DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 6th St. Boulder, CO 80302	
Plaintiffs: FEET FORWARD - PEER SUPPORTIVE SERVICES AND OUTREACH d/b/a FEET FORWARD, a nonprofit corporation; JENNIFER SHURLEY, JORDAN WHITTEN, SHAWN RHOADES, JENNIFER LIVOVICH, and LISA SWEENEY-MIRAN, individuals; v. **Defendants:** CITY OF BOULDER and MARIS HEROLD, Chief of Police for the City of Boulder.	DATE FILED September 6, 2024 10:42 AM FILING ID: 803DE5476F661 CASE NUMBER: 2022CV30341 ▲COURT USE ONLY▲
Attorneys for Plaintiffs: Daniel D. Williams, #38445 Meghan C. Hungate, #38183 Ashlyn L. Hare, #59310 Hutchinson Black and Cook, LLC 921 Walnut Street, Suite 200 Boulder, CO 80302 williams@hbcboulder.com | hungate@hbcboulder.com P: (303) 442-6514 | F: (303) 442-6593 In cooperation with the ACLU Foundation of Colorado Andy McNulty, #50546 NEWMAN | MCNULTY 1490 N. Lafayette Street, Suite 304 Denver, Colorado 80218 andy@newman-mcnulty.com 720-850-5770 In cooperation with the ACLU Foundation of Colorado Timothy R. Macdonald, #29180 Anna I. Kurtz, #51525 Emma Mclean-Riggs, #51307 American Civil Liberties Union Foundation of Colorado 303 E. 17th Ave., Suite 350 Denver, Colorado 80203 tmacdonald@aclu-co.org | akurtz@aclu-co.org | emcleanriggs@aclu-co.org P: (720) 402-3114 | F: (303) 777-1773	Case Number: 2022CV30341 Div: 2

RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

1. **INTRODUCTION**

Over the past several years, the City of Boulder has chosen to drastically cut the daytime and overnight indoor shelter space available to its houseless residents, leaving many with nowhere to go. At the same time, Boulder has allocated millions of taxpayer dollars to enforcing the Blanket Ban, B.R.C. § 5-6-10,[1] against its houseless residents who cover themselves to protect against the elements in public space. Under this scheme, many houseless residents in Boulder are left with the following choices: live under constant threat of police contact, tickets, warrants, jail, and fines; refrain from the prohibited conduct and risk serious injury and death from exposure to outdoor elements; or "get out of Boulder." Accepting the Amended Complaint's factual allegations as true and viewing them in the light most favorable to Plaintiffs (as the Court must do at this stage of the proceedings, *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 11) the Amended Complaint states plausible and serious constitutional deprivations that require this Court's consideration on a fully developed record.

This Court previously held that Plaintiffs' claims under the Cruel and Unusual Punishments clause of the Colorado Constitution, Colo. Const. art. II, § 20, stated a plausible claim for relief because Plaintiffs had adequately alleged in their Complaint that houseless individuals in Boulder were being criminalized by Defendants through enforcement of the Blanket Ban while having an "inability to access indoor shelter on a consistent basis, due in part to the number of available beds and other circumstances[.]" *Feet Forward v. City of Boulder*, 2022CV30341, *Order Re Defendants' Motion To Dismiss Plaintiffs' Complaint,* p. 25 (Boulder Dist. Ct. Feb. 23, 2023) (hereinafter "Order"). It did so based on the Colorado Constitution's cruel and unusual

[1] The Blanket Ban forbids living or sleeping outside while using "any cover or protection from the elements other than clothing." B.R.C. § 5-6-10(d).

punishments clause, not the federal constitution, and specifically cited authority holding that "when interpreting the state constitution, courts need not 'lock in on the moving target of federal jurisprudence'" and "[w]hen interpreting our own constitution, we do not stand on the federal floor, we are in our own house." *Order*, p. 17 (quoting *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶¶ 35-38).

Since this Court's previous decision, there have been no intervening decisions relating to Colo. Const. art. II, § 20 that alter this Court's analysis (and Defendants have not cited to any such decisions). Instead, Defendants posit that the United States Supreme Court's decision in *Grants Pass v. Johnson* should control this Court's analysis. 144 S. Ct. 2202 (2024). However, the *Grants Pass* decision does not interpret or apply Colo. Const. art. II, § 20. It is not binding authority on this Court. And, as this Court noted, "protections afforded by state constitutions often extend beyond those required by the Supreme Court's interpretation of federal law." *Order,* p. 17 (citing *People v. McKnight*, 2019 CO 36, ¶ 38). For the reasons outlined below and contained in Plaintiffs' prior briefing, this Court's previous analysis, which resulted in a holding that Plaintiffs stated a claim under Colo. Const. art. II, § 20 given the houseless Plaintiffs' "inability to access indoor shelter on a consistent basis, due in part to the number of available beds and other circumstances[,]" was logically sound and legally correct under Colorado Supreme Court precedent. *Order,* p. 25.[2]

2. ARGUMENT

2.1 Colo. Const. art. II, § 20 is more protective of Coloradan's rights than the Eighth Amendment and must be interpreted independently based on factors specific to

[2] Like Defendants, Plaintiffs incorporate by reference all of the arguments and authorities cited in their Response in Opposition to Defendants Motion to Dismiss (July 29, 2022), Response To Defendants' Supplemental Brief (October 21, 2022), Motion for Partial Judgement on the Pleadings (April 21, 2023), and Reply in Support of Motion for Partial Judgement on the Pleadings (June 16, 2023).

the state.

"[T]he Colorado Constitution, written to address the concerns of [Colorado's] own citizens and tailored to [Colorado's] unique regional location, is a source of protection for individual rights that is independent of and supplemental to the protections provided by the United States Constitution." *People v. Young,* 814 P.2d 834, 842-43 (Colo. 1991). The Colorado Supreme Court has repeatedly recognized these independent protections and exercised its role in interpreting them accordingly.[3] The existence of federal constitutional provisions essentially the same as those in the Colorado Constitution does not abrogate the Court's responsibility to independently resolve a state constitutional question. *Id.* at 842-43.[4] Indeed, even in cases involving federal constitutional provisions worded the same (or essentially the same) as those in the Colorado Constitution, the Colorado Supreme Court has on several occasions "determined that the Colorado Constitution

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[3] *See, e.g., Rocky Mt. Gun Owners v. Hickenlooper*, 2016 COA 45M; *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1056 (Colo. 2002); *Animas Valley Sand & Gravel v. Bd. of Cty. Comm'rs*, 38 P.3d 59, 70 (Colo. 2001); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59-60 (Colo. 1991); *People v. Ford,* 773 P.2d 1059 (Colo. 1989); *Parrish v. Lamm,* 758 P.2d 1356, 1365 (Colo. 1988); *Conrad v. City & Cnty. of Denver*, 724 P.2d 1309, 1316 (Colo. 1986); *People v. Oates,* 698 P.2d 811 (Colo. 1985); *People v. Seven Thirty-Five East Colfax, Inc.,* 697 P.2d 348, 356 (Colo. 1985); *People v. Sporleder,* 666 P.2d 135 (Colo. 1983); *Charnes v. DiGiacomo,* 612 P.2d 1117 (Colo. 1980); *People v. Paulsen,* 601 P.2d 634 (Colo. 1979); *People v. Berger,* 185 Colo. 85, 521 P.2d 1244 (1974);*People ex rel. Juhan v. Dist. Court for Cty. of Jefferson*, 439 P.2d 741 (Colo. 1968); *In Re Hearings Concerning Canon 35,* 132 Colo. 591, 296 P.2d 465 (1956); *Cooper v. People,* 13 Colo. 337, 22 P. 790 (1889).

[4] *Rocky Mt. Gun Owners v. Hickenlooper*, 2016 COA 45M; *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1056 (Colo. 2002); *Animas Valley Sand & Gravel v. Bd. of Cty. Comm'rs*, 38 P.3d 59, 70 (Colo. 2001); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59-60 (Colo. 1991); *People v. Ford,* 773 P.2d 1059 (Colo. 1989); *Parrish v. Lamm,* 758 P.2d 1356, 1365 (Colo. 1988); *Conrad v. City & Cnty. of Denver*, 724 P.2d 1309, 1316 (Colo. 1986); *People v. Oates,* 698 P.2d 811 (Colo. 1985); *People v. Seven Thirty-Five East Colfax, Inc.,* 697 P.2d 348, 356 (Colo. 1985); *People v. Sporleder,* 666 P.2d 135 (Colo. 1983); *Charnes v. DiGiacomo,* 612 P.2d 1117 (Colo. 1980); *People v. Paulsen,* 601 P.2d 634 (Colo. 1979); *People v. Berger,* 185 Colo. 85, 521 P.2d 1244 (1974);*People ex rel. Juhan v. Dist. Court for Cty. of Jefferson*, 439 P.2d 741 (Colo. 1968); *In Re Hearings Concerning Canon 35,* 132 Colo. 591, 296 P.2d 465 (1956); *Cooper v. People,* 13 Colo. 337, 22 P. 790 (1889).

provides more protection for our citizens than do similarly or identically worded provisions of the United States Constitution." *Id.*

While Colo. Const. art. II, § 20 shares the same text as the Eighth Amendment, it binds a different sovereign and carries its own independent meaning. *McKnight*, 2019 CO 36, ¶ 38. "Highly generalized" provisions are particularly likely to carry different meanings when applied to differently situated sovereigns. *Id*. at ¶ 39. The Colorado Supreme Court has already concluded that even less general provisions than Colo. Const. art. II, § 20, such as Colo. Const. art. II, § 7, are generalized enough that a court should not presume a single meaning over multiple sovereigns. *Id.* at ¶ 39; *People v. Sporleder*, 666 P.2d 135, 140 (Colo. 1983) ("Although Article II, Section 7 of the Colorado Constitution is substantially similar to its federal counterpart, we are not bound by the United States Supreme Court's interpretation of the Fourth Amendment when determining the scope of state constitutional protections."); *Rocky Mt. Gun Owners v. Polis*, 467 P.3d 314, 324 (2020) (holding that "even parallel text does not mandate a parallel interpretation"). "Cruel and unusual punishments" is broad, descriptive, generalized language. Given the array of punishments available to the state and the subjectivity of "cruel and unusual," there is no reason to assume that Colorado courts should be fully aligned with the federal courts on which punishments are unconstitutional.

Independent analysis of state constitutional provisions limiting punishment is not unique to Colorado. State supreme courts across the country have interpreted their state constitutional provisions limiting punishment as having meaning independent of and broader than the Eighth Amendment.[5] Indeed, state courts across the country are examining challenges to criminalization

[5] *See, e.g., State v. Sweet*, 879 N.W.2d 811 (Iowa 2016) (following the "federal analytical framework," but "ultimately [using the Court's] judgment in giving meaning to [Iowa's] prohibition against cruel and unusual punishment," and concluding that the Iowa constitutional

of sheltering outside under state constitutional provisions akin to Colo. Const. art. II, § 20 in the wake of *Grants Pass*. *See* **Exhibit 1**, *Currie v. City of Spokane,* 24-2-03-708-32 (challenging the criminalization of sleeping outside under Washington Constitution Art. II, § 14)*;* **Exhibit 2**, *Kitcheon v. City of Seattle*, 19-2-25729-6 SEA (granting summary judgement and finding municipal rules applicable to City displacement of houseless individuals facially unconstitutional under Washington Constitution Art. II, § 14); **Exhibit 3**, *Duncan v. Portland*, 23-CV-39824 (challenging Portland ordinance criminalizing sleeping outside during daytime hours under Oregon Constitution Art. I, § 16); **Exhibit 4**, *Williams v. Albuquerque*, D-202-CV-202207562 (challenging ordinances criminalizing houseless individuals' presence in public space with their belongings under New Mexico Constitution Art. II, § 13).

Accordingly, Colo. Const. art. II, § 20 has already been interpreted to provide greater protections than the Eighth Amendment in that it requires punishments to be analyzed against additional factors specific to Colorado. The Colorado Supreme Court applies a Colorado-specific framework when analyzing the proportionality of sentences imposed under habitual offender

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provision prohibiting "cruel and unusual punishment" rendered life without parole an unconstitutional sentence for children); *Wilson v. State*, 249 P.3d 28, 29 (Mont. 2010) (reading Montana's constitutional prohibition of "cruel and unusual punishments" in the context of the Montana Constitution to provide greater protection than the federal constitution) *State v. Kelliher*, 381 NC 558 (2022) (holding that the prohibition on "cruel or unusual punishment" in the North Carolina Constitution is broader than the Eighth Amendment, and a minimum 40- year sentence is de facto life without parole); *State v. Comer*, 249 N.J. 359 (2022) (finding a sentence to a minimum of 30 years before parole eligibility was unconstitutional as applied to children under the state constitution); *Commonwealth v. Mattis*, 224 N.E.3d 410 (Mass. 2024) (finding a sentence to life without parole unconstitutional under the state constitution when imposed on people between eighteen and twenty years old); *People v. Parks*, 987 N.W.2d 161 (Mich. 2022) (finding a mandatory sentence to life without parole unconstitutional under the state constitution when imposed on an eighteen year-old); *In re Monschke*, 482 P.3d 276 (Wash. 2021) (holding mandatory life without parole sentences imposed on people between eighteen and twenty years old unconstitutional under the state constitution); *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992).

statutes. Colorado jurisprudence defines "per se grave or serious" crimes and analyzes sentencing proportionality differently when those crimes are implicated; this concept is unknown to federal jurisprudence. *Close v. People*, 48 P.3d 528, 532-33 (Colo. 2002). Additionally, when a Colorado court conducts an individual proportionality review, it must consider "the evolving standards of decency in Colorado;" federal courts do not examine "evolving standards of decency" in individual proportional review at all. *Wells-Yates v. People*, 2019 CO 90M, ¶ 47. Recognizing the broader protections offered to Coloradans by Colo. Const. art. II, § 20, this court should disregard the *Grants Pass* decision and apply the same analysis as in its previous order.

2.2 **Colorado's history as a Western state, where people have always lived outside while sheltering themselves from the elements, demands a different interpretation of Colo. Const. art. II, § 20 from the Eighth Amendment.**

When interpreting the Colorado Constitution, this Court has the responsibility to protect the fundamental rights of its people in accordance with Colorado's own history, tradition, geography, and legal landscape. *See McKnight*, 2019 CO 36, ¶ 40 (finding that the legalization of marijuana use, possession, and growth under certain circumstances was "a local development," suggesting independent interpretation of Colorado's constitutional protection against unlawful searches was proper); *People v. Schafer*, 946 P.2d 938, 942 (Colo. 1997); *see also State v. Wilson*, 2024 WL 466105, at *15 No. SCAP-22-0000561 (Haw. Feb. 7, 2024) (finding that Hawai'i's traditions around deadly weapons, dating back to its precolonization government and immortalized in "the law of the splintered paddle" supported an independent interpretation of its Second Amendment analog). The geographic features, histories, and demographics of Colorado all bear on what Coloradoans would view as cruel and unusual punishment. The Colorado Supreme Court has recognized the relevance of such factors in interpreting Colo. Const. art. II, § 20. In holding that the Colorado death penalty sentencing statute violated Colo. Const. art. II, § 20, the Colorado

Supreme Court noted that the Colorado Constitution was "written to address the concerns of our own citizens and tailored to our unique regional location" and is thus "a source of protection for individual rights that is independent of and supplemental to the protections provided by the United States Constitution." *Young*, 814 P.2d at 843.

Colorado is a Western state, where people have always lived in close proximity with and at the mercy of, the natural elements. Coloradans have been living outside and covering themselves for survival since long before the state existed. Colo. Const. art. II, § 20 protects Coloradans' right to keep themselves alive through protective cover when they are forced to sleep outside.

The Colorado Supreme Court has considered this proud Western history in defining the contours of constitutional protections before. In *People v. Schafer*, the Court considered the historical and present use of tents as habitation in Colorado and the West as a factor in determining that there was a reasonable expectation of privacy in one's tent under the Colorado Constitution. 946 P.2d 938, 942-43 (Colo. 1997) ("Because wind, hail, rain, or snow may strike without warning any day of the year, particularly in the mountains at any altitude, the typical and prudent outdoor habitation in Colorado for overnight or extended stay is the tent."). The history of tent use at public places in Colorado is older than the state itself. "Lewis and Clark, their interpreter Charbonneau, his wife Sacajawea, and their child shared a tent of dressed buffalo skins as they traveled from Fort Mandan to the Rocky Mountains in search of a passage to the Pacific Coast[.]" *Id.* (citing *The Journals of Lewis and Clark*, p. 92 (Bernard DeVoto ed., 1953) (entry of April 7, 1805)). "The twenty-one member expedition of 1820 led by Major Stephen Long up the Platte River to the Continental Divide in Colorado was housed by means of 'three tents, sufficiently large to shelter all our party…from the storm.'" *Id.* (quoting *From Pittsburgh To The Rocky Mountains, Major Stephen Long's Expedition 1819-1820*, pp. 150-151 (Maxine Benson ed., 1988) (journal account

of the Long Expedition compiled by Edwin James, entry of June 1, 1820)). In the late 1800s and early 1900s, Boulder itself was home to a tent encampment called the Chautauqua, full of Texan educational officials establishing a teachers' retreat in the mountains:

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

Given that Coloradoans have a long history of using outdoor shelter to protect themselves

from the elements, history and tradition, in Colorado would find the criminalization of using anything to shelter oneself from the elements (including tents and certainly other coverings like blankets and tarps) as cruel and unusual punishment that is disproportionate to the crime of survival. Further, Colorado's long history of outdoor living, and Coloradoan's tradition of using coverings to protect themselves from the elements, Colorado counsels that Colo. Const. art. II, § 20 should be interpreted differently than the Eighth Amendment. Given this geographic, historical, and traditional backdrop, this Court's previous analysis of Plaintiffs' claims was proper under Colo. Const. art. II, § 20, and Plaintiffs have stated a claim for violation of Colo. Const. art. II, § 20.

2.3 **The Colorado Supreme Court has consistently held that punishing an individual for their status violates the Colorado Constitution.**

The Colorado Supreme Court has repeatedly held that punishing an individual based on their status violates the Colorado Constitution. *See Arnold v. City and County of Denver*, 464 P.2d 515 (Colo. 1970) (holding that Colorado's criminal prohibition on vagrancy constituted cruel and unusual punishment); *People v. Anaya*, 194 Colo. 345, 349 (Colo. 1977) (holding that Colorado's criminal prohibition on loitering constituted cruel and unusual punishment); *see also People v. Giles*, 662 P.2d 1073, 1077 (Colo. 1983) (holding that a conviction was not unconstitutional because "[t]he punishment imposed was for a distinct crime and not, as in *Robinson*, for an illness or infirmity beyond the control of the defendant"); *see also McKnight*, 2019 CO 36, ¶ 57 (refusing to create a "rule that would allow police to randomly search known drug users" because such a rule would result in the criminalization of drug users and "drug users have the same constitutional rights as everyone else"); *People v. Taylor*, 618 P.2d 1127, 1139 (Colo. 1980) (upholding involuntary commitment because "[i]n this case the state has not proposed to punish the respondent because of her alleged illness"); *People v. Feltch*, 174 Colo. 383, 483 P.2d 1335, 1337 (Colo.

1971).[6] In most of these cases, the Court's reasoning directly paralleled that of *Robinson v. California*, which forbade the criminalization of status, rather than conduct, as cruel and unusual. 370 U.S. 660 (1962)

In *Grants Pass*, the Supreme Court of the United States called into question *Robinson* and the idea that the Eighth Amendment's cruel and unusual punishments clause prohibited punishing status. 144 S. Ct. at 2218. In doing so, the Court cited the dissent in *Robinson* and noted that "in the 62 years since *Robinson*" the Court had not cited *Robinson* "as authority to decline the enforcement of any criminal law, leaving the Eighth Amendment instead to perform its traditional function of addressing the punishments that follow a criminal conviction." *Id.* This passage makes explicit the implicit: the Eighth Amendment may only be invoked to address punishments and not to address whether crimes themselves are cruel and unusual. *Id.*

The United States Supreme Court's interpretation of the Eighth Amendment stands in stark contrast to the Colorado Supreme Court's jurisprudence interpreting Colo. Const. art. II, § 20, which has time and again (since *Robinson* was decided in 1962) recognized that status cannot be criminalized, and that Colorado's cruel and unusual punishments clause may be invoked to prohibit the enforcement of unconstitutional status offenses. *See Arnold*, 464 P.2d at 515 (decided in 1970);

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[6] To the extent that Defendants argue this precedent allows for the regulation of "conduct" in line with *Grants Pass*, any such argument fails basic logic. As Justice Sotomayor masterfully outlined in her dissent in *Grants Pass*: under this logic the criminalization of status is constitutionally acceptable "as long as [Boulder] tacks on an essential bodily function – blinking, sleeping, eating, or breathing." *Grants Pass*, 144 S. Ct. at 2236 (Sotomayor, J., dissenting). In other words, following this strained tautology to its logical conclusion would require the conclusion that "although it is cruel and unusual to punish someone for having a common cold, it is not cruel and unusual to punish them for sniffling or coughing because of that cold." *Id.* The logical flaw in this argument is obvious and Plaintiffs ask that this Court not to engage graft the same outcome-driven logical fallacy employed by the majority in *Grants Pass* onto the Colorado precedent cited above.

Anaya, 194 Colo. at 349 (decided in 1977); *Taylor*, 618 P.2d at 1139 (decided in 1980); *Giles*, 662 P.2d at 1077 (decided in 1983); *McKnight*, 2019 CO 36, ¶ 57 (decided in 2019). This Court should decline to allow a single decision that does not interpret Colo. Const. art. II, § 20, or even mention, to persuade it away from following the extensive precedent set by Colorado's Supreme Court.

Instead, this Court should follow the Colorado Supreme Court's undisturbed precedent recognizing that criminalizing an individual's involuntary status violates Colo. Const. art. II, § 20. Punishing houseless individuals for resting or sleeping with a blanket anywhere outside at any time when they have no access to shelter is punishing status and is not the punishment of "conduct" in any meaningful sense of the word—it is akin to punishing the "conduct" of breathing outside. *See Grants Pass*, 144 S. Ct. at 2236 (Sotomayor, J., dissenting). As this Court previously recognized, Plaintiffs have adequately alleged that Boulder is criminalizing their status of being homeless through its continued enforcement of the Blanket Ban despite the fact that Plaintiffs are involuntarily houseless and unable to access shelter on a consistent basis, due to circumstances outside of their control. *Order,* p. 25 (citing *McKnight*, 2019 CO 36, ¶ 38). This Court's prior decision was consistent with the Colorado Supreme Court's longstanding jurisprudence, and this Court should reaffirm its holding.

2.4 ***Grants Pass* did not address whether a significant fine and/or jail sentence is disproportionate punishment for sleeping outside with a covering when a person has nowhere else to go.**

The Supreme Court in *Grants Pass* did "not decide whether the Ordinances violate the Eighth Amendment's Excessive Fines Clause" and, consequently, its decision has no bearing on whether laws like the Blanket Ban, are grossly disproportionate to the gravity of the offense being committed and, therefore, unconstitutional under Colo. Const. art. II, § 20. *Grants Pass*, 144 S. Ct.

at 2242 (Sotomayor, J., dissenting).[7]

Colorado jurisprudence establishes that there are circumstances in which any punishment is unconstitutionally disproportionate under Colo. Const. art. II, § 20. *See Close v. People*, 48 P.3d 528, 532-33 (Colo. 2002) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." (quoting *Robinson*, 370 U.S. at 667)); *see also Wells-Yates*, 2023 COA 120, ¶ 61. What is criminalized by the Blanket Ban has no gravity whatsoever to weigh against any punishment. Like a common cold, homelessness is a condition that is involuntary. And it is difficult to imagine a more blameless offense than resting outside with a blanket to survive the cold when there is nowhere else to go for shelter. The punishment imposed by Defendants on Plaintiffs for being homeless (including serious fines and jail time) is exceptionally harsh for the alleged crime of attempting to exist in Boulder. B.R.C. § 5-2-4 (authorizing a fine of up to $2,650 and 90 days in jail for violation of the Blanket Ban); *see Blake v. City of Grants Pass*, No. 1:18-cv-01823-CL, 2020 U.S. Dist. LEXIS 129494, at *36 (D. Or. July 22, 2020) ("Any fine is excessive if it is imposed on the basis of status and not conduct.").

Further, proportionality analysis under Colo. Const. art. II, § 20 is distinct from federal proportionality analysis. Colo. Const. art. II, § 20 demands an analysis of whether the punishment comports with "the evolving standards of decency in Colorado" and nationwide. *Wells-Yates*, 2019 CO 90M, ¶ 47. By modern standards of decency, in Colorado and nationally, punishing houseless individuals for covering themselves while existing outside when they have nowhere else to go is cruel and unusual. *See City of Grants Pass*, 144 S. Ct. at 2237 (Sotomayor, J., dissenting)

[7] Justice Thomas briefly addressed proportionality in his concurrence. *Grants Pass,* 144 S. Ct. at 2227 (Thomas, J., concurring) ("Modern public opinion is not an appropriate metric for interpreting the Cruel and Unusual Punishments Clause—or any provision of the Constitution for that matter.").

(highlighting the abject cruelty of laws that criminalize homelessness). The "clearest and most reliable objective evidence" of these evolving standards "is the legislation enacted by the country's legislatures." *Wells-Yates*, 2019 CO 90M, ¶ 46. Boulder's Blanket Ban is a draconian outlier among municipalities nationwide. *See* Nat'l L. Ctr. on Homelessness & Poverty, *Housing Not Handcuffs 2019*, at 41 (2019), available at: https://perma.cc/4M8Y-HA4Y (surveying 187 cities and finding that 79 percent do not prohibit sleeping in public citywide). Boulder's Blanket Ban is anonymous among the states as well. There is no statewide law in Colorado equivalent to the Blanket Ban. Only four states have total or near-total bans on sleeping with a blanket on public property statewide and, even in those states, the laws are narrower than the Blanket Ban. *See* N.H. Rev. Stat. § 236:58; Tenn. Code § 39-14-414; Tex. Penal Code § 48.05; *see also* H.B. 1365 (Fla. 2024) (to be codified at Fla. Stat. § 125.0231).[8] The other forty-six states and the District of Columbia do not criminalize houseless individuals existing outside with protection from the elements anywhere in public. Oregon has expressly rejected Boulder's punishment scheme, recently enacting a law intended to "ensure that individuals experiencing homelessness are protected from [city-imposed] fines or arrests for sleeping or camping on public property when there are no other options."19 See Or. Rev. Stat. § 195.530(2).

The gross disproportionality of the Blanket Ban, which was not addressed in *Grants Pass*,

[8] Although the New Hampshire statute has been on the books for decades, there is no case law interpreting it, suggesting it may never be enforced. And by its terms, the statute prohibits "sleep[ing] on the ground … on public property." N.H. Rev. Stat. § 236:58. The Tennessee law provides for the designation of "camping area[s]" and permits prosecution for sleeping on public property only if the person "know[s] that the area on which the camping occurs is not specifically designated for use as a camping area." Tenn. Code § 39-14-414(c), (d)(1). The Texas law directs police officers to "advise the person of an alternative place at which the person may lawfully camp." Tex. Penal Code § 48.05(g)(1). And Florida's new law covers only "[l]odging or residing overnight" and permits local governments to allow public camping in certain circumstances. See Fla. Stat. § 125.0231(1)(b)1, (2).

also renders it unconstitutional under Colo. Const. art. II, § 20.

3. **CONCLUSION**

Ultimately, in nearly every case cited by Defendants where the Colorado Supreme Court followed United States Supreme Court Eighth Amendment precedent: (1) neither of the advocates argued for a different interpretation of the Colorado Constitution from the United States Constitution or (2) even if an advocate did argue that the Colorado Constitution should be interpreted differently from the United States Constitution, the advocate did not propose a different standard for interpreting the Colorado Constitution (or a rational basis for doing so). In contrast, Plaintiffs have identified a long line of precedent from Colorado courts holding that status offenses and disproportionate punishments violate Colo. Const. art. II, § 20. In other words, Defendants' advocated approach would throw away nearly a century of the Colorado Supreme Court's jurisprudence on Colo. Const. art. II, § 20 in favor of following a decision by a United States Supreme Court suffering a legitimacy crisis because it is engaging in outcome-driven decision-making (with the purpose of imposing its own policy preferences on the American people) that completely abandon the principles of stare decisis. *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). This Court should not follow the Roberts Court down this dangerous and destabilizing road. Instead, Plaintiffs ask that this Court respect *stare decisi*s and follow Colorado Supreme Court precedent to hold, as it did previously, that Plaintiffs have stated a claim in this matter.

Respectfully submitted this 6th day of September, 2024.

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CERTIFICATE OF SERVICE

I certify that on this 6th day of September, 2024, I filed the foregoing via the Colorado Courts E-Filing system, which will generate a Notice of Electronic Filing to the following:

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