

<p>COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203</p>	<p>DATE FILED May 19, 2025 10:21 PM FILING ID: 820A9B6252AEA CASE NUMBER: 2025CA110</p>
<p>Appeal from Boulder County District Court Honorable Robert R. Gunning Case No. 2022CV30341</p>	
<p>Plaintiffs-Appellants: FEET FORWARD-PEER SUPPORTIVE SERVICES AND OUTREACH d/b/a FEET FORWARD, a nonprofit corporation; JENNIFER SHURLEY, JORDAN WHITTEN, SHAWN RHOADES, MARY FALTYNSKI, ERIC BUDD, and JOHN CARLSON</p> <p>v.</p> <p>Defendants-Appellees: CITY OF BOULDER and MARIS HEROLD, Chief of Police for the City of Boulder</p>	<p style="text-align: center;">☐ COURT USE ONLY ☐</p>
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<p style="text-align: center;">BRIEF OF AMICUS CURIAE HISTORIANS IN SUPPORT OF PLAINTIFFS-APPELLANTS</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

 X It contains 2,839 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R.(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Justin Carpenter _____

TABLE OF CONTENTS

TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
ISSUES PRESENTED	1
STATEMENT OF THE CASE	1
INTEREST OF AMICUS CURIAE	1
REASONS AMICUS CURIAE BRIEF IS DESIREABLE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
A. Tents and Camping on the Journey West.....	7
B. Tents and Camping in Mining Regions	9
C. Tents and Camping in Future Cities	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<i>City of Longmont v. Colo. Oil & Gas Ass’n</i> , 369 P.3d 573 (Colo. 2016).....	4
<i>Colo. Anti-Discrimination Comm’n v. Case</i> , 380 P.2d 34 (Colo. 1962).....	4
<i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156 (1972).....	6
<i>People in the Interest of J.M.</i> , 768 P.2d 219 (Colo. 1989).....	4, 8
<i>People v. Schafer</i> , 946 P.2d 938 (Colo. 1997).....	5, 7
<i>People v. Young</i> , 814 P.2d 834 (Colo. 1991).....	3

Other Sources

JACK M. BALKIN, <i>MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION</i> (2024).....	2
DOUGLAS BRINKLEY, <i>THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA</i> (2010).....	6
WILLIAM N. BYNES, <i>HISTORY OF COLORADO</i> (1901).....	11
Colorado Constitution, art. II, § 3.....	2, 4
ANNE ELLIS, <i>LIFE OF AN ORDINARY WOMAN</i> (1929).....	10, 11

HORACE GREELEY, AN OVERLAND JOURNEY, FROM NEW YORK TO SAN FRANCISCO IN THE SUMMER OF 1859 (1860).....9

FRANK MCLYNN, WAGONS WEST: THE EPIC STORY OF AMERICA’S OVERLAND TRAILS (2007).....8

HISTORY OF CLEAR CREEK AND BOULDER VALLEYS, COLORADO (1880).....9, 11

Mrs. Writer to Her Mother, THE COLORADO MAGAZINE, vol. 1 (1893).....8, 12

JARED ORSI, CITIZEN EXPLORER: THE LIFE OF ZEBULON PIKE (2014).....7

JEROME CONSTANT SMILEY, HISTORY OF DENVER: WITH OUTLINES OF THE EARLIER HISTORY OF THE ROCKY MOUNTAIN COUNTRY (1901).....12

DUANE A. SMITH, ROCKY MOUNTAIN MINING CAMPS: THE URBAN FRONTIER (1967)

WILBUR FISKE STONE, HISTORY OF COLORADO (1918).....9, 10, 11

ELLIOTT WEST, THE CONTESTED PLAINS: INDIANS, GOLDSEEKERS, & THE RUSH TO COLORADO (1998).....8, 11, 12

ELLIOTT WEST, CONTINENTAL RECKONING: THE AMERICAN WEST IN THE AGE OF EXPANSION (2023).....11

Phoebe S. K. Young, “*Bring Tent*”: *The Occupy Movement and the Politics of Public Nature in* RENDERING NATURE: ANIMALS, BODIES, PLACES, POLITICS (ed. MARGUERITE S. SHAFFER AND PHOEBE S. K. YOUNG, 2015).....3, 5

PHOEBE S. K. YOUNG, CAMPING GROUNDS: PUBLIC NATURE IN AMERICAN LIFE FROM
THE CIVIL WAR TO THE OCCUPY MOVEMENT (2021).....1, 5, 6

ISSUES PRESENTED

This brief adopts and addresses Plaintiffs-Appellants' issue C: Whether the Boulder Cover Bans violate the right to use public spaces enshrined in Colorado Constitution.

STATEMENT OF THE CASE

This brief adopts Plaintiffs-Appellants' statement of the case.

INTEREST OF AMICUS CURIAE

Amicus curiae are two professors and a graduate student who are historians at the University of Colorado Boulder. The amicus curiae live and/or work in the city of Boulder and have a general interest in bringing historical research to bear on the interpretation of the state's constitution. Phoebe S. K. Young is a Professor of History at the University of Colorado Boulder and is the author, most recently, of *CAMPING GROUNDS: PUBLIC NATURE IN AMERICA FROM THE CIVIL WAR TO OCCUPY*. Trevor Egerton is a Ph.D. student at the University of Colorado Boulder, working on American environmental history. Jonathon J. Booth is an Associate Professor of Law and an Associate Professor of History (by courtesy) at the University of Colorado Boulder.

REASONS AMICUS CURIAE BRIEF IS DESIREABLE

Although Colorado’s law prescribes no single method of constitutional adjudication, the state’s history is undoubtedly relevant to understanding the meanings of the Constitution’s provisions. *See generally* JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* (2024). This brief thus explores a relatively obscure aspect of Colorado’s history: the importance of camping on public land during the territorial and early statehood periods. This history sheds light on the meaning of the inalienable rights provision of the Colorado Constitution. Colo. Const. art. II, § 3.

SUMMARY OF ARGUMENT

During Colorado’s territorial and early statehood period, camping on public land was a common and universally accepted practice and was a fundamental aspect of the freedom of movement that allowed for the state’s settlement, growth, and economic development. When interpreted within the context of that history, the fundamental rights protected by the inalienable rights provision of the Colorado Constitution include the right to camp on public land. Any law or ordinance that restricts that right should be subject to strict scrutiny.

ARGUMENT

The men who framed Colorado’s Constitution 149 years ago would be shocked to learn that any government would purport to have the authority to ban camping in tents on public land. Colorado is a relatively young state, whose Constitution was framed less than two decades after the rapid expansion of American settlement inspired in part by the discovery of gold in the state. During the territorial and early statehood period, camping on public land was a widespread, common practice – a necessary component of settling the state and of the freedom of movement of Americans. As Colorado’s Supreme Court has recognized, the state’s Constitution was “written to address the concerns of our own citizens and tailored to our unique regional location.” *People v. Young*, 814 P.2d 834, 843 (Colo. 1991). Thus, as this brief demonstrates, the right to camp on public lands is an inalienable right protected by the Colorado Constitution, and any law or ordinance that infringes on that right, such as Boulder’s Cover Bans, must be subject to strict scrutiny. *See* Phoebe S. K. Young, “Bring Tent”: *The Occupy Movement and the Politics of Public Nature in* RENDERING NATURE: ANIMALS, BODIES, PLACES, POLITICS 301–05 (ed. MARGUERITE S. SHAFFER AND PHOEBE S. K. YOUNG, 2015) (discussing the background and enforcement of Boulder’s Cover Bans).

Article II, Section 3 of the Colorado Constitution, titled “Inalienable Rights” declares that “[a]ll 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.” Colo. Const. art. II, § 3. Colorado courts have interpreted this provision as a general protection of the fundamental rights of Colorado Residents that cannot be abridged “absent a compelling government interest.” *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 586 (Colo. 2016).

Importantly, the rights protected by the Colorado Constitution are not identical to those protected by the federal Constitution. The Colorado Supreme Court has also noted that “there are fundamental and inherent rights with which all humans are endowed even though no specific mention is made of them in either the national or state constitutions.” *Colo. Anti-Discrimination Comm’n v. Case*, 380 P.2d 34, 39 (Colo. 1962). For example, in *People in the Interest of J.M.*, the Colorado Supreme Court wrote that the inalienable rights provision protected “rights of freedom of movement and to use the public streets and facilities in a manner that does not interfere with the liberty of others,” even though freedom of movement is not

specifically mentioned in the provision. *People in the Interest of J.M.*, 768 P.2d 219, 221 (Colo. 1989).

The Colorado Supreme Court has explicitly acknowledged that Colorado's history of camping is relevant to Constitutional interpretation. In *People v. Schafer*, a search and seizure case, the Court, sitting *en banc*, affirmed the suppression of evidence that police found in a tent without a warrant. It held that "a person camping in Colorado ... has a reasonable expectation of privacy in a tent used for habitation and personal effects therein." *People v. Schafer*, 946 P.2d 938, 941 (Colo. 1997). Although *Schafer* was decided under the Fourth Amendment to the United States Constitution and its Colorado counterpart, the case's relevance here lies primarily in the Court's discussion of the history of tents as a form of habitation in Colorado. *Id.* at 942–43. The Court analyzed several historical moments, including the journey of Lewis and Clark and Stephen Long's expedition, to illustrate the long-running importance of tents in the state. *Id.* In addition to its direct relevance to the Cover Bans at issue in this case, *Schafer* demonstrates how Colorado courts have used historical evidence to determine the scope of Constitutional provisions, as the amicus curiae urge the court to do here.

Camping, of course, is an activity with a wide variety of meanings. It is a common form of both outdoor recreation and of protest. *See generally* PHOEBE S. K.

YOUNG, CAMPING GROUNDS PUBLIC NATURE IN AMERICAN LIFE FROM THE CIVIL WAR TO THE OCCUPY MOVEMENT (2021); Young, “*Bring Tent*” at 292–97. In the past century, recreational camping has become the most common reason for Americans to sleep in tents on public lands. But it is important to remember that this practice, along with the institutions that regulate camping such as the U.S. Forest Service and National Parks Service were creations of the early twentieth century’s conservation movement. *See generally* DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA (2010); YOUNG, CAMPING GROUNDS at 10, 55–134. They were created decades after the framing of Colorado’s constitution and reflect a changing set of values that moved away from the unrestricted acceptance of camping that was widely held in the American west in 1876.

This brief, however, is concerned with the right to camp on public land to obtain temporary shelter. The historical record, discussed below, shows clearly that camping on public land to obtain temporary shelter was universally accepted at the time of the drafting of the state’s constitution. Far from being the kind of activity that was potentially criminal, the framers of the constitution saw camping on public land as a fundamental and inalienable right – one of the basic “amenities of life,” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972). Camping on public

land was an unavoidable element of the freedom of movement protected by the inalienable rights provision. Colo. Const. Art. 2, §3. To illustrate this point, this brief discusses the common practices of camping in tents on public lands during the journey west, in mining camps, and in the settlements that eventually became Colorado's cities.

A. Tents and Camping on the Journey West

Railroads did not reach Colorado until 1869, meaning that any settlers who arrived in the state before then arrived over land, usually by wagon. The vast majority of the land they crossed was acquired by the United States in the Louisiana Purchase of 1803 and would not begin to be sold to Americans until the Homestead Act of 1862. Thus, if the land was no longer held by native tribes or nations, it was owned by the federal government. Famously, the first American citizens to explore the region were Meriwether Lewis and William Clark, who traveled through the West between 1804 and 1806, sleeping in tents on land newly acquired by the United States. *See Schafer*, 946 P.2d at 943 (quoting THE JOURNALS OF LEWIS AND CLARK 92 (Bernard DeVoto ed., 1953) (entry of April 7, 1805)). Zebulon Pike, after whom Pike's Peak is named, followed in Lewis and Clark's footsteps. He explored the Rocky Mountains in Colorado and similarly relied on tents for shelter when

surviving the winter near the area that would become Leadville. JARED ORSI, *CITIZEN EXPLORER: THE LIFE OF ZEBULON PIKE 180–81* (2014).

Later settlers had the same basic needs as Lewis, Clark, and Pike: they required water and feed for their animals, as well as shelter from the harsh and unpredictable weather of the Great Plains. They had no choice but to camp and sleep in tents on public land, which protected them from the worst of the sudden blizzards and hailstorms. ELLIOTT WEST, *THE CONTESTED PLAINS: INDIANS, GOLDSEEKERS, & THE RUSH TO COLORADO* 151–52, 159–63 (1998); FRANK MCLYNN, *WAGONS WEST: THE EPIC STORY OF AMERICA’S OVERLAND TRAILS* 132–37, 179–80 (2007). As one traveler noted, the emigrants “pretty much all camp where the grass is particularly good and the water is handy.” *Mrs. Writer to Her Mother*, *THE COLORADO MAGAZINE*, vol. 1, at 289 (1893).¹ Put simply, it would have been impossible for most settlers to reach Colorado without camping along the way.

Camping in tents on public land was central to the initial settlement of Colorado and the freedom of movement of its residents. *See People in the Interest of J.M.*, 768 P.2d at 221. The right to camp on public land was entirely uncontroversial in this period and it was inconceivable that any American authorities

¹ Accessible on Google Books:
<https://books.google.com/books?id=00NOAAAAYAAJ>.

would attempt to criminalize the right of American citizens to use public lands for temporary shelter.

B. Tents and Camping in Mining Regions

Settlers rushed rapidly into Colorado after the discovery of gold near Pike's Peak in 1858. These early settlers – popularly labelled “Fifty-Niners” – hoped to make their fortunes but had to survive in inhospitable landscapes that lacked any preexisting permanent settlements or functional system of private landownership. What is more, prospectors often moved frequently, chasing reports of new discoveries of gold. DUANE A. SMITH, *ROCKY MOUNTAIN MINING CAMPS: THE URBAN FRONTIER* 42 (1967). The prospectors thus required shelter against the harsh Rocky Mountain weather that could be set up and moved quickly. Tents, pitched on public lands, met their needs.

One portrait of such a camp comes from New York newspaper editor, and later presidential candidate, Horace Greeley. In 1859, he described the area that would become Central City, Colorado as a settlement in which “the entire population of the valley—which cannot number under four thousand ... sleep in tents.” HORACE GREELEY, *AN OVERLAND JOURNEY, FROM NEW YORK TO SAN FRANCISCO IN THE SUMMER OF 1859* 122 (1860); *see also* *HISTORY OF CLEAR CREEK AND BOULDER*

VALLEYS, COLORADO 438 (1880)² (describing the proliferation of tents in Central City after gold was discovered). The men in this settlement, most of whom had recently arrived from eastern towns and cities, did not own the land on which they slept, but it would never have occurred to any legal authority to arrest them for exercising their right to pitch a tent. The land on which the newcomers to Colorado slept was owned by the American public and was used to the public's benefit. Over time, these tent encampments in mining districts developed into towns with a functional government and more permanent structures, but these developments did not eliminate tents or camping. SMITH, ROCKY MOUNTAIN MINING CAMPS at 47–48.

The frequent use of tents by miners did not cease with statehood. The physical conditions of the mountains, the consistent movement of miners, and their temporary presence in any one location caused camping on public land to remain an ideal solution. The memoirs of Anne Ellis, a Colorado resident born in 1875, are full of descriptions of time spent in tents in mountain towns and mining camps. *See, e.g.*, ANNE ELLIS, LIFE OF AN ORDINARY WOMAN 100, 173, 214, 295 (1929). As Ellis's experience shows, even after the state government had been organized and local politicians and sheriffs had been elected, camping on public land remained a

² Accessible on Google Books: <https://books.google.com/books?id=QsQwR9Db-0EC>.

common feature of the state's mining industry and a basic right of the state's residents. It was a practice fundamental to Coloradan's way of life in the nineteenth century that no town or city considered criminalizing.

C. Tents and Camping in Future Cities

The use of tents on public land for temporary habitation was in no way limited to individual miners camping in far-flung parts of the mountains. In soon-to-be cities and towns, tents served both commercial and residential purposes. The first stores in settlements – including those that later became major cities – were usually housed in tents. WEST, *CONTESTED PLAINS* at 211; SMITH, *ROCKY MOUNTAIN MINING CAMPS* at 60. Similarly, the first saloons, which often provided shelter to newly arrived travelers, were also housed in tents. ELLIS, *LIFE OF AN ORDINARY WOMAN* at 72 (describing an early Leadville saloon in a tent). One chronicler of the state describes the construction of a tent for gambling just one week after the first settlement of Golden. WILLIAM N. BYNES, *HISTORY OF COLORADO*, vol. 1. 128 (1901);³ *see also* ELLIOTT WEST, *CONTINENTAL RECKONING: THE AMERICAN WEST IN THE AGE OF EXPANSION* 198 (2023). In short, Colorado's miners slept in tents, shopped in tents, and even gambled in tents.

³ Accessible on Google Books:
<https://books.google.com/books?id=ZuXgUiQ7o1wC>.

Even away from mining regions, tents were ubiquitous. The first white settlers in Denver camped along Cherry Creek in tents, coming into conflict with Arapahoe and Cheyenne who had traditionally spent the winter there. WEST, CONTESTED PLAINS at 194; HISTORY OF CLEAR CREEK AND BOULDER VALLEYS, COLORADO 547 (1880) (describing the future location of Denver in 1858 as consisting of “three tents”); JEROME CONSTANT SMILEY, HISTORY OF DENVER: WITH OUTLINES OF THE EARLIER HISTORY OF THE ROCKY MOUNTAIN COUNTRY 226 (1901) (noting that Denver’s first settlers in 1858 “camped out”). One account of Denver, written in 1860, describes the first brick houses being constructed on Lawrence Street, but notes that the author was planning to leave a hotel where she had spent a night and instead “set up our tent and ‘camp.’ Most everybody does it here, and it is cheaper, and we shall have more things to ourselves.” *Mrs. Writer to Her Mother*, THE COLORADO MAGAZINE, vol. 1, at 291 (1893); *see also* WILBUR FISKE STONE, HISTORY OF COLORADO, vol. 2 at 616 (1918)⁴ (noting that a leading citizen lived in a tent for her first three weeks in Denver). A similar pattern occurred even far from the mountains. For example, historian Elliott West describes the first years of Kit

⁴ Accessible on Google Books: <https://books.google.com/books?id=x-JYAAAAMAAJ>.

Carson as “a sprawl of tents, spindly houses, and saloons” before it became a thriving town. WEST, CONTESTED PLAINS at 321.

From the deep Rockies to the banks of the South Platte to the eastern plains, tents were everywhere on public land in early Colorado. Their presence was not a surprise or an aberration, let alone a crime. Instead, their presence on public land was a result of Coloradans exercising their fundamental rights that, after 1876, were protected by our state’s constitution.

CONCLUSION

As demonstrated above, the use of tents as temporary shelter while camping on public lands was a common feature of nineteenth century Colorado. Nearly every early settler in the state used tents for shelter at one point or another. Before, during, and after 1876, tents were ubiquitous and the legality of camping on public land was unquestioned. In fact, the use of tents on public land was a vital part of the previous two decades of Colorado’s history: settlement and the expansion of mining and urban life would have been impossible without it. There was no need to specifically protect this right in the Constitution because its acceptance was so broad. In determining the scope of the rights protected by the inalienable rights provision, it is entirely appropriate for this Court to consider our state’s history. This history demonstrates that the framers of Colorado’s constitution considered camping on of

public land as part of the fundamental right of freedom of movement that is protected by the Colorado Constitution.

The Colorado Constitution protects the same rights today that it protected in 1876. Any law or ordinance that violates these rights, such as Boulder's Cover Bans, should be subject to strict scrutiny.

Dated this 19th day of May, 2025.

Respectfully submitted,

/s/ Justin Carpenter

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2025, I served a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE HISTORIANS IN SUPPORT OF PLAINTIFFS-APPELLANTS** via Colorado's E-Filing System pursuant to Colorado Appellate Rule 30.

/s/ Justin Carpenter