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| **COLORADO COURT OF APPEALS**<br>2 East 14th Avenue<br>Denver, CO 80203 | |
| Appeal from Boulder County District Court<br>Honorable Robert R. Gunning<br>Case No. 2022CV30341<br><br>**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;<br><br>v.<br><br>**Defendants-Appellees:** CITY OF BOULDER and MARIS HEROLD, Chief of Police for the City of Boulder. | ▯ COURT USE ONLY ▯ |
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**APPELLANTS' REPLY 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 **5,613 words**, which is less than the 5,700 word limit.

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

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## 2. ARGUMENT

### 2.1 **This case presents a matter of first impression that this Court must decide.**

Throughout Appellees' briefing they repeatedly emphasize that there is no precedent specifically authorizing the claims that Appellants bring in this case. That is true. This is an issue of first impression, the first case in Colorado to address whether laws like the Cover Bans here violate Colo. Const. art. II, § 20, Const. art. II, § 3, and Colo. Const. art. II, § 25. The function of the courts is to resolve whether laws and government action violate citizens' constitutional rights, even when those cases raise undecided issues. *See People v. Seymour,* 536 P.3d. 1260, 1269 (Colo. 2023) (addressing the constitutionality of an issue that "no state supreme court or federal appellate court" had previously addressed). When looking at Colorado history, legal precedent interpreting the Colorado Constitution, and courts across the country that have addressed similar factual circumstances, it is clear Appellants have stated claims against Appellees for violating their rights by enforcing the Cover Bans while shelter is unavailable.

### 2.2 **There are multiple bases for interpreting the Colorado Constitution more expansively than the federal Constitution in this case.**

State courts are best situated to interpret their constitutions in accordance with "local conditions and traditions." Jeffrey Sutton, *51 Imperfect Solutions: States & the Making of American Constitutional Law* 17 (2018). As Appellees cite in their

briefing, the Colorado Supreme Court has held that it is appropriate to apply federal constitutional standards to analogous Colorado constitutional provisions only in specific circumstances. These include where "a party has asserted dual constitutional claims under both a federal provision and its Colorado counterpart[,]" "where no party has argued that the Colorado provisions call for a distinct analysis[,]" and "where consistency between federal and state law has been a goal" in interpreting that particular constitutional provision. Ans. Br., pp. 9-10 (quoting *Rocky Mt. Gun Owners v. Polis*, 2020 CO 66, ¶37-38). None of these situations is present here. Appellants bring only claims under the Colorado Constitution. Appellants clearly argue for a distinct analysis.

And, the Colorado Supreme Court has interpreted the constitutional provisions at issue in this case on numerous occasions and never has stated that consistency between state and federal law has been a goal. *See, e.g., People v. Young*, 814 P.2d 834, 842 (Colo. 1991); *Wells-Yates v. People*, 2019 CO 90M; *Colo. Dep't of Labor & Emp't v. Dami Hospitality, LLC*, 442 P.3d 94, 101 (Colo. 2019); *People in the Interest of J.M.*, 768 P.2d 219, 221 (Colo. 1989). It has also interpreted Colo. Const. art. II, § 20 as providing more protection than the Eighth Amendment. For example, in *Young*, the Colorado Supreme Court held that the then-effective death penalty statute violated the Colorado Constitution's due process and cruel and unusual punishments clauses. The statute was similar to state statutes that were

found compliant with the Eighth Amendment, yet *Young* struck it under the Colorado Constitution, reflecting the Colorado Constitution's broader reach. 814 P.2d at 842-43. Similarly, in *Wells-Yates*, rather than adopting the U.S. Supreme Court's approach to individual proportionality review under the Eighth Amendment, the Colorado Supreme Court made clear that "the evolving standards of decency in Colorado" are relevant to individual proportionality review under Article II, sec. 20. 2019 CO 90M, ¶ 47. As demonstrated by *Young* and *Wells-Yates*, the Supreme Court does not consistently interpret Article II, section 20 as coextensive with the Eighth Amendment.

Further, the Supreme Court has held that the due process clause of article II, section 25 is distinct from the Fourteenth Amendment, finding a statute that imposed the burden of proving insanity upon a defendant unconstitutional under the Colorado Constitution notwithstanding that the U.S. Supreme Court reached a contrary conclusion under the Fourteenth Amendment. *People ex rel. Juhan v. Dist. Ct. for Jefferson Cnty.*, 165 Colo. 253, 260-61 (1968).[1] Therefore, the three bases Appellees

[1] The Colorado Supreme Court has regularly "forge[d its] own path" in interpreting the Colorado Constitution. See In *Bock v. Westminster Mall*, 819 P.2d 55, 58 (Colo. 1991) (interpreting article II, section 10 more broadly than the First Amendment, based on Colorado history); *People v. Paulsen*, 198 Colo. 458, 461 (1979) (interpreting article II, section 18 more broadly than the equivalent federal double jeopardy provision); *People v. McKnight*, 2019 CO 36 (reading article II, section 7 more broadly than the Fourth Amendment).

cite for interpreting the Colorado constitutional provisions at issue here in lockstep with their federal counterparts are inapplicable to Appellants' claims.

Importantly, as Appellees acknowledge in their briefing, the Colorado Supreme Court has, on multiple occasions, held that it is proper to interpret the Colorado Constitution independently from the federal Constitution. Ans. Br., pp. 9-10 (citing *Rocky Mt. Gun Owners*, ¶¶ 37-38). The Colorado Supreme Court has been particularly apt to read provisions of the state constitution independently in matters of criminal law because criminal law is "best left to the expertise of the state courts as the vast majority of criminal prosecutions take place in state, rather than federal, court." *McKnight*, ¶ 39.

As Appellees acknowledge in their briefing, caselaw holds that it is proper to depart from federal constitutional analysis when: (1) the Supreme Court's reasoning as to the interpretation of a constitutional provision is not "sound"[,] *Rocky Mt. Gun Owners*, ¶ 38; and (2) when there is "historical justification" for doing so. *Curious Theater Co. v. Colo. Dep't of Pub. Health & Env't*, 220 P.3d 544, 551 (Colo. 2009). Both bases are present here.[2]

2.2.1 **The *Grants Pass* majority opinion is unsound which provides**

[2] Colorado state courts are "guardians of individual rights" with the "final say" over the meaning of our state constitution. Sutton, *supra* p. 2, at 16 ( "As a matter of power, the fifty-one highest courts in the system may each come to different conclusions about the meanings of, say, due process in their own jurisdiction . . . As a matter of reason, there often are sound grounds for interpreting the two sets of guarantees differently.").

**a strong basis for interpreting Colo. Const. art. II, § 20 differently than the Eighth Amendment.**

The Supreme Court's "recent tendencies" are to "make vindicating the rule of law and preventing manifestly injurious Government action as difficult as possible." *Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, No. 25A103, 2025 LX 307962, at *34-35 (Aug. 21, 2025) (Brown, J., dissenting). In doing so, the Supreme Court has abandoned constitutional protections that have been in place for decades, radically eroding the principles of stare decisis,[3] in favor of "Calvinball jurisprudence with a twist" where "[t]here are no fixed rules" and the government "always wins." *Id.* In line with these recent tendencies, the reasoning of the Supreme Court's decision in *Grants Pass* is not "sound[.]" *Rocky Mt. Gun Owners*, ¶ 38.

Instead of following the unsound decision of the *Grants Pass* majority, this Court should independently interpret the Colorado Constitution and, in doing so, follow the well-reasoned *Grants Pass* dissent, and the consensus of cases that predate it, holding that status offenses violate the prohibition on cruel and unusual punishment. *See* Ans. Br., pp. 18-20 (citing *Arnold v. City and County of Denver*, 464 P.2d 515 (Colo. 1970); *People v. Giles*, 662 P.2d 1073, 1077 (Colo. 1983); *People v. Taylor*, 618 P.2d 1127, 1139 (Colo. 1980); *People v. Feltch*, 483 P.2d 1335,

[3] See Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 Tulane Law Review 1533 (2008); Michael Gentithes, *Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis*, 62 Wm. & Mary L. Rev. 83 (2020).

1337 (Colo. 1971)). The *Grants Pass* dissent correctly applies the long-recognized "substantive limitation on criminal punishment" to conclude that punishing unhoused people for existing outdoors on public property when they have nowhere else to go is unconstitutional. *Grants Pass v. Johnson*, 144 S. Ct. 2202, 2233 (2024) (Sotomayor, J., dissenting). The *Grants Pass* dissent rightly concludes that "*Robinson* should [have] squarely resolve[d]" the question of that laws, like the Cover Bans, criminalizing the use of shelter outdoors when houseless individuals have nowhere else to go impose cruel and unusual punishment. *Id.* at 2237 (Sotomayor, J., dissenting).

The dissent in *Grants Pass* was not novel in this holding. Since *Grants Pass* one court has already opted to uphold the longstanding prohibition on criminalizing status, rather than staking our constitutional rights to the *Grants Pass* majority's unprecedented reasoning. *See Williams v. Albuquerque*, D-202-CV-2022-07562, *Memorandum Opinion and Order Denying City of Albuquerque's Motion for Partial Judgment on the Pleadings*, pp. 2-8. And, before *Grants Pass*, courts across the country repeatedly applied *Robinson* in this way, affirming that the cruel and unusual punishments clause of the Eighth Amendment prohibit governments from enforcing laws substantially similar to the Cover Bans.

In *Jones v. City of Los Angeles*, the Ninth Circuit held that citing homeless individuals for violating a City of Los Angeles ordinance that made it illegal to sit,

lie, or sleep on the city's sidewalks and streets at any time violated the Eighth Amendment. 444 F.3d 1118 (9th Cir. 2006). Applying *Robinson* and *Powell*, the Ninth Circuit held that "the involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment." *Id.* at 1132. Because the plaintiffs "made a substantial showing that they were unable to stay off the streets on the night[s] in question," the enforcement of the city's ordinance was cruel and unusual. *Id.* at 1136. *See also Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir. 2019), *abrogated by Grants Pass*, 144 S. Ct. 2202 (holding "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter"); *Johnson v. City of Grants Pass*, 50 F.4th 787, 808 (9th Cir. 2022) ("[A]nti-camping ordinances violate[] the Cruel and Unusual Punishment Clause to the extent they prohibited homeless persons from 'taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.'"), *overruled by Grants Pass*, 144 S. Ct. 2202; *see also Cobine v. City of Eureka*, No. C16-02239 JSW, 2016 U.S. Dist. LEXIS 58228 at *8 (N.D. Cal. Apr. 25, 2017) (denying a motion to dismiss plaintiffs' claim that a law banning camping violated the Eighth Amendment); *Anderson v. City*

*of Portland*, No. 08-1447-AA, 2009 U.S. Dist. LEXIS 67519 at *17-18 (D. Or. 2009) (denying a motion to dismiss plaintiff's claim that a law banning camping and temporary structures was unconstitutional).

In *Johnson v. City of Dallas*, the United States District Court for the Northern District of Texas considered a local ordinance substantially similar to the Cover Bans and held that as long as the homeless have no other place to be, criminalizing them for sleeping in public violates the Eighth Amendment. 860 F. Supp. 344, 346 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995). In doing so, the Court began by noting that "[i]t should be a foregone conclusion that maintaining human life requires certain acts, among them being the consuming of nourishment, breathing and sleeping." *Id.* The Court went on to reason that "[a]lthough sleeping is an act rather than a status" that "the status of being could clearly not be criminalized under *Robinson"* and "[b]ecause being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless for their status as homeless, a status forcing them to be in public." *Id.*

In *Pottinger v. Miami,* a class of homeless people brought a facial challenge to laws similar to the Cover Bans. 810 F. Supp. 1551 (S.D. Fla. 1992). The court held that these laws violated the Eighth Amendment because "arresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual." *Id.* In so holding, the Court found that "homelessness

is due to various economic, physical or psychological factors that are beyond the homeless individual's control." *Id.* at 1563. The Court concluded that, given that homelessness is not a choice, and "the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places" and "[t]he harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless." *Id.* at 1564. The Court reasoned that the ordinance's effect of punishing homeless individuals for engaging in life-sustaining activities was "no different from the vagrancy ordinances which courts struck because they punished innocent victims of misfortune and made a crime of being unemployed, without funds, and in a public place." *Id.* (citations and quotations omitted); *see also Murphy v. Raoul,* 380 F. Supp. 3d 731, 763-66 (N.D. Ill. 2019) (holding that a law requiring released prisoners to secure housing that met certain criteria after release or be subject to indefinite parole, violated the Eighth Amendment because it prohibited involuntary conduct inseparable from status).

In *Goldman v. Knecht*, the United States District Court for the District of Colorado held that a vagrancy law, which made it a crime for a person able to work to be "found loitering or strolling about, frequenting public places where liquor is sold, begging or leading an idle, immoral or profligate course of life, or not having any visible means of support" was unconstitutional. 295 F. Supp. 897, 899 (D. Colo.

1969). In doing so, the Court held that in accordance with *Powell* and *Robinson*, the law impermissibly criminalized an *involuntary* "condition" – indigency – just as the Cover Bans impermissibly criminalize the involuntary condition of homelessness. *Id*. at 907-08; *see also Wheeler v. Goodman*, 306 F. Supp. 58, 64 (W.D.N.C. 1969) vacated on other grounds, 401 U.S. 987 (1971) (finding a vagrancy law unconstitutional because it punished mere status); *Headley v. Selkowitz*, 171 So. 2d 368, 370 (Fla. 1965) (finding a vagrancy statute invalid as applied to those are not "vagrants" by choice or intentional conduct); *Parker v. Municipal Judge*, 427 P.2d 642, 644 (Nev. 1967) (overturning a vagrancy law on similar grounds); *Hayes v. Municipal Court*, 487 P.2d 974, 981 (Okla. Crim. App. 1971) (same); *Alegata v. Commonwealth*, 231 N.E.2d 201, 207 (Mass. 1967) (same).

These decisions reflect the deep roots of the principle that punishing involuntary conduct is cruel and unusual. And, the Grants Pass dissent affirms the general legal principle from these cases and *Robinson* that "jail[ing] and fin[ing] . . . people for sleeping anywhere in public at any time" punishes people "with no access to shelter . . . for being homeless." *Grants Pass*, 144 S. Ct. at 2228 (Sotomayor, J., dissenting).

Following the poorly reasoned[4] and unprecedented *Grants Pass* majority,

[4] Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 Harv. L. & Pol'y Rev. 131 (2019).

rather than decades of precent holding that punishing the status of being houseless is cruel and unusual, is contrary to this Court's duty to "engage in an independent analysis of state constitutional principles in resolving a state constitutional question." *Young*, 814 P.2d at 842. Instead, this Court should rely on the reasoning of the *Grants Pass* dissent, *Robinson*, and *Powell* (along with the legion other cases applying *Robinson* and *Powell* to claims by houseless people) to independently interpret the state cruel and unusual punishment clause in Colo. Const. art. II, § 20.

#### 2.2.2 **There is historical justification for interpreting the Colorado Constitution more broadly than the federal constitution in this context.**

Contrary to Appellees claims, Appellants were not required to plead the historical facts outlined in their briefing in their Complaint and Amended Complaint in this matter. Courts have long relied on historical facts when interpreting constitutional provisions. *See e.g., Marsh v. Chambers,* 463 U.S. 783, 791 (1983); *District of Columbia v. Heller*, 554 U.S. 570 (2008). That includes the Colorado Supreme Court, which has relied on unpled historical fact in interpreting Colorado's constitution. *See People v. Schafer*, 946 P.2d 938 (Colo. 1997). Abandoning this precedent, and adopting Appellees and the District Court's position, would be unworkable – initial pleadings would balloon to hundreds of pages with cites to historical facts related to the interpretation of the constitutional provision at issue. That is not consistent with C.R.C.P. 8(a)(2).

And, Colorado's appropriately-considered history counsels that this Court should apply a broader standard to Appellants' claims. As the *amicus* brief submitted by the University of Colorado-Boulder historians outlines: "camping on public land to obtain temporary shelter was universally accepted at the time of the drafting of the" Colorado Constitution. *Hist. Am. Br.* at 6. This history, which sets the historical context of the Colorado Constitution apart from the federal constitution, provides a strong basis for interpreting the Colorado Constitution to consider punishment for temporarily residing in a tent outside as cruel and unusual, the imposition of jail time and serious fines for temporarily residing in a tent outside as disproportionate, the restriction on temporarily residing in a tent outside as violating the right to travel, and the prohibition of temporarily residing in a tent outside in extreme weather as violating the guarantee in the Colorado Constitution that the state not expose its residents to danger.

*Schafer* likewise provides a strong basis for this Court in using Colorado's history to interpret its constitutional provisions. As in any matter of first impression, this Court is tasked with looking to analogous legal principles and applying those principles to the facts at hand. While *Schafer* did not address the constitutional provisions at issue here, it did address a historical context that is directly applicable here and provides persuasive authority this Court can certainly rely on in holding that Colo. Const. art. II, § 20 protects Appellants from the cruel and unusual

punishment imposed by the Cover Bans.

### 2.3 **The question of whether the Cover Bans impose excessive fines in violation of Colo. Const. art. II, § 20 is properly before this Court.**

Appellants properly raised the issue of proportionality in their Complaint by pleading that: (1) they faced a credible threat the Cover Bans would be enforced against them because they are involuntarily houseless, unable to access shelter, and must sleep outside, CF, pp. 17-21 ¶¶56, 60; (2) violating the Cover Bans risks a $2,650 fine or 90 days in jail, CF, pp. 9-10, ¶¶56, 60; and, (3) Appellees have caused Appellants to be subjected to cruel and unusual punishment through the enforcement of the Cover Bans. CF, p. 22, ¶¶176, 181, 182, 184.

Appellees make a pseudo-standing argument, claiming that Appellants must have been "jailed or fined" for violating the ordinances before they can sue. Ans. Br., p. 19-20. This is simply untrue. Appellants do not need to have been prosecuted under the Cover Bans to mount a pre-enforcement challenge to excessive fines. *See Watkins v. Bd. of Cnty. comm'rs*, No. 91CA0642, 1991 Colo. App. LEXIS 729 (Ct. App. Dec. 12, 1991) (holding that "a party wishing to obtain a declaration of invalidity of an ordinance of general application is not obligated to violate it to satisfy the justiciable controversy requirement... [r]ather, a party whose rights, status, and legal relations are affected by an ordinance may seek pre-enforcement review of its validity, even when enforcement measures […] have not been taken specifically against the party"). The District Court's holding to the contrary was in

error. Further, the Appellants' Complaint states that at least one Appellant has received multiple tickets for violating the Cover Bans, CF, p. 20, ¶166, 167, and the reasonable inference from those allegations is that they have been subject to the disproportionate criminal penalties in the Complaint. CF, p. 9-10, ¶56, 60.

Appellees do not engage with the merits of Appellants' proportionality claim, likely because it is a strong claim, undisturbed by the *Grants Pass* majority opinion. *Grants Pass*, 144 S. Ct. at 2244 (Sotomayor, J., dissenting). This Court should hold that Appellants have stated a claim that the Cover Bans impose excessive fines in violation of Colo. Const. art. II, § 20.

### 2.4 ***Sellers***[5] **does not counsel that Colo. Const. art. II, § 20 should be interpreted the same as the Eighth Amendment in the context presented in this case.**

First, in *Sellers*, the parties made their Eighth Amendment and article II, section 20 arguments in parallel. Where parties bring these kinds of parallel claims, applying one constitutional analysis may be proper.[6] *Rocky Mt. Gun Owners*, ¶37-38. This distinguishes *Sellers* from this case where Appellants have only brought claims under the Colorado Constitution.

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[5] *Sellers v. People*, 2024 CO 64.

[6] The defense in a criminal matter is under significant pressure to avoid waiving potential claims, even those that may only be viable after a jurisprudential change. Brent Newton, *Almendarez-Torres and the Anders Ethical Dilemma,* 45 Hous. L. Rev. 747, 750 (2008). In that context in particular, the decision to raise both federal and state constitutional claims should not always be interpreted as an invitation to parallel interpretation.

Second, both Appellees and the District Court rely upon the Colorado Supreme Court's remark in *Sellers* that "[t]o date … we have not interpreted article II, section 20 of our constitution to provide greater protection than the Eighth Amendment." ¶ 36. This statement contradicts both *Young* and *Wells-Yates,* where the Supreme Court interpreted Colo. Const. art. II, § 20 as providing more protection than federal courts determined the Eighth Amendment provided. Further, a statement by the Court in *Sellers* that it had not previously deviated from a parallel interpretation does not mean that it never will.

Third, *Sellers* does not address the circumstances here: whether laws like the Cover Bans constitute cruel and unusual punishment because they are status offenses and impose disproportionate punishment on those who are punished for surviving outside when they have nowhere else to go.

Fourth, and most importantly, in *Sellers*, the Colorado Supreme Court was considering whether to deviate from longstanding Eighth Amendment jurisprudence. Here, this Court confronts a different question: whether to follow a Supreme Court of the United States decision that abandoned decades of federal caselaw. The interpretation Appellants urge the Court to adopt is in accord with well-established Eighth Amendment tradition; it is *Grants Pass* that is the deviation. Unlike in *Sellers*, Appellants ask the Court to *follow* the reasoning of the longstanding Eighth Amendment analysis that came before *Grants Pass*, and hold that status offenses,

like the Cover Bans, constitute cruel and unusual punishment.

### 2.5 **Appellants do not seek to establish a broad right to indefinitely occupy public land.**

Appellants are not arguing for a right to occupy public land without restriction as Appellees' strawman arguments suggest. *See* Op. Br., pp. 21-24. Instead, Appellants' claim under Colo. Const. art. II, § 3 is based on their right to utilize the streets and facilities in Boulder, and shelter themselves from the elements while doing so, when there is no shelter space accessible to them. Boulder controls the ability to provide shelter and could do so, thereby defeating any claim by Appellants.

Analogous federal provisions "set[] the constitutional 'floor' for [Colorado courts'] interpretation" of their own Colorado Constitutional provisions. *Rocky Mt. Gun Owners*, ¶ 33; *id.*, ¶ 36. Federal caselaw is relevant to where that floor lies. Federal courts have repeatedly held that laws like the Cover Bans violate the right to travel. For example, in *Pottinger*, the court found that a city's enforcement of criminal ordinances that "prevent homeless individuals who have no place to go from sleeping, lying down, eating and performing other harmless life-sustaining activities" in public violated their right to travel because it denied them a "necessity of life." 810 F. Supp. at 1580. Similarly, in *Phillips v. City of Cincinnati*, the court held that laws, like the Cover Bans here, that allow for "citing and arresting unhoused persons for sleeping in public spaces" violate "the right to travel by denying unhoused people the necessity of a safe place to sleep, rest, and recuperate."

479 F. Supp. 3d 611, 622 (S.D. Ohio 2020) (emphasis omitted); *see also Johnson v. Board of Police Comm'rs*, 351 F. Supp. 2d 929, 949 (E.D. Mo. 2004) (finding a likelihood of success on the merits of the houseless plaintiffs' right to travel claim)

Like in *Pottinger*, *Phillips*, and *Johnson*, Boulder criminalizes homeless individuals' engagement in basic functions of life (sleeping, resting, and recuperating with protection from the elements) when they have nowhere else to go. Appellees offer no retort for these cases other than that they were decided under the federal constitution. This is a distinction without a difference as federal interpretation of the right to travel sets the "floor[.]" *Rocky Mt. Gun Owners*, ¶ 33, 36. And, based on federal jurisprudence, Appellants have alleged a violation of their fundamental right under the Colorado Constitution to freely utilize the streets and facilities of Boulder.

Because Appellants have alleged a violation of their fundamental rights, strict scrutiny applies. Appellees make no argument in their briefing that the Cover Bans withstand strict scrutiny or even pass muster under the reasonable exercise test (likely because the Cover Bans cannot withstand strict scrutiny or pass muster under the reasonable exercise test).

### 2.6 ***Henderson*** **does not control Appellants' danger creation claim and, even if it does, Appellants have stated a claim under Colo. Const. art. II, § 25.**

Appellees admit that Colo. Const. art. II, § 25 provides broader protection than

the Fourteenth Amendment to the U.S. Constitution. Ans. Br., p. 30. Therefore, the Colorado Supreme Court's application of the Fourteenth Amendment in *Henderson v. Gunther* does not control here. 931 P.2d 1150, 1160 (Colo. 1997). Instead, Colo. Const. art. II, § 25 and the caselaw interpreting it calls for application of the *Leake* standard. *See* Op. Br. at p. 34.

At minimum, this Court should apply the standard used by federal courts in a broad swath of cases interpreting the Fourteenth Amendment, *see* Op. Br., pp. 33-38, as the most generous federal interpretation of the danger creation claim sets the "floor[.]" *Rocky Mt. Gun Owners*, ¶ 33, 36. Courts that have addressed similar situations to the one presented here have repeatedly held that government action deliberately exposing houseless individuals to environmental dangers violates the Fourteenth Amendment. *See Where Do We Go Berkeley v. Cal. DOT (Caltrans)*, No. 21-cv-04435-EMC, 2021 U.S. Dist. LEXIS 240845, at *13 (N.D. Cal. Dec. 16, 2021) (denying motion to dismiss state-created danger claim because defendants were closing encampments knowing that available housing options may not be viable and without sufficient attempts to address alternatives); *Boyd v. City of San Rafael*, No. 23-CV-04085-EMC, 2023 U.S. Dist. LEXIS 188335, 2023 WL 6960368, at *22 (N.D. Cal. Oct. 19, 2023) (holding that removing a plaintiff's makeshift shelter during winter was likely to expose her to danger in violation of the Fourteenth Amendment); *Sacramento Homeless Union v. County of Sacramento*,

617 F. Supp. 3d 1179, 1193 (E.D. Cal. 2022) (finding a likelihood of success for claim under the state-created danger doctrine where the county sought to "sweep" encampments during extreme heat); *Mary's Kitchen v. City of Orange*, No. 8:21-cv-01483-DOC-JDE, 2021 U.S. Dist. LEXIS 219185, 2021 WL 6103368, at *11 (C.D. Cal. Nov. 2, 2021) (holding "[r]emoval of critical services coupled with a lack of adequate alternatives supports an inference that the City has acted with deliberate indifference to the danger posed" to the houseless plaintiffs in violation of the Fourteenth Amendment); *see also Homeless Union v. Cnty of San Luis Obispo*, No. 2:24-cv-00616-AB-MAA, 2024 WL 2107711, *1 (C.D. Cal. Mar. 29, 2024) (noting that a county's affirmative act of closing an RV parking site would render people homeless and pose an actual, particularized danger where the individuals had "nowhere else to go"); *Blain v. Cal. Dep't of Transp.*, 616 F. Supp. 3d 952, 957 (N.D. Cal. July 22, 2022) (finding "serious questions going to the merits" of a state-created danger claim where people were removed from an encampment rapidly, without adequate plans for housing).

However, even under the *Henderson* standard, Appellants have alleged a violation of Colo. Const. art. II, § 25. In *Henderson*, the Supreme Court held that, to state a claim under the Fourteenth Amendment on a danger creation theory, a plaintiff must allege that the defendants have "abuse[d] their governmental power by subjecting a person to harm that would not have occurred in the absence of the

state actor's conduct." 931 P.2d at 1160. The Cover Bans prohibit Appellants, who have no access to shelter, from sleeping outside with minimal cover, causing sleep deprivation, a dangerous condition in the mid- and long-term. CF, p. 10. The Cover Bans prohibit Appellants, who have no access to shelter, from protecting themselves from the elements, causing frostbite, hypothermia, heat exhaustion, heat stroke, and dehydration. CF, pp. 11-12, 17 Knowing this, Appellees continued to enforce the Cover Bans against Appellants and others, when the temperature was below freezing, when it was raining, and/or when it was snowing, contributing to the death of at least five houseless people in 2020. CF, pp. 12-14, 17, 19, 20. Enforcement of the Cover Bans has directly harmed Appellants' health. CF, p. 14, 20. These allegations certainly state a claim for an abuse of government power[7] that caused Appellants, and other houseless individuals in Boulder, significant harm. *See* Marisa Westbrook, *Unhealthy by design: health and safety consequences of the criminalization of homelessness,* JOURNAL OF SOCIAL DISTRESS AND HOMELESSNESS, (April 27, 2020) (finding that enforcement of camping bans causes increased incidence of frostbite, heat stroke, sexual assault, physical assault, robbery, and sleep deprivation); Joshua Barocas, et al., *Involuntary displacement and self-reported health in a cross-sectional survey of people experiencing homelessness in Denver, Colorado, 2018-2019*, BMC PUBLIC HEALTH (April 25, 2024) (finding that

[7] *See* Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99 (2019).

enforcement of camping bans increases infectious diseases, substance and alcohol use, and climate-related health conditions, and worsens mental health).

Danger creation caselaw firmly supports a claim that Appellees may not prevent houseless Boulderites from using protection from the elements under threat of a significant criminal penalty when there is nowhere for them to go. Appellants do not seek to impose their policy preferences on Appellees. Appellees may make policies as they like, within the boundaries of the applicable constitutions. Appellees need not provide shelter beds, but while they choose not to, they may not expose Appellants who have nowhere to go but outside to danger through forcing them to face the elements without any physical protection.

Boulder asserts that if the well-established state-created danger creation caselaw is applied to this case, Appellees would be required to provide health care, drug treatment, food, water, and general safety. This is irrational and far beyond the boundaries of Appellants' argument. This well-established, settled doctrine simply prevents Appellees from destroying a diabetic's last vial of insulin or an addict's last suboxone dose, seizing a starving person's last mouthful of bread, or pouring out an acutely dehydrated person's last sip of water. The basic principle that the government should not deliberately expose a person to grave danger is upheld in Colorado and in federal court. This Court should not take a more restrictive approach to this constitutional guarantee than its federal counterparts.

2.7 **Appellants state claims against Appellee Herold.**

The Enhance Law Enforcement Integrity Act authorizes a private right of action against a peace officer "who, under color of law, subjects or causes to be subjected . . . any other person to the deprivation of any individual rights . . . secured by the bill of rights, article II of the state constitution." C.R.S. § 13-21-131(1); *see also Woodall v. Godfrey*, 2024 COA 42, ¶ 11. "[I]n assessing whether a plaintiff pleaded an actionable claim under section 13-21-131(1), a court must determine whether the plaintiff's case rests on a violation of a right embodied in the bill of rights of the Colorado Constitution that can give rise to a private right of action." *Puerta v. Newman*, 2023 COA 100, ¶ 2. Should this Court find that Appellants have stated claims for the violation of their rights under the Colorado Constitution against Appellee Boulder, then Appellants have stated claims against Appellee Herold.

Appellee Herold, as alleged, ordered the enforcement of the Cover Bans against Appellants in violation of their constitutional rights. Appellees' citation to *Bullock v. Brooks* does not foreclose this conclusion. 2025 COA 6. In *Bullock*, the Court of Appeals considered whether a law enforcement officer should be liable for an arrest which a jury found was supported by probable cause, based on an unconstitutional statute. *Id*., ¶ 22. The Court held that the plaintiff could not establish the individual officers' "liability merely by showing that the ordinances in question were unconstitutionally vague" and instead had to meet the legal standard for his

wrongful arrest claim: that the arrest was not "supported by probable cause." *Id.* Because the jury found the arrest was supported by probable cause, the plaintiff's claim for wrongful arrest failed. Appellee Herold's liability is legally and factually distinct from that of the officers in *Bullock*.

Here, Appellants allege that Appellee Herold's affirmative decision to enforce the Cover Bans when no shelter was available in Boulder, and Appellants had nowhere else to go, constituted cruel and unusual punishment, deprived them of their right to enjoy public spaces in Boulder, and placed them in significant danger of serious bodily injury. Should this Court determine that Appellants have stated a claim for violation of their constitutional rights, then Appellants have also stated a claim against Appellee Herold.

3. **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 10th day of September, 2025.

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