COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203	DATE FILED May 19, 2025 3:34 PM FILING ID: 8CD2330DE7A6F CASE NUMBER: 2025CA110
Appeal from Boulder County District Court Honorable Robert R. Gunning Case No. 2022CV30341 **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, individuals; v. **Defendants-Appellees:** CITY OF BOULDER and MARIS HEROLD, Chief of Police for the City of Boulder.	☐ COURT USE ONLY ☐
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APPELLANT'S OPENING BRIEF

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1. **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 28 and 32, including:

> Word Limits: My brief has **9,175 words**, which is less than the 9,500 word limit.
>
> Included Sections: In the arguments section, before arguing each issue on appeal, I have separately titled sub-sections discussing the standard of review and whether the issue was preserved for appeal, with the required citations.

I understand that my brief may be rejected if I fail to comply with these rules.

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2. **ISSUES PRESENTED FOR REVIEW**

A. Whether Appellees violate Colorado's constitutional prohibition on cruel and unusual punishment by enforcing B.R.C. § 5-6-10 (the "Blanket Ban") and B.R.C. § 8-3-21(a) (the "Tent Ban") (together, the "Cover Bans") against houseless persons when they cannot access shelter;

B. Whether the Cover Bans violate the right to use public spaces, without interfering with others' liberty, enshrined in the Colorado Constitution;

C. Whether Appellees impose a state-created danger in violation of Colorado's Constitution by enforcing the Cover Bans against houseless persons when they lack access to shelter.

3. **STATEMENT OF THE CASE**

Reflecting Boulder policies, and in an attempt to make Boulder inhospitable to houseless people, over the last several years the availability of overnight shelter space in Boulder has been drastically reduced, leaving many with no choice but to live outside. CF, p. 2.[1] At the same time, Boulder has criminalized its houseless residents who must cover themselves in public space to protect against the elements through multiple municipal ordinances, and dedicated millions of taxpayer dollars to aggressively enforce them. *See* B.R.C. § 5-6-10; B.R.C. § 8-3-21; CF, pp. 12-13.

[1] Appellants cite to the original Complaint in this matter, however, all of the factual allegations cited from the original Complaint are also contained in the Amended Complaint. CF, pp. 393-414.

One ordinance, commonly called the "camping ban," does not target the recreational activity of camping, but the survival act of using shelter as minimal as a blanket to protect against the elements. B.R.C. § 5-6-10(d); CF, p. 2, 394. As such, the ordinance is more accurately called the "Blanket Ban." CF, p. 2. Another law, the "Tent Ban," forbids sheltering or storing property outside under "any tent, net, or other temporary structure." B.R.C. § 8-3-21(a); CF, p. 2. Together, the "Cover Bans" criminalize Boulder's houseless residents' right to exist in *any* of Boulder's public spaces at *any* time of day or night by forbidding the unavoidable trappings of extreme poverty. CF, p. 2. Violation of the Cover Bans is punishable by up to a $2,650 fine and 90 days in jail. *See* B.R.C. § 5-2-4; CF, p. 9.

3.1 **The shelter available in Boulder is inadequate.**

There are not nearly enough overnight shelter beds available for the number of unhoused people in Boulder. Boulder Shelter for the Homeless ("BSH") is the only emergency overnight shelter option available to most adults in Boulder.[2] CF, p. 6. Even on the rare nights when overflow "critical weather" shelter is triggered, the maximum number of facility and hotel beds combined never exceeds 180 beds. CF, p. 7. Because of this, between October 2021 and May 2022, BSH turned away at least 175 houseless people for lack of capacity. CF, p. 6. Because of the lack of beds,

[2] Additional shelter options in Boulder serve only specific subpopulations of people experiencing homelessness. CF, p. 6.

BSH even turns people away on days when exposure to the weather without shelter is dangerous to human health and safety. *Id*. Between October 2021 and May 2022, BSH turned away at least a total of 182 people on days temperatures dropped below freezing; a total of 20 people away on days temperatures dropped below 10 degrees; and a total of 55 people on days when it snowed. CF, p. 7.

In addition to space limitations, other barriers to accessing BSH prevent many houseless residents from being able to shelter there on any given night, including, but not limited to, a required screening process, work schedules, mental and physical health needs, inability of families to shelter together, and inability to enter shelter with the belongings that allow survival on nights when shelter is inaccessible. CF, p. 7. Further, on any given day, about thirty individuals experiencing homelessness are suspended from BSH. CF, p. 8. These suspensions range in length from a single night to a lifetime ban. *Id*. Even if a houseless person meets all other criteria for entry to BSH, people who cannot or did not use the screening process are not permitted to spend more than 90 nights annually at BSH, unless Boulder experiences extreme weather. *Id*.

Further, since 2017 there has been no day shelter option for most houseless adults in Boulder: BSH closes daily between 8 a.m. and 5 p.m. CF, pp. 8-9.[3] In sum,

[3] In 2024, after the filing of the Complaint in this matter, Boulder began funding a day shelter that operates on the outskirts of Boulder in a BSH facility.

most houseless people in Boulder have no meaningful access to shelter on any given day and are forced to survive outside.

3.2 **Boulder and Chief Herold enforce the Cover Bans in circumstances that expose houseless people to significant danger from environmental conditions.**

Boulder enforces its Cover Bans primarily and disproportionately against people experiencing homelessness. CF, p. 12. From January 2020 through January 2022, houseless Boulder residents were defendants in 92% of Cover Ban cases filed in Boulder Municipal Court; notably, houseless people make up only approximately 1% of Boulder's population. *Id.* Officers enforce the Cover Bans at all hours of the day, including when BSH is closed, and no indoor shelter option is open to most people experiencing homelessness in Boulder. CF, p. 13. Officers enforce the Cover Bans by writing tickets, ordering houseless residents to move along, and threatening to confiscate their belongings if they do not. *Id*.

On March 16, 2021, Chief Herold issued a "Directive on Camping Violations" to all members of BPD instructing officers to consider certain factors prior to issuing a camping ticket. *Id*. The March Directive does not instruct officers to consider either a person's ability to access indoor shelter or a person's exposure to immediate danger absent protection from the elements before enforcing the Blanket Ban against them. *Id*. And, indeed, officers do not make such inquiries. *Id.* Because of this, Boulder law enforcement officers have enforced the Blanket Ban on many nights, or

mornings following, that BSH had reached capacity and turned people away and when the weather posed a danger to their survival. *Id*. The houseless Individual Appellants have all been ticketed for violation(s) of either the Blanket Ban, Tent Ban, or both, while they were unable to access shelter in Boulder. CF, pp. 17-21.

3.3 **The Cover Bans are intended to ban houseless people from Boulder.**

When City Council approved revisions to the Blanket Ban, the ordinance's exclusion of the recreational activities of "napping during the day or picnicking" was "carefully chosen to make sure that persons who doze off in a park on a nice warm day are not accounted criminals, while those who are residing in parks can be prosecuted." CF, p. 9. During the Blanket Ban's original passage, a City Council member asked staff to draft the language such that the ordinance would prohibit those tents used for living outside, but not those used for recreating. CF, p. 9-10. Reflecting the purpose and effect of the Cover Bans to exclude the unhoused from Boulder, officers frequently tell the houseless residents they target for enforcement to "get out of Boulder." CF, p. 14.

3.4 **The District Court initially permits Appellants' state constitutional claim to proceed but reverses course and dismisses based on an intervening federal decision interpreting the U.S. Constitution.**

Appellants — a Boulder nonprofit, Boulder taxpayers, and houseless residents of Boulder who face imminent risk of citation, prosecution, and criminal penalties under the Cover Bans — sued Boulder and its police chief to enjoin enforcement of

the Cover Bans and to seek compensation for unhoused Appellants. CF, pp. 1-26. Appellants brought multiple claims, including that the Cover Bans: (1) violated their rights under Colo. Const. art. II, § 20 by subjecting them to cruel and unusual punishments; (2) unconstitutionally exposed houseless individuals in Boulder to a state-created danger in violation of Colo. Const. art. II, § 25; and (3) violated houseless individuals' fundamental right to freedom of movement as protected by Colo. Const. art. II, § 3. CF, pp. 22-25.

Appellees moved to dismiss all of Appellants' claims. CF, pp. 46-59. The District Court granted the dismissal in part, but rejected Appellees' motion as to the claim that the Blanket Ban was unconstitutional under Colo. Const. art. II, § 20. CF, pp. 210-44. The District Court held that Appellants adequately alleged in their Complaint that Appellees' enforcement of the Blanket Ban against houseless residents without access to indoor shelter violated Colorado's prohibition on cruel and unusual punishments. CF, p. 234. The parties proceeded to discovery on this claim until the United States Supreme Court granted certiorari in *Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024) ("*Grants Pass*"), and the District Court granted Appellees' motion to stay the case on that basis. CF, pp. 491-501, 536-44. After the Supreme Court decided *Grants Pass*, the District Court allowed Appellees to file an additional motion to dismiss based solely on that federal decision. CF, pp. 547-48. After briefing, the District Court dismissed Appellants' case in its entirety. CF, pp.

774-94. Appellants filed a timely notice of appeal and now appeal both dismissal orders by the District Court. CF, pp. 795-96.

4. SUMMARY OF THE ARGUMENT

The District Court erred in holding that Appellants fail to state a claim under Colo. Const. art. II, §§ 20, 3, and 25. First, the District Court discarded nearly a century of the Colorado Supreme Court's jurisprudence on Colo. Const. art. II, § 20 and failed to independently interpret Colo. Const. art. II, § 20 in light of Colorado's unique social, historical, and geographical position; instead following the United Supreme Court's flawed reasoning in *Grants Pass*, interpreting another sovereign's ban on cruel and unusual punishments. Second, the District Court did not follow the Colorado Supreme Court's decision in *People in the Interest of J.M.*, 768 P.2d 219, 221 (Colo. 1989) ("*J.M.*"), which established that Colo. Const. art. II, § 3 protects the right to use public space and prohibits laws, like the Cover Bans, that seek to exclude an entire segment of the community from public space. Third, the District Court erred by imposing a higher standard on Appellants' claims under Colo. Const. art. II, § 25 than U.S. Const. amend. XIV. Appellants adequately allege that the Cover Bans expose unhoused individuals to an unreasonable risk of harm by prohibiting the use of items that they rely on for their very survival.

Ultimately, accepting the factual allegations in Appellants' Complaint as true and viewing them in the light most favorable to Appellants (as the Court must do at

this stage of the proceedings, *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 11), Appellants' Complaint states plausible and serious constitutional deprivations that require the District Court's consideration on a developed record and under Colorado law.

5. ARGUMENT

5.1 The Cover Bans violate Colorado's constitutional prohibition on cruel and unusual punishment when enforced against houseless persons lacking adequate access to shelter.

5.1.1 Statement of preservation and standard of review.

Appellants argued below that they stated a claim under Colo. Const. art. II, § 20. *See* CF, pp. 1-22, 81-88, 224-34, 298-313, 393-413, 493-96, 560-74.

Whether Appellants stated a claim under Colo. Const. art. II, § 20 is a question of law that this Court reviews *de novo*. *See Hartsel Springs Ranch of Colo., Inc. v. Cross Slash Ranch, LLC*, 179 P.3d 237, 239 (Colo. App. 2007).

5.1.2 Appellants stated a claim under Colo. Const. art. II, § 20.

That Colorado Constitution protects Coloradans from "cruel and unusual punishments." Colo. Const. art. II, § 20. The provision is identically worded to its counterpart in the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Compare id.,*

with U.S. Const. amend. VIII.

The Colorado Supreme Court has long held that this provision imposes substantive limits on what can be made criminal and proscribes punishment grossly disproportionate to the severity of the crime. *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 217 (Colo. 1984) (quoting *Ingraham v. Wright*, 430 U.S. 651, 667 (1977)). The Cover Bans violate Colo. Const. art. II, § 20 by both punishing Appellants based on their houseless status and imposing a punishment on them that is grossly disproportionate to the severity of their alleged "crime": attempting to survive outside in Boulder when they have nowhere else to go.

5.1.3 **Federal interpretation of U.S. Const. amend VIII does not limit the protections guaranteed by Colo. Const. art. II, § 20.**

The framers of Colorado's Constitution enacted it to ensure that the rights of Coloradans were not "subservient" to the whims of the federal government and its courts.[4] "[T]he 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." *People v. Young,* 814 P.2d 834, 842-43 (Colo. 1991). The Colorado Supreme Court has repeatedly recognized these independent

[4] *See An address to the people of Colorado on the policy of adopting a state government*, p.1, https://llmc.com/OpenAccess/docDisplay5.aspx?textid=76724212#

protections and emphasized the responsibility of state courts to interpret them accordingly.[5] It has instructed that even an identically worded provision in the state constitution compels such independent analysis. *Id.* at 842-43; *Rocky Mt. Gun Owners v. Polis*, 467 P.3d 314, 324 (2020). Contrary to this duty, the District Court reversed its initial legal analysis of Appellants' state constitutional claim based solely on the conclusions of the United States Supreme Court in *Grants Pass*, a nonbinding and wrongly decided case about the requirements of the Eighth Amendment. CF, pp. 709-29.

But Colo. Const. art. II, § 20 not only binds a different sovereign than the Eighth Amendment, it contains "highly generalized" language and its subject matter—constraints on the sovereign's power to impose criminal punishment—both support its independent construction. *People v. McKnight*, 2019 CO 36, ¶¶ 38–39. The Colorado Supreme Court has specifically warned against reflexively adopting

[5] *See, e.g., Rocky Mt. Gun Owners v. Hickenlooper*, 2016 COA 45M; *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1056 (Colo. 2002); *Animas Valley Sand & Gravel v. Bd. of Cty. Comm'rs*, 38 P.3d 59, 70 (Colo. 2001); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59-60 (Colo. 1991); *People v. Ford,* 773 P.2d 1059 (Colo. 1989); *Parrish v. Lamm,* 758 P.2d 1356, 1365 (Colo. 1988); *Conrad v. City & Cnty. of Denver*, 724 P.2d 1309, 1316 (Colo. 1986); *People v. Oates,* 698 P.2d 811 (Colo. 1985); *People v. Seven Thirty-Five East Colfax, Inc.,* 697 P.2d 348, 356 (Colo. 1985); *People v. Sporleder,* 666 P.2d 135 (Colo. 1983); *Charnes v. DiGiacomo,* 612 P.2d 1117 (Colo. 1980); *People v. Paulsen,* 601 P.2d 634 (Colo. 1979); *People v. Berger,* 521 P.2d 1244 (Colo. 1974); *People ex rel. Juhan v. Dist. Court for Cty. of Jefferson*, 439 P.2d 741 (Colo. 1968); *In Re Hearings Concerning Canon 35,* 296 P.2d 465 (1956); *Cooper v. People,* 22 P. 790 (Colo. 1889).

federal interpretation when construing a generally worded Colorado constitutional provision governing the criminal law, an area of traditional state concern. *Id.* at ¶ 39 (discussing Colo. Const. art. II, § 7); *Sporleder*, 666 P.2d at 140. "Cruel and unusual" is exactly the kind of highly generalized limitation on punishment that might be expected to carry different meanings across differently situated sovereigns. Given differences in the scope of each sovereign's powers, the range of punishments that could be considered "cruel and unusual," and different local conditions, traditions, and norms, there is no reason to assume that Colorado is fully aligned with federal jurisprudence on what punishments are unconstitutional.

Independent analysis of state constitutional provisions limiting punishment is not unique to Colorado. State supreme courts across the country have interpreted their state constitutional provisions limiting punishment as having meaning independent of and broader than the Eighth Amendment.[6] Indeed, state courts across the country are examining challenges to criminalization of sheltering outside under cruel and unusual punishments clauses akin to Colo. Const. art. II, § 20 in the wake of *Grants Pass*. *See* **Exhibit 1**, *Williams v. Albuquerque*, D-202-CV-2022-07562, *Memorandum Opinion and Order Denying City of Albuquerque's Motion for Partial*

[6] *See, e.g., Wilson v. State*, 249 P.3d 28, 29 (Mont. 2010); *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016); *Commonwealth v. Mattis*, 224 N.E.3d 410 (Mass. 2024); *People v. Parks*, 987 N.W.2d 161 (Mich. 2022); *In re Monschke*, 482 P.3d 276 (Wash. 2021); *State v. Kelliher*, 381 NC 558 (2022); *State v. Comer*, 249 N.J. 359 (2022); *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992).

Judgment on the Pleadings (holding that a law criminalizing sleeping outside with cover violated New Mexico's cruel and unusual punishments clause); CF, pp. 577-693 (citing and attaching *Currie v. City of Spokane,* 24-2-03-708-32 (challenging the criminalization of sleeping outside under Washington's cruel and unusual punishments clause)*; Kitcheon v. City of Seattle*, 19-2-25729-6 SEA (granting summary judgment and finding municipal rules on displacement of houseless individuals facially unconstitutional under Washington's cruel and unusual punishments clause); *Duncan v. Portland*, 23-CV-39824 (challenging Portland ordinance criminalizing sleeping outside during daytime hours under Oregon's cruel and unusual punishments clause)).

Indeed, Colo. Const. art. II, § 20 has already been interpreted to provide greater protections than the Eighth Amendment in that it requires punishments to be analyzed against additional factors specific to Colorado. The Colorado Supreme Court applies a Colorado-specific framework when analyzing the proportionality of sentences imposed under habitual offender statutes. *Close v. People*, 48 P.3d 528, 532-33 (Colo. 2002). Colorado jurisprudence defines "per se grave or serious" crimes and analyzes sentencing proportionality differently when those crimes are implicated; this concept is unknown to federal jurisprudence. *Id.* Additionally, when a Colorado court conducts an individual proportionality review, it must consider "the evolving standards of decency in Colorado"; federal courts do not examine

"evolving standards of decency" in individual proportionality review at all. *See Wells-Yates v. People*, 2019 CO 90M, ¶ 47.

Further, Colorado's unique history and context demands a different, broader interpretation of Colo. Const. art. II, § 20. *See People v. Schafer*, 946 P.2d 938, 942 (Colo. 1997). When interpreting the Colorado Constitution, this Court is responsible for protecting fundamental rights in accordance with Colorado's unique history, tradition, geography, and legal landscape. *See McKnight*, 2019 CO 36, ¶ 40 (finding that the legalization of marijuana use, possession, and growth under certain circumstances was "a local development," suggesting independent interpretation of Colorado's constitutional protection against unlawful searches was proper); *Schafer*, 946 P.2d at 942; *see also State v. Wilson*, 2024 WL 466105, at *15 No. SCAP-22-0000561 (Haw. Feb. 7, 2024) (finding that Hawai'i's traditions around deadly weapons, dating back to its pre-colonization government and immortalized in "the law of the splintered paddle" supported an independent interpretation of its Second Amendment analog).

The Colorado Supreme Court has previously recognized the relevance of such local factors in interpreting Colo. Const. art. II, § 20. In holding that the Colorado death penalty sentencing statute violated Colo. Const. art. II, § 20, it noted that the Colorado Constitution was "written to address the concerns of our own citizens and tailored to our unique regional location" and is thus "a source of protection for

individual rights that is independent of and supplemental to the protections provided by the United States Constitution." *Young*, 814 P.2d at 843. The geographic features, histories, and demographics of Colorado all bear on what Coloradans would view as cruel and unusual punishment.

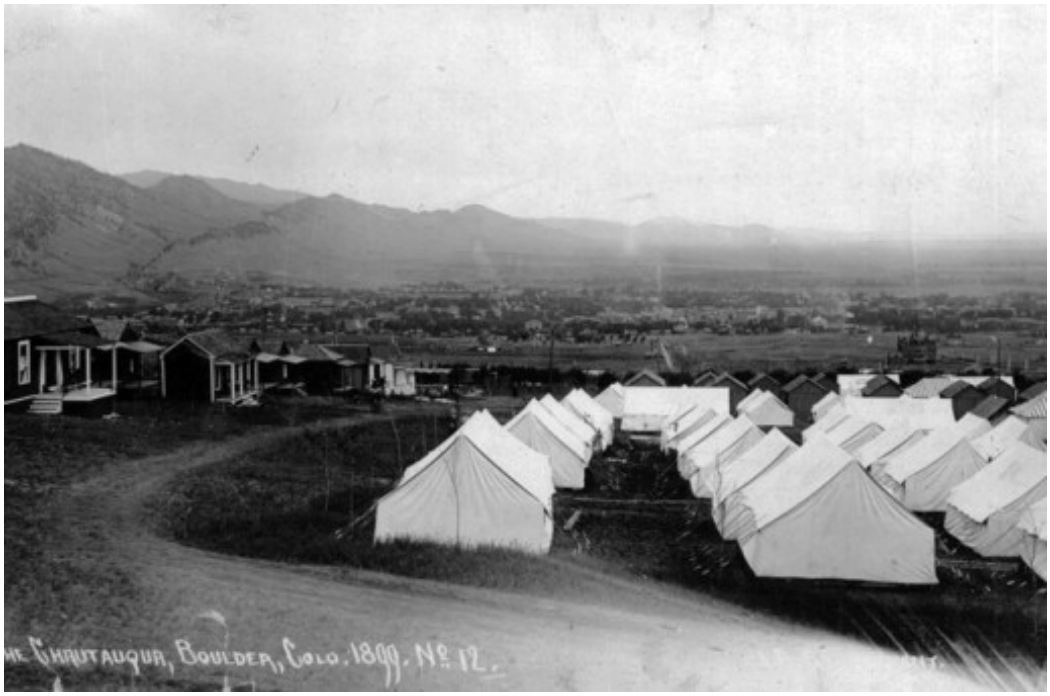
Colorado is a Western state, where people have always lived in close proximity with, and at the mercy of, the natural elements. Coloradans have been living outside, and so necessarily covering themselves for survival, since long before the state existed. In the context of this history and tradition, the Colorado Constitution's protections should be interpreted consistent with the fact that it is cruel and unusual punishment to criminalize Coloradans covering themselves to survive outside in Boulder.

The Colorado Supreme Court has considered this particular proud Western history in defining the contours of constitutional protections before. In *Schafer*, the Court considered the historical and present necessity of habitation in tents in Colorado and the West as a factor in determining that there was a reasonable expectation of privacy in one's tent under the Colorado Constitution. 946 P.2d at 942-43 ("Because wind, hail, rain, or snow may strike without warning any day of the year, particularly in the mountains at any altitude, the typical and prudent outdoor habitation in Colorado for overnight or extended stay is the tent."). It found that the history of tent use at public places in Colorado is older than the state. Lewis and

Clark, their interpreter Charbonneau, his wife Sacajawea, and their child shared a tent as they traveled to the Rocky Mountains in search of a passage to the Pacific Coast. *Id.* at 943 (citing *The Journals of Lewis and Clark*, p. 92 (Bernard DeVoto ed., 1953) (entry of April 7, 1805)). The 1820 expedition up the Platte River to the Continental Divide in Colorado was housed by means of "three tents, sufficiently large to shelter all our party. . . from the storm." *Id.* (quoting *From Pittsburgh To The Rocky Mountains, Major Stephen Long's Expedition 1819-1820*, pp. 150-51 (Maxine Benson ed., 1988) (journal account of the Long Expedition compiled by Edwin James, entry of June 1, 1820)).

During the early periods of Colorado's statehood, the late 1800s and early 1900s, Boulder was home to a tent encampment called the Chautauqua, full of

educational officials establishing a teachers' retreat in the mountains:



See J.B. Sturtevant, *Photo of Chautauqua*, Carnegie Library for Local History, available at: https://www.bouldercoloradousa.com/travel-info/boulder-history/ (showing Boulder in 1899). Further, "[f]rom September of 1913 to April of 1914, approximately nine hundred coal miners and their families […] lived in labor union tents at Ludlow across the railroad tracks from three Colorado National Guard tents housing twelve troopers during the coal field strike." *Schaefer,* 946 P.2d at 943 (citing George S. McGovern & and Leonard F. Guttridge, *The Great Coalfield War*, pp. 210-11, 213, and accompanying photographs (1972)). And, today, like the houseless Appellants in this matter, "wilderness trekkers, families car-camping for the weekend, and many travelers passing through Colorado, make tents their

home[.]" *Id.*

Colorado's long tradition of outdoor survival through use of material tools like blankets and tents counsels that Colo. Const. art. II, § 20 should be interpreted differently than the Eighth Amendment. In a state like Colorado, where the elements can be severe and people have lived at their mercy for hundreds of years, it is cruel and unusual to criminalize using tools, including tents, and certainly meager coverings like blankets and tarps, to survive outside.

5.1.5 **The logically flawed decision in *Grants Pass* does not justify departing from settled Colorado law that punishing an involuntary act or condition if it is the unavoidable consequence of one's status violates Colo. Const. art. II, § 20.**

It is well established that punishing an involuntary act or condition if it is the unavoidable consequence of one's status violates Colo. Const. art. II, § 20. *See Arnold v. City and County of Denver*, 464 P.2d 515 (Colo. 1970) (holding that Colorado's criminal prohibition on vagrancy constituted cruel and unusual punishment); *see also McKnight*, 2019 CO 36, ¶ 57 (refusing to create a "rule that would allow police to randomly search known drug users" because such a rule would result in the criminalization of drug users and "drug users have the same constitutional rights as everyone else"); *People v. Giles*, 662 P.2d 1073, 1077 (Colo. 1983) (holding that a conviction was not unconstitutional because "[t]he punishment imposed was for a distinct crime and not, as in *Robinson*, for an illness or infirmity beyond the control of the defendant"); *People v. Taylor*, 618 P.2d 1127, 1139 (Colo.

1980) (upholding involuntary commitment because "[i]n this case the state has not proposed to punish the respondent because of her alleged illness"); *People v. Feltch*, 483 P.2d 1335, 1337 (Colo. 1971). In most of these cases, the Court's reasoning directly paralleled that of *Robinson v. California*, which forbade as cruel and unusual the criminalization of an involuntary act or condition that is the unavoidable consequence of one's status. 370 U.S. 660 (1962).[7]

In *Grants Pass*, the Supreme Court of the United States did not "reconsider *Robinson*"; it remains good law today. 144 S. Ct. at 2218. So too do the decades of decisions of the Colorado Supreme Court applying *Robinson*'s reasoning. *See Arnold*, 464 P.2d at 515 (decided in 1970); *Taylor*, 618 P.2d at 1139 (decided in

[7] In *Robinson*, the Court considered a state statute criminalizing not only the possession or use of narcotics, but also addiction. Noting that the statute made an addicted person "continuously guilty of this offense, whether or not he had ever used or possessed any narcotics within the State," the Court found that the statute impermissibly criminalized the status of addiction and constituted cruel and unusual punishment. *Id*. at 666-67 & n.9. Six years after *Robinson*, in *Powell v. Texas*, 392 U.S. 514 (1968), the Court considered the constitutionality of a statute that criminalized public intoxication. In a concurring opinion that was the controlling precedent in the case, Justice White considered the voluntariness, or volitional nature, of the conduct in question. *See Powell*, 392 U.S. at 548-51 (White, J., concurring in the judgment). Under this analysis, if sufficient evidence shows that the prohibited conduct is involuntary due to one's condition, criminalization of that conduct is impermissible under the Eighth Amendment. *Id*. at 551. Notably for the present case, Justice White specifically contemplated the circumstances of individuals who are homeless. He explained that, "[f]or all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking." *Id*.

1980); *Giles*, 662 P.2d at 1077 (decided in 1983); *McKnight*, 2019 CO 36, ¶ 57 (decided in 2019). Criminalizing involuntary acts or conditions that are the unavoidable consequence of one's status or being violates Colo. Const. art. II, § 20. In this case, subjecting people to three months in jail or up to $2,650 in fines for resting or sleeping with a blanket anywhere outside at any time, when they have no access to indoor shelter is punishing status, not "conduct," akin to punishing the "conduct" of breathing outside. *See Grants Pass*, 144 S. Ct. at 2236 (Sotomayor, J., dissenting).[8]

To the extent that the District Court was persuaded by the reasoning of *Grants*

[8] A resounding chorus of courts have held that criminalizing houseless individuals when they have nowhere to go constitutes cruel and unusual punishment. *See e.g.,McArdle v. City of Ocala*, No. 5:19-cv-461, 2021 U.S. Dist. LEXIS 26849, at *9–12 (M.D. Fla. Feb. 8, 2021) (enjoining city from enforcing camping ban absent inquiry into shelter availability); *Phillips v. City of Cincinnati*, 479 F. Supp. 3d 611, 649–53 (S.D. Ohio Aug. 13, 2020) (holding plaintiffs stated a claim where they alleged a perpetual shortage of shelter for the houseless population, other barriers to entry, and city policy that did not require a determination of shelter availability prior to camping ban enforcement); *Pottinger v. Miami*, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992) (holding that "the harmless conduct for which" houseless individuals were arrested, including "harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating[,]" was "inseparable from their involuntary condition of being homeless" and, therefore, those arrests were "cruel and unusual"); *Parker v. Municipal Judge*, 427 P.2d 642, 644 (Nev. 1967) ("It is simply not a crime to be unemployed, without funds, and in a public place. To punish the unfortunate for this circumstance debases society."); *Alegata v. Commonwealth*, 231 N.E.2d 201, 207 (Mass. 1967) ("Idleness and poverty should not be treated as a criminal offense."); *Johnson v. City of Dallas*, 860 F. Supp. 344, 351 (N.D. Tex. 1994) (holding that "as long as the homeless have no other place to be, they may not be prevented from sleeping in public"), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995).

Pass, that was error. The *Grants Pass* decision was inherently flawed because it failed to acknowledge the reality that sometimes a person's conduct cannot be isolated from their status, as alleged in Appellants' Complaint. CF, pp. 30, 42, 51-52, 59-79, 180. At least one court since the *Grants Pass* decision has identified that the "status-versus-conduct analysis" employed by the majority was logically unsound, because it failed to acknowledge that "sometimes a person's conduct is inseparable from that person's status." *See* **Exhibit 1**, *Williams v. Albuquerque*, D-202-CV-2022-07562, 6-7. In so doing, the court in *Williams* refused to follow *Grants Pass,* concluding that when houseless people "have no choice but to exist outside because there are not sufficient, habitable indoor places for them to be," punishing them for engaging in conduct necessary to protect themselves from the elements is cruel and unusual punishment. *Id.* at 5-8. The *Williams* court was correct under any reasoning grounded in material reality. As Justice Sotomayor outlined in her dissent in *Grants Pass*, under the logic employed by the majority, the criminalization of status is constitutionally acceptable "as long as [the government] tacks on an essential bodily function – blinking, sleeping, eating, or breathing." *Grants Pass*, 144 S. Ct. at 2236 (Sotomayor, J., dissenting). In other words, following this strained tautology to its conclusion would require the holding that "although it is cruel and unusual to punish someone for having a common cold, it is not cruel and unusual to punish them for sniffling or coughing because of that cold." *Id.*; *see also Giles*, 662

P.2d at 1077.

5.1.6 **The Cover Bans impose grossly disproportionate punishment for involuntary survival activity.**

Appellants stated a claim that the Cover Bans impose disproportionately cruel and unusual punishments by noting the types of conduct criminalized by the Cover Bans (namely, the act of houseless individuals using cover to survive outside in Boulder when they have nowhere else to go), CF 9-10, 17-21, and the disproportionate punishment imposed by the Cover Bans for that conduct (fines of up to $2,650 per violation and up to ninety days of incarceration), CF 9-10, while claiming the Cover Bans violated their rights under Colo. Const. art. II, § 20. CF, p. 22.

To the extent that the District Court's holding that Appellants did not state a claim for disproportionate punishment was informed by *Grants Pass, Grants Pass* did "not decide whether the Ordinances violate the Eighth Amendment's Excessive Fines Clause." *Grants Pass*, 144 S. Ct. at 2242 (Sotomayor, J., dissenting). Justice Thomas's brief mention of proportionality in his concurrence was the extent of the reasoning presented on proportionality. *Grants Pass*, 144 S. Ct. at 2227 (Thomas, J., concurring) ("Modern public opinion is not an appropriate metric for interpreting the Cruel and Unusual Punishments Clause—or any provision of the Constitution for that matter."). Therefore, *Grants Pass* has no bearing on whether laws like the Cover Bans are grossly disproportionate to the gravity of the offense committed and,

therefore, unconstitutional under Colo. Const. art. II, § 20. *See also* **Exhibit 1**, p. 10.

Even if *Grants Pass* had addressed proportionality, which it did not, proportionality analysis under Colo. Const. art. II, § 20 is distinct from federal proportionality analysis. Colo. Const. art. II, § 20 demands an analysis of whether the punishment comports with "the evolving standards of decency in Colorado" and nationwide. *Wells-Yates*, 2019 CO 90M, ¶ 47. Neither *Grants Pass*, nor the District Court, conducted this Colorado-specific analysis.

The "actus reus" criminalized by the Cover Bans has no gravity whatsoever to weigh against any punishment. Being forced to live without shelter, like a common cold, is involuntary. It is difficult to imagine a more blameless offense than covering oneself with whatever is on hand to survive when there is no available shelter. The punishment imposed by Appellees on Appellants for being houseless (including fines unpayable for a person who cannot afford shelter and three *months* of jail time) is exceptionally harsh for the alleged crime of attempting to exist in Boulder. *See* B.R.C. § 5-2-4. By modern standards of decency, in Colorado and nationally, punishing the extremely poor for their efforts to survive outside when there is no available indoor shelter is cruel and unusual. *See Grants Pass*, 144 S. Ct. at 2237 (Sotomayor, J., dissenting) (highlighting the abject cruelty of laws that criminalize homelessness). Boulder's ordinance is grossly disproportionate, imposing severe punishment for blameless conduct, and Appellants stated a claim to

that effect under Colo. Const. art. II, § 20.

5.2 <u>The Cover Bans violate the right to use public spaces enshrined in the Colorado Constitution.</u>

5.2.1 **Statement of preservation and standard of review.**

Appellants argued below that they had stated a claim under Colo. Const. art. II, § 3. *See* CF, pp. 1-24, 95-103, 240-44.

Whether Appellants stated a claim under Colo. Const. art. II, § 3 is a question of law that this Court reviews *de novo*. *See Hartsel Springs Ranch of Colo., Inc.*, 179 P.3d at 239.

5.2.2 **Appellants have the right to use public streets and facilities without interfering with the liberty of others under Colo. Const. art. II, § 3.**

The right to use the public streets and facilities without interfering with the liberty of others has been recognized by the Colorado Supreme Court as both fundamental and guaranteed specifically under Colo. Const. art. II, § 3:

> [T]he 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 are basic values inherent in a free society and are thus protected by article II, section 3 of the Colorado Constitution . . . . Because these liberty interests are fundamental, the state must establish a compelling interest before it may curtail the exercise of such rights.

J.M., 768 P.2d at 221. At issue in *J.M.* was a Pueblo ordinance that prohibited loitering by minors after curfew. *Id.* at 220. Specifically, the ordinance made it unlawful for minors to "loiter on or about any street, sidewalk, curb, gutter, parking

lot, alley, vacant lot, park, playground or yard, whether public or private," without permission between 10:00 PM and 6:00 AM. *Id.* at 221.The ordinance defined loitering to include "standing around, hanging out, sitting, kneeling, sauntering, or prowling." *Id.* at 220–21. In evaluating the ordinance, the court observed that the rights it curtailed were historical "amenities of life" that are "basic in our scheme of values." *Id.* (first quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972), then quoting *Kent v. Dulles*, 357 U.S. 116, 125–26 (1958)). The court then concurred with the analysis of other jurisdictions that had treated these rights as fundamental. *Id.* (collecting cases).

Ultimately, the court in *J.M.* examined and upheld the ordinance under rational basis review, but only because it concluded that minors' right to freedom of movement is not co-extensive with that of adults. *Id.* at 223. Further, even applying a less exacting test, it was key to that conclusion that the Pueblo ordinance was "carefully drawn so as to further its goals without unduly infringing upon the liberty interest of minors." *Id.* at 224 (observing that the ordinance did *not* prevent minors' mere presence on the streets after a certain hour because it permitted presence in connection with employment, religious, civic, and social activities). Finally, the *J.M* decision was premised on the notion that these young people had somewhere *else* they could be instead — *i.e.*, at home. 768 P.2d at 223–24.

The District Court mischaracterized Appellants as asking it to recognize a new unenumerated right. CF, p. 242-43. Appellants ask this Court only to recognize the Colorado Supreme Court's decision in *J.M.*, and *J.M.* has been repeatedly reaffirmed (including in the Colorado Supreme Court's most recent opportunity to examine the meaning of Colo. Const. art. II, § 3). *See City of Longmont Colo. v. Colo. Oil & Gas Ass'n*, 2016 CO 29, ¶ 58; *Young*, 859 P.2d at 818; *State Farm Mut. Auto. Ins. Co. v. Broadnax*, 827 P.2d 531, 543 (Colo. 1992). Far more intrusive than a time-limited curfew for idle minors, the plain language of the Cover Bans makes them enforceable against houseless *adults* present with minimal shelter in *any* public space in Boulder at *any* time of day or night, whether or not they are interfering with anyone else's liberty (indeed, whether or not anyone else is even present). When Appellees enforce the ordinances in the circumstances alleged here, they leave houseless residents who cannot obtain indoor shelter with *nowhere* they can lawfully and safely exist in Boulder. This degree of intrusion cannot be justified absent a compelling government interest.

Further, the District Court did not acknowledge the numerous cases interpreting U.S. Const. amend. XIV (which provides narrower protection than the Colorado Constitution) and concluding that laws similar to the Cover Bans violate houseless individuals' right to freedom of movement. Even federal courts interpreting a much narrower right to travel have rejected the notion that the right to

freely move does not include a right to *remain*. *See City of Chicago v. Morales,* 527 U.S. 41, 55 (1999) ("[I]t is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage.'"); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (noting that the right to travel ensures "freedom to enter and abide").

For example, the plaintiffs in *Phillips*, like Appellants, alleged the insufficiency of local indoor shelter options and challenged criminal enforcement only to the extent local indoor shelter was practically unavailable. 479 F. Supp. 3d at 622. The court observed that "[c]iting and arresting houseless persons for sleeping in public spaces could violate the right to travel by denying houseless people the necessity of a safe place to sleep, rest, and recuperate." *Id.* at 622. It reasoned that when houseless residents have nowhere indoors to go, a city's enforcement of a ban on encampments "denies them a single place where they can be without violating the law." *Id.* (quoting *Pottinger*, 810 F. Supp. at 1580–81). On these bases, the court denied the defendant city's motion to dismiss on the basis the plaintiffs' claim that a "bar on homeless encampments, if and when housing is not available for certain specific houseless individuals, nor for all, unlawfully burdens the right to travel." *Id.* at 622. Likewise, in *Pottinger*, the court concluded that criminalizing houseless individuals for performing "life-sustaining activities" like sleeping, lying down, and eating in public when they had nowhere else to go "burden[ed] their right to travel"

because, as Appellants allege here, enforcement required houseless residents to keep moving around the city or to leave altogether to avoid criminalization. 810 F. Supp. at 1580–81; *see also Johnson v. Bd. of Police Comm'rs*, 351 F. Supp. 2d 929, 949 (E.D. Mo. 2004) (concluding houseless Appellants were likely to succeed on their right to travel claim where some had been told they were not wanted in parts of the city and should stay away); *Catron v. St. Petersburg*, 658 F.3d 1260 (11th Cir. 2011) (holding that a local trespass ordinance on sidewalks violated the houseless plaintiffs' freedom of movement under Florida's state constitution).

Appellees did not argue below that the Cover Bans furthered any compelling government interest. In fact, the District Court inserted the idea that the Cover Bans protect the health and safety of the community (without evidence and contrary to the allegations in Appellants' Complaint, CF 13-14, 24-25), then relied on this justification to dismiss Appellants' Complaint. Not only was it improper for the District Court to raise these arguments for Appellees, *see People v. Czemerynski*, 786 P.2d 1100 (Colo. 1990), the District Court did not apply the appropriate level of scrutiny or standard of review.

The District Court applied, essentially, rational basis review. But it should have, under *J.M.*, applied strict scrutiny. In support of its approach, the District Court cited *People v. Brown*, 485 P.2d 500 (Colo. 1971), a case decided almost two decades before *J.M.*, to argue that this case should be analyzed under a "reasonable exercise"

test. The District Court's reliance on *Brown* was misplaced. In that case, the court upheld the constitutionality of an "implied consent" law that required a driver arrested for a DUI to submit to a blood alcohol test. 485 P.2d at 501–03. Even if a "reasonable exercise" test applies to relatively minor intrusions on the right to use the public streets, like a requirement that licensed drivers demonstrate their competency to operate a motor vehicle safely, *see id.*, the Colorado Supreme Court made clear in *J.M.* that more significant intrusions, like those at issue here, must be subject to strict scrutiny.

Under strict scrutiny, Appellees have the burden to produce evidence that the breadth and severity of the challenged ordinances are *necessary* to that goal. *Jeffrey v. Colo. State. Dep't of Social Servs.*, 599 P.2d 874, 877 (Colo. 1979). On this point, a case similar to *J.M.*, decided by the Massachusetts Supreme Judicial Court under a state constitutional provision worded similarly to Colo. Const. art. II, § 3, is instructive. *See Commonwealth v. Weston*, 913 N.E.2d 832 (Mass. 2009). In *Weston,* the court held that the provision "guarantees a fundamental right to move freely within the Commonwealth," because the "right to move freely and peacefully in public without interference by police" is "[i]nherent in the right to life, liberty, and happiness." *Id.* at 841. Subjecting the curfew for minors to strict scrutiny under the provision, the court ultimately concluded that though the curfew itself was constitutional, criminal penalties for its violation were not. *Id.* at 845–46 (concluding

that the government failed to meet its burden to show that "the use of the criminal process and penalties is the least restrictive means of accomplishing its . . . objective"). Here, the District Court failed to find that the challenged ordinances represent the least restrictive means of accomplishing the purposes it imputed to Boulder's ordinance or anything else. Nor could it. Even accepting the vague interests the District Court cited to justify the criminalization of Appellants as "reasonable exercises" of the police power, Appellees have "available to [them] a variety of approaches that appear capable of serving [those] interests" without violating Appellants' fundamental rights. *McCullen v. Coakley*, 573 U.S. 464, 493 (2014); *In the Interest of E.L.M.C.*, 100 P.3d 546, 552 (Colo. App. 2004). Appellees already have ordinances that more narrowly and directly address any unspecified "public health problems" that could arise from houseless individuals existing outside: B.R.C. § 5-4-13 (prohibiting littering); § 5-6-7 (prohibiting public urination); § 10-8-2 (fire code); § 10-2.5-4 (public nuisances); CF, p. 243. Any alleged issues could be address without resorting to criminal punishment. And, pertinently, the Complaint did not allege that there was any basis for the Cover Bans from a health and safety perspective or otherwise.

Further, even if this Court were to determine that the "reasonable exercise" test applies, the District Court's order erroneously applied this test. Under established Colorado Supreme Court caselaw, for an exercise of the police power to

be a reasonable burden on a fundamental right, it must be more than merely rational. *See Rocky Mt. Gun Owners*, 467 P.3d at 327–28 (distinguishing reasonable exercise test under Colo. Const. art. II, § 13 from rational basis review under due process clause; explaining that the test must "effectuate the substantive constraints imposed" by that provision on "otherwise rational government regulation"). The Colorado Supreme Court has suggested that where a reasonable exercise test is applied to government action that burdens a fundamental right protected under the Colorado Constitution, that standard "demands not just a conceivable legitimate purpose but an actual one." *Id.* at 328. Moreover, it "does not tolerate government enactments that have either a purpose or effect of rendering the right . . . a nullity." *Id.* Even under a reasonable exercise test, because Appellants plausibly alleged that enforcement of the challenged ordinances is intended to keep people experiencing houselessness out of Boulder, the District Court erred in finding that the Cover Bans satisfy the "reasonable exercise" test. *Shapiro v. Thompson*, 394 U.S. 618, 628, 629 (1969) (holding that the right to travel was triggered by any attempt to "fence out" indigents).

Ultimately, the District Court's downplaying of the force of Colo. Const. art. II, § 3, and allowance of ambiguous and unsupported government interests to override its strong protections, ignores a robust state constitutional history wherein Colorado courts have construed the provision as its own substantive, judicially

enforceable limit on government action. *See, e.g.*, *Strickler v. Colorado Springs*, 26 P. 313, 317 (Colo. 1891) (rejecting construction of prior appropriation clause that would have conflicted with Colo. Const. art. II, § 3); *In re Morgan*, 58 P. 1071, 1073 (Colo. 1899) (striking down statute that violated Colo. Const. art. II, § 3); *City & Cty. of Den. v. Holm*, No. 2017CV31066 at *6–7 (Denver Dist. Ct. Oct. 25, 2017) (applying *J.M.* while striking down a Denver directive authorizing police to exclude individuals from public parks when they were accused, but not charged or convicted, of illegal drug activity). For these reasons, the District Court erred in dismissing Appellants' claim under Colo. Const. art. II, § 3.

5.3 **Appellees impose a state-created danger in violation of Colorado's Constitution by enforcing the Cover Bans against houseless individuals during conditions that pose a serious danger to houseless individuals.**

5.3.1 **Statement of preservation and standard of review.**

Appellants argued below that they had stated a claim under Colo. Const. art. II, § 25. *See* CF, pp. 1-23, 88-95, 234-240.

Whether Appellants stated a claim under Colo. Const. art. II, § 25 is a question of law that this Court reviews *de novo*. *See Hartsel Springs Ranch of Colo., Inc.*, 179 P.3d at 239.

5.3.2 **The District Court erred by holding that Appellants had not stated a claim under Colo. Const. art. II, § 25.**

The Colorado Supreme Court has made clear that the Colorado Constitution's due process guarantee is more protective than its federal counterpart: "[w]hat 'due process of law' means in the territorial limits of the sovereign State of Colorado, under the provisions of our own constitution," is not confined by "what it . . . may or may not mean in any other [jurisdiction]." *Juhan* 439 P.2d at 745; *id.* at 745-46 (asserting Colorado's "right, under its state due process clause, to create protections for its citizens which might not be required under the federal concept"); *see also Rocky Mt. Gun Owners*, 467 P.3d at 324; *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 553 P.2d 811, 816 (Colo. 1976) (Article II, section 25 "requires *at a minimum* the same guarantees as those protected by the due process clause of the federal constitution").

The District Court adopted a restrictive state-created danger test that has been rejected by a wide swath of courts interpreting U.S. Const. amend. XIV (making it a standard that is *less protective of rights* than the U.S. Const. amend. XIV) and that discounts some dangerous situations (harm from the elements) and privileges others (harm by private violence). CF, pp. 234-40. Critically, the District Court offered no logical basis for this distinction, and it failed to point to *any* authority that declined to apply the state-created danger doctrine to harm caused by the elements under the Colorado Constitution. *Id.*

The District Court should have analyzed Appellants' constitutional state-created danger claim under Colo. Const. art. II, § 25 using conventional tort principles, *see Leake v. Cain*, 720 P.2d 152, 160 (Colo. 1986) (concluding public official's liability for causing harm must be determined in same manner as that of private party),[9] or at the very least following due process jurisprudence that clearly holds that actions by public officials that expose individuals to inherent danger from the elements violate the due process guarantee. Colorado has recognized private entities' duty not to cause exposure to the kind of foreseeable dangers at issue here. *See, e.g.*, *Groh v. Westin Operator*, 352 P.3d 472, 473 (Colo. Ct. App. 2013) (recognizing hotel's duty to evict guest in a reasonable manner, which "precludes ejecting a guest into foreseeably dangerous circumstances resulting from . . . the environment"). Under the principles of *Leake*, where parties "should reasonably foresee that [their] act, or failure to act, will involve an unreasonable risk of harm to another, there is a duty to avoid such harm[,]" Appellants have stated a claim. 720 P.2d at 160; *see also Doe v. Univ. of Denver*, 2022 COA 57, ¶ 65 (Colo. 2022) ("[T]he question of whether a duty should be imposed in a particular case is essentially one

[9] To the extent the Colorado Governmental Immunity Act ("CGIA"), C.R.S. § 24-10-101 *et seq.*, might once have barred *Leake*'s applicability to the present claim, that is no longer the case. The CGIA *does not* apply to claims for deprivations of rights, like Appellants', brought under the new law. C.R.S. § 13-21-131(2)(a). *Leake* remains good law for the propositions cited in this this brief.

of fairness under contemporary standards — whether reasonable persons would recognize a duty and agree that it exists."). Appellees know — or, at the very least, should know — that prohibiting residents who cannot obtain indoor shelter from using the minimal tools necessary for their survival outdoors (especially in extreme weather) involves an unreasonable risk of harm. *See Leake*, 720 P.2d at 160. Appellees enforce the Cover Bans in a manner that causes the very harm they should foresee, and this alone adequately alleges a claim for relief under Colo. Const. art. II, § 25. *Id.* at 154.

Further, even if this Court does not adopt *Leake*'s standard, Appellants have stated a claim for the violation of their rights under Colo. Const. art. II, § 25 under the federal state-created danger standard. Even under federal law, state-created danger is cognizable where a state actor affirmatively places the plaintiff in danger or renders the plaintiff more vulnerable to danger by acting with deliberate indifference. *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th Cir. 2011); *Penilla by & Through Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997) (allowing state-created danger claim to proceed where officers took affirmative actions that increased the health risks faced by the decedent, including removing him from public view and leaving him alone in any empty house, thereby placing him in more danger than they found him in); *Santa Cruz Homeless Union v. Bernal*, 2021 U.S. Dist. LEXIS 13839, at *5–6 (N.D. Cal. Jan. 20, 2021) (finding houseless

Appellants likely to succeed on a state-created danger claims where they had demonstrated that city defendant's closure of encampments would put displaced residents at greater risk of contracting COVID-19).

Numerous federal courts interpreting U.S. Const. amend. XIV have held that government officials violate the due process guarantee when they expose houseless individuals to danger from the elements by seizing or threatening to seize their belongings. For example, in *Jeremiah v. Sutter County*, houseless plaintiffs challenged the county's enforcement of its camping ban, asserting — like Appellants do here — that it placed them at "higher risk of danger because they [we]re prohibited under the Ordinance from using any form of cover or protection from the elements." No. 2:18-cv-00522-TLN-KJN, 2018 U.S. Dist. LEXIS 43663, at *11 (E.D. Cal. Mar. 16, 2018) (cleaned up). In granting the plaintiffs a temporary restraining order, the court found that the defendant county was aware of recent wind, rain, and cold weather, should have reasonably known that the Appellants relied on their camping gear to stay safe from the elements, and would knowingly place them at increased risk of harm if it confiscated and seized their shelters and possessions. *Id.* at *12; *see also, e.g.*, *Langley v. City of San Luis Obispo*, No. CV 21-07479-CJC, 2022 U.S. Dist. LEXIS 96169, at *15–16 (C.D. Cal. Feb. 7, 2022) (denying motion to dismiss state-created danger claim where houseless Appellants alleged that "because they lack other options for shelter, the city's sweeps and

property seizures force homeless people 'to live exposed to the elements, without protection from cold, wind, and rain, jeopardizing their physical and mental health'"); *Where Do We Go Berkeley v. Cal. Dep't of Transp.*, 2021 U.S. Dist. LEXIS 240845, at *32 (N.D. Cal. Dec. 16, 2021) (rejecting Appellees' argument that houseless Appellants could not state viable state-created danger claim without asserting harm by a third party as "danger could come from . . . environmental elements"). Similarly, in *Sanchez v. City of Fresno*, a houseless individual brought a state-created danger claim against defendant city and its officials for destroying his shelter when he could not obtain shelter indoors. 914 F. Supp. 2d 1079, 1093 (E.D. Cal. 2012). The court denied the city's motion to dismiss the claim, reasoning that plaintiff plausibly alleged the city deprived him of shelter despite extreme weather conditions and that they "kn[e]w or should reasonably [have known] that their conduct threatened plaintiff's continued survival." *Id.* at 1102.

Additionally, several federal circuit courts of appeal have applied the state-created danger doctrine to harm caused by extreme weather. For example, in *Munger v. City of Glasgow Police Dep't*, police ejected the plaintiff from a bar in Montana when it was eleven degrees outside, and the plaintiff died from hypothermia two blocks away. 227 F.3d 1082, 1084 (9th Cir. 2000). The Ninth Circuit concluded the officers had affirmatively placed him in a position of danger. *Id*. at 1085–87. Further, in *Kneipp v. Tedder*, police officers intercepted a couple returning home from a bar

on a night when temperatures dropped to thirty-four degrees. 95 F.3d 1199, 1201 (3d Cir. 1996). After the officers permitted one person to walk home alone, she was found unconscious nearby and having suffered brain damage as a complication of hypothermia. *Id*. at 1201. The Third Circuit held "[a] jury could find [the person] was in a worse position after the police intervened than she would have been if they had not done so. As a result of the affirmative acts of the police officers, [her] danger or risk of injury. . . was greatly increased." *Id.* at 1209. To Appellants' knowledge (and as discussed above), every court to consider whether a state-created danger claim lies where state action exposes houseless individuals to harm from the elements has answered in the affirmative.

Ultimately, the District Court's interpretation of Colo. Const. art. II, § 25 was narrower than the well-established interpretation of U.S. Const. amend. XIV and contrary to binding Colorado caselaw holding that Colo. Const. art. II, § 25 "requires *at a minimum* the same guarantees as those protected by the due process clause of the federal constitution." *Air Pollution Variance Bd.*, 553 P.2d at 816. Under even the narrowest *applicable* standard, Appellants stated a state-created danger claim.

6. **CONCLUSION**

For the foregoing reasons, Appellants respectfully request that this Court reverse the District Court's Orders dismissing their claims and remand this case for further proceedings.

Respectfully submitted this 19th day of May, 2025.

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