DISTRICT COURT, BOULDER COUNTY, COLORADO
Boulder County Justice Center
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Boulder, Colorado 80302

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Plaintiffs: 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: CITY OF BOULDER and MARIS HEROLD, Chief of Police for the City of Boulder.

▲ COURT USE ONLY ▲

Case Number: 2022CV30341

Division: 2

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DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendants City of Boulder and Maris Herold, by their attorneys, the Boulder, Colorado City Attorney's Office and Hall & Evans, LLC, pursuant to this Court's Order dated August 9, 2024, hereby respectfully submit this Motion to Dismiss Plaintiffs' Amended Complaint, as follows:

RELEVANT PROCEDURAL HISTORY

Plaintiffs filed their Complaint for Declaratory and Injunctive Relief on May 26, 2022. Plaintiffs' challenged the constitutionality of two of the City of Boulder's municipal ordinances, B.R.C. § 5-6-10 and B.R.C. § 8-3-21(a). Defendants moved to dismiss. On February 23, 2023, this Court issued its Order Re Defendants' Motion to Dismiss Plaintiffs' Complaint granting the Motion respecting Plaintiffs' challenge to B.R.C. § 8-3-21(a), but denying the Motion regarding B.R.C. § 5-6-10 to the extent it asserted a violation of Colo. Const. art. II, § 20.

Plaintiffs' Amended Complaint raising only the challenge to B.R.C. § 5-6-10 was accepted by this Court on October 16, 2023. Based on this Court's Order of February 23, 2023, Defendants answered Plaintiffs' Amended Complaint and this matter proceeded with discovery.

On February 23, 2024, Defendants filed a Motion to Stay Proceedings Pending Decision from the Supreme Court of the United States seeking a stay based on the pending decision in ***City of Grants Pass v. Johnson***. This Court issued its Order Re Defendants' Motion to Stay Proceedings Pending Decision from the Supreme Court of the United States on April 10, 2014, granting Defendants' Motion to Stay.

The Supreme Court of the United States decided ***City of Grants Pass v. Johnson,*** 144 S.Ct. 2202 (2024), on June 28, 2024. On August 9, 2024, a Status Conference was held before this

Court. At the Status Conference, this Court authorized Defendants to file a Motion to Dismiss Plaintiffs' Amended Complaint based on the ***Grants Pass*** decision and set a briefing schedule.

ARGUMENT

I. PLAINTIFFS' REMAINING CLAIM SHOULD BE DISMISSED BASED ON THE *GRANTS PASS* DECISION OF THE SUPREME COURT OF THE UNITED STATES[1]

Plaintiffs' challenge is premised on Colo. Const. art. II, § 20. In its entirety, this provision of the Colorado Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Colo. Const. art. II, § 20. In turn, the Eighth Amendment to the United States Constitution in its entirety provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend VIII. The two provisions are identical.

In ***Grants Pass***, the Supreme Court addressed whether Grants Pass' municipal ordinances restricting encampments on public property violated the Cruel and Unusual Punishments Clause

[1] As discussed during the Status Conference, in this Motion Defendants do not reiterate their previous arguments made in the Motion to Dismiss because of this Court's familiarity with all the arguments and authorities previously presented to this Court. For this Court's reference, the prior briefs from the Defendants consist of the following: (1) Defendants' Motion to Dismiss, June 17, 2022; (2) Reply in Support of Motion to Dismiss, August 12, 2022; (3) Defendants' Supplemental Brief, September 16, 2022; (4) Defendants' Supplemental Reply Brief, October 28, 2022; and (5) Defendants' Opposition to Motion for Partial Judgment on the Pleadings, May 26, 2023. In addition, Defendant believe the following prior Orders of this Court are relevant: (1) Order Re Defendants' Motion to Dismiss Plaintiffs' Complaint, February 23, 2023; (2) Order Re Plaintiffs' Motion for Partial Judgment on the Pleadings, September 14, 2023; and (3) Order Re Defendants' Motion to Stay Proceedings Pending Decision from the Supreme Court of the United States, April 10, 2014

of the Eighth Amendment. ***Grants Pass,*** 144 S.Ct. at 2208. Initially, the Supreme Court outlined the Grants Pass ordinances at issue as follows:

> Like many American cities, Grants Pass has laws restricting camping in public spaces. Three are relevant here. The first prohibits sleeping "on public sidewalks, streets, or alleyways." Grants Pass Municipal Code § 5.61.020(A) (2023); App. to Pet. for Cert. 221a. The second prohibits "[c]amping" on public property. § 5.61.030; App. to Pet. for Cert. 222a (boldface deleted). Camping is defined as "set[ting] up . . . or remain[ing] in or at a campsite," and a "[c]ampsite" is defined as "any place where bedding, sleeping bag[s], or other material used for bedding purposes, or any stove or fire is placed . . . for the purpose of maintaining a temporary place to live." §§ 5.61.010(A)-(B); App. to Pet. for Cert 221a. The third prohibits "[c]amping" and "[o]vernight parking" in the city's parks. §§ 6.46.090(A)-(B); 72 F.4th at 876. Penalties for violating these ordinances escalate stepwise. An initial violation may trigger a fine. §§ 1.36.010(I)-(J). Those who receive multiple citations may be subject to an order barring them from city parks for 30 days. § 6.46.350; App. to Pet. for Cert. 174a. And, in turn, violations of those orders can constitute criminal trespass, punishable by a maximum of 30 days in prison and a $1,250 fine. Ore. Rev. Stat. §§ 164.245, 161.615(3), 161.635(1)(c) (2023).

Id. at 2213.

Next, the Supreme Court analyzed the meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause and determined the Grants Pass ordinances did not violate the Eighth Amendment. In so holding, the Court initially reasoned the Cruel and Unusual Punishments Clause focuses on the type of permissible punishment "a government may impose after a criminal conviction, not on the question whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction for that offense." ***Id.*** at 2216.[2] The Court also concluded the punishments imposed by Grants Pass' ordinance were not cruel or unusual

[2] One federal court cited ***Grants Pass*** for the following proposition: "The Eighth Amendment protection against cruel and unusual punishment can only be invoked by persons convicted of crimes." ***Williams v. City of Sacramento,*** 2024 U.S. Dist. LEXIS 137389, at *6 (E.D. Cal. Aug. 1, 2024).

within the meaning of the Eighth Amendment. ***Id.*** Additionally, the Court rejected the Ninth Circuit's reading of ***Robinson v. California,*** 370 U.S. 660 (1962), and concluded the ordinances did not criminalize status, reasoning as follows:

> Still, no one has asked us to reconsider ***Robinson***. Nor do we see any need to do so today. Whatever its persuasive force as an interpretation of the Eighth Amendment, it cannot sustain the Ninth Circuit's course since ***Martin***. In ***Robinson,*** the Court expressly recognized the "broad power" States enjoy over the substance of their criminal laws, stressing that they may criminalize knowing or intentional drug use even by those suffering from addition. 370 U.S. at 664, 666, 82 S.Ct. 1417, 8 L.Ed.2d 758. The Court held only that a Strate may not criminalize the "status" of being an addict. ***Id.*** at 666, 82 S.Ct. 1417, 8 L.Ed. 2d 758. In criminalizing a mere status, ***Robinson*** stressed, California had taken a historically anomalous approach toward criminal liability. One, in fact, this Court has not encountered since ***Robinson*** itself.
>
> Public camping ordinances like those before us are nothing like the law at issue in ***Robinson***. Rather than criminalize mere status, Grants Pass forbids actions like "occupy[ing] a campsite" on public property "for the purpose of maintaining a temporary place to live" Grants Pass Municipal Code, §§ 5.61.030, 5.61.010; App. to Pet. for Cert. 221a-222a. Under the city's laws, 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 on the lawn of a municipal building. See Part I.C., *supra; Blake v. Grants Pass,* No. 1:18-cv-01823 (D. Ore.), ECF Doc. 63-4, pp. 2, 16; Tr. Of Oral Arg. 159. In that respect, the city's laws parallel those found in countless jurisdictions across the country. See Part I-A, *supra*. And because laws like these do not criminalize mere status, ***Robinson*** is not implicated.

Id. at 2218. Finally, the Supreme Court concluded its Opinion by emphasizing the complexity of homelessness as a societal problem and how it was not a judicial function to create public policy based on any interpretation of the Eighth Amendment. ***Id.*** at 2226.

Plaintiffs' challenge to B.R.C. § 5-6-10 fails under ***Grants Pass***. This provision provides as follows:

> (a) No person shall camp within any park, parkway, recreation area, open space, or other city property.

> (b) No person shall camp within any public property other than city property or any private property without having obtained: (1) Permission of the authorized officer of such property; or (2) Permission of the owner of private property.
>
> (c) This section does not apply to any dwelling in the city, as defined by Section 5-1-1, "Definitions," B.R.C. 1981.
>
> (d) For purposes of this section, ***camp*** 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. But the term does not include napping during the day or picnicking. The term ***shelter*** includes, without limitation, any cover or protection from the elements other than clothing. The phrase ***during the day*** means from one hour after sunrise until sunset, as those terms are defined in Chapter 7-1, "Definitions," B.R.C. 1981. ***Camp*** does not include temporary residence associated with the performance of a governmental service by emergency responders or relief workers during a Disaster Emergency as defined in Section 2-2.5.2, "Definitions," B.R.C. 1981.
>
> (e) Testimony by an agent of the persons specified in Subsection (b) of this section that such agent is the person who grants permission to camp or lodge upon such property, or that in the course of such agent's duties such agent would be aware of permission and that no such permission was given, is prima facie evidence of that fact.

B.R.C. § 5-6-10 (emphases in original). Review of this provision in comparison to the Grants Pass ordinances upheld by the Supreme Court demonstrates this provision is less restrictive than those upheld. Further, violations of this ordinance are punishable by a fine of up to $2650 per violation or incarceration for not more than ninety days in jail, or both. B.R.C. § 5-2-4(a).[3] The Supreme Court concluded similar punishment is not cruel and unusual punishment prohibited by the Eighth Amendment. ***Grants Pass,*** 144 S.Ct. at 2216.

[3] B.R.C. 5-2-4(e) provides that beginning in 2022, the City will increase the maximum fine every January 1 to account for inflation. Notwithstanding that provision, the City has not in fact increased the maximum fine.

The question is then whether this Court should follow the Supreme Court's analysis and holding in ***Grants Pass*** in interpreting Colo. Const. art. II, § 20. Defendants maintain the answer to this question is yes. Importantly, as cited above, the two constitutional provisions are identical. [*See also* Order, 2/23/23, at 15 ("Plaintiffs allege that the Blanket Ban and Tent Ban violate the Colorado Constitution's cruel and unusual punishment clause (art. II, § 20). Its language is identical to the better-known federal counterpart, the Eighth Amendment to the U.S. Constitution."). Based on the identical language used, there is no basis for this Court to not follow ***Grants Pass*** as none of the bases the Colorado Supreme Court has identified for a divergent interpretation of the Colorado Constitution exist.

Most recently in ***Rocky Mt. Gun Owners v. Polis,*** 467 P.3d 314 (2020), the Colorado Supreme Court analyzed how provisions of the Colorado Constitution should be interpreted in relation to provisions of the United States Constitution. The Colorado Supreme Court explained:

> We acknowledge in some contexts, we have borrowed from federal analysis of the U.S. Constitution in construing our own constitutional text, particularly where a party has asserted dual constitutional claims under both a federal provision and its Colorado counterpart. We have leaned on federal analysis primarily where the text of the two provisions is identical or substantially similar, *see, e.g.,* ***Young,*** 814 P.2d at 845 ("Although [U.S. Supreme Court] cases cannot control our decision because the issue is one of Colorado constitutional law, we are attentive to the Supreme Court's reasoning, especially because the text of the cruel and unusual punishment clauses of the two constitutions are the same"), and where consistency between federal and state law has been a goal of our own precedent, *see, e.g.,* ***Nicholls v. People,*** 2017 CO 71, ¶ 19, 396 P.3d 675, 679 (looking to federal Confrontation Clause analysis for guidance where our decisions "evidence[d] a reasoned attempt to 'maintain consistency between Colorado law and federal law" in that area (quoting ***Compan v. People,*** 121 P.3d 876, 886 (Colo. 2005))). That said, even parallel text does not mandate a parallel interpretation. *See, e.g.,* ***People v. McKnight,*** 2019 CO 36, ¶¶ 38-43, 446 P.3d 397, 406-08 (departing from Fourth Amendment jurisprudence to determine a dog sniff was a search under article II, section 7 of the Colorado Constitution where distinctive state-specific factors overcame the provisions' substantially similar wording).

> We have also tended to follow federal jurisprudence where, based on our own independent analysis, we find the U.S. Supreme Court's reasoning to be sound, *see, e.g.,* ***Nicholls,*** ¶ 32, 396 P.3d at 681-82 (following new development in federal Confrontation Clause jurisprudence because "the Supreme Court's reasoning . . . is sound"), and where no party has argued that the Colorado provisions calls for a distinct analysis, *see, e.g.,* ***Garner v. People,*** 2019 CO 19, ¶ 67 n. 8, 436 P.3d 1107, 1120 n. 8 ("We do not separately analyze our state constitutional due process guarantee because [defendant] has not argued that it should be interpreted any more broadly than its federal counterpart."), *cert. denied,* 140 S.Ct. 448, 205 L.Ed.2d 253 (2019).

Id. at 324-25; *see also* ***Curious Theater Co. v. Colo. Dep't of Pub. Health & Env't,*** 220 P.3d 544, 551 (Colo. 2009) ("[W]e have, however, generally declined to construe the state constitution as imposing such greater restrictions in the absence of textual differences or some local circumstance or historical justification for doing so. Simply disagreeing with the United States Supreme Court about the meaning of the same or similar constitutional provisions, even though we may have the power to do so, risks undermining confidence in the judicial process and the objective interpretation of constitutional and legislative enactments").

Application of the Colorado Supreme Court's guideposts for determining when to interpret the Colorado Constitution differently from the United States Constitution demonstrates no legitimate basis to do so here. First, the text of Colo. Const. art. II, § 20 and the Eighth Amendment are identical. Second, no Colorado appellate decision has interpreted Colo. Const. art. II, § 20 inconsistently with the Supreme Court's interpretation of the Eighth Amendment in ***Grants Pass***. Indeed, the Colorado Supreme Court has interpreted the Cruel and Unusual Punishment Clause of Colo. Const. art. II, § 20 consistently with the Eighth Amendment. *See* ***People v. Young,*** 814 P.2d 834, 842-46 (Colo. 1991); ***People v. Shaver,*** 630 P.2d 600, 604-5 (Colo. 1981); ***Normad v. People,*** 440 P.2d 282, 284 (Colo. 1968); ***Walker v. People,*** 248 P.2d 287, 302-3 (Colo. 1952). Other provisions of Colo. Const. art. II, § 20 have also been interpreted consistently with the Eighth

Amendment. *See, e.g,* ***People v. Jones,*** 489 P.2d 596, 599 (Colo. 1971) (interpreting the excessive bail clause of Colo. Const. art. II, § 20 the same as the Eighth Amendment); ***Pueblo Sch. Dist. No. 70 v. Toth,*** 924 P.2d 1094, 1099 (Colo. App. 1996) (interpreting the excessive fines clause of Colo. Const. art. II, § 20 the same as the Eighth Amendment). Third, no local circumstances in Colorado related to municipal regulations of homelessness or otherwise warrant a different interpretation of the Colorado Constitution. Fourth, there are no historical justifications for interpreting Colo. Const. art. II, § 20 differently than the Eighth Amendment in this context. The absence of any of the identified bases to interpret the Colorado Constitution differently demonstrates this Court should follow the Supreme Court's interpretation of the Eighth Amendment in ***Grants Pass***.

Finally, this Court should refrain from interpreting Colo. Const. art. II, § 20 based on Plaintiffs' preferred public policy. The Colorado Supreme Court has deferred to legislators to make public policy fully consistently with the Supreme Court of the United States' recognition in ***Grants Pass*** the judiciary is ill-suited to solve homelessness by judicial fiat. The Colorado Supreme Court has previously recognized it is a "general proposition" that "courts must avoid making decisions that are intrinsically legislative." ***Town of Telluride v. Lot Thirty-Four Venture, L.L.C.,*** 3 P.3d 30, 38 (Colo. 2000). "It is not up to the court to make policy or to weigh policy." ***Id.*** (citing ***Colorado Soc'y of Community & Inst'l Psychologists, Inc. v. Lamm,*** 741 P.2d 707, 712 (Colo. 1987)); ***Labato v. People,*** 218 P.3d 358, 381 (Colo. 2009). Ultimately it is up to legislators to determine Colorado's public policies regarding homelessness, not this Court.

No decision from any court interpreting Colo. Const. art. II, § 20 as not precluding municipal ordinances restricting people from living outside serves to restrict the abilities of either the Colorado General Assembly, a Board of County Commissioners or a City Council from making

their own public policy decisions related to issues involving homelessness. The import of a court decision interpreting Colo. Const. art. II, § 20 only concerns the meaning of the Colorado Constitution, and does not and cannot determine the City of Boulder's public policies concerning homelessness. Ultimately, the City Council of the City of Boulder enacted B.R.C. § 5-6-10 and B.R.C. § 8-3-21(a), and it is up to the City Council, not the Plaintiffs nor this Court, to determine the continued propriety of these provisions as a matter of public policy. This Court must reject Plaintiffs' effort to litigate the public policy of the City of Boulder and the State of Colorado under the guise of their interpretation of Colo. Const. art. II, § 20.

CONCLUSION

In conclusion, for the foregoing reasons, Defendants City of Boulder and Maris Herold respectfully request this Court dismiss the Plaintiffs' Amended Complaint with prejudice, and for all other and further relief as this Court deems just and appropriate.

Dated this 23rd day of August, 2024.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 23rd day of August, 2024, a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** was served via the Colorado Courts E-Filing System to counsel of record appearing herein.

s/ Nicole Marion
Nicole Marion, Legal Assistant
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