Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED May 19, 2025 1:24 PM FILING ID: 6218249A13390 CASE NUMBER: 2025CA110
Appeal from Boulder County District Court Honorable Robert R. Gunning Case No. 2022CV30341	
Plaintiff-Appellants: FEET FORWARD – PEER SUPPORTIVE SERVICES AND OUTREACH d/b/a FEET FORWARD, a nonprofit organization; JENNIFER SHURLEY; JORDAN WHITTEN; SHAWN RHOADES; MARY FALTYNSKI; ERIC BUDD; and JOHN CARLSON, v. **Defendants-Appellees:** CITY OF BOULDER, and MARIS HEROLD, Chief of Police for the City of Boulder	**▲ COURT USE ONLY ▲** Court of Appeals Case Number: 2025CA110
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BRIEF OF *AMICI CURIAE* THE STATE LAW RESEARCH INITIATIVE AND THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF PLAINTIFF-APPELLANTS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of 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 4,750-word limit set by C.A.R. 29(d) because it contains 4,745 words.

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge 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.

Dated May 19, 2025.

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The State Law Research Initiative ("SLRI") is a legal advocacy organization dedicated to strengthening state constitutional rights that prevent extremes in our criminal systems. SLRI has unique expertise in developing and applying state constitutional law through legal scholarship and appellate briefing.

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a non-profit organization at the University of California, Irvine School of Law. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of over 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. Much of its advocacy focuses on advancing state constitutional jurisprudence.[1]

[1] Amici are grateful to Boston University School of Law students Zoie Valencia, Angel Yi, and Quinn Phillips for their contributions to this brief.

SUMMARY OF ARGUMENT

Colorado courts "have a responsibility to engage in [] independent" state constitutional analysis, as often "the Colorado Constitution provides more protection for [its] citizens than do similarly or identically worded" federal rights. *People v. Young*, 814 P.2d 834, 842 (Colo. 1991). Considering Article II, § 20's right against "cruel and unusual punishments," the Colorado Supreme Court emphasized that "the Colorado Constitution, written to address the concerns of our own citizens and tailored to our unique regional location, is a source of protection for individual rights that is independent of and supplemental to the protections provided by the United States Constitution." *Id*. at 843.

Under this independent analysis, it is "cruel and unusual" for Boulder, Colorado, to criminally punish someone for sleeping outside with a blanket or tent when they have nowhere else to go. *See* B.R.C. §§ 5-6-10(d), 8-3-21(a) ("the bans"); Am. Compl. ¶¶ 174-77. Boulder's bans unlawfully criminalize the status of being unhoused. Although a divided U.S. Supreme Court reached a different conclusion under the Eighth Amendment in *City of Grants Pass v. Johnson*, 603 U.S. 530 (2024), neither that opinion nor any Colorado precedent relieves this court of its "responsibility to engage in an independent [Section 20] analysis[.]" *Young*, 814 P.2d at 842. Contrary to the district court's approach, state constitutional

independence is the baseline in Colorado. Moreover, imposing *any* criminal fines or jail time for sleeping outside is excessive punishment *per se* under well-established constitutional principles. *See Solem v. Helm*, 463 U.S. 277, 287 (1983) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.") (internal quotation omitted).

This brief presents three main arguments. First, state constitutionalism is vital role to protect individual liberty, and state courts must independently analyze rights despite superficially similar federal analogs. Second, Section 20 provides greater rights against unlawful punishments than the Eighth Amendment. State courts have a structural role in protecting rights within state criminal legal systems, as reflected in the national trend of state courts reviving independent state antipunishment rights. Consistent with these principles, Colorado Supreme Court precedent not only permits but *demands* a state-specific analysis in this case.

Finally, the bans violate Section 20 by criminalizing poverty and imposing excessive punishment. This court should adopt the dissenting view in *Grants Pass* as more consistent with Colorado cases prohibiting the criminalization of status. Moreover, Appellants' claim that it is cruel and unusual to punish unhoused people with fines and jail time for sleeping outdoors is a paradigmatic "categorical" challenge that "turn[s] on the characteristics of the offender." *Graham v. Florida*,

560 U.S. 48, 61 (2010); *Sellers v. People*, 560 P.3d 954, 959 (Colo. 2024). Here, the bans are excessive punishment because they violate Colorado's standards of decency and fail to serve any legitimate penological purpose.

ARGUMENT

I. The Colorado Constitution Demands Independent Interpretation and Provides Greater Individual Rights Than The Federal Constitution.

State constitutional rights are not "mere … shadows," *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring), or "mirrors of federal protections," *People v. McKnight*, 446 P.3d 397 (Colo. 2019) (internal citations omitted). They play a crucial role in shaping the full breadth of individual rights. As Justice Brennan implored, the "legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for with it, the full realization of our liberties cannot be guaranteed."[2] As the Federal Constitution provides only the minimum rights protections, state courts may read their "own State's constitution more broadly than [the Supreme Court] reads the federal Constitution, or to reject the mode of analysis used by [the Supreme Court]

[2] William Brennan, *State Constitutions & The Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982).

A state law "approach [that] treats federal precedent with a presumption of correctness [] has no sound basis in our federal system."[3] Such "lockstep" analysis poses a "grave threat to independent state constitutions, and [is] a key impediment to the role of state courts in contributing to the dialogue of American constitutional law."[4]

Colorado courts, therefore, have a "responsibility to engage in an independent analysis of state constitutional principles in resolving a state constitutional question." *Young*, 814 P.2d at 842. Even "parallel" text in the state and federal charters "does not mandate parallel interpretation." *Rocky Mt. Gun Owners v. Polis*, 467 P.3d 314, 324 (Colo. 2020). And when constitutional language is "highly generalized"—such as when it broadly prohibits "cruel and unusual punishments"—there is "no reason to reflexively assume that there must be 'just one meaning over a range of differently situated sovereigns.'" *McKnight*, 446 P.3d at 407 (quoting SUTTON, *supra* note 4, at 174).

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[3] Goodwin Liu, *Brennan Lecture: State Constitutions & the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1315 (2017).

[4] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16 (2018).

To be sure, federal analysis of similar issues is relevant, and in some cases, the Colorado Supreme Court has "follow[ed] federal jurisprudence where, *based on [its] independent analysis*, [it found] the U.S. Supreme Court's reasoning to be sound." *Rocky Mt. Gun Owners*, 467 P.3d at 325 (emphasis added). But the Court has also not hesitated to recognize more expansive individual rights, including by adopting the dissenting view in U.S. Supreme Court decisions. *See*, *e.g.*, *People v. Sporleder*, 666 P.2d 135, 141-42 (Colo. 1983) (adopting Justice Thurgood Marshall's dissenting view in *Smith v. Maryland*, 442 U.S. 735 (1975) to hold that, under the state constitution, police must obtain a warrant before installing a pen register).

In reaching state-specific results, the Colorado Supreme Court has explained that state courts "have a freer hand in … allowing local conditions and traditions to affect their interpretation of a constitutional guarantee," and to account for the "general institutional differences between the state government and its federal counterpart[.]" *McKnight*, 446 P.3d at 407; SUTTON, *supra* note 4 at 17. Criminal law in particular "has traditionally been considered best left to the expertise of the state courts as the vast majority of criminal prosecutions take place in state, rather than federal, court." *Id*. Accordingly, Colorado's constitution provides greater rights

regarding police searches and seizures,[5] due process,[6] double jeopardy,[7] and—as discussed further below—cruel and unusual punishment.[8]

II. Colorado's Prohibition On "Cruel and Unusual Punishments" Provides Greater Individual Rights Than the Federal Eighth Amendment.

A. Eighth Amendment jurisprudence is a poor fit for state court deference.

Given state law's prominent role in criminal prosecutions, state courts must analyze rights against punishment independently. State courts interpreting state constitutions are structurally better positioned to shape and enforce antipunishment rights because the vast majority of criminal cases are adjudicated in state courthouses, and state governments hold nearly 90% of the people confined in U.S.

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[5] *See Sporleder*, 666 P.2d at 142; *People v. Oats*, 698 P.2d 811 (Colo. 1985) (rejecting analysis in *United States v. Karo*, 468 U.S. 705 (1984) to hold that warrantless installation of tracking devices on a drum of chemicals violated Section 7); *Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980) (rejecting analysis in *United States v. Miller*, 425 U.S. 435 (1976) to hold that bank customers have reasonable expectation of privacy in bank records).

[6] *People ex rel. Juhan v. District Ct. for Cnty of Jefferson*, 439 P.2d 741 (Colo. 1968) (rejecting analysis in *Leland v. Oregon*, 343 U.S. 790 (1952) to hold that requiring an accused to prove sanity by a preponderance of evidence violates Colorado's due process clause).

[7] *People v. Paulsen*, 601 P.2d 634 (1979) (rejecting analysis in *United States v. Scott*, 437 U.S. 82 (1978) to preclude retrial where trial court erroneously entered post-jeopardy judgment of acquittal on grounds unrelated to factual guilt or innocence).

[8] *See Wells-Yates v. People*, 454 P.3d 191 (2019); *Young*, 814 P.2d 834, 842-43.

prisons.[9] *See McKnight*, 446 P.3d at 407. Assessing the constitutional limits of such systems is therefore a state-specific task for which state courts have greater legitimacy and responsibility.[10]

In contrast, Eighth Amendment jurisprudence is federal-specific and constrained by concerns about intruding into state legal systems. As a result, it necessarily ignores crucial state-specific factors and leaves a gap for state liberty protections to fill. The U.S. Supreme Court has acknowledged this dynamic, expressly inviting divergent state constitutional approaches to similar questions. *See Jones v. Mississippi*, 593 U.S. 98, 109 (2021) (holding that judges may sentence children to die in prison so as to "avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems").

Indeed, *Grants Pass* upheld a criminal ban on sleeping in public in part to avoid "interfer[ing] with essential considerations of federalism that reserve to the States the primary responsibility for drafting their own criminal laws." 603 U.S. at 551 (internal quotation omitted). Such concerns are irrelevant to state courts applying state constitutions. *See Fletcher v. Alaska*, 532 P.3d 286, 308 (Alaska Ct.

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[9] *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html.

[10] *See* Robert J. Smith et al, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537, 544 (2023).

App. 2023) ("[T]he federalist concerns that led to the restrained approach adopted by *Jones* are not at issue when state courts are determining the scope and meaning of their own independent state constitutions").

In sum, a federal doctrine that applies to more than 50 separate legal systems does not warrant a presumption of correctness when the scope of *state* constitutional rights is at issue.

B. There is a growing nationwide trend of state supreme courts expanding state constitutional rights against cruel and/or unusual punishments.

Consistent with the structural importance of state constitutional rights, many state supreme courts have expanded rights against excessive punishments—most recently departing from or expanding Eighth Amendment cases to find rights against excessive prison terms based on the offense and age of the offenders, even under identical "cruel and unusual" language.

For example, the Iowa Supreme Court has held that the state's "cruel and unusual" punishment clause prohibits all mandatory minimum and life without parole (LWOP) sentences for youth under age 18. *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014); *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016). Neither holding exists in federal precedent. The *Lyle* court declared its "independent and unfettered authority to interpret the Iowa Constitution," and explained that "[s]imilarity between federal

and state constitutional provisions does not require us to follow federal precedent interpreting the Federal Constitution." 854 N.W.2d at 384 n.2 (internal quotation omitted). The court also emphasized that "Iowans have generally enjoyed a greater degree of liberty and equality because we do not rely on a national consensus regarding fundamental rights[.]" *Id*. at 387.

Likewise, the Alaska Court of Appeals in 2023 invoked the state's "cruel and unusual punishments" clause to reject the U.S. Supreme Court's *Jones* ruling. It decided instead that courts must "affirmatively consider" youth as a mitigating factor and justify LWOP with "an on-the-record sentencing explanation" as to why "the juvenile offender is … irreparabl[y] corrupt[]." *Fletcher*, 532 P.3d at 308 (internal quotations omitted).

Elsewhere, state supreme courts applying similar cruel and/or unusual clauses have recognized rights against LWOP sentences for people under age 21. The Michigan and Washington supreme courts banned mandatory LWOP sentences for that age group, *People v. Taylor*, No. 166428, 2025 Mich. LEXIS 603 (Mich. Apr. 10, 2025); *In re Monschke*, 483 P.3d 276, 280 (Wash. 2021), while the Massachusetts high court went further to ban LWOP entirely. *Commonwealth v. Mattis*, 224 N.E.3d 410 (Mass. 2024).

In recognizing broader state constitutional rights, these other state courts variously relied on, among other factors: unique state history, state-specific standards of decency, and state courts' unique role in protecting individual liberty. While textual differences matter, they are not dispositive, as the Colorado Supreme Court has recognized in Section 20 cases. *See Young*, 814 P.2d at 842.

C. *Section 20 likewise provides greater individual rights—especially when federal rights are limited by divided, federal-specific decisions like* Grants Pass.

The Colorado Supreme Court has repeatedly recognized its obligation to interpret Section 20 independently, notwithstanding its shared language with the Eighth Amendment. In *Young*, a challenge to the state's death penalty statute, the court explained that the "existence of federal constitutional provisions essentially the same as those to be found in our state constitution does not abrogate our responsibility to engage in an independent analysis of state constitutional principles[.]" 814 P.2d at 842.

This is more than hollow rhetoric. In *Wells-Yates v. People*, the court deployed state-specific reasoning to find distinct Section 20 protections from Habitual Criminal Act sentences. 454 P.3d 191, 197 (Colo. 2019). First, the court stressed that Section 20 doctrine "does not mirror the Supreme Court's," and recognizes the risk that "habitual criminal" sentences will be "[dis]proportionate to the crime.'" *Id*. at

201 (quoting *Alvarez v. People*, 797 P.2d 37, 40 (Colo. 1990)). The court added that while "cruel and unusual" is defined in part by "evolving standards of decency"—a concept borrowed from Eighth Amendment jurisprudence—state courts must assess the "standards of decency *in Colorado*." *Id*. at 206 (emphasis added). Applying these principles, the court held that legislative sentencing reforms are relevant to the state's standards of decency, even if they are prospective-only and do not apply to the person challenging their sentence. *Id*. In other words, courts must consider whether recent, more lenient sentencing reforms show that previously imposed sentences are now unconstitutionally severe. Eighth Amendment doctrine poses no such requirement.

Here, the district court erroneously disregarded *Wells-Yates* based on the Colorado Supreme Court's remark in *Sellers v. People* that "[t]o date … we have not interpreted article II, section 20 of our constitution to provide greater protection than the Eighth Amendment." 560 P.3d at 961.[11] But that statement is dubious given *Wells-Yates* and, in any case, refers only to whether Section 20 prohibits LWOP for felony murder. Applying *Sellers* here gets the legal standard backward. Colorado

[11] Despite recognizing that "*Grants Pass* is not controlling authority for this Colorado Constitutional claim," the district court insisted that, in light of *Sellers*, it lacked "the discretion to interpret Art. II, § 20 more broadly than the Eighth Amendment." *Feet Forward et al. v. City of Boulder*, No. 2022cv30341, Order re Def. Mot. to Dismiss Am. Compl. at 13, 16 (Dec. 6, 2024).

law is clear: state courts have a "responsibility to engage in" independent Section 20 analysis. *Young*, 814 P.2d at 842. That is the default starting point. So the question is not whether, as the trial court framed it, a higher court has already found more expansive state-specific rights than are afforded by the Eighth Amendment, but whether the usual state constitutional independence is *foreclosed*. And *Sellers* cannot be read as holding that all Eighth Amendment rulings must now be reflexively imported into state constitutional law without regard to the legal question presented—a proposition that would be inconsistent with a century of state constitutional independence in Colorado. Indeed, *Sellers* does not offer a "holding" on this point at all, but rather an imprecise description of Colorado case law. *See* 560 P.3d at 958-960.

Further, adopting *Grants Pass* would effectively roll back existing rights that Colorado courts have long-embraced. *Grants Pass* is regressive in two ways. First, in lengthy dicta, the majority suggests gutting Eighth Amendment law to limit only the "'method or kind of punishment' a government may 'impos[e] for the violation of criminal statutes." 603 U.S. at 542 (quoting *Powell v. Texas*, 392 U.S. 514, 531-32 (1968) (plurality opinion)). So curtailed, the Eighth Amendment might bar "medieval tortures," but little else. *Id*. at 572 (Sotomayor, J., dissenting). Criminalizing mere status would be fair game, and there would be no proportionality

requirement preventing excessive sentences. It would erase well-established principles that prohibit executing people with intellectual disabilities, *Atkins v. Virginia*, 536 U.S. 304 (2002); protect youth from LWOP, *Miller v. Alabama*, 567 U.S. 460 (2012); and require humane conditions inside prisons. *Brown v. Plata*, 563 U.S. 493 (2011). It would also undo the line of cases—explicitly incorporated into Section 20 jurisprudence—requiring "that any sentence to death be both certain and reliable." *Young*, 814 P.2d at 843.

Second, the sleeping bans that *Grants Pass* upheld are the latest version of status-based anti-vagrancy laws that state and federal courts in Colorado have repeatedly struck down.[12] Even if Colorado has followed federal cases to this point, no Colorado Supreme Court holding—not in *Sellers* or any other case—requires state courts to stay on that path after the *Grants Pass* retrenchment. To the contrary, Section 20, which turns in part on standards of decency specific to Colorado, should be construed in accord with existing state case law.

Finally, *Grants Pass* addressed only one type of cruel and unusual claim: whether a law improperly criminalizes status. Both the Eighth Amendment and

[12] *See infra* Part III; *see also* Risa L. Goluboff & Richard Schragger, *Grants Pass & the Vagrancy Revolution Revisited*, SUP. CT. REV. 24 (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5127249.

Section 20 also prohibit excessive punishments. As explained below, the bans' sanctions are excessive *per se* under well-established constitutional principles.

III. Boulder's Criminal Sleeping Bans Violate Section 20.

A. *Boulder's bans unlawfully criminalize status.*

For decades, Colorado courts have held that local governments cannot target blameless conduct—whether couched as "loitering," "soliciting," or "strolling about"—as a means to police people who may be unhoused, experiencing poverty, or generally considered outcasts. *See Arnold v. City of Denver*, 464 P.2d 515 (Colo. 1970); *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969). This court should adhere to this precedent and find that the bans unconstitutionally target the status of being unhoused.

In *Goldman v. Knecht*, a federal district court in Colorado struck down a statute that prohibited "[a]ny person able to work" from, among other things, "loitering or strolling about." 295 F. Supp. At 899, n.2, finding that it unlawfully criminalized status as opposed to behavior. While "loitering" may be conduct, the court said, it is not inherently criminal, immoral, or antisocial conduct. Thus, it must be accompanied by some *other* blameworthy behavior—"obstruct[ing] the orderly government process," for example, or "prepar[ing] to commit a criminal offense"—to avoid unconstitutionally punishing status alone. *Id*. at 905, 908 ("[i]f addiction to

narcotics is a status which the legislature cannot validly declare to be a crime under *Robinson* [*v. California*], it follows that the Colorado attempt to declare idleness or indigency coupled with being able-bodied must also (indeed even more) be held beyond the power of the state legislative body").

The Colorado Supreme Court struck down similar laws in *Arnold v. City & Cnty of Denver*, 464 P.2d 515 (Colo. 1970) and *People v. Gibson*, 521 P.2d 774 (Colo. 1974). *Gibson* in particular, emphasized prohibitions on using vaguely defined or blameless conduct as a backdoor to criminalizing status. 521 P.2d at 775 (barring loitering bans aimed at preventing "deviate sexual intercourse" because they effectively targeted status, even when they required the intent to solicit).

Here, sleeping outside with a blanket or tent does "not call to mind conduct which is in and of itself immoral and antisocial" any more than loitering or strolling about. *See Goldman*, 295 F. Supp. at 907-08. It is only a means to police protected status—a conclusion further confirmed by how the ban is enforced. While the ban is facially neutral, it is primarily enforced against the unhoused with a directive to "deal with [Boulder's] encampment problem." Am. Compl. ¶ 87. It is therefore unsurprising that "Boulder issues camping ordinance citations to people experiencing homelessness at a rate nearly 500 times greater than it does to housed individuals," and that, on average, "70% of the individuals held in the Boulder

County jail for municipal violations alone are homeless."[13] Such disparities reveal the same status-based concerns that drove Colorado courts to strike down anti-vagrancy ordinances.

B. Boulder's bans are excessive punishment per se.

Even if this Court finds that the bans criminalize conduct rather than status, they are unconstitutional because imposing *any* criminal sanction on sleeping outside with a blanket is categorically disproportionate and excessive under well-established constitutional principles.

i. Legal standard: the Categorical Framework.

Both the Eighth Amendment and Section 20 prohibit excessive or disproportionate punishments, including when the offense is so *de minimis* that virtually any criminal punishment would be excessive. *See Sellers*, 560 P.3d at 959 (addressing Section 20's prohibition on excessive punishment)*; Solem*, 463 U.S. at 287 (explaining that "[e]ven one day in prison" would be excessive "cruel and unusual punishment for the 'crime' of having the common cold.") (internal quotation omitted).

[13] *See* Michael Bishop et al., *Too High a Price 2: Move on to Where?*, U. DENVER L. STUD. RSCH. 13-14 (2018).

When, as here, a punishment is disproportionate as applied to an entire category of people, courts apply the two-step "categorical framework" set forth in *Graham v. Florida*. *See* 560 U.S. at 61; *Sellers*, 560 P.3d at 959-60. First, the Court asks whether the sentencing practice violates contemporary standards of decency, including emerging social consensus regarding punishment practices. *Graham*, 560 U.S. at 61. Second, the court assesses whether the punishment meaningfully serves legitimate penological goals. *Id.* at 71 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."). Although most often applied in capital and youth LWOP cases, the categorical approach extends to any punishment imposed on a class of people with shared characteristics. *See id.* at 61. This challenge by unhoused people with nowhere else to sleep presents the paradigmatic case for categorical resolution.

ii. The bans violate Colorado's contemporary standards of decency.

While *state* legislation may be the "clearest and most reliable objective evidence" of a state's standards of decency, this case involves a local ordinance that does not reflect statewide consensus. *Wells-Yates*, 454 P.3d at 206 (quoting *Atkins*, 536 U.S. at 312). Thus, "[s]tate courts should look to a variety of secondary indicators" to assess "societal consensus within their state," including "public

opinion polling."[14] *See also Atkins*, 536 U.S. at 316 n.21 ("[P]olling data shows a widespread consensus among Americans … that executing the [intellectually disabled] is wrong.").

Here, a recent poll of Colorado residents commissioned by Amicus SLRI shows overwhelming moral condemnation of Boulder's bans and deep skepticism of their efficacy.[15] Overall, 79% said that it "is not morally acceptable" to criminalize sleeping outside with a blanket, including 75% of Republican respondents and 86% of Democratic respondents. Only 10% said that the ban is morally acceptable. Further, 69% ranked "[a]rresting people who have no shelter when they sleep outside" as the *least* effective of nine potential policies to reduce homelessness (another 14% said it was the second least effective). The two policies ranked most effective were "[m]ore affordable housing" (31%) and "[m]ore shelter beds" (27%). Finally, 61% agreed that "homelessness results from circumstances beyond an individual's control," showing that most Coloradans view homelessness as a systemic problem, and that even those who disagree share the "consensus that a criminal blanket ban [is] both immoral and ineffective."[16]

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[14] Smith et al., *State Constitutionalism*, *supra* note 10, at 584.
[15] Ian P. Farrell, *Community Attitudes Toward Homelessness Policies In Colorado* (May 15, 2025), https://tinyurl.com/3ypyaxpy (surveying a sample of 744 Colorado residents representative with regard to political affiliation, race, and gender).
[16] *Id.* at 9.

Colorado's rich culture of camping and sleeping outdoors underscores the disconnect between the bans and the state's values. *Cf. State v. Wilson*, 543 P.3d 440, 455 (Haw. 2024) (emphasizing Hawaii's "Aloha spirit" and tradition to support independent interpretation of state constitution's Second Amendment analog). In *People v. Schafer*, the Colorado Supreme Court invoked the state's unique camping culture to find a reasonable expectation of privacy against police searches in tents and other outdoor shelters. 946 P.2d 938, 943 (Colo. 1997). The Court recognized "that tents have long been utilized as temporary or longer-term habitation in Colorado," and highlighted the necessity of tents given that "wind, hail, rain, or snow may strike without warning any day of the year" in Colorado. *Id.* at 942. Here, too, the court should recognize that turning a cultural norm into a crime violates Colorado's standards of decency.

iii. The bans are cruel because they fail to serve any penological purpose.

Imposing fines and jail time for the inevitable consequences of being unhoused does not measurably serve the accepted penological purposes of rehabilitation, deterrence, retribution, or incapacitation, and the ban is therefore "by its nature disproportionate to the offense." *See People in Interest of T.B.*, 489 P.3d 752, 772 (Colo. 2021); *Graham*, 560 U.S. 48 at 71.

As to rehabilitation, camping bans only impair exits out of homelessness. They (1) disrupt access to stabilizing services;[17] (2) create cycles in which people are jailed and released to the same location, where they incur additional violations;[18] (3) cause job loss, missed work, and lost pay—impacts that are worsened by unaffordable fines and fees;[19] and (4) fuel cycles of incarceration by creating criminal records.[20] Unsurprisingly, as enforcement of sleeping bans has increased over the last ten years, the number of people experiencing chronic homelessness in Colorado has increased by 150%.[21]

Further, since the bans target unavoidable behaviors, they can neither deter criminality nor serve retribution. *See Tison v. Arizona*, 418 U.S. 137, 149 (1987) (stating retribution requires personal culpability); *People v. McClintic*, 484 P.3d 724,

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[17] *See* Paul Rubenstein, Los Angeles Municipal Code Section 41.18 Effectiveness Report (21-0329-S4), L.A. HOMELESS SERVS. AUTH., 3-4 (2023), https://tinyurl.com/4zm2zvfn.

[18] *See* Housing Not Handcuffs 2019, NAT'L L. CTR. 64, https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf.

[19] *See id.* (noting "criminal convictions, and their collateral consequences, can bar access to employment and housing" and that "unaffordable tickets lead to ruined credit which can serve as a direct bar to housing access").

[20] *See id.*

[21] Colorado State of Homelessness Report 2023, COLO. COAL. FOR THE HOMELESS, 1 (2023), https://tinyurl.com/4wrcz69e; Robert Davis, How the Urban camping ban has impacted Denver's homeless community, DENVER VOICE, (May 12, 2022), https://www.denvervoice.org/archive/2022/5/12/how-the-urban-camping-ban-has-impacted-denvers-homeless-community ("[T]he number of people experiencing homelessness has grown exponentially since [Denver's camping ban] was passed.").

728 (Colo. App. 2020) (holding that where an individual's acts are not "a result of effort or determination [they] do not constitute criminal conduct").[22] The only harm that the bans could prevent is onlookers' discomfort over seeing people experiencing homelessness.[23] While the bans' defenders say they curtail other harms—such as public drug use, petty theft, or illicit fires—they address none of those behaviors, and instead invite "broken windows policing [that] displace[s] individuals from stabilizing services and social support."[24]

In sum, the bans and their punishments find no support in any penological justification and are thus inherently disproportionate to the prohibited conduct.

CONCLUSION

[22] *See also Housing Not Handcuffs 2019*, *supra* note 18, at 60-62 (finding homeless individuals live outside because they lack better options and cannot afford housing, despite taking on work).

[23] *See id.*; City of Boulder, *Boulder City Council Meeting 7-20-21*, YOUTUBE (July 20, 2021) (2:21:28 - 2:25:00), https://tinyurl.com/37n4cbnj (recording community comments supporting tent ban because they "don't like" to visit certain areas); City of Boulder, *City Council Agenda Item*, "Second Reading and Motion to adopt Ordinance No. 7719 amending Section 5-6-10,"(May 4, 2010), https://tinyurl.com/ytvh8rjj (citing "perceived unwelcoming or intimidating" shopping environment in business districts as justification for the Ban).

[24] Tony Sparks, *Reproducing Disorder: The Effects of Broken Windows Policing on Homeless People with Mental Illness in San Francisco*, 45 SOC. JUST. 51, 62 (2018).

For the foregoing reasons, this court should find that the Amended Complaint plausibly alleges that Boulder's bans violate Colorado's cruel and unusual punishment clause.

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CERTIFICATE OF SERVICE

I certify that on this 19th day of May, 2025, a true and accurate copy of the foregoing **BRIEF OF *AMICI CURIAE* THE STATE LAW RESEARCH INITIATIVE AND THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF PLAINTIFF-APPELLANTS** was electronically filed and served on all parties of record via the Colorado Courts E-Filing System.

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