DISTRICT COURT, BOULDER COUNTY, COLORADO Boulder County Justice Center 1777 6th Street Boulder, Colorado 80302	
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
Attorneys for Defendants: Office of the City Attorney Teresa Taylor Tate, Reg. No. 38594 Luis A. Toro, Reg. No. 22093 Christopher Reynolds, Reg. No. 42282 P.O. Box 791 Boulder, CO 80306 Telephone: (303) 441-3020 Fax: (303) 441-3859 tatet@bouldercolorado.gov torol@bouldercolorado.gov reynoldsc@bouldercolorado.gov Hall & Evans, L.L.C. Andrew D. Ringel, No. 24762 1001 17th Street, Suite 300 Denver, CO 80202 Telephone: (303) 628-3300 Fax: (303) 3368 ringela@hallevans.com	

DEFENDANTS' REPLY BRIEF IN SUPPORT OF 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, hereby respectfully submit this Reply Brief in Support of Motion to Dismiss Plaintiffs' Amended Complaint, as follows:

ARGUMENT

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

Plaintiffs' Response to Defendants' Motion to Dismiss Plaintiffs' Amended Complaint ("Response") offers a series of unconvincing arguments and inapplicable precedent designed to have this Court make public policy for the State of Colorado and the City of Boulder under the guise of an interpretation of Colo. Const. art. II, § 20. State and local legislators decide public policy not this Court. ***Town of Telluride v. Lot Thirty-Four Venture, L.L.C.,*** 3 P.3d 30, 38 (Colo. 2000); ***Labato v. People,*** 218 P.3d 358, 381 (Colo. 2009). Plaintiffs' approach must be rejected.

First, Plaintiffs argue generally the Colorado Constitution is more protective than the United States Constitution. [Response, at 3-7]. This is true in some contexts, but not others. The issue here is whether Colo. Const. art. II, § 20 is more protective in this context, not whether the Colorado Constitution has been interpreted as more protective in other contexts. The proper analysis was laid out by the Colorado Supreme Court in ***Rocky Mt Gun Owners v. Polis,*** 467 P.3d 314, 324-25 (Colo. 2020). [Motion, at 7-9]. Plaintiffs' general discussion does not apply the Supreme Court's analysis for determining when to interpret the Colorado Constitution differently.

Second, Plaintiffs rely on decisions from other courts interpreting the other states' constitutions and complaints filed in other states. [Response, at 5-6 & n. 5]. Yes, other states have interpreted their own constitutions as more protective than the United States Constitution. Nothing

about that unremarkable fact establishes a basis for this Court to interpret Colo. Const. art. II, § 20 differently than the Eighth Amendment in this case.

Third, Plaintiffs offer two Colorado cases supposedly standing for the proposition Colo. Const. art. II, § 20 has been interpreted to provide greater protection than the Eighth Amendment. [Response, at 6-7]. Review of these cases demonstrates Plaintiffs significantly misinterpret them. In ***Close v. People,*** 48 P.3d 528 (Colo. 2002), the Colorado Supreme Court analyzed the Eighth Amendment's requirement for proportionality in sentences. ***Id.*** at 532-40. Nowhere in ***Close*** is Colo. Const. art. II, § 20 mentioned and nothing suggests there is any difference between federal and Colorado law on the proportionality issue. *See, e.g.,* ***id.*** at 538 ("In sum, our precedent establishes the following. We have closely followed the United States Supreme Court in developing our own principles to guide proportionality reviews."). In ***Wells-Yates v. People,*** 2019 CO 90M, the Colorado Supreme Court also addressed the Eighth Amendment's proportionality requirement for sentences. Colo. Const. art. II, § 20 is discussed in ***Wells-Yates,*** but the discussion does not include any analysis of it being more protective than the Eighth Amendment. ***Id.*** at ¶¶ 10-18. Rather, the tenor of the discussion demonstrates an effort to interpret the two constitutional provisions consistently. *See, e.g.,* ***id.*** at ¶ 17 ("We now clarify that, in conformity with federal precedent, Colorado courts conducting an extended proportionality review should compare the sentence at issue to (1) sentences for other crimes in the same jurisdiction and (2) sentences for the same crime in other jurisdictions. To the extent our prior cases have provided contrary instructions, they have done so incorrectly."). Notably, despite Defendants citing multiple cases where both the Cruel and Unusual Punishments Clause and other provisions of Colo. Const. art.

II, § 20 have been interpreted consistently with the Eighth Amendment [Motion, at 8-9], Plaintiffs offer no attempt to distinguish this precedent.

Fourth, Plaintiffs suggest Colorado's history includes people living outside and this history should be used to interpret Colo. Const. art. II, § 20. [Response, at 7-10]. Preliminarily, Plaintiffs' discussion of history are not facts included in the Amended Complaint and Plaintiffs offer no procedural mechanism for them to be considered by this Court in the context of review under C.R.C.P. 12(b)(5). Plaintiffs offer no citation to any Colorado court using history to interpret the meaning of Colo. Const. art. II, § 20. Instead, Plaintiffs invoke the discussion of Colo. Const. art. II, § 7 in ***People v. Schafer,*** 946 P.2d 938 (Colo. 1997), suggesting the Supreme Court found a reasonable expectation of privacy in a tent under Colorado law. [Response, at 8]. Notably, Plaintiffs ignore the reality the Supreme Court in ***Schafer*** interpreted the Fourth Amendment and Colo. Const. art. II, § 7 identically. ***Id.*** at 941 ("We determine under the Fourth Amendment of the United States Constitution and its Colorado counterpart, Colo. art. II, Section 7, that a person camping in Colorado on unimproved and apparently unused land that is not fenced or posted against trespassing, and in the absence of personal notice against trespass, has a reasonable expectation of privacy in a tent used for habitation and personal effects therein."). Nothing in ***Schaefer*** actually supports Plaintiffs' argument the Colorado constitution should be interpreted differently than the United States Constitution.

Fifth, Plaintiffs argue the Colorado Supreme Court has interpreted the Colorado Constitution to preclude punishment based on status. [Response, at 10-11]. Plaintiffs again misinterpret the law. In ***Arnold v. City & Cnty. of Denver,*** 464 P.2d 515 (Colo. 1970), the Supreme Court expressly determined the ordinance at issue involved both status and behavior. *See* ***id.*** at

517 ("It will be observed, however, that the ordinance involves ***behavior*** as well as ***status***."; emphases in original). In ***People v. Anaya,*** 572 P.2d 153 (Colo. 1977), the Supreme Court upheld the sentence. ***Id.*** at 154. Plaintiffs inappropriately cite the dissent. ***Id.*** at 155 (Carrigan, J. dissenting) ("Such a sentence may be so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Article II, Section 20 of the Colorado Constitution.").

Plaintiffs next cite cases following ***Robinson v. California***, 370 U.S. 660 (1962), and its distinction between status and behavior. [Response, at 10-11 (citing ***People v. Gibbs,*** 662 P.2d 1073 (Colo. 1983), ***People v. Taylor,*** 618 P.2d 1127 (Colo. 1980), ***People v. Feltch,*** 483 P.2d 1335 (Colo. 1971), and ***People v. McKnight,*** 446 P.3d at 397 (Colo. 2019)]. Crucially, none of these decisions interprets or applies Colo. Const. art. II, § 20 and none of them suggest the Colorado Constitution should have a different interpretation than the Eighth Amendment. *See* ***Gibbs,*** 662 P.2d at 1077 (interpreting the Eighth Amendment); ***Taylor,*** 618 P.2d at 1139 (unclear whether any specific constitutional provision is being discussed but only discussing decisions from the Supreme Court of the United States); ***Feltch,*** 483 P.2d at 1335-37 (analyzing whether there was probable cause for arrest); ***McKnight,*** 446 P.3d at 412-13 (analyzing whether there was probable cause for a K-9 search). These cases are therefore distinguishable.

Sixth, Plaintiffs criticize the analysis in ***Grants Pass v. Johnson,*** 144 S.Ct. 2202 (2024), of ***Robinson***, suggest it was wrongly decided, and argue this Court should follow the dissent's reasoning. [Response at 11-12 & n. 6]. Again, as discussed above, there is no actual precedent interpreting Colo. Const. art. II, § 20 as making a status vs. behavior distinction or offering any interpretation in of the Colorado Constitution as more protective than the Eighth Amendment

based on the alleged criminalization of status. Plaintiffs are certainly free to vigorously argue ***Grants Pass*** was wrongly decided, but absent any precedent actually supporting Plaintiffs' interpretation of the Colorado Constitution no basis exists for this Court to adopt Plaintiffs' preferred policy outcome. *Compare* ***Lochner v. New York,*** 198 U.S. 45, 75 (1905) (Holmes, J. dissenting) ("This case is decided upon an economic theory which a large majority of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.").

Seventh, Plaintiffs argue ***Grants Pass*** did not address whether a significant fine or a jail sentence is disproportionate punishment for Plaintiffs' actions. [Response, at 12-15]. To begin, Plaintiffs do not actually plead an claim in the Amended Complaint alleging the potential punishments for violations of B.R.C. § 5-6-10 violate Colo. Const. art. II, § 20. The Amended Complaint does not allege any of the individual Plaintiffs have been punished by jail or a fine. [*See* Amended Complaint, ¶¶ 124-137 (Jennifer Shurley); ¶¶ 138-149 (Jordan Whitten); ¶¶ 150-164 (Shawn Rhoades)]. None of the allegations in the First Claim allege any violation of Colo. Const. art. II, § 20 based on any punishment potentially or actually imposed. [*See* Amended Complaint, ¶¶ 169-180]. The relief sought by Plaintiffs does not include any request for relief related to any potential or actual punishment for violation of the ordinance. [*See* Amended Complaint, at 21, Prayer for Relief, ¶ A ("To declare that, as applied to homeless individuals in Boulder when they cannot access indoor shelter, the Blanket Ban, B.R.C. § 5-6-10, amounts to

cruel and unusual punishment prohibited by article II, section 20 of the Colorado Constitution"). Accordingly, this issue is not properly before this Court.

Moreover, it is axiomatic this Court cannot review the constitutionality of a punishment for a crime until someone has actually suffered the punishment. Here, factually, none of the Plaintiffs have been jailed or been fined for any violation of this Boulder ordinance. Absent an actual punishment having occurred, any challenge to the punishment under Colo. Const. art. II, § 20 is simply not ripe. Courts analyzing such issues do so after the punishment has been imposed. *Compare* ***Specht v. People,*** 396 P.2d 838, 839 (Colo. 1964); ***People v. Coolidge,*** 953 P.2d 949, 950 (Colo. App. 1997).

Eighth, and finally, Plaintiffs suggest this Court should not follow ***Grants Pass*** because the Supreme Court of the United States is "suffering a legitimacy crises because it is engaging in outcome-driven decision-maker (with the purpose of imposing its own policy preferences on the American people) that completely abandon the principles of stare decisis." [Response, at 15]. This Court's decision in this case is not about the legitimacy of the Supreme Court of the United States or whether ***Grants Pass*** was correctly decided. Instead, this Court need only decide whether Plaintiffs have provided a legitimate basis to interpret the identical language of Colo. Const. art. II, § 20 differently than the Eighth Amendment as interpreted by ***Grants Pass***. Disagreement with ***Grants Pass*** is not a proper basis for this Court's decision. *See* ***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 statute 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.). Plaintiffs have failed to establish any basis recognized by the Colorado Supreme Court to interpret Colo. Const. art. II, § 20 differently than the Eighth Amendment. Plaintiffs' policy preferences in this area, including Plaintiffs' adamance ***Grants Pass*** was wrongly decided, are properly articulated to state and local legislators and not this Court because policy preference is not and cannot be the basis of any decision by this Court. Indeed, should this Court adopt Plaintiffs' policy preferences it would be doing exactly what Plaintiffs criticize the Supreme Court of the United States for doing.

CONCLUSION

In conclusion, for the foregoing reasons, as well as based on the arguments and authorities in their Motion to Dismiss, 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 20th day of September, 2024.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of September, 2024, a true and correct copy of the foregoing **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** was served via the Colorado Courts E-Filing System to counsel of record appearing herein.

s/ Nicole Marion
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