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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
Appeal from Douglas County District Court Hon. Andrew Baum Case No. 2022CV30088	
Plaintiff/Appellant: JAMES WOODALL, v. **Defendant/Appellee:** LUKE GODFREY.	**▲COURT USE ONLY▲**
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BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF APPELLEE LUKE GODFREY

CERTIFICATION

I hereby certify that this brief complies with C.A.R. 28(a)(2-3), 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 3,684 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
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The Colorado Municipal League ("CML") respectfully submits the following *Amicus Curiae* Brief in Support of Appellee Luke Godfrey.

IDENTITY OF CML AND ITS INTEREST IN THE CASE

CML, formed in 1923, is a non-profit, voluntary association of 270 of the 272 cities and towns located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. CML's members include all 105 home rule municipalities, 163 of the 166 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities with a population greater than 2,000.

Many of CML's member municipalities employ peace officers to provide public safety services. Municipalities recruit, train, and support peace officers and often have an obligation to provide defenses for and indemnify those officers in civil lawsuits. The Law Enforcement Integrity Act ("LEIA") made systemic changes to law enforcement practices, peace officer certification, and both criminal and civil liability for peace officers.

CML's brief will discuss the nature of the cause of action created by C.R.S. § 13-21-131(1) and its interplay with article II, section 7 of the Colorado Constitution, which parallels the Fourth Amendment to the U.S. Constitution with regard to its protections from excessive force by law enforcement. CML is concerned that an

excessively permissive pleading standard and an expansion of the common understanding of the constitutional rights subject to the cause of action created in C.R.S. § 13-21-131(1), will unfairly increase and prolong litigation, undermine efforts to recruit and retain qualified peace officers, confuse law enforcement practices, and threaten the livelihood of peace officers who did not actually deprive a person of their constitutional rights.

SUMMARY OF ARGUMENT

This case presents an opportunity to confirm the application of Federal jurisprudence regarding excessive force claims under the Fourth Amendment to the U.S. Constitution, to claims brought pursuant to C.R.S. § 13-21-131(1) for the alleged deprivation of rights secured by article II, section 7 of the Colorado Constitution. Colorado's statutory remedy was enacted as a limited provision in broader legislation to increase law enforcement transparency, accountability, and integrity. That remedy should not be construed in an overly permissive manner that would lower the appropriate legal standard for claims under Colorado's Constitution and ignore valuable precedent interpreting a parallel constitutional right. Improperly conflating the "deprivation of rights" remedy with other components of the LEIA and creating a lower standard for such claims will undermine law enforcement

staffing, impose substantial burdens on municipal budgets, and, most importantly, expose peace officers to consequences that the General Assembly did not intend.

ARGUMENT

I. The standard for LEIA claims against peace officers is not a lower bar than the standard for constitutional claims brought under federal law.

The Colorado General Assembly enacted comprehensive reforms to law enforcement practices and accountability standards with the passage of the LEIA in 2020 through Senate Bill 20-217 ("SB 217"). Colo. Sess. Laws 2020, ch. 110 at 445. The LEIA created a new civil cause of action to enforce violations of the Colorado Constitution by peace officers plus body worn camera requirements, new statutory use of force standards, requirements for officers to intervene, criminal liability for peace officers, the ability for the Colorado Attorney General to bring civil actions for a pattern and practice of constitutional violations, and data reporting and collection.

Nothing in the LEIA suggests, however, that the General Assembly intended for these reforms to imply that a low legal standard would apply to the new, limited civil remedy for individuals vindicating their state constitutional rights. Certainly, the LEIA does not make every use of force presumptively suspect from a constitutional perspective. Rather, the LEIA retained a minimum requirement – that a plaintiff plausibly alleges that a peace officer deprived them of an enumerated

individual right in Colorado's Bill of Rights by a peace officer's action or inaction. *See Puerta v. Newman*, --P.3d--, 2023 WL 7031030, at *1 (Colo. App. Oct. 26, 2023) (applying the standard for dismissal for failure to state a claim) (quoting *Patterson v. James*, 454 P.3d 345 (Colo. App. 2018).

The LEIA's new civil cause of action against peace officers provides:

> A peace officer . . . who, under color of law, subjects or causes to be subjected, including failing to intervene, any other person to the deprivation of any individual rights that create binding obligations on government actors secured by the bill of rights, article II of the state constitution, is liable to the injured party for legal or equitable relief or any other appropriate relief.

C.R.S. § 13-21-131(1). This cause of action bears some similarity to the Federal civil remedy for federal rights provided by 42 U.S.C. § 1983 ("Section 1983"), which states, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

When construing the LEIA, courts should give effect to every word and should "not create an addition to a statute that the plain language does not suggest or demand." *Spahmer v. Gullette*, 113 P.3d 158, 162 (Colo. 2005).

With these targeted changes to the LEIA, the General Assembly removed some, but not all, restrictions that previously inhibited federal claims under Section 1983. Most notably, the LEIA prohibits the defense of qualified immunity[1] and removes all statutory immunities and statutory limitations on liability, damages, or attorney fees. C.R.S. § 13-21-131(2).

Even if an LEIA deprivation of rights claim is "easier" for a plaintiff to litigate compared to a claim under Section 1983 due to the removal of qualified immunity as an affirmative defense, it does not follow that the General Assembly intended to lower the legal standard for alleging or proving a violation of an individual right in Colorado's Bill of Rights. The elimination of qualified immunity essentially only removed the requirement to show that the right at issue was "clearly established." The standard that requires the violation of a constitutional right is unchanged. *See, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 204 (2001) ("The inquiries for qualified immunity and excessive force remain distinct . . . ."). Similarly, changes to statutory immunities and statutory limitations on liability, damages, or attorney fees simply

[1] Qualified immunity is a defense that requires a plaintiff to show (1) that there was a violation of a constitutional right, and (2) that the right at issue was clearly established at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232, 236 (2009).

means that defendants cannot raise these defenses or assert a cap on any damages or attorney fees they might otherwise owe.

With the passage of the LEIA, the General Assembly neither expressly provided for a reduced standard nor crafted a civil remedy as substantively broad as Section 1983. Unlike the similar Federal provision, the LEIA's civil action extends only to constitutional rights and not "other laws." The phrase "and laws" that appears in Section 1983 means that the "remedy broadly encompasses violations of federal statutory as well as constitutional law." *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *see also Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990) (citing *Maine* for the same proposition). The LEIA's civil remedy only protects "any individual rights that create binding obligations on government actors secured by the bill of rights, article II of the state constitution." C.R.S. § 13-21-131(1).

The LEIA's civil remedy is also distinct with regard to who can be the subject of the claim. The LEIA focuses solely on law enforcement personnel, providing for claims against only "peace officers" who are "acting under color of law," C.R.S. § 13-21-131(1), whereas Section 1983 applies broadly to any person "acting under color of law." Additionally, the LEIA permits claims only against the peace officer and not the peace officer's employer, as Section 1983 does. *Compare Ditirro v. Sando*, 520 P.3d 1203, 1209 (Colo. App. 2022) (finding no liability for government

entities under C.R.S. § 13-21-131(1)), *with Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (holding government entities can be liable under Section 1983).

Moreover, a lowered bar is not needed because the LEIA does not rely solely on private actions by citizens to give effect to the law's purpose of increasing law enforcement accountability. While C.R.S. § 13-21-131(1) focuses on constitutional rights enforced by individuals, the LEIA's other accountability standards are implemented through government actors. For example, the Attorney General is authorized to file a civil lawsuit against a government entity or employee to obtain relief to eliminate a pattern or practice of conduct that deprives individuals of their rights secured by the constitution or laws of the United States or the state of Colorado. C.R.S. § 24-31-113. A peace officer can be prosecuted for failing to intervene to stop the use of unlawful force, adding to pre-existing criminal sanctions for unlawful use of force. C.R.S. § 18-8-802(1.5); C.R.S. § 18-8-803. A peace officer's certification must be administratively revoked upon conviction of a crime involving unlawful use of force or upon findings of civil liability for the use of unlawful physical force or failure to intervene if serious bodily injury or death occurred.[2] C.R.S. § 24-31-904(1)(a)(I)-(II). Revocation is also required after an

[2] House Bill 21-1250 clarified these revocation provisions to add a requirement that death or serious bodily injury resulted from the force and to provide for revocation

administrative or investigative finding that an officer violated statutory use of force standards, if death or seriously bodily injury occurred. C.R.S. § 24-31-904(1)(a). Applying a lax standard to the civil remedy of C.R.S. § 13-21-131(1), is neither necessary nor consistent with these other accountability standards.

The new definition of unlawful use of force in the criminal context, C.R.S. § 18-1-707, does not provide the appropriate legal standard for adjudicating LEIA claims. Assigning constitutional meaning to criminal or administrative use of force standards or violations of policy is inappropriate. *See George v. Beaver Cnty.*, 32 F.4th 1246, 1254 (10th Cir. 2022) ("Failing to comply with jail policy does not amount to a constitutional violation on its own.") (citing *Davis v. Scherer*, 468 U.S. 183 (1984)). This standard, located in Title 18 (the Criminal Code), Article 1, Part 7, titled "Justification and Exemptions from Criminal Responsibility," provides an affirmative defense for a defendant in a criminal case – it cannot be relied upon as the standard in a civil proceeding. *See Hurtado v. Brady*, 165 P.3d 871, 876 (Colo. App. 2007) ("A plaintiff may not recover damages for an alleged violation of a criminal statute"); *Creech v. Fed. Land Bank*, 647 F. Supp. 1097, 1099 (D. Colo. 1986) ("[A] 'bare criminal statute,' which contains absolutely no indication that a

based on administrative or investigative findings. Colo. Sess. Laws 2021, ch. 458, § 24-31-904 at 3059-60.

civil remedy is available, does not provide a basis from which to infer a private cause of action"). Nor can the General Assembly attempt to redefine a state constitutional right by reformulating an affirmative defense to a crime. *See Washington Cnty. Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 149 (Colo. 2005) ("Only the judicial branch holds the ultimate authority to construe the constitution's meaning.").

The LEIA's purpose of increasing law enforcement accountability is implemented through several avenues, only one of which is a limited civil remedy expressly requiring the deprivation of an enumerated constitutional right. Based on the plain language of C.R.S. § 13-21-131(1), and its context within the LEIA, this court should not endorse a low standard for claims brought under C.R.S. § 13-21-131(1).

II. Colorado courts should look to Federal precedent to determine whether a use of force was unconstitutional in a claim brought under C.R.S. § 13-21-131(1).

To make the legal determination as to whether a person was deprived of a constitutional right enumerated in the Colorado Constitution, courts should rely heavily on the expansive library of case law developed by Federal courts in interpreting any parallel Federal constitutional rights. With the LEIA's civil remedy for deprivation of constitutional rights, courts will have to contend with complicated excessive force questions that they infrequently, if ever, confronted in the past.

Rather than painstakingly developing an independent and potentially inconsistent and confusing body of law regarding excessive force claims, Colorado's courts should look to Federal jurisprudence evaluating similar claims under the Fourth Amendment to the U.S. Constitution.

The concept of excessive force is typically evaluated as a form of "seizure" of a person by conduct of a peace officer during an arrest, investigatory stop, or similar action. *See Sebastian v. Douglas Cnty.*, 370 P.3d 175, 178 (Colo. App. 2013) (reiterating that for Fourth Amendment excessive force claim under Section 1983, plaintiff must show they were "seized" by "means intentionally applied" by government actor). As it relates to protections against unlawful seizure of a person, Colorado's constitution is substantively identical to the Fourth Amendment. Article II, Section 7 of the Colorado Constitution provides, in part, "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures." In nearly matching terms, the Fourth Amendment of the U.S. Constitution provides, in part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Each provision ensures the security of the people from unreasonable seizures of their persons.

"[T]he Colorado and United States Constitutions are generally co-extensive insofar as they address warrantless searches and seizures." *People v. Rossman*, 140 P.3d 172, 176 (Colo. App. 2006) (citing *People v. Rodriguez*, 945 P.2d 1351 (Colo. 1997)). Although "under certain circumstances, Article II, Section 7, of the Colorado Constitution affords broader protections than the Fourth Amendment," in every such case, the Colorado Supreme Court "has identified a privacy interest deserving of greater protection than that available under the Fourth Amendment." *Id.* (internal citations omitted); *see also People v. Seymour*, --- P.3d ---, 2023 WL 6805809 (Colo. Oct. 16, 2023) (noting that the Federal and Colorado constitutions "recognize different scopes of privacy interests). No such identified privacy interest exists in the context of an excessive force case and no court has held that Colorado's protections against unreasonable seizure exceed those of the Fourth Amendment.

As both constitutions protect against unreasonable seizures using the same terms, Colorado courts should follow federal standards grounded in the constitutional expectation of reasonableness and not divert to a more permissive standard. In *Graham v. Connor*, 490 U.S. 386, 396 (1989), the U.S. Supreme Court explained, "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying

intent or motivation." (internal citations omitted). The Court cautioned that this test's "proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396 (internal citations omitted).

Federal jurisprudence also informs how a peace officer's intent remains relevant in an LEIA claim. Neither Section 1983 nor C.R.S. § 13-21-131(1) discuss an officer's intent; rather, the nature of the constitutional right involved and the body of case law on the respective constitutional right that establishes the intent requirement. While a mistake of law has no bearing on a constitutional claim without qualified immunity, a reasonable mistake of fact must be considered in evaluating whether the use of force was constitutionally reasonable. The U.S. Supreme Court articulated this key distinction that applies equally to claims under C.R.S. § 13-21-131(1) and Section 1983:

> If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.
>
> The qualified immunity inquiry, on the other hand, has a further dimension. ***An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake

> as to what the law requires is reasonable . . ., the officer is entitled to the immunity defense.

Saucier, 533 U.S. at 204-05. The LEIA's indemnity provision at C.R.S. § 13-21-131(4)(a) does not change this result simply because it provides some personal protection for an officer based on a mistaken belief in the lawfulness of their actions. *See* C.R.S. § 13-21-131(4)(a).

CML urges this court to evaluate the excessive force claim brought pursuant to C.R.S. § 13-21-131(1) using the jurisprudence developed to evaluate similar claims brought under Section 1983, excepting qualified immunity. Creating a new, Colorado-specific standard is unnecessary and inappropriate.

III. Lowering the legal standard for LEIA claims unduly harms municipalities and municipal peace officers.

If this Court were to accept the low legal standard for LEIA claims advocated for by the Plaintiff/Appellant, it would have significant detrimental effects on municipalities, their peace officers, and the public safety services they provide. A low standard for LEIA claims would result in a large increase in claims against peace officers that would penalize conduct that has traditionally been understood to not deprive a person of the right to be free from unreasonable seizures. If these purely legal questions cannot be resolved at the pleading or summary judgment stage, a ripple effect of negative impacts would ensue.

First, a permissive standard would substantially increase the monetary liability for which the municipality will be primarily responsible. C.R.S. § 13-21-131(4)(a) provides that "a peace officer's employer shall indemnify its peace officers for any liability incurred by the peace officer and for any judgment or settlement entered against the peace officer for claims arising" out of the LEIA, unless they determine "the officer did not act upon a good faith and reasonable belief that the action was lawful." Even if this exception is invoked, the peace officer is only liable for five percent of the judgment or settlement or $25,000, whichever is less, while the municipality as the employer must pay the rest. *Id.* Moreover, "if the peace officer's portion of the judgment is uncollectable from the peace officer" the municipality must satisfy the full amount. *Id.* Given that a peace officer's certification could be revoked if a claim results in a finding of civil liability, an influx in claims is also likely to lead to an increase in settlements that would not require decertification but would require indemnity by the municipal employer. *See* C.R.S. § 13-21-131(4).

Inflating the monetary liability of municipalities by decreasing the legal standard to make a claim would be a significant financial burden on municipal

budgets, which are funded by taxpayer dollars.[3] In identifying the proper standard for LEIA claims, it is important to consider the appropriate balance in light of the use of public funds, and the impact that judgments paid with taxpayer dollars has on the other services a municipality is able to provide. This increase in liability and monetary payouts from municipalities will likely also have an impact on insurance premiums as well as the ability of a municipality to obtain insurance coverage at all.

Second, a decreased standard for LEIA claims will negatively impact peace office certification, as well as hiring and retention. If a "peace officer is found civilly liable for the use of unlawful physical force, or is found civilly liable for failure to intervene in the use of unlawful force and the incident resulted in serious bodily injury or death to another person," the P.O.S.T. board must permanently revoke the officer's certification. C.R.S. § 24-31-904(1)(a)(II). A reduced legal threshold would, in turn, mean officers would have a much higher likelihood of losing their peace officer certification and, in turn, their career. The unfortunate truth is that this increased risk, along with the potential for increased civil liability, dissuades many good candidates from becoming peace officers and has caused good officers to leave

[3] The only circumstance when a municipality would not have to indemnify a peace officer is if the "officer was convicted of a criminal violation for the conduct from which the claim arises unless the . . . employer was a causal factor in the violation, through its action or inaction." C.R.S. § 13-21-131(4)(a)

law enforcement careers. Accordingly, peace officer hiring and retention has become, and will likely remain, very difficult for many municipalities.[4]

CONCLUSION

The LEIA was enacted to provide a civil remedy to enforce rights under the Colorado Constitution, without the protection of any immunity defenses or limitation. The LEIA, however, was not enacted to completely overhaul the legal standards for constitutional claims in a manner that would impose almost limitless liability and risk on peace officers and, through indemnity obligations, their public employers. Accordingly, CML urges this Court to hold that the standard for claims arising out of the Colorado Constitution is not dictated by state statute, that the standard for LEIA claims is commensurate with the standard for Section 1983

[4] *See* David Migoya, *More Than 200 Police Officers Have Resigned or Retired Since Colorado's Police Reform Bill Became Law*, Denver Post, Aug. 18, 2020, https://tinyurl.com/3rdvb3zd (discussing the impact of SB 20-217 on peace officer resignations and retirements); Allison Sherry, *After Police and Sheriffs Deputies Left Agencies in Droves in 2021, Democratic Leaders Try to Stem the Tide*, Colorado Public Radio, Jan. 13, 2022, https://tinyurl.com/bdcrzudb (discussing the significant increase in peace officers leaving the profession and the challenges in filling positions due, at least in part, to police reform in Colorado); Julia Cardi, *Recruitment, Morale Continuing Concerns for Colorado Law Enforcement Agencies, Survey Says*, Denver Gazette, Oct. 25, 2022, https://tinyurl.com/4dpc9x6h (discussing results of a 2022 survey of Colorado peace officers, including concerns about changes in state law, including increased liability and safety concerns).

claims, and that Colorado courts should rely on federal jurisprudence in analyzing LEIA claims.

Dated this November 20, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this November 20, 2023, I filed the foregoing **BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF APPELLEE LUKE GODFREY** via Colorado Courts E-Filing, which will send a true and correct copy to the following:

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