

COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203 United States Petition for Writ of Certiorari Court of Appeals No. 25CA110 Opinion by Judge Kuhn Fox and Sullivan, JJ., concur	DATE FILED July 31, 2026 8:58 PM FILING ID: 2F67227174677 CASE NUMBER: 2026SC406
Petitioners: 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. Respondents: City of Boulder and Maris Herold, Chief of Police for the City of Boulder.	
<i>Attorneys for Petitioners:</i> Timothy Macdonald, #29180 Anna I. Kurtz, #51525 Emma Mclean-Riggs, #51307 ACLU Foundation of Colorado 303 E. 17th Ave., Suite 350 Denver, CO 80203 (720) 402-3114	Case Number: 2026SC406

tmacdonald@aclu-co.org
akurtz@aclu-co.org
emcleanriggs@aclu-co.org

Andy McNulty, #50546
Madeline Leibin, #59414
NEWMAN | MCNULTY
1490 N. Lafayette Street, Suite 304
Denver, CO 80218
(720) 850 – 5770
andy@newman-mcnulty.com
madeline@newman-mcnulty.com
*In cooperation with the ACLU
Foundation of Colorado*

Daniel D. Williams, #38445
Meghan C. Hungate, #38183
Matthew A. Simonsen, #53757
Grata Law and Policy LLC
1919 14th Street, Suite 700
Boulder, CO 80302
(303) 535 – 3533
dan@gratalegal.com
meghan@gratalegal.com
*In cooperation with the ACLU
Foundation of Colorado*

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Writ of Certiorari complies with all the requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. The undersigned certifies that the brief complies with the applicable word limits set forth in C.A.R. 53(f)(1) because it contains 3,795 words.



Anna I. Kurtz, *Counsel for Petitioners*

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ISSUES PRESENTED¹

(1) Whether laws banning minimal shelter from the elements plausibly violate the Colorado Constitution as applied to unhoused residents in circumstances that effectively criminalize their status, banish them from every public space in a city, and endanger their lives.

(2) Whether, absent precedent divergently construing a parallel state constitutional provision, Colorado courts must follow in lockstep with a federal decision retrenching individual rights, here *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024), rather than engage in the independent analysis commanded by *People v. Young*, 814 P.2d 834 (Colo. 1991).

JURISDICTION

This petition seeks review of *Feet Forward v. City of Boulder*, 2026 COA 37 (May 14, 2026). This Court has jurisdiction under Colo. Const. art. VI, §§1-2 and C.R.S. §13-4-108. No party sought rehearing. The deadline to file this petition was most recently extended to July 31, 2026.

PENDING CASES

None.

¹ These issues of law are preserved, Op. Br. 9-38, and reviewed *de novo*.

STATEMENT OF THE CASE

This case presents an issue of first impression: whether, under the Colorado Constitution, a city that bans sheltering oneself outdoors with anything beyond clothing may criminally punish residents who have no meaningful choice but to violate those bans, particularly during dangerous weather, because they are involuntarily unhoused.

At issue are two City of Boulder ordinances—B.R.C. §5-6-10 (“Blanket Ban”) and B.R.C. §8-3-21(a) (“Tent Ban”). The Blanket Ban makes it a crime to “reside or dwell temporarily” in public and conduct “activities of daily living, such as eating or sleeping” while using “any cover or protection from the elements other than clothing.” B.R.C. §5-6-10(d). The Tent Ban makes it a crime to “erect or use any tent, net, or other temporary structure for the purpose of shelter or storage of property” on public property. B.R.C. §8-3-21(a). Violating either is punishable by up to a \$2,650 fine, ninety days in jail, or both. B.R.C. §5-2-4(a).

Respondents designed the ordinances to target unhoused residents’ presence in Boulder’s public spaces and enforce them accordingly. CF,

pp.12, 56, 187, 269. Unhoused residents comprise roughly 1% of the City's population but 92% of the defendants accused of violating the ordinances. CF, p.12.

Many people experiencing homelessness in Boulder have nowhere to go *inside*. CF, pp.17-21. At night, indoor shelter capacity cannot accommodate everyone who needs it, and program rules, restrictions, and other barriers further exclude people from accessing the limited shelter that exists. CF, p.5. During the day, Boulder offers most unhoused adults no indoor shelter at all. CF, pp.9, 22, 280.

By criminalizing the unavoidable trappings of extreme poverty, the ordinances penalize unhoused residents' existence in any of the City's public spaces at any hour. CF, p.2. Respondents enforce the ordinances without regard to whether indoor shelter is available or whether the weather makes the prohibited items essential to survival, including when the temperature is below freezing. CF, pp.13, 20, 272.

There are thus times when many of the unhoused residents who call Boulder home have no place in the City where they can lawfully be. CF, p.24. And that is largely the point. CF, p.2. When enforcing the

ordinances, officers tell unhoused residents to “get out of Boulder.” CF, pp.2, 14, 18, 20.

Petitioners—housed and unhoused residents of Boulder and a local nonprofit—challenged Respondents’ enforcement of these ordinances under the Colorado Constitution. The lawsuit is not a facial challenge and does not question the City’s power to reasonably regulate public space. Instead, it asserts that the ordinances are unconstitutional as applied to involuntarily unhoused people who necessarily use a prohibited covering to avoid immediate danger from the elements. CF, pp.12-14, 23.

Petitioners challenge Respondents’ ability to force involuntarily unhoused residents either to face the elements unprotected, face criminal sanction, or leave. Respondents unconstitutionally punish the status of homelessness (cruel and unusual punishment; art. II, §20); actively endanger lives (due process; art. II, §25); and banish those deemed undesirable from public space (inalienable rights; art. II, §3). CF, p.2.

The district court initially dismissed all claims but one: that the Blanket Ban, as applied, violates article II, section 20’s prohibition on

cruel and unusual punishment. CF, pp.210-44. Then, after the Supreme Court’s decision in *Grants Pass*, the district court dismissed the complaint in its entirety, even though nothing about Colorado law had changed.

In *Grants Pass*, an opinion that “dramatically weakened, and potentially eroded, Eighth Amendment-based substantive limits on criminal laws,”² the Court ruled 6-3 that ordinances criminalizing sleeping in public forbid conduct, not the status of being homeless. *Id.* at 546. Three justices dissented, protesting that punishing people with no access to shelter for sleeping outside “punishes them for being homeless” and that “[s]leep is a biological necessity, not a crime.” *Id.* at 563-64 (Sotomayor, J., dissenting).

The court of appeals affirmed. Like the district court, because it concluded this Court had not previously interpreted article II, section 20 to provide greater protection than the Eighth Amendment, the panel

² *Eighth Amendment–Cruel and Unusual Punishment Clause–City of Grants Pass v. Johnson*, 138 Harv. L. Rev. 375 (2024).

followed *Grants Pass* to reject Petitioners’ cruel and unusual punishment. *Feet Forward*, ¶¶ 25-36.

The court rejected Petitioners’ article II, section 3 claim—which asserted a violation of the fundamental right to access the public streets without interfering with the rights of others, recognized by this Court in *People in the Interest of J.M.*, 768 P.2d 219 (Colo. 1989)—by recasting it as an assertion of “a fundamental right to shelter in public” and upholding the ordinances as rationally related to policy justifications asserted in Respondents’ briefing, even though they contradict the complaint.

Finally, it rejected Petitioners’ narrow state-created danger claim—which asserted that Respondents violate article II, section 25 when they enforce the ordinances in conditions when the prohibited cover is necessary to prevent immediate danger from the elements—solely because the danger alleged is not caused by a third-party private actor. *Id.* at ¶ 71.

ARGUMENT

I. This petition presents important issues of first impression that will otherwise evade review while impacting thousands of Coloradans statewide.

No matter how extreme the heat or how deep the snow, Boulder's bans present those without access to shelter an ultimatum: face the capricious Colorado elements uncovered, face a criminal citation, or leave. That is not a choice. It is punishment for surviving. It is banishment for being poor.

Boulder is not alone. Cities across Colorado have comparable ordinances on their books, and *Grants Pass* has encouraged their proliferation. At least ten cities in Colorado, including Aurora, Greeley, Lakewood, Colorado Springs, and Grand Junction, adopted new or expanded bans in the decision's wake.³ Montrose now mandates *at least* ten days in jail for anyone cited three times under its camping ban.⁴ Boulder's main shelter recently reinstated a policy restricting admission

³ Two Years Since Grants Pass: Tracking the Criminalization of Homelessness Across US Cities, ACLU (June 24, 2025), <https://www.aclu.org/two-years-since-grants-pass-tracking-the-criminalization-of-homelessness>.

⁴ Montrose Code § 6-1-10(E)(3).

for those without six months' prior local residency, only exacerbating the constitutional concerns with its bans.⁵

This case asks whether the Colorado Constitution provides any guardrails on the enforcement of such laws against people who are involuntarily unhoused. Particularly post-*Grants Pass*, that is a question of profound importance. Last year, 53,776 people experienced homelessness in Colorado.⁶ This case bears on their dignity, survival, and right to exist in the place they call home. More broadly, it implicates basic premises of criminal punishment, including whether the constitution tolerates the criminalization of conduct that is not volitional; the effective banishment of a disfavored group; and the active endangerment of citizens living in extreme poverty. These issues deserve this Court's careful consideration.

⁵ Brooke Stephenson, *Boulder's Main Homeless Shelter Will Limit Stays for People Without Local Ties* (Apr. 14, 2016), <https://boulderreportinglab.org/2026/04/14/boulders-main-homeless-shelter-will-limit-stays-for-people-without-local-ties/>.

⁶ Colorado's State of Homelessness Report (2025), <https://www.cohmis.org/soh2025>.

If the Court declines review, there will not soon be another opportunity to weigh in, and unhoused residents will meanwhile face an amplified web of laws that target their existence statewide and “cause a destabilizing cascade of harm.” 603 U.S. at 568 (Sotomayor, J., dissenting). The decision below “lays the groundwork for a ‘not-in-my backyard’ domino effect.” *Ryals v. City of Englewood*, 2016 CO 8, ¶ 59 (Hood, J., dissenting in part). “No longer hindered by the prospect of viable lawsuits, the remaining metro-area cities now have every incentive to pass” ordinances like Boulder’s or worse. *Id.* at ¶ 66.

Other states’ courts are wrestling with these issues under their own constitutions on actual records. *See, e.g., Williams v. Albuquerque*, Order Denying Motion for Partial Judgment on the Pleadings, No. D-202-CV-2022-07562 (Bernalillo Dist. Ct. Mar. 18, 2025) (rejecting reliance on *Grants Pass*; permitting plaintiffs to proceed on cruel and unusual punishment and state-created danger claims under state constitution); *Currie v. City of Spokane*, Order Denying Defendants’ Motion to Dismiss, No. 23-2-03708-32 (Wash Super. Ct. Nov. 18, 2024) (permitting cruel and unusual punishment and due process claims under Washington

Constitution); *Duncan v. Portland*, Opinion & Order on Plaintiffs’ Motion for Preliminary Injunction, No. 23CV39824 (Multnomah Cir. Ct. Nov. 9, 2023) (granting preliminary injunction under state constitution); *Mahelona v. Honolulu*, Order on Plaintiffs’ Motion for Preliminary Injunction, No. 1CCV-23-0000972 (Haw. Cir. Ct. Jan. 3, 2024) (denying preliminary injunction under state constitution). By affirming dismissal under C.R.C.P. 12(b)(5) in a published decision, the court of appeals short-circuited that chance for Colorado.⁷

The court of appeals’ decision was deeply wrong. But either way, this Court should not let a single division’s decision countenancing laws three justices of the U.S. Supreme Court have called “unconscionable and unconstitutional” settle these matters for Colorado’s foreseeable future.

II. The decisions below reflect the need for guidance on lower courts’ “responsibility to engage in an independent analysis of state constitutional principles.”

Both lower courts recited this Court’s instruction that the Colorado Constitution must be independently construed. But both refused to

⁷ Even constitutional defenses asserted in municipal court would be nonstarters under *Feet Forward*, unlikely to be appealed or reach this Court’s limited docket.

perform that analysis without a precedent from this Court expressly authorizing departure from federal jurisprudence. *See Feet Forward*, ¶¶ 25-36 (following *Grants Pass* because this Court “has not interpreted section 20 as providing greater protections than those afforded by the Eighth Amendment”); *CF*, pp.728, 789 (declining to question “whether *Grants Pass* was correctly decided” because no precedent provided “discretion to interpret Art. II, §20 more broadly”).

Yet it was in reference to the cruel and unusual punishments clause that this Court instructed that even an identical federal provision “does not abrogate our responsibility to engage in an independent analysis of state constitutional principles in resolving a state constitutional question.” *People v. Young*, 814 P.2d 834, 842 (Colo. 1991).

The lower courts’ approach inverts the required analysis. This Court has repeatedly reaffirmed the duty to construe the state constitution independently, *e.g.*, *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 34, and instructed that federal jurisprudence may be followed where, based on that “independent analysis,” a court finds “the U.S. Supreme Court’s reasoning to be sound,” *id.* at ¶ 38. State courts

encountering questions of first impression under the Colorado Constitution should not need to justify diverging from federal jurisprudence; they should need a reason to mirror it. Federal decisions may be persuasive authority—but only if they persuade.

The lower courts’ abdication is especially dangerous here because *Grants Pass* was a sharp departure from settled federal jurisprudence. Prior cases firmly established that the Eighth Amendment places “substantive limits on what can be made criminal and punished as such,” CF,_p.225 (quoting *Ingraham v. Wright*,_430_U.S._651,_667 (1977)), and forbids criminalizing status, CF,_pp.226-27 (citing *Robinson v. California*, 370 U.S. 660 (1962)). *Grants Pass* cast *Robinson*—the very case that incorporated the cruel and unusual punishments clause against the states—as an outlier. And it relied on a false distinction between status and conduct to sideline *Robinson* without meaningfully addressing its abdication of *stare decisis*.

By asking only whether this Court had historically construed section 20 more broadly, the lower courts failed to grapple with the incongruity of *Grants Pass* with this Court’s precedents. See, e.g., *Palmer*

v. A.H. Robins Co., Inc., 684 P.2d 187, 217 (Colo. 1984) (recognizing that the cruel and unusual punishments clause imposes substantive limits on what can be criminalized); *Arnold v. City & Cty. of Denver*, 464 P.2d 515, 516-17 (Colo. 1970) (striking down vagrancy ordinance, recognizing that punishing status is unconstitutional); *Boe v. Children's Hosp. Colorado*, 2026 CO 32, ¶ 55 (recognizing that status and conduct can be inextricably intertwined). They failed to consider that past reliance on federal analysis may not have reflected an interest in consistency for consistency's sake, but this Court's conclusion that then-prevailing federal reasoning was sound. They also failed to consider the Colorado Constitution "as a whole." *Havens v. Bd. of Cnty. Comm'rs*, 924 P.2d 517, 523 (Colo. 1996).

Other state high courts have offered guidance to help lower courts evaluate new federal precedent. They instruct courts to consider whether the decision sharply departs from earlier precedent, retrenches on Bill of Rights protections, or limits rights in a manner inconsistent with the spirit of earlier opinions. *See, e.g., Kahn v. Griffin*, 701 N.W.2d 815, 828-29 (Minn. 2005); *People v. Teresinski*, 640 P.2d 753, 760-61 (Cal. 1982);

see also Granillo v. State, --- P.3d ----, 2026 WL 2085397, at *29 (Haw. July 15, 2026) (“When six justices walk away from those they are supposed to protect, state constitutions hold the line.”); *Sitz v Dep’t of State Police*, 506 N.W.2d 209, 763 (Mich. 1993) (“[O]ur courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the [U.S.] Supreme Court has.”). Such instruction helps fulfill the design of dual sovereignty and of states as independent “bulwarks of freedom” in our constitutional system.⁸ This Court should grant review to provide like guidance so that the meaning of the Colorado Constitution does not unthinkingly follow wherever federal law goes, even when it upends prior jurisprudence.

III. The court of appeals opinion rests on a fiction rather than the well-pleaded facts, rejects claims not asserted, and strays from this Court’s precedents.

The court of appeals got this case wrong. Its fundamental mistake was to accept the *Grants Pass* majority’s fiction that criminalizing the defining features of homelessness is distinct from criminalizing

⁸ Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 179 (2018).

homelessness itself. That false premise underlies the entire opinion. But fiction cannot sustain withholding the protections of the Colorado Constitution from a deeply vulnerable group.⁹ If the challenged ordinances are to be upheld, let the decision be based on fact.

The court of appeals acknowledged “tension” in “differentiating between a person’s conduct and status when their conduct involves basic activities for survival due to an involuntary status.” *Feet Forward*, ¶ 41. But it affirmed dismissal because “the status of homelessness is [not] involuntary in all instances” and, like in *Grants Pass*, “it makes no difference whether the charged defendant is homeless, a backpacker on vacation passing through town, or a student who abandons his dorm room to camp out in protest.” *Id.* at ¶¶ 41-43 (quoting 603 U.S. at 546).

That reasoning answers the wrong question. Petitioners do not bring a facial challenge. The fact that it “makes no difference” to Respondents whether a person’s status makes the prohibited conduct unavoidable is precisely the problem, not the scheme’s saving grace.

⁹ “Fiction always is a poor ground for changing substantial rights.” *Haddock v. Haddock*, 201 U.S. 562, 630 (1906) (Holmes, J., dissenting).

Whether homelessness is involuntary “in all instances” is also therefore beside the point. The complaint alleged that Respondents enforce the law even against those who *are* involuntarily unhoused, as they did against the individual plaintiffs, and Petitioners challenge only that enforcement.

The question left unanswered by the decision below is whether it is permissible that involuntarily unhoused residents cannot remain in Boulder without necessarily violating the ordinances because of their status. Can the laws be said not to target status because “there are other things that can be done if one happens to be unhoused in the City of Boulder that are not criminalized,” as Respondents urged?¹⁰

The court engaged in no review of the legal sufficiency of the claims based on the facts alleged as to the individual plaintiffs. It merely declared that “reasonable minds can disagree on this point of status versus conduct” and then rejected Petitioners’ complaint outright—an outcome appropriate under C.R.C.P. 12(b)(5) only where a claim is

¹⁰ Oral Argument at 21:20, *Feet Forward* (Apr. 7, 2026), <https://www.coloradojudicial.gov/topic/77/court-appeals-oral-arguments>.

implausible. By tethering its ruling to *Grants Pass* rather than the complaint, the court wrongly deprived Petitioners—and future potential plaintiffs with different facts—of the opportunity to prove that they *were* involuntarily unhoused and that Respondents’ enforcement includes unconstitutional applications.

This Court should grant review because unhoused residents deserve an answer to the actual question presented, which is whether the Colorado Constitution tolerates enforcement of the ordinances where, in fact, “[t]he only way to comply . . . is to leave” the city altogether. 603 U.S. at 575 (Sotomayor, J., dissenting).

The same fiction infected the court’s treatment of Petitioners’ remaining claims. Petitioners alleged that, as applied, the ordinances unjustifiably burden the rights of involuntarily unhoused individuals to use public streets without interfering with the rights of others. CF, pp.4-21 This Court recognizes that right as fundamental:

[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 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.

The court of appeals rejected the claim on the basis that section 3 “doesn’t state that there is a fundamental right to shelter on public land to sleep and rest,” observing that no one has challenged state laws that regulate recreational camping. *Feet Forward*, ¶ 53 & n.7. The court’s comparison exposes a profound “misapprehend[sion] of the claim of liberty ... presented to it.” *Lawrence v. Texas*, 539 U.S. 558, 566-67 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and criticizing its reductive, demeaning framing of laws criminalizing sodomy). Criminalizing the survival measures of a disfavored group is not akin to creating general rules to manage recreation outside. As applied, the bans effectively exclude people who are involuntarily unhoused from living lawfully within Boulder’s city limits. CF, pp.2, 24-25.

The court then declared that section 3 is not implicated because “occupying public property to shelter for sleep and rest necessarily interferes with every other resident’s ability to traverse, use, and enjoy that same space.” *Feet Forward*, ¶ 53. That assumption directly

contradicts the well-pleaded allegation that the individual plaintiffs were ticketed when they were not interfering with anyone's liberty. CF, p.20. And it conflicts with *J.M.* itself, where this Court had no trouble concluding that an ordinance prohibiting "standing around, hanging out, sitting, kneeling, sauntering or prowling" *implicated* section 3. 768 P.2d at 221. Other courts have widely agreed that the right to freedom of movement includes the right to remain. Op. Br. at 26-28.

Boulder's ordinances are not written or enforced to target interference with the rights of others. They target "activities of daily living" and "protection from the elements." Whether their breadth and severity are justified by or tailored to sufficiently important government interests are questions Petitioners should have the chance to test on the evidence. *E.g., Commonwealth v. Weston*, 913 N.E.2d 832, 845-46 (Mass. 2009) (upholding curfew for minors but striking down criminal penalties as "extraordinary and unnecessary response to what is essentially a status offense").

Finally, the court of appeals rejected Petitioners' danger-creation claim solely because the complaint does not allege that the ultimate harm

comes from a third-party private actor. *Feet Forward*, ¶ 71. The state-created danger doctrine recognizes that the government violates due process when it fails to protect a person from harm in circumstances where it either created the danger that caused the harm or made the individual more vulnerable to it. *Henderson v. Gunther*, 931 P.2d 1150, 1156 (Colo. 1997). Respondents actively create or at least increase the vulnerability of unhoused residents to danger when they assign criminality to their means of survival. Other courts have held such harms cognizable. Opening Br. at 36-38.

Language in the caselaw referring to private actors stems from the doctrine's context as an exception to the state action doctrine, which usually recognizes constitutional injuries caused only by the government itself. *Id.* at 1155. Because the private harm is what makes the constitutional claim questionable, it is illogical to extrapolate that private harm is a necessary ingredient. If the government can be liable for exposing someone to danger inflicted by a third party, it should be answerable for affirmatively placing someone in direct, known danger, where causation is necessarily more proximate.

Regardless of this Court’s view of the merits, Petitioners ask that it grant review so that the controlling law on these matters does not rest on a legal fiction but engages independently and meaningfully with the well-pleaded realities of being unhoused in Boulder.

IV. This case is the right vehicle for addressing the issues presented.

This appeal provides the ideal vehicle for certiorari review. First, because it arises from a dismissal under C.R.C.P. 12(b)(5), it presents pure questions of law.

Second, the facts frame the legal issues cleanly. Boulder has inadequate shelter. Each individual plaintiff was involuntarily unhoused when criminalized. The scheme is severe, punishing “activities of daily living” using “any cover or protection from the elements,” on all public property, with penalties including incarceration. Enforcement targets the unhoused, even in dangerous conditions, and outpaces every other Colorado city combined.

Third, Petitioners’ as-applied claims are narrow, addressing enforcement only against involuntarily unhoused individuals. The Tent Ban and danger-creation claims are further tailored to when the

criminalized cover is necessary to avoid immediate danger from the elements.

These features leave the Court ample room to resolve the issues presented while preserving local governments' ability to regulate public space in ways that respect constitutional rights.

Fourth, the state constitutional arguments are no afterthought. Petitioners asserted their claims under the Colorado Constitution alone. The “distinctive state-specific factors” that compel independent interpretation, *People v. McKnight*, 2019 CO 36, ¶ 40, were robustly briefed below. *E.g.*, Br. of Amicus Curiae Historians in Support of Plaintiffs-Appellants (explaining why criminalizing the use of shelter on public land would have shocked Colorado’s framers); *see also People v. Schafer*, 946 P.2d 938, 942-43 (Colo. 1997) (“tak[ing] notice” in constitutional analysis “that tents have long been utilized as temporary or longer term habitation in Colorado”).

Finally, even reversal would mean only that Petitioners’ claims and Respondents’ defenses may be tested on the evidence.

CONCLUSION

This case presents questions of first impression and profound consequence for unhoused residents and cities statewide. They deserve independent analysis on the facts alleged, under the Colorado Constitution. The lower courts believed that responsibility falls to this Court alone. This Court should grant the petition to fulfill *Young's* command and give the issues the consideration they are due.

Respectfully Submitted,

Date: July 31, 2026

A handwritten signature in black ink, appearing to read 'A. Kurtz', is written over a horizontal line.

Anna I. Kurtz, #51525
Timothy Macdonald, #29180
Emma Mclean-Riggs, #51307
ACLU Foundation of Colorado

Andy McNulty, #50546
Madeline Leibin, #59414
NEWMAN | MCNULTY
In cooperation with the ACLU Foundation of Colorado

Daniel D. Williams, #38445
Meghan C. Hungate, #38183
Matthew A. Simonsen, #53757
Grata Law and Policy LLC
In cooperation with the ACLU Foundation of Colorado

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2026, I served a true and correct copy of the foregoing document to all counsel of record via the Colorado Courts E-Filing System.

/s/ Anna I. Kurtz

Anna I. Kurtz, Attorney for Petitioners