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<tr><td>District Court, Boulder County, State of Colorado
1777 Sixth Street, Boulder, Colorado 80302
(303) 441-3750</td><td rowspan="2">DATE FILED
December 6, 2024 1:23 PM
CASE NUMBER: 2022CV30341

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<tr><td>FEET FORWARD – PEER SUPPORTIVE SERVICES AND OUTREACH d/b/a FEET FORWARD, a nonprofit corporation; JENNIFER SHURLEY, JORDAN WHITTEN, SHAWN RHOADES, MARY FALTYNISKI, ERIC BUDD, and JOHN CARLSON, individuals,
Plaintiffs,

v.

CITY OF BOULDER and MARIS HEROLD, Chief of Police for the City of Boulder,
Defendants</td></tr>
<tr><td></td><td>Case Number: 2022CV30341
Division 2</td></tr>
<tr><td colspan="2">ORDER RE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT</td></tr>
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I. INTRODUCTION

This litigation challenges the constitutionality of the City of Boulder's camping ban. Plaintiffs initially contended that the City's Blanket Ban and Tent Ban violate three Colorado constitutional provisions. In February 2023, the Court partially granted Defendants' Motion to Dismiss. The February 2023 Order dismissed all three claims relating to the Tent Ban and dismissed two claims relating to the Blanket Ban. This prior ruling denied the Motion to Dismiss Plaintiffs' claim that the Blanket Ban violated Article II, Section 20 of the Colorado Constitution (Colorado's constitutional prohibition against cruel and unusual punishment), concluding that Plaintiffs had alleged a plausible claim for relief through that claim.[1]

[1] *Order Re Defendants' Motion to Dismiss Plaintiffs' Complaint*, issued February 23, 2023.

Plaintiffs then filed an Amended Complaint requesting the following relief:

a. A declaration that, as applied to the Individual Plaintiffs when they cannot access indoor shelter, the Blanket Ban amounts to cruel and unusual punishment prohibited by Article II, Section 20 of the Colorado Constitution;

b. A declaration that Defendants, under color of law, subjected or caused the Individual Plaintiffs to be subjected to the deprivation of individual rights secured by Article II of the Colorado Constitution; and

c. A permanent injunction prohibiting Defendants, and all persons and entities acting under their direction or on their behalf, from enforcing the Blanket Ban against unhoused individuals when they cannot access indoor shelter.

On April 10, 2024, the Court stayed these proceedings pending the United States Supreme Court's decision in *City of Grants Pass, Oregon v. Johnson*. The U.S. Supreme Court issued its opinion in *Grants Pass* on June 28, 2024. Following a Status Conference, Defendants filed a *Motion to Dismiss Plaintiffs' Amended Complaint*, arguing that Plaintiffs' remaining claim has no legal basis in light of the U.S. Supreme Court's *Grants Pass* ruling. Plaintiffs maintain that despite *Grants Pass*, they have plausibly alleged a claim for relief under Article II, § 20 of the Colorado Constitution.

This Order first discusses the impact the U.S. Supreme Court's decision in *Grants Pass* has on these arguments. The Order then analyzes Plaintiffs' remaining claim in light of *Grants Pass*, evaluates whether Colorado law supports a different conclusion than the one reached under *Grants Pass*, and concludes that Defendants' *Motion to Dismiss Plaintiffs' Amended Complaint* should be GRANTED.

II. BACKGROUND

A. Procedural History

On May 26, 2022, Plaintiffs filed a *Complaint* challenging two provisions in the Boulder Revised Code ("B.R.C.") that prohibit camping on city property. Plaintiffs asserted that B.R.C. § 5-6-10 (the "Blanket Ban") and B.R.C. § 8-3-21(a) (the "Tent Ban") violated three provisions of the Colorado Constitution, including Art. II, § 20. Defendants filed their first *Motion to Dismiss* on June 17, 2022, contending that Plaintiffs had failed to state a claim upon which relief can be granted under C.R.C.P. 12(b)(5). Following extensive briefing, on February 23, 2023, the Court granted the *Motion to Dismiss* as to all claims except for Plaintiffs' challenge to the Blanket Ban under Colorado Constitution Art. II, § 20. The Court concluded that Plaintiffs have standing and that the matters presented were ripe and justiciable. The Court's decision to deny Defendants' *Motion to Dismiss* on the issue of whether the Blanket Ban violated Art. II, § 20 of the Colorado Constitution relied extensively on two Ninth Circuit opinions — *Martin v. City of Boise* and *Johnson v. City of Grants Pass*. As discussed further below, *Martin* has since been abrogated and the lower court's decision in *Grants Pass* was reversed.

Plaintiffs filed an *Amended Complaint* on October 13, 2023, containing only the remaining claim under Art. II, § 20. Defendants filed an *Answer* on October 30, 2023. The matter was set for trial in August 2024, and the parties proceeded with discovery. Then, on January 12, 2024, the U.S. Supreme Court granted certiorari for *City of Grants Pass v. Johnson*.[2] Because *Grants Pass*[3] and the underlying *Martin* doctrine served as a key legal underpinning for Plaintiffs' remaining claim, Defendants filed a *Motion to Stay Proceedings Pending Decision of Supreme Court of the*

[2] *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. July 5, 2023), *cert. granted*, 144 S. Ct. 2202 (2024) (No. 23-175).
[3] *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. July 5, 2023), *rev'd*, 144 S. Ct. 2202 (2024).

*United State*s on February 23, 2024. Following briefing, the Court granted the *Motion* on April 10, 2024 because it concluded that *Grants Pass*[4] was "pivotal to this Court's February 23, 2023 ruling that Plaintiffs had stated a claim upon which relief could be granted." *Order re Defendant's Motion to Stay*, April 10, 2024.

On June 28, 2024, the U.S. Supreme Court overturned the Ninth Circuit's *Grants Pass* and decision and abrogated *Martin*.[5] At a status conference on August 9, 2024, the Court set a briefing schedule for any renewed *Motion to Dismiss* in light of the *Grants Pass* opinion.[6] Defendants filed a *Motion to Dismiss Plaintiffs' Amended Complaint* on August 23, 2024. Plaintiffs filed a *Response Brief* on September 6, 2024. After a Court-approved extension, Defendants filed a *Reply Brief* on September 20, 2024.

B. *Johnson v. City of Grants Pass*, 144 S.Ct. 2202 (2024)

This Court chose to stay proceedings because it concluded that the U.S. Supreme Court's ruling was highly relevant to the core issues in this case. The stay Order noted that *Grants Pass*[7] is at minimum of "great precedential value" in light of the identical text of the two Constitutional provisions and in the absence of existing Colorado precedent independently interpreting Art. II, § 20 in the context of camping bans. *Order re Defendants' Motion to Stay* at 6. As such, the ruling from the U.S. Supreme Court is extremely relevant, though not dispositive, to determining whether Plaintiffs' remaining claim states a valid basis for relief.

Grants Pass considered the constitutionality of three municipal ordinances restricting encampments on public property within the city of Grants Pass, Oregon. In 2018, several individuals experiencing homelessness filed a putative class action on behalf of unhoused residents

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[4] *Id.*
[5] *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024).
[6] *Id.*
[7] *Id.*

of Grants Pass to challenge the ordinances as cruel and unusual punishment under the Eighth Amendment. This action was filed shortly after the Ninth Circuit's opinion in *Martin v. Boise*, which held that enforcing an ordinance that imposed criminal sanctions for "sitting, sleeping, or lying outside on public property" was cruel and unusual when the number of unhoused individuals exceeded the number of available beds in shelters.[8]

The U.S. District Court in *Grants Pass* enjoined the ordinances pursuant to *Martin*, finding that all unsheltered individuals in Grants Pass were "involuntarily" unhoused because the number of unhoused individuals in the city exceeded the number of "practically available shelter beds."[9] The Ninth Circuit affirmed. In doing so, the Ninth Circuit extended the holding in *Martin* to invalidate ordinances which imposed criminal sanctions for sleeping outdoors with basic shelter, such as a pillow, blanket, sleeping bag, or cardboard box, because those ordinances prohibited unhoused persons from "taking necessary minimal measures to keep themselves warm and dry while sleeping" when no indoor shelter is available.[10] The Ninth Circuit emphasized that these ordinances cannot be enforced against individuals who are unhoused "involuntarily," as defined by the U.S. District Court.[11] The City of Grants Pass appealed once more, and the U.S. Supreme Court granted certiorari.

While *Grants Pass* was on appeal at the Ninth Circuit, Plaintiffs filed the present case, including the claim that the Boulder ordinances constituted cruel and unusual punishment in

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[8] *Martin v. City of Boise*, 920 F.3d 584, 616–17 (9th Cir. 2019), *abrogated by City of Grants Pass v. Johnson*, 144 S.Ct. 2202 (2024).

[9] *Blake v. City of Grants Pass*, No. 1:18-CV-01823-CL, 2020 WL 4209227, at *8 (D. Or. July 22, 2020), *aff'd in part, vacated in part, remanded sub nom*. *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022), *aff'd in part, vacated in part, remanded sub nom*. *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), *rev'd*, 144 S.Ct. 2202 (2024).

[10] *Johnson v. City of Grants Pass*, 72 F.4th 868, 889-91 (9th Cir. July 5, 2023), *rev'd*, 144 S.Ct. 2202 (2024).

[11] *Id.* at 891–96.

violation of Article II, § 20 of the Colorado Constitution. Article II, § 20 is identical to the Eighth Amendment. In defending the merits of their claim in response to Defendants' first *Motion to Dismiss*, Plaintiffs relied heavily on *Martin* and cited the U.S. District Court's decision in *Grants Pass*. In denying Defendants' motion to dismiss the Article II, § 20 claim as to the Blanket Ban, this Court relied primarily on the Ninth Circuit's opinions in *Martin* and *Grants Pass*. Although these decisions were not binding outside the Ninth Circuit, the Court concluded that they were persuasive authority in what was, at the time, a very unsettled legal landscape.

On June 28, 2024, the U.S. Supreme Court reversed the Ninth Circuit's *Grants Pass* decision, and abrogated *Martin,* in a six to three opinion. The majority opinion, written by Justice Gorsuch, emphasized that the Eighth Amendment restricts primarily the "method or kind" of criminal punishment.[12] The Court concluded that the punishments attached to the Grants Pass ordinances — increasing fines and up to 30 days in jail — were not cruel or unusual because they were not designed to "superadd terror, pain, or disgrace," and are typical of other punishments for similar offenses.[13]

Nor did the majority opinion agree that the ordinances punished status alone, as argued by the unhoused plaintiffs.[14] Under *Robinson v. California*, 370 U.S. 660 (1962), criminal punishment for "mere status," such as addiction, is per se cruel and unusual even if the punishment is acceptable in the abstract.[15] However, punishment for conduct is permissible even when that conduct is closely related to status.[16] The Court held that the Grants Pass camping ordinances validly criminalized the conduct of "occupying a campsite on public property" and were applicable

[12] *City of Grants Pass v. Johnson*, 144 S.Ct. 2202, 2217 (citing *Powell v. Texas*, 392 U.S. 514, 531–532 (1968) (plurality opinion)).
[13] *Id.* at 2218–19 (internal quotations omitted).
[14] *Id.* at 2220.
[15] *Id.* at 2220–21.
[16] *Id.*at 2222 (internal quotations omitted).

to housed and unhoused persons alike.[17] In particular, the Court expressly declined to extend *Robinson*, concerned that doing so would infringe on the legislative branches' power to decide substantive criminal law and policy.[18] The Court specifically concluded that the *Martin* framework — classifying the enforcement of camping bans as unconstitutional punishment of involuntary status when the overall unhoused population exceeds the number of available shelter beds — is unworkable and in excess of Eighth Amendment dictates.[19]

Justice Sotomayor wrote in dissent, joined by Justices Kagan and Jackson. The dissent characterized the issue as whether the Constitution permits criminalizing sleeping outside when there is nowhere else to go.[20] Punishing a "biological necessity" like eating or sleeping is not meaningfully distinguishable from punishing the status of being unhoused, because the criminalized "conduct" prohibits the very activities which define the status of being unhoused.[21] The dissent thereby opposed the majority's view of "conduct," arguing that the majority's approach would allow criminal punishment for any status plus an essential bodily function, such as "being an addict and breathing."[22]

III. STANDARD OF REVIEW

C.R.C.P. 12(b)(5) provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. The purpose of a motion under Rule 12(b)(5) is to test the formal sufficiency of the complaint. *Dorman v. Petrol Aspen, Inc.*, 914 909, 911 (Colo. 1996). When reviewing a motion to dismiss, the Court must accept the material allegations of the complaint as

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[17] *Id.* The U.S. Supreme Court noted that an Equal Protection Clause challenge may be the appropriate vehicle to challenge uneven enforcement of the ordinance against unhoused persons.
[18] *Id.* at 2223–26.
[19] *Id.* at 2228–30.
[20] *Id.* at 2229 (dissent).
[21] *Id.* at 2236 (dissent).
[22] *Id.*

true and draw all inferences in favor of the plaintiff. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). To survive a C.R.C.P. 12(b)(5) motion to dismiss, the complaint must state a plausible claim for relief by alleging facts sufficient "to raise the right to relief above the speculative level." *Warne v. Hall*, 2016 CO 50, ¶ 9. The plaintiff has the burden to frame a complaint with "sufficient factual matter, accepted as true" to suggest that the plaintiff is entitled to relief. *Id*. Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010).

Ordinances are presumed to be constitutional, and the party challenging an ordinance bears the burden of proving the ordinance unconstitutional beyond a reasonable doubt. *Mosgrove v. Federal Heights*, 543 P.2d 715, 717 (Colo. 1975); *McCarville v. City of Colorado Springs*, 2013 COA 169, ¶ 16.

IV. ANALYSIS

This analysis proceeds in four parts. First, this decision analyzes the Blanket Ban under the Eighth Amendment standard set forth by *Grants Pass*, 144 S.Ct. 2202 (2024), and concludes that the Blanket Ban is not cruel and unusual punishment under that standard. Next, this decision analyzes whether Article II, Section 20 of the Colorado Constitution may be interpreted more broadly than the Eighth Amendment and concludes that such an interpretation is not consistent with Colorado case law, including a recent Colorado Supreme Court opinion. The decision then evaluates Colorado courts' interpretation of status and conduct crimes and concludes that no sufficient basis exists to rule that the Blanket Ban improperly punishes mere status. Finally, the Court emphasizes that it may not consider policy preferences in rendering this decision.

A. Eighth Amendment Analysis

Plaintiffs' remaining claim challenges the Blanket Ban, which prohibits "residing or dwelling temporarily" on public property and conducting the "activities of daily living, such as

eating or sleeping," with "any cover or protection from the elements other than clothing." B.R.C. § 5-6-10. Plaintiffs allege that the civil fines and criminal penalties attached to this ordinance are cruel and unusual punishment for unhoused people under Article II, § 20 of the Colorado Constitution. Art. II, § 20 is identical to the federal Eighth Amendment and states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Grants Pass* notwithstanding, Plaintiffs maintain that they have stated a plausible claim for relief under Art. II, § 20 of the Colorado Constitution.[23]

While federal law is not dispositive of Plaintiffs' state law claim, *Grants Pass* is highly persuasive for the reasons set forth above. The U.S. Supreme Court's *Grants Pass* decision offers the clearest rule by which to evaluate whether the Blanket Ban is cruel and unusual. Thus, the Court looks first to federal case law to inform its decision on Plaintiffs' remaining claim under the Colorado Constitution. Defendants argue that Plaintiffs' remaining challenge of the Blanket Ban should be dismissed under *Grants Pass* because the Boulder ordinances are less restrictive than the ones upheld by the U.S. Supreme Court and carry similar punishments. *Motion to Dismiss Amended Complaint* at 5-6. The Court agrees.

In *Grants Pass*, the U.S. Supreme Court upheld an ordinance prohibiting public sleeping and public camping with bedding, sleeping bags, stoves, or fires. 144 S.Ct. 2202, 2213. The punishments for violating these ordinances include civil fines, bans from public parks, and up to 30 days of incarceration. *Id.* The U.S. Supreme Court overturned the Ninth Circuit's formula basing the constitutionality of enforcement on whether the persons charged were "involuntarily"

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[23] Although this Court previously addressed the scope of Art. II, § 20, *see Order Re Defendants' Motion to Dismiss Plaintiffs' Complaint* at 17, Plaintiffs now cite additional case law to support their contention that the Colorado provision is more protective than the Eighth Amendment. Given the importance of Art. II, § 20 to Plaintiffs' remaining claim and the Colorado Supreme Court's recent ruling addressing these very provisions, the Court addresses Art. II, § 20 more thoroughly in Section III(B) of this Order.

unhoused.[24] Rather than analyze the status of the charged individuals based on local shelter conditions, the U.S. Supreme Court concluded that these ordinances were constitutional because they punished conduct, rather than status, and because the punishments were neither disproportionate to the offense nor inherently cruel. *Id.*

Defendants now argue that the Blanket Ban is constitutional under the *Grants Pass* standard because it 1) prohibits less conduct and 2) imposes comparable punishments. *Motion to Dismiss Plaintiffs' Amended Complaint* at 6. Plaintiffs do not dispute Defendants' characterization of the Boulder ordinances as less restrictive than the ordinances that the U.S. Supreme Court upheld in *Grants Pass*. The ordinances upheld by the U.S. Supreme Court punished two types of conduct:

> "Sleeping on public sidewalks, streets, or alleyways at any time," G.P.M.C. §5.61.020(A), as well as "occupy[ing] a campsite" on public property, defined as "set[ting] up . . . or remain[ing] in or at a campsite," which is "any place where bedding, sleeping bag[s], or other material used for bedding purposes, or any stove or fire is placed . . . for the purpose of maintaining a temporary place to live." Grants Pass Municipal Code (G.P.M.C.) § 5.61.030; 5.61.010(A)–(B).

Grants Pass, 144 S.Ct. at 2213. The Blanket Ban punishes a similar range of conduct. While it is less restrictive on public sleeping, it covers a broader range of prohibited "shelters" than the Grants Pass ordinances. The Blanket Ban prohibits

[24] Plaintiffs' *Amended Complaint* alleges facts that support a plausible claim under this formula, which served as the basis of this Court's previous Order denying Defendant's *Motion to Dismiss* as to Plaintiffs' Art. II, § 20 claim. The *Amended Complaint* alleges that the City of Boulder has more unhoused individuals than shelter beds on any given nights, meaning there are some unhoused individuals who cannot obtain indoor shelter. *Amended Complaint* at ¶¶ 25-34; *Complaint* at ¶¶ 24–52. These facts would support a finding of an "involuntarily" unhoused status pursuant to the now-abrogated *Martin* doctrine. Plaintiffs then allege that the Blanket Ban effectively prohibits unhoused persons from taking necessary measures to keep themselves warm and dry while sleeping in public places as a result of a lack of alternative shelter options. *Amended Complaint* at ¶ 70; *Complaint* at ¶¶ 61–82.

> “camp[ing] within any park, parkway, recreation area, open space, or other city property.” B.R.C. § 5-6-10(a). “Camp” is defined as “reside or dwell temporarily in a place, *with shelter*, and conduct activities of daily living, such as eating or sleeping, in such place” except daytime napping and picnicking. *Id.* at § 5-6-10(d) (*emphasis added*). The term “shelter” includes, “without limitation, any cover or protection from the elements other than clothing.” *Id.*

The U.S. Supreme Court concluded that the Grants Pass ordinances do not criminalize status because they punish the conduct of “occupying a campsite” on public property for the purpose of maintaining a temporary place to live. *Grants Pass*, 144 S.Ct. at 2223. The majority opinion noted that the law is facially neutral, applying equally to an unhoused person as to a “backpacker on vacation.” *Id.* Likewise, under the majority’s reasoning in *Grants Pass*, the Blanket Ban punishes conduct rather than “mere status.” While the Blanket Ban encompasses a slightly different set of conduct than the Grants Pass ordinances, the Blanket Ban’s prohibition on “temporarily residing or dwelling in a place with protection from the elements” is analogous to Grants Pass’s prohibitions. And, like the Grants Pass ordinances, the Blanket Ban is ostensibly enforceable against anyone, regardless of housing status.[25] Under the *Grants Pass* holding, the Blanket Ban is therefore not cruel or unusual punishment by virtue of punishing status.

Plaintiffs ask this Court to consider whether the B.R.C. punishments are grossly disproportionate to the crime because the U.S. Supreme Court did not address the proportionality of the punishments in *Grants Pass*. *Response* at 12–13. However, Plaintiffs allege no facts in their *Amended Complaint* to advance an argument that the punishments are disproportionate. Indeed, the *Amended Complaint* does not allege that any of the named Plaintiffs have paid fines or been

[25] Whether the Blanket Ban is disproportionately enforced against unhoused individuals is a question of equal protection, not of cruel or unusual punishment.

incarcerated as punishment for violations of the Blanket Ban.[26] As such, the Court has no basis for addressing the issue of proportionality.

Nor does the Blanket Ban impose an inherently cruel or unusual punishment under federal law. Defendants argue that the punishments for violating the Blanket Ban are neither inherently cruel nor disproportionately punitive because they are comparable to those upheld by *Grants Pass*. *Motion to Dismiss Amended Complaint* at 6. Plaintiffs do not contest this argument. The U.S. Supreme Court concluded that the punishments associated with the Grants Pass ordinances — progressive fines of $295 to $1,250, 30-day bans from public parks for repeat offenders, and 30 days in prison — are not inherently cruel. 144 S.Ct. 2202, 2218–19. The U.S. Supreme Court also concluded that these punishments were not "unusual" because they were civil fines and brief periods of incarceration and therefore typical of the punishments attached to similar ordinances in other cities and states. *Id.* at 2219.

Maximum punishments for violations of the Blanket Ban are more severe than the punishments upheld in *Grants Pass*. Violations of the Blanket Ban are punishable by fines of up to $2,650 per violation and up to ninety days of incarceration. *Motion to Dismiss Amended Complaint* at 6. While the maximum range of these punishments are more severe than those upheld in *Grants Pass*, they are similar in kind and magnitude. Furthermore, neither a civil fine nor ninety days' imprisonment is cruel or unusual "in the abstract." 144 S.Ct. at 2220 (citing *Robinson v. California*, 370 U.S. 660, 667 (1970)). As such, the Blanket Ban is not inherently cruel or unusual by the Eighth Amendment standard set forth in *Grants Pass*.

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[26] See *Amended Complaint*, ¶¶ 124-164. Insofar as Plaintiffs discuss proportionality in their *Amended Complaint*, the facts alleged relate to disproportionate enforcement rather than disproportionate punishment. *Amended Complaint* ¶¶ 46, 81, 153. These facts may bear on an equal protection challenge but do not relate to the issue of proportionality.

B. Article II, Section 20 Jurisprudence

To be sure, *Grants Pass* is not controlling authority for this Colorado Constitutional claim. Indeed, Plaintiffs do not contend that the Blanket Ban challenge states a plausible claim for relief under the *Grants Pass* majority opinion. Rather, Plaintiffs argue that their claim remains plausible because Art. II, § 20 is more protective than the Eighth Amendment. Because Colorado appellate authority has thus far relied on Eighth Amendment case law to interpret Art. II, § 20 claims and because the Colorado Supreme Court has not yet interpreted Art. II, § 20 to afford broader protection than its federal counterpart, the Court disagrees.

The Colorado Supreme Court has recognized that when it comes to interpreting the state Constitution, Colorado stands "in our own house" and not on a federal floor. *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 36. Colorado is not bound to federal jurisprudence when interpreting its own Constitution. Instead, the Colorado Supreme Court borrows from federal constitutional analysis to construe the text of the Colorado Constitution when it independently deems such reasoning to be sound. *Id.* at ¶ 38. Therefore, the critical question is whether the Colorado Supreme Court has ever, in its independent judgment, deviated from federal jurisprudence when interpreting Art. II, § 20. This Court concludes that it has not.

The Colorado Supreme Court has identified several circumstances where it tends to incorporate federal precedent into Colorado constitutional interpretation, such as where the text of the state constitutional provision is "identical or substantially similar" to its federal counterpart and where parties assert dual claims under the state and federal Constitutions. *Id.* at ¶ 37. Even so, parallel text does not mandate parallel interpretation where distinctive state-specific factors overcome textual similarities. *Id.*, *citing People v. McKnight*, 2019 CO 36, ¶¶ 38–43 (departing from Fourth Amendment jurisprudence when interpreting Colorado Constitution Art. II, § 7

despite substantially similar wording). As such, some provisions of the Colorado Constitution with identical or substantially similar text to their federal counterparts nevertheless offer broader protections. *See McKnight*, 2019 CO 36 (broader dog-sniff search protections under Art. II, § 7 than the federal Fourth Amendment); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002) (broader free speech protections under Art. II, § 10 than the federal First Amendment).

Plaintiffs cite these cases to support the general contention that the Colorado Constitution may be interpreted more broadly than its federal counterpart.[27] However, the issue is not only whether the Colorado Constitution can offer more protection in general; it is whether Art. II, § 20 has in fact been interpreted as more protective than the Eighth Amendment. *See Reply* at 2. Plaintiffs cite *Close v. People*, 48 P.3d 528 (Colo. 2002), *abrogated by Wells-Yates v. People*, and *Wells-Yates v. People*, 2019 CO 90M, to support their contention that Art. II, § 20 has already been interpreted more broadly than the Eighth Amendment in the context of proportionality review. Of these two cases, only *Wells-Yates* directly addresses Art. II, § 20.

Plaintiffs argue that the Supreme Court has indirectly interpreted Art. II, § 20 more broadly than the Eighth Amendment by adopting a state-specific test for proportionality in *Wells-Yates*. In that case, the Colorado Supreme Court acknowledged that while Colorado "embraces" federal proportionality precedent when interpreting Art. II, § 20, the state test flows differently than federal analysis. *Wells-Yate*s, 2019 CO 90M, ¶¶ 10–11. Notably, however, the Court does not expressly attribute these differences to Art. II, § 20. Plaintiffs may have reasonably inferred from *Wells-*

[27] Plaintiffs also cite similar challenges in other state courts (*Response*, Exhibits 1–4). Three of these Exhibits are complaints, while the fourth Exhibit is an order in *Kitcheon v. City of Seattle*, 19-2-25729-6 SEA, granting summary judgment to plaintiffs. Because the *Kitcheon* order precedes the U.S. Supreme Court ruling in *Grants Pass* and relies on the Ninth Circuit's rulings in *Martin* and *Grants Pass,* it provides no independent support for Plaintiffs' argument.

Yates that the Colorado Supreme Court's consideration of "evolving standards of decency" in its proportionality review interprets not the Eighth Amendment, but the Colorado Constitution. *See Response* at 7. Plaintiffs therefore argue that *Wells-Yates*, in conjunction with case law interpreting other provisions of the Colorado Constitution, demonstrate that this Court has the authority to interpret Art. II, § 20 more broadly than the Eighth Amendment.

Critically, however, a recently announced Colorado Supreme Court opinion clarifies that no such authority currently exists. On September 30, 2024, after briefing concluded in this case, the Colorado Supreme Court issued *Wayne TC Sellers IV v. People*, 2024 CO 64, 2024 WL 434852 (opinion has not been released yet for publication in permanent law reports; mandate stayed on October 18, 2024 due to potential petition for certiorari to U.S. Supreme Court). In 2019, Sellers was convicted of felony murder and sentenced to life without parole (LWOP) pursuant to then-existing statutory requirements. In 2021, the Colorado legislature reclassified felony murder from a Class 1 offense carrying a minimum sentence of LWOP to a Class 2 offense carrying a minimum sentence of 48 years. *Id.* at ¶¶ 1, 11. Sellers appealed his sentence as cruel and unusual punishment under both the Eighth Amendment and Art. II, § 20, arguing first that his sentence was per se cruel and unusual due to the reclassification of the offense and second that LWOP was grossly disproportionate to the crime of felony murder. *Id.* at ¶¶ 1–3.

In raising these arguments at the Colorado Supreme Court, Sellers expressly requested the Court to deviate from federal Eighth Amendment case law and interpret Art. II, § 20 to render an LWOP sentence for a felony murder categorically improper. *Id.* at ¶ 36. The Colorado Supreme Court declined to do so. When setting forth its standard of review, the Court recognized that while it is "free to construe" state constitutional protections more broadly than their federal counterparts,

it has not "interpreted article II, section 20 of [the Colorado] Constitution to provide more protection than the Eighth Amendment." *Id.*

Sellers appears to resolve any doubts that the Colorado Supreme Court has interpreted Art. II, § 20 to afford more protection against cruel or unusual punishment than does the Eighth Amendment. *Sellers* primarily relied on federal case law to conclude that the sentence was not grossly disproportionate to the crime, noting that it perceived no basis to afford Sellers greater protection under Art. II, § 20 than under the Eighth Amendment. *Id.* at ¶¶ 38–53. Moreover, Colorado's appellate courts have consistently relied on Eighth Amendment jurisprudence to interpret various provisions of Art. II, § 20. *See People v. Young*, 814 P.2d. 834, 845–46 (Colo. 1991) (relying on federal death penalty jurisprudence to evaluate whether a Colorado death penalty sentencing scheme was cruel and unusual under Art. II, § 20), *superseded by statute as recognized in People v. Vance*, 933 P.2d 576 (Colo. 1997); *People v. Jones*, 489 P.2d 596, 599 (Colo. 1971) (citing federal standards to determine excessive bail under Art. II, § 20); *see also Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094, 1099–1100 (Colo. App. 1996) (applying federal principles to decide whether fines were excessive under Art. II, § 20). In light of *Sellers* and the foregoing appellate history, this Court discerns no Colorado appellate authority providing it with the discretion to interpret Art. II, § 20 more broadly than the Eighth Amendment.

Nor do the alleged state-specific facts about Colorado's history of outdoor tent use that Plaintiffs raise for the first time in their *Response* convince this Court that Art. II, § 20 inherently and unequivocally protects Coloradans' right to sleep outside using protective cover. Most critically, the historical facts set forth in the *Response* are not alleged in the *Amended Complaint*.

Plaintiffs cite *People v. Schafer* to support their contention, suggesting that the Court may, like the *Schafer* court, rely on evidence of "typical and prudent" outdoor living in Colorado to

analyze rights under the Colorado Constitution. 946 P.2d 938, 942–43 (Colo. 1997). However, *Schafer* protects not the right to camp in general but the right to privacy in tents under Art. II, § 7, which *Schafer* interprets using Fourth Amendment jurisprudence. *Id.* Nor does *Schafer* address Art. II, § 20.

Plaintiffs allege further facts about the settlement of Colorado, the establishment of Chautauqua, and the history of outdoor shelter in the American West to demonstrate the unique relationship between outdoor living and Western geography. In essence, Plaintiffs argue that local history creates a general "right to camp" that should be considered when determining what constitutes cruel and unusual punishment. Even assuming these facts to be true, the "state-specific factors" and "local developments" that courts rely on when diverging from federal jurisprudence goes beyond general history. *See People v. McKnight*, 2019 CO 36, ¶ 40. In *McKnight*, the Colorado Supreme Court decided to deviate from Fourth Amendment case law regarding dog sniffs not simply because marijuana use is particular to Colorado history but because marijuana possession had been legalized by a state Constitutional amendment. 2019 CO 36, ¶¶ 38–48. This decision suggests that general facts about Colorado history are not sufficient to move the needle away from federal case law interpreting the Eighth Amendment.

C. Colorado Status Jurisprudence

Plaintiffs further allege that the Blanket Ban violates Art. II, § 20 because it criminalizes the status of being unhoused. Most of the cases cited by Plaintiffs in their *Response* do not interpret Art. II, § 20 of the Colorado Constitution. *Response* at 10–11. The Response mistakenly cites the dissent in *People v. Anaya*, 572 P.2d 153, 155 (Carrigan, J. dissenting). The other cited cases follow and interpret *Robinson v. California*, 370 U.S. 660 (1962) for the general proposition that under the Eighth Amendment, punishment based on status is unconstitutional. None of these cases

interprets or applies Colo. Const. Art. II, § 20 or holds that it should be interpreted differently than the Eighth Amendment. *See People v. Giles*, 662 P.2d 1073 (Colo. 1983) (interpreting Eighth Amendment); *People v. Taylor*, 618 P.2d 1127 (Colo. 1980) (discussing SCOTUS opinions); *People v. Feltch*, 483 P.2d 1335 (Colo. 1971) (whether probable cause for arrest); and *People v. McKnight*, 2019 CO 36 (whether probable cause for search).

Colorado jurisprudence generally follows the constraints delineated in *Robinson* and *Powell*: that while mere status cannot be criminalized, conduct that goes beyond mere status can be criminalized. *Arnold v. City and County of Denver*, 464 P.2d 515 (Colo. 1970). In *Arnold*, the Colorado Supreme Court considered the constitutionality of the City and County of Denver's 1950 vagrancy statute, which criminalized all who had the "status or condition" of vagrancy. *Id.* at 516. In turn, the statute classified as a vagrant anyone who "wanders about the streets, alleys, or other public ways or places, or who is found abroad at late or unusual hours in the night without any visible or lawful business and not giving a satisfactory account of himself." City and Cty. of Denver Rev. Mun. Code § 824.1 (Series 1950). While *Arnold* was decided on Fourteenth Amendment grounds, the case first addressed the distinction between status and conduct as it relates to vagrancy.

The *Arnold* court recognized that while crimes of condition and status alone were unconstitutional under *Robinson*, an ordinance which couples status with behavior is not unconstitutional. 464 P.2d at 517. To support this contention, *Arnold* endorsed the U.S. District of Colorado's perspective regarding status and conduct in *Goldman v. Knecht*:

> "Conceivably, loitering or strolling on public property which obstructs the orderly government process would be offensive, and conceivably loitering and strolling about, when coupled with preparation to commit a criminal offense or with interference with the activities of others, might be within the scope of legislative prohibition, but the statute does not require the loitering or strolling to be associated with any other conduct."

64 P.2d 515, 517 (Colo. 1970), *quoting Goldman v. Knecht*, 295 F. Supp. 897, 905 (D. Colo. 1969). The *Arnold* court thereby acknowledged that some conduct, such as "loitering and strolling," is coextensive with status, while other conduct like "obstruct[ing] the orderly government process" or "prepar[ing] to commit a criminal offense" is not.[28] *Arnold* and *Goldman* are not, however, very illuminating on the distinction between status and conduct. And even if "residing or dwelling" and "eating or sleeping" in a public location were considered coextensive with the status of being unhoused, *Arnold* does not answer the question of whether the additional conduct of using protection or cover from the elements is sufficiently distinct from status.[29]

Plaintiffs specifically argue that because the number of unhoused individuals may exceed the number of available shelter beds in the City of Boulder, and because people need to sleep and stay warm regardless of whether they have a roof over their heads, enforcing the Blanket Ban against those individuals criminalizes the status of being involuntarily unhoused. These arguments were modeled on Eighth Amendment jurisprudence that has since been overturned. While one could argue based on *Arnold* and *Goldman* that the Boulder provision punishes only conduct that is coextensive with status, these cases do not outline any clear principles to distinguish conduct from status in the context of camping bans or provide a sufficient basis to support Plaintiffs' claim in light of *Grants Pass*. As such, the Court concludes there is no persuasive legal authority to support the conclusion that the Blanket Ban unconstitutionally criminalizes involuntary status.

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[28] This reasoning is reminiscent of Justice Sotomayor's dissent, which reasons that some conduct is inseparable from status. 144 S.Ct. 2202, 2259–67 (dissent).

[29] *Arnold* ultimately concluded that while "not giving a satisfactory account of himself" was a "matter of behavior," the phrase was unconstitutionally overbroad and vague. 64 P.2d at 517.

D. <u>Policy</u>

Homelessness, a reality for too many individuals, is a pressing and complex societal problem.[30] Like many local governments across the country, the City of Boulder has grappled with how best to address this crisis. Through this litigation and in the Amended Complaint, Plaintiffs have advanced plausible arguments that the Blanket Ban may not be the best public policy response. Reasonable people will disagree over which policy responses are most effective in addressing this complex issue. The wisdom of the Blanket Ban is not before the Court, however.[31] *See Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000) ("It is not up to the court to make policy or to weigh policy"). Rather, this Court is tasked with considering whether Plaintiffs have stated a plausible claim for relief under existing law. Under the recent precedent set forth by the U.S. Supreme Court in *Grants Pass*, the Court concludes Plaintiffs have not stated a viable claim for relief. In particular, the Court may not interpret Art. II, § 20 more broadly than the Eighth Amendment when the Colorado Supreme Court has recently explicitly stated that Colorado has not yet chosen to follow that path. In granting Defendants' *Motion to Dismiss Amended Complaint* and dismissing Plaintiffs' remaining claim, the Court does not intend to minimize the gravity of the urgent problems facing Boulder's unhoused population.

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[30] Over 600,000 people experience homelessness in America on any given night. *Grants Pass*, 144 S.Ct. at 2229 (dissent) (citations omitted). Some suggest that homelessness may be the "defining public health and safety crisis in the western United States" today, and according to the federal government, homelessness in this country has reached its highest levels since the government began reporting data on the subject. *Id.* at 2208 (majority) (citations omitted). The causes of homelessness are complex and interconnected, including debt and stagnant wages, abuse, physical and mental health disabilities, rising housing costs, and lack of affordable housing options. *Id.* at 2228 (dissent).

[31] The Court also declines Plaintiffs' invitation to question the legitimacy of the U.S. Supreme Court. Plaintiffs' *Response*, p. 15. This decision is not about the legitimacy of the U.S. Supreme Court or whether *Grants Pass* was correctly decided. Disagreement with *Grants Pass*, without more, is not a proper basis for the Court's decision.

V. CONCLUSION

The Court is tasked with determining whether Plaintiffs have plausibly alleged that the Blanket Ban violates Colorado's cruel and unusual punishment clause (Colo. Const. Article II, § 20). In light of the U.S. Supreme Court's *Grants Pass* opinion, which overturned two Ninth Circuit decisions that were pivotal to this Court's prior ruling, Plaintiffs have not stated a plausible claim for relief under Article II, § 20 of the Colorado Constitution. To date, the Colorado Supreme Court has not interpreted Article II, § 20 more expansively than the Eighth Amendment. In the absence of case law supporting Plaintiffs' remaining claim, Defendants' *Motion to Dismiss Amended Complaint* is granted.

SO ORDERED this 6th day of December, 2024.

BY THE COURT:

Robert R. Gunning
District Court Judge