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HSBC Executive Board
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July 29, 2021

SENT VIA ELECTRONIC MAIL: rivera-vandermyden@bouldercolorado.gov
homeless-solutions@bouldercounty.org

Re: Unconstitutional treatment of unhoused Boulder residents

Dear City Manager Rivera-Vandermyde and HSBC Executive Board Members:

Over the past several months, the ACLU of Colorado (“ACLU”) has been reviewing policies adopted and implemented by the City of Boulder and the intergovernmental Homeless Solutions for Boulder County (“HSBC”) that impact unhoused Boulder residents. I write to express our significant concerns arising from that investigation.

Records examined by the ACLU evidence a system that, with one hand, makes shelter available to only a limited few, and with the other, criminalizes those forced to sleep outdoors under the false narrative that they are resistant to services. The scheme betrays a governmental aspiration ultimately to drive unhoused residents out of Boulder. This approach to homelessness violates the Constitution, and we urge the City and HSBC to change course.

Our alarm regarding the treatment of people experiencing homelessness in Boulder only deepened with City Council’s April vote to spend an additional \$2.7 million on expanded efforts to police the city’s unhoused residents and evict them from public space¹—an especially disturbing commitment of resources amid both a nationwide reckoning with the racialized harms caused by over-policing and a

¹ Deborah Swearingen, *Boulder Set to Spend \$2.7M on Clearing Encampments, Cleaning Parks*, Boulder Daily Camera (April 29, 2021), <https://www.dailycamera.com/2021/04/29/boulder-set-to-spend-2-7m-on-clearing-encampments-cleaning-parks/>.

pandemic-induced recession that has dramatically increased the number of our neighbors that are forced into homelessness. We were further discouraged to learn that just last week, the City adopted an ordinance barring tents from city property,² doubling down on its commitment to wield the criminal law to attempt to punish people out of poverty—or, at the very least, drive them out of town. In light of these recent developments, we can only anticipate that the impending reopening of the Boulder County Jail to its pre-COVID acceptance of low-level offenders will usher in a renewed era of aggressive enforcement of ordinances targeting Boulder’s unhoused.³

Neither expelling nor criminalizing the unhoused is a viable policy solution to homelessness in Boulder. This letter addresses only two harmful features of Boulder’s current approach: (1) HSBC eligibility criteria that condition access to shelter on six months of prior residency in Boulder County; and (2) the City of Boulder’s enforcement of its camping ban against individuals unable to obtain indoor shelter. The ACLU calls on HSBC and the City of Boulder to abandon these practices, which not only are counterproductive and morally untenable, but, as detailed herein, plainly violate the Constitution.

I. HSBC’s six-month residency requirement for shelter is unconstitutional.

As you know, Homeless Solutions for Boulder County (“HSBC”) is the intergovernmental entity that coordinates services for individuals experiencing homelessness in Boulder County.⁴ Under this regional system, all single unhoused adults must go through a centralized screening process known as Coordinated Entry to receive homelessness services in Boulder.⁵

² Ordinance No. 8470 (2021), codified at B.R.C. § 8-3-21; Shay Castle, *Boulder Bans Tents on All City Land, Allowing Immediate Removal*, Boulder Beat (July 22, 2021), <https://boulderbeat.news/2021/07/22/boulder-tent-ban/>; Deborah Swearingen, *Tents, Propane Tanks Now Prohibited in Boulder’s City Parks and Public Spaces*, Boulder Daily Camera (July 22, 2021), <https://www.dailycamera.com/2021/07/21/tents-propane-tanks-now-prohibited-in-boulders-city-parks-and-public-spaces/>.

³ City officials and staff made clear their frustration that the jail’s temporary closure to low-level offenders during the COVID-19 pandemic “ma[de] enforcement of the camping ban and other offenses associated with encampments difficult to conduct.” City of Boulder City Council Agenda Item 6A, *Maintaining Safe and Welcoming Public Spaces Update* at 7 (Jan. 19, 2021); *see also* Email from Maris Herold, Police Chief, Boulder Police Department, to Kurt Firnhaber, Director, Housing & Human Services (December 16, 2020) (on file with ACLU) (“It is clear, camping tickets do not deter illegal camping. Anyway, I really think the answers will include some type of consequences (courts) and making the environment unpleasant for illegal encampments.”).

⁴ HSBC “includes multiple government entities including Boulder County and the Cities of Boulder and Longmont, the nonprofits working to impact homelessness, and other external partners.” *Homeless Solutions for Boulder County*, Boulder County (last visited July 25, 2021), <https://www.bouldercounty.org/departments/community-services/homeless/>.

⁵ *HSBC Services*, Boulder County (last visited July 15, 2021), <https://www.bouldercounty.org/departments/community-services/homeless/homeless->

Clients who seek to enter shelter in Boulder must meet with “Coordinated Entry and Diversion Specialists” who refer the applicants down 1 of 2 paths: (1) a System Entry Assessment, or (2) Diversion Services. A System Entry Assessment may lead to referral to one of two longer-term shelter programs: Housing-Focused Shelter⁶ or Navigation.⁷ Diversion Services, on the other hand, consist of interventions with a “lighter touch” than shelter—such as mediation with a landlord, or a bus ticket out of town—with the aim of preventing the need for shelter in the first place. While people are generally assessed for these graduated levels of support based on need, the rule is different for people who have been in Boulder County for less than six months at the time they seek services. Official policy is that these clients “will only receive (be eligible for) Diversion Services and will not complete the System Entry screen.”⁸

This policy generally excludes newer Boulder County residents from even the possibility of shelter except in the most severe weather.⁹ Even more perversely, records reviewed by the ACLU reveal that if a person even attempts to seek shelter before they meet the six-month residency requirement, they are screened to Diversion Services and blocked for two years from being rescreened for any other kind of shelter referral. The two-year bar creates an irrational system that rewards those who refrain from seeking shelter and penalizes those who promptly try to access services. And troubling data indicate that people of color, particularly Black and Indigenous people, are disproportionately represented in newer arrivals to Boulder and thus in the number of clients unable to access shelter.¹⁰

The U.S. Supreme Court has repeatedly struck down durational residency requirements for vital government assistance as unconstitutional discrimination against newer residents. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969); *Mem’l*

services/ (“All single homeless adults must go through the Coordinated Entry process to receive services from Boulder County or the cities of Boulder or Longmont.”).

⁶ Housing-Focused Shelter is the most significant level of support offered; participants can stay in shelter with case management support until permanently housed.

⁷ Navigation involves shorter-term shelter stays and case management support designed to quickly resolve a person’s homelessness.

⁸ Boulder County, Request for Proposal for Countywide Coordinated Entry & Diversion Services (October 2019) (on file with ACLU).

⁹ If a person does not qualify for Housing-Focused Shelter or Navigation, they can generally only access shelter through a lottery when certain seasonal or weather triggers make surplus Severe Weather Shelter beds available at Boulder Shelter for the Homeless. Individuals are not permitted to utilize more than 60 nights of severe weather shelter per season (up from 30 nights as of February 12, 2021). *Homelessness: Severe Weather Shelter*, City of Boulder (last visited Feb. 21, 2021),

<https://bouldercolorado.gov/homelessness/homelessness>. When Severe Weather Shelter is not triggered, there may be limited circumstances where Diversion clients can stay at the shelter for up to, but no more than, three nights. Boulder County RFP, *supra* note 8.

¹⁰ Deborah Swearingen, *Homelessness and Housing Services in Boulder Among Many Areas Affected by the Coronavirus Pandemic*, Boulder Daily Camera (May 16, 2021), <https://www.dailycamera.com/2021/05/15/homelessness-and-housing-services-in-boulder-among-many-areas-affected-by-the-coronavirus-pandemic/>.

Hosp. v. Maricopa Cty., 415 U.S. 250 (1974); *Saenz v. Roe*, 526 U.S. 489 (1999). Boulder’s six-month residency requirement for shelter has the same constitutional defects.

There is significant evidence that Boulder’s durational residency requirement was adopted to conserve resources for longtime residents and prevent new unhoused individuals from traveling to, and living in, Boulder. For example, records reviewed by the ACLU indicate that the six-month requirement was adopted based on data showing that the share of HSBC clients who had recently moved to Boulder was on the rise, and was recommended expressly to “focus ongoing sheltering programs on those who have been in Boulder County longer.”¹¹ And at a City Council meeting this year, Kurt Firnhaber, Boulder’s Director of Housing and Human Services, explained the rationale behind the long waiting period for being rescreened: “[P]eople can’t just age into the six months,” because “otherwise we would simply have ... people come to Boulder simply to stay on house [unhoused] to get into a program that has limited capacity.”¹² The U.S. Supreme Court has rejected each of these rationales outright.

Boulder simply cannot constitutionally address homelessness by trying to keep unhoused people out of town. *Shapiro*, 394 U.S. at 631 (“[T]he purpose of deterring the in-migration of indigents . . . is constitutionally impermissible.”). Nor can it constitutionally rely on a durational residency requirement as a solution to the problem of limited resources. *Mem’l Hosp.*, 415 U.S. at 266. We urge HSBC immediately to rescind eligibility criteria that unlawfully condition shelter on six months of prior residency in Boulder County.

II. The City of Boulder’s enforcement of its camping ban against those who cannot obtain indoor shelter is unconstitutional.

Boulder’s camping ban, B.R.C. § 5-6-10, prohibits camping on *any* city property.¹³ Under its definition of what it means to “camp,” the ordinance makes it a crime to sleep outside with shelter as minimal as a blanket or sleeping bag.¹⁴ As a result, there is nowhere in the city for people experiencing homelessness lawfully to survive outside at night. Unsurprisingly, 99% of individuals charged in 2019 with

¹¹ Memorandum from Jennifer Biess, Homeless Services System Manager, Boulder County, to HSBC Executive Board, re: HSBC Year 1 Review Results and Recommendations 6 (March 5, 2019) (on file with ACLU).

¹² City of Boulder City Council Meeting Transcript, Statement of Kurt Firnhaber, Director of Housing & Human Services (Jan. 19, 2021).

¹³ B.R.C. § 5-6-10(a) (banning camping outright “within any park, parkway, recreation area, open space, or other city property”); *id.* § 10(b)(1) (banning camping “within any public property other than city property” without permission of an authorized officer).

¹⁴ *Id.* § 5-6-10(d) (“[C]amp means to reside or dwell temporarily in a place, with shelter, and conduct activities of daily living, such as eating or sleeping, in such place. . . . The term shelter includes, without limitation, any cover or protection from the elements other than clothing.”).

camping in the City of Boulder were unhoused.¹⁵ City staff has acknowledged that “[m]ost of the defendants charged with camping are indigent,”¹⁶ and the City Attorney has admitted that the camping ban “is enforced primarily against people experiencing homelessness.”¹⁷

It is unconstitutional for the City of Boulder to enforce its camping ban against those who cannot obtain shelter indoors. The law on this point is straightforward: “the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.”¹⁸

The City has defended aggressive enforcement of its camping ban by citing the persistence of unused beds at Boulder Shelter for the Homeless,¹⁹ using that data to paint those on the streets as “service resistant” and voluntarily unhoused.²⁰ But the reality is that shelter capacity is woefully inadequate to support the number of people experiencing homeless in Boulder, and empty shelter beds are attributable to policies of exclusion—like the unconstitutional six-month residency requirement—and other limitations that make shelter inaccessible to many.

The unhoused population in Boulder is likely somewhere between 1,400-4,100 people.²¹ Meanwhile, thanks to the elimination of a program that used to account for

¹⁵ *Maintaining Safe and Welcoming Public Spaces*, *supra* note 3, at 26.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 26.

¹⁸ *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 674 (2019); *accord Warren v. Chico*, No. 2:21-CV-00640, 2021 U.S. Dist. LEXIS 128471 (E.D. Cal. July 8, 2021); *McArdle v. City of Ocala*, No. 5:19-cv-461, 2021 U.S. Dist. LEXIS 26849 (M.D. Fla. Feb. 8, 2021); *People v. Wiemold*, 19CV30889 (Larimer Dist. Ct. Feb. 4, 2021); *Phillips v. City of Cincinnati*, 479 F. Supp. 3d 611 (S.D. Ohio Aug. 13, 2020); *Cobine v. City of Eureka*, 250 F. Supp.3d 423 (N.D. Cal. April 25, 2017); *Anderson v. City of Portland*, No. 08-1447-AA, 2009 U.S. Dist. LEXIS 67519 (D. Or. July 31, 2009); *Pottinger v. Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

¹⁹ *See Shelter Utilization Among Persons Experiencing Homelessness in Boulder*, City of Boulder (last updated July 18, 2021), <https://bouldercolorado.gov/shelter-utilization-dashboard>.

²⁰ Shay Castle, *Boulder’s Homelessness Language to Get Critical Look*, Boulder Beat (Jan. 23, 2021), <https://boulderbeat.news/2021/01/23/a-look-at-boulders-language-on-homelessness/>.

²¹ While the last annual Point-in-Time survey (a known underestimate) accounted for 689 people experiencing homelessness in Boulder, *see 2020 PIT Report – Boulder County*, <https://www.mdhi.org/pit>, providers estimate that a local unhoused population is anywhere from two to six times the number captured in a PIT report, Rae Solomon, *Pandemic Disrupts Annual Survey of People Experiencing Homelessness in Denver, Boulder and Beyond*, KUNC (Feb. 4, 2021), <https://www.kunc.org/community/2021-02-04/pandemic-disrupts-annual-survey-of-people-experiencing-homelessness-in-denver-boulder-and-beyond>. For another metric that is almost certainly an undercount, Boulder screened close to 1,200 people for homelessness-related services through Coordinated Entry in 2020 alone.

almost half of the city’s shelter space, the only beds generally available to adults experiencing homelessness in Boulder are those at Boulder Shelter for the Homeless.²² And the Shelter’s typical 160-bed capacity remains limited to 140 beds as a COVID precaution to allow for distancing.²³

But bed space aside, on a given night, many people experiencing homelessness in Boulder are *ineligible* for shelter. As discussed above, an unconstitutional six-month residency requirement not only excludes newer residents from shelter, it also blocks them from becoming eligible for shelter for a full two-years after their first attempt at seeking services. In addition, according to city staff, there are typically about thirty individuals suspended from Boulder Shelter for the Homeless at a given time.²⁴ Finally, other policy restrictions and structural realities at the Shelter exclude people from being able to stay there. For example, a person may exhaust their seasonal allotment of Severe Weather Shelter days or have a mental health diagnosis that is incompatible with crowded congregate settings.

Records reviewed by the ACLU make clear that the Boulder Police Department (“BPD”) unconstitutionally enforces the camping ban without regard to these myriad reasons people experiencing homelessness are excluded from shelter in Boulder. In a March directive, BPD Chief Maris Herold instructed officers to consider certain factors prior to issuing a camping ticket, none of which includes whether the contacted individual could have obtained indoor shelter.²⁵ At least one police report even documents an officer writing a citation while the cited individual was still asleep—guaranteeing that no inquiry about access to shelter was made prior to the officer’s decision to enforce.

Failure even to inquire about shelter availability risks unlawfully punishing individuals who have no choice but to sleep outside—effectively punishing them for being homeless. To avoid this result, the ACLU urges the City immediately to comply with the Constitution and clarify that BPD will not enforce B.R.C. § 5-6-10 against those unable to access shelter indoors.

See Single Adult Homelessness Services System, City of Boulder (last visited July 25, 2021), <https://bouldercolorado.gov/boulder-measures/single-adult-homelessness-system>.

²² *See* Shay Castle, *Boulder Slashing Winter Homeless Sheltering Budget by More Than \$100k*, Boulder Beat (Sept. 19, 2020), <https://boulderbeat.news/2020/09/19/boulder-slashing-homeless-budget-100k/>.

²³ *COVID-19 Response*, Boulder Shelter for the Homeless (last updated July 1, 2021), <https://bouldershelter.org/covid-19-response/>.

²⁴ *Maintaining Safe and Welcoming Public Spaces*, supra note 3, at 3. According to its most recent Management Plan, the Shelter reserves for itself wide latitude in setting the length of suspensions. The Shelter can thus ban a person for a day or for life for even the most minor infraction. *See* City of Boulder City Council Agenda Item 5A, Attachment C, BSH Proposed Management Plan Changes at 19–21 (Sept. 19, 2017).

²⁵ *Directive on Camping Violations*, Memorandum from Maris Herold, Police Chief, BPD, to All Department Members (Mar. 16, 2021) (on file with ACLU).

III. Conclusion

Boulder prides itself for being recognized two years in a row as “the No. 1 place in America to call home.”²⁶ It is our hope that the City and HSBC will recognize that unhoused residents have every right to call Boulder home, too.

I would appreciate receiving confirmation of your receipt of this letter as well as a response from both the City and HSBC within two weeks (by August 12, 2021).

Sincerely,



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²⁶ *City Receives Top Ranking for Second Year in a Row*, City of Boulder (July 13, 2021), <https://bouldercolorado.gov/news/boulder-named-best-place-live-nation-us-news-world-report>.