COLORADO SUPREME COURT 2 East 14th Avenue, 4th Floor Denver, CO 80203 City of Aurora Municipal Court 14999 Alameda Pkwy Aurora, CO 80012 Case Numbers J316178, J317516 Honorable Shelby L. Fyles, Judge	DATE FILED January 13, 2025 5:49 PM FILING ID: 38E36BC5D2365 CASE NUMBER: 2024SA308
In Re: People of the State of Colorado by and through the City of Aurora, v. Danielle Ashley Simons	**▲COURT USE ONLY▲**
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RESPONSE BRIEF PURSUANT TO C.A.R. 21 OF PEOPLE OF THE STATE OF COLORADO, BY AND THROUGH THE CITY OF AURORA

CERTIFICATE OF COMPLIANCE

I hereby certify that the Plaintiff's Response Brief complies with all requirements of C.A.R. 28 and 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

This document complies with the applicable word limits set forth in C.A.R. 28(g). In total, it contains 7,212 words (not to exceed 9,500 words pursuant to C.A.R. 28(g)).

I acknowledge that my document may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 32.

s/ Josh A. Marks
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By and Through the People of the
City of Aurora

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I. STATEMENT OF THE ISSUES

1. Does a rational basis support the General Assembly's, and this Court's, decisions to authorize higher criminal penalties in home rule cities?
2. Should the Court align its equal protection jurisprudence with the majority approach set forth in *United States v. Batchelder*, 442 U.S. 114, 125 (1979)?

II. NATURE OF THE CASE

These consolidated cases are before the Court pursuant to C.A.R. 21.[1] They arise out of criminal prosecutions in Aurora Municipal Court. On November 3, 2023, an Aurora Police Officer initiated Case No. J316178 by charging Ms. Simons with motor vehicle trespass in violation of § 94-83 of the Aurora City Code. *See* Petitioner's Appendix, Ex. C. That case is before this Court as 2024SA308.

On May 5, 2024, an Aurora Police Officer initiated Case No. J317516 by charging Ms. Simons with trespass in violation of § 94-71(a)(6) of the Aurora City Code. *See* Petitioner's Appendix, Ex. E. That case is before this Court as 2024SA309.

[1] The Court entered its Order consolidating Case Nos. 2024SA308 and 2024SA309 for purposes of briefing and oral argument on December 19, 2024.

Ms. Simons filed substantially identical motions to dismiss in each case on preemption and equal protections grounds, asserting that she should be not prosecuted on municipal charges since state trespass statutes provide a lower penalty range. On October 3, 2024, the Municipal Court denied Ms. Simons' motions to dismiss in both cases. The court entered the same Order in both of Ms. Simons' cases. This Court issued Orders to Show Cause in response to the municipal court's rulings on the motions in each case. Ms. Simons has not yet been tried in either matter.

These consolidated cases raise virtually identical issues to those presented in *In re People v. Camp*, 24SA276 ("*Camp*"). Petitioner and her amici have adopted by reference arguments made in that proceeding. In the interests of efficiency for the parties and the Court, Respondent People of the State of Colorado by and through the City of Aurora (hereinafter, "Aurora") does the same, but builds upon that briefing to further address the preemption and equal protection arguments raised by Ms. Simons.

A. Municipal Court Background.

Aurora adopts Westminster's discussion in *Camp* of the constitutional and statutory background pertaining to municipal courts. Aurora also adopts

Westminster's discussion of the interests of home rule municipalities, particularly those with overlapping judicial districts, in the operation of their municipal courts.

The City of Aurora is a home rule municipality straddling Adams, Arapahoe and Douglas Counties, and thus the 17th and 18th Judicial Districts. Section 10-4(a) of Aurora's Home Rule Charter provides for a Municipal Court "vested with exclusive original jurisdiction of all cases arising under the Charter and the ordinances of the City of Aurora." App., Ex. A at 2 (Aurora Home Rule Charter) at § 10-4.[2] The Charter requires each judge of the Municipal Court to be a member of the bench or bar of Colorado for at least five years before appointment. *See id*., § 10-4(b). Section 50-27(a) of Aurora's City Code requires a verbatim record of proceedings. *See* App., Ex. B at 5. The combination of these two provisions qualifies the Aurora Municipal Court as a court of record for purposes of § 13-10-102(3), C.R.S. (2024).

Section 50-26(c) of the City Code makes the Court's territorial jurisdiction, as relevant here, "coextensive with the corporate limits of the City." App., Ex. B at 4. The Aurora Municipal Court has its own judicial performance commission and nine full-time judges. *See id.* at 6 (Aurora City Code § 50-101); App., Ex. C at 22

[2] Appendix cites are to the continuously paginated number in the lower right corner of each page.

(Aurora 2024 Adopted Budget). It also staffs its own Probation Department and operates three treatment courts: one focused on teens, one on mental health, and one on veterans. *See* App., Ex. C at 20, 23. The Probation Department employs eleven people, and handles over 700 cases per year. *See id.* at 21.

In 2024, Aurora budgeted $7,471,269 for administering the Municipal Court and its Probation Department, and for providing court security. *See id.* at 14. In addition, it budgeted $4,505,873 for its nine judges, nine courtroom assistants, five court reporters, and three treatment courts. *See id.* at 22. Aurora's total expenditures to operate the Court accordingly approach $12 million. This figure notably does *not* include the costs of operating the Aurora Detention Center.

It also does not include funding for the City Attorneys who prosecute cases in Municipal Court, or for the Public Defenders provided to those who qualify for indigent counsel. For the latter department, the City's 2024 budget funds 17.5 full-time employees at a budgeted cost of $2,581,458. This includes a Chief Public Defender and eleven attorneys. The Public Defender's Office is overseen by a seven-member Commission whose members are appointed by the City Council. This oversight structure is designed to ensure the Office's independence. *See id.* at

29.[3] According to a budget narrative prepared by the Aurora Public Defender's Office, "Aurora, Colorado has a strong and effective municipal public defense delivery system and a municipal court that promotes the rule of law and protects individual due process rights." *Id.* at 31.

The National Center for State Courts ("NCSC") performed a study of the Aurora Municipal Court from 2023-2024. NCSC averaged case filings over a three-year period, using 2019, 2022 and 2023 as the study years to eliminate impacts from the pandemic. Over this three-year period, Aurora Municipal Court case filings averaged 25,700 per year. This included 18,352 traffic cases; 385 animal-related matters; 1,246 domestic violence criminal cases; 3,365 non-domestic violence criminal cases; 1,728 juvenile delinquency cases, and 156 problem-solving court cases. *See* App. Ex. D (NCSC 2024 Study of Aurora Municipal Court) at 47.

III. SUMMARY OF THE ARGUMENT

Aurora adopts in its entirety Westminster's summary of the argument in *Camp.* The trespass charges at issue in Ms. Simons' cases do not differ materially from the theft charge in Ms. Camp's case. The statutory penalty authorization in

[3] Strong evidence of that independence appears in this Court's *Camp* file, where the Aurora Public Defender filed an amicus brief advanced the same attacks on Aurora's ordinances that Ms. Simons advances here.

§§ 13-10-113(1)(a) and 31-16-101(1)(a), C.R.S. (2024) is the same, and Colorado law has long recognized home rule authority to adopt and enforce trespass ordinances. *See Lehman v. Denver,* 355 P.2d 309, 311 (Colo. 1960). As in *Camp*, this is a basic statutory construction case, not a preemption case. Even if it were, applying preemption analysis to trespass violations in municipal court shows that state law does not preempt prosecution of such claims.

Similarly, a rational basis supports Aurora's ordinances for the all the reasons Westminster explains. Aurora does, in addition, build on Westminster's arguments surrounding this Court's departure from *United States v. Batchelder,* 442 U.S. 114 (1979). Prior to *People v. Lee,* 476 P.3d 351, 354 (Colo. 2020), this Court applied the *Trueblood* rule[4] after conviction and sentence. By advancing *Trueblood* analysis to the moment of charging, *Lee* stimulates criminal defendants to file civil suits under § 13-21-131 against peace officers for the simple act of writing a ticket. Peace officers cannot realistically be expected to predict the outcome of pages-long constitutional analyses in the field. The combination of *Lee* and § 13-21-131—which threatens officers with personal liability and withdraws qualified immunity—accordingly creates an incentive for officers to either undercharge or not charge at all, chilling proper enforcement of the criminal law.

[4] Aurora adopts Westminster's description of the *Trueblood* rule.

This outcome, along with complications created by the Court of Appeals' endorsement of plain error review in *Trueblood* cases, highlights the *Trueblood* rule's incompatibility with basic criminal justice principles. Prosecutorial discretion in charging, like judicial discretion in sentencing, has been a part of American law since the founding. This Court's decisions on prosecutorial discretion in general are consistent with the United States Supreme Court's approach, and acknowledge that criminal statutes are "couched in mandatory terms but not uniformly enforced against every eligible offender." *People v. Gallegos*, 644 P.2d 920, 930 (Colo. 1982).

The *Trueblood* rule has been recognized as not only a departure from that approach, but contradictory to it. *See State v. Williams*, 175 P.3d 1029, 1033 (Utah 2007). While the Court regularly provides many pages of *Trueblood* analysis comparing statutory elements, it has never provided a comparable level of detail explaining how its two lines of prosecutorial discretion authority coexist, much less why the Court has chosen to depart from *Batchelder*.

The Court should take this opportunity to provide that rationale, or align its jurisprudence with the majority of jurisdictions. At a minimum, to address the presumably unintended consequences of *Lee*, the Court should restrict *Trueblood* analysis to the review of final judgments after conviction and sentencing.

IV. ARGUMENT

Aurora's argument in this case rests principally on Westminster's arguments in *Camp*, which Aurora adopts in full. Aurora addresses preemption only briefly. With respect to equal protection, Aurora adopts all of Westminster's arguments, and offers additional discussion relating to problems occasioned by the *Trueblood* rule, and the rule's departure from mainstream jurisprudence.

A. Both the General Assembly and this Court Have Foreclosed Preemption by Authorizing Aurora's Regulation of Trespass.

Aurora adopts Westminster's arguments with respect to the nature of municipal home rule powers and preemption in their entirety. Because these cases deal with municipal ordinances applying penalties that the General Assembly itself has expressly authorized in §§ 13-10-113(1)(a) and 31-16-101(1)(a), they involve no preemption issue at all. All the Court need do is apply basic principles of statutory construction.

1. Standard of Review.

De novo review governs the statutory construction and preemption issues here. *See, e.g.*, *City of Longmont Colo. v. Colorado Oil & Gas Assoc.*, 369 P.3d 573, 578 (Colo. 2016).

2. Ms. Simons Identifies no Statewide Concern to Preempt Aurora from Regulating Trespass.

This case involves no preemption issue at all. The "conflict" between misdemeanor and municipal penalties upon which Ms. Simons relies exists in the General Assembly's own statutes. Ms. Simons does not and cannot argue § 18-1.3-501 preempts §§ 13-10-113 and 31-16-101. Aurora's penalty provision, City Code § 1-13(a), is authorized by, and consistent with, both §§ 13-10-113 and 31-16-101.

She also does not identify any statewide concern to preclude Aurora from regulating trespass. Nor could she, since this Court long ago recognized that home rule municipalities may regulate trespass. *See Lehman v. Denver,* 355 P.2d 309, 311 (Colo. 1960).

In *Camp*, Westminster has covered in detail why S.B. 21-271's legislative history shows no intent to even address, much less preempt, municipal ordinances. It also addressed in detail the wealth of this Court's cases upholding ordinances like the trespass ordinances at issue here. Westminster's analysis applies equally to demonstrate that S.B. 21-271 did not preempt Aurora's ordinances. Aurora adopts that analysis in its entirety.

Aurora agrees that S.B. 21-271's legislative history references eliminating sentencing disparities. Selective reliance on that passage from the legislative history alone, however, ignores that the *mechanism* the General Assembly chose to

address sentencing disparities generally limited itself to misdemeanors. The Colorado Commission on Criminal and Juvenile Justice ("CCJJ") undertook a comprehensive revision of misdemeanor offenses and the sentencing rubric governing them. It made no such effort with respect to municipal offenses or felonies. Instead, as Westminster explained, the CCJJ expressly disclaimed any intent to address municipal offenses. *See* Westminster's *Camp* Appendix, Ex. H at 2 of 2 ("Municipal charges are not addressed in this recommendation").

Hence, the General Assembly left §§ 13-10-113 and 31-16-101 untouched.[5] As Westminster demonstrated, Ms. Camp's and Ms. Simons' selective reliance on S.B. 21-271's legislative history only serves to highlight why the Court can and should resolve this case simply using basic principles of statutory interpretation to harmonize § 18-1.3-501 on the one hand and §§ 13-10-113 and 31-16-101 on the other.

[5] Nor did the CCJJ or the General Assembly provide any specific mechanism to address sentencing disparities based on race. The only mention of race in S.B. 21-271 appears in a revision to § 18-9-111, the harassment statute. Neither this case nor Ms. Camp's case deals with a charge of harassment. Both federal and state constitutional law, of course, already prohibit discrimination based on race. *See, e.g.*, *People v. Graves*, 368 P.3d 317, 329 n.13 (Colo. 2016) (citing *United States v. Armstrong,* 517 U.S. 456, 464–65 (1996). Indeed, any statutory revision would itself have had to demonstrate compliance with those constitutional standards.

B. Recent Revisions to the *Trueblood Rule* Significantly Complicate Enforcement of the Criminal Law.

Aurora also adopts Westminster's *Camp* arguments concerning equal protection in their entirety. Indeed, the clear rational basis supporting Westminster's ordinance applies equally to Aurora's ordinances. Here, as there, Article XX of the Colorado Constitution itself provides a rational basis for differentiating urban crimes from non-urban crimes. And, again as in *Camp*, the increased penalty ranges for trespass in Aurora can be conceivably explained by Aurora's desire to curb motor vehicle theft and to protect against potential burglaries, two issues that are more prevalent in urban areas like Aurora.[6] Geographical classifications have long been constitutionally permissible, as Westminster showed.

Westminster also showed how sixty years of this Court's decisions demonstrate that rational basis review is an integral component of the *Trueblood* rule's equal-protection test. The notion that *Lee* articulates a stand-alone, categorical rule that needn't account for decades of equal protection principles finds no support in *Lee* or any other of this Court's cases.

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[6] The fact that state and municipal courts are treated as part of a unified system for purposes of double jeopardy, *see, e.g.*, *Waller v. Florida*, 397 U.S. 387, 395-96 (1970) does not alter the rational basis analysis under equal protection principles.

Lee itself cites *Dean v. People*, 366 P.3d 593 (Colo. 2016), which discusses the rational basis foundations of the *Trueblood* rule in detail. Indeed, the Court recently cited these two cases in the same breath while once again reaffirming that rational basis review applies. In *Plemmons v. People*, the Court wrote:

> [W]e are mindful that although "Colorado's guarantee of equal protection is violated where two criminal statutes proscribe identical conduct, yet one punishes that conduct more harshly," *People v. Lee,* 2020 CO 81, ¶ 14, 476 P.3d 351, 354 (quoting *Dean v. People,* 2016 CO 14, ¶ 14, 366 P.3d 593, 597), "equal protection is not violated so long as the legislative classification is not arbitrary or unreasonable, and the differences in the provisions bear a reasonable relationship to the public policy to be achieved," *Dean*, ¶ 16, 366 P.3d at 598.

517 P.3d 1210, 1217 (Colo. 2022).

Thus, neither *Lee* nor any other *Trueblood* case articulates a categorical rule divorced from rational basis review. The Court should decline Ms. Camp's and Ms. Simons' invitation to read these basic doctrinal foundations out of the *Trueblood* rule.

To the contrary, their and other litigants' perception that the *Trueblood* rule is a stand-alone, categorical constitutional rule highlights why the Court should take this opportunity to clarify the doctrine. Aurora therefore asks the Court to align its equal protection jurisprudence with: (1) its own caselaw governing prosecutorial discretion; and (2) the majority rule rejecting *Trueblood* analysis as "unnecessary" and "unsatisfying."

1. Standard of Review.

Judicial review of statutes for compliance with the Constitution presents an issue of law. *De novo* review applies. *See Dean*, 366 P.3d at 596.

2. The Trueblood Rule and § 13-21-131.

Extending the *Trueblood* Equal Protection rule to pre-conviction activity, combined with civil liability under the Law Enforcement Integrity Act, places peace officers in a complex predicament: having to predict, in the field, when the *Trueblood* rule applies. Ultimately, as discussed below, this creates a perverse disincentive for police *not* to charge criminals, even where obvious probable cause exists.

Prior to *Lee*, the Court concluded that "a person is denied equal protection when two criminal statutes proscribe different penalties for identical conduct and a person is *convicted and sentenced* under the statute" with the harsher penalty. *Campbell v. People*, 73 P.3d 11, 13 (Colo. 2003) (emphasis added); *see also, e.g.*, *People v. Stewart*, 55 P.3d 107, 114 (Colo. 2002) (noting rule applies when someone is "convicted"); *People v. Richardson*, 983 P.2d 5, 7 (Colo. 1999) ("convicted"); *People v. Romero*, 746 P.2d 534, 536 (Colo. 1987) ("convicted and sentenced"). Undertaking *Trueblood* review post-sentencing avoided hypothetical

conflicts that might never ripen were a defendant: (a) acquitted, or (b) sentenced within the authorized range of both overlapping statutes.

Lee, however, advanced the timing of *Trueblood* review to the moment of charging: "under prevailing Colorado equal protection principles, a defendant may not be charged" with the statute carrying higher penalties; instead, "the defendant must be charged under" the statute with lower authorized penalties. 476 P.3d at 353.

Lee has stimulated criminal defendants to combine this "charging" version of the *Trueblood* rule with § 13-21-131, C.R.S. (2024) to sue law enforcement officers for damages arising out of the mere decision to ticket criminal activity.[7] As a result, peace officers may face damages for performing a basic function: charging, based on probable cause, violations of criminal statutes enacted by the General Assembly or municipalities.[8]

In the federal system, qualified immunity shields officers who fail to accurately predict the outcome of unsettled constitutional disputes from risks of civil liability. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Section 13-21-131(2), however, expressly withdraws both statutory and qualified immunity

[7] *See Lozano v. City of Westminster et al.*, Adams County District Court Case No. 2024CV31572.

[8] Aurora does not concede such civil claims are valid.

from peace officers defending claims under the Colorado Constitution. It also provides for personal liability up to $25,000 if a peace officer's employer determines that the officer did not act upon a good faith and reasonable belief that an action was lawful. *See* § 13-21-131(4)(a).

The combination of the *Trueblood* rule's distinctive approach to constitutional adjudication and § 13-21-131's immunity-stripped approach to civil rights litigation leads to an interesting outcome. According to criminal defendants, peace officers in the field must conduct, at their peril, an element-by-element comparison of all potentially-applicable statutes or ordinances before charging someone with a crime.

The *Trueblood* rule's element-by-element comparison tends to be intricate, and typically consumes pages of published judicial opinions. *See, e.g., Lee*, 476 P.3d at 355-58*; Stewart,* 55 P.3d at 115-116; *People v. Jefferson and Savage,* 748 P.2d 1223, 1231-33 (Colo. 1988). The Utah Supreme Court, before abandoning the doctrine in most circumstances, described it as requiring "an exquisitely detailed dissection" of statutory language to determine whether any elemental difference exists. *Williams*, 175 P.3d at 1033.

Add to this complexity the potential for sentencing enhancements under specific circumstances, and a peace officer's ability to discern whether an equal

protection problem exists may require hours—if not days—of analysis: a far cry from the few minutes historically associated with issuing a citation. The legal complexity inherent in analyzing whether a *Trueblood* problem exists may not yield any clear conclusions for peace officers, and may distract the officer from grappling with whether probable cause supports a charging decision.

Uncertain of their ability to accurately predict the outcome of this involved legal exercise, and potentially facing personal liability in the tens of thousands of dollars if they get it wrong, peace officers now have an incentive to select the lowest-level offense governing any specific fact pattern. Or, perhaps, take the safest route: not charge at all.

The Court can, to be sure, determine that the General Assembly possesses the power to change this state of affairs should it wish by altering § 13-21-131. The Court should also, however, recognize how its own distinctive approach to constitutional interpretation contributes to this outcome. Before turning to that discussion, however, Aurora highlights another notable feature of contemporary *Trueblood* jurisprudence.

3. Plain Error Review in Trueblood Cases.

As just noted, *Trueblood* analysis typically consumes several pages of element-by-element comparison between two statutes. And, of course, to engage

in this analysis one must necessarily be aware of which statutes arguably overlap. The challenge this poses does not end with peace officers. In *People v. Dominguez*, 551 P.3d 1205, 1208 (Colo. App. 2024), *cert. granted,* 2024 WL 5229031, the Court of Appeals reversed the defendant's conviction on *Trueblood* grounds after applying a plain error standard of review.

Applying plain error review to the *Trueblood* rule as formulated in *Lee* would appear to obligate trial courts to, *sua sponte*: (a) independently scrutinize the charges in each criminal case filed in their division; (b) identify any potentially-overlapping statutes; and (c) conduct a *Trueblood* analysis to ensure no equal protection problems exist. Since plain error review applies, and since *Lee* requires *Trueblood* analysis at the time of charging, trial courts presumably must undertake this analysis when prosecutors file charges, and presumably should make findings for the record. Otherwise, the *Trueblood* rule may void any conviction.

Trial courts are certainly better suited to conduct *Trueblood* analyses than peace officers. But trial courts, prosecutors and public defenders are notoriously busy. *Trueblood* analysis is time consuming and likely to require independent research. And, of course, when plain error review applies, the defense need not even bring the issue to the trial court's attention to preserve it, so the trial court will

often lack the guidance typical of the adversary process, placing additional burdens on the trial court to be independently thorough.

Given these realities and the already heavy demands placed on those handling criminal dockets, the Court should be unsurprised if this state of affairs results in a significant increase in the number of criminal appeals, and in the number of convictions being reversed on *Trueblood* grounds.

C. The *Trueblood* Rule's Departure from General Principles of Prosecutorial Discretion.

As discussed herein—and as the Court itself has recognized—the *Trueblood* rule's departure from established equal protection principles places Colorado in a small minority of jurisdictions. This is all the more surprising given Colorado's general approach to prosecutorial discretion. Considering the guard rails currently built into prosecutorial discretion and the significant legal trend of abandoning similar equal protection rules, the need for continuing the *Trueblood* line of authority should be re-examined.

1. Prosecutorial Discretion Basics.

Prosecutorial discretion over charging—like judicial discretion over sentencing—has been a feature of American jurisprudence since "the very beginnings of the Republic." Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1422 (2008).

"Enforcement, of course, is *always* selective; for all sorts of reasons, the system does not, cannot and will not enforce the norms in any total way. Un-enforcement is as vital a part of the story as enforcement." Lawrence M. Friedman, *Crime and Punishment in American History* at 5 (Harper Collins 1993) (emphasis in original); *see also, e.g.,* W. Robert Thomas, *Does the State Have an Obligation Not to Enforce the Law*, 101 Wash. U. L. Rev. 1883, 1906-09 (2024) (describing how discretionary enforcement of a broad criminal code is preferable to absolute enforcement of a narrow code); Stephanos Bibas*, The Need for Prosecutorial Discretion*, 10 Temple Pol. & Civ. Rights L. Rev. 369, 370-71 (2010) (describing how discretionary enforcement humanizes the criminal justice system).

Prosecutors, of course, do not enact statutes or compile criminal codes. That power resides solely with the legislature. And the history of legislation is a history of imperfect foresight. Legislatures simply cannot predict how human ingenuity will innovate to thwart or evade legislative intent. To compensate, legislation tends to be broad. Courts have long acknowledged this reality. *See, e.g.*, *Lloyd A. Fry Roofing Co. v. State of Colorado Department of Health Air Pollution Variance Board*, 499 P.2d 1176, 1179 (Colo. 1972) ("It is impossible for the legislature to be absolutely precise in all fields in which it enters.")

Prosecutorial discretion is the discretion *not* to charge. Along with judicial sentencing discretion, it permits the criminal justice system to take account of the individual needs of offenders in a system characterized by broad statutory terms. *See, e.g.*, *Bibas, supra,* at 370-71. There is nothing particularly new about this understanding. *See, e.g.*, Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1101–02 (1952) (noting that prosecutorial discretion ameliorates "harsh or anarchical penalty provisions" on "a large though incalculable scale."); *see also, e.g.*, *U.S. v. Butler*, 485 F.3d 569, 576 n.7 (10th Cir. 2007) (noting that in "a global view of the criminal justice process" both prosecutorial discretion over charging and judicial discretion over sentencing act as "safety valves"); *U.S. v. Mishoe*, 241 F.3d 214, 220-21 (2d Cir. 2001) (noting that Congress legislates "in contemplation of both a criminal justice system that appropriately accords substantial discretion to prosecutors in determining what charges to initiate . . . and the limited discretion of sentencing judges to ameliorate unduly harsh punishments."); *State v. Pal*, 374 Wis. 2d 759, 777 (Wis. 2017) (noting that criminal justice outcomes are "subject to both prosecutorial charging discretion and judicial sentencing discretion.")

Courts have long concluded separation-of-powers principles permit: (1) legislatures to enact broad criminal statutes; and (2) prosecutors to exercise

broad discretion in implementing them. The law in this regard is sufficiently settled that even commentators have largely abandoned efforts to change it. Colorado's general doctrine on prosecutorial discretion tracks principles recognized by the United States Supreme Court and broadly accepted across the United States.

2. Prosecutorial Discretion in the Courts.

The law governing prosecutorial discretion has been well-settled for decades. As this Court recognized in *People v. Gallegos*, 644 P.2d 920, 930 (Colo. 1982) criminal statutes are "couched in mandatory terms but not uniformly enforced against every eligible offender." Instead, in "our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury generally rests entirely in his discretion." *Id.* (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)); *see also People v. Storlie,* 327 P.3d 243, 246 (Colo. 2014) (noting "the separation of powers principle that the role of prosecuting crimes belongs to the district attorney as a member of the executive branch, and that the district attorney enjoys broad discretion in the exercise of this authority."); *People v. Weiss*, 133 P.3d 1180, 1189 (Colo. 2006) ("Prosecutorial discretion to bring or not bring charges is extraordinarily wide.")

"This broad discretionary power is justified by the need to preserve flexibility and freedom of action." *Gallegos*, 644 P.2d at 930 (citing *Breitel, Control in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427, 428, 435 (1960)). "The need for flexibility is uniquely present in criminal prosecutions in light of the numerous factors affecting the decision whether to prosecute and the limited resources available for administering criminal justice." *Id.* Thus, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* (quoting *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962)).

In Colorado, the General Assembly has also legislatively granted broad prosecutorial discretion in § 18-1-408(7), C.R.S. (2024). The legislature does, however, permit courts to override decisions not to prosecute when a prosecuting attorney's refusal to charge altogether is arbitrary or capricious. *See* § 16-5-209, C.R.S. (2024).

As *Gallegos*'s repeated cites to federal authority demonstrate, a similar deference to prosecutorial discretion exists in the federal system. As the Court held in *Wayte v. United States*, broad prosecutorial discretion:

> [R]ests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

470 U.S. 598, 607-8 (1985). Still, such discretion is not "unfettered," because "[s]electivity in the enforcement of criminal laws" may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights. *Id.* at 608 (citing, *inter alia*, *United States* v. *Batchelder*, 442 U.S. 114, 125 (1979)).

More recent federal decisions confirm the broad deference historically afforded to prosecutorial discretion remains unchanged. *See, e.g.*, *United States v. Texas*, 143 S. Ct. 1964, 1972 (2023) (engaging in lengthy discussion of separation-of-powers issues underlying prosecutorial discretion, holding that "in light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising

arrest and prosecution policies," and concluding that this "complicated balancing process in turn leaves courts without meaningful standards for assessing those policies."); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("A selective-prosecution claim asks a court to exercise judicial power over a special province of the Executive.")

This Court has applied these broad principles of prosecutorial discretion in the past to recognize prosecutorial authority to, among other things: (1) charge or not charge habitual criminal counts, *see Gallegos*, 644 P.2d at 930; and (2) charge or not charge an offense as a crime of violence, *see Smith v. People*, 852 P.2d 420, 423 (Colo. 1993).

3. The Trueblood Rule as an Outlier.

This Court has long acknowledged that *Trueblood* analysis departs from the general rule followed by the United States Supreme Court and the majority of jurisdictions. *See, e.g., Lee*, 476 P.3d at 354 (noting departure from *Batchelder*); *id.* at 359 (Samour, J., dissenting) (noting majority of jurisdictions reject *Trueblood* approach). The Court in *Lee* found it unnecessary to address this discrepancy because the parties had not asked it to do so. *See id.* at 354. Similarly, in both this case and Ms. Camp's case against Westminster, a rational basis exists to sustain the

challenged ordinances under any equal protection standard. The Court can easily uphold Aurora's ordinances on the grounds Westminster describes.

Still, given the consequences set forth above, Aurora urges the Court to adopt the general approach set forth in *Batchelder* as an alternative basis to affirm the municipal court's ruling below.

a. *Batchelder's Unremarkable Holding.*

When viewed through the prism of the various Colorado and federal authorities discussed above, *Batchelder* is an unremarkable application of general standards recognized well before. *See, e.g.*, *Gallegos*, 644 P.2d at 930 (quoting *Oyler*, 368 U.S. at 456) ("the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.")

Justice Thurgood Marshall authored *Batchelder* for a unanimous Court. The case involved two gun-control statutes with substantially identical elements as applied to convicted felons like the defendant. One authorized a five-year sentence, the other only two years. The Court concluded that both statutes "unambiguously specify the activity proscribed and the penalties available upon conviction," and thus satisfied due process notice requirements. 442 U.S. at 123.

"That this particular conduct may violate both Titles," the Court held, "does not detract from the notice afforded by each." *Id.* And "[a]lthough the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments." *Id.*

Citing a long line of cases including *Bordenkircher*, the Court held that it "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants," *id.* at 123-24, and that "[w]hether to prosecute and what charge to file" are decisions that generally rest in the prosecutor's discretion. *Id.* at 124.

The fact that the statutes at issue there had identical elements did not leave prosecutors with "unfettered" discretion, because "[t]he Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* at 125 n.9 (quoting *Oyler*, 368 U.S. at 456). Nor did it permit the prosecution to predetermine the ultimate criminal sanction, as the sentencing judge would retain discretion to impose the final penalty. *See id.* at 125.

With respect to the prosecutor's discretion to choose between the two charges, the Court held:

> [T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.

Id.

b. The *Trueblood* Rule's Remarkable Departure.

The Court described the *Trueblood* rule's purpose in *Campbell*: "[o]ur equal protection jurisprudence under Colorado law prohibits the General Assembly from providing the prosecution with complete unrestrained discretion in the charging decision." 73 P.3d at 14. As the discussion above shows, however, prosecutors never have "unrestrained" or "unfettered" charging discretion under either

Colorado or federal constitutional law. *See Gallegos*, 644 P.2d at 930; *Wayte*, 470 U.S. at 608 (citing *Batchelder*, 442 U.S. at 125).[9]

Moreover, the restraints do not end with the federal and state constitutions. Both § 18-1-408 and § 16-5-209 impose statutory restraints on prosecutorial discretion, as does Crim. P. 48(a). And, of course, prosecutors are subject to disciplinary action pursuant to the Rules of Professional Conduct. *See, e.g., People v. Stanley*, 559 P.3d 697 (Colo. 2024) (recognizing broad prosecutorial discretion, but applying rules of professional conduct and ABA standards to uphold sanction of disbarment against prosecutor).

The *Trueblood* rule accordingly appears to rest on a questionable premise. The Supreme Court of Utah in *Williams* acknowledged this when discussing the tension between its own versions of *Gallegos* and *Trueblood*. As the court wrote

[9] Nor do law enforcement officers. *See, e.g.*, *People v. McClain*, 149 P.3d 787, 791 n.5 (Colo. 2007) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)) ("Selective enforcement of the law based on racial considerations is, of course, constitutionally unacceptable under the Equal Protection Clause.") Indeed, as discussed above, law enforcement officers may be answerable for such acts under 42 U.S.C. § 1983 and § 31-21-131. And, of course, it is prosecutors who ultimately exercise discretion over criminal cases, not law enforcement officers. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 263 (2006) (holding that prosecutorial discretion acts as an intervening cause superseding law enforcement decisions surrounding case filing).

there, reconciling the doctrines embodied in *Gallegos* on the one hand and *Trueblood* on the other:

> [M]ight not be of concern if they offered different solutions to different problems, but they do not. Instead, they present two discrete and contradictory ways to solve the same legal problem. That problem exists because the efforts of legislatures to define criminal conduct and to prescribe the sanctions for those crimes have yielded laws that overlap one another and provide disparate penalties for the same offenses.

Williams, 175 P.3d at 1032. As observed above, the *Williams* court summarized a recent analysis involving its *Trueblood* rule[10] as requiring "an exquisitely detailed dissection of the plain language of two statutes" to determine whether there was an elemental difference between them. *Id.* at 1033. Both statutes involved homicide; the court's previous decision distinguished them as "completely dissimilar" on the basis that one statute required a showing of "harm," while the other required a showing of "serious harm." The court observed that this exercise:

> [F]orced us to be more strenuous in our parsing of relevant statutes than we would have preferred. It likely overstates the case to label as "completely dissimilar" a distinction between "serious physical injury" and "physical injury" in the statutory formulation of two crimes in which the person upon whom the injury, serious or otherwise, is inflicted dies. We saw these exertions through to the end, however, because the *Shondel* doctrine demanded it. The result our efforts yielded, though defensible, was not particularly satisfying.

Williams, 175 P.3d at 1033-34.

[10] Known as the *Shondel* doctrine.

This polite critique reveals how, despite the *Trueblood* rule's formalism, courts may struggle to reach outcomes driven more by the facts of the case than by the consistent application of doctrinal principles. As Westminster observed in the *Camp* case, reconciling *Campbell* and *People v. McKenzie*, 458 P.2d 232, 234 (Colo. 1969) on the one hand with cases like *Lee* and *People v. Marcy*, 628 P.2d 69, 74 n.5 (Colo. 1981) on the other is not an altogether easy task. The former find elemental differences sufficient even when the underlying behavior is admittedly indistinguishable. The latter disregard elemental differences and closely scrutinize whether statutes operationally overlap to declare statutes unconstitutional.

Law professors prone to critiquing judicial opinions on grounds that "bad facts make bad law" might reasonably contend that the Court's decisions in these two classes of cases rested more on the respective stakes for the public and the defendants than on the consistent application of constitutional principles.

Moreover, it is difficult to perceive a meaningful difference between the discretion a prosecutor exercises when deciding, for example, to charge a habitual criminal count from the discretion exercised to charge an overlapping crime. The *Trueblood* rule appears to rest on concerns that overlapping charges permit prosecutors to selectively prosecute individuals who commit the same offenses differently based solely on an assessment of their individual characteristics. But

that, of course, is precisely what the habitual statute authorizes, with particularly devastating consequences for defendants facing habitual counts.

While the *Trueblood* rule may provide a formalistic distinction between the two analyses, it remains the case that in both instances the underlying concern appears to be with differentially prosecuting people based on their individual characteristics. *See, e.g.*, *Williams*, 175 P.3d at 1032 (noting that *Gallegos* and *Trueblood* analyses are distinct and contradictory approaches to the same problem).

And while the habitual context may provide the starkest example, the reality remains that individualized differentiation in prosecution is broadly necessary to the proper functioning of the criminal justice system. *See Gallegos*, 644 P.2d at 930 (noting criminal statutes are "couched in mandatory terms but not uniformly enforced against every eligible offender.").[11] As a consequence, most courts now recognize *Batchelder*'s reasoning is consistent with America's basic criminal justice framework, while *Trueblood* review is not. *See, e.g.*, *State v. Rooney*, 19 A.3d 92, 102 (Vt. 2011) (noting that majority of courts follow *Batchelder* and that

[11] The same, of course, is true of individualized differentiation in sentencing, where the pre-sentence investigation process provides sentencing judges with individualized background and recommendations. *See, e.g.*, *Hernandez v. People,* 176 P.3d 746, 753 (Colo. 2008) (noting broad trial court discretion to take account of individualized characteristics during sentencing, and holding that legislature can restrict that discretion should it so choose).

states like Colorado struggle "unnecessarily from a constitutional standpoint" with identicality of elements and degrees of punishment); *Davis v. Mun. Ct.,* 757 P.2d 11, 26 (Cal. 1988) (applying *Batchelder* to uphold a wobbler statute that permitted prosecutor to charge it as either a misdemeanor or a felony); *State v. Pickering*, 462 A.2d 1151, 1161 (Me. 1983) (collecting cases).

Apart from *Campbell*'s statement that the *Trueblood* rule's purpose is barring "complete unrestrained discretion" in the charging decision, the Court has rarely explained the reasoning underlying the *Trueblood* rule in any significant detail. In *Marcy*, the Court distinguished *Batchelder* in a lengthy footnote stating that the murder charges at issue in that case impacted "to a much greater extent the major features of the criminal justice system." *See* 628 P.2d at 74 n.5. The Court also explained how the significant gulf in potential sentencing exposure between first- and second-degree murder contributed to the analysis. *See id.*

Leaving to the side that the very same concerns surrounding widely disparate penalties exist in the habitual context, only one year after *Marcy* the Court applied the *Trueblood* rule in a case involving neither of these factors: *People v. Mumaugh*, 644 P.2d 299, 301 (Colo. 1982). *Mumaugh* found a *Trueblood* rule violation based on the differences between Class 1 and Class 2 traffic infractions. It cannot be seriously argued that the different sentencing

ranges at issue there exceeded those in *Batchelder*, or even approached those at issue in *Marcy.* The Court in *Mumaugh* did not explain why or how *Marcy*'s rationale could extend to the facts in that case. In fact, it did not cite *Marcy* or *Batchelder* at all. And while numerous decisions since have noted Colorado's departure from *Batchelder,* none attempts to explain or justify that departure in any more detail than *Marcy.*

4. The Court Should Abandon, or at a Minimum Limit and Explain, the Trueblood Rule.

At present, therefore, it remains largely unknown why *Trueblood* analysis is sufficiently important to justify the departure from federal constitutional standards and Colorado's broad rules of prosecutorial discretion set forth in *Gallegos, Storlie* and *Weiss*. Although the Court routinely provides multiple pages of element-by-element comparisons in *Trueblood* cases, it has never provided a comparably detailed explanation of the actual purposes behind the rule.

In Aurora's view, the foregoing discussion makes clear that the time has come for the Court to abandon the *Trueblood* rule altogether.[12] Should the Court choose to maintain the rule, it should at least take this opportunity to clarify what purposes the rule serves, and how it coexists with Colorado's general approach to prosecutorial discretion.

At a minimum, the Court should make clear that the *Trueblood* analysis applies only to those convicted and sentenced of crimes subject to the rule—and not to the mere act of charging. Clarifying this question will eliminate the most imminent threats to the proper enforcement of the criminal law posed by the rule's interaction with § 13-21-131 and plain error review.

V. CONCLUSION

The Court should discharge the Orders to Show Cause. Aurora respectfully requests oral argument.

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[12] Aurora questions whether the Court requires much argument from parties when it comes to the test for overruling its own precedent. Briefly, however, the *Trueblood* rule was erroneous from its outset as the foregoing discussion of the majority rule demonstrates. Moreover, more good than harm will come from overruling the *Trueblood* line of cases, due to the unpredictable operation of *Trueblood* rule—*compare, e.g., Campbell* with *Lee*—and the burdens it places on trial courts and the proper enforcement of the criminal law. *See, e.g., People v. Johnson,* 549 P.3d 985, 998 (Colo. 2024) (articulating test for overruling).

Respectfully submitted this 13th day of January, 2025.

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[Pursuant to Rule 121, the signed original is on file at Berg Hill Greenleaf Ruscitti LLP]

s/ Josh A. Marks
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2025, a true and correct copy of the foregoing **RESPONSE BRIEF PURSUANT TO C.A.R. 21 OF PEOPLE OF THE STATE OF COLORADO, BY AND THROUGH THE CITY OF AURORA** was served electronically via CES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

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