



**Prime Sponsors:** Reps. Melton & Salazar

**Hearing Date:** March 14, 2018

**Bill Status:** House Local Government

*This memorandum was drafted by Denver Law's Homeless Advocacy Policy Project; it serves as a review and analysis of existing law. Nothing herein should be construed as legal advice.*

**Q: *Would the Right to Rest Act (proposed Act) violate "home-rule" authority?***

**A:** The Colorado Constitution grants municipalities "home-rule" authority to create or amend charters governing local and municipal matters. COLO. CONST. art XX, § 6. For matters that involve mixed state and local concern, a home-rule ordinance may coexist with state regulation only if the two do not conflict. *City of Northglenn v. Ibarra*, 62 P.3d 151, 155 (Colo. 2003). In the event of a conflict, the state statute supersedes the conflicting local ordinance. *Id.* Courts determine whether an issue is of state, mixed, or local concern by considering the totality of the circumstances on a case-by-case basis. *Id.* at 155-56. Factors relevant in determining whether a matter is local, state, or mixed include: (1) the need for statewide uniformity of regulation; (2) the extraterritorial impact of local regulation; (3) whether the matter has traditionally been regulated at the state or local level; and (4) whether the Colorado Constitution specifically commits the matter to state or local regulation. *City of Commerce City v. State*, 40 P.3d 1273, 1280 (Colo. 2002). Without enacted state authority to invalidate unconstitutional action, municipalities criminalize activities associated with homelessness to varying degrees. This engenders a high extraterritorial impact by fostering transient movement across municipalities. Because (1) of the need for uniformity, (2) the current extraterritorial impact, (3) regulating the activities of people who are homeless is neither a traditionally local nor statewide activity, and (4) the Colorado Constitution is silent in allocating this power, the proposed Act likely would not violate "home rule" authority.

**Q: *Would the proposed Act allow individuals, unhoused or otherwise, to camp in public spaces indefinitely?***

**A:** Colorado law prohibits anyone from camping within recreation areas for a period exceeding two weeks. Colo. Rev. Stat. § 25-13-110. The proposed Act does not invalidate this law.

**Q: *Would the proposed Act interfere with health code enforcement?***

**A:** Colorado law expressly authorizes law enforcement "to provide for and compel the removal of . . . rubbish of all kinds from lots . . . sidewalks, [and] alleys." § 31-15-401(1)(c)-(d)(1). Colorado statutes protect the right of the State to "restrain[], prevent[], abate[], and perpetually enjoin[]" any public nuisance. § 16-13-302. Colorado's nuisance statutes also grant the county or district board of health the authority to "destroy, remove, or prevent the nuisance, source of filth, or cause of sickness." § 25-1-518(1). This includes the unlawful disposal of trash. A premises is considered a public nuisance if it is unsanitary, unsuitable for

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human habitation, or a menace to public health. *Echave v. City of Grand Junction*, 193 P.2d 277, 280 (Colo. 1948). The proposed Act does not invalidate these laws.

**Q: *Would the proposed Act alter law enforcement's ability to conduct searches?***

**A:** Individuals are afforded security in “their persons, papers, homes and effects, from unreasonable searches and seizures” and that “no warrant to search any place or seize any person or things shall issue without describing the place to be searched, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.” COLO. CONST., art. II, § VII. Courts must assess whether an individual possesses a “subjective expectation of privacy” in her personal property or in a particular area and whether “that subjective expectation of privacy is one society recognizes as reasonable.” *Hoffman v. People*, 780 P.2d 471, 474 (Colo. 1989) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967)). Courts consider the totality of the circumstances and the specific facts of a given case to determine whether an individual has a reasonable expectation of privacy in a particular area or in the individual’s personal property. *Henderson v. People*, 879 P.2d 383, 387 (Colo. 1994).

Individuals have a reasonable expectation of privacy in the contents of “sealed containers” they own. *People v. Oates*, 698 P.2d 811, 816 (Colo. 1985). For example, a person has a reasonable expectation of privacy in the contents of her purse or wallet. *People v. Wright*, 840 P.2d 866, 869 (Colo. 1991) (reasoning that these items “are of an extremely personal nature”). This reasonable expectation of privacy extends to closed backpacks. *People v. Hines*, 575 P.2d 414, 415 (Colo. 1978). Nothing about the proposed Act would alter this analysis or law enforcement’s ability to conduct searches of personal items.

Courts generally afford the highest protection to an individual’s residence when interpreting the proscription against unreasonable searches and seizures. *People v. Schafer*, 946 P.2d 938, 942 (Colo. 1997). Individuals likely have a reasonable expectation of privacy in a secured tent they are using as shelter. *Id.* at 941. One of the primary exceptions to the warrant requirement arises when law enforcement has probable cause to believe an individual is or has committed a crime and there are exigent circumstances “justifying [] immediate police actions.” *Garcia*, 752 P.2d at 581. Exigent circumstances exist when there is a threat that an individual will immediately remove or destroy evidence of a crime. *Id.* Nothing about the proposed Act would alter this analysis of law enforcement’s ability to search a residence.

**Q: *Would the proposed Act establish unhoused individuals as a protected class?***

**A:** The Fourteenth Amendment prohibits a state from denying “to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. AMEND. XI. Classifications or government actions on the basis of race, national origin, or alienage “are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.” *Id.* at 440 (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 365 (1971)). Classifications or government actions that discriminate based on characteristics beyond a person’s control that do not impact his or her contribution to society—e.g. gender or illegitimacy—receive intermediate scrutiny. *Id.* at 440-41. These are protected classes. Previously, the Supreme Court has rejected the argument that poverty

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qualifies a class of people to receive strict or intermediate scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23-24 (1973). Courts have previously applied rational basis when reviewing ordinances that had a discriminatory impact on homeless individuals. *Goldman v. Knecht*, 295 F. Supp. 897, 906-07 (D. Colo. 1969). Under a rational basis test, the plaintiff bears a burden of proof to show that the government's classification does not "rationally related to a legitimate governmental interest." *U. S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973) (citing *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)). Given the difficulty in establishing protected class status and case precedent holding poverty is not a suspect classification, the Act likely will not change this status quo.

**Q: *Would a municipality or local government be liable should someone who is homeless commit a crime that would have otherwise been unlawful had the proposed Act not been passed?***

**A:** The Colorado Governmental Immunity Act (CGIA) states that "no public employee shall be liable for injuries arising out of an act or omission occurring during the performance of his or her duties and within the scope of his or her employment, unless such act or omission was willful and wanton . . ." Colo. Rev. Stat. § 24-10-105. Abiding by the terms of the proposed Act is an act for which public entities have governmental immunity from liability.

Further, § 24-10-118(2)(a) provides that a public employee will be immune from tort liability except where: (1) the action is for injuries resulting from the circumstances specified in § 24-10-106(1); or (2) the act or omission causing the injury was willful and wanton. § 24-10-106(1)(d)(I) states that immunity may be waived when "[a] dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic on the . . . portion customarily used for travel . . . [or] any public highway, road, street, or sidewalk within the corporate limits of any municipality . . ." Accordingly, law enforcement will still have the responsibility to enforce health codes and nuisance laws so as to avoid liability.

Of note, nothing about the proposed Act provides a "free pass" to people who are homeless to commit dangerous or serious crimes. Each of Colorado's counties has committed, at least in part, to being a sanctuary for undocumented immigrants. The proposed Act, like the deferred action immigration policy, ensures the government will not criminalize someone for actions part and parcel to their status—whether that status is "unhoused" or "undocumented."