Supreme Court No. 98824-2

COA No. 78230-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Respondent,

v.

STEVEN G. LONG,

Petitioner.

ON APPEAL FROM SEATTLE MUNICIPAL COURT
Honorable Karen Donahue

PETITION FOR REVIEW

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I. INTRODUCTION

On a cold and rainy October night, Steven Long returned from work to his home and found that the City of Seattle had towed it away and impounded it. Long's home was his truck. It was the only home and the only shelter he had. All of his worldly possessions – his clothes, tools, food, cooking utensils – were stored in it. The City towed his truck away because Long had violated a city parking law by parking in the same place for more than 72 hours. Under the City Code, Long could not get his truck back unless and until he paid all accrued towing and storage fees, and with every passing day those fees kept accumulating. Moreover, if he did not pay those fees within fifteen days, the City was entitled to auction off his home. Long did not have the money to redeem his home. A magistrate approved a payment plan and Long was able to get his home back just three days before it was scheduled to be sold. For a total of 21 days Long was without his home and all his possessions.

The City insisted that he still had to pay the towing and storage fees that had accumulated. Long maintained that the City violated the Homestead Act by holding onto his home for 21 days and threatening to auction his truck if he did not pay all those fees. He also maintained that the accumulated storage fees constituted an excessive fine that violated the Eighth Amendment and Wash. Const., art. 1, §14. Finally, Long claimed that by impounding his home the City had violated Wash. Const., art. 1, §7.

In a RALJ appeal the Superior Court agreed with Long that the City had violated the Homestead Act and the Court of Appeals affirmed that

ruling. *Slip Op.* at 19. The RALJ judge also agreed with Long that the City's imposition of towing and storage fees in the amount of $547.12 constituted a constitutionally excessive fine but the Court of Appeals disagreed. Based upon a misreading of this Court's decision in *State v. Clark*, 124 Wn.2d 90, 875 P.2d 613 (1994), the Court of Appeals rejected Long's excessive fines clause arguments and reversed the Superior Court's decision on that issue. The Court of Appeals also refused to consider Long's art. 1, §7 arguments because they were raised for the first time on appeal. The Court concluded that Long had failed to show manifest constitutional error because he had not shown that the seizure of his home had any identifiable practical consequences. *Slip Op*. at 26-27.

Notwithstanding its asserted reliance on *Clark,* the decision below actually conflicts with *Clark* and ignores the holding of that case. The opinion fails to conduct any analysis of the *Clark* proportionality factors, and holds instead that fines that repay the government for the cost of enforcing the law can *never* constitute an excessive fine because the Government is entitled to rough remedial justice. In fact, this Court's decision in *Clark* expressly rejects such an absolute rule and explicitly holds that sometimes the repayment of the costs of enforcement *does* constitute an excessive fine. *Clark* also holds that a court considering an excessive fines clause claim is required to conduct a proportionality analysis that encompasses several factors, one of which is the severity of the criminal offense. The Court of Appeals completely failed to consider this factor, and overlooked the fact that in *Clark* the defendants' two offenses were both

class C felonies, whereas in this case the only "offense" was a civil infraction punishable by a fine of $44.

Contrary to dicta in this Court's decision in *Clark*, the Court below failed to consider the fact that the seized property was Long's residence. Contrary to the express holding of *Tellevik v. Real Property,*, 83 Wn. App. 366, 921 P.2d 1088 (1996), the Court of Appeals failed to conduct any analysis of the proportionality factors that have been identified by this Court in *Clark* and by the U.S. Supreme Court. Contrary to centuries of common law and the U.S. Supreme Court's decision in *Timbs v. Indiana*, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019), the Court below ignored the undisputed evidence of Long's extreme poverty and simply never considered Long's personal financial circumstances. CP 110. Finally, the Court of Appeals rejected the claim that towing and storage fees were excessive on the grounds that fines set by the Legislature are presumptively constitutional, overlooking the undisputed fact that the fees in this case were ***not*** set by the Legislature.

The Court below also failed to recognize the internal inconsistency of its opinion. On the one hand the Court held that Seattle violated the Homestead Act by withholding his home under threat of forced sale for 21 days. *Slip Op.* at 19.[1] On the other hand the Court held that ordering Long to pay the City $547.12 was not constitutionally excessive because those

[1] "While the City did not ultimately forcibly sell Long's truck, *it did withhold his truck* under the threat of such a sale unless he agreed to pay the impoundment costs. Liberally construing the Act to achieve its purpose of protecting homes, we determine that *this violated the Homestead Act*." (Italics added).

costs were incurred by the City when the vehicle was towed and stored. But if withholding the vehicle for 21 days was unlawful then why should Long pay the City for expenses that it incurred by *illegally* storing the vehicle while withholding it from Long? What kind of "rough remedial justice" is achieved by making the parking violator compensate the City for the costs that it incurred by violating the Homestead Act?

Finally, the Court below failed to recognize that the record indisputably shows that the seizure of his home and all his possessions caused Long to suffer identifiable practical consequences and thus the Court erred in refusing to consider his art. 1, §7 claim. The opinion issued below holds that Long's home was illegally withheld for 21 days under the threat of forced sale in violation of the Homestead Act. But despite the holding, the Court below held that no practical and identifiable consequences resulted from the illegal withholding of his home.

II. IDENTITY OF PETITIONER

Steven Long, Petitioner, seeks review of the decision issued below.

III. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' published decision issued on June 29, 2020. (Appx. A) (-- Wn. App.3d -- , 2020 WL 3547072).

IV. ISSUES PRESENTED FOR REVIEW

1. Is an order that requires an offender to repay the State the costs of enforcement insulated from any judicial review to determine whether the repayment order is constitutionally excessive?

2. When a fine is challenged as constitutionally excessive is it error for the court to refuse to conduct a proportionality analysis?

3. When a fine is challenged as constitutionally excessive must the court consider the individual financial circumstances of the defendant?

4. Doe the presumption of constitutionality which applies to fines set by the Legislature apply to fines set by police department employees when they contract with a private company?

5. When government unlawfully withholds a person's home under threat of coerced sale, is an order requiring a person to repay government for the storage costs of such an unlawful withholding a constitutionally excessive fine?

6. Did the Court of Appeals err by failing to consider whether the fine in this case violated Wash. Const., art. 1, §14?

7. Did Petitioner's art. 1, §7 claim constitute manifest constitutional error because the unlawful withholding of his home for 21 days constituted practical and identifiable consequences resulting from an unreasonably long seizure?

V. STATEMENT OF THE CASE

The decision below summarizes the facts of this case as follows:

Long, a 60-year-old member of the Confederated Salish and Kootenai Tribes of Flathead Nation, was evicted from his apartment in 2014. Since then, he has lived in his truck, a 2000 GMC 2500 Sierra valued at about $4,000. Long works as a general laborer and keeps work tools, as well as personal items, in his truck. Long's work includes construction, painting, light plumbing, mechanics, and other labor.

In June 2016, while driving his truck, Long heard "grinding noises" coming from the gears. Long pulled into a store parking lot and stayed there for a few weeks with the business's permission. On July 5, 2016, Long moved his truck to an unused gravel lot owned by the City. Long stated that he parked at the lot because "it is secluded, there were other individuals living in vehicles, and the public did not appear to use it regularly." The lot was also near a day center for the homeless.

Three months later, on October 5, 2016, police were dispatched to an area near the gravel lot for an unrelated complaint. After the police

dealt with the complainant, another individual walked up and reported an incident involving Long. The officers approached Long and told him that, under city ordinance, his truck could not remain parked on city property for more than 72 hours. Long states that he told the officers the truck was inoperable and that he needed a part to repair it. Long also claims he told the officers that the truck was his home. The officers called a parking enforcement officer (PEO) to "tag" the truck. A PEO arrived and posted a 72-hour notice, which stated that the vehicle would be impounded it if he did not move it at least one city block within 72 hours, on Long's truck.

Long did not move his truck because he did not believe it was running well enough to drive. On October 12, 2016, Lincoln Towing, which contracts with the City to perform impound services, towed Long's truck while he was away working. Long learned of the impoundment when he returned to the lot around midnight. He was distressed because "it was a cold night and the beginning of an intense wind and rain storm." The truck contained his "winter jacket, clothes, sleeping bag, blankets, tools, tool boxes, air mattress, cooking stove and utensils, change for the bus, rubbing alcohol for [his] joints, laptop, and all [his] personal items for bathing and cleaning [him]self." After unsuccessfully trying to create a shelter out of a tarp, Long went to the nearby day center. Because the center did not have any available beds or mats, Long sat in a chair until the morning. Without his truck, Long began to live outside.

On October 18, 2016, Long obtained access to his truck at the Lincoln Towing lot and removed some personal items and bedding that he could carry. Long, however, could not afford to pay the costs to redeem his truck.

Long requested a hearing on the impoundment; the hearing occurred before a magistrate at Seattle Municipal Court on November 2, 2016. Long told the court that the truck was his home. But because Long did not argue that he had parked his truck legally, the magistrate determined that the ticket and impoundment were proper. The magistrate waived the $44 ticket, reduced the impoundment charges from $946.61 to $547.12, and added a $10 administrative fee. The magistrate set up a payment plan that required Long to pay $50 per month. Long felt he "had no real choice but to agree" to the payment plan because he needed his truck and did not want the City to auction it.

After the hearing, Long retrieved his truck from the impound lot. There, he learned that if he had not retrieved the vehicle, Lincoln Towing would have sold it at auction three days later—on November 5, 2016. Long drove his truck to a friend's property for storage. As of March 13, 2017,

> Long continued to experience homelessness, worked in Seattle, and lived outside.

Slip Op. at 5-7.

Purporting to rely on *Clark*, the Court of Appeals failed to consider any of the factors bearing on excessiveness on the ground that *Clark* holds that the recovery of the costs of enforcement can never be constitutionally excessive, and that fines set by the legislative body are entitled to a presumption that they are not excessive:

> … If the value of the fine or forfeiture is within the range prescribed ***by the legislative body***, a strong presumption exists that a forfeiture is constitutional. *United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009).
>
> Here, impounding Long's truck and requiring him to pay the associated fees is not a disproportionate punishment for a parking violation. Moving a vehicle has a direct relationship to the offense of illegally parking. And the fees are not excessive because the impoundment costs repay the City's agent, Lincoln Towing, for the costs of towing the vehicle based on contract. ***"The government is entitled to rough remedial justice."*** *State v. Clark*, 124 Wn.2d 90, 103, 875 P.2d 613 (1994), overruled on other grounds by *State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997) (determining forfeitures of the defendant's homestead and motorhome was ***not excessive because their value nearly equaled the cost of prosecution and investigation***). Moreover, towing illegally parked vehicles and requiring the owner to pay the associated costs are the exact penalties the City Council authorized for a violation of the 72-hour rule. See SMC 11.72.440(E). Thus, a strong presumption exists that the penalties were not excessive, which presumption Long does not overcome. For these reasons, we conclude that neither the impoundment nor the associated costs constituted excessive punishment under the Eighth Amendment.

Opinion, at 21-22 (emphasis added).

VI. ARGUMENT FOR GRANTING REVIEW

A. Criteria for discretionary review.

The decision conflicts with this Court's decision in *Clark* and with the Court of Appeals' decision in *Tellevik*; it raises significant questions of law under both the U.S. and Washington constitutions; and it involves significant issues of public interest that should be determined by this Court. All of the RAP 13.4(b) criteria for discretionary review are met in this case.

B. Excessive Fines Clause Issues

1. Contrary to *Clark*, which holds that an order requiring the offender to repay the costs of enforcement may sometimes constitute an excessive fine, the opinion below holds that such orders are never constitutionally excessive and fails to analyze any of the *Bajakajian* proportionality factors, such as the severity of the offense.

The decision below purports to rely on *Clark* as authority for the proposition that the "rough recovery" of the costs of prosecution can never constitute an excessive fine which violates the Eighth Amendment. But *Clark* actually *explicitly rejects* that proposition and states that *despite* a rough equivalence between a fine and the costs of prosecution, nevertheless a fine can still be constitutionally excessive:

> The rough equivalence of the value of the property forfeited and the amount spent on prosecution ***may not always*** insulate a forfeiture from a finding that the forfeiture is "excessive".

Clark, 124 Wn.2d at 104 (emphasis added). Directly contrary to *Clark*, the very case it purports to rely on, the opinion below fails to consider, or even discuss, any of the traditional factors bearing on the excessiveness inquiry

(gravity of the offense; personal financial circumstances of the defendant; and whether the property is the defendant's residence).

In *Clark* the defendant was convicted of two Class C felonies, (possession of a controlled substance with intent to manufacture or deliver and possession of more than 40 grams of marijuana), both punishable by up to 5 years in prison. *Id.* at 94.[2] Through civil proceedings, the State sought to forfeit Clark's home, motor home, and van. *Id.* Finding that the combined equity in the home and motor home was $30,921 and the cost of the prosecution and investigation was at least $26,000, the Superior Court ordered forfeiture of the home and motor home. *Id.* at 103. Noting that there was a rough equivalence between the value of the forfeited property and the cost of prosecution, this Court held that in this particular case "[o]n the particular facts of this case" those forfeitures were not constitutionally excessive. But this Court also expressly held that such a "rough equivalence" "*may not always insulate a forfeiture from a finding that the forfeiture is 'excessive.'*" *Id*. at 104 (italics added). This Court then cited a number of cases to illustrate the kinds of factors that must be considered and the types of circumstances when a penalty would be found excessive despite such a rough equivalence:

> *See Austin*, 509 U.S. at [623] n. 15, 113 S.Ct. at 2812 n. 15 (citing concurrence by Scalia, J.); *United States v. Borromeo*, 1 F.3d 219 (4th Cir. 1993) (compare value of property against nature of offense or amount needed to effectuate legitimate remedial purposes of forfeiture); *United States v. One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d 1493 (11th Cir. 1994)

[2] Clark was sentenced to 8 months in jail and $5,170 in fines. *Id.* at 95.

> (because owner of house was not one who preyed systematically on citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, forfeiture of his home worth $150,000 was excessive); *United States v. Real Property Located at 6625 Zumirez Drive*, 845 F.Supp. 725 (C.D. Cal. 1994) (considering gravity of offense, harshness of punishment, whether defendant property was integral to offense, and whether activity involving defendant property, the forfeiture of father's home with $625,000 equity as a result of son selling cocaine on property was excessive); *United States v. Certain Real Property*, 829 F.Supp. 1071 (E.D. Wisconsin 1993) (where substantial manufacturing operation had been established on property, forfeiture of property was not excessive).
>
> ***On the particular facts of this case, however***, we do not find the punishment in the form of the civil forfeitures of the Clarks' home and motorhome to be "excessive".

Clark, 124 Wn.2d at 104 (emphasis added).

When considering claims of excessiveness courts look at "the severity of the offense" as a key factor. *See United States v. Bajakajian*, 524 U.S. 321, 324, 339 (1998). Even though Bajakajian's offense was a felony, since "the harm that [he] caused was minimal" and since he "caused no loss to the public fisc," the Court found the forfeiture to be unconstitutional because it was "grossly disproportionate" to the offense. *Id.* at 326.

This case involves a civil parking infraction that is not even a criminal offense. Moreover, the record shows that Long's parking infraction did not affect anyone and caused no harm whatsoever. The spot where he parked was *not* a residential neighborhood, and he did not take up a spot that one would expect to be used by customers of any business, and his truck was not blocking anything. CP 60. So the "harm" caused by Long's infraction was

not merely "minimal," it was utterly nonexistent.[3] See CP 1075. The Magna Charta, the predecessor to the Excessive Fines Clause, declared that no amercement should be imposed absent some "genuine harm." *Browning-Ferris v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989).[4] The decision below fails to even consider whether his infraction caused a "genuine harm" and treats Long's infraction the same as Clark's felony drug offense.

The decision also conflicts with *Tellevik v. Real Property*, 83 Wn. App. 366, 921 P.2d 1088 (1996). There the State Patrol sought to forfeit John Chavez's home that he used to grow marijuana in. Chavez "asserted, in the course of arguing his excessive fines claim, that the trial court was required to conduct a proportionality-type analysis." *Id*. at 370. The trial court rejected his claim "without making a proportionality analysis." *Id.* The Court of Appeals reversed and remanded, holding that a proportionality analysis was constitutionally required. *Id.* at 375-76.[5]

The *Opinion* in this case contains the same error. In Municipal

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[3] As the Superior Court RALJ judge noted: "To the extent I look at the City as a victim, ***I don't see how the City was victimized here.*** I could in a different parking situation easily see that, but this isn't that case because it doesn't look as though the area where Mr. Long was parked was in very hot demand for City vehicles or otherwise. So ***I don't see a lot of relationship between the penalty here***, namely, the big towing fine or towing fee, ***and the harm to the City caused by the defendant's actions.***" (Emphasis added).

[4] The English King's practice of imposing crushing fines – "amercements" – on people who could not possibly pay them, prompted a legal response: "The Amercements Clause of Magna Carta limited these abuses in four ways: by requiring that one be amerced ***only for some genuine harm*** to the Crown; by requiring that ***the amount of the amercement be proportioned to the wrong***; by requiring that ***the amercement not be so large as to deprive him of his livelihood***; and by requiring that the amount of the amercement be fixed by one's peers, sworn to amerce only in a proportionate amount." *Id.* at 271 (emphasis added).

[5] "When Chavez was before the trial court, ***he expressly asked for a proportionality analysis. The trial court declined. This was error,*** and we remand for further proceedings to determine whether the forfeiture sought here is excessive within the meaning of the Eighth Amendment to the United States Constitution." (Emphasis added).

Court and in Superior Court, Long asked for a proportionality analysis and both courts conducted one. The Superior Court agreed with Long (in part) that the towing and storage fees were "grossly disproportionate." Only the Court of Appeals refused to conduct a proportionality test.

That refusal is predicated on the Court of Appeals' misreading of *Clark*. In *Tellevik*, the Court of Appeals read *Clark correctly* and recognized that although the costs of prosecution was *one* of the many factors to be considered when conducting a proportionality analysis, all the other factors had to be considered as well, including "the nature and value of the property" (in this case the property was Long's only shelter), "the effect" of the forfeiture on the owner (loss of his shelter and all that it contained), and "the gravity of the type of crime" [in this case a civil infraction] "as indicated by the maximum sentence" [here a $44 fine]." *Tellevik*, 83 Wn. App. at 374-75 & n.28, citing both *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 985-86 (9th Cir. 1995) and *Clark*.

2. The *Opinion* mistakenly applies a presumption of non-excessiveness to fines that were *not* set by the legislature. The towing and storage fees were set by the police.

In "deriving a constitutional excessiveness standard" the U.S. Supreme Court held that in the first instance courts should consider the range of fines authorized by *legislatures*:

> [J]udgments about the appropriate punishment for an offense belong in the first instance ***to the legislature*** [and r]eviewing courts … should grant substantial deference to the broad authority ***that legislatures necessarily possess in determining ... questions of legislative policy***.

Bajakajian, 524 U.S. at 336 (emphasis added). That is because elected legislators represent the collective judgment of the people.[6] Citing to *United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009), the Court of Appeals' decision states: "If the value of the fine or forfeiture is within the range prescribed *by the legislative body*, a strong presumption exists that a forfeiture is constitutional." *Slip Op.* at 21 (italics added).

But the record in this case shows that the towing and storage fees were *not* set by any legislative body. The City's own witness stated that the amount of impound costs are set *by a contract* between the City and Lincoln Towing that is negotiated by the Seattle Police Department. CP 883-84.[7] The Police Department is not a legislative body.[8] The employees who negotiate that contract are not elected, and they do not constitute a representative body. Their view of what is an appropriate fine is not an expression of "the collective . . . opinion of the people [of Seattle] as to what

[6] *Accord United States v. 817 N.E. 29th Drive, Wilton Manors*, 175 F.3d 1304, 1309 (11th Cir. 1999).

[7] "I am currently a License and Standards Inspector, in the Finance and Administrative Services (FAS) Department, and I assist with the Administration of ***the Seattle Police Department contract for impound services with Lincoln Towing.*** **[¶]** The impound and storage fees are set in the contract." (Emphasis added).

[8] The only legislative judgment that applies to this case is the Seattle City Council's enactment of an infraction table, SMC §11.31.121, which lists the standard penalty for violation of SMC §11.72.440(B) as a $44 fine. In the absence of a vehicle impound, a $44 fine would be the *only* financial penalty imposed for commission of this infraction.

is and is not excessive." *Wilton Manors*, at 1309.[9] Thus, the Court of Appeals erred when it accorded towing and storage fees established by the police department a presumption of non-excessiveness and its reliance on *Seher* (where the Court relied on a Congressional judgment) is misplaced.[10]

3. The Court has failed to consider the individual circumstances of the offender, contrary to *Timbs*.

Citing the U.S. Supreme Court's decisions in *Timbs v. Indiana*, 139 S.Ct. 682 (2019) and the concurrence in *Browning-Ferris*, Long argued below that the Seattle Municipal Court was required to consider his personal financial circumstances when deciding if the penalties imposed were grossly disproportional. The *Opinion* below does not discuss this factor, and thus silently rejects Long's argument.

In *Timbs* the Court cited Blackstone's commentary on the amercement provision in Magna Charta, the predecessor to the Excessive Fines Clause. There Blackstone stated that Magna Charta guaranteed that "no man shall have a larger amercement imposed upon him than his

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[9] Moreover, as this Court recently recognized, many people cannot afford to pay these costs. Because they are unable to redeem their vehicles within the fifteen day redemption period, their cars are auctioned off and they lose them forever: "[T]he legislature must have known that, for the poor, impoundment often means forfeiture. While there are procedures for an owner to recover an impounded vehicle, for the poor who cannot afford the towing and storage fees, these procedures offer little relief." *State v. Villela*, 194 Wn.2d 451, 460 n.3, 450 P.3d 170 (2019). For homeless people like Long, such an auction not only means that they lose a vehicle, it means they lose their only shelter.

[10] Last week the Ninth Circuit ruled that parking fines are subject to Excessive Fines Clause, reversed a summary judgment in favor of the city and remanded "for the court to determine under *Bajakajian* whether the late payment penalty of $63 is grossly disproportional for the offense of failing to pay the initial fine [for the infraction of failing to pay for overtime use of a metered parking space] within 21 days." *Pimentel v. City of Los Angeles*, 2020 WL 4197744, at *6 (9th Cir. July 22).

circumstances or personal estate will bear . . . ."). *Timbs*, 139 S.Ct. at 688. *Accord Browning-Ferris*, 492 U.S. 257 (1989) (O'Connor, J. concurring in part and dissenting in part);[11] 4 *Blackstone Commentaries*[12] at 372 (Univ. Chicago Press ed. 1979). Justice Thomas vigorously endorsed this same principle, citing to *Jones v. Commonwealth*, 5 Va. 555, 557 (1799),[13] and to a 1680 decision of the House of Commons finding that a judge had "most notoriously departed from all Rules of Justice and Equality, in the Imposition of Fines upon Persons convicted of Misdemeanors" without "any regard to the Nature of the Offences, or the Ability of the Persons." *Timbs*, 139 S.Ct. at 694 (Thomas, J. concurring).

The evidence was undisputed that Long earned between three to six hundred dollars a month and received a tribal dividend of one hundred dollars a month. CP 110, ¶¶ 24-25.[14] Moreover, since his tools were in his truck when it was impounded, he could not earn as much as usual because

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[11] Under Magna Charta, after "the amount of an amercement was initially set by the court[:] [a] group of the amerced party's peers would then be assembled to reduce the amercement *in accordance with the party's ability to pay*." *Id.* at 289 (italics added).

[12] Blackstone remarked that the "*quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. . . . [A]t all events, *what is ruin to one man's fortune, may be a matter of indifference to another's.*" *Browning-Ferris*, 492 U.S. at 300 (Op. of O'Connor, J.) (italics added).

[13] In *Jones*, a case with four defendants, the Court held that it would be "the highest injustice to oblige" the defendant of "poorer circumstances" to pay the same amount of fine as that of his three wealthier co-defendants.

[14] "I earn between $300 and $600 a month, depending on the work I can get. I also receive $100 a month in tribal dividends. I am not receiving any public benefits other than food assistance, which began on November 21, 2016. I am trying to save money to move into an indoor living location, such as an apartment or shared housing, but I have not been able to do so in the past few years." [¶] I have no financial accounts. I currently have about $25 in cash. My only possession of value is my truck, which I understand to be worth approximately $4,000 according to the Kelly Bluebook."

he could only do unskilled labor jobs that did not require them. CP 110, ¶27. Contrary to *Timbs*, *Browning-Ferris*, and Magna Charta,[15] *without* considering his ability to pay, the Court below concluded that the fees imposed upon Long were not excessive. But *Timbs* holds that consideration of "whether a fine is larger than what [the offender's] personal estate will bear" is constitutionally required. *Timbs*, at 688, citing Blackstone.

4. Last week a federal court held that civil fines imposed on the homeless violated the Excessive Fines Clause.

Last week, a federal district court held that civil fines imposed on homeless people for violating two municipal anti-camping laws and an illegal sleeping law violated the Excessive Fines Clause. The two anti-camping infractions "carr[ied] a mandatory fine of $295. The fine for illegal sleeping is $75. When unpaid, the fines increase to $537.60 and $160 respectively because of additional 'collection' fees." *Blake v. City of Grants Pass*, Case No. 1:18-cv-01823-CL, *Slip Op.* at 21 (Copy attached as

[15] It also conflicts with several cases from other jurisdictions. *See, e.g.*, *State v. Goodenow*, 251 Or. App. 139, 282 P.3d 8, 17 (2012) ("Whether an otherwise proportional fine is excessive can depend on, for example, *the financial resources available to a defendant*, the other financial obligations of the defendant, *and the effect of the fine on the defendant's ability to be self-sufficient.*") (italics added); *State v. Staub*, 182 La. 1040, 162 So. 766, 768 (La. 1935) ("What constitutes an excessive fine . . . depends in part . . . upon the ability of the defendant to pay."); *Commonwealth v. the Real Property at 416 So. 62nd Street*, 106 A.3d 836, 871 (Pa. Cmwlth. 2014) ("'The Excessive Fines analysis … requires . . . a thorough examination of every property owner's circumstances . . . ."); *United States v. Levesque*, 546 F.3d 78, 83-84 (1st Cir. 2008) ("'[T]he great object' of this provision was that '[i]n no case could the offender be pushed absolutely to the wall ….''); *Cf. Commonwealth v. Eisenberg*, 626 Pa. 512, 543, 98 A.2d 1268 (2014) (striking down statute on state constitutional grounds because it imposed a mandatory minimum fine without consideration of "the specific facts" about the defendant who was a full time student, did not own a house, and was living with his fiancée who was expecting a child).

Appendix F). The district court found these fines unconstitutional because they were "grossly disproportionate to the 'gravity of the offense.'":

> Any fine is excessive if it is imposed on the basis of status and not conduct. For Plaintiffs, the conduct for which they face punishment is inseparable from their status as homeless individuals, and therefore, beyond what the City may constitutionally punish. The fines associated with violating the ordinances at issue, as applied to Plaintiffs, are unconstitutionally excessive.

Slip Op. at 23.

5. Despite the reservation of the issue in *Clark*, the Court of Appeals failed to consider Long's art. 1, §14 state constitutional claim as required by *O'Day*.

Because the question was not adequately briefed, in *Clark* this Court declined to decide whether the penalty imposed violated art. 1, §14, reserving that state constitutional law issue for another day.[16] Long raised and briefed the issue of whether the excessive fines clause of art. 1, §14 provided greater protection than its federal counterpart in the Eighth Amendment,[17] but both the City and the Court of Appeals ignored it. Long noted that there is precedent for a state supreme court to rely on its state constitutional prohibition against excessive fines to strike down a fine, citing *Commonwealth v. Eisenberg*, 626 Pa. 512, 98 A.2d 1268 (2014).[18] Nevertheless, the Court of Appeals did not address Long's state constitutional law claim.

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[16] *Clark*, 124 Wn.2d at 102 n.7, citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

[17] *See Cross-Mtn for Discr. Rev.*, at 1 and *Respondent Long's Reply Brief*, at 18-20.

[18] *See also Tejada v. 2015 Cadillac Escalade*, 267 So.3d 1032, 1036 (Fla 2019) (remanded to consider claim that forfeiture violated Florida Const., art. 1, §17.)

As this Court stated in *O'Day v. King County,* 109 Wn.2d 796, 801-802, 749 P.2d 142 (1988), "[t]his court has a duty, where feasible, to resolve constitutional questions first under the provisions of our own state constitution before turning to federal law."[19] The Court of Appeals' refusal to consider Long's state constitutional law claim conflicts with *O'Day*, ignores the fact that this Court explicitly left this issue in *Clark,* and the fact that this Court has previously held that art. 1, §14 does confer greater protection than the Eighth Amendment.[20]

C. Article 1, Section 7 issues.

Long raised the issue of whether the retention of Long's vehicular home violated art. 1, §7 for the first time on appeal. In its first opinion, the Court below refused to consider the issue on the ground that "Long does not show that his privacy interests were disturbed" because "nothing in the record suggests that anyone searched Long's truck while it was impounded." *Appx. D* at 25. The Court reasoned that since the truck was never searched, art. 1, § 7 simply did not apply. *Id.* ("[Long] does not explain how the impoundment of his vehicle affected any privacy interest."). *Id.* In his reconsideration motion, Long pointed out that the impoundment of his home was a seizure and that every seizure constitutes a disturbance of one's private affairs. The

[19] *Accord Collier v. Tacoma*, 121 Wn.2d 737, 745, 854 P.2d 1046 (1993) (courts "must first decide if the asserted right is more broadly protected under the state constitution than it is under federal constitutional law." *Forbes v. City of Seattle*, 113 Wn.2d 929, 934, 785 P.2d 431 (1990); *Bedford v. Sugarman*, 112 Wn.2d 500, 507, 772 P.2d 486 (1989). When a state court neglects its duty ... it "deprives the people of their 'double security.'" *Alderwood Associates v. Wash. Env. Council*, 96 Wn.2d 230, 238, 635 P.2d 108 (1981) (quoting THE FEDERALIST NO. 51, at 339 (Modern Library ed. 1937)).

[20] *See, e.g., State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980); *State v. Gregory*, 192 Wn.2d 1, 15, 427 P.3d 621 (2018).

Court below then withdrew its first opinion and issued a new opinion.

Once again, the Court of Appeals held that Long had failed to show manifest constitutional error, but this time the Court ruled that Long had reasoned that although the seizure of his home was a disturbance of his private affairs, since the impoundment of the car was reasonable Long did not suffer any practical and identifiable consequences as a result of it. *Id.* at 24-27. But the court overlooked the fact that a seizure that is reasonable at the outset can become unreasonable if the duration of the seizure lasts longer than necessary. *See, e.g.*, *State v. Williams*, 102 Wn.2d 733, 741, 689 P.2d 2 1065 (1984) ("the length of time involved here appears to approach excessiveness," art. 1, §7 violated).[21]

Thus, even assuming, *arguendo*, that the initial impoundment of Long's truck was reasonable, the Court of Appeals failed to recognize that in the Homestead Act portion of its opinion *it had already held* that it was unlawful – and thus legally unreasonable – to refuse to release the truck to Long unless he paid all the accruing towing and storage fees. *Slip Op.* at 19. The alleged purpose of the impoundment was to remove a car from a spot where it was illegally parked. That purpose was fully accomplished by impoundment. Long tried to retrieve his truck but the City refused to release it and held on to it for 21 days. The Court of Appeals held that because "the

[21] *Accord State v. Cole*, 73 Wn. App. 844, 848, 871 P.2d 656 (1994) (even assuming initial traffic stop was reasonable, the seizure became unreasonable because the length of the stop went on for longer than necessary to issue traffic citation); *State* v. *Gonzales*, 46 Wn. App. 388, 394-95, 731 P.2d 1101 (1986); *Cf. United States v. Place*, 462 U.S. 696, 709-10 (1983) (Fourth Amend. violated: "the 90 minute detention of respondent's luggage is sufficient to render the seizure unreasonable") (discussed in *Williams*, at 739).

City ... did withhold his truck" under the threat of a forced sale "this violated the Homestead Act." *Id.* Thus, this "withholding" of Long's home was constitutionally unreasonable[22] because the City lacked "lawful authority" to withhold Long's home. Since the *duration* of the seizure exceeded the permissible constitutional scope, the identifiable and practical consequences of the art. 1, §7 violation were that Long was deprived of his home for 21 days. Thus Long did show manifest constitutional error and the Court below erred in failing to consider his art. 1, §7 claim.

VII. CONCLUSION

Appellate review of Excessive Fines Clause claims is *de novo*. The need for review by this Court is vividly illustrated by the fact that the Superior Court and the Court of Appeals reached opposite conclusions on the Excessive Fines Clause issue. The last time this Court considered an Excessive Fines Clause claim was 26 years ago, and was decades before the Supreme Court's 2019 decision in *Timbs*. Moreover, the decision below is internally contradictory. It specifically holds that the withholding of Long's home was unlawful and yet simultaneously holds that this unconstitutional seizure did not constitute manifest constitutional error because any violation of art. 1, §7 had no practical and identifiable consequences. Because this case meets all of the criteria for discretionary review set forth in RAP 13.4(b) this Court should grant review, reverse, and remand with directions to vacate the $547.12 fine imposed on Long.

[22] Although the opinion glosses over it, it also violated Wash. Const., art. XIX, §1 because that article mandates that "[t]he Legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."

Respectfully submitted this 28th day of July, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF SEATTLE, Petitioner/Cross-Respondent, v. STEVEN GREGORY LONG, Respondent/Cross-Petitioner.	No. 78230-4-I DIVISION ONE PUBLISHED OPINION

CHUN, J. — The Washington State Constitution mandates that the legislature protect portions of homesteads from forced sale. Accordingly, over a century ago, Washington passed its first homestead law. And over 25 years ago, our state legislature expanded homestead protection to "personal property that the owner uses as a residence," including automobiles. The law requires Washington courts to construe the "Homestead Act" (Act), chapter 6.13 RCW, broadly due to "the sanctity with which the legislature has attempted to surround and protect homestead rights." In re Marriage of Baker, 149 Wn. App. 208, 212, 202 P.3d 983 (2009).

Here, the city of Seattle (City) properly concedes that Steven Long's truck, which constituted his principal residence, may constitute a homestead. State and Seattle laws, however, allow for the forced sale of a vehicle after impoundment, regardless of whether such personal property constitutes a homestead. This case concerns whether the City violated Long's homestead

rights when it towed his truck and withheld it under the threat of forced sale unless he paid the impoundment costs or signed a payment plan.

Long concedes that the City could have ticketed him, towed his truck, and required him to pay for towing and storage costs and an administrative fee without violating his rights. The problem, Long argues, is that the City withheld the truck under the threat of a forced sale if he did not sign a payment plan. We agree. As noted above, the law requires us to construe the Homestead Act broadly in favor of the homeowner, so that it may achieve its purpose of protecting homes. In doing so, we determine that the Act protected Long's truck as a homestead and the City violated the Act by withholding the truck subject to auction unless he paid the impoundment costs or agreed to a payment plan. We therefore affirm the superior court's decision to void the payment plan.

This case also presents the following constitutional issues: first, whether impounding a vehicle that serves as a home and requiring the registered owner to pay the associated costs constitutes excessive punishment under the federal constitution's Eighth Amendment; second, whether a vehicle owner may assert the state-created danger doctrine under the due process clause to obtain relief from impoundment; and third, whether Long may raise for the first time on appeal that towing a vehicle that serves as a home violates the private affairs guaranty of our state constitution.

We conclude these additional constitutional arguments fail. As for the Eighth Amendment, assuming without deciding that the impoundment and associated costs constitute penalties, they are not excessive because they

directly and proportionally relate to the offense of illegal parking and are the exact penalties the Seattle City Council authorized. We also determine that Long cannot assert the state-created danger doctrine to seek relief from the impoundment, and he cannot raise his claim under the private affairs guaranty for the first time on appeal.

Our decision does not affect the City's authority to tow and impound an illegally parked vehicle.[1] Nor does it prohibit the City from charging a vehicle owner for costs associated with the towing and impounding of a vehicle. But if that vehicle serves as the owner's principal residence, the City may not withhold the vehicle from the owner under the threat of forced sale.

We affirm in part and reverse in part.

I. BACKGROUND

King County (County) currently faces a homelessness[2] crisis. In January 2019, researchers identified 11,199 people experiencing homelessness within the County.[3] Of these individuals, 2,147 lived in a vehicle.[4] These figures

[1] We note here that recently, the City passed Ordinance No. 126042 to permit the creation of 40 transitional encampments as an interim use where people living in their cars may camp indefinitely. Seattle Ordinance 126042, § 1 (Feb. 28, 2020).

[2] For purposes of this opinion, we use the definition of "homeless" found in the Count Us In report, which, "[u]nder the Category 1 definition of homelessness in the HEARTH Act, includes individuals and families living in a supervised publicly or privately operated shelter designated to provide temporary living arrangements, or with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground." APPLIED SURVEY RESEARCH & ALL HOME, COUNT US IN 116 (2019), http://allhomekc.org/wp-content/uploads/2019/09/KING-9.5-v2.pdf [https://perma.cc/LJL2-WNJL].

[3] Homelessness in King County 2019, ALL HOME, http://allhomekc.org/wp-content/uploads/2019/05/All-Homes-Infographic-V04.pdf [https://perma.cc/5LQX-ZCQE].

[4] Homelessness in King County 2019, supra.

apparently underestimate the number of people experiencing homelessness in the County.[5]

A. Seattle's 72-hour Rule

The Seattle Municipal Code (SMC) generally prohibits parking a vehicle in the same location on City property for more than 72 hours. SMC 11.72.440(B) (72-hour Rule). If a vehicle is parked in violation of the 72-hour Rule, it is "subject to impound as provided for in Chapter 11.30 SMC." SMC 11.72.440(E). SMC 11.30.030 incorporates applicable provisions of chapter 46.55 RCW by reference. Under RCW 46.55.140(1), "[a] registered tow truck operator who has a valid and signed impoundment authorization has a lien upon the impounded vehicle for services provided in the towing and storage of the vehicle." If the registered owner does not claim their vehicle or contest the impoundment within 15 days of the tow, the tow truck operator "shall conduct a sale of the vehicle at public auction" and use the proceeds to satisfy its lien. RCW 46.55.130(1), (2)(h).

If a person seeks to redeem an impounded vehicle without contesting the impoundment, then they must pay the towing contractor for the removal, towing, and storage costs of the impoundment plus an administrative fee. SMC 11.30.120(B). If a person chooses to contest the impoundment, then they may request a hearing before the municipal court. SMC 11.30.160. If the municipal court determines the City properly impounded the vehicle, then the vehicle "shall be released only after payment to the City of any fines imposed on

[5] APPLIED SURVEY RESEARCH & ALL HOME, supra, at 5.

any underlying traffic or parking infraction and satisfaction of any other applicable requirements of SMC 11.30.120(B) and payment of the costs of impoundment and administrative fee to the towing company." SMC 11.30.160(B). The municipal court also may allow the owner to make payments for the impoundment costs and administrative fee over time if there is extreme financial need and effective guarantee of payment. SMC 11.30.160(B). In that case, the City pays the impoundment costs to the towing company. SMC 11.30.160(B).

B. Steven Long

Long, a 60-year-old member of the Confederated Salish and Kootenai Tribes of Flathead Nation, was evicted from his apartment in 2014. Since then, he has lived in his truck, a 2000 GMC 2500 Sierra valued at about $4,000. Long works as a general laborer and keeps work tools, as well as personal items, in his truck. Long's work includes construction, painting, light plumbing, mechanics, and other labor.

In June 2016, while driving his truck, Long heard "grinding noises" coming from the gears. Long pulled into a store parking lot and stayed there for a few weeks with the business's permission. On July 5, 2016, Long moved his truck to an unused gravel lot owned by the City. Long stated that he parked at the lot because "it is secluded, there were other individuals living in vehicles, and the public did not appear to use it regularly." The lot was also near a day center for the homeless.

Three months later, on October 5, 2016, police were dispatched to an area near the gravel lot for an unrelated complaint. After the police dealt with the

complainant, another individual walked up and reported an incident involving Long. The officers approached Long and told him that, under city ordinance, his truck could not remain parked on city property for more than 72 hours. Long states that he told the officers the truck was inoperable and that he needed a part to repair it. Long also claims he told the officers that the truck was his home. The officers called a parking enforcement officer (PEO) to "tag" the truck. A PEO arrived and posted a 72-hour notice, which stated that the vehicle would be impounded it if he did not move it at least one city block within 72 hours, on Long's truck.

Long did not move his truck because he did not believe it was running well enough to drive. On October 12, 2016, Lincoln Towing, which contracts with the City to perform impound services, towed Long's truck while he was away working. Long learned of the impoundment when he returned to the lot around midnight. He was distressed because "it was a cold night and the beginning of an intense wind and rain storm." The truck contained his "winter jacket, clothes, sleeping bag, blankets, tools, tool boxes, air mattress, cooking stove and utensils, change for the bus, rubbing alcohol for [his] joints, laptop, and all [his] personal items for bathing and cleaning [him]self." After unsuccessfully trying to create a shelter out of a tarp, Long went to the nearby day center. Because the center did not have any available beds or mats, Long sat in a chair until the morning. Without his truck, Long began to live outside.

On October 18, 2016, Long obtained access to his truck at the Lincoln Towing lot and removed some personal items and bedding that he could carry.

Long, however, could not afford to pay the costs to redeem his truck.

Long requested a hearing on the impoundment; the hearing occurred before a magistrate at Seattle Municipal Court on November 2, 2016. Long told the court that the truck was his home. But because Long did not argue that he had parked his truck legally, the magistrate determined that the ticket and impoundment were proper. The magistrate waived the $44 ticket, reduced the impoundment charges from $946.61 to $547.12, and added a $10 administrative fee. The magistrate set up a payment plan that required Long to pay $50 per month. Long felt he "had no real choice but to agree" to the payment plan because he needed his truck and did not want the City to auction it.

After the hearing, Long retrieved his truck from the impound lot. There, he learned that if he had not retrieved the vehicle, Lincoln Towing would have sold it at auction three days later—on November 5, 2016. Long drove his truck to a friend's property for storage. As of March 13, 2017, Long continued to experience homelessness, worked in Seattle, and lived outside.

Long appealed the magistrate's decision to a municipal court judge. On March 13, 2017, after discovery, Long moved for summary judgment. He argued that the citation and impoundment of his vehicle and the associated fines, fees, and penalties violated (1) the excessive fines clause of the Eighth Amendment, (2) the due process clause of Fourteenth Amendment to the United States Constitution, and (3) the homestead protections under the Washington Constitution and the Homestead Act.

On May 10, 2017, the municipal court denied Long's motion. Long filed a notice of RALJ appeal to King County Superior Court on June 8, 2017.[6]

On March 2, 2018, the superior court affirmed in part and reversed in part. The court affirmed that the impoundment itself did not violate either the Eighth Amendment or Long's substantive due process rights. It reversed in part, however, because it determined that the impoundment fees were excessive in violation of the Eighth Amendment and that attaching Long's truck as security for the impoundment fees violated the Homestead Act. The court also voided the payment plan and ordered the City to refund previous payments.

Both Long and the City filed motions for discretionary review, which a commissioner of this court granted.

II. ANALYSIS

A trial court properly grants summary judgment in the absence of a genuine issue of material fact. CR 56(c); Billings v. Town of Steilacoom, 2 Wn. App. 2d 1, 14, 408 P.3d 1123 (2017). In reviewing a summary judgment ruling, we "engage[] in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party." Billings, 2 Wn. App. 2d at 14. The parties do not appear to dispute any of the facts material to our analysis.

A. The Homestead Act

The City argues that while a truck may qualify for homestead protection,

[6] On June 28, 2017, the City orally moved for a final judgment before the municipal court, which the court granted.

the Homestead Act does not apply here. Long contends that "[t]he City violated the Homestead Act by attaching [his] residence as security for his impound debts and by threatening to sell his home for those debts." We agree in part with Long and conclude that the City violated the Homestead Act.

1. The Origins of Washington's Homestead Act

States began passing homestead laws in the 19th century. Paul Goodman, The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880, 80 J. AM. HIST. 470, 470 (1993). Such laws aim to protect a debtor's dwelling from execution and forced sale. WASH. STATE BAR ASS'N, WASHINGTON REAL PROPERTY DESKBOOK SERIES: INTERESTS IN REAL PROPERTY AND DUTIES OF THIRD PARTIES § 10.2(2) (4th ed. 2015). Texas was the first state to pass a homestead exemption law in 1839, and 18 more states passed homestead laws between 1848 and 1852. Goodman, supra, at 470. These laws "aimed at providing a measure of security in an increasingly insecure, volatile economy" that accompanied the development of capitalism in the United States. Goodman, supra, at 470. Before these laws, the United States experienced financial "panic[s]" that caused thousands to suffer from unemployment and bankruptcy and to lose their homes. Goodman, supra, at 471. In response, states passed homestead exemption laws that "promised to shield at least homes so that families no longer need worry that the breadwinner's bad luck or incompetence would plunge an entire household into destitution." Goodman, supra, at 471.

The Washington State Constitution mandates that "[t]he legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." CONST. art. XIX, § 1. Washington passed its first homestead law in 1895 under this constitutional mandate.[7] LAWS OF 1895, ch. 64, § 1; REM. REV. STAT. § 528 (Supp. 1945).

As was true with the first homestead laws in the nation, the purpose of Washington's Homestead Act is to place qualifying homes, or portions of them, beyond the reach of financial misfortune and to promote the stability and welfare of the state. Clark v. Davis, 37 Wn.2d 850, 852, 226 P.2d 904 (1951).

The law requires us to liberally construe the Homestead Act in favor of the debtor so it may achieve its purpose of protecting homes. In re Dependency of Schermer, 161 Wn.2d 927, 953, 169 P.3d 452 (2007) ("The [Homestead Act] is favored in law, and courts construe it liberally so it may achieve its purpose of protecting family homes."); Baker, 149 Wn. App. at 212 (broadly interpreting the Homestead Act due to "the public policy involved in [Washington's] homestead statutes" and "the sanctity with which the legislature has attempted to surround and protect homestead rights"); In re Tr.'s Sale of Real Property of Upton, 102 Wn. App. 220, 223, 6 P.3d 1231 (2000) ("'homestead and exemption laws are favored in law and are to be liberally construed'" (quoting In re Tr.'s Sale of Real Property of Sweet, 88 Wn. App. 199, 204, 944 P.2d 414 (1997))); Burch v. Monroe, 67 Wn. App. 61, 64, 834 P.2d 33 (1992) (noting that homestead laws

[7] Washington Territory passed its first homestead law in 1860. Goodman, supra at 472.

are enacted "'in the interest of humanity'" because "[t]heir intent is to ensure shelter for families" (quoting Macumber v. Shafer, 96 Wn.2d 568, 570, 637 P.2d 645 (1981))); Webster v. Rodrick, 64 Wn.2d 814, 816, 394 P.2d 689 (1964) (stating that homestead statutes "do not protect the rights of creditors; they are in derogation of such rights" (citing First Nat'l Bank of Everett v. Tiffany, 40 Wn.2d 193, 242 P.2d 169 (1952))); Downey v. Wilber, 117 Wash. 660, 661, 202 P. 256 (1921) (noting that the purpose of the Homestead Act "is to prevent a forced sale of the home; in other words, to secure the claimant and [their] family in the possession of [their] home").

Washington's Homestead Act defines a "homestead" as "real or personal property that the owner uses as a residence." RCW 6.13.010(1). While mobile homes were the first form of personal property covered by the Act, the legislature amended the Act in 1993 to cover "personal property that the owner uses as a residence" so as to extend homestead protection to cars and vans. FINAL B. REP. ON SUBSTITUTE S.B. 5068, 53d Leg., Reg. Sess. (Wash. 1993) ("[b]ecause some Washington citizens reside on their boats or in their cars or vans, it has been recommended that the homestead exemption's scope be expanded to include any personal or real property that the owner uses as a residence"). "Once the owner occupies the property as a principal residence, a homestead exception is established automatically without a declaration." Nw. Cascade, Inc. v. Unique Constr., Inc., 187 Wn. App. 685, 697-98, 351 P.3d 172 (2015). A "homestead is exempt from attachment and from execution or forced sale for the debts of the owner up to the amount specified in RCW 6.13.030." RCW 6.13.070(1).

2. Declaration of homestead

The City agrees that a truck may qualify for homestead protection. But it asserts that under RCW 6.13.040, Long needed to file a declaration of homestead for the Act to protect his truck. Long contends that occupying his vehicle as his principal home rendered it automatically protected. We agree with Long.

We review de novo issues of statutory interpretation. Nw. Cascade, 187 Wn. App. at 696. We "'look first to the plain meaning of the statutory language, and . . . interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.'" Benson v. State, 4 Wn. App. 2d 21, 26, 419 P.3d 484 (2018) (quoting Rivard v. State, 168 Wn.2d 775, 783, 231 P.3d 186 (2010)). Our fundamental objective when construing a statute is to determine and carry out the legislature's intent. King County v. King County Water Dist. No. 20, 194 Wn.2d 830, 853, 453 P.3d 681 (2019).

RCW 6.13.040(1) lists circumstances under which the homestead exemption automatically protects property, and circumstances that require a declaration of homestead for the exemption to apply:

> *Property described in RCW 6.13.010 constitutes a homestead and is automatically protected by the exemption* described in RCW 6.13.070 from and after the time the real or personal property is occupied as a principal residence by the owner or, if the homestead is unimproved or improved land that is not yet occupied as a homestead, from and after the declaration or declarations required by the following subsections are filed for record or, if the homestead is a mobile home not yet occupied as a homestead and located on land not owned by the owner of the mobile home, from and after delivery of a declaration as prescribed in RCW 6.15.060(3)(c) or, if

> the homestead is *any other personal property*, from and after the delivery of a declaration as prescribed in RCW 6.15.060(3)(d).

(Emphasis added.)

The opening clause of the subsection provides, "Property described in RCW 6.13.010 constitutes a homestead and is automatically protected . . . from and after the time the real or personal property is occupied as a principal residence by the owner." RCW 6.13.010(1) defines a "homestead" as "real or personal property that the owner uses as a residence." Thus, because Long occupied his truck as a principal residence, the homestead exemption automatically applies.

The City points to the final clause in RCW 6.13.040(1) and asserts that the language requiring a declaration for "any other personal property" applies to Long's truck. But such a reading would render meaningless the terms "any other." See Benson, 4 Wn. App. 2d at 26. The final clause refers to personal property *other than* the personal property listed in the opening clause (i.e., personal property described in RCW 6.13.010). Thus, the City's reading would have the final clause contradict the opening clause.[8]

[8] The City's interpretation also appears inconsistent with case law providing that property occupied as a residence is automatically protected as a homestead without a declaration. See Schermer, 161 Wn.2d at 953 ("A home automatically becomes a homestead when the owners use the property as their primary residence"); Fed. Intermediate Credit Bank of Spokane v. O/S Sablefish, 111 Wn.2d 219, 229, 758 P.2d 494 (1988) ("The Legislature substantially rewrote the homestead act in 1981. The major purpose of this effort was to make the homestead classification automatic once the property is occupied as a permanent residence."); Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle, 101 Wn.2d 416, 420, 679 P.2d 928 (1984) ("possession was (and is) the key to the right to homestead"); Viewcrest Condo. Ass'n v. Robertson, 197 Wn. App. 334, 340, 387 P.3d 1147 (2016) ("Once property is occupied as a primary residence, a homestead is automatically created."); Nw. Cascade, 187 Wn. App. at 697-98 ("Once the owner occupies the property as a principal residence, a homestead exception is established automatically without a declaration."); In re Wilson, 341 B.R. 21,

The City supports its interpretation of RCW 6.13.040(1) by citing the declaration requirements for "other personal property" set forth in RCW 6.15.060(3)(d). In a declaration for "other personal property" the debtor must state that they reside on the personal property as a homestead. RCW 6.15.060(3)(d). The City claims that if "other personal property" from RCW 6.13.040(1) did not refer to occupied personal property, then RCW 6.15.060(3)(d) would not require the debtor to state that they reside on the personal property.

The two statutes do appear inconsistent. While RCW 6.13.040(1) provides that occupied personal property is automatically protected, RCW 6.15.060(3)(d) implies that a declaration is required for the Act to protect such property. Thus, the statute is susceptible to more than one reasonable meaning. Statutes that can be reasonably interpreted in two or more ways are ambiguous. Payseno v. Kitsap County, 186 Wn. App. 465, 469, 346 P.3d 784 (2015). When statutes are ambiguous, it is appropriate for courts "to resort to aids to construction, including legislative history." King County, 194 Wn.2d at 853. Ultimately, we must harmonize related statutory provisions to carry out a consistent scheme that maintains the statute's integrity. King County, 194 Wn.2d at 853. And again, with respect to the Homestead Act, the law requires us to liberally construe the Act in favor of the homesteader. Schermer, 161 Wn.2d at 953.

25-26 (9th Cir. 2006) (stating that an automatic homestead exemption is created for real or personal property from and after the time the property is occupied as a principal residence by the owner).

When a statute is ambiguous, courts "'rely on statutory construction, legislative history, and relevant case law to determine legislative intent.'" Payseno, 186 Wn. App. at 469 (quoting State v. Rice, 180 Wn. App. 308, 313, 320 P.3d 723 (2014)). The final bill report on the 1993 amendment states that the legislature sought to expand the scope of the exemption "to include *any* personal or real property" because some citizens resided on their boats or in their cars or vans. FINAL B. REP. ON SUBSTITUTE S.B. 5068 (emphasis added). The report's summary also provides that "[t]he definition of homestead is expanded to include *any* real or personal property that the owner uses as a residence." FINAL B. REP. ON SUBSTITUTE S.B. 5068 (emphasis added). This history shows the legislature intended to for the Act to automatically protect people residing in their vehicles. Moreover, this broader interpretation of the types of property automatically protected under the Act maintains the statute's integrity by effecting its overall purpose of protecting homes.

The undisputed evidence shows that Long lived in his truck when the City impounded it. Because the legislative history shows an intention for broad protections of personal property and because we must liberally construe the Act, we interpret the Homestead Act not to require a declaration for personal property that the owner is occupying as a principal residence. Thus, the truck constituted a homestead and the homestead exemption applied.

3. Attachment

The City claims that the lien resulting from the impoundment of Long's truck did not violate the Homestead Act because the payment plan, which does

not encumber Long's truck, extinguished it. Long argues a lien was automatically placed on his truck upon it being towed, and this constituted an attachment that violated the Homestead Act. We determine that the lien never attached to Long's truck.

As stated above, under Washington law, "[a] registered tow truck operator who has a valid and signed impoundment authorization has a lien upon the impounded vehicle for services provided in the towing and storage of the vehicle." RCW 46.55.140(1). For a towing company to release an impounded vehicle, SMC 11.30.120(B) requires the registered owner to pay all the accumulated impound debt to the towing company. In cases of extreme financial hardship, however, a magistrate may allow the registered owner to make payments over time if there is an effective guarantee of payment. SMC 11.30.160(B). If a magistrate sets up such a payment plan, the City pays the costs of impoundment to the towing company. SMC 11.30.160(B).

Because statutes creating liens are in derogation of the common law, we strictly construe them. City of Algona v. Sharp, 30 Wn. App. 837, 843, 638 P.2d 627 (1982) (citing Dean v. McFarland, 81 Wn.2d 215, 500 P.2d 1244 (1972)). Unless the statute lists a lien among the several types that one may execute against a homestead, courts must infer that the legislature intended the omission of the lien type from the Homestead Act. Sharp, 30 Wn. App. at 842. There is not a statutory provision for execution or forced sale of a homestead to satisfy liens under RCW 46.55.140(1). See RCW 6.13.080. Because "[t]he homestead is . . . a species of land tenure exempt from execution and forced sale in all but

the enumerated circumstances," a lien type not enumerated in the Act cannot be superior to the homestead. Sharp, 30 Wn. App. at 843.

As for the attachment of liens under RCW 46.55.140(1), RCW 6.13.090 states, "A judgment against the owner of a homestead shall become a lien on the value of the homestead property in excess of the homestead exemption . . . ." While courts have not yet addressed the attachment process for liens under RCW 46.55.140(1), they have determined that "a general judgment lien does not operate upon, and does not attach to, premises which constitute a homestead." Locke v. Collins, 42 Wn.2d 532, 535, 256 P.2d 832 (1953); In re DeLavern, 337 B.R. 239, 242 (Bankr. W.D. Wash. 2005) (noting that, under Washington's Homestead Act, a judgment lien "cannot attach to homestead property"). Instead, "[l]iens commenced under RCW 6.13.090 encumber the value *in excess* of the homestead exception." In re Deal, 85 Wn. App. 580, 584, 933 P.2d 1084 (1997).

We see no reason why the attachment law for liens under RCW 46.55.140(1) would differ from that for judgment liens, and therefore apply these principles to the issue before us. Thus, while RCW 46.55.140(1) created a lien on Long's truck, it could not attach. See DeLavern, 337 B.R. at 242 ("Thus, while a judgment lien is created on property rather than value pursuant to *Wilson Sporting Goods*,[9] under the more specific analysis of *Deal* and *Sweet*, it cannot attach to homestead property."). Further, because Long's truck did not have

[9] Wilson Sporting Goods Co. v. Pedersen, 76 Wn. App. 300, 886 P.2d 203 (1994).

value above the homestead exemption, there was no property to which the RCW 46.55.140(1) lien could attach. For these reasons, we reject Long's argument that the attachment of a lien to his truck violated the Homestead Act.

4. Withholding Truck under Threat of Forced Sale

Long claims the City would release his truck, which it withheld under the threat of forced sale, only if he agreed to a payment plan. The City responds that the sale of an unclaimed vehicle is not forced. We decide that the City could not withhold Long's truck under the threat to forcibly sell it, or threaten to forcibly sell it unless he agreed to pay the associated fees, without violating his homestead rights. For these reasons, we determine the payment plan is void.

If a registered owner does not claim their vehicle or contest impoundment within 15 days of the tow, the tow truck operator "shall conduct a sale of the vehicle at public auction." RCW 46.55.130(1). The tow truck operator uses the proceeds from the sale to satisfy its lien and remits any surplus to the State. RCW 46.55.130(2)(h). The registered owner may seek the surplus proceeds within one year of the sale. RCW 46.55.130(2)(h).

Here, the City does not contest Long's assertion that Lincoln Towing would have sold his truck at public auction on November 5 if he had not agreed to the payment plan three days earlier. Instead, it claims that any sale of the truck would not have been a "forced sale" because Long consented to any such sale by willfully violating the 72-hour Rule.

Washington courts have defined a "forced sale" as a sale with an element of compulsion:

> "A forced sale is generally a transaction in which there is an element of compulsion on the part of either the seller or the buyer. If the element of compulsion is based upon purely economic reasons, the sale is generally considered voluntary . . . Where, however, a seller or buyer is forced to act under a decree, execution or something more than mere inability to maintain the property, the element of compulsion is based upon legal, not economic, factors."

Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle, 101 Wn.2d 416, 422, 679 P.2d 928 (1984) (alteration in original) (quoting State v. Lacey, 8 Wn. App. 542, 549, 507 P.2d 1206 (1973)). "Impoundment under Wash. Rev. Code § 46.55 is not a consensual consumer transaction." Betts v. Equifax Credit Info. Servs., Inc., 245 F. Supp. 2d 1130, 1133 (W.D. Wash. 2003). Although the City argues that selling an unclaimed vehicle at a public auction is a consensual transaction, a state statute, not the registered owner, authorizes the sale of the vehicle. See Betts, 245 F. Supp. 2d at 1134 (stating that impoundments are not consensual because they are authorized by state statute, not the vehicle's owner). In other words, legal factors compel the sale. Accordingly, such a transaction constitutes a forced sale. Thus, because Long's truck constituted his homestead, the City—through the tow operator—could not forcibly auction it.

While the City did not ultimately forcibly sell Long's truck, it did withhold his truck under the threat of such a sale unless he agreed to pay the impoundment costs. Liberally construing the Act to achieve its purpose of protecting homes, we determine that this violated the Homestead Act. The City had no legal authority to make the threat to induce Long to enter a payment plan. Thus, we conclude the payment plan is void. See Sharp, 30 Wn. App. at 843 (noting that a sale of an exempted homestead is void).

B. Eighth Amendment

The City argues the trial court erred by determining that the impoundment costs violated the Eighth Amendment. Long contends that both the impoundment and the associated costs constituted excessive punishment. We determine that, assuming without deciding that the impoundment of Long's truck and the associated costs constituted penalties, they fell short of constitutional excessiveness.

"Constitutional interpretation is a question of law reviewed de novo." State v. Ramos, 187 Wn.2d 420, 433, 387 P.3d 650 (2017).

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The amendment's purpose, apart from the bail clause, is to limit the government's power to punish. Austin v. United States, 509 U.S. 602, 609, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). The Fourteenth Amendment's due process clause makes the Eighth Amendment's excessive fines clause applicable to the states. Timbs v. Indiana, __ U.S. __, 139 S. Ct. 682, 687, 203 L. Ed. 2d 11 (2019).

When determining how the Eighth Amendment affects a specific civil in rem forfeiture, courts address two questions: "(1) Does the forfeiture constitute punishment, and (2) if so, is that punishment excessive?" Tellevik v. Real Property Known as 6717 100th Street S.W., 83 Wn. App. 366, 372, 921 P.2d 1088 (1996). The party challenging the constitutionality of a forfeiture bears the

burden of demonstrating an Eighth Amendment violation. United States v. Jose, 499 F.3d 105, 108 (1st Cir. 2007).

In evaluating excessiveness, "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." United States v. Bajakajian, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Thus, a punitive forfeiture violates the Eighth Amendment if it is "grossly disproportional to the gravity of a defendant's offense." Bajakajian, 524 U.S. at 334. If the value of the fine or forfeiture is within the range prescribed by the legislative body, a strong presumption exists that a forfeiture is constitutional. United States v. Seher, 562 F.3d 1344, 1371 (1st Cir. 2009).

Here, impounding Long's truck and requiring him to pay the associated fees is not a disproportionate punishment for a parking violation. Moving a vehicle has a direct relationship to the offense of illegally parking. And the fees are not excessive because the impoundment costs repay the City's agent, Lincoln Towing, for the costs of towing the vehicle based on contract. "The government is entitled to rough remedial justice." State v. Clark, 124 Wn.2d 90, 103, 875 P.2d 613 (1994) (determining forfeitures of the defendant's homestead and motorhome were not excessive because their value nearly equaled the cost of prosecution and investigation), overruled on other grounds by State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997). Moreover, towing illegally parked vehicles and requiring the owner to pay the associated costs are the exact penalties the

city council authorized for a violation of the 72-hour Rule. See SMC 11.72.440(E). Thus, a strong presumption exists that the penalties were not excessive, which presumption Long does not overcome. For these reasons, we conclude that neither the impoundment nor the associated costs constituted excessive punishment under the Eighth Amendment.

C. Substantive Due Process

Long contends that the City violated his substantive due process rights by towing his car because it deprived him of a shelter and exposed him to inclement weather. The City argues that Long cannot assert this claim to obtain relief from impoundment. We agree with the City.

The Fourteenth Amendment's due process clause provides, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The substantive component of the clause bars certain arbitrary and wrongful government actions regardless of procedural fairness. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). The clause, however, "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Thus, "[the clause's] language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." DeShaney, 489 U.S. at 195.

An exception to this rule of nonliability, however, exists through the state-created danger doctrine. Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1086 (9th Cir. 2000). Thus, some courts have recognized that plaintiffs can argue the doctrine to hold states liable under 42 U.S.C. § 1983.[10] Henry A. v. Willdren, 678 F.3d 991, 1002 (9th Cir. 2012) ("The State can also be held liable under the Fourteenth Amendment's Due Process clause . . . 'where state action creates or exposes an individual to a danger which [they] would not have otherwise faced.'" (quoting Kennedy v. City of Ridgefield, 439 F.3d 1055, 1061 (9th Cir. 2006))); Rivera v. Houston Indep. Sch. Dist., 349 F.3d 244, 249 (5th Cir. 2003) (noting that the Tenth, Sixth, Third, Second, and Ninth Circuits have recognized state actors may be held liable under the state-created danger doctrine if they knowingly endanger a person).[11] Long cites no case that considers the state-created danger doctrine in a context other than a 42 U.S.C. § 1983 suit.

Long cites two cases, Lawrence v. Texas, 539 U.S. 558, 578-79, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), and Foucha, 504 U.S. at 77-83, to argue that a plaintiff may raise a due process claim to obtain relief in an enforcement action.

[10] Neither the United States Supreme Court nor any Washington court has endorsed this doctrine.

[11] Henry A. concerned a 42 U.S.C. § 1983 suit against a county and county officials for alleged systematic failures in its foster care system that injured children in its care. 678 F.3d at 996-98. Kennedy concerned a 42 U.S.C. § 1983 claim against a police officer. 439 F.3d at 1057. In that case, a couple reported to the officer that a 13-year-old neighbor had molested their child and informed the officer of the 13-year-old's violent tendencies. Kennedy, 439 F.3d at 1057-58. Though the officer told the couple he would notify them before speaking to the neighbor about their complaint, he failed to do so. Kennedy, 439 F.3d at 1058. Later that night, the 13-year-old attacked the couple, shooting the woman and fatally shooting her husband. Kennedy, 439 F.3d at 1058.

But neither of these cases addresses the state-created danger doctrine or suggests that we should expand a narrow exception for liability to serve as a way to pursue relief in civil enforcement actions. As a result, we determine Long cannot raise the state-created danger doctrine to seek relief from impoundment.

D. The Private Affairs Guaranty

In supplemental briefing, Long relies on State v. Villela, 194 Wn.2d 451, 450 P.3d 170 (2019), to argue that the impounding officer's failure to consider whether impoundment was reasonable under Long's individual circumstances or whether reasonable alternatives existed to impoundment violated article I, section 7 of the state constitution—i.e., the private affairs guaranty. The City argues that Long cannot raise this issue for the first time on appeal. We agree with the City.

An appellate court may refuse to review any claim of error that a party did not raise before the trial court. RAP 2.5(a). A limited exception exists, however, for manifest errors affecting a constitutional right. RAP 2.5(a)(3). "To determine whether manifest constitutional error was committed there must be a 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences.'" State v. A.M., 194 Wn.2d 33, 38, 448 P.3d 35 (2019) (alteration in original) (internal quotation marks omitted) (quoting State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). An appellant meets this requirement if they make a plausible showing that the error led to actual prejudice. A.M., 194 Wn.2d at 39.

To determine whether Long makes a plausible showing of actual prejudice, we consider whether Long has sufficiently asserted a violation of article I, section 7. Courts use a two-step analysis to determine whether the government violated a person's rights under article I, section 7 of the Washington Constitution. Villela, 194 Wn.2d at 458. "First, [courts] 'determine whether the action complained of constitutes a disturbance of one's private affairs.' If so, [they] turn to the second step: 'whether authority of law justifies the intrusion.'" Villela, 194 Wn.2d at 458 (citation omitted) (quoting State v. Puapuaga, 164 Wn.2d 515, 522, 192 P.3d 360 (2008)). Regarding the second step, our Supreme Court has identified three instances in which a vehicle may be impounded:

> A vehicle may be lawfully impounded (1) as evidence of a crime, when the police have probable cause to believe the vehicle has been stolen or used in the commission of a felony offense; (2) under the "community caretaking function" if (a) the vehicle must be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety or if there is a threat to the vehicle itself and its contents of vandalism or theft *and* (b) the defendant, the defendant's spouse, or friends are not available to move the vehicle; and (3) in the course of enforcing traffic regulations if the driver committed a traffic offense for which the legislature has expressly authorized impoundment.

State v. Tyler, 177 Wn.2d 690, 698, 302 P.3d 165 (2013) (quoting State v. Williams, 102 Wn.2d 733, 742-43, 689 P.2d 1065 (1984)). Ultimately, "an impound is lawful under article I, section 7 only if, in the judgment of the impounding officer, it is reasonable under the circumstances and there are no reasonable alternatives." Villela, 194 Wn.2d at 460.

As Long's new claim arises under article I, section 7, it implicates a constitutional right. But Long does not show a plausibility of practical and identifiable consequences because he fails to show that the impoundment was unlawful under article I, section 7. Because an impoundment is a seizure under our constitution, Long shows a disturbance of his private affairs and meets the first step of the analysis. See Villela, 194 Wn.2d at 458. Turning to the second step, we must determine whether authority of law justifies the intrusion. Here, the SMC permits police to impound vehicles parked in violation of the 72-hour Rule. SMC 11.72.440(E). Thus, the police could lawfully impound Long's truck in enforcing traffic regulations.[12]

Long also claims the impoundment was unlawful because the City did not consider reasonable alternatives to impounding the truck. But Long told the officers that the truck was inoperable and he needed a part to repair it. The PEO was aware of this as well. Long also was not present when the PEO towed the vehicle. Thus, both at the time the officers called the PEO and when the PEO arrived to tow the truck, there did not appear to be a reasonable way to move the truck other than to impound it. Indeed, Long does not suggest a reasonable alternative to the impoundment.

Because Long does not show that the impoundment was unlawful under article I, section 7, he fails to make a plausible showing that the asserted

[12] SMC 11.72.440(E) falls under Title 11, "Vehicles and Traffic," Subtitle I, "Traffic Code."

constitutional violation had practical and identifiable consequences. We decline to review the claim for the first time on appeal.

III. CONCLUSION

We affirm the superior court's determination that the City violated Long's homestead rights by withholding his truck under the threat of forced sale and refusing to release it until he signed a payment plan. Thus, we also affirm the superior court's decision to void the payment plan. And we affirm the superior court's conclusion that the City did not violate Long's substantive due process rights. Finally, we reverse the superior court's determination that the impoundment costs violate the Eighth Amendment and affirm its conclusion that the impoundment itself did not constitute excessive punishment.

We affirm in part and reverse in part.

Chun, J.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF SEATTLE, Petitioner/Cross-Respondent, v. STEVEN GREGORY LONG, Respondent/Cross-Petitioner.	No. 78230-4-I ORDER DENYING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION

Respondent/Cross-Petitioner Steven Long filed a motion for reconsideration of the opinion filed on May 4, 2020. Petitioner/Cross-Respondent City of Seattle filed a response. The court has determined that the motion should be denied. However, the opinion should be withdrawn, and a substitute opinion filed. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; and it is further

ORDERED that the opinion filed on May 4, 2020, is withdrawn; and it is further

ORDERED that a substitute opinion shall be filed.

Chun, J.

J.

J.

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF SEATTLE, Petitioner/Cross-Respondent, v. STEVEN GREGORY LONG, Respondent/Cross-Petitioner.	No. 78230-4-I ORDER CALLING FOR ANSWER TO MOTION FOR RECONSIDERATION

Respondent/Cross-Petitioner Steven Long filed a motion for reconsideration of the opinion filed on May 4, 2020. A panel of the court has considered the motion and has determined that an answer to the motion should be called for. Now, therefore, it is hereby

ORDERED that Petitioner/Cross-Respondent City of Seattle shall serve and file an answer to the motion. The answer shall not exceed 25 pages and shall be filed not later than 10 days from the date of this order, and a copy thereof be served on opposing counsel.

FOR THE COURT:

Chun, J.

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF SEATTLE, Petitioner/Cross-Respondent, v. STEVEN GREGORY LONG, Respondent/Cross-Petitioner.	No. 78230-4-I DIVISION ONE PUBLISHED OPINION

CHUN, J. — The Washington State Constitution mandates that the legislature protect portions of homesteads from forced sale. Accordingly, over a century and a half ago, Washington passed its first homestead law. And over 25 years ago, our state legislature expanded homestead protection to "personal property that the owner uses as a residence," including automobiles. The law requires Washington courts to construe the "Homestead Act" (Act), chapter 6.13 RCW, broadly due to "the sanctity with which the legislature has attempted to surround and protect homestead rights." Baker v. Baker, 149 Wn. App. 208, 212, 202 P.3d 983 (2009).

Here, the city of Seattle (City) properly concedes that Steven Long's truck, which constituted his principal residence, may constitute a homestead. State and Seattle laws, however, allow for the forced sale of a vehicle after impoundment, regardless of whether such personal property constitutes a homestead. This case concerns whether the City violated Long's homestead

rights when it towed his truck and withheld it under the threat of forced sale unless he paid the impoundment costs or signed a payment plan.

Long concedes that the City could have ticketed him, towed his truck, and required him to pay for towing and storage costs and an administrative fee without violating his rights. The problem, Long argues, is that the City withheld the truck under the threat of a forced sale if he did not sign a payment plan. We agree. As noted above, the law requires us to construe the Homestead Act broadly in favor of the homeowner, so that it may achieve its purpose of protecting homes. In doing so, we determine that the Act protected Long's truck as a homestead and the City violated the Act by withholding the truck subject to auction unless he paid the impoundment costs or agreed to a payment plan. We therefore affirm the superior court's decision to void the payment plan.

This case also presents the following constitutional issues: First, whether impounding a vehicle that serves as a home and requiring the registered owner to pay the associated costs constitutes excessive punishment under the federal constitution's Eighth Amendment. Second, whether a vehicle owner may assert the state-created danger doctrine under the due process clause to obtain relief from impoundment. And third, whether Long may raise for the first time on appeal that towing a vehicle that serves as a home violates the private affairs guarantee of our state constitution.

We conclude these additional constitutional arguments fail. As for the Eighth Amendment, assuming without deciding that the impoundment and associated costs constitute penalties, they are not excessive because they

directly and proportionally relate to the offense of illegal parking and are the exact penalties the City Council authorized. We also determine that Long cannot assert the state-created danger doctrine to seek relief from the impoundment, and he cannot raise his claim under the private affairs guarantee for the first time on appeal.

Our decision does not affect the City's authority to tow and impound an illegally parked vehicle.[1] Nor does it prohibit the City from charging a vehicle owner for costs associated with the towing and impounding of a vehicle. But if that vehicle serves as the owner's principal residence, the City may not withhold the vehicle from the owner under the threat of forced sale.

We affirm in part and reverse in part.

I. BACKGROUND

King County (County) currently faces a homelessness[2] crisis. In January 2019, researchers identified 11,199 people experiencing homelessness within the County.[3] Of these individuals, 2,147 lived in a vehicle.[4] These figures

[1] We note here that recently, the City passed Ordinance No. 126042 to permit the creation of 40 transitional encampments as an interim use where people living in their cars may camp indefinitely. Seattle Ordinance 126042, § 1 (Feb. 28, 2020)

[2] For purposes of this opinion, we use the definition of "homeless" found in the Count Us In report, which, "[u]nder the Category 1 definition of homelessness in the HEARTH Act, includes individuals and families living in a supervised publicly or privately operated shelter designated to provide temporary living arrangements, or with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground." APPLIED SURVEY RESEARCH & ALL HOME, COUNT US IN 116 (2019), http://allhomekc.org/wp-content/uploads/2019/09/KING-9.5-v2.pdf [https://perma.cc/LJL2-WNJL].

[3] Homelessness in King County 2019, ALL HOME, http://allhomekc.org/wp-content/uploads/2019/05/All-Homes-Infographic-V04.pdf [https://perma.cc/5LQX-ZCQE].

[4] Homelessness in King County 2019, supra.

apparently underestimate the number of people experiencing homelessness in the County.[5]

A. Seattle's 72-hour Rule

The Seattle Municipal Code (SMC) generally prohibits parking a vehicle in the same location on City property for more than 72 hours. SEATTLE MUNICIPAL CODE (SMC) 11.72.440(B) (72-hour Rule). If a vehicle is parked in violation of the 72-hour Rule, it is "subject to impound as provided for in Chapter 11.30 SMC." SMC 11.72.440(E). SMC 11.30.030 incorporates applicable provisions of Chapter 46.55 RCW by reference. Under RCW 46.55.140(1), "[a] registered tow truck operator who has a valid and signed impoundment authorization has a lien upon the impounded vehicle for services provided in the towing and storage of the vehicle." If the registered owner does not claim their vehicle or contest the impoundment within 15 days of the tow, the tow truck operator "shall conduct a sale of the vehicle at public auction" and use the proceeds to satisfy its lien. RCW 46.55.130(1), RCW 46.55.130(2)(h).

If a person seeks to redeem an impounded vehicle without contesting the impoundment, then they must pay the towing contractor for the removal, towing, and storage costs of the impoundment plus an administrative fee. SEATTLE MUNICIPAL CODE (SMC) 11.30.120(B). If a person chooses to contest the impoundment, then they may request a hearing before the municipal court. SEATTLE MUNICIPAL CODE (SMC) 11.30.160. If the municipal court determines the City properly impounded the vehicle, then the vehicle "shall be released only

[5] APPLIED SURVEY RESEARCH & ALL HOME, supra, at 5.

after payment to the City of any fines imposed on any underlying traffic or parking infraction and satisfaction of any other applicable requirements of SMC 11.30.120(B) and payment of the costs of impoundment and administrative fee to the towing company." SMC 11.30.160(B). The municipal court also may allow the owner to make payments for the impoundment costs and administrative fee over time if there is extreme financial need and effective guarantee of payment. SMC 11.30.160(B). In that case, the City pays the impoundment costs to the towing company. SMC 11.30.160(B).

B. Steven Long

Long, a 60-year-old member of the Confederated Salish and Kootenai Tribes of Flathead Nation, was evicted from his apartment in 2014. Since then, he has lived in his truck, a 2000 GMC 2500 Sierra valued at about $4,000. Long works as a general laborer and keeps work tools, as well as personal items, in his truck. Long's work includes construction, painting, light plumbing, mechanics, and other labor.

In June 2016, while driving his truck, Long heard "grinding noises" coming from the gears. Long pulled into a store parking lot and stayed there for a few weeks with the business's permission. On July 5, 2016, Long moved his truck to an unused gravel lot owned by the City. Long stated that he parked at the lot because "it is secluded, there were other individuals living in vehicles, and the public did not appear to use it regularly." The lot was also near a day center for the homeless.

Three months later, on October 5, 2016, police were dispatched to an

area near the gravel lot for an unrelated complaint. After the police dealt with the complainant, another individual walked up and reported an incident involving Long. The officers approached Long and told him that, under city ordinance, his truck could not remain parked on City property for more than 72 hours. Long states that he told the officers the truck was inoperable and that he needed a part to repair it. Long also claims he told the officers that the truck was his home. The officers called a parking enforcement officer (PEO) to "tag" the truck. A PEO arrived and posted a 72-hour notice on Long's truck, which stated that the vehicle would be impounded it if he did not move it at least one city block within 72 hours.

Long did not move his truck because he did not believe it was running well enough to drive. On October 12, 2016, Lincoln Towing, which contracts with the City to perform impound services, towed Long's truck while he was away working. Long learned of the impoundment when he returned to the lot around midnight. He was distressed because "it was a cold night and the beginning of an intense wind and rain storm." The truck contained his "winter jacket, clothes, sleeping bag, blankets, tools, tool boxes, air mattress, cooking stove and utensils, change for the bus, rubbing alcohol for [his] joints, laptop, and all [his] personal items for bathing and cleaning [him]self." After unsuccessfully trying to create a shelter out of a tarp, Long went to the nearby day center. Because the center did not have any available beds or mats, Long sat in a chair until the morning. Without his truck, Long began to live outside.

On October 18, 2016, Long obtained access to his truck at the Lincoln

Towing lot and removed some personal items and bedding that he could carry. Long, however, could not afford to pay the costs to redeem his truck.

Long requested a hearing on the impoundment, which occurred before a magistrate at Seattle Municipal Court on November 2, 2016. Long told the court that the truck was his home. But because Long did not argue that he had parked his truck legally, the magistrate determined that the ticket and impoundment were proper. The magistrate waived the $44 ticket, reduced the impoundment charges from $946.61 to $547.12, and added a $10 administrative fee. The magistrate set up a payment plan that required Long to pay $50 per month. Long felt he "had no real choice but to agree" to the payment plan because he needed his truck and did not want the City to auction it.

After the hearing, Long retrieved his truck from the impound lot. There, he learned that if he had not retrieved the vehicle, Lincoln Towing would have sold it at auction three days later—on November 5, 2016. Long drove his truck to a friend's property for storage. As of March 13, 2017, Long continued to experience homelessness, worked in Seattle, and lived outside.

Long appealed the magistrate's decision to a municipal court judge. On March 13, 2017, after discovery, Long moved for summary judgment. He argued that the citation and impoundment of his vehicle and the associated fines, fees, and penalties violated (1) the excessive fines clause of the Eighth Amendment, (2) the due process clause of Fourteenth Amendment of the United States Constitution, and (3) the homestead protections under the Washington Constitution and the Homestead Act.

On May 10, 2017, the municipal court denied Long's motion. Long filed a notice of RALJ appeal to King County Superior Court on June 8, 2017.[6]

On March 2, 2018, the superior court affirmed in part and reversed in part. The court affirmed that the impoundment itself did not violate either the Eighth Amendment or Long's substantive due process rights. It reversed in part, however, because it determined that the impoundment fees were excessive in violation of the Eighth Amendment and that attaching Long's truck as security for the impoundment fees violated the Homestead Act. The court also voided the payment plan and ordered the City to refund previous payments.

Both Long and the City filed motions for discretionary review, which a commissioner of this court granted.

II. ANALYSIS

A trial court properly grants summary judgment in the absence of a genuine issue of material fact. CR 56(c); Billings v. Town of Steilacoom, 2 Wn. App. 2d 1, 14, 408 P.3d 1123 (2017). In reviewing a summary judgment ruling, we "engage[] in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party." Billings, 2 Wn. App. 2d at 14. The parties do not appear to dispute any of the facts material to our analysis.

A. The Homestead Act

The City argues that while a truck may qualify for homestead protection,

[6] On June 28, 2017, the City orally moved for a final judgment before the municipal court, which the court granted.

the Homestead Act does not apply here. Long contends "[t]he City violated the Homestead Act by attaching [his] residence as security for his impound debts and by threatening to sell his home for those debts." We agree in part with Long and conclude that the City violated the Homestead Act.

1. The Origins of Washington's Homestead Act

States began passing homestead laws in the 19th century. Paul Goodman, The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880, 80 J. AM. HIST. 470, 470 (1993). Such laws aim to protect a debtor's dwelling from execution and forced sale. WASH. STATE BAR ASS'N, WASHINGTON REAL PROPERTY DESKBOOK SERIES: INTERESTS IN REAL PROPERTY AND DUTIES OF THIRD PARTIES § 10.2(2) (4th ed. 2015). Texas was the first state to pass a homestead exemption law in 1839, and 18 more states passed homestead laws between 1848 and 1852. Goodman, supra, at 470. These laws "aimed at providing a measure of security in an increasingly insecure, volatile economy" that accompanied the development of capitalism in the United States. Goodman, supra, at 470. Before these laws, the United States experienced financial "panic[s]" that caused thousands to suffer from unemployment and bankruptcy and to lose their homes. Goodman, supra, at 471. In response, states passed homestead exemption laws that "promised to shield at least homes so that families no longer need worry that the breadwinner's bad luck or incompetence would plunge an entire household into destitution." Goodman, supra, at 471.

The Washington State Constitution mandates that "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." CONST. art. XIX, § 1. Washington passed its first homestead law in 1860 under this constitutional mandate. As was true with the first homestead laws in the nation, the purpose of Washington's Homestead Act is to place qualifying homes, or portions of them, beyond the reach of financial misfortune and to promote the stability and welfare of the state. Clark v. Davis, 37 Wn.2d 850, 852, 226 P.2d 904 (1951).

The law requires us to liberally construe the Homestead Act in favor of the debtor so it may achieve its purpose of protecting homes. In re Dependency of Schermer, 161 Wn.2d 927, 953, 169 P.3d 452 (2007) ("The [Homestead Act] is favored in law and courts construe it liberally so it may achieve its purpose of protecting family homes."); Baker, 149 Wn. App. at 212 (broadly interpreting the Homestead Act due to "the public policy involved in [Washington's] homestead statutes" and "the sanctity with which the legislature has attempted to surround and protect homestead rights"); In re Upton, 102 Wn. App. 220, 223, 6 P.3d 1231 (2000) ("'homestead and exemption laws are favored in law and are to be liberally construed'" (quoting Sweet v. O'Leary, 88 Wn. App. 199, 204, 944 P.2d 414 (1997)); Burch v. Monroe, 67 Wn. App. 61, 64, 834 P.2d 33 (1992) (noting that homestead laws are enacted "in the interest of humanity" because "[t]heir intent is to ensure shelter for families" (citing Macumber v. Shafer, 96 Wn.2d 568, 570, 637 P.2d 645 (1981))); Webster v. Rodrick, 64 Wn.2d 814, 816, 394 P.2d 689 (1964) (stating that homestead statutes "do not protect the rights of creditors;

they are in derogation of such rights" (citing First Nat'l Bank of Everett v. Tiffany, 40 Wn.2d 193, 242 P.2d 169 (1952)); Downey v. Wilber, 117 Wn. 660, 661, 202 P. 256 (1921) (noting that the purpose of the Homestead Act "is to prevent a forced sale of the home; in other words, to secure the claimant and [their] family in the possession of [their] home").

Washington's Homestead Act defines a "homestead" as "real or personal property that the owner uses as a residence." RCW 6.13.010. While mobile homes were the first form of personal property covered by the Act, the legislature amended the Act in 1993 to cover "personal property that the owner uses as a residence" so as to extend homestead protection to cars and vans. FINAL B. REP. ON SUBSTITUTE S.B. 5068, 53d Leg., Reg. Sess. (Wash. 1993) ("[b]ecause some Washington citizens reside on their boats or in their cars or vans, it has been recommended that the homestead exemption's scope be expanded to include any personal or real property that the owner uses as a residence"). "Once the owner occupies the property as a principal residence, a homestead exception is established automatically without a declaration." NW Cascade, Inc. v. Unique Constr., Inc., 187 Wn. App. 685, 697-98, 351 P.3d 172 (2015). A "homestead is exempt from attachment and from execution or forced sale for the debts of the owner up to the amount specified in RCW 6.13.030." RCW 6.13.070(1).

2. Declaration of homestead

The City agrees that a truck may qualify for homestead protection. But it asserts that under RCW 6.13.040, Long needed to file a declaration of homestead for the Act to protect his truck. Long contends that occupying his

vehicle as his principal home rendered it automatically protected. We agree with Long.

We review de novo issues of statutory interpretation. NW Cascade, 187 Wn. App. at 696. We "look first to the plain meaning of the statutory language, and [] interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous." Benson v. State, 4 Wn. App. 2d 21, 26, 419 P.3d 484 (2018). Our fundamental objective when construing a statute is to determine and carry out the legislature's intent. King County v. King County Water Dist. Nos. 20, 45, 49, 90, 111, 119, 125, 194 Wn.2d 830, 853, 453 P.3d 681 (2019).

RCW 6.13.040(1) lists circumstances under which the homestead exemption automatically protects property, and circumstances that require a declaration of homestead for the exemption to apply:

> *Property described in RCW 6.13.010 constitutes a homestead and is automatically protected by the exemption* described in RCW 6.13.070 from and after the time the real or personal property is occupied as a principal residence by the owner or, if the homestead is unimproved or improved land that is not yet occupied as a homestead, from and after the declaration or declarations required by the following subsections are filed for record or, if the homestead is a mobile home not yet occupied as a homestead and located on land not owned by the owner of the mobile home, from and after delivery of a declaration as prescribed in RCW 6.15.060(3)(c) or, if the homestead is *any other personal property*, from and after the delivery of a declaration as prescribed in RCW 6.15.060(3)(d).

(Emphasis added.)

The opening clause of the subsection provides, "Property described in RCW 6.13.010 constitutes a homestead and is automatically protected . . . from and after the time the real or personal property is occupied as a principal

residence by the owner." RCW 6.13.010 defines a "homestead" as "real or personal property that the owner uses as a residence." Thus, because Long occupied his truck as a principal residence, the homestead exemption automatically applies.

The City points to the final clause in RCW 6.13.040(1) and asserts that the language requiring a declaration for "any other personal property" applies to Long's truck. But such a reading would render meaningless the terms "any other." See Benson, 4 Wn. App. 2d at 26. The final clause refers to personal property *other than* the personal property listed in the opening clause (i.e., personal property described in RCW 6.13.010). Thus, the City's reading would have the final clause contradict the opening clause.[7]

The City supports its interpretation of RCW 6.13.040(1) by citing the declaration requirements for "other personal property" set forth in RCW 6.15.060(3)(d). In a declaration for "other personal property" the debtor

[7] The City's interpretation also appears inconsistent with case law providing that property occupied as a residence is automatically protected as a homestead without a declaration. See Schermer, 161 Wn.2d at 953 ("A home automatically becomes a homestead when the owners use the property as their primary residence"); Fed. Intermediate Credit Bank of Spokane v. O/S Sablefish, 111 Wn.2d 219, 229, 758 P.2d 494 (1988) ("The Legislature substantially rewrote the homestead act in 1981. The major purpose of this effort was to make the homestead classification automatic once the property is occupied as a permanent residence."); Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle, 101 Wn.2d 416, 420, 679 P.2d 928 (1984) ("possession was (and is) the key to the right to homestead"); Viewcrest Condo. Ass'n v. Robertson, 197 Wn. App. 334, 340, 387 P.3d 1147 (2016) ("Once property is occupied as a primary residence, a homestead is automatically created."); NW Cascade, 187 Wn. App. at 697-98 ("Once the owner occupies the property as a principal residence, a homestead exception is established automatically without a declaration."); In re Wilson, 341 B.R. 21, 25-26 (9th Cir. 2006) (stating that an automatic homestead exemption is created for real or personal property from and after the time the property is occupied as a principal residence by the owner).

must state that they reside on the personal property as a homestead. RCW 6.15.060(3)(d). The City claims that if "other personal property" from RCW 6.13.040(1) did not refer to occupied personal property, then RCW 6.15.060(3)(d) would not require the debtor to state that they reside on the personal property.

The two statutes do appear inconsistent. While RCW 6.13.040(1) provides that occupied personal property is automatically protected, RCW 6.15.060(3)(d) implies that a declaration is required for the Act to protect such property. Thus, the statute is susceptible to more than one reasonable meaning. Statutes that can be reasonably interpreted in two or more ways are ambiguous. Payseno v. Kitsap County, 186 Wn. App. 465, 469, 346 P.3d 784 (2015). When statutes are ambiguous, it is appropriate for courts "to resort to aids to construction, including legislative history". King County, 194 Wn.2d at 853. Ultimately, we must harmonize related statutory provisions to carry out a consistent scheme that maintains the statute's integrity. King County, 194 Wn.2d at 853. And again, with respect to the Homestead Act, the law requires us to liberally construe the Act in favor of the homesteader. Schermer, 161 Wn.2d at 953.

When a statute is ambiguous, courts "rely on statutory construction, legislative history, and relevant case law to determine legislative intent." Payseno, 186 Wn. App. at 469. The final bill report on the 1993 amendment states that the legislature sought to expand the scope of the exemption "to include *any* personal or real property" because some citizens resided on their

boats or in their cars or vans. FINAL B. REP. ON SUBSTITUTE S.B. 5068, 53d Leg., Reg. Sess. (Wash. 1993) (emphasis added). The report's summary also provides that "[t]he definition of homestead is expanded to include *any* real or personal property that the owner uses as a residence." FINAL B. REP. ON SUBSTITUTE S.B. 5068, 53d Leg., Reg. Sess. (Wash. 1993) (emphasis added). This history shows the legislature intended to for the Act to automatically protect people residing in their vehicles. Moreover, this broader interpretation of the types of property automatically protected under the Act maintains the statute's integrity by effecting its overall purpose of protecting homes.

The undisputed evidence shows that Long lived in his truck when the City impounded it. Because the legislative history shows an intention for broad protections of personal property, and because we must liberally construe the Act, we interpret the Homestead Act not to require a declaration for personal property that the owner is occupying as a principal residence. Thus, the truck constituted a homestead and the homestead exemption applied.

3. Attachment

The City claims that the lien resulting from the impoundment of Long's truck did not violate the Homestead Act because the payment plan, which does not encumber Long's truck, extinguished it. Long argues a lien was automatically placed on his truck upon it being towed, and this constituted an attachment that violated the Homestead Act. We determine that the lien never attached to Long's truck.

As stated above, under Washington law, "[a] registered tow truck operator who has a valid and signed impoundment authorization has a lien upon the impounded vehicle for services provided in the towing and storage of the vehicle." RCW 46.55.140(1). For a towing company to release an impounded vehicle, SMC 11.30.120(B) requires the registered owner to pay all the accumulated impound debt to the towing company. In cases of extreme financial hardship, however, a magistrate may allow the registered owner to make payments over time if there is an effective guarantee of payment. SMC 11.30.160(B). If a magistrate sets up such a payment plan, the City pays the costs of impoundment to the towing company. SMC 11.30.160(B).

Because statutes creating liens are in derogation of the common law, we strictly construe them. City of Algona v. Sharp, 30 Wn. App. 837, 843, 638 P.2d 627 (1982) (citing Dean v. McFarland, 81 Wn.2d 215, 500 P.2d 1244 (1972)). Unless the statute lists a lien among the several types that one may execute against a homestead, courts must infer that the legislature intended the omission of the lien type from the Homestead Act. Algona, 30 Wn. App. at 842. There is not a statutory provision for execution or forced sale of a homestead to satisfy liens under RCW 46.55.140(1). See RCW 6.13.080. Because "[t]he homestead is . . . a species of land tenure exempt from execution and forced sale in all but the enumerated circumstances," a lien type not enumerated in the Act cannot be superior to the homestead. Algona, 30 Wn. App. at 843.

As for the attachment of liens under RCW 46.55.140(1), RCW 6.13.090 states, "A judgment against the owner of a homestead shall become a lien on the

value of the homestead property in excess of the homestead exemption . . . ." While courts have not yet addressed the attachment process for liens under RCW 46.55.140(1), they have determined that "a general judgment lien does not operate upon, and does not attach to, premises which constitute a homestead." Locke v. Collins, 42 Wn.2d 532, 535, 256 P.2d 832 (1953); In re DeLavern, 337 B.R. 239, 242 (W.D. Wash. 2005) (noting that, under Washington's Homestead Act, a judgment lien "cannot attach to homestead property."). Instead, "[l]iens commenced under RCW 6.13.090 encumber the value *in excess* of the homestead exception." In re Deal, 85 Wn. App. 580, 584, 933 P.2d 1084 (1997).

We see no reason why the attachment law for liens under RCW 46.55.140(1) would differ from that for judgment liens, and therefore apply these principles to the issue before us. Thus, while RCW 46.55.140(1) created a lien on Long's truck, it could not attach. See DeLavern, 337 B.R. at 242 ("Thus, while a judgment lien is created on property rather than value pursuant to *Wilson Sporting Goods*,[8] under the more specific analysis of *Deal* and *Sweet*, it cannot attach to homestead property."). Further, because Long's truck did not have value above the homestead exemption, there was no property to which the RCW 46.55.140(1) lien could attach. For these reasons, we reject Long's argument that the attachment of a lien to his truck violated the Homestead Act.

4. Withholding Truck under Threat of Forced Sale

Long claims the City would release his truck, which it withheld under the

[8] Wilson Sporting Goods Co. v. Pedersen, 76 Wn. App. 300, 886 P.2d 203 (1994).

threat of forced sale, only if he agreed to a payment plan. The City responds that the sale of an unclaimed vehicle is not forced. We decide that the City could not withhold Long's truck under the threat to forcibly sell it, or threaten to forcibly sell it unless he agreed to pay the associated fees, without violating his homestead rights. For these reasons, we determine the payment plan is void.

If a registered owner does not claim their vehicle or contest impoundment within 15 days of the tow, the tow truck operator "shall conduct a sale of the vehicle at public auction." RCW 46.55.130(1). The tow truck operator uses the proceeds from the sale to satisfy its lien and remits any surplus to the state. RCW 46.55.130(2)(h). The registered owner may seek the surplus proceeds within one year of the sale. RCW 46.55.130(2)(h).

Here, the City does not contest Long's assertion that Lincoln Towing would have sold his truck at public auction on November 5 if he had not agreed to the payment plan three days earlier. Instead, it claims that any sale of the truck would not have been a "forced sale" because Long consented to any such sale by willfully violating the 72-hour Rule.

Washington courts have defined a "forced sale" as a sale with an element of compulsion:

> A forced sale is generally a transaction in which there is an element of compulsion on the part of either the seller or the buyer. If the element of compulsion is based upon purely economic reasons, the sale is generally considered voluntary . . . Where, however, a seller or buyer is forced to act under a decree, execution or something more than mere inability to maintain the property, the element of compulsion is based upon legal, not economic, factors.

Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle, 101 Wn.2d 416, 422, 679

P.2d 928 (1984). "Impoundment under Wash. Rev. Code § 46.55 is not a consensual consumer transaction." Betts v. Equifax Credit Info. Servs., Inc., 245 F. Supp. 2d 1130, 1133 (W.D. Wash. 2003). Although the City argues that selling an unclaimed vehicle at a public auction is a consensual transaction, a state statute, not the registered owner, authorizes the sale of the vehicle. See Betts, 245 F. Supp. 2d at 1134 (stating that impoundments are not consensual because they are authorized by state statute, not the vehicle's owner). In other words, legal factors compel the sale. Accordingly, such a transaction constitutes a forced sale. Thus, because Long's truck constituted his homestead, the City—through the tow operator—could not forcibly auction it.

While the City did not ultimately forcibly sell Long's truck, it did withhold his truck under the threat of such a sale unless he agreed to pay the impoundment costs. Liberally construing the Act to achieve its purpose of protecting homes, we determine that this violated the Homestead Act. The City had no legal authority to make the threat to induce Long to enter a payment plan. Thus, we conclude the payment plan is void. See City of Algona v. Sharp, 30 Wn. App. 837, 843, 638 P.2d 627 (1982) (noting that a sale of an exempted homestead is void).

B. Eighth Amendment

The City argues the trial court erred by determining that the impoundment costs violated the Eighth Amendment. Long contends that both the impoundment and the associated costs constituted excessive punishment. We determine that, assuming without deciding that the impoundment of Long's truck

and the associated costs constituted penalties, they fell short of constitutional excessiveness.

"Constitutional interpretation is a question of law reviewed de novo." State v. Ramos, 187 Wn.2d 420, 433, 387 P.3d 650 (2017).

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., Amend. 8. The Amendment's purpose, apart from the bail clause, is to limit the government's power to punish. Austin v. United States, 509 U.S. 602, 609, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). The Fourteenth Amendment's due process clause makes the Eighth Amendment's excessive fines clause applicable to the States. Timbs v. Indiana, __ U.S. __, 139 S. Ct. 682, 687, 203 L. Ed. 2d 11 (2019).

When determining how the Eighth Amendment affects a specific civil *in rem* forfeiture, courts address two questions: "(1) does the forfeiture constitute punishment, and (2) if so, is that punishment excessive?" Tellevik v. Real Property Known as 6717 100th Street S.W. Located in Pierce County, 83 Wn. App. 366, 372, 921 P.2d 1088 (1996). The party challenging the constitutionality of a forfeiture bears the burden of demonstrating an Eighth Amendment violation. United States v. Jose, 499 F.3d 105, 108 (1st Cir. 2007).

In evaluating excessiveness, "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." United States v. Bajakajian, 524 U.S. 321, 334, 118 S. Ct.

2028, 141 L. Ed. 2d 314 (1998). Thus, a punitive forfeiture violates the Eighth Amendment if it is "grossly disproportional to the gravity of a defendant's offense." Bajakajian, 524 U.S. at 334. If the value of the fine or forfeiture is within the range prescribed by the legislative body, a strong presumption exists that a forfeiture is constitutional. United States v. Seher, 562 F.3d 1344, 1371 (1st Cir. 2009).

Here, impounding Long's truck and requiring him to pay the associated fees is not a disproportionate punishment for a parking violation. Moving a vehicle has a direct relationship to the offense of illegally parking. And the fees are not excessive because the impoundment costs repay the City's agent, Lincoln Towing, for the costs of towing the vehicle based on contract. "The government is entitled to rough remedial justice." State v. Clark, 124 Wn.2d 90, 103, 875 P.2d 613 (1994), overruled on other grounds by State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997) (determining forfeitures of the defendant's homestead and motorhome was not excessive because their value nearly equaled the cost of prosecution and investigation). Moreover, towing illegally parked vehicles and requiring the owner to pay the associated costs are the exact penalties the City Council authorized for a violation of the 72-hour rule. See SMC 11.72.440(E). Thus, a strong presumption exists that the penalties were not excessive, which presumption Long does not overcome. For these reasons, we conclude that neither the impoundment nor the associated costs constituted excessive punishment under the Eighth Amendment.

C. Substantive Due Process

Long contends that the City violated his substantive due process rights by towing his car because it deprived him of a shelter and exposed him to inclement weather. The City argues that Long cannot assert this claim to obtain relief from impoundment. We agree with the City.

The Fourteenth Amendment's due process clause provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST., Amend. 14. The substantive component of the clause bars certain arbitrary and wrongful government actions regardless of procedural fairness. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). The clause, however, "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Thus, "[the clause's] language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." DeShaney, 489 U.S. at 195.

An exception to this rule of non-liability, however, exists through the state-created danger doctrine. Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1086 (9th Cir. 2000). Thus, some courts have recognized that plaintiffs can argue the doctrine to hold states liable under 42 U.S.C. § 1983.[9] Henry A. v.

[9] Neither the United States Supreme Court nor any Washington court has endorsed this doctrine.

Willdren, 678 F.3d 991, 1002 (9th Cir. 2012) ("The State can also be held liable under the Fourteenth Amendment's Due Process clause . . . 'where state action creates or exposes an individual to a danger which [they] would not have otherwise faced.'" (quoting Kennedy v. City of Ridgefield, 439 F.3d 1055, 1061 (9th Cir. 2006)); Rivera v. Houston Indep. Sch. Dist., 349 F.3d 244, 249 (5th Cir. 2003) (noting that the Tenth, Sixth, Third, Second, and Ninth Circuits have recognized state actors may be held liable under the state-created danger doctrine if they knowingly endanger a person).[10] Long cites no case that considers the state-created danger doctrine in a context other than a 42 U.S.C. § 1983 suit.

Long cites two cases, Lawrence v. Texas, 539 U.S. 558, 578-79, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) and Foucha, 504 U.S. at 77-83, to argue that a plaintiff may raise a due process claim to obtain relief in an enforcement action. But neither of these cases address the state-created danger doctrine nor suggest that we should expand a narrow exception for liability to serve as a way to pursue relief in civil enforcement actions. As a result, we determine Long cannot raise the state-created danger doctrine to seek relief from impoundment.

[10] Henry A., concerned a 42 U.S.C. § 1983 suit against a county and county officials for alleged systematic failures in its foster care system that injured children in its care. 678 F.3d at 996-98. Kennedy concerned a 42 U.S.C. § 1983 claim against a police officer. 439 F.3d at 1057. In that case, a couple reported to the officer that a 13-year-old neighbor had molested their child and informed the officer of the 13-year-old's violent tendencies. Kennedy, 439 F.3d at 1057-58. Though the officer told the couple he would notify them before speaking to the neighbor about their complaint, he failed to do so. Kennedy, 439 F.3d at 1058. Later that night, the 13 year-old attacked the couple, shooting the woman and fatally shooting her husband. Kennedy, 439 F.3d at 1058.

D. The Private Affairs Guarantee

In supplemental briefing, Long relies on State v. Villela, 194 Wn.2d 451, 450 P.3d 170 (2019), to argue that the impounding officer's failure to consider whether impoundment was reasonable under Long's individual circumstances or whether reasonable alternatives existed to impoundment violated article I, section 7 of the state constitution—i.e., the private affairs guarantee. The City argues that Long cannot raise this issue for the first time on appeal. We agree with the City.

An appellate court may refuse to review any claim of error that a party did not raise before the trial court. RAP 2.5(a). A limited exception exists, however, for manifest errors affecting a constitutional right. RAP 2.5(a)(3). "To determine whether manifest constitutional error was committed there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences." State v. A.M., 194 Wn.2d 33, 38, 448 P.3d 35 (2019) (internal quotation marks and citation omitted). An appellant meets this requirement if they make a plausible showing that the error led to actual prejudice. A.M., 194 Wn.2d at 39.

Courts use a two-step analysis to determine whether the government violated a person's rights under article I, section 7 of the Washington Constitution. Villela, 194 Wn.2d at 458. "First, [courts] determine whether the action complained of constitutes a disturbance of one's private affairs. If so, [they] turn to the second step: whether authority of law justifies the intrusion." Villela, 194 Wn.2d at 458 (internal quotation marks and citations omitted). Courts

have continually acknowledged the privacy interest of individuals and objects in automobiles. Villela, 194 Wn.2d at 458.

As Long's new claim arises under article I, section 7, it implicates a constitutional right. But Long does not show a plausibility of practical and identifiable consequences because he does not explain how the impoundment of his vehicle affected any privacy interest. Typically, claims arising under article I, section 7 involve the search and seizure of a defendant's personal property. See Villela, 194 Wn.2d at 458 (search of a vehicle), State v. Puapuaga, 164 Wn.2d 515, 521, 192 P.3d 360 (2008) (search of personal papers); State v. Surge, 160 Wn.2d 65, 73, 156 P.3d 208 (2007) (plurality opinion) (deoxyribonucleic acid (DNA) collection); State v. Hinton, 179 Wn.2d 862, 865, 319 P.3d 9 (2014) (search of cell phone). Here, nothing in the record suggests that anyone searched Long's truck while it was impounded. Because Long does not show that his privacy interests were disturbed and thus that article I, section 7 applies, he fails to make a plausible showing that the asserted constitutional violation had practical and identifiable consequences. We decline to review the claim for the first time on appeal.

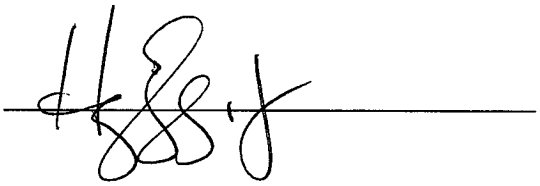
III. CONCLUSION

We affirm the superior court's determination that the City violated Long's homestead rights by withholding his truck under the threat of forced sale and refusing to release it until he signed a payment plan. Thus, we also affirm the superior court's decision to void the payment plan. And we affirm the superior court's conclusion that the City did not violate Long's substantive due process

rights. Finally, we reverse the superior court's determination that the impoundment costs violate the Eighth Amendment and affirm its conclusion that the impoundment itself did not constitute excessive punishment.

We affirm in part and reverse in part.

WE CONCUR:



APPENDIX E

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

CITY OF SEATTLE, ~~Appellant~~ Respondent,

vs.

STEVEN GREGORY LONG
~~Respondent~~ Appellant

NO. 17-2-15099-1 SEA

DECISION ON RALJ APPEAL

CLERK'S ACTION REQUIRED

This appeal came on regularly for oral argument on MARCH 2, 2018 **pursuant to RALJ 8.3, before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:**

Reasoning Regarding Assignment of Error: THE MUNICIPAL COURT'S DECISION BELOW IS REVERSED IN PART AND AFFIRMED IN PART FOR THE REASONS ORALLY STATED ON THE RECORD TODAY WHICH WILL BE INCORPORATED INTO THIS WRITTEN ORDER ON TRANSCRIPTION. ONCE THAT TRANSCRIPT IS PREPARED AN AMENDED ORDER WILL BE ENTERED MAKING THE TRANSCRIPT A PART OF THIS WRITTEN ORDER.

IT IS ~~HEREBY~~ ORDERED that the above cause is:

[ ] **AFFIRMED;** [ ] **REVERSED;** [ ] **MODIFIED;**

COSTS IN PART IN PART

~~**REMANDED to**~~ THE MUNICIPAL COURT SHALL REFUND ~~**Court for further proceedings, in accordance with the above decision and that the Superior Court Clerk is directed to release any bonds to the Lower Court after assessing statutory Clerk's fees and costs.**~~ ALL PAYMENTS PREVIOUSLY MADE BY LONG TO THE CITY AND THE AGREEMENT TO MAKE FUTURE *

DATED: MARCH 2, 2018

JUDGE 49823

James E Lobsenz #8787
Counsel for Appellant

#32091
Counsel for Respondent

DECISION ON RALJ APPEAL (DCRA) **10/01**

* PAYMENTS IS VOID.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

DEBRA BLAKE, GLORIA JOHNSON, JOHN LOGAN, individuals, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CITY OF GRANTS PASS,

Defendant.

Case No. 1:18-cv-01823-CL

OPINION AND ORDER

CLARKE, Magistrate Judge.

This case involves a certified class of homeless individuals residing in and around Grants Pass, Oregon. The class members allege that the City of Grants Pass has a web of ordinances, customs, and practices that, in combination, punish people based on their status of being involuntarily homeless. This case comes before the Court on cross-motions for summary judgment. The Court has also considered amicus briefs submitted by League of Oregon Cities and the National Law Center on Homelessness and Poverty. For the reasons below, Plaintiffs'

Motion for Summary Judgment (Dkt. No. 62) is GRANTED in part and DENIED in part, and Defendant's Motion for Summary Judgment (Dkt. No. 80) is DENIED.[1]

STANDARD OF REVIEW

Summary judgment shall be granted when the record shows that there is no genuine dispute as to any material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). The court cannot weigh the evidence or determine the truth but may only determine whether there is a genuine issue of fact. *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002). An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

When a properly supported motion for summary judgment is made, the burden shifts to the opposing party to set forth specific facts showing that there is a genuine issue for trial. *Id.* at 250. Conclusory allegations unsupported by factual material are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts which show there is a genuine issue for trial. *Devereaux*, 263 F.3d at 1076. In assessing whether a party has met its burden, the court views the evidence in the light most favorable to the non-moving party. *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995).

[1] The parties have consented to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c)(1).

BACKGROUND

This case is about respecting the dignity of homeless individuals and the City of Grants Pass' ability to protect the safety and welfare of its citizens. Unsheltered homelessness is an ever-growing crisis nationwide, and the overwhelming majority of homeless individuals are not living that way by choice. According to the United States Department of Housing and Urban Development ("HUD"), there were an estimated 533,000 homeless individuals in the United States in 2018; more than a third of whom were "unsheltered homeless," meaning, individuals "whose primary nighttime location [wa]s a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, . . . or camping ground."[2] HUD's figures are obtained using what is known as a "point-in-time" or "PIT" count, which, as its name suggests, is arrived at by counting the number of people in a city or county who are homeless on a particular night.[3] HUD requires local homelessness assistance and prevention networks to conduct a PIT count each year as a condition of federal funding. A 2001 administrative study found that the true size of a homeless population may be anywhere between 2.5 to 10 times larger than what can be estimated by a PIT count.[4] As the Ninth Circuit recognized in *Martin v. City of Boise*, there are many reasons for this undercount:

> It is widely recognized that a one-night point in time count will undercount the homeless population, as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

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[2] National Law Center on Homelessness & Poverty, *Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities* 28 n. 15 (2019), http://nlchp.org/wpcontent/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [hereinafter *Housing Not Handcuffs*].
[3] *Id.* at 28.
[4] *Id.*

920 F.3d 584, 604 (9th Cir.), *cert. denied sub nom. City of Boise, Idaho v. Martin*, 140 S. Ct. 674, (2019).

To combat the homeless crisis, many local governments have created ordinances—such as the ones challenged by Plaintiffs in this case—that ban "camping" or similar activities in all or parts of a city. These ordinances are often referred to as "quality of life laws."[5] Enforcing quality of life laws is an expensive endeavor nationwide. For example, the City of Los Angeles spends $50 million annually policing criminal and civil quality of life laws.[6] By contrast, the City of Los Angeles spends only $13 million on providing housing and services to the country's largest homeless population.[7] Likewise, a Seattle University study found that the cost to the City of Seattle for enforcing just one of its six quality of life laws was $2.3 million over five years.[8]

The City of Grants Pass, Oregon, the city involved in this case, had a population of 23,000 people according to the 2000 census, and it is now estimated to have more than 38,000 people.[9] The development of affordable housing in Grants Pass has not kept up with the population growth. City Manager Aaron Cubic confirmed in his deposition that Grants Pass has a vacancy rate of 1% and that "essentially means that there's no vacancy." Edward Johnson Decl., Ex. 1, Cubic Depo. at p. 49, lines 1-10 (Dkt. #63-1). Kelly Wessels, the Chief Operating Officer of the Community Action Agency that serves Grants Pass testified that "Grants Pass'

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[5] *See* Joshua Howard et al., *At What Cost: The Minimum Cost of Criminalizing Homelessness in Seattle and Spokane,* HOMELESS RIGHTS ADVOCACY PROJECT 10 (2015), https://digitalcommons.law.seattleu.edu/hrap/10.
[6] Gale Holland, *L.A. Spends $100 Million a Year on Homelessness, City Report Finds*, LOS ANGELES TIMES, Apr. 16, 2015, https://www.latimes.com/local/lanow/la-me-ln-homeless-caoreport-20150416-story.html.
[7] *Housing Not Handcuffs*, *supra* note 2, at 71.
[8] *See* Joshua Howard et al., *At What Cost: The Minimum Cost of Criminalizing Homelessness in Seattle and Spokane,* HOMELESS RIGHTS ADVOCACY PROJECT iii (2015), https://digitalcommons.law.seattleu.edu/hrap/10.
[9] http://worldpopulationreview.com/us-cities/grants-passor-population/.

stock of affordable housing has dwindled to almost zero. Landlords routinely require an applicant to have an income that is three times the monthly rent. Rental units that cost less than $1,000/month are virtually unheard of in Grants Pass." Kelly Wessels Decl. ¶ 7 (Dkt. #42).

A point-in-time count of homeless individuals was conducted by the United Community Action Network ("UCAN") on January 30, 2019, in Grants Pass. UCAN counted 602 homeless individuals in Grants Pass. Wessels Decl. ¶ 6 (Dkt. #42). Another 1,045 individuals were counted as "precariously housed," meaning that they were sleeping at the home of somebody else, or "couch surfing." *Id.*

In March 2013, the Grants Pass City Council hosted a Community Roundtable, hereinafter referred to as the "2013 Roundtable Meeting," to "identify solutions to current vagrancy problems." Wessels Decl. ¶ 8, Ex. 1 (minutes of public roundtable) (Dkt #65). Minutes from this meeting show that the City Council President stated, "the point is to make it uncomfortable enough for them in our city so they [referring to homeless individuals] will want to move on down the road." Wessels Decl., Ex. 1 at 2 (Dkt. #65-1). At the end of the meeting, a list of "actions to move forward on" was created. These action items included (i) ways to increase police presence downtown; (ii) create an exclusion zone and possibly have a blanket trespassing regulation; (iii) specific amount of misdemeanors leading to prosecution; (iv) not feeding in parks or other specific areas in the city; (v) posting "zero tolerance" signs stating certain ordinances will be strictly enforced; (vi) look into the possibility of creating a "do not serve" or "most unwanted" list; (vii) pass out the trespassing letters and get word out to have them signed; and (viii) provide assistance in constructing safe areas at agencies to protect volunteers from aggressive behavior. *Id.* at 13. City Manager Aaron Cubic confirmed that the action items from the 2013 Roundtable Meeting were copied into the City's strategic plans in the

form of an objective to "address the vagrancy issue" starting with the 2013-14 Grants Pass Strategic Plan up to the current 2019 Grants Pass Strategic Plan. Edward Johnson Decl., Ex. 1, Cubic Depo. at p. 29 lines 11-16; p. 46 line 20 to p. 48 line 10. (Dkt. #63-1). The City Manager also confirmed that one of the action items related to this objective was the "targeted enforcement of illegal camping." *Id.* at p. 36 line 16 to p. 37 line 5.

There are no homeless shelters in Grants Pass that qualify as "shelters" under the criteria provided by HUD. The housing option cited by the City that most resembles a shelter is the Gospel Rescue Mission ("GRM"), which operates transitional housing programs in Grants Pass. GRM Director of Resident Services, Brian Bouteller, testified that GRM offers 30-day transitional housing in two facilities: one facility is for women and children with capacity for 60 people and the other for men with 78 spaces. Edward Johnson Decl., Ex. 2, Bouteller Depo. p. 18 lines 10-15 (Dkt. #63-2). There is no program for men with children or unaccompanied minors. *Id.* at Bouteller Depo. p. 19, lines 5-8. Homeless individuals in these programs are required to work six-hour days, six days a week in exchange for a bunk for 30 days. *Id.* at Bouteller Depo. p. 48 line 23-p. 51 line 5. During this 30-day period, people are not permitted to look for outside work. *Id.* at Bouteller Depo. at p. 51 line 25-p. 52 line 4. It is mandatory that GRM residents attend a traditional Christian Chapel twice a day and go to a Christian Church that follows the Nicene and Apostle's Creed every week. *Id.* at Bouteller Depo. at p. 33 line 10-p. 35 line 3. Before a person is considered for admission at GRM, they must agree to comply with a lengthy list of rules. For example, if you have serious or chronic medical or mental health issues that prevent you from participating in daily GRM life, you may not be able to stay at the GRM; you are to remain nicotine free during your stay at GRM; all intimate relationships other than legal/biblical marriage, regardless of gender, either on or off Mission property are strictly

forbidden. Edward Johnson Decl., Ex 3 (Dkt. #63-3). GRM has avoided seeking government funding so that it can maintain these restrictive rules. Johnson Decl., Ex 2, Bouteller Depo. p. 15 lines 15-23 (Dkt. #63-2).

The class of involuntarily homeless people living in and around Grants Pass, Oregon was certified by this Court on August 7, 2019. (Dkt. #47). The class is defined as all involuntarily homeless individuals living in Grants Pass, Oregon, including homeless individuals who sometimes sleep outside city limits to avoid harassment and punishment by Defendant City of Grants Pass as addressed in this lawsuit. The class representatives allege that each of their situations fall under the definition of homelessness adopted by HUD. 24 C.F.R § 582.5 (2012). HUD's definition encompasses a variety of living situations, including youth homelessness, *id.* § 582.5(3); individuals fleeing domestic violence, *id.* § 582.5(4); individuals "living in a supervised publicly or privately operated shelter designed to provide temporary living arrangements," *id.* § 582.5(1)(ii); and individuals whose primary nighttime residence "is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, or camping ground, *id.* § 582.5(1)(i).

Class representatives allege that their situations are just three representations of modern homelessness in the United States. Class representative, Debra Blake, lost her job and housing approximately ten years ago and has been involuntarily homeless in Grants Pass ever since. Blake Decl. ¶ 3 (Dkt. #90). At the time of class certification, Ms. Blake was living in temporary transitional housing, but her ninety-day stay expired and she has returned to sleeping outside. As recently as September 11, 2019, Ms. Blake was cited for illegal camping and "prohibited conduct" in Riverside Park in Grants Pass because she was laying in the park in a sleeping bag at 7:30 a.m. *Id.* ¶ 7. Ms. Blake was convicted and fined $590. Later that same morning, the same

officer wrote Ms. Blake a citation for "criminal trespass on City property" with an associated fine of $295. *Id.* Ms. Blake was also issued a park exclusion on September 11, 2019. *Id.* ¶ 8. Ms. Blake filed an appeal and the exclusion was lifted without explanation after she had already been excluded from all Grants Pass parks for two weeks. *Id.* Currently, Ms. Blake owes the City over $5,000 in unpaid fines related to enforcement of the ordinances at issue while living outside in Grants Pass. Class representative, John Logan, has been intermittently homeless in Grants Pass for the last ten years. Mr. Logan currently sleeps in his truck at a rest stop north of Grants Pass because he fears being awakened and ticketed if he sleeps in his truck within the City. Logan Decl. ¶ 2 (Dkt. #67). Mr. Logan is a licensed home care provider and his clients have allowed him to sleep on a mattress in a room they use for storage approximately four to five nights a week. *Id.* ¶ 3. However, that job ended in October or November 2019. *Id.* Class representative, Gloria Johnson, has been living out of her van since at least before this litigation began. Johnson Decl. ¶ 2 (Dkt. #91). Ms. Johnson has parked her van to sleep outside of town on both BLM land and county roads. She claims that she has been asked to move along several times. *Id.* ¶¶ 3-5. While their exact circumstances and stories may vary, the three class representatives all share the need to conduct the life sustaining activities of resting, sleeping, and seeking shelter from the elements while living in Grants Pass without a permanent home.

Through their appointed class representatives, Plaintiffs move for summary judgment on each of their claims. Plaintiffs allege that the City of Grants Pass, through a combination of ordinances, customs, and policies, has unconstitutionally punished them for conducting life-sustaining activities and criminalized their existence as homeless individuals. Plaintiffs seek an order from this Court declaring that the City's enforcement of Grants Pass Municipal Codes ("GPMC") 5.61.020 (the "anti-sleeping ordinance"); GPMC 5.61.030 and GPMC 6.46.090 (the "anti-camping ordinances"), GPMC 6.46.350 (the "park exclusion ordinance") and criminal trespass laws stemming from violations of those ordinances are unconstitutional as applied to the

plaintiff class. Plaintiffs also seek an injunction prohibiting the City from enforcing those ordinances and related criminal trespass laws against the plaintiff class unless and until members of the class have the opportunity to obtain shelter within the City. The exact language of the ordinances at issue are as follows:

> **5.61.010 Definitions**
> A. "To Camp" means to set up or to remain in or at a campsite.
> B. "Campsite" means any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established, or maintained for the purpose of maintaining a temporary place to live, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.
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> **5.61.020 Sleeping on Sidewalks, Streets, Alleys, or Within Doorways Prohibited**
> A. No person may sleep on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety.
> B. No person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk.
> C. In addition to any other remedy provided by law, any person found in violation of this section may be immediately removed from the premises.
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> **5.61.030 Camping Prohibited**
> No person may occupy a campsite in or upon any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct, unless (i) otherwise specifically authorized by this Code, (ii) by a formal declaration of the City Manager in emergency circumstances, or (iii) upon Council resolution, the Council may exempt a special event from the prohibitions of this section, if the Council finds such exemption to be in the public interest and consistent with Council goals and notices and in accordance with conditions imposed by the Parks and Community Services Director. Any conditions imposed will include a condition requiring that the applicant provide evidence of adequate insurance coverage and agree to indemnify the City for any liability, damage or expense incurred by the City as a result of activities of the applicant. Any findings by the Counsel shall specify the exact dates and location covered by the exemption.

> **6.46.090 Camping in Parks**
> A. It is unlawful for any person to camp, as defined in GPMC Title 5, within the boundaries of the City parks.
> B. Overnight parking of vehicles shall be unlawful. For the purposes of this section, anyone who parks or leaves a vehicle parked for two consecutive hours or who remains within one of the parks as herein defined for purposes of camping as defined in this section for two consecutive hours, without permission from the City Council, between the hours of midnight and 6:00am shall be considered in violation of this Chapter.

> **6.46.350 Temporary Exclusion from City Park Properties**
> An individual may be issued a written exclusion order by a police officer of the Public Safety Department barring said individual from all City Park properties for a period of 30 days, if within a one-year period the individual:
> A. Is issued 2 or more citations for violating regulations related to City Park properties, or
> B. Is issued one or more citations for violating any state law(s) while on City Park property.

Plaintiffs also challenge the appeal process for park exclusions as violating their procedural due process rights. The language detailing the appeal procedures are found in GPMC 6.46.355:

> **6.46.355 Appeal and Hearing**
> If the individual who is issued a written exclusion order files a written objection to the exclusion with the City Manager within 2 business days, the matter shall be placed on the City Council's agenda not earlier than 2 days after receiving the objection. The objection may be heard by the Council at its discretion at a regular meeting, at a Council workshop, or at a special meeting. The exclusion order shall remain in effect pending the hearing and decision of the Council. At the hearing the staff shall provide the Council with information regarding the exclusion order and the individual shall be allowed to present relevant evidence. The staff shall have the burden of proof by a preponderance of evidence.

The two camping ordinances carry a mandatory fine of $295. The fine for illegal sleeping is $75. GPMC 1.36.010. When unpaid, the fines increase to $537.60 and $160 respectively due to "collection fees." Johnson Decl., Ex. 9 at 5-6 (Dkt. #63-9). Plaintiffs were provided 615 citations and 541 incident reports issued pursuant to three of these ordinances:

GPMC 5.61.020 (the anti-sleeping ordinance), GPMC 5.61.030 (the anti-camping ordinance), GPMC 6.46.090 (the anti-camping in parks ordinance). Inessa Wurscher Decl. ¶¶ 4-5 (Dkt. #64). Of the 615 tickets, 313 were for illegal sleeping, 129 were for illegal camping in the parks and 182 were for illegal camping. *Id.* ¶ 5 (some citations were for more than one offense). The number of citations rose from 24 tickets in 2012 to 228 tickets in 2014, a significant increase following the 2013 Roundtable Meeting. *Id.*

DISCUSSION

I. Grants Pass' policy and practice of punishing homelessness violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.

a. *Martin v. Boise* is controlling precedent.

The United States Constitution prohibits punishing people for engaging in unavoidable human acts, such as sleeping or resting outside when they have no access to shelter. *Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019) *cert. denied* 2019 U.S. LEXIS 7571 (Dec. 16, 2019). In *Martin*, the Ninth Circuit held that "so long as there is a greater number of homeless individuals in [a city] than the number of available beds [in shelters]," a city cannot punish homeless individuals for "involuntarily sitting, lying, and sleeping in public." *Id.* at 617. That is, as long as there are no emergency shelter beds available to homeless individuals, "the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." *Id.* (*quoting Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated on other grounds*, 505 F.3d 1006 (9th Cir. 2007)).

Martin is binding precedent on this Court. In *Martin*, six plaintiffs who were or had recently been homeless residents of Boise, Idaho challenged two city ordinances that punished homeless people for sleeping or camping in public spaces. The Boise "camping ordinance" prohibited and punished the "use of 'any streets, sidewalks, parks, or public places as a camping

place at any time.'" *Id.* at 603. Camping was defined as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence." *Id.* at 603-604. The Boise "disorderly conduct ordinance" prohibited "occupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof." *Id.* at 604.

In this case, Grants Pass' two anti-camping ordinances prohibit "occupying a campsite" on "any publicly-owned property" in the City of Grants Pass. GPMC 5.61.030; GPMC 6.46.090. "Campsite" is defined as "any place where bedding, sleeping bag, or other material used for bedding purposes . . . is placed . . . for the purpose of maintaining a temporary place to live." GPMC 5.61.010(B). The camping ordinances apply to all public spaces in Grants Pass at all times, including parks. The camping ordinances also prohibit anyone from sleeping in their cars for two consecutive hours within any Grants Pass park parking lot between the hours of midnight and 6:00 a.m. GPMC 6.46.090(B). The anti-sleeping ordinance prohibits sleeping "on public sidewalks, streets, or alleyways at any time . . . ." GPMC 5.61.020. Additionally, "[n]o person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk." *Id.* These ordinances, in combination, prohibit individuals from sleeping in any public space in Grants Pass while using any type of item that falls into the category of "bedding" or is used as "bedding."

Grants Pass takes the position that *Martin* simply confirms that a city cannot criminalize the unavoidable act of sleeping outside when there are not enough shelter beds available. Grants Pass argues that the City amended its anti-camping ordinances to remove the word "sleeping" after *Martin*. On January 2, 2019, the City amended GPMC 6.46.090 by removing the word "sleeping" so that the act of "sleeping" was to be distinguished from the prohibited conduct of

"camping" under the City's Camping in the Parks Ordinance. Aaron Hisel Decl. ¶¶ 12, 13, Exs. 11, 12 (Dkt. #81) . The City's intent for making this change "was to make it clear that those without shelter *could* engage in the involuntary acts of sleeping or resting in the City's parks but would still be prohibited from the voluntary conduct of maintaining a 'campsite' in the parks as a 'place to live.'" Defendant's Motion at 35 (Dkt. #80) (emphasis in original). The Court appreciates the City's attempt to comply with *Martin*. However, Grants Pass ignores the basic life sustaining need to keep warm and dry while sleeping in order to survive the elements. Under the Grants Pass ordnances, if a homeless person sleeps on public property with so much as a flattened cardboard box to separate himself from the wet cold ground, he risks being punished under the anti-camping ordinance. Grants Pass cannot credibly argue that its ordinances allow sleeping in public without punishment when, in reality, the only way for homeless people to legally sleep on public property within the City is if they lay on the ground with only the clothing on their backs and without their items near them. That cannot be what *Martin* had in mind. Maintaining a practice where the City allows a person to "sleep" on public property, but punishes him as a "camper" if he so much as uses a bundled up item of clothing as a pillow, is cruel and unusual punishment. Therefore, this Court finds that it is not enough under the Eight Amendment to simply allow sleeping in public spaces; the Eight Amendment also prohibits a City from punishing homeless people for taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.

As was the case in *Martin,* Grants Pass has far more homeless people than "practically available" shelter beds. In *Martin,* the Ninth Circuit's math reflected 867 homeless individuals in Ada County Idaho (an unknown number in Boise) while Boise had 354 emergency shelter beds and 92 overflow mats. *Martin* 920 F.3d at 604, 606. On January 30, 2019, the Point in

Time Count[10] in Grants Pass counted 1,673 unduplicated individuals, 602 of whom were "homeless" and the rest of whom were "precariously housed or doubled up." Wessels Decl. ¶¶ 5-6 (Dkt. #42). The mathematical ratio in the record as it currently stands is 602 homeless people (with another 1,071 on the verge of homelessness) in Grants Pass and, on the other side of the ledger, zero emergency shelter beds. The numbers here are clear, overwhelming, and decisive.

The Gospel Rescue Mission ("GRM") is the only entity in Grants Pass that offers any sort of temporary program for some class members year-round. However, GRM cannot be included in the mathematical ratio of homeless people to shelter beds because GRM has lost its designation as a HUD certified emergency shelter. Wessels Decl. ¶ 12 (Dkt. #29). GRM is also considerably less accessible than even the shelters in *Martin* because it does not offer temporary emergency shelter and has substantial religious requirements and other restrictive rules. GRM does not offer "emergency shelter," only a "30-day Residential Program." Bouteller Depo. p. 27 lines 11-18. This program offers extended stays and is more akin to a transitional housing program than a homeless shelter. Bouteller Depo. p. 18 lines 10-15; Wessels Decl. ¶ 12 (Dkt. #29). Additionally, there are several strict rules for residents of GRM, including remaining nicotine free while on or off the premises and mandatory attendance to Christian church and other church affiliated activities. Even without these rules, GRM's 138 beds would not be nearly enough to accommodate the at least 602 homeless individuals in Grants Pass.

Grants Pass argues that Plaintiffs have alternative "realistically available" shelter outside the City on federal BLM land, Josephine County land, or state rest stops. This remarkable

[10] The Ninth Circuit in *Martin* also used PIT Counts to determine the number of homeless people in the area and commented that PIT Counts typically undercount the homeless population in a community because of difficulty in locating people, weather and volunteer issues. *Martin* at 604.

argument not only fails under *Martin*, but it also sheds light on the City's attitude towards its homeless citizens. Essentially, Grants Pass argues that it should be permitted to continue to punish its homeless population because Plaintiffs have the option to just leave the City. The City's suggestion that because it is geographically smaller than Boise or other cities, it should be allowed to drive its homeless population onto "nearby" federal, state, or Josephine County land, is not supported by *Martin*. Additionally, the record does not support the suggestion that homeless people are welcome to live without interruption by law enforcement at these locations. BLM land is available for recreational camping, not as a space for emergency shelter. Fed. Reg. Vol. 70, No. 159 (Aug. 18, 2005). The campsites cost money. Aaron Hisel Decl., Ex. 1 at 52 (Dkt. #81-1). Living, establishing occupancy, or using this land for "residential purposes" is specifically prohibited, and there are limits on how long a person can stay. Fed. Reg. Vol. 70, No. 159; *See also* Gloria Johnson Decl. ¶¶ 3-5; Blake Decl. ¶ 15. Homeless people who attempt to live on BLM land are subject to trespass prosecution under 43 C.F.R. 2808.10, fined $330, and summoned to this Court. Likewise, Josephine County does not welcome non-recreational camping in its parks. The County issued a letter from its Parks Director on November 12, 2019, stating that "County Parks are not a good alternative for nonrecreational campers – individuals or families who need a place to sleep, due to not having a permenant [sic] residents [sic]." Wessels Decl., Ex. 1 (Dkt. #89-1). This letter urges homeless services providers not to pay for campsites for homeless individuals in County Parks. Wessels Decl. ¶ 8 (Dkt. #89). Similarly, camping, setting up a tent, or remaining in a rest stop for more than 12 hours in a 24-hour period are explicitly prohibited. OAR 734-030-0010(18).

Finally, the City lists three services offered within Grants Pass that similarly do not change the equation under *Martin*. In February 2020, the Umpqua Community Action Network

(UCAN) opened a warming center that may hold up to 40 individuals on nights when the temperature is either below 30 degrees or below 32 degrees with snow. Wessels Decl. ¶ 9 (Dkt. #89). From the record, it appears 131 different people have stayed at the warming center since it opened. *Id.* ¶¶ 9-11. As of the filing of Plaintiffs' Reply Brief, the center had been open sixteen nights and reached capacity on every night except the first night it opened, when it had 32 occupants. *Id.* ¶ 11. While the opening of a warming shelter is positive for the City, this emergency warming facility is not a shelter for the purposes of the *Martin* analysis because the facility does not have beds and is not available consistently throughout the year. *Id.* ¶ 9. Even if the warming center did count as a shelter under HUD, the capacity of the warming center is not large enough to accommodate the amount of homeless people in Grants Pass.

The City also referenced a "sobering center" where intoxicated individuals may be temporarily held and a youth shelter. Response Br. at 13 (Dkt. #80). The sobering center is not a shelter. It allows for temporary placement for "highly intoxicated" individuals while they sober up, and for individuals who are creating a nuisance but "do not warrant a trip to jail." Aaron Hisel Decl., Ex. 1 at 33 (Dkt #81-1). Plaintiffs claim that the sobering center has no beds and consists of a chair with restraints and 12 locked rooms with toilets where people can sober up for several hours. Edward Johnson Decl., Ex. 2 (Dkt. #92-2). Hearts with a Mission Youth Shelter runs an 18-bed facility where minors aged 10-17 may stay for 72 hours, unless they have parental consent to stay longer. Edward Johnson Decl. ¶ 4 (Dkt. #92). This shelter does not have enough beds to serve the number of homeless individuals in Grants Pass and is not "practically available" to class members in this case because it is reserved for minors. The record is undisputed that Grants Pass has far more homeless individuals than it has practically available shelter beds.

This case cannot be distinguished from the holding in *Martin*. The alternative shelters suggested by the City do not change the equation set out in *Martin.* Because Grants Pass lacks adequate shelter for its homeless population, its practice of punishing people who have no access to shelter for the act of sleeping or resting outside while having a blanket or other bedding to stay warm and dry constitutes cruel and unusual punishment in violation of the Eighth Amendment.

b. The Eighth Amendment prohibits cruel and unusual punishment whether the punishment is designated as civil or criminal.

Grants Pass argues that the Eighth Amendment analysis does not apply to the ordinances at issue in this case because they are designated as violations and, therefore, not criminal matters. To support this assertion, Grants Pass quotes the Oregon Court of Appeals, which found "[a] violation is not a crime." *State v. Dahl*, 185 Or App 149, 152-56 (2002) (analyzing Oregon's statutory distinctions between crimes and civil offenses and holding, among other things, that the Fifth Amendment does not apply to violations precisely because they are not crimes). However, the label of crime or violation is not dispositive where the Eighth Amendment is concerned. The focus, for Eighth Amendment purposes, is the punishment associated with the crime, violation, or civil penalty. Even though Grants Pass labels the ordinances as violations, offenders of these violations are still subject to punishment. As the United States Supreme Court has held,

> The purpose of the Eighth Amendment . . . was to limit the government's power to punish. *See Browning-Ferris*, 492 U.S. at 266-267, 275. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. 'The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.' *United States v. Halper*, 490 U.S. 435, 447-448, (1989).

Austin v. United States, 509 U.S. 602, 609-610 (1993).

Unlike the Fifth Amendment's Self-Incrimination Clause, the Eighth Amendment's prohibition on punishing an involuntary act or condition applies to punishment beyond "criminal" cases. Again, the Supreme Court made clear,

> [The United States] further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal [citations omitted]. We disagree. Some provisions of the Bill of Rights are expressly limited to criminal cases. The Fifth Amendment's Self-Incrimination Clause, for example, provides: "No person…shall be compelled in any criminal case to be a witness against himself." The protections provided by the Sixth Amendment are explicitly confined to "criminal prosecutions." [Citation omitted]. The text of the Eighth Amendment includes no similar limitation. Nor does the history of the Eighth Amendment require such a limitation…

Austin, 509 U.S. at 608.

The Supreme Court further opined that provisions of civil forfeiture were punitive because "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 610 (emphasis in original). Ultimately, the Supreme Court held that civil forfeiture constitutes "payments to a sovereign as punishment for some offense, and, as such, is subject to the limitations of the Eighth Amendment excessive fines clause." *Id.* at 622.

The Court's reasoning and holding in *Austin* has been affirmed by subsequent decisions. Most recently, in *Timbs v. Indiana*, the Supreme Court declined to overrule *Austin*: "We thus decline the State's invitation to reconsider our unanimous judgment in *Austin* that civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive." *Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019).

Violations of the Boise ordinances analyzed in *Martin* were misdemeanors, 920 F.3d at 603, so the Ninth Circuit at times used the word "criminal" in its analysis. However, a careful reading of *Martin* shows that this language was not a limitation on when the Eighth Amendment's prohibition on cruel and unusual punishment applies. The Ninth Circuit stated the broad question that it was addressing was "[D]oes the Cruel and Unusual Punishments Clause of

the Eighth Amendment preclude the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter?" *Id.* at 615. The Ninth Circuit held that it does, quoting *Jones*, "the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Id.* at 616. It is the punishment of a person's unavoidable status that violates the constitution, not whether that punishment is designated civil or criminal. *See id.* The main difference between Grants Pass' punishment scheme and that of Boise's in *Martin* is that Grants Pass first issues fines for violations and then either issues a trespass order or excludes persons from all parks before a person is charged with misdemeanor criminal trespass. This makes no difference for Eight Amendment purposes because the result, in Boise and Grants Pass, is identical: involuntarily homeless people are punished for engaging in the unavoidable acts of sleeping or resting in a public place when they have nowhere else to go.

Additionally, as the Supreme Court noted, "whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." *United States v. Ward*, 448 U.S. 242, 248 (1980). In Oregon, violations are defined as criminal actions and are prosecuted in criminal proceedings. ORS 131.005(6)-(7). The Grants Pass Municipal Code uses the language and procedures of criminal law, discussing those "guilty" of code violations. GPMC 1.36.010(A). The violations are prosecuted in the Josephine County Circuit Court by the Josephine County District Attorney's office. ORS 153.076(6). As in a criminal trial, a defendant may not be compelled to testify and the same pretrial discovery that applies in misdemeanor and felony cases applies. ORS 153.076(3)-(4). The judgment from a camping violation in Grants Pass reads, "[t]he court finds the defendant GUILTY of the charges

designated CONVICTED in the section below." Edward Johnson Decl., Ex. 9 at 3-4 (Dkt. #63-9).

Moreover, even if *Martin* and the Eighth Amendment were limited to "criminal" punishments, which they are not, Grants Pass' enforcement scheme involves criminal punishment. Violations for sleeping and "camping" are an element of future Criminal Trespass II arrests and initiate the criminal process in two common circumstances: (1) after a person is "trespassed" from an area for "camping" and either does not leave or returns, or (2) after an officer excludes a person from a park for prohibited camping. In either situation, if that person does not move along or returns to the location, they are subject to arrest and prosecution for Criminal Trespass II. The criminal process is initiated with the original citation and that citation is an element of the subsequent criminal trespass charge once the person is trespassed or excluded under threat of arrest for criminal trespassing.

Therefore, Grants Pass' enforcement scheme is subject to Eighth Amendment analysis. Under such analysis, the ordinances at issue and their enforcement, as applied to plaintiff class members, violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.

II. Grants Pass' policy and practice of enforcing the ordinances at issue violates the Excessive Fines Clause of the Eight Amendment.

Grants Pass' enforcement of the ordinances at issue also violates the Excessive Fines Clause of the Eighth Amendment. The Supreme Court has found that the phrase "nor excessive fines imposed," in the Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Timbs v. Indiana,* 139 S.Ct. 682, 687 (2019) *citing United States v. Bajakajian,* 524 U.S. 321, 327-328, (1998). There is a two-step inquiry in analyzing an excessive fines claim: (1) is the fine punitive, and if so, (2) is it excessive? *Bajakajian*, 524 U.S. at 334.

To determine when a fine is punitive, courts look to whether the fine is tied to punishment and prohibited conduct. *Bajakajian*, 524 U.S. at 328; *Austin*, 509 U.S. at 619-22; *See also U.S. v. Mackby*, 339 F.3d 1013 (9th Cir. 2003) (assuming a statutory fine under the False Claims Act imposed after a finding of liability in a civil trial was punitive). It does not matter if the fine imposed is characterized as criminal or civil, the salient inquiry is whether the fine at least partially serves the traditional punitive functions of retribution and deterrence. *Austin*, 509 U.S. at 610. For example, in *Wright v. Riveland*, the Ninth Circuit held that a 5% deduction for the Crime Victim's Compensation Fund was punitive because there was no relationship between the deduction and the harm the defendant caused. *Wright v. Riveland*, 219 F.3d 905, 915 (9th Cir. 2000); *see also Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994) (observing the similarities between civil and criminal punishment, the court held "Criminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior."). The Supreme Court has held that all civil penalties have some deterrent effect. *U.S. v Hudson*, 522 U.S. 93, 102 (1997).

In this case, the Court finds that the fines imposed for violating the ordinances at issue are punitive. According to the record, the two camping ordinances carry a mandatory fine of $295. The fine for illegal sleeping is $75. When unpaid, the fines increase to $537.60 and $160 respectively because of additional "collection fees." Johnson Decl., Ex. 9 at 5-6 (Dkt. #63-9). Officers have the discretion to issue warnings prior to issuing a citation, but once a citation is issued, officers have no discretion over the amount of the fine, which is "autofilled" into all camping citations. Johnson Decl., Ex. 6, Burge Depo. at 20, lines 15-21 (Dkt. #63-6); Ex. 4, Hamilton Depo at p. 84 line 23 to p. 85 line 5 (Dkt. #63-4). Based on the record and minutes

from the 2013 Roundtable Meeting, these statutory fines serve no remedial purpose and were intended to deter homeless individuals from residing in Grants Pass. Moreover, the ordinances themselves describe these fines as punishment. Compare GPMC 1.36.010(c) ("MAXIMUM FINE: except in cases where a different punishment is prescribed by any provision of this Code…") with GPMC 1.36.010(e) (allowing for restitution to any person, or business, including the city, who has been damaged by the defendant's conduct).

Because the fines are punitive, the inquiry turns to whether the fines are excessive. The Supreme Court held that a fine violates the excessiveness standard of the Eighth Amendment if the amount of the fine is "grossly disproportionate to the gravity of the offense." *Bajakajian,* 524 U.S. at 324, 334 ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."); *see also Wright v. Riveland*, 219 F.3d 905, 916 (9th Cir. 2000) (following *Bajakajian*). In applying this standard, courts have looked to a non-exhaustive list of several factors, including the nature of the offense, whether the violation was related to other illegal activity, and other penalties that may be imposed.[11] *See generally U.S. v. Mackby*, 339 F.3d 1013 (9th Cir. 2003).

Here, the decisive consideration is that Plaintiffs are being punished for engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay warm and dry. Plaintiffs do not have enough money to obtain shelter, so they likely cannot pay these fines. When the fines remain unpaid, the additional collection fees are applied and the fines still remain unpaid, subjecting plaintiffs to collection efforts, the threat of driver license

[11] The Supreme Court has left open the question of whether the ability to pay the fine would be relevant to the excessiveness inquiry. *Bajakajian* at 340, n.15; see also *Timbs* at 688 *quoting* 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) "[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear . . . ."

suspensions (Johnson Decl., Ex. 9 at 3-4 (Dkt. #63-9)), and damaged credit that makes it even more difficult for them to find housing, exacerbating the homeless problem in Grants Pass (Wessels Dec. ¶11 (Dkt #65)). As the Supreme Court recognized in the cruel and unusual punishment context, "even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 660, 667 (1962). So too here. Fining a homeless person in Grants Pass who must sleep outside beneath a blanket because they cannot find shelter $295 ($537.60 after collection fees are inevitably assessed) is grossly disproportionate to the "gravity of the offense." Any fine is excessive if it is imposed on the basis of status and not conduct. For Plaintiffs, the conduct for which they face punishment is inseparable from their status as homeless individuals, and therefore, beyond what the City may constitutionally punish. The fines associated with violating the ordinances at issue, as applied to Plaintiffs, are unconstitutionally excessive.

Having found that the ordinances violate the Cruel and Unusual Punishment Clause as well as the Excessive Fines Clause of the Eight Amendment, the Court declines to decide whether the ordinances are also unconstitutionally vague.

III. The appeal process for park exclusions in Grants Pass violates procedural due process rights.

a. Plaintiffs' claim that park exclusions violate procedural due process was adequately pled and standing has been established.

Grants Pass does not challenge the merits of plaintiffs' procedural due process claim regarding the City's park exclusion ordinance in its response to Plaintiffs' motion for summary judgment. Instead, Grants Pass argues that this claim was not properly pled in the operative complaint. The Court disagrees. This claim seems to be the sole reason for the Third Amended Complaint filed on November 13, 2019. (Dkt. #50). The only changes from the Second Amended Complaint were to add the allegation at paragraph 87 that, "Plaintiffs have been

excluded from Grants Pass parks without due process of law" and to specifically add "GPMC 6.46.350 (the park exclusion ordinance)" to the injunctive and declaratory relief sought in this case. Third Amended Complaint ¶ 87, Prayer ¶¶ 3-4 (Dkt. #50). Although the City correctly points out that GPMC 6.46.355 (the ordinance that explains the appeal procedure) is missing from the operative complaint, Plaintiffs made clear that they were challenging park exclusions under the Procedural Due Process Clause. The City did not object to the amendment or ask that it be clarified or made more specific. Therefore, the claim was pled, and the City was on notice.

Second, Grants Pass argues that if the claim was pled, it should be dismissed because Plaintiffs have not alleged or sufficiently established standing. The City argues, "plaintiffs do not even attempt to produce a plaintiff or rely upon any individual's standing." Response at 51 (Dkt. #80). The Court disagrees. The record shows that of the 59 park exclusions produced to Plaintiffs by the City, all were issued to homeless individuals and 42 were issued for illegal camping. Pltf.s' Motion at 22 (Dkt. #62); Inessa Wurscher Decl. ¶ 7 (Dkt. #64). Class representative Debra Blake was issued an exclusion on September 11, 2019, after she was found sleeping in a City Park, and a copy of that exclusion order has been provided in the record. Johnson Decl., Ex. 9 at 7 (Dkt. #63-9). Debra Blake filed a written objection to her September 11, 2019 banishment from all parks. The ban was "lifted" without explanation on September 25, 2019, after half of the exclusion period had expired. Blake Decl. ¶ 8 (Dkt. #90). Additionally, class member Dolores Nevin was excluded from all parks after being found sleeping in Riverside Park on December 31, 2019. Wurscher Decl., Ex. 1 at 33-35 (Dkt. #64-1). Moreover, Plaintiffs provided evidence that a park exclusion goes into effect immediately and is not stayed when appealed. Johnson Decl., Ex. 5, McGinnis Depo p. 28 line 23 to p. 29 line 5 (Dkt. #63-5); Ex. 4,

Hamilton Depo. at p.117 lines 11-14 (Dkt. #63-4). Therefore, Plaintiffs have standing to seek prospective declaratory and injunctive relief regarding the park exclusion appeal process.

Finally, Grants Pass argues in a footnote that if the claim was pled and plaintiffs do have standing, the claim is "moot" because the current practice of the Grants Pass Department of Public Safety is to not issue park exclusions until City Council "has made appropriate revisions." Response at 51, n.8 (Dkt. #80). Evidence presented by Grants Pass to show this policy change consists of a sworn declaration from Jim Hamilton, the Deputy Chief for the City of Grants Pass Department of Public Safety, in which he declares, "The current practice is that there are no park exclusions being issued by anyone in the Grants Pass Department of Public Safety by way of written Order from me. Unless and until a revised version of the park exclusion ordinance is adopted by the City council and the related forms revised, they will not be issued." Hamilton Decl. ¶ 3 (Dkt. #83). The written order issued to the department was not attached as an exhibit. However, even if it was, policy changes not reflected in a change to statutes or ordinances does not render a claim moot. *Rosebrock,* 745 F.3d at 971-72. The doctrine of voluntary cessation has been interpreted to apply generally in cases in which an injunction is sought. "Such cases do not become moot 'merely because the [defendant's] conduct immediately complained of has terminated, if there is a possibility of a recurrence which would be within the terms of a proper decree.'" *Armster v. U.S. District Court for the Central District of California*, 806 F.2d 1347, 1357 (9th Cir. 1986) (quoting P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 110 (2d ed. 1973)). This is particularly true, whereas here, the "new policy. . . could be easily abandoned or altered in the future." *Bell,* 709 F.3d at 901. If a municipal defendant could moot out claims simply by announcing in its cross-motion for summary judgment that it has decided not to enforce the offending ordinance,

the doctrine of voluntary cessation would be rendered meaningless. Plaintiffs pled this claim, have standing to assert it, and Grants Pass cannot moot this claim by asserting that it has temporarily stopped issuing park exclusions.

b. Plaintiffs are entitled to summary judgment on this claim.

Under Grants Pass' enforcement scheme, police officers may issue a written exclusion order barring an individual "from all city park properties for a period of 30 days, if within a one-year period the individual is issued two or more citations for violating regulations related to city park properties, or is issued one or more citations for violating any state law(s) while on city park property." GPMC 6.46.350. A park exclusion goes into effect immediately upon being issued and is not stayed while a person appeals. Johnson Decl., Ex. 5, McGinnis Depo p. 28 line 23 to p. 29 line 5 (Dkt. #63-5); Ex. 4, Hamilton Depo. at p.117 lines 11-14 (Dkt. #63-4); GPMC 6.46.355. The appeal period is "within two business days" and the method of appeal is by "written objection" to the City Manager, at which point the objection will be placed on the City Council's agenda. GPMC 6.46.355.

Sixteen years ago, this Court found a substantially identical appeal process in Portland's park exclusion ordinance to violate procedural due process rights.

> The risk of erroneous deprivation is compounded by PCC 20.12.265's deficient appeal procedures and lack of a pre-deprivation hearing. An exclusion takes effect immediately upon issuance and is not stayed pending appeal. Thus, a person excluded from a park is subject to arrest for reentry as soon as she receives the exclusion notice. An appeal may be filed within five days, but the individual continues to be excluded from the parks. Thus, even if the exclusion is ultimately found to be invalid, the individual has been kept from the public park(s) for at least a significant portion of the thirty days.

Yeakle v. City of Portland, 322 F. Supp. 2d 1119, 1130 (D. Or. 2004). For the same reasons, Grants Pass' park exclusion ordinance is also unconstitutional and violates the procedural protections of the due process clause.

The *Yeakle* court applied the three-part balancing test from *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976) to Portland's functionally identical park exclusion appeal process. The court found that excluded individuals have a strong liberty interest in avoiding unjust exclusion because of the importance of public parks as a "treasured and unmatched resource" for members of the public. 322 F. Supp 2d at 1129. In this case, that interest is even greater for Plaintiffs because several parks in Grants Pass contain benches, tables and restrooms that homeless individuals may use for basic activities of daily life when they have no alternative place to dwell. The court also found that "the risk of erroneous deprivation under the present procedure is considerable" given the lack of pre-deprivation process and the lack of "any evidentiary standard." *Id.* at 1130. The same is true here. There is no requirement in the ordinance that the Grants Pass police officer have enough evidence or reasonable suspicion of the excludable conduct to issue an exclusion or make an arrest. The officer need not witness the violation or have any other reliable information that a violation occurred under the language of the ordinance. Further, just like in *Yeakle*, "a person is subject to arrest for reentry as soon as she receives the exclusion notice" and "even if the exclusion is ultimately found to be invalid, the individual has been kept from the public parks for at least a significant portion of the thirty days." *Id.* The *Yeakle* Court concluded that "a pre-deprivation hearing or other procedural safeguard would not unduly burden the government" and "there would be no additional burden on the City if the park exclusions were simply stayed in the event that an individual filed an appeal." *Id.* at 1131. For the same reasons, the procedures for appealing park exclusions in Grants Pass violate Plaintiffs' procedural due process rights.

IV. Plaintiffs are denied summary judgment on their Equal Protection Claim.

The Equal Protection Clause guarantees that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Plaintiffs allege selective enforcement of the ordinances at issue. As such, they "must demonstrate that enforcement had a discriminatory effect and the police were motivated by a discriminatory purpose." *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007). Further, because the class seeks to enjoin enforcement, they must demonstrate that the selective enforcement "is part of a 'policy, plan, or a pervasive pattern.'" *Id.* at 1153 (quoting *Thomas v. County of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1993)).

Plaintiffs did not carry their burden of demonstrating that the City's ordinances were selectively enforced and that enforcement was motivated by a discriminatory purpose under the summary judgment standard. The evidence relied on by Plaintiffs to prove this claim are the minutes from the 2013 Roundtable Meeting and deposition testimony from two Grants Pass police officers. The City disputes this evidence as proof of selective enforcement. The City argues that deposition testimony from two knowledgeable police officers that they "could not remember" enforcing these ordinances against a non-homeless individual is not enough for the Court to conclude that these ordinances were selectively enforced as a matter of law. The Court agrees. Moreover, the City provided its Department of Public Safety Policy Manual, which specifically includes instructions to officers to not discriminate against homeless individuals. *See* Hamilton Decl., Ex. 1 (Dkt. #83-1). Therefore, facts surrounding the issues of whether the City's enforcement scheme had a discriminatory effect and whether the police were motivated by a discriminatory purpose are in dispute. As a result, Plaintiff's are denied summary judgment on their equal protection claim.

V. Plaintiff's are denied summary judgment on their Substantive Due Process Claim.

The substantive due process clause of the Fourteenth Amendment forbids the government from depriving a person of life, liberty, or property when the government acts with deliberate indifference or reckless disregard for that person's fundamental rights. *Tennison v. City & County of S.F.*, 570 F.3d 1078, 1089 (9th Cir. 2009); *Porter v. Osborn*, 546 F.3d 1131, 1137-39 (9th Cir. 2008). A plaintiff establishes a substantive due process violation by showing the defendant deprived him of his life, liberty, or property and engaged in "conscience shocking behavior." *Brittain v. Hansen,* 451 F.3d 982, 991 (9th Cir. 2006). An official's conduct may shock the conscience where the official acts with deliberate indifference or reckless disregard for the plaintiff's rights in situations where the official had the opportunity to deliberate. *Tennison,* 570 F.3d at 1089; *Porter,* 546 F.3d atl137-39.

Plaintiffs argue they have a protected liberty interest in being present in public spaces in Grants Pass. Plaintiffs cite *Morales*, which found "it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage,' or the right to move 'to whatsoever place one's own inclination may direct' identified in Blackstone's Commentaries." 27 U.S. at 53-54 (citing *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972); *Kent v. Dulles*, 357 U.S. 116, 126 (1958); 1 W. Blackstone, Commentaries on the Laws of England 130 (1765)). At least three Courts of Appeals have followed *Morales* and acknowledged a liberty interest to remain in a place open to the public. See *Vincent v. City of Sulphur*, 805 F.3d 543, 548 (5th Cir. 2015) ("Supreme Court decisions amply support the proposition that there is a general right to go to or remain on public property for lawful purposes . . . ."); *Catron v. City of St. Petersburg,* 658 F.3d 1260, 1266 (11th Cir. 2011) ("Plaintiffs have a

constitutionally protected liberty interest to be in parks or on other city lands of their choosing that are open to the public generally."); *Kennedy v. City of Cincinnati,* 595 F.3d 327, 336 (6th Cir. 2010) ("[I]t is clear that Kennedy had a liberty interest 'to remain in a public place of his choice' and that defendants interfered with this interest.").

However, even if this Court were to find that Plaintiffs have a liberty interest to remain in City parks or other City lands that are open to the public generally, Plaintiffs have not provided this Court with controlling authority to convince the Court that Plaintiffs have a liberty interest to sleep or camp in a public place. Moreover, Plaintiffs have not carried their burden of showing that the City engaged in "conscience shocking behavior" under the summary judgment standard. This Court's holding that the enforcement of Grants Pass' ordinances violate the Eight Amendment does not automatically translate to a finding that Grants Pass officials acted with deliberate indifference or reckless disregard for Plaintiffs' fundamental rights. Whether Grants Pass' conduct shocks the conscience is a question of material fact. Therefore, Plaintiffs are denied summary judgment on their substantive due process claim.

VI. Conclusion

The holding in this case does not say that Grants Pass must allow homeless camps to be set up at all times in public parks. Just like in *Martin,* this holding in no way dictates to a local government that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the street at any time and at any place. *See Martin*, 920 F.3d 584, 617. Nor does this holding "cover individuals who do have access to adequate temporary shelter, whether they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it." *Id.* at n. 8. The City may implement time and place restrictions for when homeless individuals may use their belongings to keep warm and dry and when they must have their belonging packed up. The City may also implement an anti-camping ordinance that is more

specific than the one in place now. For example, the City may ban the use of tents in public parks without going so far as to ban people from using any bedding type materials to keep warm and dry while they sleep. The City may also consider limiting the amount of bedding type materials allowed per individual in public places. Moreover, this holding does not limit Grants Pass' ability to enforce laws that actually further public health and safety, such as laws restricting littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence. Grants Pass would retain a large toolbox for regulating public space without violating the Eight Amendment.

There is no doubt that homelessness is a serious public health concern. Homeless individuals have higher rates of chronic physical and mental health conditions, increased rates of mortality, and related diseases and co-occurring disorders.[12] With the lack of access to the most basic of human needs, including running water, toilets, and trash disposal, infectious diseases—like COVID-19—can spread quickly. Uprooting homeless individuals, without providing them with basic sanitation and waste disposal needs, does nothing more than shift a public health crisis from one location to another, potentially endangering the health of the public in both locations. This concern is particularly acute during the current COVID-19 pandemic. As the U.S. Centers for Disease Control and Prevention (the "CDC") explained in its *Interim Guidance for Responding to Coronavirus Disease 2019 (COVID-19) among People Experiencing Unsheltered Homelessness*: Unless individual housing units are available, do not clear encampments during community spread of COVID-19.

The Court encourages Grants Pass to work with local homeless services experts and mental health professionals to develop training programs that cover techniques and tools for

[12] *Housing Not Handcuffs*, *supra* note 2 at 68.

interacting with homeless individuals and for deescalating mental health crises. For example, the City of Eugene, Oregon has used the services from an organization called CAHOOTS ("Crisis Assistance Helping Out on the Streets") to provide free "immediate stabilization in cases of urgent medical need or psychological crisis, assessment, information referral, advocacy [and] (in some cases) transportation to the next step in treatment" to the people of Eugene, Oregon.[13] As *The Wall Street Journal* noted, Gary Marshall, a 64-year-old who previously lived on the streets of Eugene, said the police approach was "name, serial number and up against the van." In contrast, when he was having one of his frequent panic attacks, CAHOOTS counselors would bring the him inside and talk him down, he said.[14]

Such trainings have also been proven to be effective in Miami-Dade County, Florida. Specifically, "providing mental health de-escalation training to [its] police officers and 911 dispatchers enabled [the county] to divert more than 10,000 people to services or safely stabilizing situations without arrest."[15] The number of people in jail, in turn, fell by nearly 49%, which allowed the county to close an entire jail facility, thereby saving nearly $12 million a year.[16]

The City of Medford, Oregon, has also developed new strategies for addressing the homeless crisis in its community. The City of Medford worked with Rogue Retreat, a nonprofit group, to open Hope Village in November 2017.[17] Hope Village is the first tiny homes

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[13] CAHOOTS, https://whitebirdclinic.org/cahoots/ (last visited Mar. 26, 2020); Mobile Crisis Services in Eugene and Springfield, *White Bird Clinic CAHOOTS*, https://whitebirdclinic.org/wp-content/uploads/2019/04/11x8.5_trifold_brochure_cahoots.pdf.

[14] Zusha Elinson, *When Mental-Health Experts, Not Police, Are the First Responders,* THE WALL STREET JOURNAL (Nov. 24, 2018), https://www.wsj.com/articles/when-mental-healthexperts-not-police-are-the-first-responders-1543071600.

[15] *Housing Not Handcuffs*, *supra* note 2 at 98.

[16] *Id.*

[17] Rogue Retreat, *Hope Village*, https://www.rogueretreat.com/housing-programs/hope-village/ (last visited Jul. 17, 2020).

community in Southern Oregon that provides short term transitional shelter and case management for individuals and families to help move from homelessness into long term housing.[18] The idea of Hope Village was created in 2013, when Rogue Retreat, St. Vincent DePaul, and the Jackson County Homeless Taskforce began researching and visiting other villages in Oregon to find creative ways to serve the homeless in Jackson County.[19] Hope Village started with 14 units, each 8 feet by 10 feet, plus a communal kitchen, laundry and shower facilities. Hope Village began operating under a one-year agreement with the city, and in less than a year, the Medford City Council approved doubling the size of the village and signed a new, two-year agreement with Rogue Retreat.[20] Medford city officials didn't create the project, didn't build the units, and doesn't operate the village. However, city leaders supported the concept from the beginning, offering a city-owned property for the village.[21] When neighboring businesses and other property owners objected to that location, the City of Medford continued to offer support and encouragement, culminating in a new location.[22] Hope Village now sits on property owned by the City of Medford and another property leased by Rogue Retreat.[23] Residents of Hope Village are required to attend case management meetings, counseling sessions, and work on permanent ways to stay off of the streets. Rogue Retreat says the average

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[18] *Id.*
[19] *Id.*
[20] Mail Tribune Editorial Board, *Medford can be proud of Hope Village*, THE MAIL TRIBUNE (Aug. 4, 2019), https://mailtribune.com/opinion/editorials/medford-can-be-proud-of-hope-village.
[21] *Id.*
[22] *Id.*; *see also* April Ehrlich, *Law Enforcement Officials Argue Rural Homeless Services Worsen Problem*, NPR (Jan. 21, 2020), https://www.npr.org/2020/01/21/797497926/law-enforcement-officials-argue-rural-homeless-services-worsen-problem ("Hope Village in Oregon faced some pushback in its early stages a few years ago. Some people feared that it would increase crime and generate litter. But resident Buckshot Cunningham says those fears proved to be wrong. 'Look at this place,' he says, motioning to the neat row of cottages. 'It's clean; it's beautiful. And it stays that way seven days a week, all year round. It's pretty simple.'").
[23] Mail Tribune Editorial Board, *Medford can be proud of Hope Village*, THE MAIL TRIBUNE (Aug. 4, 2019), https://mailtribune.com/opinion/editorials/medford-can-be-proud-of-hope-village.

stay at Hope Village is around four months, and the program has a 62 percent success rate. According to Rogue Retreat, this means 6 out of 10 people in the program successfully move away from homelessness.[24]

As the League of Oregon Cities noted in its amicus brief, "Oregon's cities are obligated to provide safe and livable communities for all residents." Cities Br. at 2 (Dkt. #87). Laws that punish people because they are unhoused and have no other place to go undermine cities' ability to fulfill this obligation. Indeed, enforcement of such "quality of life laws" do nothing to cure the homeless crisis in this country. Arresting the homeless is almost never an adequate solution because, apart from the constitutional impediments, it is expensive, not rehabilitating, often a waste of limited public resources, and does nothing to serve those homeless individuals who suffer from mental illness and substance abuse addiction.

Quality of life laws erode the little trust that remains between homeless individuals and law enforcement officials. This erosion of trust not only increases the risk of confrontations between law enforcement and homeless individuals, but it also makes it less likely that homeless individuals will cooperate with law enforcement.[25] Moreover, quality of life laws, even civil citations, contribute to a cycle of incarceration and recidivism. Indeed, civil citations requiring appearance in court can lead to warrants for failure to appear when homeless people, who lack a physical address or phone number, do not receive notice of relevant hearings and wind up incarcerated as a result.[26] Moreover, unpaid civil citations can impact a person's credit history and be a direct bar to housing access in competitive rental markets where credit history is a factor

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[24] Madison LaBerge, *New tiny home village in Grants Pass for homeless population*, FOX 26 (June 10, 2020), https://fox26medford.com/new-tiny-home-village-in-grants-pass-for-homeless-population/
[25] *Housing Not Handcuffs*, *supra* note 2 at 65.
[26] *Id.* at 52.

in tenant selection. In this way, civil penalties can prevent homeless people from accessing the very housing that they need to move from outdoor public spaces to indoor private ones.

There are many options available to Grants Pass to prevent the erection of encampments that cause public health and safety concerns without violating the Eight Amendment. The Court reminds governing bodies of the importance of empathy and thinking outside the box. We must try harder to protect our most vulnerable citizens. Let us not forget that homeless individuals are citizens just as much as those fortunate enough to have a secure living space.

ORDER

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment (Dkt. No. 62) is GRANTED in part and DENIED in part, and Defendant's Motion for Summary Judgment (Dkt. No. 80) is DENIED.

IT IS SO ORDERED and DATED this 22nd day of July, 2020.

/s/ Mark D. Clarke
MARK D. CLARKE
United States Magistrate Judge

CARNEY BADLEY SPELLMAN

July 28, 2020 - 9:20 AM

Filing Petition for Review

Transmittal Information

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Appellate Court Case Title:	City of Seattle, Petitioner/Cross-Respondent v. Steven G. Long, Respondent/Cross-Petitioner (782304)

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