Colorado Court of Appeals 2 East 14th Avenue, Denver, CO 80203	
Appeal from Boulder County District Court Honorable Robert R. Gunning Case No. 2022CV30341	
Plaintiffs-Appellants: Feet Forward-Peer Support 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-Appellees:** City of Boulder and Maris Herold, Chief of Police for the City of Boulder	**▲COURT USE ONLY▲**
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BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF BOULDER AND MARIS HEROLD

CERTIFICATION

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 3,833 words (does not exceed 4,750 words).

The brief complies with the content and form requirements set forth in C.A.R. 29.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Robert Sheesley
Robert Sheesley, #47150

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The Colorado Municipal League ("CML") respectfully submits the following *amicus curiae* brief in support of the City of Boulder ("Boulder") and Maris Herold.

IDENTITY OF CML AND ITS INTEREST IN THE CASE

CML, formed in 1923, is a non-profit, voluntary association of 271 of the 273 cities and towns located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. CML's members include all 108 home rule municipalities, 162 of the 164 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities with a population greater than 2,000. CML has regularly appeared in the courts as an *amicus curiae* to advocate on behalf of the interests of municipalities statewide.

The outcome of this case is of particular interest to CML's members, many of whom are subject to claims like those made against Boulder in this case. Municipalities serve the public interest by exercising police powers sanctioned by constitutional and statutory authority. Colorado's municipalities struggle to accommodate the fluctuation of homeless individuals, provide shelter to people moving into their boundaries from other areas, and prevent the misuse or private domination of public spaces intended for other purposes. Colorado's local governments have relied reasonably and in good faith on the U.S. Supreme Court's

recent decision in *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520, 526 (2024) ("*Grants Pass*") that this appeal threatens to undermine.

CML's participation will provide the Court an explanation of how Colorado's municipalities approach the complex societal issue of homelessness and how Appellants' constitutional approach would negatively impact municipalities and the legislative policy-making process. CML will also discuss general municipal authority to regulate public places to ensure the health, safety, and welfare and enjoyment of such places by the community at large. Finally, CML will discuss how Appellants' approach is inconsistent with the historical context of the Colorado Constitution.

ARGUMENT

At its core, this case is about the ability of local elected bodies to reasonably regulate public spaces, control local budgets, and identify appropriate solutions to an issue of immense complexity. As the United States Supreme Court recognized in *Grants Pass*, "[m]any cities across the American West face a homelessness crisis. The causes are varied and complex, the appropriate public policy responses perhaps no less so." 603 U.S. at 526. CML urges the Court to affirm the district court's decision and reject Appellants' efforts to introduce new substantive constitutional

limits that would handcuff local policymakers in developing appropriate public policy responses and the neutral regulation of conduct in public spaces.

I. The judiciary should not recognize novel constitutional rights to interfere with legislative authority to control public spaces and address the complex social issue of homelessness.

Homelessness is a complex and serious social issue that needs effective legislative and social – not judicial – responses. In dealing with issues of homelessness, local elected representatives must balance individual rights, strong human emotions, nuanced data, competing community interests, complex underlying causes, duties to preserve public property, and limited budgets. Finding balanced, acceptable, and workable responses is a quintessentially democratic endeavor vested in the legislative bodies that define policy and regulate public spaces. When it comes to the use of municipal property and the daily interactions of Coloradans in their local environments, such authority is vested in municipal governing bodies. Manufacturing new constitutional limits or rights will only harm local government efforts to innovate and identify appropriate solutions for the specific conditions of their communities. Replacing the measured consideration of local governing bodies with unworkable judicial standards that would impose undue financial burdens on local governments and violate the separation of powers doctrine.

While "the line of demarcation between a proper exercise of the police power and an infringement of constitutional guarantees is not always well defined," *Cottrell Clothing Co. v. Teets*, 342 P.2d 1016, 1019 (Colo. 1959), the absence of a constitutional guarantee should make the review of an ordinance passed under the police power non-controversial. CML urges the Court to resist Appellants' request to impose new and significant limits through Article II of the Colorado Constitution on municipalities' ability to address public health and safety concerns arising from homeless encampments and to preserve public spaces for their intended purposes. *See Grants Pass*, 603 U.S. at 560 (cautioning that the Eighth Amendment does not authorize judges to dictate homelessness policy and wrest legislative rights and responsibilities from the people); *see also Wimberly v. Ettenberg*, 570 P.2d 535, 538 (Colo. 1977) (considering a standing question, noting that "[c]ourts cannot, under the pretense of an actual case, assume powers vested in the executive or legislative branches" and should exercise "judicial self-restraint, based upon considerations of judicial efficiency and economy").

Appellants attempt to connect their claims to fundamental rights to avoid the necessary deference given to legislative judgments regarding the use of the police power. Local ordinances are "the expression of that branch of the government having primary authority to determine what is requisite to promote and preserve health,

safety, and morals." *In re Interrogatories of the Gov. on Chapter 118, Sess. Laws 1935*, 52 P.2d 663, 667 (Colo. 1935) (internal citations omitted). The reasonableness of regulation is left to the discretion of the legislative branch of government and courts will not overturn an ordinance simply "because compliance is burdensome." *See Town of Dillon v. Yacht Club Condos. Home Owners Ass'n*, 325 P.3d 1032, 1039-40 (Colo. 2014) (internal citation omitted). Without an infringement on a fundamental right or a distinction based on a suspect class, legislation must bear only a rational relationship to a permissible governmental purpose. *Colo. Soc. of Cmty. and Institutional Psychologists, Inc. v. Lamm*, 741 P.2d 707, 711 (Colo. 1987) (internal citation omitted).

Manufacturing constitutional rights will not solve what is fundamentally a legislative question. The complexity of the issue has been described as follows:

> Addressing homelessness effectively requires understanding that each Colorado community is different. Levels of capacity, infrastructure, access to resources, and the unique local context – including demographics, geography, and economic factors – all vary and play a critical role in shaping effective homelessness response strategies. What works in a rural area will differ from an urban center. Therefore, flexible, responsive, and community-specific approaches are essential.

Colorado's First Annual State of Homelessness Report 2024, https://www.cohmis.org/soh2024#responsesystem (visited Aug. 4, 2025).

Policymakers in municipalities, who can fully evaluate all concerns and available resources, continue a robust debate over the proper course of action. Generally, the approach is multi-faceted and includes opportunities for housing at the same time as respecting the enforcement of neutral camping laws. Other levels of government have also discussed options. For example, the Colorado General Assembly twice considered and quickly rejected a bill that would create a "right to rest" in public spaces. *See* Concerning the creation of the "Colorado Right to Rest Act," H.B. 1096, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019), https://leg.colorado.gov/bills/hb19-1096 (visited Aug. 4, 2025); H.B. 1067, 71st Gen. Assemb., Reg. Sess. (Colo. 2018), https://leg.colorado.gov/bills/hb18-1067 (visited Aug. 4, 2025). A recent presidential order expressed a preference for emphasizing civil commitment and prohibitions on urban camping, counter to the "housing first" preferences that communities like Boulder have adopted in combination with other efforts. Exec. Order No. 14321, 90 Fed. Reg. 35816 (Jul. 24, 2025). Neither solution is likely acceptable in every community and CML suggests that local jurisdictions are best suited to identify the appropriate response for the jurisdiction. The Court should be hesitant to implement solutions by judicial fiat, especially those that were rejected legislatively.

Municipal experiences in the Ninth Circuit following *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), expose the flaws of that circuit's choice to create a constitutional right that improperly involved the judiciary in this policymaking area. As noted in *Grants Pass*, cities that funded shelter space were told by courts that the shelter was inadequate because it lacked certain characteristics, as determined by individual judges. The City of Chico, California, built an outdoor shelter with fencing, water, toilets, handwashing stations, and shade canopies, only to be told that the court thought that appropriate shelter required indoor spaces. *Grants Pass*, 603 U.S. at 555 (citing *Warren v. Chico*, 2021 WL 2894648, *3 (ED Cal., July 8, 2021)). Shelters provided by the City of Los Angeles, California, were found to be inadequate because they didn't provide medical testing during the COVID-19 pandemic or security. *Id.* (citing *LA Alliance for Hum. Rights v. Los Angeles*, 2020 WL 2512811, *4 (CD Cal., May 15, 2020)).

The inadequacies of the judicially-created "shelter availability" test reveal the impropriety of interfering with legislative authority in this area. The supposed involuntary status and shelter availability on which the test depends varies daily based on an individual's circumstances and desires, the jurisdiction, and the types of shelter that may be available. The test lacks boundaries sufficient to guide an individual or a government actor. First, knowing the exact number of homeless

persons on a given day and confirming the exact number of shelter beds in use at a given point is a practical impossibility. How is availability measured? What shelter is sufficient? Second, if a smaller or resource-limited municipality does not have shelter beds within its own boundaries for the number of homeless individuals in the jurisdiction, is it prohibited from enforcing ordinances like Boulder's or can it rely on regional counts of shelter space? How far can a person be required to travel to a shelter, and must the municipality provide transport? Are only well-resourced municipalities that can pay for shelter permitted to enforce such ordinances? How is a government to meaningfully and consistently gauge whether a person is "involuntarily" homeless or what actions are necessary for their needs? Must municipalities maintain public parks for the purpose of camping if they are to have parks at all? Do these rights expand or contract based on the weather or an individual's specific choices or preferences about shelter? The tests and the rights it would guarantee are so boundaryless that they presumptively authorize a poorly defined class of individuals to avoid the enforcement of generally applicable laws.

Colorado's courts should not follow the errors of the Ninth Circuit Court of Appeals by imposing novel, broad, and unworkable constitutional constraints on a legislative body's right to pass and enforce appropriate local laws. Each of Appellants' proposed constitutional theories suffers from the same infirmities. As a

dissenting Ninth Circuit judge in *Grants Pass* stated, "Not every challenge we face is constitutional in character. Not every problem in our country has a legal answer that judges can provide. This is one of those situations." *Johnson v. City of Grants Pass*, 72 F.4th 868, 945 (9th Cir. 2023) (Bress, J., dissenting from denial of reh'g). The judiciary is not suited to resolve these critical social and fiscal issues. While perhaps appealing at a high level, these broad solutions cannot reasonably be implemented practically and consistently and would usurp a legislative function.

II. Municipalities build, maintain, and regulate public spaces for the benefit of the general welfare while responding to the homelessness crisis.

By prohibiting the occupation of public parks and rights-of-way, Colorado's municipalities are performing the hard work of balancing community needs while investing enormous resources into homeless and housing services. But unambiguous, reasonable limits on camping on public property are unfairly derided as "criminalizing homelessness" if the jurisdiction does not make the policy choice to also fully fund shelters. That overly simplistic analysis is unrealistic and does not reflect the complexity of the situation, including competition for resources and the preservation of public spaces for their intended purpose.

Through the police power, municipalities possess authority to legislate for the general protection and general welfare of its citizens. *See Town of Dillon*, 325 P.3d

at 1038–39. Municipalities derive the police power from C.R.S. § 31-15-103 or, for home rule municipalities, directly from Article XX of the Colorado Constitution. The police power extends to the use of streets and the prevention and removal of encroachments and obstructions on streets. C.R.S. § 31-15-701(1)(a)(I). Municipalities, "as in the judgment of the governing body of such city," can acquire property "for boulevards, parkways, avenues, driveways, and roadways or for park or recreational purposes for the preservation or conservation of sites, scenes, open space, and vistas of scientific, historic, aesthetic, or other public interest." C.R.S. § 31-25-201(1).

The ability to uniformly regulate public space should not shift based on whether a local government has adequate funds to provide shelter space or whether or how the local government chooses to provide shelter. Colorado's municipalities have taken a variety of approaches to the issue of urban camping as one aspect of the homelessness crisis. Some municipalities, like Boulder, prohibit camping through ordinances designed with either civil or criminal penalties. At the same time, municipalities, like Boulder, have established funding opportunities for human services needs. *See Human Services Fund*, CITY OF BOULDER https://bouldercolorado.gov/services/human-services-fund (last visited Aug. 4, 2025).

How to budget limited public moneys – especially in a time of shrinking revenue and state and federal funding opportunities – is a fundamentally democratic exercise that reflects local compromises. For example, the City of Loveland, with a population of nearly 80,000, voluntarily implemented an ordinance in 2022 under the specter of the out-of-circuit decision *Martin* that limited the enforcement of the city's camping ordinance in the absence of shelter space. Other municipalities voluntarily have imposed similar limits. At the time, Loveland spent $1.1 million to $3.1 million annually on encampment removal and shelter operations, with the bulk of the funding coming from one-time federal or state funding and the remainder from the city's general fund in competition with other demands. Loveland also implemented a "Street Outreach Program" to provide services to homeless individuals, funded by opioid litigation settlement funds and the state's Transformational Homelessness Response Grant Program, which provided funding through September 2026. *Temporary Shelter at South Road Facility to Close by Sept. 30*, CITY OF LOVELAND (July 3, 2025), https://tinyurl.com/Loveland02 (last visited Aug. 4, 2025).

But Loveland and other municipalities must soon reckon with impending financial limitations and the termination of federal and state funding. One-time funding for Loveland's services has expired and the city's 2025 budget recognized

a $10.5 million general fund shortfall requiring a reduction in city services. *Service Changes for 2025*, CITY OF LOVELAND, https://tinyurl.com/Loveland01 (last visited Aug. 4, 2025). The Transformational Homelessness Response Grant Program and other state programs seem unlikely to be funded again. As a result, the city is considering whether to repeal the ordinance requiring shelter availability at the same time as it is proceeding with the previously planned closure of the temporary emergency shelter.

For legislatures, the policy choice is not so simple as choosing between funding shelters or permitting camping on public property. Municipalities must contend with the undeniable impact of encampments and camping on public property. Such activities monopolize common spaces like parks and sidewalks that were not intended for that purpose. In encampments, garbage, human waste, fire risks, health hazards like used needles, and physical violence are commonplace. Impacts on surrounding areas include reduced quality of life, increased crime, and loss of business from decreased foot traffic. Finally, requiring the funding of shelters could have the perverse effect of exacerbating homelessness or reducing the effectiveness of other responses to the crisis.

Rejecting Appellants' claims will not result in the "criminalization of homelessness" or nefarious actions by local governments. As Justice Gorsuch noted

in *Grants Pass*, "a variety of other legal doctrines and constitutional provisions work to protect those in our criminal justice system" from convictions. *Grants Pass*, 603 U.S. at 550. But accepting Appellants' theories would have the practical effect of imposing a judicially-created financial obligation on local governments to provide public shelter or surrender public spaces to an ill-defined class of individuals who would be immune from reasonable regulation.

III. Appellants' constitutional interpretations are unreasonable and inconsistent with the historical context of the Colorado Constitution.

CML supports Boulder's arguments regarding the application of Article II of the Colorado Constitution in this case. Appellants' reading of these constitutional provisions would create a class of persons immunized from the enforcement of camping bans and potentially other neutral laws, create a personal liberty right to occupy public spaces for habitation, and expose government to tremendous risk for the enactment and enforcement of any public safety law through a gross expansion of the "state-created danger" doctrine and concepts of due process. CML offers additional limited arguments regarding the historical context of Art. II, § 20 of the Colorado Constitution.

As understood in 1876 and consistently interpreted since then, the Cruel and Unusual Punishment Clause of Art. II, § 20 provides no greater individual protection or inhibition on government regulation of camping on public property than the

Eighth Amendment to the U.S. Constitution. *See Wells-Yates v. People*, 454 P.3d 191, 197 (Colo. 2019), *as modified on denial of reh'g* (Dec. 16, 2019) (discussing the general adherence to Eighth Amendment interpretations despite a difference in analysis) (internal citations omitted). As a result, *Grants Pass* should control the outcome of this case, and this Court should continue to view the Cruel and Unusual Punishment clause as dealing "exclusively with the criminal process and criminal punishments" and not neutral regulations of conduct. *See Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 217 (Colo. 1984) (citing *Ingraham v. Wright,* 430 U.S. 651, 667 (1977). "The primary purpose of [the Cruel and Unusual Punishments Clause] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes . . . ." *Id.* (quoting *Powell v. Texas*, 392 U.S. 514, 531–32 (1968) (plurality opinion)).

No standard of constitutional interpretation supports finding any divergence between the Cruel and Unusual Punishment Clause of the Colorado Constitution and that of the U.S. Constitution. Faced with a claim that a right is implied in the state Constitution, courts attempt to "ascertain, if that may be done, what the framers of the Constitution really had in mind, and actually intended to cover . . .." *People v. Rodriguez*, 112 P.3d 693, 699 (Colo. 2005) (quoting *Schwartz v. People*, 104 P.2 98 (1909)). Courts may look at the proceedings of the Constitutional Convention, the

view of from other states from which Colorado's provisions were likely adopted, contemporaneous views of prior and existing laws, and the state of things at the time. *See id*. In particular, the constitutions of Illinois (1870), Pennsylvania (1873), and Missouri (1875) and the interpretations of their courts are especially relevant. *Id*. (citing Dale A. Oesterle & Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 1 (2002)).

During Colorado's Constitutional Convention, Art. 2, § 20 was developed through the Standing Committee on Bill of Rights. The Cruel and Unusual Punishment Clause provision was unamended throughout the Convention and was adopted in the same form as it was introduced, save for a few commas and the choice to use the singular "punishment." Proceedings of the Constitutional Convention 91, 144, 378, 488, 526, 666 (1875), https://tinyurl.com/1875convention (last visited Aug. 4, 2025). The Convention proceedings reflect no discussion of the clause. The provision has neither been amended nor interpreted as other than coextensive with the Eighth Amendment.

Further, no contemporaneous account suggests a tendency of delegates or voters to accept a individual constitutional right to occupy public property in defiance of traditional health, safety, and welfare laws. Whether people used tents in 1876 or camped on property (which may or may not have been public) is

irrelevant. Housing options and exposure to the elements in 1876 Colorado likely differed little from shelter types and weather in the thirteen original states in 1789.[1] Constitutional delegates and voters were aware of the inherent authority of government to regulate, through the police power, "as broad as the public welfare." *See In re Interrogatories*, 52 P.2d at 667 (internal citations omitted). Delegates could not have been aware of this power and yet imposed a silent restraint, unheard of for 150 years, that would severely restrain the authority of government in the manner Appellants suggest.

The constitutions of Illinois, Pennsylvania, and Missouri also suggest no reason to diverge from *Grants Pass*. Missouri's identical constitutional provision states, "that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." MO. CONST. art. I, § 21. That provision has been interpreted to "provide the same protection against cruel and unusual punishment" as the Eighth Amendment. *See State v. Wood*, 580 S.W.3d 566, 588 (Mo. 2019) (internal citations omitted). Missouri's courts never interpreted the

[1] Colorado's history and context as to a person's expectation of privacy in a tent, as considered in *People v. Schafer*, 946 P.2d 938 (Colo. 1997), is irrelevant. In *Schafer*, the Court took notice that tents historically were "typical and prudent outdoor habitation" because of exposure to the elements. However, that history was necessary to consider that a person used a tent as habitation to which rights against warrantless search would attach. Further, the fact that the occupant was not trespassing was critical.

provision to align with the Ninth Circuit's erroneous extension of *Robinson v. California*, 370 U.S. 660 (1962).

The constitutions of Pennsylvania and Illinois also align with federal interpretations of the Eighth Amendment. Pennsylvania's Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." PENN. CONST. art 1, § 13; *Comm. v. Hairston*, 249 A.3d 1046, 1058 (Pa. 2021) (internal citation omitted) ("[T]he rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments"). The provision in Illinois bars the imposition of unreasonable penalties:

> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

ILL. CONST. art. 1, § 11; *People v. Patterson*, 25 N.E.3d 526, 550-51 (Ill. 2014) ("[T]he Illinois proportionate penalties clause is co-extensive with the eighth amendment's cruel and unusual punishment clause") (internal citation omitted). Courts in Illinois and Pennsylvania have not interpreted their constitutions in the manner proposed here by Appellants.

CML urges the Court to reject efforts to create personal rights to interfere with neutral regulation of conduct on public property that would otherwise be evaluated solely to identify whether a reasonable relationship exists between the regulation and a legitimate government objective. *See Town of Dillon*, 325 P.3d at 1039 (identifying the standard for reviewing ordinances that do not implicate fundamental rights).

CONCLUSION

In conclusion, CML respectfully requests that the Court affirm the dismissal of all claims against Boulder. The Court should hesitate to identify new substantive constitutional individual rights that would trump reasonable regulation of conduct in public places for the benefit of communities at large. Colorado's municipalities and other policymakers must retain the latitude to find effective solutions to one of society's most vexing problems while simultaneously protecting investments in public spaces and the community's right to safely enjoy them.

Dated August 7, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this August 7, 2025, I filed the foregoing **BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF BOULDER** via Colorado Courts E-Filing, which will send a true and correct copy to the following:

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