rights action brought under C.R.S. §13-21-131 ("§131") to redress the profound harm caused by the unlawful search of Ms. Johnson's home and the violation of her rights under article II, section 7 of the Colorado Constitution. Passed in 2020, §131 made available to Coloradans, for the first time, a civil cause of action for damages to vindicate violations of the state Bill of Rights. Colo. S.B. 217, 2020 Gen. Assemb., Reg. Sess. The statute imposes liability wherever a peace officer causes the deprivation of a right under article II of the Colorado Constitution. *Id.* §131(1). No statutory limitations on damages or immunity apply. *Id.* §131(2)(a). And unlike in federal civil rights actions brought under 42 U.S.C. §1983, qualified immunity "is not a defense to liability" under §131. *Id.* §131(2)(b). Also, unlike the federal civil rights statute, §131 requires that city police departments indemnify a

defendant officer for any liability incurred under the statute—unless the officer did not act upon a good faith, reasonable belief the action they took was lawful (in which case the officer's maximum liability is $25,000). *Id.* §131(4).

To prove her §131 claim against Defendants, Ms. Johnson was required to show that the search of her home violated the Colorado Constitution and that each officer was a legal cause of the unlawful search. She did so. A search pursuant to a warrant is unconstitutional if it is unsupported by probable cause. Here, the jury found that Defendants obtained the warrant by submitting a materially misleading affidavit. Corrected for proven falsehoods and omissions, the jury determined Defendants' affidavit did *not* establish probable cause to search Ms. Johnson's home. The jury appropriately awarded Ms. Johnson compensatory damages for the significant harms she suffered as a result of the unlawful intrusion into her home. It also awarded exemplary damages against both Defendants, concluding they caused the unlawful search through willful and wanton conduct.

Defendants' attempts to overturn the jury's verdict fail.[1]

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[1] Defendant Staab largely adopts and incorporates arguments set forth in Defendant Buschy's Opening Brief. References to Buschy's filing are to "Br."

First, Defendants ask this Court to craft a good-faith exception to the probable cause requirement. The Court should reject that invitation, which is inconsistent with the Colorado Constitution and the text and purpose of §131. Second, Defendants attack the sufficiency of the evidence underlying the jury's verdict and damages awards, but their arguments amount to nothing more than disagreement with the jury's reasonable conclusions from the evidence. Next, Defendants ask the Court to apply a pro-rata liability statute to shield them from joint and several liability for the indivisible injury they caused Ms. Johnson. But as the trial court correctly recognized, "statutory limitations on liability [or] damages . . . do not apply" to claims brought under §131. *Id.* §131(2)(a). Finally, §131 easily passes constitutional muster, and this Court should reject Defendants' late and meritless argument that it violates their rights to equal protection. This Court should affirm the jury's well-supported verdict.

ARGUMENT

I. The Trial Court Properly Instructed the Jury.

A. Standard of Review and Preservation.

Ms. Johnson agrees that Defendants preserved their objections to Instruction 16 and that this Court reviews de novo whether instructions correctly state the law.

Vititoe v. Rocky Mountain Pavement Main., Inc., 2015 COA 82, ¶67. On review, the jury instructions must be viewed "as a whole," not in isolation. *Waneka v. Clyncke*, 134 P.3d 492, 494 (Colo. App. 2005), *aff'd*, 157 P.3d 1072 (Colo. 2007). Further, if the jury would have reached the same verdict under a different instruction, there is no reversible error. *Id.*

B. Discussion

An officer who submits a materially false warrant application that results in an unlawful search is liable under §131. That is because the plain text of the statute imposes liability when a peace officer, acting under color of law, causes the deprivation of a right protected by the Colorado Constitution. *Id.* §131(1). Accordingly, the jury was properly instructed to consider whether Defendants submitted a false and materially misleading affidavit to the reviewing judge that caused Ms. Johnson's home to be searched without probable cause. The jury answered yes.

Defendants ask this Court to create an exception to the probable cause requirement that denies relief to the victim of an unlawful search unless she can show that the officer responsible not only caused a deficient warrant to issue by submitting a false and materially misleading affidavit but did so in bad faith. But Defendants' arguments rely on doctrines, including qualified immunity, that do not

apply here. It would be contrary to the Colorado Constitution and the text and purpose of §131 to fashion a good faith exception that exempts officers from liability under the statute for a constitutional injury they caused. In addition, based on the punitive damages award, the jury here necessarily found that both officers acted in a willful and wanton manner in causing Ms. Johnson's constitutional injury. Because the jury was properly instructed and would have reached the same result even under Defendants' preferred rule, this Court should affirm.

1. The trial court properly instructed the jury under the Colorado Constitution and §131.

Section 131 straightforwardly imposes liability where a peace officer causes a violation of article II of the Colorado Constitution. Article II, section 7 provides that "no warrant to search any place . . . shall issue . . . without probable cause." A warrant is supported by probable cause "when the affidavit in support of the warrant alleges sufficient facts to warrant a person of reasonable caution to believe that . . . evidence of criminal activity is located at the place to be searched." *People v. Seymour*, 2023 CO 53, ¶54 (quoting *Henderson v. People*, 879 P.2d 383, 391 (Colo. 1994)). When the constitution "demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing." *Franks v. Delaware*, 438 U.S. 154, 165 (1978). As a result, as Defendants

acknowledge, "factual misstatements or omissions in an affidavit may cause a warrant to issue without probable cause." Br. 12. And, importantly, Defendants concede that "if the warrant lacks probable cause, any search under it is unconstitutional." Br. 12.

The jury was instructed accordingly. Instruction 15 explained that "[t]o obtain a search warrant, a law enforcement officer must show probable cause;" and that "[i]n deciding whether to issue a search warrant, a judge generally relies on the facts stated in an affidavit signed by a law enforcement officer." CF 4195.

Instruction 17 defined probable cause and specified that "[w]hether probable cause has been established involves a practical, commonsense evaluation of the totality of the circumstances." CF 4197. It also instructed the jury that "[i]n determining whether probable cause existed, you should consider what Defendants knew, the reasonably trustworthy information Defendants received, and reasonable inferences that may flow from the information in the affidavit." *Id.*

Instruction 16 stated that to prove her case, Plaintiff needed to show by a preponderance of the evidence that:

> "1. In the warrant affidavit, Defendants made false statements, or omissions that created a falsehood; and
>
> 2. Those false statements or omissions were material, or necessary, to the finding of probable cause for the arrest warrant."

CF 4196. The Instruction further provided that "[t]o determine whether any misstatements or omissions were material, you must subtract the misstatements from the warrant affidavit and add the facts that were omitted, and then determine whether the warrant affidavit, with these corrections, would establish probable cause." *Id.* The trial court thus provided the jury with detailed and proper instructions on how to make the determination of whether "the warrant lack[ed] probable cause," such that "any search under it [was] unconstitutional." Br. 12.

Contrary to Defendants' characterization, nothing in the instructions suggested that misstatements and omissions would "automatically" prevent the affidavit from establishing probable cause. Br. 14. In fact, they said the opposite: that Defendants could be liable only if the affidavit, correcting for any proven misstatements and/or omissions, did not establish probable cause under the jury's practical, commonsense evaluation of the totality of the circumstances. CF 4196–97. This instruction properly stated the law.

a. Applying the federal standard for civil liability from 42 U.S.C. §1983 would inject qualified immunity into §131.

Defendants' reliance on the test for civil liability for misleading affidavits under §1983 is misplaced. Br. 13. The federal rule that officers can be liable only if they made "intentional and reckless factual misstatements" does not come from the

Fourth Amendment, but from the doctrine of qualified immunity. *See, e.g.*, *Stonecipher v. Valles*, 759 F.3d 1134, 1142 (10th Cir. 2014) (describing plaintiff's burden to show deliberate falsehood or reckless disregard for truth *when a law enforcement officer raises qualified immunity as a defense*). Defendants' argument is wrong because it ignores that the doctrine of qualified immunity does not apply to claims under §131.

Under federal civil rights law, individual officers are not liable for all the constitutional violations they cause. Instead, their exposure is limited by qualified immunity, a shield from liability that courts have created and read into §1983. *Malley v. Briggs*, 475 U.S. 335, 339–40 (1986).[2] To pierce the shield of liability in a federal §1983 damages action, it is not enough to prove that a defendant officer caused the deprivation of a plaintiff's constitutional rights. The plaintiff must show *more*.

In enacting §131, the General Assembly expressly rejected this scheme for peace officers sued for violating the Colorado Constitution. The statute is clear that when an officer causes a deprivation of rights protected by article II, liability follows.

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[2] *See also Green v. Thomas*, 3:23-CV-126-CWR-ASH, 2024 WL 2269133, at *1 (S.D. Miss. May 20, 2024) (explaining that §1983 itself imposes strict liability for constitutional violations and that the invention of qualified immunity was "an unconstitutional error" of the judiciary).

C.R.S. §13-21-131(1). And it rejects the shield of qualified immunity outright. *Id.* §131(2)(b). But the federal test Defendants advocate here—which prevents a plaintiff from recovering unless she can show the officer made knowing or reckless falsehoods or omissions material to probable cause—has the defense of qualified immunity *built in*. Grafting that federal test onto §131 would thus contravene the legislature's express policy choice rejecting the doctrine.

The federal test for civil liability requires more than proof of a constitutional violation. In *Malley v. Briggs*, the U.S. Supreme Court decided to "define[] the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional [search]" at the same threshold where it had earlier determined that evidence unconstitutionally seized on the authority of a deficient warrant should be suppressed in the criminal context—i.e., where the good faith exception articulated in *United States v. Leon*, 468 U.S. 897 (1984), did not apply. 475 U.S. at 344–45. In the context of a warrant that issued on a misleading affidavit, that meant circumstances meeting the test adopted in *Franks v. Delaware*, 438 U.S. 154, 166, 170 (1978): where the officer made knowing or reckless falsehoods or omissions material to probable cause. *Leon*, 468 U.S. at 923. Under such circumstances, "the officer's application for a warrant could not be said to be objectively reasonable"

because it created the unnecessary danger of an unlawful search. *Malley*, 475 U.S. at 345–46.

Importantly, the *Franks* standard—which Defendants ask this Court to adopt—represented a compromise between "competing values": the importance of the probable cause requirement on the one hand and, on the other, the societal cost of excluding evidence probative of guilt from use in a criminal prosecution. 438 U.S. at 165–66. In *Franks*, the Court made the threshold for suppression *more* demanding than a mere constitutional violation, striking its balance where it thought the exclusionary rule's benefit as a deterrent to official misconduct would outweigh the burden to society of interfering with criminal convictions. *Id.*

In defining qualified immunity under the same standard, the Court recognized the doctrine's common purpose with the exclusionary rule—i.e., deterring intentional police misconduct, but limiting the repercussions for other constitutionally questionable actions. 475 U.S. 344–45. Both tests under federal law—in the criminal context, for suppressing evidence seized pursuant to a warrant and, in the civil context, for piercing the shield of qualified immunity—thus require

not just that an officer cause a constitutional violation, but that he do so in bad faith.[3] *See, e.g.*, *Harmon v. City of Pocatello,* 431 F. Supp. 3d 1135, 1160 (D. Idaho 2020) (acknowledging that "[a] misrepresentation in an affidavit constitutes a violation of the Fourth Amendment if the misrepresentation is material" but then concluding that to overcome qualified immunity the plaintiff must "also demonstrate that the police officer deliberately falsified information presented to the magistrate or recklessly disregarded the truth."), *aff'd,* 854 F. App'x 850 (9th Cir. 2021).

It would be improper to import these federal standards to claims for damages under §131. Section 131 creates a remedy when a peace officer causes the deprivation of a plaintiff's rights under article II of the Colorado Constitution. *Id.* §131(1). Qualified immunity is no defense. *Id.* §131(2)(b). And a successful claim does not cost society the suppression of probative evidence in criminal prosecutions. *Franks*, 438 U.S. at 166. Instead, §131 has the wholly beneficent public purpose of making whole those whose rights the police violate. This Court should reject

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[3] The Court reaffirmed in *Malley* that, under well-settled constitutional tort principles, a judge's decision to issue a warrant does not break the causal chain between the officer's application for the warrant and an improvident search. *Briggs*, 475 U.S. at 345.

Defendants' request to adopt a standard for liability under §131 that bakes in qualified immunity and improperly burdens victims of police misconduct.

b. A categorical good faith exception to liability is contrary to §131.

Defendants' request to adopt a good faith exception to liability is also contrary to the plain text of §131. The centerpiece of Defendants' proposed test is that a jury considering a §131 claim should be instructed to include certain misstatements in the affidavit and exclude material omissions, so long as they were made negligently or in good faith. Br. 14. Contrary to their earlier concession that "if the warrant lacks probable cause, any search under it is unconstitutional," Br. 12, Defendants argue that a warrant that in reality lacks probable cause should still as a matter of law justify a search under §131. They offer no textual basis in §131 that could justify that deviation from foundational constitutional principles.

First, Defendants ask the Court to impose a state of mind requirement where the statute has none. § 131(1). The absence of any such requirement in §131 makes good sense. It would be odd for the statute to require a particular state of mind for all claims because, depending on the constitutional violation, intent requirements vary. For example, retaliation in violation of article II, section 10's protection of the right to free speech requires proof the plaintiff's protected expression was a motivating factor in the defendant's allegedly unlawful conduct. *Hadley v. Moffat*

Cnty. Sch. Dist. RE-1, 681 P.2d 938, 943 (Colo. 1984). To prove an unconstitutional prison condition under article II, section 20, a plaintiff must prove a correction officer's subjective deliberate indifference to their need. *Winston v. Polis*, 2021 COA 90, ¶¶16–19. Meanwhile, as Defendants point out elsewhere in their brief, an officer's subjective intent is irrelevant to whether a search is supported by probable cause. Br. 24.

Second, the statute flatly contradicts Defendants' notion that good faith should be a safe harbor from liability. Section 131 requires city police departments to completely indemnify officers who incur liability under the statute, with one exception: an officer will be responsible for a limited amount if they do not act "upon a good faith and reasonable belief that their action was lawful." *Id.* §4(a). The law thus explicitly contemplates liability for officers who *do* act upon a "good faith and reasonable belief," and requires that the city indemnify the officer in such circumstances. Indeed, this is the default under the statute – officers who act in good faith but nonetheless violate a person's constitutional rights will have their judgments paid by the police department. Defendants' argument would render this language a nullity.

Because their argument has no textual basis, Defendants suggest that the jury instructions were not "in harmony with legislative intent." Br. 17. Defendants seek

to rely on general statements from two legislators, out of hundreds, during debates about proposed amendments to the then draft legislation. *Id.* But the best indicator of legislative intent is the language the General Assembly used in the statute it ultimately passed. And as discussed above, §131 includes no required element of intent or bad faith. Where, as here, "the statutory language is clear, [a court will] apply it as written—venturing no further." *Poudre Sch. Dist. R-1 v. Stanczyk*, 2021 CO 57, ¶13.

c. Federal cases do not control Colorado constitutional law.

Finally, contrary to Defendants' contention, Colorado courts have *not* concluded that the analyses under article II, section 7 and the Fourth Amendment are identical. Br. 13. The Colorado Supreme Court has made clear that "there is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way." *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶35. (quoting Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 181 (2018)). The court has long embraced independent interpretation of article II, section 7 of the Colorado Constitution in particular. *See People v. McKnight*, 2019 CO 36, ¶¶28-32, 38–39. And as the trial court correctly observed, CF 6232-6235, it has expressly charted a course more

protective than its federal counterpart in the context of challenges to the veracity of an affidavit for search warrant. Under the Fourth Amendment, "negligence or innocent mistake" in an affidavit is categorically insufficient to justify suppression of evidence. *Franks*, 438 U.S. at 155–56. But under article II, section 7, courts are empowered to suppress evidence where affidavit errors result from "the negligence or good faith mistake of either the officer or the informant." *People v. Dailey*, 639 P.2d 1068, 1075–76 (Colo. 1982); *People v. Reed*, 56 P.3d 96, 99 (Colo. 2002).[4] If even good faith falsehoods in affidavits can justify suppression of evidence in a criminal prosecution, it was not error to instruct the jury to take note of all proven falsehoods in evaluating probable cause here.

2. The jury concluded both Defendants were willful and wanton.

In addition to finding that Ms. Johnson's home was searched without probable cause and that Defendants caused the unlawful search, the jury also concluded that

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[4] Contrary to Defendants' suggestion, *Reed* did not change this rule. On the contrary, *Reed* explicitly reaffirmed the *Dailey* test, which allows for negligent and good faith omissions to be the basis for *suppressing evidence*—a remedy that does not automatically follow even for evidence that *is* unconstitutionally seized. Second, the lower court's error in *Reed* was in failing even to *consider* whether the source of the errors in the affidavit justified exclusion. And the reviewing court's decision that the falsehoods should not be stricken was fact-specific and relied on the fellow officer rule, which excused the errors as a matter of law, 56 P.3d at 100, and which is not at issue here.

both officers acted in a willful and wanton manner such that they owed exemplary damages under C.R.S. §13-21-102. The jury was properly instructed that it could only award such damages if it found the Defendant engaged in "an act or omission *purposefully* committed by a person who *must have realized* that the conduct was dangerous, and which conduct was done *heedlessly and recklessly*, either without regard to the consequences, or without regard to the rights and safety of others, particularly the plaintiff." CF 4207 (emphasis added). And in closing, Plaintiff asked the jury to find that "the conduct by both Defendants was the very definition of reckless." TR 3/1/24, 112:3–5.

In awarding punitive damages against both Defendants, the jury necessarily concluded that each of them *purposefully* acted or failed to act; that they *must have realized* their conduct was dangerous; and that they engaged in their conduct *heedlessly and recklessly*.

Reversal based on Instruction 16 would therefore be improper not only because the instructions accorded with Colorado law, but also because it cannot be said that an instruction requiring a finding that Defendants acted at least recklessly would have altered the jury's verdict. *Waneka*, 134 P.3d at 494.

II. The Evidence Supported the Jury's Verdict in Favor of Ms. Johnson.

A. Standard of Review and Preservation.

Ms. Johnson agrees this issue was preserved and that sufficiency of the evidence is a legal question reviewed de novo. But the question before the Court is "whether there is competent evidence from which the jury could have logically reached its verdict." *Vititoe*, ¶34. As such, "[w]hen reviewing a challenge based on the sufficiency of the evidence, an appellate court may not disturb the jury's verdict unless it is clearly erroneous." *Ovation Plumbing, Inc. v. Furton*, 33 P.3d 1221, 1225 (Colo. App. 2001). The Court "must evaluate the record in the light most favorable to the verdict, and every inference fairly deducible from the evidence should be drawn in favor of the verdict." *Id.* A jury's verdict may not be disturbed "if there is *any* support for it in the record." *Id.*

B. Discussion

Ample evidence supported the jury's verdict. Defendants' arguments to the contrary either ignore the record or merely disagree with conclusions the jury was entitled to reach. The jury reasonably rejected the very factual arguments Defendants repeat on appeal to this Court. The Court should affirm.

1. There was ample evidence that Defendants caused an unlawful search of Ms. Johnson's home.

To prove her claim, Ms. Johnson needed to show that Defendants submitted an affidavit containing false statements and omissions to obtain the warrant, and that a corrected affidavit—free of those inaccuracies—would not have established probable cause.[5] Ms. Johnson put on substantial evidence of false statements and omissions in Defendants' affidavit, any combination of which could have supported the jury's conclusion that there was no probable cause to search her home.

a. Defendants acknowledge false statements in the affidavit that justify affirmance.

Despite vigorously disputing the facts at trial, Defendants now admit that the jury could have concluded that there were at least two false statements in the affidavit: (1) the assertion that the screenshot of the app and the red dot "signif[ied] the phone being inside the house"; and (2) the assertion that the iPhone had not

[5] The Court should reject Buschy's superficial argument that because he did not draft the affidavit, but only supervised, approved, and initialed it, EX 118-121, the jury could not find that he was a cause of Ms. Johnson's constitutional injury. Buschy testified that the warrant would not have issued but for his approval of the affidavit. TR 2/28/24 98:9-21, 131:6-12. And Staab testified Buschy pressured him to submit the affidavit as written. TR 2/27/24 283:24-284:5; 292:8-293:12. The jury was more than entitled to conclude from this evidence that Buschy was a cause of the unlawful search.

moved from 11:24am to 3:55pm the day before. Br. 20. These concessions alone justify affirmance.

Defendants fall back to insisting these two false statements were not material, but the evidence put on by *both* sides at trial was that they were critical to probable cause. Buschy testified specifically that these were the very pieces of evidence he relied on to determine it was appropriate to move forward with the warrant. TR 2/28/24, 91:20-25, 106:8-11. Staab emphasized in opening that the evidence would show the only time the phone was stationary was when it was (allegedly) pinging to Ms. Johnson's home at 5380 Worchester. TR 2/26/24, 171:8-19, 177:10-15. He later testified that the red dot in the screenshot was the only reason he sought a warrant for Ms. Johnson's home as opposed to the other neighboring properties that were also encompassed by the screenshot's blue circle. TR 2/27/24, 242:19-243:12; 2/28/24, 16:20-17:5, 20:20-21:17. And he cited the red dot as the reason for thinking it unnecessary to disclose in the affidavit his total inexperience with the app. TR 2/28/24, 20:25-21:6. Finally, the district attorney who approved the warrant and whom Defendants proffered as an expert in probable cause repeatedly testified to the importance of the placement of the red dot, TR 2/29/24, 131:16-132:1, 136:4-14, and the report that the phone had not moved, in her probable cause evaluation. TR 2/29/24, 132:2-12, 183:23-184:10. Defendants' theory of the case at trial essentially

rested on the very facts they now admit a jury could have determined were false. Defendants cannot now credibly argue such information was immaterial.

In any event, evidence at trial supported the materiality of the admitted false statements. Plaintiff's FindMy expert explained that the affidavit's characterization of the screenshot was not just wrong, but misrepresented the essential feature of probable cause: the likelihood that the phone was where the affidavit asserted it was. TR 2/29/24, 188:2–195:14. Plaintiff's police practices expert also opined that the meaning of the red dot was essential to the probable cause determination. TR 2/28/24, 194:11-196:12. Indeed, in the entire record, the red dot over Ms. Johnson's home was the *only* reason to believe the phone was *inside* Ms. Johnson's house. And the entire (false) theory of the affidavit was that the placement of the red dot indicated the location of the phone, which in turn was probative of the location of the truck and other stolen goods. EX 120; TR 2/28/24, 106:8-21.

Defendants nonetheless assert that the conceded falsehoods are immaterial because, setting them aside, other statements could still have established probable cause for the search. Br. 22. But contrary to the appropriate standard of review, Defendants ignore record evidence casting doubt on the truth of the *other* statements upon which they now seek to rely. Because the record, read in the light most favorable to the verdict, supports the materiality of the conceded falsehoods, this

Court should affirm.

b. Defendants' disagreements with the jury are no basis for reversal.

None of Defendants' remaining arguments casts doubt on the sufficiency of the evidence underlying the jury's verdict. First, relying on various inferences drawn in their own favor and ignoring evidence they dislike, Defendants insist that the remaining alleged falsehoods were not actually misstatements of fact (and make no argument the misstatements were immaterial). Second, employing the same tactics, Defendants assert that each of the various omissions in the affidavit were immaterial. But because there is record evidence supporting contrary conclusions, the jury was entitled to disagree. *See Robinson v. Denver*, 30 P.3d 677, 683 (Colo. App. 2000). Moreover, Defendants take aim at each misstatement and omission on its own, but the jury was properly instructed to consider them together. Because the conclusion that the totality of the circumstances made the affidavit materially misleading finds support in the record, Defendants' arguments fail.

First, the jury was entitled to conclude the various alleged falsehoods were factual misstatements. For example, the affidavit misleadingly indicated that the theft victim "reported the first [FindMy] ping occurred on 01/03/2021, at 1124 hours," and "[t]he last [FindMy] ping was on 01/03/2021, at 1555 hours." EX, pp. 118–22. But the jury heard evidence that the victim had reported [FindMy] pings all

over Denver prior to 11:24, and that no ping happened at 3:55pm at all. Defendants attempt to cure the first falsehood by arguing the affidavit "obviously" did not mean to suggest the phone did not start pinging until 11:24am, but instead that the first ping *at the house* occurred then. Br. 20-21. But the jury was entitled to draw the contrary inference. In any event, the jury could also have considered Defendants' undisputed failure to mention earlier pings all over Denver a material *omission*, the materiality of which Defendants do not dispute. EX, pp. 358-359, 366-371; TR 2/27/24, 226:8-22, 229:11-16; 2/28/24, 35:17-38:4, 222:9-17. And while Defendants argue Plaintiff presented no evidence the phone pinged *after* 3:55 pm, that is beside the point: the jury was entitled to doubt whether there was *any* 3:55 ping and thus whether the phone reported itself near 5380 Worchester for *any* duration of time. TR 2/27/24, 305:14-18; 2/28/24, 52:21-23, 53:8-11, 199:18-23.

Next, Defendants cannot dispute there was evidence the officers had no reason to believe that the truck or firearms were at Ms. Johnson's home when they swore in the affidavit to the contrary. Instead, Defendants attempt to downplay this admitted falsehood by arguing that "reason to believe" is a legal assertion, not a factual misstatement. Br. 21. The cases Defendants cite stand for the uncontroversial proposition that *probable cause* is in many circumstances a legal question. They do not suggest that when swearing out an affidavit for search warrant, an officer's

assertion that he has reason to believe certain items are at a particular address is not a statement of fact. Moreover, Defendants intended to testify at trial that they *did* have "reason to believe" the items listed in the warrant would be found at Ms. Johnson's home. CF 2666–72. That their anticipated testimony crumbled on cross examination—such that they had to admit the opposite, TR 2/27/24, 257:10-18; 2/28/24, 48:15-49:11, 105:7–106:21—does not make it any less factual.

Next, Defendants argue it was not a misstatement to say McDaniel had used FindMy on other occasions because the officers were permitted to presume that as a victim, his word was reliable. This misses the point. The affidavit stated McDaniel had used the app on *multiple* previous occasions, even though Defendant Staab admitted he had been told by McDaniel of only *one* previous time. EX, pp. 118–22, TR 2/27/24, 267:9-11.

Defendants further argue that their undisputed omissions, including their inexperience with FindMy, that Plaintiff was not a suspect, and that no suspicious activity was observed at Plaintiff's home, were immaterial. BR at 24–25. But the jury heard from Plaintiff's police practices expert that these omissions were important to a probable cause analysis and the jury was entitled to credit that testimony. TR 2/28/24, 196:13-198:21, 202:5-203:11. The jury was properly instructed (in a stipulated instruction) to consider the "reasonably trustworthy

information Defendants received, and the reasonable inferences that may flow from the information." CF 4136. It was up to the jury to decide whether inclusion of the omitted information would have altered the evaluation of probable cause under the totality of the circumstances in this case.

On the whole, Defendants dispute whether any particular omission was necessary on its own to probable cause. But what matters—and what Defendants' analysis misses—is that the jury was properly instructed to consider the false and omitted information together and decide that a corrected affidavit would not have established probable cause.

2. Sufficient evidence supported the jury's award of exemplary damages.

Defendants do not dispute that the Court properly instructed the jury on when to award exemplary damages under C.R.S. §13-21-102(1). They merely disagree with the jury's conclusion that such damages were warranted here. But contrary to the appropriate standard of review, Defendants' narrative of the facts ignores adverse evidence. Where "the defendant is conscious of his conduct and the existing conditions and knew or should have known that injury would result, the statutory requirements" for exemplary damages are met. *Coors v. Sec. Life of Denver Ins. Co.,*

112 P.3d 59, 66 (Colo. 2005). The jury was entitled to conclude both Defendants' conduct met this standard.

First, all the evidence regarding Defendants' concerns that there was insufficient basis for a warrant—which Defendants do not dispute but argue is irrelevant to the probable cause analysis itself—was evidence from which the jury could have concluded that their conduct in pushing forward with the warrant was sufficiently reckless as to merit exemplary damages.

As to Buschy, the jury heard evidence that the day *before* the search, he *knew* the phone had been pinging all over Denver prior to broadcasting itself in Ms. Johnson's neighborhood, and the phone had pinged at an address *other* than Ms. Johnson's during the four hours the affidavit said it had remained in the same place. TR 2/27/24, 181:10-182:5, 184:17-186:16. The jury heard this from an investigating officer who personally relayed those facts to Buschy. TR 2/27/24, 181:20-182:5, 183:17-22, 184:1-186:8, 186:13-19. While Defendant Buschy denied the conversation, the jury was entitled to credit the testimony of his fellow officer as more trustworthy. *See Gresser v. Banner Health*, 2023 COA 108, ¶110.

Bolstering the inference that Buschy knew about the theft and pings a day earlier, unexplained documentary evidence showed direct communication between Buschy and McDaniel early the morning of January 4. TR 2/27/24, 239:5-20; EX

177–83. From this evidence, the jury was entitled to reject Defendants' narrative that the officers' failure of due diligence was somehow justified by the urgency of the circumstances surrounding the theft of the truck allegedly containing guns.

The jury was also entitled to conclude that Staab would not have sought the warrant but for Buschy's pressure to do so notwithstanding the probable cause concerns. TR 2/27/24, 283:24-284:5, 292:12-293:6, 318:24-319:2. In sum, contrary to Defendants' arguments, evidence demonstrated Buschy's conduct warranted exemplary damages.

The same is true for Staab. He testified that it "blew his mind" that McDaniel allegedly left six guns, a suppressor, 1000 rounds of ammunition, and $4,000 in cash in his truck in a hotel parking lot. TR 2/27/24, 221:4-223:23. He also certainly knew of his total unfamiliarity with FindMy. TR 2/27/24, 250:12-251:9. Yet Staab conducted no investigation into McDaniel, failed to corroborate his statements, including about FindMy, and failed to take advantage of multiple DPD resources that would have made clear the police had no business invading Ms. Johnson's home. TR 2/27/24, 224:9-225:12, 251:13-22, 279:21-281:15. He also admitted that he pushed forward with the warrant despite his doubts because orders must be followed in a "paramilitary organization" like DPD. TR 2/27/24, 241:22-24, 259:3-9, 281:16-18, 293:7-12, 253:22-255:14. The jury was entitled to conclude that these

actions were done heedlessly and recklessly, without regard to the consequences or the rights of Ms. Johnson. CF 4145.

In sum, there was evidence Defendants' conduct was marked by knowing misrepresentations, an unacceptable failure of basic police work, and the choice to follow orders that pose great risk to constitutional liberties. The jury was entitled to conclude exemplary damages were appropriate.

III. The Evidence Supported the Jury's Damages Award.

A. Standard of Review and Preservation.

Ms. Johnson agrees this issue was preserved. The amount of damages to which an injured party is entitled is within the exclusive province of the jury, and a jury's damages award is generally considered "inviolate." *Schuessler v. Wolter*, 2012 COA 86, ¶45. When reviewing a jury's award, this Court "view[s] the record in the light most favorable to the prevailing party and draw[s] every inference deducible from the evidence in favor of that party." *Averyt v. Wal-Mart Stores*, 265 P.3d 456, 462 (Colo. 2011). A jury's award of damages will not be disturbed "unless it is completely unsupported by the record." *Id.* Finally, whether the damages award warranted a new trial was a matter within the sound discretion of the trial court. *Schuessler*, ¶47.

B. Discussion

1. The jury's compensatory damage award reflects the devastation Defendants caused.

The jury was properly instructed to award damages in an amount that would fairly compensate Ms. Johnson for emotional stress, pain and suffering, inconvenience, and quality of life impairment that she proved were caused by defendants' wrongful conduct. CF 4200. As measuring noneconomic damages is not an exact science, the jury was properly instructed to use their best judgment based on the evidence to determine the appropriate award. CF 4203. Here, the jury's award was supported by the record and reflected how profoundly the unjustified intrusion into Ms. Johnson's home transformed her life for the worse.

In addition to seeing first-hand the photo and video record of the raid on Ms. Johnson's home, the jury heard multiple witnesses describe the terrifying scene. They also heard extensive testimony recounting the debilitating effects on Ms. Johnson in the days and months that followed, and the deep, lasting damage it caused her life and her spirit. The jury heard that Ms. Johnson developed feelings of depression and anxiety and was unable to process the traumatic memories, TR 2/27/24, 48:18-49:2; she retreated from her community and developed paranoia, constantly looking out her windows to see if the police had returned, TR 2/26/24,

221:21-222:5; she could not sleep, or even be alone in her home and stayed with her children for weeks at a time, TR 2/26/24, 213:13-214:23; 2/27/24, 44:19-45:6, 47:24-48:4; she sought therapy and medical treatment to address her trauma, sleeplessness, and lack of appetite, TR 2/26/24, 225:13-226:16; 2/27/24, 47:18-48:8, 49:6-50:20; the trauma she experienced made it impossible for her to remain in her home and community of more than forty years, forcing her to move, TR 2/26/24, 216:19-217:13; 2/27/24, 18:5-12, 50:21-52:1; her children testified that their mom would never be the same; that the unlawful raid changed her; that after the incident, part of her was gone; that her spirit is broken. TR 2/26/24, 226:25-227:6; 2/28/24, 242:1-2; 2/29/24, 86:8-87:1. More than just the words these witnesses spoke, the jurors were able to observe their demeanor on the stand as they described the immediate and long-term impacts on Ms. Johnson.

Defendants attempt to cast aside this testimony by labeling it insufficiently objective or corroborated. But in any event, this Court properly instructed the jury to assess for themselves the credibility and weight of all the witnesses' testimony, taking into consideration all relevant factors. CF 4190. The jury was entitled to credit Ms. Johnson and her adult children, and there is no basis to substitute Defendants' view of the evidence for the jury's.

Because they cannot show the award is unsupported by the record, Defendants argue that the harm they caused Ms. Johnson is not of the type that justifies the jury's emotional distress award. But the rules they invoke are antithetical to measuring noneconomic damages and contrary to the applicable standard of review. For example, Defendants assert that the duration of the search made the jury's award excessive. Br. 32. But the jury heard how long the search lasted.[6] In light of all the evidence, the jury rejected Defendants' view that the harm they caused was trivial. As the proper judges of the facts and credibility, the jurors concluded Ms. Johnson suffered significant emotional distress.

For these reasons, the Court should also reject Defendants' argument that the trial court abused its discretion in declining to order a new trial on damages. First, the trial court did not simply reject Defendants' post-trial arguments out-of-hand. On the contrary, the court *did* remit some of Plaintiff's damages, evidencing the deliberation the court took in determining that the remainder of the compensatory damages award was supported by the record. Defendants offer no reason to second-

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[6] Indeed, the fact that the search team recognized they were in the wrong place could lead a reasonable jury to conclude that Defendants' shoddy investigation was *more* blameworthy, not less.

guess that decision other than a comparison of the jury award here with verdicts from other cases and other contexts. But such comparisons are unpersuasive because they "yield no insight into the evidence the jurors heard and saw or how they used it during their deliberations." *Osterhourt v. Bd. of Cnty. Comm'rs of LeFlore Cnty.,* 10 F.4th 978, 999 (10th Cir. 2021); Restatement (Third) of Torts: Remedies §17(f) (critiquing and disapproving of comparative review).

And Defendants' math is in any event misleading. The comparisons they draw improperly rely on the total verdict, which includes $2.5 million in punitive damages. Analyzed properly, Defendants' examples themselves demonstrate that the compensatory award is not manifestly excessive. For example, Defendants cite a case in which a plaintiff—more than a decade ago, in 2013—was awarded $750,000 in compensatory damages arising from a false and misleading affidavit. Br. 30. Moreover, Defendants' survey is incomplete. It leaves out, for example, a $2.1 million verdict approved by the District of Colorado to a plaintiff who was unlawfully arrested and subjected to an attendant backpack search by the Boulder Police Department. *Franco v. City of Boulder*, No. 19-cv-02634, 2022WL 474699 (D. Colo. Feb. 16, 2022) (noting plaintiff was not physically injured during his "unremarkable encounter with police in terms of any use of force" but awarding damages based on temporary loss of liberty and events' emotional impact); *see also*

Loggervale v. Holland, 677 F. Supp. 3d 1026, 1061 (N.D. Cal. 2023) (affirming an $8.75 million jury award for the detention of three women in the back of police cars for 91 minutes).

Defendants are not permitted to substitute their quantification of Ms. Johnson's injuries for the jury's. *Clark v. Aldenhoven*, 143 P. 267, 268 (Colo. Ct. App. 1914). Defendants' minimization of the harm they caused Ms. Johnson provides no basis to doubt the jury's judgment and sound award.

2. The jury's exemplary damage award is proper.

Defendants' attacks on the jury's award of exemplary damages are also meritless. First, contrary to Defendants' suggestion, the award against each Defendant is plainly within constitutional bounds, amounting to less than Ms. Johnson's compensatory damages and at a 1:1 ratio with her non-economic damages. Second, the award is supported by the record. As discussed in Part II(B)(2), there was ample evidence that both Defendants were "conscious of [their] conduct and the existing conditions and knew or should have known that injury would result." And throughout trial, rather than acknowledge their wrongdoing, Defendants sought to discredit the testimony of Plaintiff and her adult children regarding how the DPD raid impacted her, including Ms. Johnson's distress in its immediate aftermath, its long-term impact on her mental and physical health, and her ultimate decision to

leave her home and community of four decades. *Cf. Loggervale*, 677 F. Supp. 3d at 1030 ("[T]he defense never made any apology or show of regret. Instead, the defense, before the jury, impugned the credibility and integrity of plaintiffs."). Indeed, Defendants *continued* to insist at trial that they had done nothing wrong and would do the same thing again. As the jury was properly instructed, punitive damages serve to both "punish the Defendant" and offer an "example to others." The jury was entitled to award punitive damages in an amount they thought appropriate to punish these Defendants and to deter law enforcement from engaging in the type of behavior that led to Ms. Johnson's injuries.

IV. Defendants Buschy and Staab Are Jointly and Severally Liable for the Unlawful Search they Caused.

A. Standard of Review and Preservation.

Ms. Johnson agrees that this issue was preserved and that the Court reviews de novo whether, as a matter of statutory construction, C.R.S. §13-21-111.5 should apply to shield Defendants from joint and several liability under §131.

B. Discussion

The Enhance Law Enforcement Integrity Act is clear that "statutory limitations on liability [or] damages. . . do not apply" to claims brought under §131. *Id.* §(2)(a). For that reason, the trial court was right to conclude that C.R.S. §13-21-111.5—which "*limits* an individual defendant's *liability* for damages to the injury or

damage actually resulting from his own fault," *Vickery v. Evans*, 266 P.3d 390, 392 (Colo. 2011) (emphasis added)—does not apply in this case. TR 03/01/24, 16–21. Instead, the background common law rule of joint and several liability does.

Defendants' sole argument to the contrary is that C.R.S. §13-21-111.5 does not count as a "limitation" on liability or damages proscribed by §131. Br. 34–36. But the thrust of Defendants' objection is that by not applying §111.5, the trial court *failed to properly limit their liability and damages.* Br. 35. In other words, Defendants ask this Court to hold that §111.5 must limit their liability and damages even though they claim it is not a limitation on liability or damages (to avoid the plain text of §131). The Court should reject this proposed end-run around the legislature's explicit language in §131(2)(a).

Defendants also offer *no* basis for their construction of §131. They baldly assert that the "limitations" that "do not apply" to constitutional claims per §131(2)(a) can mean only either (1) a restriction on the "types of claims" a plaintiff may bring or (2) a "sum certain cap on damages a plaintiff may recover." Br. 35. That interpretation reads nonexistent words of limitation into the statute and draws arbitrary lines where the legislature drew none. The General Assembly provided *categorically* that "statutory immunities and statutory limitations on liability [or] damages . . . do not apply" under §131. *Id.* §(2)(a).

There is no reason to conclude that §111.5's limitations should nonetheless apply to Ms. Johnson's claims. It provides that "*no defendant shall be liable* for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant." C.R.S. §13-21-111.5(1) (emphasis added). Under any interpretation of the language, §111.5 serves to provide a limitation on the liability and damages of ordinary tortfeasors. *Vickery*, 266 P.3d at 392 (recognizing this provision "limits an individual defendant's liability"). The plain and ordinary meaning of "limit" is simply "something that bounds, restrains, or confines," *Limit*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/limits. Black's Law Dictionary similarly defines "limit" to mean "a restriction or restraint," and "limitation of liability" broadly to mean "a written statement . . . that restricts the conditions under which a party may be responsible for loss or damages." Moreover, other limitations on damages and liability in Title 13 contain restrictions broader than the two varieties that qualify under Defendants' construction. *See, e.g.*, C.R.S. §13-21-110. In sum, given its plain and ordinary meaning, read in context, and read in harmony with related statutory provisions, Br. 35, "limitations" as used in §131 encompasses the limitation effected by §111.5. Relying on §111.5 to limit Defendants' exposure in this case would be

contrary to the legislature's unambiguous directive that statutory limitations on liability and damages categorically do not apply to claims brought under §131.

Defendants do not contest that in the absence of §111.5, under settled principles of damages liability for constitutional torts, where multiple tortfeasors concurrently cause an indivisible injury—like the one Ms. Johnson suffered here—they are jointly and severally liable such that each can be held liable for the entire injury. *Northington v. Marin*, 102 F.3d 1564, 1568–69 (10th Cir. 1996). Thus, contrary to Defendants' suggestion, the trial court did *not* hold either officer responsible for more than "those damages . . . his alleged conduct directly caused." Br. 36. The jury was properly instructed that it must find, as to each Defendant, that "Defendant's acts were *the cause of damages* sustained by Plaintiff." CF 4193 (emphasis added). Defendants were free to, and did, argue that their actions were not the cause of the unlawful search of Ms. Johnson's home.[7] They simply failed to so persuade the jury. Similarly incorrect is Defendants' assertion that the trial court's imposition of joint and several liability somehow made it impossible for either of

[7] Notably, neither Defendant ever sought to argue that one of them was responsible for some percentage of fault in this case nor asserted pro-rata liability as an affirmative defense. Instead, Defendants chose to present a joint defense to all liability in this matter.

them to appeal the damages award against each—as their separate briefs in this case demonstrate.

Finally, as a practical matter, *neither* Defendant will be on the hook for the damages they caused in this case. As discussed above, §131 provides a default rule that the city, the officers' employer, must indemnify them for any liability. Indeed, Defendants relied on Denver's responsibility for the damages award in this case to avoid posting a bond pending appeal. CF 4244–48, 4779–83. The reality of individual peace officers' insulation from loss under the scheme of §131 is just another reason joint and several liability makes good sense when officers concurrently cause an indivisible injury.

Because Ms. Johnson's injury was indivisible and the jury found both Defendants were causes of that injury, and because the limitation in §111.5 cannot apply Plaintiff's §131 claims, there was no error in the trial court's determination that Defendants were jointly and severally liable for her damages.

V. Defendants' Equal Protection Defense Was Waived and Is Nonetheless Meritless.

A. Standard of Review and Preservation.

Ms. Johnson disagrees that Defendants preserved the issue of whether §131 is constitutional. This defense was asserted for the first time in their post-trial Rule 59

motions and was therefore waived, C.R.C.P. 8(c); 12(b); *Hawg Tools, LLC v. Newsco Int'l Energy Servs.,* 2016 COA 176M, ¶43, and the trial court properly declined to consider it. CF 6240.

The appropriate standard of review for whether the trial court erred in refusing to rule on a new theory presented only post-trial is abuse of discretion. *Bowlen v. Fed. Deposit Ins. Corp*., 815 P.2d 1013, 1015–16 (Colo. App. 1991). Because Defendants fail to demonstrate the trial court abused its discretion in rejecting their dilatory defense, this Court should affirm. *See Landmark Towers Ass'n v. UMB Bank,* 2018 COA 100, ¶¶42-45.

If the Court considers Defendants' argument that §131 is unconstitutional, Ms. Johnson agrees that question is reviewed de novo. However, §131 is entitled to a presumption of constitutionality and Defendants bear a "heavy burden" in challenging the statute. *Woo v. El Paso Cnty. Sheriffs' Off.*, 2022 CO 56, ¶21.

B. Discussion

Defendants complain that §131 is unconstitutional because it imposes a cause of action against peace officers, as opposed to other government officials. As a threshold matter, Defendants' argument fails because the legislature could have rationally concluded that police are not similarly situated to other government agents or civilian tortfeasors. Defendants' comparison of police officers to social workers,

animal control, and tax assessors, Br. 39, ignores the reality that police officers have the authority to detain, arrest, imprison, and even kill citizens under certain conditions. These powers are not comparable to the job duties of other government officials and differentiate police from ordinary alleged civilian tortfeasors. The general assembly may treat these categories of people differently because they are differently situated in terms of their responsibilities and obligations to the public.

Defendants' argument also fails because §131 is rationally related to legitimate government interests. *Dean v. People*, 366 P.3d 593, 597 (Colo. 2016). The legislature had ample reason to conclude that creating a mechanism for holding *police* accountable for infringing upon individual rights was of special urgency. For example, the General Assembly might rationally have considered the fact that, in 2019 alone, Colorado law enforcement killed 36 people and wounded 28 others[8] and was in the top 10 states with the highest rates of fatal police shootings.[9] The General Assembly might have considered police officers' arrest and killing of Elijah McClain; Colorado Springs police officers' shooting and killing of D'Von Bailey in

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[8] https://www.denverpost.com/2020/02/02/colorado-officer-involved-shootings-2019-database/.

[9] Mapping Police Violence (Sept. 9, 2024), https://mappingpoliceviolence.org/?year=2019&location=Colorado&race=people.

response to a false robbery report; and Minneapolis police officers' killing of George Floyd —all of which made national news and sparked protests in Colorado. Indeed, the new cause of action created under §131 was just one prong of a sweeping police accountability bill passed in direct response to police violence in Colorado and elsewhere.

The fact that police officers are not the only officials who may violate the Colorado Constitution does not mean the legislature is prohibited from providing a remedy for police misconduct that violates constitutional rights. "A legislative enactment does not violate the equal protection clause merely because it is not all-embracing. The legislature is free to recognize degrees of harm and may confine its restrictions to those classes of cases where the need is deemed to be clearest." *Montrose Cnty. Sch. Dist. Re-1J v. Lambert*, 826 P.2d 349, 351–52 (Colo. 1992); *see also Latham v. First Marine Ins. Co.*, 16 F. App'x 834, 840 (10th Cir. 2001) ("[A] policy aimed at correcting a social ill need not solve the entire problem in one fell swoop; in many cases it may be more prudent and efficacious to address social problems one step at a time").

Nor was it irrational for the legislature to conclude that a peace officer who violates someone's constitutional rights should be subject to limitations on damages different from an ordinary tortfeasor. Br. 43. The fact that the legislature imposed

damages caps for certain types of cases, but not others, or to apply pro-rata liability for some actions, but not others, is precisely the kind of decision that legislatures are best suited to make. *See Mosko v. Dunbar*, 135 Colo. 172, 175 (1957) (it is well established that "it is within the exclusive province of the legislature to determine the necessity, expediency, wisdom, fairness and justness of the law enacted"); *see also Bellendir v. Kezer*, 648 P.2d 645, 647 (Colo. 1982). And Defendants do not explain how returning to the status quo ante and common law evaluation of liability can possibly be a constitutional violation. Defendants also fail to acknowledge that in §131, the legislature ensured it would generally be city police departments that bear the cost of police misconduct. Such indemnification does not exist for other defendants in civil lawsuits, but these are the types of interests the legislature was entitled to balance.

In sum, the legislature's policy choices in addressing the pressing concern of police reform were prudent and rational. Defendants cannot meet their high burden of showing that no set of conceivable facts establish a rational relationship between §131 and the government's legitimate interest in police accountability. Accordingly, if the Court reaches the issue, it should reject Defendants' challenge to the statute's constitutionality.

CONCLUSION

Plaintiff respectfully requests that the Court affirm the trial court's judgment.

REQUEST FOR ATTORNEY FEES

Plaintiff respectfully requests reasonable fees and costs under §131(3).

Dated: September 27, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2024, I served a true and correct copy of the foregoing document to all counsel of record via the Colorado Courts E-Filing System.

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