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6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
7 **IN AND FOR THE COUNTY OF KING**

8 SEATTLE/KING COUNTY COALITION ON
HOMELESSNESS, et al,

9 Plaintiffs,

10 vs.

11 CITY OF BURIEN,

12 Defendant.

No. 24-2-00127-1 KNT

**ORDER REGARDING SUMMARY
JUDGMENT**

13 Homelessness is perhaps the defining societal crisis facing King County. The plight of
14 the homeless cannot be overlooked and is cause for much concern. Addressing homelessness is
15 a “complicated policy matter” and the Washington State Legislature adopted “a voluntary state-
16 local partnership model that invites local experimentation.” *Jewels Helping Hand v. Hansen*, --
17 P.3d --, at *1 (Apr. 17, 2025). Our State has been wrestling with this complex issue for twenty
18 years, when our Legislature first “started a state-local collaboration with the goal of ending
19 homelessness in Washington” by 2015. *Id.* at *2 (citing RCW 43.185C.005). King County
20 declared a homelessness emergency in November 2015, almost ten years ago.¹ And the most

21
22 ¹ See [homeless emergency king county.pdf](#) (last visited April 22, 2025). So too did Seattle.
See [Executive, Seattle Mayor declare emergencies, announce new investments to respond to](#)

1 recent point-in-time count, from January 2022, determined that more than 13,000 individuals
2 were homeless in King County on a given evening and that homelessness disproportionately
3 impacts historically marginalized communities.²

4 No one would seriously dispute that despite all the efforts that have been made by
5 federal, state and local governments, as well as countless nonprofit organizations and
6 volunteers, a homelessness crisis still exists today. Some believe that adequate governmental
7 efforts to house the unhoused have not been made and that criminalizing camping will only
8 make matters worse, while others have grown frustrated with what they perceive to be
9 government inaction when it comes to cleaning up our parks and sidewalks. As our State
10 Auditor observed in 2022:

11 Washingtonians are growing frustrated and concerned as the number of people
12 living on the streets and in encampments continues to grow, even as government
13 spends more on programs to address homelessness. Each county and city must
14 determine how it wants to address this complex, human problem based on the
15 needs of the people experiencing homelessness and the availability of local
16 resources. But one thing is certain: Each community must also do all it can to
17 maximize the public's financial investments in programs to address
18 homelessness by figuring out what work and what doesn't, and adjusting
19 accordingly.

20 See Contracted Homeless Services 2-pager draft-REV.indd (last visited May 7, 2025).³

21 Homelessness and its attendant policies has become a polarizing political issue. The root causes
22 of homelessness are many and vary individual to individual. People of good faith can disagree
23

24 homelessness - King County, Washington (last visited April 22, 2025). The Court takes judicial
notice of this government website and its contents.

² Data Overview - KCRHA (last visited April 22, 2025). The Court takes judicial notice of this
government website and its contents. See also *City of Seattle v. Long*, 198 Wn.2d 136, 171-72,
493 P.3d 94 (2021).

³ The Court takes judicial notice of this government website and its contents.

ORDER RE: SUMMARY JUDGMENT

Judge Michael K. Ryan
King County Superior Court

1 as to how best to solve what seems to be an intractable societal problem, but everyone likely
2 agrees that something more or something different needs to be done.

3 This Court has been asked to weigh-in on the matter and determine whether the
4 Washington State Constitution prevents Burien from enforcing a law prohibiting camping,
5 sleeping, and storing belongings on public property. And while the United States Supreme
6 Court recently held that municipalities have the constitutional authority under the United States
7 Constitution to criminalize camping and sleeping on public property, even when no shelter
8 space is available within a jurisdiction, *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024);
9 this Court must assess Plaintiffs' claims under our State Constitution, which often affords
10 greater protection than its federal counterpart. In making this assessment, this Court is
11 concerned neither with the wisdom nor efficacy of Burien's approach, only its constitutionality.
12 After much thought and consideration, this Court concludes that Burien's anti-camping law is a
13 constitutionally permissible exercise of Burien's police powers and Burien is entitled to
14 judgment as a matter of law.

15 I BACKGROUND

16 A. The Parties.

17 This lawsuit was brought against Burien by three individuals, one who is currently
18 experiencing homelessness, and two others who are not currently homeless, but anticipate they
19 will again experience homelessness, and a non-profit whose mission is to advocate for housing
20 justice and provide services to the unhoused.

21 Carlo Paz is currently homeless and living in Burien and became homeless after his
22 divorce in mid-2023. *See* Dkt. No. 38 at ¶¶2-3. He is currently unemployed and cannot afford
23 to rent a place of his own, and occasionally stays at a friend's house, but does not overstay his

1 welcome. *Id.* at ¶4. He also occasionally stays in cities nearby Burien, but “typically returns to
2 Burien daily or every other day and [tries] to stay overnight in Burien when [he] is able.” *Id.* at
3 ¶10. He has never been cited or arrested under the law in question, or any of its prior versions.

4 Mr. Paz was part of a large encampment, known as the Ambaum encampment, and he,
5 along with 22 other homeless residents of the encampment, signed a cease-and-desist letter to a
6 Burien-sponsored services agency (The More We Love), refusing that group’s outreach efforts,
7 noting that “when we are ready to face our trauma sober we will let someone certified know.
8 Please stop.” Dkt. No. 50 at Exhibit 3. In explaining why he resisted services from The More
9 We Love, Mr. Paz notes individuals at the Ambaum encampment “would have taken
10 permanent housing if it was offered” and the services rendered by this organization were not
11 “reliable” because they only resulted in getting a “hotel stay for one or two days.” *See*
12 *generally* Dkt. No. 74. He also noted that other groups also provided services and offered other
13 residents of the encampment “housing or help.” *Id.* at ¶3.

14 Elizabeth Hale and Alex Hale are married, have lived in Burien for seven years, and
15 became homeless in 2023 after Mr. Hale lost his job and they were evicted from their
16 apartment. *See, e.g.*, Dkt. No. 36 at ¶2-3. While they want to find permanent housing, they are
17 both unemployed and cannot afford rent. *See, e.g.*, Dkt. No. 37 at ¶6. They both describe, in
18 detail, the difficult reality they faced because they have no stable place to live and certain
19 events that occurred in December 2023, regarding the Ambaum encampment. *See generally*
20 Dkt. Nos. 36 & 37. At the time the Hales each signed their declarations in this case (late
21 November/early December), they were not homeless in Burien; rather, due to Ms. Hale’s
22 medical condition she and her husband were “able to get a temporary place to stay at a hotel in
23 Kent” and when that stay ends the Hales “intend to continue living in Burien until [they are]

1 able to find more stable housing[.]” Dkt. No. 36 at ¶26. Neither of them filed any declaration in
2 reply; thus, the Court is not certain whether either of the Hales is currently homeless, and if so,
3 if they are homeless in Burien as opposed to some other location, or whether they have been
4 able to secure stable housing. Neither of them have been cited or arrested under the law in
5 question, or any prior version of the law.

6 The Seattle/King County Coalition on Homelessness (Coalition) “is a nonprofit
7 organization that is formed for the purpose to challenge systemic causes of homelessness and
8 advocate for housing justice, and to meet the immediate needs of unhoused people in King
9 County.” Dkt. No. 45 at ¶ 3. The Coalition’s members are made up of “organizational”
10 members consisting “of 50-60 community-based nonprofit organizations” that provide a wide
11 range of services to King County residents and “[i]ndividual members who have personal
12 experience of homelessness or unstable housing, and people who have expertise providing,
13 using, or helping others navigate housing, shelter and other survival services, health care, or
14 human services.” *Id.* None of the Coalition’s members are homeless individuals who currently
15 reside or intend to reside in Burien.

16 Located just south of the White Center neighborhood in Seattle, Burien, which has a
17 population of just over 50,000 residents,⁴ is “roughly 13 square miles, about six of which are
18 water.” Dkt. No. 50 at ¶3. Based on its geography, Burien has limited public spaces, and “94%
19 of Burien residents [say] that public parks and open spaces [are] important to their quality of
20 life” and “in 2022, Burien recorded 130,000 visits to its parks.” *Id.* According to its City
21 Manager, “Burien leads its response to homelessness with a ‘services first’ approach and works

22 ⁴ U.S. Census Bureau QuickFacts: Burien city, Washington (last visited May 2, 2025). The
23 Court takes judicial notice of the contents of this government website.

1 with multiple agencies and non-profit organizations to provide services and resources to
2 individuals facing homelessness.” *Id.* at ¶5. Burien works with other King County
3 communities, as well as the local faith community, on homelessness issues. *See id.* at ¶¶5-7.

4 There are currently two shelters in Burien, Hospitality House and Mary’s Place. *See*
5 Dkt. No. 39 at ¶5. “Hospitality house is a women’s shelter and operates as a clean and sober
6 facility. Mary’s Place is a family shelter.” *Id.* Both shelters are typically at capacity, and while
7 this Court was not provided with any detailed specifics as to the size of Burien’s unhoused
8 population given the transient nature of that population,⁵ there is no dispute that the number of
9 homeless individuals in Burien generally exceeds the number of shelter beds available in the
10 city on most days. *See* Dkt. No. 40 at Exhibit 6, p. 101. Burien also has a severe weather
11 shelter, which is only operational “a few nights each year[.]” Dkt. No. 39 at ¶6.

12 **B. Procedural History.**

13 On January 3, 2024, Plaintiffs filed this lawsuit against Burien alleging that (1)
14 subjecting homeless individuals to criminal sanctions for camping on public property violates
15 article 1, section 14 of the Washington State Constitution, (2) a prior version of the law in
16 question was unconstitutionally vague and amounted to an unlawful delegation of authority, (3)
17 the threatened seizure and removal of homeless camps on government property violates article
18 1, section 7 of the Washington State Constitution, (4) Burien violates article 1, section 12 of the
19 Washington State Constitution by “discriminating against people with disabilities by subjecting
20 them to worse treatment irrationally,” (5) banning public camping violates article 1, section 12
21 of the Washington State Constitution “by denying homeless residents in Burien the right to

22 ⁵ Estimates range from between 100 to 200 not including “families living in RVs, vehicles,
23 couch surfing, or those we just don’t have eyes on.” *See* Dkt. No. 40 at Exhibit 11.

1 reside in Burien, in violation of their right to intrastate travel,” and (6) a declaratory judgment
2 that Burien’s camping law is unconstitutional. *See generally* Dkt. No. 1. In addition to
3 declaratory relief, Plaintiffs also seek an injunction “prohibiting the enforcement of the City of
4 Burien’s Ordinance.” *See id.* at 20.

5 After the parties briefed this case for summary judgment, but before oral argument,
6 Burien changed the operative law and enacted Ordinance 864 (the Ordinance). The Court
7 convened a status conference at Burien’s request, reset the date for oral argument, and asked
8 the parties to address questions related to mootness and how the new Ordinance impacted this
9 case. The parties filed briefs, and Plaintiffs acknowledged their unlawful delegation and
10 vagueness challenges were mooted by the Ordinance, and that this Court need not address those
11 claims. *See* Dkt. No. 88.⁶ The Court heard extensive argument on February 14, 2025, reserving
12 ruling on the matter. *See* Dkt. No. 100 (Verbatim Report of Proceedings). Finally, after oral
13 argument, this Court requested supplemental briefing on the issue of whether any of the
14 Plaintiffs have standing to bring a pre-enforcement, as-applied challenge under article 1,
15 section 14, which prohibits, among other things, “cruel punishments inflicted” based on the
16 Court of Appeals unpublished decision in *Kitcheon v. City of Seattle*, 2024 WL 5040630 (Dec.
17 9, 2024). Each party briefed the matter. *See* Dkt. Nos. 102 & 104. This Order follows.

18 **C. Relevant Factual History of Burien’s Anti-Camping Laws.**

19 Since 2007, Burien has prohibited camping “in any park area including any park
20 parking lot.” BMC 7.30.110; *see also* BMC 7.10.020(2) (defining camping) & BMC 7.30.120
(prohibition on type of tent allowed to be temporarily erected and not authorizing overnight

21 ⁶ In addition, Plaintiffs did not address their disability discrimination claim in any of the
22 briefing and the Court concludes they have abandoned that claim and Burien is entitled to
judgment as a matter of law as to that cause of action.

1 camping.). The record before the Court shows that under this law, only a single individual was
2 arrested, as the former Chief of Police explained:

3 To my knowledge, there has been only one criminal arrest for camping in parks
4 since 2019. That arrest occurred after multiple efforts to gain compliance
5 through alternate housing options. I do know that the person arrested was
ultimately connected with options that resulted in him getting stable housing, so
I also consider that case a success because he is no longer camping in public
spaces and we helped him access shelter.

6 Dkt. No. 40, Exhibit 5 at ¶8 (Declaration of Mr. Theodore Boe).⁷

7 BMC 7.30.110 remained unchanged until September 25, 2023, when Burien passed
8 Ordinance 818, which was modeled on a Bellevue ordinance. The impetus behind this change
9 was to bring Burien's anti-camping law into compliance with the dictates of *Martin v. City of*
10 *Boise*, 920 F.3d 584 (9th Cir. 2019) & *Johnson v. City of Grants Pass*, 72 F.4th 868 (2023).⁸
11 See Dkt. No. 40 at Exhibit 1. Approximately a week later, on October 2, 2023, Burien made
12 some adjustments to Ordinance 818, and enacted Ordinance 827 because such adjustments
13 "would enhance Burien and its partners' ability to effectively refer individuals to shelter and, if
14 necessary, enforce the ordinance." See *id.* at Exhibit 2. Collectively, these ordinances made it a
15 crime to camp on public property between 7:00 p.m. and 6:00 a.m., except in designated places
16 and "[g]iven the sensitivity of this matter, the significance and impact of the unhoused, and the
17 need to educate and inform the public, including the unhoused" the effective date of the
18

19 ⁷ This declaration was not prepared for this litigation; rather, it was submitted in support of the
20 King County Sheriff's (Ms. Patricia Cole-Tindall) lawsuit against Burien in federal court.
These lawsuits will be discussed later in this Section.

21 ⁸ *Martin* was decided in 2018, but the opinion was amended in 2019. All cites to *Martin* will be
22 to the amended opinion issued in 2019. See *Johnson* at 877 & n.5 (explaining procedural
history of *Martin*). These cases were overruled by the United States Supreme Court in *Grants*
Pass, supra.

1 ordinances was November 1, 2023. As noted above, Plaintiffs filed this lawsuit challenging
2 these ordinances two months later.

3 On March 4, 2024, Burien amended these ordinances and enacted Ordinance 832 in
4 response to concerns over a dramatic increase in unhoused individuals in Burien, rising crime
5 and safety concerns, complaints from its citizenry, and in an effort “to clarify and enhance its
6 efforts to protect Burien residents, businesses, and property and to assist and provide clear
7 guidance for the unhoused.” Dkt. No. 40 at Exhibit 3. This drew an immediate rebuke from the
8 King County Sheriff’s Office (KCSO).

9 Behind the scenes, however, a long-simmering dispute between Burien and King
10 County and the KCSO⁹ over the scope of *Martin*¹⁰ boiled over into public view. The KCSO
11 refused to enforce Ordinance 832 based on *Martin*, and on March 8, “the KCSO leadership
12 notified its personnel in Burien to refrain from enforcing the new camping ordinance, until the
13 constitutionality of the ordinance could be resolved.” Dkt. No. 40 at 34-35. Three days later,
14 the King County Sheriff sued Burien in federal court seeking an advisory opinion as to the
15 constitutionality of Ordinance 832, and, in turn, Burien sued the Sheriff in Snohomish County
16 seeking to enforce the interlocal agreement, which was removed to federal court. In September
17 2024, Judge Richard Jones dismissed the Sheriff’s lawsuit and remanded Burien’s lawsuit back
18 to Snohomish County. *See, e.g., See Cole-Tindall v. City of Burien*, 2024 WL 5379336, at * 1
19 & n.1 (W.D. Wash. Sept. 24, 2024) (dismissing KCSO’s case for lack of justiciability) & *City*

20 ⁹ The KCSO provides law enforcement services to the city under an interlocal agreement. *See*
21 Dkt. No. 40 at pp. 37-80 (interlocal agreement).

22 ¹⁰ *See, e.g.,* Dkt. No. 40 at 82-86 (letter from General Counsel to King County Executive to
23 Burien City Manager). At some point, King County offered Burien \$1 million in resources and
24 35 pre-fabricated sleeping structures, but the County rescinded that offer. *See* Dkt. No. 45 at
¶10. No explanation exists in the record for this recission.

1 of *Burien v. Cole-Tindall*, 2024 WL 4274368 (W.D. Wash. Sep. 24, 2024) (remanding matter
2 back to Snohomish County Superior Court).¹¹ Even after *Martin* was abrogated by the Supreme
3 Court’s decision in *Grants Pass* and Judge Jones dismissed the Sheriff’s action, the KCSO still
4 refused to enforce Ordinance 832. See Dkt. No. 82 at Appendix A (fourth Whereas clause).
5 Given KCSO’s steadfast refusal to enforce Ordinance 832, there is no dispute that Ordinance
6 832 has never been enforced and no one has been cited or arrested under any of the post-*Martin*
7 ordinances just discussed. See Dkt. No. 50 at ¶28. Again, the only arrest in the record occurred
8 under Burien’s original no-camping law, which was enacted in 2007.

9 On January 27, 2025, days before oral argument in this case, Burien enacted the
10 Ordinance, which is more straightforward than prior ordinances. In enacting the Ordinance, the
11 Burien City Council noted that prior “efforts to comply with the overruled Ninth Circuit model,
12 which involves reasonable time, place, and manner restrictions, must cease because King
13 County and its Sheriff have refused to enforce Burien’s law[.]” See Dkt. No. 82 at Appendix A,
14 p. 2. The Ordinance took effect immediately because:

15 [T]he need to have enforcement of this ordinance remains critical to the peace,
16 health, and safety of the City of Burien’s residents and businesses, regardless of
17 their statuses. Compelling King County to comply with its contractual
18 obligations is also crucial. As a result, this ordinance is an emergency
19 ordinance[.]

20 ¹¹ After Judge Jones dismissed/remanded the cases, the KCSO provided an amicus brief in this
21 case arguing different grounds than it did in *Cole-Tindell*. Abandoning its arguments regarding
22 *Martin*, the KCSO changed gears and argued the prior ordinance was vague and without
23 standards, arguing theories of the case (federal due process) not advanced by Plaintiffs. See
24 Dkt. No. 55. The Court allowed the amicus brief to be filed, but given the straightforward
nature of the new Ordinance, the issues raised by the KCSO are moot.

1 *Id.* at 4. The Ordinance is now codified at BMC 9.85.150, and entitled “Unlawful public
2 camping and storage.”¹²

3 In Section 1 of the Ordinance the Burien City Council made several legislative findings
4 regarding public health, safety and welfare, but also found that “Allowing camping can result in
5 fewer people who need assistance seeking and obtaining that assistance.” *Id.* at 5.

6 Section 2 of the Ordinance makes it “unlawful for any person to camp or store items on
7 public property in Burien at any time.” BMC 9.85.150(2). And Section 4 defines “camp” or
8 “camping” as “to reside or sleep on public property with or without the use of huts, lean-tos,
9 tents, temporary shelters, vehicles, or equivalents or as evidenced by the use of beds, blankets,
10 cots, hammocks, mattresses, sleeping bags, tarpaulins, or equivalents, or cooking tools or fire.”
11 BMC 9.85.150(4)(a). This definition excludes “the authorized use of Burien’s or a
12 governmental entity’s public property.” *Id.*

13 Section 3 of the Ordinance creates “no requirement that beds, housing, shelter or
14 treatment be available, offered or sought before enforcement[.]” BMC 9.85.150(3)(a). That
15 same subsection also notes:

16 however, law enforcement may offer the same to a person camping on public
17 property, and if the person accepts the offer or agrees to ‘camp’ off of public
18 property, that person *may not be arrested under this section unless they continue
19 to or insist on unlawfully storing items on public property.*

20 *Id.* (emphasis added).

21 Under Section 5 of the Ordinance, the King County Sheriff Deputy, serving as Burien’s
22 Chief of Police, with written approval of the City Manager, is “authorized to adopt

23 ¹² For continuity’s sake, although the Ordinance is now codified, throughout this Order the
24 Court will reference the Ordinance, as opposed to the codified section of Burien’s Municipal
Code, when discussing its constitutionality, unless otherwise appropriate.

1 administrative policies and procedures for implementing this chapter.” BMC 9.85.150(5). The
2 Ordinance further requires that the City Manager must be “guided by Burien’s interpretation of
3 applicable federal and state law, the reasonable deference due to law enforcement’s expertise,
4 the safety and dignity of those impacted, and the need to protect public and private property in
5 the City of Burien.” *Id.* As of this writing, the parties have not provided the Court with any
6 administrative policies or procedures, written or otherwise.

7 Finally, under Section 6 of the Ordinance, a violation is considered “a misdemeanor and
8 may be subject to criminal deferral.” BMC 9.85.150(6). Under both Washington and Burien
9 law, a misdemeanor is punishable by a fine of not more than \$1,000.00 or by imprisonment in a
10 county jail for not more than ninety (90) days, or both. *See, e.g.*, RCW 9A.20.010 & BMC
11 9.05.040. The Ordinance also provides judicial officers with the discretion to waive all fees,
12 fines or penalties “upon a reasonable showing of need.” BMC 9.85.150(6). The Ordinance also
13 amended BMC 10.15.100 to add “camping” to list of prohibited actions with respect to
14 Burien’s streets, rights-of-way, and public property. Like the prior ordinances (aside from the
15 one enacted in 2007), the Ordinance has not yet been enforced against any individual, thus, no
16 citations have been or issued or arrests made.¹³

17 II LEGAL ANALYSIS

18 Ordinances, like statutes, are presumed “constitutional, and the party challenging
19 constitutionality bears the burden of proving otherwise.” *Woods v. Seattle’s Union Gospel*

20 ¹³ To the extent this Court deems other facts relevant to its legal analysis, those facts will be
21 addressed in the context of the legal discussions. The Court denies Plaintiffs request to strike
22 Burien’s motion because the Motion was timely filed, and even if it were not, Plaintiffs have
23 not demonstrated any prejudice. In addition, the Court denies Plaintiffs’ request to strike certain
24 evidence given how this Court considered the evidence. For example, the Court is not viewing
certain complaints for the truth of the matter, but rather for simply show evidence of fact of
complaint and to explain Burien’s actions.

1 *Mission*, 197 Wn.2d 231, 239, 481 P.3d 1060 (2021). “The Washington Constitution provides
2 municipalities with police powers to protect health and safety [and] [t]his is a broad delegation
3 of power that mirrors the police powers of the state legislature.” *Potter v. City of Lacey*, 3
4 Wn.3d 328, 336, 550 P.3d 1037 (2024) (citing Wash. Const. art. XI, § 11) (hereinafter *Potter*
5 *II*).¹⁴ When enacting ordinances touching upon health and safety, municipalities do not need
6 “scientific or exact proof of the need for” the ordinance. *State v. J.D.*, 86 Wn. App. 501, 508,
7 937 P.2d 630 (1997). Likewise, governments have “a compelling interest in promoting the
8 health, safety, and welfare of its citizens. Thus, where a statute’s primary purpose is to promote
9 safety and welfare, we will presume that the statute is constitutional if it bears a reasonable and
10 substantial relationship to that purpose.” *State v. Smith*, 185 Wn. App. 945, 955, 344 P.3d 1244
11 (2015); *see also City of Seattle v. Larkin*, 10 Wn. App. 205, 210, 516 P.2d 1083 (1973).

12 Challenges to municipal laws come in two forms: facial and as-applied. “The court’s
13 focus when addressing constitutional facial challenges is on whether the statute’s language
14 violates the constitution, not whether the statute would be unconstitutional ‘as applied’ to the
15 facts of a particular case.” *Vet Voice Found. V. Hobbs*, -- P.3d -- (2025), 2025 WL 715791, at *
16 7 (Mar. 6, 2025) (quotation & citation omitted). Because they “often rest on speculation” and
17 are contrary “to the fundamental principle of judicial restraint,” facial challenges are
18 “disfavored.” *Woods* at 240; *see also Lenci v. City of Seattle*, 63 Wn.2d 664, 668, 388 P.2d 926
19 (1964) (“These rules are more than mere rules of judicial convenience. They mark the line of
20 demarcation between legislative and judicial functions.”), *abrogated on other grounds*, *Yim v.*
21 *City of Seattle*, 194 Wn.2d 682, 702, 451 P.3d 694 (2019). In contrast, as-applied challenges are

22 ¹⁴ There are numerous “*Potter*” decisions discussed in this Order, and each decision will be
23 given a specific designation to avoid confusion based on the timing of its issuance.

1 “characterized by a party’s allegation that application of the statute in the specific context of
2 the party’s actions or intended actions is unconstitutional.” *Woods* at 239 (citation & quotation
3 omitted). A determination that an ordinance is unconstitutional as-applied “prohibits future
4 application of the statute in a similar context, but the statute is not totally invalidated.” *Id.* at
5 240 (same). Plaintiffs only bring as-applied challenges, and acknowledge “there are
6 hypothetical applications of the ordinance that would be constitutional.” Dkt. No. 91 at 3.

7 **A. Justiciability of Plaintiffs’ Claims.**

8 Before turning to the merits, the Court must first consider whether the named Plaintiffs
9 and/or the Coalition has standing to challenge the Ordinance, which has never been enforced
10 against anyone, whether a Plaintiffs in this case or otherwise. This Court concludes that the
11 Coalition lacks organizational standing as to all claims, but that, at the very least, Mr. Paz has
12 standing to challenge the Ordinance as to certain of the claims.

13 To establish organizational standing, the Coalition must show that “(1) its members
14 would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are
15 germane to its purpose; and, (3) neither the claim asserted nor the relief requested requires the
16 participation of its individual members.” *Riverview Cmty. Grp. v. Spencer & Livingston*, 181
17 Wn.2d 888, 901, 337 P.3d 1076 (2014) (cleaned up) (quotation omitted). The first two
18 components are constitutionally required, the third is prudential. *See id.* The overall purpose of
19 organizational standing is to “permit a single plaintiff to adequately represent the interests of its
20 many members in a single lawsuit, thus avoiding repetitive and costly independent actions.” *Id.*
21 (quotation omitted). The Coalition fails the first element because none of its members are
22 subject to enforcement under the Ordinance.

1 None of the Coalition's members are homeless individuals residing or seeking to reside
2 in Burien and nothing in the Coalition's declaration states that any of its members have any
3 intention of camping in Burien, making them subject to the Ordinance's prohibitions. Because
4 none of their members would suffer an injury in fact by virtue of the Ordinance's enforcement,
5 the Coalition lacks organizational standing because none of their members have standing in
6 their own right. *Compare Alim v. City of Seattle*, 14 Wn. App.2d 838, 855, 474 P.3d 589 (2020)
7 (two organizations had standing because their members had standing). That the Coalition's
8 overall mission, which practically speaking is to advocate on behalf of homeless individuals,
9 might not be aligned with Burien's approach does not mean that it has standing to challenge the
10 Ordinance. Nor does the fact that the Ordinance may undercut their efforts, or require their
11 efforts to focus on Burien as opposed to some other jurisdiction, create standing. If the rule
12 were otherwise, every organization that disagreed with a law enacted by a government or had to
13 make decisions on how to expend resources based on a law's passing, would have standing to
14 challenge that law. This would greatly expand standing, and effectively nullify standing's
15 injury-in-fact requirement in the context of organization standing. Moreover, given the
16 Coalition does not advance a facial challenge, and only an as-applied challenge, individual
17 participation would be necessary of any members who are subject to potential enforcement of
18 the Ordinance. Because the Coalition lacks organization standing, this Court **GRANTS**
Burien's Motion on all claims as it relates to the Coalition.

19 As to the named Plaintiffs, only one Plaintiff needs to establish standing for this Court
20 to consider the claims being advanced. It is undisputed that the Hales are not currently
21 homeless in Burien, or anywhere else; thus, the Court has serious concerns about whether they
22 have standing to challenge the Ordinance because it is purely speculative whether they will

1 ever return to camp or reside on Burien's property. That said, the Court finds that Mr. Paz has
2 standing to bring his right to travel and private affairs causes of action because he is currently
3 homeless in Burien, and intends to remain so. Thus, standing is no bar for this Court to consider
4 Plaintiffs' claims in those regards. Because standing is not dispensed in gross, and Plaintiffs
5 must establish standing for each claim they bring, as well as each form of relief they seek, *see*,
6 *e.g.*, *Murthy v. Missouri*, 603 U.S. 43, 61 (2024); the Court will later explain why none of the
7 named Plaintiffs have standing to challenge the Ordinance under article 1, section 14, which is
8 the "cruel punishment inflicted" claim." *See infra* Part II-B-3.

9 **B. Article 1, section 14: Cruel Punishment Inflicted.**

10 Article 1, section 14 of the Washington State Constitution provides: "Excessive bail
11 shall not be required, excessive fines imposed, nor cruel punishment inflicted." Generally, the
12 "cruel punishment inflicted" clause provides greater protection than the Eighth Amendment,
13 but that is not always the case. *See State v. Bassett*, 192 Wn.2d 67, 78-79, 428 P.3d 343 (2018)
14 (noting "inconsistent precedent"). When a party seeks to establish greater protection, it must
15 explain "why enhanced protections are appropriate in specific applications." *Id.* at 79
16 (quotation omitted); *see also Kitchon, supra*, at *17.

17 Plaintiffs assert Burien's prohibition on camping or sleeping on public property
18 amounts to the infliction of cruel punishment in violation of article 1, section 14. As Plaintiffs
19 put it: "Punishing a person for sleeping or residing in public when they have nowhere else to
20 sleep or reside is cruel punishment because it is unavoidable conduct [and the Ordinance]
21 criminalizes involuntary, life-sustaining activities[.]" Dkt. No. 91 at 9. In Plaintiffs' view, it
22 would be "cruel punishment to force an unhoused person to spend even a day in jail for the
23 crime of having nowhere to go." *Id.* Burien counters by arguing it is not criminalizing

1 homelessness, but rather conduct, and article 1, section 14 does not proscribe what conduct can
2 be criminalized and even so, “a divertible misdemeanor, subject to a necessity defense” does
3 not amount to “cruel punishment inflicted.” Dkt. No. 76 at 3.

4 This Court agrees with Burien because (1) article 1, section 14 does not proscribe what
5 can be criminalized and under controlling federal and state case law the Ordinance criminalizes
6 conduct, not status, (2) nothing in Washington law requires this Court to Plaintiffs’ proposed
7 constitutional rule which mirrors the rule announced in *Martin*, (3) Plaintiffs lack standing to
8 bring an as-applied challenge because fear of arrest is insufficient to satisfy standing’s injury-
9 in-fact requirement under article 1, section 14, and (4) assuming standing, applying our
10 Supreme Court’s heightened protection tests for sentencing results in a determination that
11 article 1, section 14 is not violated by any hypothetical sentence.

12 **1. Article 1, Section 14 Does not Proscribe What can be Criminalized.**

13 Plaintiffs ask this Court to rule that the “cruel punishment inflicted” clause not only
14 prohibits the infliction of cruel punishment, but also proscribes what can be criminalized.
15 Specifically, Plaintiffs argue that the Ordinance criminalizes the “status” of homelessness
16 because unhoused individuals have no other choice but to sleep or camp on public property. *See*
17 Dkt. No. 91 at 8-9. Because both Washington and United Supreme Court precedent compel a
18 contrary conclusion, Plaintiffs’ argument fails.

19 Plaintiffs argue Burien is “wrong when it asserts that the Cruel Punishment Clause
20 cannot restrict what may be made criminal,” asking this Court to interpret *Robinson v.*
21 *California*, 370 U.S. 660 (1962), to support the conclusion that punishing someone for
22 “unavoidable conduct” constitutes cruel punishment under article 1, section 14. *See* Dkt. No. 91
23 at 8-9. This Court disagrees. To start, Plaintiffs have not pointed the Court to any Washington

1 authority supporting the theory that article 1, section 14 restricts what may be criminalized or
2 punished as such. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193
3 (1962) (“Where no authorities are cited in support of proposition, the court is not required to
4 search out authorities, but may assume counsel, after diligent search, has found none.”). While
5 our Supreme Court has noted that “[a]rticle 1, section 14 proscribes both disproportionate
6 sentencing and certain modes of punishment,” *In re Williams*, 198 Wn.2d 342, 354, 496 P.3d
7 289 (2021); neither it, nor any appellate court, has ever extended article 1, section 14 into the
8 realm of what may or may not be criminalized and punished as such, which is the touchstone of
9 *Robinson*.

10 Our Supreme Court has never held that article 1, section 14 substantively limits what
11 conduct a government may criminalize, and prior case law from our Supreme Court, as shown
12 below, has rejected similar requests in the past. Such a path is fraught with peril and slippery
13 slopes that Justice Thurgood Marshall warned, if expanded, would become a “constitutional
14 doctrine of criminal responsibility.” *Powell v. Texas*, 392 U.S. 514, 534 (1968) (plurality). That
15 said, there is no need for this Court to decide this question in the abstract, because the Eighth
16 Amendment, which serves as a floor for article 1, section 14, already provides adequate
17 protection in this regard as Plaintiffs acknowledge,¹⁵ and such protection is consistent with

18 ¹⁵ While Plaintiffs provide a general independent state analysis under *State v. Gunwall*, 106
19 Wn.2d 54 (1986) for “this case,” writ large, Dkt. No. 34 at 23-25; they failed to provide any
20 *Gunwall* analysis for this particular context, *i.e.*, whether in the specific context of prohibiting
21 what may be criminalized article 1, section 14 provides greater protection than its federal
22 counterpart as they were required to do. *See, e.g., Bassett* at 79; *see also id.* (“Yet we noted that
even where it is already established that the Washington Constitution may provide enhanced
protections on a general topic, parties are still required to explain why enhanced protections are
appropriate in specific applications.”) (quotation omitted); *accord Kitcheon*, 2024 WL
5040630, at * 16 (discussing *Gunwall*). In any event, Plaintiffs acknowledge that in this context
the federal and state constitutions are coextensive. Dkt. No. 91 at 9.

1 Washington law interpreting article 1, section 14 regarding a distinction in laws that criminalize
2 status as opposed to conduct.

3 After surveying prior precedents, the United States Supreme Court explained:

4 [T]he Cruel and Unusual Punishments Clause circumscribes the criminal
5 process in three ways: First, it limits the kinds of punishments that can be
6 imposed on those convicted of crimes; second, it proscribes punishments grossly
7 disproportionate to the severity of the crime; and third, it imposes substantive
8 limits on what can be made criminal and punished as such. We have recognized
9 that the last limitation as one to be applied sparingly. The primary purpose of
10 (the Cruel and Unusual Punishments Clause) has always been considered, and
11 properly so, to be directed at the method or kind of punishment imposed for
12 violation of a criminal statute.

13 *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (citations & quotations omitted). The only time
14 the United States Supreme Court determined a law fell into the third category was in *Robinson*,
15 which Plaintiffs argue supports their position. *See* Dkt. No. 91 at 9.

16 In *Robinson*, the Court addressed a California law making it a criminal offense “to be
17 addicted to the use of narcotics.” *Id.* at 660 & n.1; *see also id.* at 662-63 (quoting jury
18 instructions). It noted that the law in question, as construed by the California state courts,

19 is not one which punishes a person for the use of narcotics, for their purchase,
20 sale or possession, or for antisocial or disorderly behavior resulting from their
21 administration. Rather, we deal with a statute which makes the ‘status’ of
22 narcotic addiction a criminal offense, for which he may be prosecuted ‘at any
23 time before he reforms.’ California has said that a person can be continuously
24 guilty of this offense, whether or not he has ever used or possessed any narcotics
within the State, and whether or not he has been guilty of any antisocial
behavior there.

Id. at 666. The Court held “that a state law which imprisons a person thus afflicted as a
criminal, even though he has never touched any narcotic drug within the State or been guilty of
any irregular behavior there, inflicts a cruel and unusual punishment in violation of the
Fourteenth Amendment.” *Id.* at 667. *Robinson*’s entire rationale for striking down the law was

1 that it *failed* to criminalize *conduct*, and merely criminalized the status of being addicted to
2 narcotics. *Robinson* stands for the basic proposition that the government may not prosecute you
3 criminally for who you are, but may prosecute you criminally for what you do.

4 Several years later, the Supreme Court decided *Powell*, where Mr. Powell was arrested
5 and convicted for being intoxicated in public in contravention of a Texas statute. As a defense,
6 Mr. Powell argued it would violate the Eighth Amendment to punish him because he “was
7 afflicted with the disease of chronic alcoholism” and that “his appearance in public while drunk
8 was not of his own volition.” *Id.* at 517 (cleaned up) (plurality). Justice Marshall, writing for
9 the plurality, rejected extending *Robinson* to Mr. Powell’s case because he:

10 was convicted, not for being a chronic alcoholic, but for being in public while
11 drunk on a particular occasion. The State of Texas has not sought to punish mere
12 status, as California did in *Robinson* . . . Rather, it has imposed upon appellant a
13 criminal sanction for public behavior which may create a substantial health and
safety hazards, both for the appellant and for members of the general public, and
which offends the moral and esthetic sensibilities of a large segment of the
community. This seems a far cry from convicting one for being an addict, being
a chronic alcoholic, being mentally ill or a leper.

14 *Id.* at 532 (quotations omitted). Justice Marshall noted *Robinson* brought “the Court but a very
15 small way into the substantive criminal law” and warned that extending *Robinson* would want
16 for any “limiting principle.” *Id.* at 533. He wrote further:

17 The entire thrust of *Robinson*’s interpretation of the Cruel and Unusual
18 Punishment Clause is that criminal penalties may be inflicted only if the accused
19 has committed some act, has engaged in some behavior, which society has an
20 interest in preventing, or perhaps in historical common law terms, has
committed some actus reus. It thus does not deal with questions of whether
certain conduct cannot constitutionally be punished because it is, in some sense,
involuntary or occasioned by a compulsion.

21 *Id.* at 533 (quotation omitted). Justice Marshall went on to note that bringing Mr. Powell’s case
22 under *Robinson*’s rubric would too heavily involve the courts in defining the contours of the

1 criminal law, and that constitutionalizing such a rule would be fraught with unintended
2 consequences that the judiciary was ill-equipped to address. *Id.* at 534-35. Under *Powell*,
3 *Robinson* does not apply in cases where conduct, as opposed to mere status, is criminalized
4 even if the underlying conduct can be described as “involuntary” or unavoidable.

5 While much ink has been spilled by courts on *Robinson*’s meaning and application to
6 laws like the one at issue here,¹⁶ both the United States Supreme Court and our State Supreme
7 Court have already interpreted *Robinson* in a manner consistent with *Powell*. Consequently,
8 *Robinson* is unhelpful to Plaintiffs.

9 Plaintiffs are incorrect that there is a “line of 8th Amendment cases looking at status
10 offenses” from the United States Supreme Court for this Court to draw parallels from. Dkt. No.
11 91 at 9. There is only *Robinson*.¹⁷ The Supreme Court has never applied its reasoning in any
12 other case. *See Grants Pass* at 546 (“Nor, in the 62 years since *Robinson*, has this Court once

13 ¹⁶ *See, e.g., Jones v. City of Los Angeles*, 444 F.3d 1118, 1131-1137 (9th Cir. 2006) & *id.* at
14 1142-1147 (Rymer, J., dissenting), *vacated*, 505 F.3d 1006 (9th Cir. 2007); *Martin v. City of*
15 *Boise*, 920 F.3d 584, 615-617 (9th Cir. 2019) & *id.* at 590-92 (M. Smith, J., dissenting);
Johnson v. City of Grants Pass, 72 F.4th 868, 892-93 (9th Cir. 2023) & *id.* at 897-900 (Collins,
J., dissenting) & *id.* at 927-930 (O’Sannlain, J. dissenting) 936-938 (M. Smith, J., dissenting).

16 While *Martin* relied heavily on *Jones*, that decision was vacated and therefore was of no
17 precedential value in the Ninth Circuit at the time *Martin* revived its reasoning. Prior to *Martin*,
18 district courts refused to follow the majority in *Jones*. *See, e.g., Lehr v. City of Sacramento*, 624
F. Supp.2d 1218, 1231 (E.D. Cal. 2009) (“[T]his Court is not now bound by the majority’s
19 rationale and cannot today accept its logic. Rather, this Court finds the *Jones* dissent to be the
more persuasive and well-reasoned opinion.”).

20 ¹⁷ *Ingraham* is unhelpful to Plaintiffs because while the Court mentioned *Robinson* in passing,
it reaffirmed the baseline principle that the clause “was designed to protect those *convicted* of
21 crimes.” *Id.* at 664 (emphasis added); *see also Graham v. Connor*, 490 U.S. 386, 392 & n.6
(noting *Ingraham* “confirmed” that the cruel and unusual punishments clause does not attach
22 until after conviction and sentence). What is more, *Ingraham* did not involve applying
Robinson, and instead held that it did not apply to the imposition of corporal punishment in
schools. *Ingraham* at 671.

1 invoked it as authority to decline the enforcement of any criminal law, leaving the Eighth
2 Amendment to perform its traditional function of addressing the punishments that follow
3 criminal conviction.”). And while the Court did not overrule *Robinson* in *Grants Pass*, it raised
4 serious questions as to its future viability and it specifically limited its application to laws that
5 facially criminalize status, not conduct. *Grants Pass* at 549 (“*Robinson* already sits uneasily
6 with the Amendment’s terms, original meaning, and our precedents. Its holding is restricted to
7 laws that criminalize ‘mere status.’ Nothing in the decision called into question the ‘broad
8 power’ of States to regulate acts undertaken with some *mens rea*.”).

9 In *Grants Pass*, the Supreme Court expressly rejected applying *Robinson* in an identical
10 context, involving a facially neutral law that did not single out any class of individuals,
11 holding:

12 Public camping laws like those before us are nothing like the law at issue in
13 *Robinson*. Rather than criminalize mere status, *Grants Pass* forbids actions like
14 occupying a campsite on public property for the purpose of maintaining a
15 temporary place to live. Under the city’s laws, it makes no difference whether
16 the charged defendant is homeless, a backpacker on vacation passing through
17 town, or a student who abandons his dorm room to camp out in protest on the
18 law of a municipal building. In that respect, the city’s laws parallel those found
19 in countless jurisdictions across the country. And because laws like these do not
20 criminalize mere status, *Robinson* is not implicated.

21 *Grants Pass* at 546 (alterations & quotations omitted). Despite this clear and unequivocal
22 holding on *Robinson*’s application to laws like the Ordinance, Plaintiffs nonetheless ask this
23 Court to disregard this holding and adopt the dissenting Justices’ views on the meaning of
24 *Robinson*. See Dkt. No. 73 at 4-5. This Court cannot do so because it is bound by the Supreme
Court’s interpretation of its own case law, just like it is bound by the Court’s interpretation of
federal law. This Court is not free, as Plaintiffs suggest, to adopt the dissenting Justices’ view

1 on *Robinson* under the guise of an independent evaluation under State law.¹⁸ *Robinson* means
2 what *Grants Pass* says it means. To the extent *Robinson* prohibits criminalizing ‘mere status,’
3 *Grants Pass* rejected the notion that conduct *derivative of one’s status*, even if could be
4 characterized as unavoidable or involuntary, fell within the purview of *Robinson*’s “narrow
5 holding.” *Grants Pass* at 548-50.

6 Nor is this Court at liberty to extend *Robinson* to meet Plaintiffs’ theory in this case.
7 *Grants Pass* refused the same entreaty because such an extension was foreclosed by *Powell*.
8 *Grants Pass* at 547-50. Like Plaintiffs’ here, plaintiffs and the dissent in *Grants Pass* sought to
9 extend *Robinson* to cover laws that would “effectively” permit cities to punish a person based
10 on status because they have no other option but to violate the law. *Grants Pass* at 548-47. After
11 extensively quoting Justice Marshall’s plurality opinion in *Powell*, *id.* at 548-49 & n.6; the
12 Court stated:

13 This case is no different from *Powell*. Just as there, the plaintiffs here seek to
14 expand *Robinson*’s ‘small’ intrusion ‘into the substantive criminal law.’ Just as
15 there, the plaintiffs here seek to extend its rule beyond laws addressing ‘mere
16 status’ to laws addressing actions that, even if taken with the requisite *mens rea*,
17 might ‘in some sense’ qualify as ‘involuntary.’ And just as *Powell* could find
18 nothing in the Eighth Amendment permitting that course, neither can we.

19 *Grants Pass* at 549. While this Court is not bound by the Supreme Court’s interpretation of the
20 Eighth Amendment in deciding the scope and application of article 1, section 14, it does not
21 follow that this Court may interpret *Robinson* or *Powell* in a manner different from how the
22

23 ¹⁸ Independent of how the Court interpreted *Robinson* in *Grants Pass*, the decision is on all
24 fours with the issues before this Court and it would be unwise for this Court to simply ignore
Grants Pass’ import to this case. As our Supreme Court explained: “Although the federal
court’s interpretations of federal law are not binding on this state’s interpretation of parallel
state law and constitutional provisions, the opinions of the United States Supreme Court ‘are
nevertheless important guides on the subjects which they squarely address.’” *State v. Fortune*,
128 Wn.2d 464, 474-75, 909 P.2d 930 (1996) (quoting *Gunwall*, 106 Wn.2d at 61).

1 Supreme Court interpreted those cases in a virtually identical context. *Robinson*, as interpreted
2 by the United States Supreme Court, does not assist Plaintiffs.

3 In any event, even assuming this Court could interpret *Robinson* and *Powell* in a
4 manner at odds with *Grants Pass*, Washington case law compels this Court to reject Plaintiffs'
5 argument that criminalizing conduct that is "unavoidable" or "involuntary" falls within
6 *Robinson*'s prohibition against criminalizing status. After *Robinson* was decided, but before
7 *Powell*, our Supreme Court interpreted *Robinson* in a manner consistent with *Grants Pass*,
8 when considering whether article 1, section 14 was violated.

9 In *City of Seattle v. Hill*, our Supreme Court held that an ordinance prohibiting public
10 drunkenness was constitutional, under both article 1, section 14 and the Eighth Amendment, as
11 applied to a chronic alcoholic, holding that the law regulates behavior not status. 72 Wn.2d
12 786, 435 P.2d 692 (1967). Mr. Hill was arrested and convicted of public intoxication "and
13 sentenced to 180 days in jail" under a Seattle ordinance that made it unlawful for any person to
14 be, among other things, intoxicated in public. *Id.* at 787-88.¹⁹ On appeal, he urged "that he was
15 helpless to avoid violating the ordinance because of his addiction to alcohol," which left him no
16 choice but to drink in public. *Id.* at 787; *see id.* at 793 ("Defendant, however, says that the law
17 punished him for conduct that he could not control or avoid[.]"). He argued, among other
18 things, that his conviction violated article 1, section 14. *Id.* at 788-89.

19 In rejecting his claims, the court read *Robinson* in a manner consistent with how *Grants*
20 *Pass* interpreted the case over half a century later. Our Supreme Court's analysis follows:

21 ¹⁹ Mr. Hill had been arrested and convicted of public intoxication 98 times, and although his
22 combined sentences ran 17 ½ years, he "served only a fraction of this, being repeatedly let out
of jail on suspended sentences." *Id.* at 789.

1 Relying largely upon the rationale of *Robinson v. State of California*, defendant
2 again urges that, being a chronic addictive alcoholic, he is being punished for
3 having a disease or being of a status instead of committing an offense. We think
4 the answer to this contention is short and clear. In that case, the State of
5 California, by statute, had made narcotics addiction alone, that is the status of
6 being an addict, punishable as a public offense. In striking down a conviction
7 based on proof of addiction only as constituting cruel and unusual punishment
8 under the eight amendment [. . .] the Supreme Court sharply delineated the
9 distinction between simply being a narcotic addict and the actions expected of
10 an addict. Holding that, although a state may not punish a mere status or make a
11 criminal offense of what is considered to medically to be a disease, the court
12 affirmed the long-standing principle that a state may forbid and punish the
13 conduct ordinarily related to an addiction such as the possession, purchase, sale,
14 or the condition of being under the influence or narcotics. *It is the conduct or
15 action, not the status or disease, that becomes punishable.*

16 In the instant case, it was Mr. Hill's conduct, his actions in public while drunk,
17 which caused his arrest and confinement, not his status or condition of being an
18 alcoholic. [. . .]

19 The officer made the arrest under Seattle ordinance No. 16046 s 1, which does
20 not purport to make an offense of being an alcoholic, but rather to preserve
21 public peace and welfare by prohibiting public drunkenness. Although lying in a
22 stupor on a sidewalk may well be an indication of alcoholism, it is evidence of
23 drunkenness in a public place[.] [. . .] *Behavior is what counts; the ordinance
24 regulates behavior only.* We see no reason under the constitutions of the state
and the United States why the communities of this state may not adopt and
enforce legislation to protect themselves from the nuisance, offensive
misconduct, and serious dangers at times associated with public drunkenness.

Id. at 795-96 (emphasis added) (citations omitted); *see also White v. Ray*, 64 Wn.2d 15, 21, 390
P.2d 535 (1964) (rejecting broad application of *Robinson*). Consistent with *Grants Pass's*
reading of *Robinson*, *Hill* rejected the notion that laws criminalizing *conduct* associated with a
status, even if unavoidable or involuntary, violated article 1, section 14.

While there is language contained in *Hill* that some modern-day observers might
consider to be crude in its description of alcoholism, which everyone today recognizes as a

1 disease,²⁰ the upshot of *Hill* for analysis purposes is that it rejected the extension of *Robinson*
2 advanced by Plaintiffs and the *Grants Pass* dissent. So even if this Court was at liberty to
3 ignore *Grants Pass*'s interpretation of *Robinson*, it is not at liberty to ignore *Hill*'s
4 interpretation of *Robinson*. See, e.g., *Godefroy v. Reilly*, 146 Wn. 257, 259, 262 P. 639 (1928)
5 ("When this court has once decided a question of law, that decision, when the question rises
6 again, is not only binding on all inferior courts in this state, but is binding on this court until
7 that case is overruled."); *State v. Griepsma*, 25 Wn. App.2d 814, 818, 525 P.3d 623 (2023) ("it
8 is the province of the Supreme Court to decide whether to reject its prior holdings.").

9 *Hill*'s understanding of *Robinson* is also consistent with later decisions addressing
10 *Robinson* by our State Supreme Court. For example, in *State v. Manussier*, Mr. Manussier
11 argued that Washington's "three strikes law" violated article 1, section 14 based on *Robinson*
12 "because it imposes punishment on an 'untenable basis' by criminalizing the 'propensity' or
13 'bare intention' to commit crimes." 129 Wn.2d 652, 679 n.111, 921 P.2d 473 (1996). In
14 rejecting this argument, our Supreme Court concluded, in line with *Grants Pass* and consistent
15 with *Hill*, that *Powell* "clarified" the distinction between conduct and status, by explaining that
16 "*Robinson* does allow imposition of criminal penalties for commission of some *act* which

17 ²⁰ This was the point being made by Justice Finley in dissent. 72 Wn.2d at 817-18 (explaining
18 that alcoholism was a disease). Unlike alcoholism or narcotic addiction, homelessness is a not a
19 disease. Thus, determining that homelessness is a "status" under *Robinson* is a thorny legal
20 question and determining as much could have wide-ranging effects. See, e.g., *Joyce v. City &*
21 *Cty. of San Francisco*, 846 F. Supp. 843, 857-58 (N.D. Cal. 1994) ("In addition to the fact that
22 homelessness does not analytically fit into a definition of a status under the contours of
governing case law, the effects which would ensue from such a determination by this Court
would be staggering."); *Allen v. City of Sacramento*, 234 Cal. App.4th 41, 59 ("But being
homeless is not necessarily equivalent to an involuntary condition or status. What constitutes a
status might elude perfect definition, but factors such as the involuntary acquisition of the
characteristic (including whether the characteristic was present at birth) and the degree to which
a person has control over that characteristic determine whether a characteristic is a status.")
(quotation & citation omitted).

1 society has an interest in preventing.” *Manussier* at 679 n.111 (emphasis in original); *see also*
2 *Blondheim v. State*, 84 Wn.2d 874, 879-80, 529 P.2d 1096 (1975) (“it was not the ‘status’ of
3 being incorrigible for which petitioner was given a suspended commitment . . . it was her
4 conduct” that led to such a finding); *State v. Ames*, 89 Wn. App. 702, 710, 950 P.2d 514 (1998)
5 (rejecting argument that article 1, section 14 was violated because sentence was based on
6 individual’s “status” as a habitual offender because “it is defendant’s conduct in committing the
7 crime . . . not his status as a repeat offender that lead to his arrest and confinement.”). Likewise,
8 in *State v. Smith*, the court rejected the application of *Robinson*, noting that while the law there
9 sought “to punish a person for his status as a drug addict,” the law at issue in *Smith* was about
10 marijuana possession, and the court noted that “[p]ossession of a drug is not a status[.]” 93
11 Wn.2d 329, 344 n.7, 610 P.2d 869 (1980).²¹ Washington courts, consistent with *Grants Pass*,
12 have confined *Robinson* to its central holding: Laws that do not proscribe conduct, but only
13 status are impermissible, and this is so even where certain conduct could be considered
14 involuntary or unavoidable.²²

15 In summary, *Grants Pass* makes clear that homelessness is not a “status” as that term
16 was used in *Robinson* and that even if sleeping or camping in public may, in some sense qualify
17 as involuntary, *Robinson* does not apply. Our State Supreme Court has read *Robinson* and

18 ²¹ The *Smith* court further rejected *Robinson*’s application because the defendant admitted the
19 State could prohibit marijuana possession in certain circumstances. *Smith* at 93 Wn.2d at 344
20 n.7. Here, in framing their as-applied challenge, Plaintiffs, like the defendant in *Smith*,
21 acknowledge that the city may enforce the Ordinance against certain individuals, not just
22 homeless individuals who are “involuntarily” homeless.

23 ²² At least one State high court addressed *Robinson* in a similar context and it too rejected
24 Plaintiffs’ reading of *Robinson* and held that a law like the Ordinance did not violate the
California State Constitution (as well as the Eighth Amendment). *See Tobe v. City of Santa*
Ana, 892 P.2d 1145, 1166-1167 (Cal. 1995) (“The ordinance permits punishment for
proscribed conduct, not punishment for status.”).

1 *Powell* consistent with *Grants Pass* on each occasion where the opportunity arose and has done
2 so in the context of article 1, section 14. Consistent with this weight of authority, this Court
3 concludes that, as a matter of law, the Ordinance, does not punish “mere status,” rather, it
4 punishes conduct—namely camping and sleeping on public property. This is permissible under
5 article 1, section 14 and consistent with Washington courts’ treatment of *Robinson*.

6 Extending *Robinson* to bring within its sphere laws criminalizing conduct typically
7 associated with homelessness—like sleeping and camping on public property—because they
8 are “unavoidable” or “involuntary” would be an improper extension of *Robinson* under
9 precedents establish by both the Washington and United States Supreme Courts. While
10 Washington law prohibits the criminalization of “mere status” to the extent federal law does,
11 the Ordinance in question, which is a proper exercise of Burien’s police powers, is not in
12 conflict with that constitutional prohibition because it punishes conduct, not status. The
13 Ordinance does not criminalize homelessness or being human, it criminalizes camping and
14 sleeping on public property.

15 **2. Nothing in Article 1, Section 14 Requires Adoption of Plaintiffs’ Proposed**
16 **Constitutional Rule.**

17 Plaintiffs ask this Court to “hold that even when laws are written to be generally
18 applicable, it is a violation of Article 1, Section 14 to criminally punish *involuntarily homeless*
19 individuals for engaging in *life sustaining activities* in public if there is no other public areas or
20 available shelter where individuals can engage in those activities.” Dkt. No. 34 at 28 (emphasis
21 added). In advancing this rule, Plaintiffs do not explain what it means to “involuntarily
22 homeless,” or whether there are limits on what “life sustaining activities” should be covered

1 under their proposed constitutional rule. Nothing in Washington law requires the adoption of
2 this proposed constitutional rule.

3 No Washington court has ever adopted Plaintiffs' approach, and Plaintiffs cite no
4 authority in support of this requested holding nor have they pointed to anything in the
5 constitutional text or its history supporting this argument. *See, e.g., Westerman v. Cary*, 125
6 Wn.2d 277, 288, 892 P.2d 1067 (1994) (evaluation of constitutional provision requires
7 examination of text and history). And while Plaintiffs generally argue that article 1, section 14,
8 is more protective than the Eighth Amendment, *see* Dkt. No. 34 at 24; they do not tailor their
9 analysis to support this specific rule, even though required to do so. *See, e.g., Bassett* at 79. Nor
10 do Plaintiffs explain, as they must under *Gunwall*'s fourth factor, whether Washington law has
11 been more protective than its federal counterpart in the specific context of public camping or
12 even more generally, homelessness. *See, e.g., In re Williams*, 198 Wn.2d 342, 358, 496 P.3d
13 289 (2021) ("The question is then whether Washington law has been more protective than
14 federal law in the context of prison conditions."). Even though the Court finds that Plaintiffs
15 have not met their burden under *Gunwall* to demonstrate that article 1, section 14 provides
16 greater protection than the Eighth Amendment in this specific context, the Court will
17 nevertheless address whether Washington law requires the adoption of a constitutional rule that
18 only a single federal circuit has adopted and which has recently been rejected by the United
19 States Supreme Court as incompatible with the Eighth Amendment.

20 When fashioning a constitutional rule under our State Constitution, the constitutional
21 text and its history is the proper starting place. Exactly what the word "cruel" means has not
22 been defined with any precision by our appellate courts; and has almost exclusively been
23 addressed in terms of sentences imposed on criminal defendants. *See, e.g., State v. Fain*, 94

1 Wn.2d 387, 617 P.2d 720 (1980) (setting out four-part test to determine proportionality of a
2 sentence imposed in the context of three-strikes law requiring life in prison for three fraud
3 convictions totaling \$470); *Bassett*, 192 Wn.2d 67 (adopting categorical bar analysis within the
4 specific context of sentencing children to life without parole). More recently, our Supreme
5 Court expanded article 1, section 14 to include prison conditions after noting the interplay
6 between criminal sentencing and prison conditions. *In re Williams* at 359. None of these recent
7 cases specifically define what “cruel” means in a manner that easily applies to the issue before
8 this Court because those courts, unlike this Court, were being asked to address sentences
9 imposed or conditions existing. Here, Plaintiffs ask this Court to adopt their chosen rule in the
10 abstract, never explaining why the text or history of article 1, section 14 supports a rule that has
11 no textual basis or historical pedigree under Washington law.

12 The earliest Washington court to address article 1, section 14 was *State v. Fellen*, which
13 involved a forced vasectomy for an individual convicted of “carnal abuse of a female under the
14 age of ten.” 70 Wn. 65, 66-67, 126 P. 75 (1912).²³ While certain portions of that opinion seem
15 to adopt interpretations of the Eighth Amendment, *id.* at 70-71; other parts of the decision note
16 that the term “cruel” requires a showing “to the effect that [something] will in fact subject
17 appellant to [a] marked degree of physical torture, suffering, or pain.” *Id.* at 67. Plaintiffs do
18 not argue that any sentence allowable under the Ordinance amounts to any of these
19 prohibitions. The next case discussing article 1, section 14, in actual substance, as far as this
20 Court is aware; is *City of Seattle v. Hill*, which, as this Court has already discussed, rejected the

21 ²³ By citing this case, this Court in no way condones the penalty imposed in *Fellen*. “Forced
22 sterilization was appropriately condemned by the United States Supreme Court[.]” *In re Williams* at 358.

1 notion that article 1, section 14 covers situations, like here, where an individual is claiming
2 their violation of a law was involuntary or occurred because it was unavoidable. *See supra*.²⁴
3 Nothing in the text or history of article 1, section 14, supports Plaintiffs' proposed rule; nor is
4 the rule supported by early case law interpreting the constitutional provision's meaning. This
5 Court is reluctant to adopt a constitutional rule from whole cloth that has no textual mooring in
6 article 1, section 14, or any historical or case law basis upon which to rest the rule.

7 For example, in *Williams*, where our Supreme Court determined that prison condition
8 claims deserved greater protection under article 1, section 14 than the Eighth Amendment after
9 conducting a lengthy *Gunwall* analysis, it did so based on a "modified version of the federal
10 deliberate indifference standard." 198 Wn.2d at 370. In *Williams*, there was an established body
11 of federal case law that provided "a useful framework" to assist the court in formulating a test
12 to be applied under article 1, section 14. 198 Wn.2d at 3632. No similar body of federal case
13 law (or other state law) exists to aid this Court in formulating an appropriate standard to be
14 applied in this context. There is only *Martin*, which was abrogated by *Grants Pass*. No other
15 federal circuit court, or State high court, has adopted *Martin*, or anything resembling *Martin*, in
16 a related context. Thus, the Plaintiffs' request places this Court at sea without any compass to
17 guide it to the proper constitutional rule. Accepting Plaintiffs' invitation to adopt its proposed
18 constitutional rule places this Court into the area of judicial policy making, which is an arena
19 courts do not often tread when engaging in constitutional interpretation and adjudication.

20
21 ²⁴ Our Supreme Court mentioned article 1, section 14 in *States v. Fairbanks*, 25 Wn.2d 686,
22 689, 171 P.2d 845 (1946) and *Ex parte Brown*, 39 Wn. 160, 166-67, 81 P. 552 (1905), but
neither case discussed the provision in length nor sheds any useful light on what "cruel" means.

1 Although disclaiming any reliance on *Martin* in their briefing,²⁵ when pressed for the
2 basis of their proposed constitutional rule, Plaintiffs' counsel ultimately acknowledged that it
3 wanted this Court to adopt the rule announced in *Martin* as the law of this State. *See* Dkt. No.
4 100 at 42. In *Martin*, the Ninth Circuit held "that so long as there is a greater number of
5 homeless individuals in a jurisdiction than the number of available beds in shelters, the
6 jurisdiction cannot prosecute homeless individuals for involuntarily sitting, lying, and sleeping
7 in public." 920 F.3d at 617. This holding was premised on the notion all human beings are
8 "biologically compelled to rest, whether by sitting, lying, or sleeping." *Id.* *Martin* characterized
9 its holding as a "narrow one," and caveated its holding noting it "does not cover individuals
10 who *do* have access to *adequate temporary shelter*, whether because they have the means to
11 pay, or because it is *realistically available* to them for free, but who chose not to use it." *Id.* at
12 n.8 (some italics added). There are several reasons why this Court determines that adopting the
13 *Martin* rule, or Plaintiffs' version of the same, would not be appropriate.

14 First, the foundational aspect of *Martin*'s analysis rested on a flawed interpretation of
15 *Robinson* and *Powell*. Only by cobbling together varying dissents and concurrences from
16 *Powell*, *Martin* concluded that "five Justices gleaned from *Robinson* that the Eighth
17 Amendment prohibits the state from punishing an involuntary act or condition if it is the
18 unavoidable consequence of one's status *or being*." *Martin* at 616-17 (emphasis added).²⁶ As
19 explained, this reading of *Robinson* and *Powell* was rejected by the United States Supreme

20 ²⁵ *See* Dkt. No. 73 at 3.

21 ²⁶ *Robinson* addressed a law that criminalized mere "status," and *Powell* drew a distinction
22 between laws that criminalize "status," and laws regulating conduct associated with a "status."
Neither case discussed "being." This Court is not certain how *Martin* gleaned from these cases
that the Eighth Amendment prohibits "being."

1 Court in *Grants Pass*, and is inconsistent with Washington courts’ reading of those cases. *See*
2 *supra*.²⁷ Without this fundamental premise—individuals cannot be punished for acts that are
3 unavoidable—*Martin*’s holding is reduced to a policy judgment, not a constitutional rule.

4 Second, *Martin* never defined what either “realistically available” or “adequate
5 temporary shelter”²⁸ meant, nor placed any definitive limiting principle on its ruling.
6 Unsurprisingly, this led to a hodge-podge of rulings from federal trial courts who tried to make
7 sense of a constitutional rule that had no textual mooring in the Eighth Amendment. *See, e.g.,*
8 *Grants Pass* at 554-555 (cataloging cases); *see also Johnson*, 72 F.4th at 940-943 (M. Smith, J.,
9 dissenting from the denial of rehearing en banc) (same). For example, one federal court
10 indicated that because *Martin* “holds that individuals may not be subjected to criminal penalties
11 for engaging in involuntary, life-sustaining activities on public property . . . the City may not
12 prosecute or otherwise penalize the [homeless] for eliminating in public if there is no
13 alternative to doing so.” *Mahoney v. Sacramento*, 2020 WL 616302, *3 (E.D. Cal. Feb. 10,
14 2020). While this is an extreme example, eliminating oneself, much like sleeping and cooking
15 and eating food, is a biological necessity.

16 Under *Martin*’s reasoning, whose holding hinges on the biological necessity of rest, if
17 an individual has no other alternative but to cook on an open flame in a park during the height
18 of fire season so that they can eat, a municipality would be powerless to prevent such conduct

19 ²⁷ More specifically, *Martin* concluded that certain statements in Justice White’s *Powell*
20 concurrence rendered Justice Fortas’ *Powell* dissent as the controlling opinion and Justice
21 Marshall’s plurality a dissent. No one defended this analysis before the Supreme Court. *Grants*
22 *Pass* at 549 n.6.

23 ²⁸ For example, *Martin* held that because two of the plaintiffs objected to the religious nature of
24 a particular shelter, such shelters “could not be counted as available” based on Establishment
Clause concerns. *Johnson v. City of Grants Pass*, 74 F.4th 868, 877 (9th Cir. 2023), *rev’d*
Grants Pass, 603 U.S. 520 (2024).

1 unless they provided a place to cook and eat. This is not an abstract proposition because
2 defining a constitutional right to be free from criminal punishment for those things which are a
3 “biological necessity,” such as sleep, brings with it a host of scenarios which can be deemed
4 unavoidable for individuals who have no other options and has far-reaching implications
5 beyond issues related to homelessness. This concern was central to Justice Marshall’s opinion
6 in *Powell*. See *Powell* at 534-35. Plaintiffs’ “life sustaining activities” language suffers from
7 the same analytical flaw as *Martin*’s “biological necessity” language from both a doctrinal and
8 practical application perspective.

9 *Martin*’s rule, and the one advanced by Plaintiffs, is too malleable and lacks any
10 legitimate limiting principle based on its underlying reasoning. Adopting this rule would only
11 increase litigation, leave trial courts like this one without sufficient guidance on how to apply
12 it, and create much uncertainty among municipalities and law enforcement officials as to what
13 they could or could not do with respect to homeless individuals residing on public land. Even if
14 cabined only to sleep, questions remain as to how a municipality goes about counting the
15 homeless on a daily basis to determine whether the number of beds exceed the number of beds
16 available before it arrests someone, how a boots-on-the-ground officer knows whether a
17 homeless individual is voluntarily or involuntarily homeless, whether the rule requires each of
18 Washington’s 281 municipalities to have shelter beds within their jurisdictional borders, or
19 whether shelter would be considered “adequate” or “realistically available” when it was located
20 in an adjacent town. *Grants Pass* at 552-56. Nothing in the Washington Constitution compels
21 this Court to engage in a similar experiment under the guise of constitutional interpretation.

22 Under the rule proposed by Plaintiffs, how is a law enforcement officer enforcing the
23 Ordinance supposed to know, at the time of citation or arrest, whether someone is

1 “involuntarily” homeless without potentially violating someone’s right to remain silent? What
2 does the word “adequate” mean in terms of shelter?²⁹ For example, many shelters do not allow
3 drug or alcohol use. *See* Dkt. No. 50 at ¶11. Under Plaintiffs’ rule, would a sober shelter be
4 “adequate” or “available” for someone with an active substance use disorder for purposes of the
5 constitutional rule? Likewise, would a person with an active substance use disorder, who
6 refused shelter at a facility barring substance use, be considered “voluntarily homeless,” when
7 an offer of shelter is made? While Plaintiffs address none of these practical concerns in their
8 briefing, they are very important to this Court because, in the end, Plaintiffs are asking this
9 Court to expound on the meaning of our State Constitution and establish a firm and fixed
10 constitutional rule that they believe is compelled by article 1, section 14.

11 Through the eyes of policy-makers within the Ninth Circuit, *Martin* also had the
12 perverse effect, as the Supreme Court explained, at reducing the number of individuals who
13 accepted offers of shelter. As the Supreme Court observed: “The city of Seattle, for example,
14 reports that roughly 60 percent of its offers of shelter have been rejected in a recent year.”
15 *Grants Pass* at 531. While other cities noted that “the vast majority of their homeless
16 populations are not actively seeking shelter and refuse all services.” *Id.* And the federal
17 government reported that only between 25-41 percent of encampment residents willingly
18 accept shelter beds when they are offered. *Id.* There is similar evidence before this Court. Mr.
19 Paz, for example, along with over twenty other residents of the Aumbaum encampment
20 demanded that one of Burien’s service providers “cease and desist” their outreach efforts
21 because, as Mr. Paz explained, they could not provide permanent housing, but only brief stays

21 ²⁹ Plaintiffs acknowledge the law could be constitutionally applied “[i]f a hypothetical person
22 had *adequate shelter* in the city of Burien and simply chose to erect a tent in a park or sleep on
a sidewalk at night[.]” Dkt. No. 91 at 3 (emphasis added).

1 at a hotel. *See* Dkt. No. 74 at ¶¶4 & 6. While *Martin*'s rule, which focused on the practical
2 availability of shelter beds, did not create the homelessness problem, it most certainly did not
3 solve it. What it did do, however, was take away one tool that certain municipalities believed,
4 like Burien does here, would incentivize individuals like Mr. Paz and others to accept services.

5 Third, putting to the side the amount of litigation such a malleable rule will necessarily
6 create regarding the regulation of public property in Washington, *Martin* led to satellite
7 litigation in our State. To comply with *Martin*'s rule, municipalities in Washington amended
8 prior camping bans to comply with its dictates. This, in turn, generated additional litigation. For
9 example, Spokane amended an ordinance banning camping citywide to comply with *Martin*,
10 but those changes were not adequately protective of public safety according to its citizens who
11 passed an initiative addressing the issue which, in turn, led to initiative-related litigation. *See*
12 *generally Jewels Helping Hand v. Hansen*, -- P.3d --, (Wash. 2025). In fact, this case presents
13 another example of how *Martin*'s rule generated confusion and tension among law enforcement
14 officials and policy makers. *Martin* was the reason Burien adopted a series of ordinances, and
15 also the reason why the KCSO refused to enforce the prior ordinances, which, in turn, led to
16 federal and state litigation between Burien and the KCSO. That neither Burien nor King
17 County could agree on what it required highlights the practical problems of adopting a similar
18 constitutional rule.

19 Finally, *Martin*, and the rule advanced by Plaintiffs, injects this Court into the realm of
20 crafting homeless policy. There are 281 municipalities, spread across 39 counties, in the
21 Evergreen State. Accepting Plaintiffs' articulation of the "cruel punishments inflicted" clause's
22 mandates would require each of these municipalities to create shelter space before they could
23 enforce a prohibition on camping or sleeping on public property because Plaintiffs' preferred

1 constitutional rule focusses in on shelter space being available *in the jurisdiction* enforcing its
2 camping ban. *See, e.g.*, Dkt. No. 91 at 3 (tying position to shelter “in the city of Burien,” as
3 opposed to some other jurisdiction). This jurisdiction-centric approach makes little practical or
4 logical sense from a constitutional perspective. As one judge explained: “Under this view, if a
5 large homeless shelter with 1,000 vacant beds were opened a block outside the City’s limits,
6 the City would *still* be required by [*Martin*] to allow hundreds of people to sleep in their vans in
7 the City and, presumably, in the City’s public parks as well. Nothing in law or logic supports
8 such a conclusion.” *Johnson*, 72 F.4th at 912 (9th Cir. 2023) (Collins, J., dissenting). Rather
9 than read like a constitutional rule, Plaintiffs’ proposed rule is more akin to a policy
10 determination that is at odds with the region’s current approach to homelessness and interferes
11 with State law that recognizes the need for flexibility at the local level in addressing
12 homelessness.³⁰

13 Aside from the obvious budgetary implications for local jurisdictions, adopting
14 Plaintiffs’ jurisdiction-specific rule is also inconsistent with how the legislative and executive
15 branches at both the County and municipal level have structured a regional response to
16 homelessness. For example, as the Coalition explains, the two shelters located in Burien are not
17 designated to only serve Burien’s homeless, but “serve King County families with children and
18 single women” and they “are largely funded through a combination of private donations and
19 public funding contracts administered through the King County Regional Homelessness

20 ³⁰ Recently, in *Jewels Helping Hand*, our Supreme Court concluded that Spokane’s regulations
21 in response to *Martin* were part of a “comprehensive municipal policy scheme regulat[ing]
22 public camping, including homeless encampments,” which were part of broader “state-local
engagement and interchange that balances constitutional protections with the city’s health and
safety.” *Id.* at * 13.

1 Authority, and are part of the regional network serving all King County residents in need of
2 shelter.” Dkt. No. 45 at ¶22.³¹ Likewise, Burien is a member of the South King County
3 Housing and Homelessness Partners, which is “a joint board formed by an interlocal agreement
4 with 10 other cities in south King County and King County” and it also works “with 17 other
5 Washington cities to fund and implement human services programs” designed to address
6 homelessness. Dkt. No. 50 at ¶5. The proposed rule—requiring each jurisdiction to have more
7 shelter beds than homeless—necessarily disrupts the regional approach to homelessness already
8 adopted by the coordinate branches of local governments here in King County.

9 What is more, it creates a one-size-fits-all approach to homelessness policy, under the
10 guise of constitutional adjudication. Plaintiffs’ constitutional rule presupposes that providing
11 shelter beds is the solution, or is a viable solution, to addressing homelessness. That is a policy
12 judgment, not a constitutional one. Such a rule necessarily diverts limited resources away from
13 municipalities—who in their political judgments may believe the answer to lessening the
14 homelessness crisis lies in a different approach—from implementing more permanent solutions
15 like long-term permanent housing, or investing in mental health and substance use disorder
16 treatment because if they do not invest in *immediate* shelter space to match the number of
17 homeless individuals residing in their jurisdiction, they cannot enforce camping bans which are
18 designed to protect the health, safety and welfare of its citizens, both housed and unhoused.

19 In its political judgment, Burien determined that banning camping, sleeping, and storing
20 belongings on public property will incentivize individuals to accept various services, which
21 Burien believes is an important first-step in getting someone into permanent housing. In fact, it

22 ³¹ The King County Regional Homeless Authority was created by an interlocal agreement
23 between King County and Seattle. See Revised-and-Amended Interlocal-
24 Agreement November-7-2024.pdf (last visited May 8, 2025).

1 is undisputed there has only been a *single* arrest made since 2019 and that arrest led to that
2 individual getting into permanent housing. *See* Dkt. No. 40 at ¶8. And while some may
3 question the wisdom of Burien choosing a “stick” approach, or question whether such an
4 approach will do anything other than exacerbate the problem, the proper role of this Court is
5 not to judge the wisdom or efficacy of Burien’s chosen approach, only the constitutionality of
6 that choice. The privilege of adorning a black gown made of silk does not endow this Court
7 with any special or superior competence in crafting homelessness policy.

8 The judiciary is unequipped to craft something as complex as homelessness policy and
9 this Court does not believe that its proper role is to second-guess Burien’s policy choice,
10 through the guise of constitutional interpretation and adjudication, simply because it may not
11 agree with that policy choice. The complexities of homelessness policy is better left to the other
12 branches of government, who better understand local conditions and the needs of their
13 communities. Homeless policy involves tough decisions, and vigorous debate, and this Court
14 should not enter that fray, unless it is absolutely required to do so by the constitution. Nothing
15 in Washington law compels this Court to adopt *Martin*, or Plaintiffs’ version of the same, as the
16 constitutional rule in this State.

17 Indeed, doing so at this time may well circumvent the political process. As of this
18 writing, there is currently a bill under consideration in our State Legislature, similar to an
19 Oregon law,³² that, if passed, might have major implications for laws like the one at issue in
20 this case because it would create standards on how to assess laws prohibiting camping on
21 public property. *See, e.g.,* [HB 1380 Washington State Legislature](#). While HB 1380 is not yet
22 law, and may never become law, its existence demonstrates that the political process is at work,

23 ³² 603 U.S. at 588 (Sotomayor, J., dissenting) (discussing Oregon law).

1 as it should be, on an issue of such importance as the homelessness crisis. This Court is hesitant
2 to interfere with the legislative process unless absolutely compelled to do so.

3 Each party filed several declarations from non-parties. Plaintiffs filed several
4 declarations from other homeless individuals explaining their lived experiences of being
5 homeless in Burien, and Burien filed several first-hand declarations from individuals living or
6 running a business near an encampment and about how unsafe they are and how they impact
7 the community. *See, e.g.*, Dkt. Nos. 41, 42, 43, 66, 67, 68 & 69. Unquestionably, both sides tell
8 a compelling story. But the Court need not recount those specifics because they are at the heart
9 of every policy debate concerning homelessness policy. Suffice it to say, the Court is not blind
10 to the reality faced by the homeless who are simply trying to exist, nor is it blind to how unsafe
11 encampments are and how they detrimentally impact surrounding communities. Neither of
12 these considerations, however, guide this Court's determination in this case, which is guided by
13 the State Constitution, not sympathy for the plight of the homeless, nor sympathy for residents
14 impacted by having an encampment in their neighborhood. This Court will not "couch its own
15 moral beliefs in constitutional terms and [] substitute its own judgment as to the morality of the
16 criminal law for that of the" city of Burien. *Lehr* at 1234.

17 Because nothing in Washington law requires this Court to adopt the rule advanced by
18 Plaintiffs, this Court declines Plaintiffs' invitation. The proposed rule is not supported by the
19 text or history of article 1, section 14, rests on factually-intensive distinctions that have no
20 legitimate limiting principles, creates practical application problems for policy-makers, law
21 enforcement officials and judges, and invites this Court into the legislative arena under the
22 auspices of constitutional adjudication. In this Court's view, the "status versus conduct"
23 distinction, which is the heart of the matter, provides an easy to apply constitutional rule.

24 ORDER RE: SUMMARY JUDGMENT

Judge Michael K. Ryan
King County Superior Court

1 Municipalities are given a clear constitutional line when crafting criminal laws, law
2 enforcement understands what is and is not permitted, and courts are given a simple and
3 principled rule to apply. By ignoring this simple distinction, and having the constitutional rule
4 turn on necessarily fact-based determinations such as the “voluntary” or “involuntary” nature of
5 the individual’s homelessness, and the “adequacy” of the shelter offered, Plaintiffs proposed
6 test suffers from the same doctrinal infirmities as the Ninth Circuit’s rule in *Martin*.

7 While some of the judiciary’s finest moments have come when it has protected the most
8 vulnerable among us, and conversely, its most regrettable moments have occurred when the
9 judiciary failed to act, that mixed tradition does not mean that every societal problem can or
10 should be resolved through constitutional adjudication. Homeless policy is complex and multi-
11 faceted, and better left to local officials, and the people who elect them, not to judges, who are
12 ill-equipped to write homelessness policy. And when the State Constitution does not demand
13 intervention, as here, courts should be reluctant to inject themselves into tough policy debates
14 under the guise of constitutional interpretation. *Martin* did just that, and Plaintiffs ask this
15 Court to do the same. This Court determines it would be unsound to follow in *Martin*’s
16 footsteps and nothing in article 1, section 14 compels a contrary conclusion.

17 **3. Plaintiffs Lack Standing to Bring an As-Applied Claim.**

18 Plaintiffs acknowledge that a facial challenge to the Ordinance fails because “there are
19 hypothetical applications of the ordinance that would be constitutional;” thus, Plaintiffs only
20 advance an as-applied challenge under article 1, section 14. Dkt. No. 91 at 3. For example,
21 Plaintiffs acknowledge that “[i]f a hypothetical person had adequate shelter in the city of
22 Burien and simply chose to erect a tent in a park or sleep on a sidewalk at night, it would not be
23 cruel punishment to *criminally cite* that person.” *Id.* (emphasis added). Thus, Plaintiffs appear

1 to argue that the mere possibility of citation or arrest, without an actual arrest or the imposition
2 of any sentence implicates article 1, section 14. Plaintiffs request both declaratory and
3 injunctive relief. *Id.*

4 To determine standing under the Uniform Declaratory Judgment Act (UDJA), a party
5 seeking relief must show their interests are “arguably within the zone of interests to be [...]”
6 regulated” and whether the law at issue “has caused injury in fact.” *Wash. State Hous. Fin.*
7 *Comm’n v. Nat’l Homebuyers Fund, Inc.*, 193 Wn.2d 704 711-12, 445 P.3d 533 (2019)
8 (citations & quotations omitted) (hereinafter *WSHFC*). To obtain injunctive relief, a party
9 “must show (1) that he has a clear and legal or equitable right, (2) that he has a well-grounded
10 fear of an immediate invasion of that right, and (3) that the acts complained of are either
11 resulting in or will result in actual and substantial injury to him.” *Port of Seattle v. Int’l*
12 *Longshoremen’s & Warehousemen’s Union*, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958). The
13 last two elements of this test parallel the UDJA’s standing requirement. Central to both is the
14 concept of injury-in-fact. Plaintiffs bear the burden of establishing standing. *Branson v. Port of*
15 *Seattle*, 152 Wn.2d 862, 876, 101 P.3d 67 (2004).

16 No one disputes that Plaintiffs’ past and future intended conduct falls within the “zone
17 of interests” regulated by the Ordinance. This, without more, however, does not establish
18 standing. And while the UDJA’s standing requirement is not “a particularly high bar,” *WSHFC*
19 at 712; Plaintiffs’ alleged injury cannot be “speculative or abstract.” *Id.* at 716.

20 It is undisputed that none of the named Plaintiffs has been cited, arrested, or criminally
21 sentenced under the Ordinance, or any prior ordinance, which is the gravamen of their article 1,
22 section 14 claim. *See* Dkt. No. 1 at ¶ 43. In fact, two of the named Plaintiffs (the Hales), were
23 not homeless in Burien at the time they filed declarations in support of summary judgment, and

1 the third named Plaintiffs, Mr. Paz, is sometimes homeless in Burien and sometimes not
2 homeless in Burien and was part of a group demanding that outreach efforts “cease and desist”
3 that may have resulted in him securing temporary shelter at a hotel. At most, Plaintiffs fear that
4 at some point the Ordinance will be enforced against them, either through a criminal citation,
5 an arrest, or the actual imposition of a sentence.³³

6 The Court is not aware of any Washington authority permitting standing in a pre-
7 enforcement, as-applied challenge under article 1, section 14 when a statute has never been
8 applied generally, or applied against the Plaintiffs specifically. Plaintiffs have not pointed this
9 Court to any such authority. In the only case where this issue has arisen in Washington, our
10 Court of Appeals held that “mere threats of criminal penalties are insufficient to constitute
11 punishment as it is defined under article 1, section 14” and rejected the as-applied claim based
12 on lack of standing. *Kitcheon v. City of Seattle*, 2024 WL 5040630, at * 17 (Dec. 9, 2024)
13 (citation omitted) (emphasis added);³⁴ *cf. Williams v. City of Spokane*, 199 Wn.2d 236, 248,
14 505 P.3d 91 (2022) (“Thus, regardless of whether he intends to drive in the same school zone
15 again, Williams does not have standing to seek declaratory and injunctive relief as a matter of
16 law.”); *Forbes v. Pierce County*, 5 Wn. App.2d 423, 436, 427 P.3d 675 (2018) (denying

17 ³³ Plaintiffs go so far as to claim that “[t]he threat of enforcing this ordinance also constitutes
18 cruel punishment.” See Dkt. No. 1 at ¶ 65. In other words, they argue that the Ordinance’s mere
19 existence amounts to “cruel punishment.” This cannot be correct under any fair or logical
20 reading of article 1, section 14, which at a minimum, requires the actual infliction of some form
21 of punishment. Likewise, an arrest, without more, has never been, nor logically could it be,
22 considered “punishment” under article 1, section 14. *Accord Jones*, 444 F.3d at 1148 (9th Cir.
2006) (Rymer, J., dissenting) (“the Eighth Amendment does not forbid arrests”). As noted
previously, *Jones* was later vacated.

21 ³⁴ “[U]npublished opinions of the Court of Appeals filed on or after March 1, 2013 . . . may be
22 accorded such persuasive value as the court deems appropriate.” GR 14.1(a).

1 standing where party failed to demonstrate “a current threat to impose a criminal penalty.”)³⁵
2 *State v. Shelton*, 194 Wn. App. 660, 674 n.8, 378 P.3d 230 (2016) (“Because Shelton cannot
3 show harm until the State seeks to enforce collection of the DNA fee, he does not have
4 standing.”); *Superior Asphalt & Concrete Co. Inc. v. Wash. Dep’t of Labor & Indus.*, 121 Wn.
5 App. 601, 607, 89 P.3d 316 (2004) (“As the trial court correctly determined, Superior Asphalt
6 has no standing to challenge the safety regulations because it had never been issued a
7 citation.”). Like in *Kitcheon*, there is no genuine issue of material fact that any of the named
8 Plaintiffs (nor any of the Coalitions’ members) has been cited, arrested, charged, convicted, or
9 sentenced under the Ordinance (or any prior ordinance). Consequently, because Plaintiffs rely
10 only on fear or threat of future action, they lack standing to bring an as-applied challenge under
11 article 1, section 14 under *Kitcheon*, which this Court chooses to follow. Put simply, no
12 punishment, cruel or otherwise, has been inflicted against them under the Ordinance and may
13 never be inflicted against them. The existence of the Ordinance, without more, does not create
14 an injury in fact.

15 Any potential future application of the statute to any of the named Plaintiffs is
16 speculative because it requires a series of events that may never come to pass. First, as
17 explained, since 2007 only *one* person has been arrested for camping on public property, and
18 while the record is not precise on whether that person was charged or sentenced, it is
19

20 ³⁵ In their Supplemental Brief on standing under article 1, section 14, Plaintiffs attribute a quote
21 to *Forbes* that does not actually appear in *Forbes*; rather, the quoted passage attributed to
22 *Forbes* is from *Alim v. City of Seattle*, 14 Wn. App.2d 838, 474 P.3d 589 (2020), discussing
Forbes. Compare Alim at 853 with Dkt. No. 102 at 3.

1 reasonable to assume they were not because that person ended up in permanent housing.³⁶
2 Thus, there is no track-record of arrests like those existing in *Grants Pass* and *Martin*. Second,
3 there is no evidence in this record that the Sherriff Cole-Tindall will permit her personnel to
4 enforce the Ordinance because even after her legal arguments were rejected by the federal
5 court, the KCSO still refused to enforce the Ordinance and actively opposed Burien in this
6 litigation.

7 Third, even assuming future enforcement, while Section 3 of the Ordinance creates “no
8 requirement that beds, housing, shelter or treatment be available, offered or sought before
9 enforcement,” BMC 9.85.150(3)(a); that same subsection creates a significant caveat: It notes:

10 however, law enforcement may offer the same to a person camping on public
11 property, and if the person accepts the offer or agrees to ‘camp’ off of public
property, that person *may not be arrested under this section unless they continue
to or insist on unlawfully storing items on public property.*

12 *Id.* (emphasis added). This Court, as a matter of law, interprets the “may not” language
13 italicized above to be mandatory, not permissive, given the structure of the sentence. In other
14 words, although an offer of shelter is not mandatory, if such an offer is made and accepted that
15 person may only be arrested if they continue to store their belongings on public property.
16 Likewise, the Ordinance requires the KCSO to write administrative rules governing how the
17 Ordinance will be implemented. The Court has no such rules before it.

18 Given all of this, this Court is left guessing whether the Ordinance will be enforced in a
19 manner that will cause any injury to any of the named Plaintiffs. That the Ordinance may be

20 ³⁶ This Court is adjudicating cross motions for summary judgment. In the context of standing, it
21 is Plaintiffs’ burden to show standing; thus, this Court must view the evidence in the light most
22 favorable to Burien with respect to Plaintiffs’ claim that it has standing to pursue this cause of
action; thus, the fact that there are cross-motions, with competing inferences, is of no moment
regarding the standing inquiry. If Plaintiffs lack standing for this cause of action, it must be
dismissed.

1 enforced against other homeless individuals in Burien, not named in this suit, has no bearing on
2 whether *these* Plaintiffs have standing because this is not a class action lawsuit and the named
3 Plaintiffs lack standing to raise the constitutional rights of other individuals not before the
4 Court. *See, e.g., State v. Farmer*, 116 Wn.2d 414, 421, 805 P.2d 200 (1991).

5 Fifth, Plaintiffs want this Court to rule in the abstract that “spending one day in jail for
6 simply existing” is cruel punishment under article 1, section 14. Even accepting the basic
7 premise of the argument, which as explained above is inconsistent with *Robinson* and *Powell*
8 and our Supreme Court’s interpretation of those cases, several factual hurdles must be cleared
9 before any even a single day of jail is imposed for violating the Ordinance:

10 (1) A named Plaintiff would have to be “involuntarily” homeless,³⁷ despite evidence
11 suggesting that two of them are not homeless and one of them has periodic success in finding a
12 place to sleep, on a given day when the KCSO is enforcing the Ordinance (a reasonable
13 inference is that will not occur, if at all, until after the KCSO drafts and adopts the required
14 administrative policies and procedures on how to enforce the Ordinance given its refusal to
15 enforce the Ordinance);

16 (2) An actual arrest must occur, or criminal citation issue, against one of the named
17 Plaintiffs or one of the named Plaintiffs must refuse to remove their belongings from public
18 property after being offered assistance;

19 (3) Then a prosecuting attorney must then exercise their discretion and decide to
20 bring criminal charges, as opposed to deferring prosecution for some other reasons (such as an
21 agreement to enter into treatment, referral to other services, etc.);

22 ³⁷ As noted, Plaintiffs concede their article 1, section 14 only applies to the extent a named
23 Plaintiff is “involuntarily” homeless, as opposed to voluntarily homeless.

1 (4) Assuming no deferral occurs, the case proceeds to trial after counsel is
2 appointed, and a jury rejects a named Plaintiffs' invocation of a "necessity" defense,³⁸ which
3 everyone agrees would be an available defense in any trial under the Ordinance; and,

4 (5) Finally, the sentencing judge exercises their discretion and imposes jail time, as
5 opposed to some other sentence, such as mandatory treatment, community service, a deferred
6 sentence, etc.³⁹

7 It is only at this point, assuming each of these hurdles have been cleared, that any
8 "punishment" is "inflicted" under article 1, section 14. *Cf. State v. Smith*, 93 Wn.2d 329, 342-
9 43, 610 P.2d 869 (1980) ("Implicit in all the cases which have come to our attention, with the
10 exception of *Robinson* [supra], is an acknowledgment that before these constitutional
11 provisions can be invoked, the defendant must show that the punishment which he suffers *by*
12 *reason of the sentence imposed* is cruel and unusual.") (emphasis added);⁴⁰ *see also Johnson v.*
13 *City of Dallas*, 61 F.3d 442, 445 (5th Cir. 1995) (standing under Eighth Amendment requires
14 conviction). Then, and only then, would this Court have all the information it needs to
15 determine whether the sentence imposed is unconstitutionally "cruel" as applied to one of the

16 ³⁸ *See, e.g., State v. Ward*, 8 Wn. App.2d 365, 372, 438 P.3d 588 (2019) ("To successfully raise
17 the necessity defense, the defendant must prove, by a preponderance of the evidence, that (1)
18 they reasonably believed the commission of the crime was necessary to avoid or minimize a
19 harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of
20 the law, (3) the threatened harm was not brought about by the defendant, and (4) no reasonable
21 legal alternative existed.") (citations omitted).

22 ³⁹ Any fines imposed—potentially up to \$1000.00—are not subject to the "cruel punishment
23 inflicted" clause, but rather would be addressed under the "excessive fines imposed" clause or
24 its federal counterpart. *See, e.g., City of Seattle v. Long*, 198 Wn.2d 136, 158-77 493 P.3d 94
(2021).

⁴⁰ *Smith* determined *Robinson* did not apply because marijuana possession/use was not a status,
but conduct that the State could lawfully proscribe. 93 Wn.2d at 343 n.6 & *id.* at 344 n.7.

1 named Plaintiffs. Plaintiffs' article 1, section 14 claim is too speculative to support injunctive
2 or declaratory relief because it rests entirely on speculative fears about how law enforcement,
3 prosecutors, juries, and judicial officers will act in a hypothetical scenario that is completely at
4 odds with how a prior camping ban was enforced in Burien. Given this, the named Plaintiffs
5 have failed to meet their burden and establish standing for their article 1, section 14 claim.

6 While it is true our Supreme Court has taken a more flexible approach to standing
7 "when necessary to ensure that an issue of substantial public importance does not escape
8 review," it has also defined an issue "of substantial importance" as one that "immediately
9 affects substantial segments of the population and its outcome will have a direct bearing on the
10 commerce, finance, labor, industry or agriculture generally." *WSHFC* at 718 (quoting *Wash.*
11 *Nat. Gas. Co. v. Pub. Util. Dist. No 1 of Snohomish Cty.*, 77 Wn.2d 94, 96, 459 P.2d 633
12 (1969)). This case obviously raises issues of public importance, but the criteria set out by our
13 Supreme Court is not satisfied in this context. *See Kitcheon* at 18 n.23.

14 Given the numerous hypothetical facts that need to occur before any "punishment" as
15 that term is understood in article 1, section 14 occurs, prudence and judicial restraint further
16 support this Court's conclusion that the standing inquiry should not be relaxed under the facts
17 and circumstances before this Court. While the legal issues are worthy of debate, a more
18 concrete set of facts should exist before this Court determines the constitutionality of the
19 Ordinance or lays down some broad constitutional rule like the one advanced by Plaintiffs, or
20 that this Court fashions on its own. "Holding a statute unconstitutional as-applied prohibits
21 future application of the statute in a similar context, but the statute is not totally invalidated."
22 *Woods* at 240. Plaintiffs are asking this Court to announce a broad constitutional rule, without
23 any specific factual application to review, based on a set of facts that has never existed and may

1 never exist. The better course is to wait until real facts develop so that this Court can ensure
2 that any constitutional rule it announces is no broader than necessary to afford adequate relief
3 to the parties before the Court.⁴¹

4 Based on the above, Burien is entitled to judgment as a matter of law on Plaintiffs'
5 article 1, section 14 claim because none of the named Plaintiffs have met their burden and
6 established standing to bring an as-applied challenge in the context of article 1, section 14.
7 Consequently, the Court **GRANTS** Burien's Motion as to Plaintiffs' article 1, section 14 claim.

8 **4. Neither *Bassett* nor *Fain* Require Invalidating the Ordinance As-Applied to**
9 **the Named Plaintiffs.**

10 Assuming standing, the named Plaintiffs' article 1, section 14 challenge still fails for the
11 alternative reason that a divertible misdemeanor, subject to a necessity defense, does not
12 amount to "cruel punishment inflicted" under any of the governing tests employed by our
13 courts to determine whether the imposition of a sentence is unconstitutionally cruel when
14 article 1, section 14 provides more protection than its federal counterpart.

15 Article 1, section 14 "protects against sentences that are grossly disproportionate to the
16 crime committed." *State v. Whitfield*, 132 Wn. App. 878, 901, 134 P.3d 1203 (2006). "A
17 punishment is grossly disproportionate only if the conduct should never be proscribed, or if the
18 punishment is clearly arbitrary and shocking to the sense of justice." *State v. Smith*, 93 Wn.2d
19 329, 344-45, 610 P.2d 869 (1980) (internal citations omitted). *Smith* cited *Robinson* for the first
20 proposition, but rejected its application because the law in question did not implicate *Robinson*
because "[p]ossession of a drug is not status." 93 Wn.2d at 344 n.7. This Court has already

21 ⁴¹ For example, while Plaintiffs request injunctive relief, they have not provided this Court with
22 any proposed language that they would want to include in any injunction. Such language would
have been helpful to the Court in understanding the scope and breadth of Plaintiffs' claims.

1 explained, in detail, why *Robinson* does not apply to the Ordinance because the Ordinance
2 criminalizes conduct, not mere status. No further discussion is necessary on that point.

3 Our Supreme Court has endorsed two analytical methods to determine whether a
4 sentence is constitutionally disproportionate. Both tests seem an odd fit in this case because
5 there is no actual sentence imposed for this Court to evaluate (*Fain*) nor is there any sentence
6 that might apply across the board to certain individuals (*Bassett*). Under the Ordinance, any
7 person convicted of illegal camping, whether involuntarily homeless, voluntarily homeless, a
8 person with a home who just wants to camp, etc., may be subject to up to 90 days in jail, may
9 get a deferred sentence, or may receive some other form of alternative sentence. This Court is
10 not aware of any relevant Washington decision (or any other decision for that matter) applying
11 either of these tests, or any similar test, to a situation like the one before this Court, nor have
12 the parties pointed the Court to any such case. Indeed, as explained above, when expanding the
13 protections of article 1, section 14 to prison conditions, our Supreme Court did not apply either
14 test—both of which appear directed at sentencing—rather it crafted a “modified versions of the
15 federal deliberate indifference standard” to evaluate such claims. *See In re Williams* at 198
16 Wn.2d at 370. Nevertheless, because both parties addressed these tests and their application,
this Court will do the same despite its reservations.

17 **a. Categorical Bar Analysis.**

18 The “categorical bar” analysis was first adopted by our Supreme Court in *Bassett*,
19 which addressed whether article 1, section 14 categorically barred sentencing children “to life
20 in prison without the possibility of parole or early release.” 192 Wn.2d at 72. Under this
21 approach, courts assess “(1) whether there are objective indicia of a national consensus against
22 the sentencing practice and (2) whether in our independent judgment, based on controlling

1 precedent and our understanding and interpretation of the cruel punishment provision's text,
2 history, and purpose, weighs against the sentencing practice." *State v. Reynolds*, 2 Wn.3d 195,
3 203-04, 535 P.3d 427 (2023) (internal quotations omitted).

4 Plaintiffs argue that this Court is obligated to apply *Bassett*'s categorical approach
5 based on the nature of their challenge. This Court has concerns with accepting this as the
6 correct analysis. Neither our Supreme Court nor any appellate court (that this Court is aware
7 of)⁴² has ever applied the "categorical bar" analysis outside the context of sentencing children.
8 Indeed, the "categorical bar" analysis derives from of a troika of United States Supreme Court
9 decisions addressing youth sentencing, culminating in *Miller v. Alabama*, 567 U.S. 460 (2012),
10 which recognizes that "children are different" in the context of criminal sentencing and barred
11 the imposition juvenile life without parole sentences. *Bassett* at 81-83 (quoting *Miller* at 481);
12 see also *id.* at 73-74. Given the common characteristics among a specific class of juvenile
13 offenders—16-and-17-year olds—namely, youth brain development and how it relates to
14 diminished culpability and a heightened capacity for change, *Bassett* determined that applying
15 *Fain*, which was the traditional test, was not appropriate because it did not allow for the
16 consideration of "the characteristics of youth" in accordance with *Miller* and Washington
17 courts' treatment of *Miller*. *Bassett* at 83-84.

18 Unlike children, whose brains generally develop at the same pace, there is no common
19 characteristic, with respect to culpability or capacity for rehabilitation, among the named

20 ⁴² At least one appellate court rejected the application of the "categorical bar" analysis to a pet
21 owner who argued that a sentencing condition prohibiting a defendant from owning or caring
22 for his pet dog should be categorically barred. See *State v. Doll*, 22 Wn. App.2d 1037, at *6
(2022) (unpublished) ("Pet owners do not have distinctive characteristics as a class that would
make a categorical bar analysis appropriate."). Likewise, our Supreme Court determined that
the categorical bar analysis offered a "poor framework for analyzing the procedural burden-
shifting claim" by a youth offender. *State v. Gregg*, 196 Wn.2d 473, 481, 474 P.3d 539 (2020).

1 Plaintiffs, or the homeless in general, that would make application of a “categorical bar”
2 approach appropriate. There is no singular trait attributable to the homeless, other than the fact
3 that they are currently homeless. Some are fleeing domestic violence, others are in the throes of
4 addiction, while others have lost their jobs or have been evicted from their homes, and still
5 others suffer from untreated mental illnesses or have fled homes where who they are and how
6 they identify themselves have not been accepted. The only common characteristic—a lack of a
7 stable place to be—is not permanent, rather it is transitory. Indeed, the nomenclature commonly
8 used—“people experiencing homelessness”—reflects the reality that homelessness is a
9 transitory state that varies by degree depending on the individual in question. As the named-
10 Plaintiffs show, people come in and out of homelessness and are often able to secure shelter or
11 find other ways to avoid having to sleep outdoors. To suggest that homelessness is a fixed-
12 state, on par with youth brain development, “is to deny the efficacy of social intervention to
13 change the condition of those currently homeless.” *Joyce*, 846 F. Supp. at 857 (N.D. Cal.
14 1994).

15 Likewise, there is no established body of Washington case law recognizing that the
16 involuntarily homeless are subject to special considerations when it comes to sentencing.
17 *Bassett*, and many other Washington decisions, acknowledged that because children lack a fully
18 developed brain, their “moral culpability” is reduced because, in layperson’s terms, they simply
19 do not know better, they lack impulse control, and they have a greater potential for
20 rehabilitation and therefore sentencing them to extended prison terms, whether actual life terms
21 or *de facto* life terms, is cruel punishment. And unlike youth, which are governed by various
22 statutes and case law recognizing that “children are different” in the sentencing context, no
23 similar body of statutory or decisional law makes any similar distinctions for the involuntary

1 homeless or even the indigent (aside from the imposition of legal financial obligations, which
2 would be analyzed under the “excessive fines” clause of article 1, section 14). For example,
3 nothing in the Sentencing Reform Act (SRA) treats the homeless as its own class of individuals
4 who, due to some common characteristic, are less culpable than other adults in the general
5 population when they commit legislatively proscribed acts.

6 The categorical approach adopted in *Bassett* made practical and logical sense in that
7 case because it (1) applied categorically to any child who had committed serious crimes and (2)
8 involved a fixed sentence of life in prison without the possibility of parole or early release.
9 Based on brain science, a consistent body of law had been established that “children are
10 different” when it comes to criminal sentencing because their brains will mature, they are more
11 capable of rehabilitation than older adults, and their lack of brain maturity leads to impetuous
12 decisions. Here, to say that all homeless are alike, in the same way a child’s brain development
13 is, oversimplifies and homogenizes the homeless. Homeless individual are just that:
14 Individuals. Unlike children, there is no unifying characteristic “of the offender class” because
15 each homeless individual has their own personal story to tell and an explanation as to how they
16 became homeless and why they continue to be homeless. Unlike brain development of a child,
17 there is no single source of why someone is homeless; thus, taking a one-size-fits-all approach
18 to sentencing makes little legal or practical sense. Likewise, the sentence at issue here can
19 range from a deferral (if that is even properly considered a sentence in how that term was
20 applied in *Bassett*) to up to 90 days in jail. Unlike *Bassett*, which targeted a very specific
21 sentence—life without parole or possibility of early release—Plaintiffs are asking this Court to
22 categorically determine *any sentence*, even a deferred one, is unconstitutionally cruel when an

1 individual is “involuntarily homeless,” which is an “offender class” that, unlike children, defies
2 an easy definition.

3 Trying to shoehorn Plaintiffs’ articulated theory into an analytical framework whose
4 genesis is based on the uniqueness of children in the sentencing context makes little sense and
5 would turn any ruling this Court makes into something tantamount to a class-wide ruling in a
6 case that is not a class action. Indeed, on the record before this Court, when viewing the
7 evidence in the light most favorable to Burien as this Court must when analyzing Plaintiffs’
8 requests for affirmative relief, it is not even certain whether any of the named Plaintiffs meet
9 the very standard Plaintiffs advance as being “involuntarily homeless” because the Hales are
10 not currently homeless, and Mr. Paz has rejected services in the past because he would prefer
11 “permanent housing” as opposed to “a hotel stay for one or two days.” *See* Dkt. No. 73 at ¶¶ 4
12 & 6. Even if the “categorical bar” approach was appropriate to apply, this is a poor record on
13 which to apply it.

14 Notwithstanding this Court’s concerns about its application generally to the homeless, or
15 to the specific named Plaintiffs here, the “categorical bar” approach yields a result in favor of
16 Burien. The burden is on Plaintiffs to show they satisfy *Bassett*’s requirements. *See, e.g., State*
17 *v. Moen*, 4 Wn. App.2d 589, 602-03, 422 P.3d 930 (2018).

18 The “first step in the categorical bar analysis is to determine whether there is a national
19 consensus against the sentencing practice at issue.” *Reynolds*, at 204. Here, the practice at issue
20 is whether other jurisdictions criminalize public camping.⁴³ The key to *Bassett*’s “national
21 consensus” is “not so much the number of” of jurisdictions that have similar sentencing

22 ⁴³ Even framing the issue this way takes this case out of the heartland of *Bassett*, which focuses
23 on “sentencing practices,” not what can or cannot be criminalized.

1 schemes, but rather “the consistency of the direction of change.” *Reynolds* at 204 (quotations &
2 citations omitted). The “national trend” of laws relating to criminalizing camping runs counter
3 to Plaintiffs’ arguments. As the National Homelessness Law Center notes, since the issuance of
4 *Grants Pass*, “roughly 150 cities in 32 states have passed or strengthened” laws banning
5 outdoor camping even if no shelter space is available. *See* Dkt. No. 93 at 7 (citing Many more
6 cities ban sleeping outside despite a lack of shelter space • Stateline) (last visited May 9,
7 2025).⁴⁴ And the practice is widespread throughout the United States. *Grants Pass* recognized
8 that “a majority of cities have laws restricting camping in public spaces, and nearly forty
9 percent have one or more laws prohibiting camping citywide.” 603 U.S. at 532 (citation &
10 quotation omitted). Likewise, “large numbers of cities and States across the country have long
11 employed, and today employ, similar punishments for similar offenses.” *Id.* at 543 (comparing
12 punishments imposed in *Grants Pass* with those imposed for similar offenses elsewhere).
13 Plaintiffs provide no evidence to the contrary.

14 Plaintiffs ask this Court to eschew *Bassett*’s “national consensus” requirement “because
15 this is a local ordinance being considered under the state constitution [and] instead look to see
16 if there is a consensus in our state in favor of Burien’s approach.” Dkt. No. 91 at 7-8. This
17 Court is not at liberty to ignore *Bassett*’s “national consensus” requirement. What is more, it is
18 not lost on this Court that many Washington cities and towns, like Burien and Spokane for
19 example, changed preexisting ordinances regarding public camping to comply with *Martin*. *See*
20 *Jewels Helping Hand* at *3 (“*Martin* . . . triggered changes to the law in many localities—
including Spokane.”). Thus, pointing to laws currently on the books presents a skewed view of

21 ⁴⁴ Plaintiffs did not move to strike Burien’s reliance on this article; thus, the Court may
22 consider it because Plaintiffs waived any hearsay objection to this Court’s consideration of its
contents.

1 a “local consensus” on this issue because but for *Martin*, prior camping laws, with potential
2 criminal penalties, would have remained on the books. In any event, as of January 27, 2025,
3 seven Washington cities (not including Burien) have changed their anti-camping law and
4 several of them reverted to pre-*Martin* law or have removed *Martin*-related protections. *See*
5 Dkt. No. 93 at 7 (citing Many more cities ban sleeping outside despite a lack of shelter space •
6 Stateline) (last visited May 9, 2025). At bottom, Plaintiffs have failed to establish there is any
7 “consensus,” whether national or local, against laws criminalizing public camping. In fact, the
8 weight of the evidence points in the opposite direction because based on what has been
9 presented to this Court there is a growing national and local trend in *favor* of the practice.

10 Under the second factor, this Court must “exercise its own independent judgment”
11 based on “controlling precedent and [its] understanding and interpretation of the cruel
12 punishment provision’s text, history, and purpose” and determine whether these weigh “against
13 the sentencing practice.” *Reynolds* at 204 (quotations omitted). In so doing, this Court must
14 consider “the culpability of the offenders at issue in light of their crimes and characteristics,
15 along with the severity of the punishment in question and whether the challenged sentencing
16 practice serves legitimate penological goals” and there are “four recognized legitimate
17 penological goals[:] retribution, deterrence, incapacitation, and rehabilitation.” *Reynolds* at
18 207-08 (citations & quotations omitted).

19 This Court has already explained its view as to controlling precedent and the text,
20 history and purpose of article 1, section 14 and concluded that they do not require this Court to
21 accept the central premise of Plaintiffs’ argument—that article 1, section 14 excuses conduct
22 that is unavoidable based on individual’s unique and personal circumstances. It need not repeat
23 that analysis here. As to culpability, as explained, there is no common trait among the named

1 Plaintiffs, or the homeless in general, that makes them less culpable as a class of individuals
2 like, for example, youth brain development. As noted, the poor and indigent are subject to the
3 same laws as all others, and nothing in the SRA treats them differently.

4 Indeed, many crimes this Court commonly sees whether on the plea calendar or during
5 sentencing hearing, are crime of “poverty,” and that issue is often addressed through
6 prosecutorial discretion, alternate sentencing regimes and deferred sentences, not through the
7 categorical bar of imposing any sentence whatsoever. As to severity, the potential imposition of
8 up to 90 days in jail for violating the Ordinance—which is designed to protect the public
9 health, safety and welfare—is not, standing alone “shocking to the sense of justice and totally
10 arbitrary.” *Smith*, 93 Wn.2d at 345. The sentencing range is the least severe punishment range
11 under Washington law, which orders its criminal offenses and commensurate sentencing ranges
12 between misdemeanors, gross misdemeanors, and felonies (which are classified). And given the
13 invocation of a “necessity defense” and a sentencing court’s discretion to impose alternate
14 sentences, such as deferred sentences or treatment requirements, there is no specific sentence
15 for this Court to address.

16 As to penological goals, the purpose of the Ordinance is not, despite Plaintiffs’
17 characterization to the contrary, to criminalize homelessness. Rather, as the history of the
18 Ordinance shows, it is to simplify what is proscribed and to remove objections made by the
19 KCSO who refused to enforce prior versions of the Ordinance.⁴⁵ It is also, in Burien’s
20 legislative judgment, a means by which to coax the homeless into accepting services, which
21 may result in more positive outcomes than the status quo. The Ordinance, with its criminal

21 ⁴⁵ In fact, prior versions of the Ordinance, aside from the initial law passed in 2007, were
22 written with the purpose of complying with *Martin*. Whether they did or did not comply with
23 *Martin* was at heart of the dispute between Burien and the KCSO.

1 penalties, serves to deter the proliferation of encampments, which everyone should agree are
2 unsafe for the unhoused and the surrounding community. *Accord Jewels Helping Hand* at * 5
3 (“Despite Jewels’ efforts, the area surrounding the encampment saw a sharp increase in its
4 four-year crime rate, with some of the criminal activity occurring near a school.”); *Grants Pass*
5 at 520 (“And by one estimate, more than 40 percent of the shootings in Seattle in early 2022
6 were linked to homeless encampments.”).

7 To categorically prohibit any amount of jail time for engaging in camping on public
8 property for a certain subset of individuals who defy easy identification would “take from
9 elected representatives the questions whether and when someone who has committed a
10 proscribed act should be relieved of responsibility for lack of moral culpability.” *Grants Pass* at
11 552 (quoting *Powell*). Our Supreme Court has only ever done this in the context of youth
12 sentencing, where the children in question faced life in prison without the possibility of parole.
13 And while some may argue there are good policy reasons for accepting Plaintiffs’ position, this
14 Court “cannot disturb [the potential sentences] at issue here based on disagreement with
15 legislative policy choices. [It] can determine only whether the legislative policy choices violate
16 the constitution.” *Reynolds* at 210. Based on this Court’s independent judgment, looking at
17 article 1, section 14’s test, history and purpose, relevant case law, as well as culpability and
18 penological justifications for the Ordinance, this Court concludes that permitting jail time for
19 violating the Ordinance’s prohibition on public camping is not categorically unconstitutional
20 under article 1, section 14.

21 **b. *Fain* Proportionality Test.**

22 In *Fain*, our Supreme Court faced the question of whether a life sentence was
23 unconstitutionally cruel under a habitual criminal statute for three fraud crimes “adding up to a

1 total of less than \$470.” 94 Wn.2d at 397-98. Because Fain’s Eight Amendment claim was
2 foreclosed by *Rummel v. Estelle*, 445 U.S. 263 (1980), our Supreme Court fashioned a “test to
3 determine whether a sentence is unconstitutionally cruel under article 1, section 14: the *Fain*
4 proportionality test.” *Reynolds* at 210. “Under this test, courts ask whether the sentence is
5 grossly disproportionate to the crime based on four factors: (1) the nature of the offense; (2) the
6 legislative purpose behind the habitual criminal statute; (3) the punishment defendant would
7 have received in other jurisdictions for the same offense; and (4) the punishment meted out in
8 the same jurisdiction.” *Id.* (quoting *Fain* at 397).

9 Applying *Fain*, which tests for gross disproportionality, is difficult, if not impossible,
10 because this Court does not have any sentence before it and therefore cannot evaluate any
11 specific facts related to any specific sentence being challenged. In any event, Plaintiffs’ article
12 1, section 14 claim fails. Both the nature of the offense and the Ordinance’s purpose counsels
13 against any finding of gross disproportionality. The offense here is a violation of a law
14 designed to promote public health, safety and welfare, which are the zenith of a locality’s
15 police powers and this Court has already explained the purposes behind the Ordinance, which
16 are legitimate.⁴⁶ Next, as noted above, the pervasiveness of such anti-camping laws and similar
17 criminal penalties elsewhere around the United States are not so dissimilar as to render the
18 Ordinance’s sentencing range grossly disproportionate. For example, in *Fain*, Washington was
19 “one of only three states” which retained “a habitual criminal statute imposing a mandatory life

20 ⁴⁶ To the extent Plaintiffs argue the Ordinance unconstitutionally targets the homeless, that is
21 more akin to an equal protection challenge or a selective prosecution claim, and is nothing that
22 article 1, section 14 is concerned with. Plaintiffs bring no state or federal equal protection
23 claim. And if the Ordinance is ultimately enforced in an arbitrary manner, or only against the
24 homeless, there may be alternate legal avenues available to those prosecuted under the
Ordinance. See *Grants Pass* at 542-43 & *id.* at 546 n.5 & *id.* at 588-591 (Sotomayor, J.,
dissenting).

1 sentence after any three felonies.” 94 Wn.2d at 399. Here, the opposite is true. Finally, the list
2 of misdemeanors for which there is a potential 90-day sentences are too numerous to list here.
3 In contrast, in *Fain*, only one other offense—murder in the first degree—carried with it the
4 same sentence Mr. Fain was facing for crimes totaling \$470. *See* 94 Wn.2d at 410. In the end,
5 there is nothing “clearly arbitrary” or “shocking to” this Court’s sense of justice, let alone both,
6 that would allow this Court to determine that any sentence imposed under the Ordinance would
7 be grossly disproportionate and therefor unconstitutionally cruel under article 1, section 14.

8 **C. Right to Reside/Sleep and Intrastate Travel.**

9 Plaintiffs next allege that the Ordinance “by banishing Burien’s homeless residents,
10 denies them *the right to reside without threat of arrest*, in violation of their *state constitutional*
11 *rights to intrastate travel*.” Complaint at ¶93 (emphasis added). In light of the new Ordinance,
12 Plaintiffs have also focused on the right to “sleep” as being derivative of the right to intrastate
13 travel. Our Supreme Court in *Potter II* instructed lower courts that when examining whether a
14 right to intrastate travel exists in an as-applied challenge such as this, courts should examine the
15 party’s allegations to determine the “specific right” they are asserting. *Potter II*, 3 Wn.3d at
16 336. Properly defined, Plaintiffs assert a limited and specific state constitutional right, which
17 “inheres in a Washington state constitutional right to intrastate travel,” to reside or sleep on
18 public property without threat of arrest. *Id.* at 331.

19 At oral argument, Plaintiffs disclaimed any argument that they were grounding their
20 intrastate travel claim on the United States Constitution. *See* Dkt. No. 100 at 74 (“This case
21 arises under the Washington Constitution and the rights inherent in there. As discussed, those
22 rights can be co extensive [sic] with federal rights.”). This disclaimer is critical because if the
23 Washington Constitution does not generally protect the right to intrastate travel, Burien is

1 entitled to judgment as a matter of law on this claim. Put simply, if no such right exists under
2 Washington law, then no claim can lie based on Plaintiffs' concession.⁴⁷

3 **1. The Washington Constitution Does not Recognize a Right to**
4 **Intrastate Travel, or a Right to Reside/Sleep on Public Property.**

5 Plaintiffs assert that these rights emanate from article 1, section 12, which states: "No
6 law shall be passed granting to any citizen, class of citizens, or corporation other than
7 municipal, privileges or immunities which upon the same terms shall not equally belong to all
8 citizens, or corporations."⁴⁸ Burien contends that no Washington Court has ever specifically
9 held that a state constitutional right to intrastate travel exists. Plaintiffs contend that such
10 authority does exist. This dispute was the basis for the Ninth Circuit's recent decision certifying
11 this very question (as well as another question) to our State Supreme Court. *See Potter v. City*
12 *of Lacey*, 46 F.4th 787, 792 (9th Cir. 2022) ("[W]e have determined that although the
13 Washington Supreme Court has concluded that a right to intrastate travel exists under the
14 United States Constitution, it has never decided whether this right exists under the Washington
15 State Constitution or any other source of Washington law.") ("*Potter I*").

16 Much like Mr. Potter, Plaintiffs rely primarily on *Eggert v. City of Seattle*, 81 Wn.2d
17 840, 505 P.2d 801 (1973) and *Macias v. Department of Labor & Industries*, 100 Wn.2d 263,
18 668 P.2d 1278 (1983), in support of their view that the Washington State Constitution provides

19 ⁴⁷ "In general, the plaintiff is the master of the complaint[.]" *Hayes v. USAA Cas. Ins. Co.*, 185
20 Wn. App. 1055, at * 9 (Wash. Ct. App. Feb. 17, 2015). Why Plaintiffs chose to limit their
21 constitutional claims to only claims under the Washington State Constitution is not apparent,
22 but having done so, this Court must respect their choice.

23 ⁴⁸ Plaintiffs acknowledged that to the extent these rights exist under article 1, section 12, these
24 rights are coextensive with the federal right to intrastate travel and that the Washington State
Constitution does not provide any greater protection than the United States Constitution in this
regard. *See Trans.* at 73-76. Consequently, they have provided no *Gunwall* analysis.

1 a right to intrastate travel. *See Potter I* at 792. This Court agrees with the Ninth Circuit that
2 neither of those cases specifically hold that the Washington State Constitution, as opposed to
3 the United States Constitution, confers a right of intrastate travel on Washington's residents.
4 *See id.* Nor does either case specifically hold that a right to reside/sleep on public land exists
5 under Washington law.

6 While *Eggert* recognized a right to intrastate travel, the opinion does not mention article
7 1, section 12, and ultimately concludes that the law in question—which dealt with durational
8 residency requirements for civil servants—violated “both the equal protection clause of the
9 Fourteenth Amendment and the respondents’ constitutional right to travel” because it penalized
10 “recent travel by completely and unconditionally depriving those recently migrated to the city
11 [of] the right to apply for employment.” 81 Wn.2d at 847-48.

12 *Macias*, which invalidated a law denying migrant farm workers compensation benefits
13 when they failed to earn more than \$150 from a farmer for whom they were working, held that
14 the law violated the right to travel because the migrant farm workers were penalized based on
15 the migratory nature of their jobs. In its analysis, *Macias* relied on cases from the U.S. Supreme
16 Court discussing “interstate migration” and the freedom to “travel throughout the length and
17 breadth of our land, uninhibited by statutes, rules or regulations which unreasonably burden or
18 restrict this movement.” 100 Wn.2d at 272-74 (citing *Shapiro v. Thomson*, 394 U.S. 618 (1969)
19 & *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974)).⁴⁹ To be sure, *Macias* concludes by

20 ⁴⁹ *Shapiro* struck down a residency-based waiting requirements for the receipt of welfare
21 benefits for individuals migrating to another state because it penalized migration into the that
22 state. 394 U.S. at 629-30; *see also id.* at 634 (“The waiting-period provision denies welfare
benefits to otherwise eligible applicants solely because they have recently moved into the
jurisdiction.”). Likewise, *Memorial Hospital* struck down durational residency requirements to

1 noting that “our state constitution privileges and immunities clause . . . independently supports
2 our conclusion[.]” *Id.* at 275. This sentence, without more, and when put in the context of
3 *Macias*’ reasoning, does not support the conclusion that *Macias* held that our State Constitution
4 protects the right to intrastate travel because it only addressed interstate, not intrastate, travel.

5 Relying on *Potter II*, Plaintiffs argue that our Supreme Court recently held, albeit
6 implicitly, that a “right to intrastate travel does exists under the Washington Constitution.” Dkt.
7 No. 34 at 31.⁵⁰ This Court disagrees. While that question could have been squarely answered,
8 our Supreme Court referred only to the “*claimed* Washington State constitutional right to
9 intrastate travel.” *Potter II* at 330 (emphasis added). And in so doing, applied the alleged right
10 to reside to the specifics of Mr. Potter’s challenge. *Id.* at 335. *Potter II* does not support the
11 proposition that the Washington Constitution protects the right to intrastate travel. In effect, our
12 Supreme Court assumed the right to intrastate travel’s existence, without squarely deciding the
13 matter. This is too slender a reed for this Court to answer a question of such constitutional
14 significance.

15 At oral argument, Plaintiffs noted that even if this Court concludes that no appellate
16 court has concluded that article 1, section 12 protects a right to intrastate travel, this Court has
17 the authority to determine that such a right exists. *See* Dkt. No. 100 at 76. While the Court
18 agrees it has such authority, it declines to find that such a right exists for several reasons.

19
20 receive state-funded medical care because it “penalizes indigents for exercising their right to
migrate to and settle in” Arizona. 415 U.S. at 261-62.

21 ⁵⁰ This position is at odds with counsel’s statements at oral argument. *See* Dkt. No. 100 at 20
22 (“With all due respect to the court, [in *Potter II*] it reformulated that question to avoid deciding
the answer of whether an intrastate right to travel exists.”).

23 ORDER RE: SUMMARY JUDGMENT

Judge Michael K. Ryan
King County Superior Court

1 First, while numerous federal circuit courts have found that such a right exists, and our
2 own State Supreme Court has acknowledged such a right exists under the U.S. Constitution, the
3 United States Supreme Court has not yet explicitly determined that such a right exists, even
4 though verbiage in their earlier right to travel cases hints at the right's existence. *See Potter v.*
5 *City of Lacey*, 2024 WL 4511612, at * 1 fns. 3 & 4 (9th Cir. Oct. 15, 2024) ("*Potter III*").

6 Second, the determination that a constitutional right exists that is not explicitly
7 mentioned in the constitutional text, is a complex question involving policy considerations on
8 how to define the contours of the non-textual right. No party has briefed this Court on what
9 considerations, if any, this Court would need to consider when recognizing a constitutional
10 right in the first instance, such as how narrowly or broadly the right should be defined, the
11 constitutional source for the right, or how this Court would determine the appropriate level of
12 scrutiny that should apply to this right. *See, e.g., Lutz v. City of York, Pa.*, 899 F.2d 255, 258-
13 270 (3d Cir. 1990) (applying extensive analysis to determine whether right to intrastate travel
14 exists, the source from which it derives, and the level of scrutiny to apply). This Court hesitates
15 to enter such unchartered constitutional territory without adequate guidance from the parties or
16 appellate authority explaining how the Court should undertake the creation of a constitutional
17 right that is not expressly provided for in our State or Federal Constitution.

18 Relatedly, the source of the federal right to travel, on which the right to intrastate travel
19 acknowledge by *Eggert* relies, is not always clear and often depends on the nature of the claim
20 before the Court.⁵¹ More recently, however, the United States Supreme Court provided a
21 measure of clarity on this issue, explaining:

22 ⁵¹ *Eggert* recognized as much. 81 Wn.2d at 843 ("Although there have been recurring
23 differences in emphasis with the Court as to the source of the constitutional right of interstate

1 The “right to travel” discussed in our cases embraces at least three different
2 components. It protects [1] the right of a citizen of one State to enter and leave
3 another State, [2] the right to be treated as a welcome visitor rather than an
4 unfriendly alien when temporarily present in the second State, and, [3] for those
5 travelers who elect to become permanent residents, the right to be treated like all
6 other citizens of that State.

7 *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (numbers added). The first right is not derived from the
8 text of the U.S. Constitution, and while the Supreme Court decided not to “identify the source
9 of [this] particular right,” it noted it may have been a byproduct of the Articles of
10 Confederation. *Id.* at 501. The second right derives from Article IV, § 2, which reads “The
11 Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the
12 several States.” *Id.* at 501-02. And the third right derives from the “privileges and immunities”
13 clause of the Fourteenth Amendment. *Id.* at 503-04. Notably, the U.S. Supreme Court did not
14 cite the Fourteenth Amendment’s “equal protection” clause as the source for the right to travel,
15 of which the right intrastate travel would be derivative. Nor did it address whether any such
16 right to intrastate travel exists.

17 While *Eggert* cited the U.S. Constitution’s equal protection clause as a source of the
18 constitutional right to travel, it did so in the context of reviewing a law that created
19 classifications among “bona fide residents upon the basis of recent travel [and] penalize[d] only
20 those residents who have traveled into the city during the qualifying period.” 81 Wn.2d at 844-
21 45. Plaintiffs make no equal protection arguments in this case. What is more, to the extent

22 travel, there is no need here to canvas those differences further. All have agreed that the right
23 exists.”); see also *id.* at 849-50 (Hale, J., dissenting); see also *Attorney Gen. of N.Y. v. Soto-*
24 *Lopez*, 476 U.S. 898, 902 (1986) (“The textual source of the constitutional right to travel, or
more precisely, the right of free interstate migration, though, has proved elusive. It has been
variously assigned to the Privileges and Immunities Clause of Art. IV, the Commerce Clause,
and to the Privileges and Immunities Clause of the Fourteenth Amendment. The right has also
been inferred from the federal structure of government adopted by our Constitution.”)
(plurality) (citations omitted).

1 Eggert grounded the right to travel in the Fourteenth Amendment’s “equal protection” clause,
2 that conclusion may have been overcome by *Saenz*, which sought to clarify the Supreme
3 Court’s conflicting and confusing jurisprudence in this area.⁵²

4 Although nothing in the text of article 1, section 12 mentions the word travel, Plaintiffs
5 say the right resides there. In this Court’s estimation, it would be an odd fit to shoehorn the
6 right to intrastate travel (or to reside/sleep) into article 1, section 12 of the Washington State
7 Constitution because that clause was “intended to prevent favoritism and special treatment for a
8 few to the disadvantage of others.” *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d
9 506, 518 (2020); *see, e.g., City of Seattle v. McConahy*, 86 Wn. App. 557, 570-72, 937 P.2d
10 1133 (1997) (analyzing article 1, section 12 and right to travel claims separately). Article 1,
11 section 12 “provides heightened state law protections when the threat is not of majoritarian
12 tyranny but of a special benefit to a minority and when the issue concerns favoritism rather than
13 discrimination.” *Bennett v. United States*, 2 Wn.3d 430, 443, 539 P.3d 361 (2023) (citation &
14 quotation omitted).

15 The nature of Plaintiffs’ claim does not fit neatly within the purpose of article 1, section
16 12, because they do not argue the Ordinance benefits a minority nor that it concerns favoritism.
17 If anything, they argue the opposite—that the law was designed to target the homeless or that it
18 will have a disproportionate impact on the homeless—but Plaintiffs bring no equal protection
19

20 ⁵² If the reader finds the doctrinal underpinnings of the right to travel interesting, or wants to
21 gain a better understanding of the Supreme Court’s right to travel jurisprudence pre-*Saenz*, it
22 would be worth their time to read Judge Becker’s scholarly opinion in *Lutz v. City of York*,
which canvasses the right to travel cases and assesses the appropriate level of scrutiny to be
applied depending on from where the unenumerated right derives. 899 F.3d at 258-270.

1 claim under either the state or federal constitutions.⁵³ Also, Plaintiffs have not (1) provided this
2 Court with any independent analysis as to whether their purported rights are properly
3 considered a “privilege or immunity as defined in our early cases distinguishing the
4 fundamental rights of state citizenship,” (2) argued that the Ordinance grants either a “privilege
5 or immunity for purposes of our state constitution,” and (3) addressed “whether there is a
6 ‘reasonable ground’ for granting the privilege or immunity,” all of which is required when
7 considering whether article 1, section 12 has been violated. *Martinez-Cuevas* at 518-19. If
8 Plaintiffs believe the right to intrastate travel resides elsewhere in the Washington State
9 Constitution, they have not pointed this Court to any such provision.

10 Finally, it is not lost on the Court that our Supreme Court recently had the opportunity
11 in *Potter II* to answer whether the Washington Constitution protects a right to intrastate travel.
12 While both parties point to this fact to support their diametrically opposed positions, to this
13 Court, the fact that they did not do so suggests that there is uncertainty as to whether such a
14 right exists under our State Constitution and where that right would emanate from. If the issue
15 had already been decided, one way or the other, our Supreme Court would have said so. Based
16 on all of this, the Court concludes that article 1, section 12, does not protect the right to
17 intrastate travel, nor a derivative right to reside or sleep on public property. To the extent our
18 courts have enforced such the right to intrastate travel, they have done so exclusively through
19 the United States Constitution, not the Washington Constitution.

20 ⁵³ “Homeless persons are not a suspect class” for purpose of federal equal protection analysis.
21 See, e.g., *Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000) (citing cases); see also
22 *City of Seattle v. Webster*, 115 Wn.2d 635, 647, 802 P.2d 1333 (1990) (“We have found not
cases where the homeless have been judicially declared a protected class for purposes of
Fourteenth Amendment analysis.”); *Harris v. McRae*, 448 U.S. 297, 323 (1980) (“poverty,
standing alone, is not a suspect classification.”).

1 Because Plaintiffs have expressly disclaimed any cause of action under the United
2 States Constitution, and rest their intrastate travel argument solely on the Washington State
3 Constitution, this Court determines that Burien is entitled to judgment as a matter of law on
4 Plaintiffs' state constitutional claim based on the claimed right to intrastate travel (or to
5 reside/sleep on public property) because no such right presently exists under the Washington
6 State Constitution. The Court **GRANTS** Burien's Motion with respect to Plaintiffs' state
7 constitutional challenge based on the claimed right to intrastate travel/right to reside.

8 **2. Assuming a Right to Intrastate Travel Exists, Burien is Entitled to**
9 **Judgment as a Matter of Law.**

10 For completeness's sake, assuming a right to intrastate travel exists as a matter of
11 Washington constitutional law, this Court determines that, as a matter of law, the Ordinance
12 does not burden, implicate or violate this purported right or any derivative right such as the
13 right to reside or sleep on public property without fear of arrest. As noted above, Plaintiffs do
14 not claim that any state-based right to intrastate travel is more protective or broader than its
15 federal counterpart; thus, Plaintiffs have not provided this Court with, nor asked this Court to
16 conduct, any analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). See Dkt.
17 No. 100 at 73-76. Consequently, this Court will examine both State and Federal decisions in
18 assessing the scope of any purported rights at issue in this case.

19 At the threshold, it is important to recognize that sleeping outdoors, and by extension
20 the right to reside, on public property is not itself a fundamental right subject to any
21 constitutional protection. *Joel*, 232 F.3d at 1357; *Joyce v. City & Cty. of San Francisco*, 846 F.
22 Supp. 843, 859 (N.D. Cal. 1994); *State of Hawaii v. Sturch*, 921 P2d 1170, 1176 (Haw. App.

1 1996).⁵⁴ To the extent such rights exist, it can only be derivative of a broader right to intrastate
2 travel which has never been expressly recognized by the United States Supreme Court, but has
3 been recognized, as a matter of federal constitutional law, by our State Supreme Court.

4 As explained previously, the right to travel generally derives from the Articles of
5 Confederation, and the Privileges and Immunities clauses contained in the U.S. Constitution,
6 and was designed largely to prohibit discrimination against migration and those citizens
7 travelling from State to State. *See supra* (discussing *Saenz*). Whether a right to *intrastate* travel
8 exists under the federal constitution remains an open question. *See, e.g., Jeffery v. City of New*
9 *York*, 113 F.4th 176, 190 (2d Cir. 2024) (“To be sure, the Supreme Court has not decided
10 whether the constitutional right to travel safeguards free movement within a given State as well
11 as between States.”) (citing *Memorial Hosp.*, 415 U.S. at 255-56 (1974)); *see also Potter III* at
12 *1 (9th Cir. Oct. 15, 2024) (noting Ninth Circuit has not yet decided whether such a right
13 exists); *Hannemann v. S. Door Cty. Sch. Dist.*, 673 F.3d 746, 756 (7th Cir. 2012) (“We have
14 not yet decided whether there is a federal constitutional right to intrastate travel[.]”); *Doe v.*
15 *Miller*, 405 F.3d 700, 711-713 (8th Cir. 2005) (assuming such a right existed and upholding
16 residency restriction); *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 536-38 (D.C. Cir. 1999)
(en banc) (holding no similar right exists for minors).

17 And even for those federal courts that recognize the right to intrastate travel, the precise
18 source of the right, the contours of the right, as well as the appropriate means-ends scrutiny to
19 apply, has created a doctrinal morass among the circuits. For example, the Sixth Circuit defines
20 the right as the ability to “travel locally through public spaces and roadways,” and applies

21 ⁵⁴ *Sturch* acknowledged that such a right may exist if it is within the ambit of the First
22 Amendment. 921 P.2d at 1176 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288
(1984)). Plaintiffs have not brought any First Amendment, or related state-based, claims.

1 “strict scrutiny” or “intermediate scrutiny” depending on specific circumstances. *Compare*
2 *Johnson v. City of Cincinnati*, 310 F.3d 484, 496-97 & 502 (6th Cir. 2002) (applying strict
3 scrutiny), with *Cole v. City of Memphis*, 839 F.3d 530, 537-38 (6th Cir. 2016) (applying
4 intermediate scrutiny). In contrast, the Third Circuit defines the right as the ability “to move
5 freely about one’s neighborhood or town, even by automobile,” but subjects alleged
6 infringements of that right to a traditional “time, place and manner” analysis. *See Lutz*, 899
7 F.2d at 268-69 (3d Cir. 1990); *see also; Potter I*, 46 F.4th at 796-800 & fns. 5-7 (9th Cir. 2022)
8 (Bennett, J., dissenting) (collecting cases). While some federal courts of appeals recognize the
9 right as tied to the freedom of movement, others tie the right only to interstate travel. *See, e.g.,*
10 *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1080-1081 (2020) (discussing cases and
11 noting that in the Tenth Circuit the right to “freedom of movement” is tied to “interstate” not
12 intrastate travel).

13 If all of this was not confusing enough, a more recent U.S. Supreme Court case, which
14 postdates cases relied on by lower courts to find the right’s existence, has cast doubt on the
15 right to intrastate travel. *See Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 277
16 (1993) (“Such a purely intrastate restriction does not implicate the right of interstate travel,
17 even if it is applied intentionally against travelers from other States, unless it is applied
18 *discriminatorily* against them.”) (emphasis in original). In short, the federal courts are neither
19 consistent on the right to intrastate travel’s existence, the source of the right, and what manner
20 of scrutiny is applied to such a right.

21 Courts in Washington have, however, determined that the *federal* right to travel
22 includes an intrastate component, but as with the federal courts, they have not clearly defined
23 the right’s contours nor consistently distinguished between intrastate and interstate travel. The

1 right was first recognized in *Eggert*, but the court did not elaborate beyond acknowledging that
2 the right protects “travel within and between states[.]” 81 Wn.2d at 845. Other Washington
3 courts have noted that although the right to travel may be fundamental, such a right is “not
4 absolute.” *Abbott v. Gen. Accident Grp.*, 39 Wn. App.263, 269, 693 P.2d 130 (1984); *see also*
5 *State v. Scheffel*, 82 Wn.2d 872, 880, 514 P.2d 1052 (1973) (right to travel contains “no
6 constitutional right to a particular mode of travel.”). Our Supreme Court recently noted that
7 there is no (federal) constitutional right to intrastate travel that protects the right to remain in a
8 particular place, in a particular manner, *in a vehicle.*” *Potter II* at 336 (emphasis added). No
9 Washington court has addressed whether either the state or federal constitution protects the
10 right to remain in a particular place to camp or sleep, which is what is at issue here.

11 While numerous Washington courts have noted that statutes that implicate the right to
12 travel are subject to strict scrutiny, *see, e.g., City of Seattle v. McConahy*, 86 Wn. App. 557,
13 571-72, 937 P.2d 1113 (1997); others recognize that strict scrutiny does not necessarily always
14 apply to right to travel claims. *See, e.g., Caminiti v. Boyle*, 107 Wn.2d 662, 667 (1987)
15 (“Although the right to travel is fundamental, a challenged statute must have a certain ‘amount
16 of impact’ on the ability of a person to travel between and among states before the strict
17 scrutiny standard is triggered.”) (citing *Macias*, 100 Wn.2d at 273); *see also Abbott* at 269
18 (“*Macias* also held a certain ‘amount of impact’ on the right to travel is required before the
19 strict scrutiny/compelling interest test is triggered.”); and still others apply “the test of
20 reasonable basis” when a facially neutral law creates “an indirect and minor infringement” on
21 the right to travel. *City of Seattle v. Larkin*, 10 Wn. App. 205, 208, 516 P.2d 1083 (1973).
22 Relevant here, one court has determined that a Seattle ordinance prohibiting sitting or lying on
23 a sidewalk in certain parts of Seattle did “not implicate the right to travel,” *McConahy* at 571;

1 and another court determined that a Seattle law prohibiting hitchhiking, even though it had
2 incidental effect on the poor, did not violate the right to travel. *Larkin* at 208-211.

3 As with the federal courts, Washington courts are not uniform in what level of scrutiny
4 applies to claims based on the right to intrastate travel nor is there any set definition for what
5 the right protects. Despite this uncertainty, no Washington court has ever concluded that the
6 federal right to intrastate travel contains a right to reside or sleep on public property free from
7 threat of arrest.⁵⁵ Plaintiffs claim is clearly one of first-impression.

8 While there is no consensus as to the contours of the federal right to intrastate travel in
9 Washington or federal courts, this Court will accept for purposes of its analysis, that it
10 generally protects the ability to travel locally through public spaces and roadways, which
11 appears to be the common thread running through this jurisprudence. *See, e.g., Doe v. Miller*,
12 405 F.3d 700, 713 (8th Cir. 2005) (assuming right encompassed ability to “travel locally
13 through public spaces and roadways”); *see also Williams v. Town of Greenburgh*, 535 F.3d 71,
14 75 (2d Cir. 2008) (right to intrastate travel “protects *movement between places* and has no
15 bearing on *access* to a particular place.”) (emphasis in original); *Doe v. City of Lafayette*, 377
16 F.3d 757, 771-72 (7th Cir. 2004) (en banc) (right to intrastate travel not violated where ban

17 ⁵⁵ One Washington court, cited to the Court by Plaintiffs during oral argument, has determined
18 that a juvenile curfew violated the “freedom of movement,” which is “rooted both in the First
19 Amendment’s protection of association and expression and in the fundamental liberties of the
20 Fifth Amendment.” *State v. J.D.*, 86 Wn. App. 501, 506, 937 P.2d 630 (1997). Here, Plaintiffs
21 makes no claims under the First or Fifth Amendment; therefore, there are no meaningful
22 analogies to draw from this case to the issues before this Court. *See also City of Sumner v. Walsh*, 148 Wn.2d 490, 519-20, 61 P.3d 1111 (2003) (Madsen, J., dissenting) (noting confusion about basis of “freedom of movement” claim to juvenile curfew, and evaluating the issue under equal protection “because the ordinance differentiates between classes of individuals based on age.”). Likewise, Plaintiffs acknowledged that their vagueness challenge is moot; thus, cases like *Papachristou v. City of Jacksonville*, which held that a so-called vagrancy law was void for vagueness, has no application here. 405 U.S. 156, 165-71 (1972).

1 from park did not limit individual's from "moving from place to place within his locality to
2 socialize with friends and family, to participate in gainful employment or to go to the market to
3 buy food and clothing."); *see also City of Spokane v. Port*, 43 Wn. App. 273, 275, 716 P.2d 945
4 (1986) ("Freedom of movement is at the heart of our scheme of values[.]"). This assumption is
5 consistent with Plaintiffs' request that this Court follow the Sixth Circuit's decision in *Johnson*
6 *v. City of Cincinnati*, *supra*, which defined the right similarly. *See* Dkt. No. 34 at 30-31.

7 "A state law implicates the right to travel when the law actually deters such travel and
8 where deterring travel is the law's primary objective [or] when the law uses any classification
9 which serves to penalize the exercise of that right." *State v. Smith*, 185 Wn. App. 945, 952, 344
10 P.3d 1244 (2015) (citing *State v. Lee*, 135 Wn.2d 369, 957 P.2d 741 (1998) & *Soto-Lopez*, 476
11 U.S. 898 (1986)) (quotations omitted). "A law violates the right to travel if it penalizes
12 migration from state to state, or makes it impossible to move about within a state." *McConahy*
13 at 557. The Ordinance does not implicate, much less violate, any purported right to intrastate
14 travel and this conclusion is consistent with every court, save one, that has addressed similar
15 claims under similar circumstances.

16 The Ordinance is facially neutral as to travel, applies equally to residents and non-
17 residents alike and makes no classifications based on residential status, and any impact it has on
18 intrastate travel is incidental, not direct. *See, e.g., Nishi v. County of Marin*, 2012 WL 566408,
19 at * 5 (N.D. Cal. 2012) ("Defendants correctly assert that the camping ban is
20 nondiscriminatory. It does not distinguish between resident and non-resident, or between those
21 who are homeless and those who are not. The camping ban applies equally to everyone, as
22 evidenced by the language, 'no person.' The nondiscriminatory camping ban's impact on the
23 right to travel is at best, incidental. Individuals, such as plaintiff, can move freely within the

1 public land as part of their personal liberty.”); *see also Larkin*, 10 Wn. App. at 208; *accord*
2 *Webster* at 646 (1990) (rejecting equal protection challenge based on disparate impact to
3 homeless to Seattle’s pedestrian interference ordinance where ordinance “applies equally to *all*
4 *persons*”) (quoting *City of Seattle v. Slack*, 113 Wn.2d 850, 858, 784 P.2d 494 (1989))
5 (emphasis in original). Nothing on the face of the Ordinance prohibits any person from any
6 egress or ingress into Burien, and it applies equally to residents and non-residents alike. It is
7 simply not targeted directly at travel, nor is deterring travel its primary purpose. Likewise, it
8 does not penalize migration in any realistic sense because it does not condition the receipt of
9 any governmental benefit on residency or treat long-term residents better than new arrivals.
10 Ridding Burien of the homeless is not the Ordinance’s primary goal. The Ordinance at issue was
11 enacted to provide a more straightforward prohibition to address concerns raised by the KCSO
12 in enforcing the law, represents an effort to incentivize Burien’s unhoused population to accept
13 services, and to preserve and protect Burien’s public lands by criminalizing camping. While
14 Plaintiffs speculate that the Ordinance will deter individuals from travelling to Burien, no
15 record evidence supports this fact-based conclusion. Even under the most generous view, the
16 statute at most has in incidental effect on intrastate travel. *See, e.g., Anderson v. City of*
Portland, 2009 WL 2386056, at 10 (D. Or. July 31, 2009).

17 Even under Plaintiffs preferred definition of the right to intrastate travel—the ability to
18 move freely through local streets and towns—Plaintiffs’ articulation of its claim is analytically
19 difficult to square with what they ultimately seek—to be able to remain in Burien free from the
20 threat of arrest. The Ordinance “does not impede the travel of any of the named plaintiffs
21 because they do not seek to *travel* anywhere; they seek only to remain.” *Davison v. City of*
22 *Tucson*, 924 F. Supp. 989, 993 (D. Az. 1996) (emphasis in original); *see also Veterans for*

1 *Peace Greater Seattle Chapter 92 v. City of Seattle*, 2009 WL 2243796, at * 4 (W.D. Wash.
2 2009) (“As a result, it is clear that the residents of ‘Nickelsville’ cannot invoke the fundamental
3 right to travel in justifying their desire *to remain* on WSDOT property without permission.”)
4 (emphasis added); *Seeley v. State*, 655 P.2d 803, 808 (Ariz. Ct. App. 1982) (“Moreover, the
5 tenor of the statute is not to prohibit movement, but to encourage it. It is the sedentary activities
6 of ‘lying, sleeping, and sitting’ which are prohibited.”); *accord Doe*, 405 F.3d at 713 (8th Cir.
7 2005) (rejecting “ambitious articulation” of “a fundamental right ‘to live where you want.’”).⁵⁶
8 Accepting Plaintiffs’ position would turn the right to intrastate *travel* on its head because it
9 would create a right to remain. As one court noted in rejecting a similar argument: “To find that
10 the present facts implicate the right to travel would simply stretch that jurisprudence too far.”
11 *Sanchez v. City of Fresno*, 914 F. Supp.2d 1079, 1111 (E.D. Cal. 2012). This Court agrees.

12 Consistent with our Supreme Court’s recent decision in *Potter II*—rejecting that a right
13 to reside in a specific manner is encompassed in a right to intrastate travel—the California
14 Supreme Court rejected a similar argument almost thirty years ago. In so doing, it said:

15 The right to travel does not . . . endow citizens with a ‘right to live or stay where
16 one will.’ While an individual may travel where he will and remain in a chosen
location, the constitutional guaranty does not confer immunity against local
trespass law and does not create a right to remain without regard to the

17 ⁵⁶ Plaintiffs’ reliance on cases involving “banishment orders,” which arise as a condition of a
18 criminal sentence and categorically prohibit someone from going to certain places is misplaced.
19 *See, e.g., State v. Schimelpfenig*, 128 Wn. App. 224 (2005), *abrogated in part by In re Winton*,
20 196 Wn.2d 270, 275, 474 P.3d 532 (2020). The named Plaintiffs are asking to remain, via
21 residing, sleep, or both, in a specific area, namely Burien. Unlike banishment orders, the
22 Ordinance does not prohibit Plaintiffs from Burien, and they are free to come and go from
Burien as they chose. What they cannot do is camp, sleep, or store their belongings on public
property. Banishment cases are simply inapposite because of the right Plaintiffs ultimately seek
to protect—the right to sleep or reside on public property without fear of arrest. *See, e.g.,*
Aitken v. City of Aberdeen, 393 F. Supp.3d 1075, 1084 (W.D. Wash. 2019) (“Courts in this
circuit agree that the right to travel is not a right to remain indefinitely wherever one pleases.”).

1 ownership of property on which he chooses to live or stay, be it public or
2 privately owned property.

3 *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1165 (Cal. 1995). That is what Plaintiffs are asking
4 this Court to conclude: the right of travel gives them a right to reside and/or sleep on public
5 property in Burien. While the right to travel is an important federal right possessed by our
6 citizenry, that right simply does not supply the citizenry with the ability to take up residence on
7 public property. Nor does the fact that “adequate shelter space” is not available change the
8 constitutional calculus because municipalities have “no constitutional obligation to provide
9 homeless persons with accommodations to facilitate their right to travel.” *Allen v. City of*
10 *Sacramento*, 234 Cal. App.4th 41, 61 (2015) (citing *Tobe*). To accept Plaintiffs’ position would
11 require this Court to greatly expand the right to intrastate travel, which focusses on the ability
12 to come and go, to include a “right to reside” or “right to sleep” in Burien specifically, or more
generally on public property. This Court is not prepared to take such a constitutional leap.

13 The only court that has accepted Plaintiffs’ theory on the right to travel is *Pottinger v.*
14 *City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992). Respectfully, this Court declines to follow
15 *Pottinger* for several reasons.

16 *First*, there were numerous ordinances at issue in *Pottinger*, which prohibited standing,
17 sleeping, sitting, loitering, and/or prowling at various places, and taken together the court
18 determined that those ordinances violated the right to travel. *Id.* at 1559-60 & 1578-83. Here,
19 only a single law is at issue, and while it prohibits camping, it does not prohibit eating,
20 standing, or congregating in public places. *Second*, the factual record in *Pottinger* is
21 significantly different. In that case, there was evidence of systematic arrests (approximately
22 3500 arrests) of the homeless, which was developed during a five-day hearing, which included

1 testimony and exhibits, and internal city correspondence that the city's sole purpose of
2 enforcing these laws was to harass the homeless. *Id.* at 1554-57. Here, in sharp contrast, there is
3 no evidence that Burien has arrested anyone under the Ordinance, or any prior version of the
4 Ordinance (save for a single exception under the original law). Further, an important purpose
5 for the recent change to the Ordinance was not to drive out the homeless, but rather to create a
6 straightforward Ordinance that the KCSO would enforce because past efforts to comply "with
7 the Ninth Circuit rulings by allowing camping in some areas" led to increased litigation. *See*
8 Dkt. No. 82 at Appendix A.

9 *Third, Pottinger* relied on cases involving laws denying governmental benefits to
10 individuals based on residency and durational requirements. *Pottinger* at 1578-79 (citing
11 *Shapiro & Memorial Hospital*). Respectfully, the *Pottinger* court stretched those cases beyond
12 their intended scope and drew from them parallels that are now inconsistent with more recent
13 U.S. Supreme Court decisions, namely *Saenz, supra*, which further elucidated the right to travel
14 and acknowledged that the equal protection clause is not the font of the right to travel. None of
15 the ordinances in *Pottinger*, unlike the cases it relied upon, touched upon benefit denials or
16 residency requirements. In this Court's view, the lessons drawn by *Pottinger* from the cases it
17 cited is the equivalent of placing a doctrinally square peg into a constitutional round hole. *See,*
18 *e.g., Allen v. City of Sacramento*, 234 Cal. App.4th 41, 62 (Cal. App. 2015); *Johnson v. City of*
19 *Dallas*, 860 F. Supp. 344, 354-355 (N.D. Tex. 1994) (rejecting application of similar cases to
20 right to similar right to travel claim).⁵⁷ What is more, the Ordinance at issue here has none of

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22 ⁵⁷ While *Johnson* accepted *Pottinger*'s Eighth Amendment holding, that ruling was later
23 reversed and vacated on appeal. *See Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995).

1 the hallmarks of a facially discriminatory law targeting travel, as it applies equally to residents
2 and non-residents alike, and contains no durational limitations.

3 Channeling *Pottinger*'s reasoning, Plaintiffs argue that "laws penalize travel when they
4 deny a person the necessities of life." See Dkt. No. 100 at 21 (citing *Macias*). *Macias* does not
5 stand for such a broad proposition and Plaintiffs ignore the context in which *Macias* arose—
6 whether the denial of *inclusion* in a state benefit program that penalizes migrant workers for the
7 migrant nature of the employment violated the right to interstate travel. 100 Wn.2d at 266-67
8 (1983). *Macias* was focused on the *exclusion* of migrant farmworkers from a governmental
9 benefit program and relied on a line of cases involving laws penalizing individuals "who have
10 exercised their constitutional right of interstate migration" and who were denied *state-provided*
11 benefits to medical care and welfare benefits. *Id.* at 274 (quoting *Memorial Hosp.*, 415 U.S. at
12 258-59 (1974)).

13 Properly understood, *Macias* and the cases cited therein do not stand for the broad
14 proposition that anytime a government denies an individual a "basic necessity of life," the right
15 to travel is implicated. And to the extent *Pottinger* construes *Memorial Hospital* to support
16 such a conclusion, the decision is unpersuasive because it is only where the government
17 provides benefits to one class of individuals and not to others based on recent migration that
18 *Macias* and like cases apply. That is not the situation here. Burien is not denying any state-
19 created benefit based on migration and the law applies evenhandedly to any person who wants
20 to sleep, camp, or reside on public property. The ramifications of accepting Plaintiffs reading of
21 *Macias* (and *Pottinger*'s reading of *Memorial Hospital*) are far-reaching because it would turn
22

1 every law denying a “basic necessity of life,”⁵⁸ even where the government does not provide
2 that necessity in the first place, into a potential claim under the right to travel. Further,
3 Plaintiffs’ interpretation moves the right to travel further from its constitutional moorings, as
4 described in *Saenz* because it focuses not on travel itself, but on the purported necessity being
5 denied.

6 *Fourth*, this Court finds convincing that numerous other courts, including the California
7 Supreme Court, have declined to follow *Pottinger*’s logic, analysis, and result. *See, e.g., Joyce*,
8 846 F. Supp. at 860 (N.D. Cal. 1994); *Davison*, 924 F. Supp. at 993 (D. Az. 1996); *Tobe*, 892
9 P.2d at 165 (Cal. 1996); *Anderson v. City of Portland*, 2009 WL 2386056, at * 9 (D. Or. July
10 31, 2009); *Sanchez*, 914 F. Supp.2d at 1110 (E.D. Cal. 2012); *Allen* at 60-62; *Roulette v. City of*
11 *Seattle*, 850 F. Supp. 1442, 1447-48 (W.D. Wash. 1994). In fact, this Court is only aware of
12 one court that has adopted *Pottinger*’s reasoning in this regard, *see Tobe v. City of Santa Ana*,
13 27 Cal. Rptr.2d 386 (Cal. App. 1994); but that decision was reversed by the California Supreme
14 Court. *See Tobe* at 1161-66 (1995). This Court joins the California Supreme Court, as well as
15 every other federal district courts to consider the matter, and declines to follow *Pottinger*.

16 *Finally*, this Court is not compelled to follow *Pottinger* based on *McConahy*. 86 Wn.
17 App. at 571-72. *McConahy*’s reference to *Pottinger* was dicta because it was unnecessary to the
18 holding of the case because the law at issue in *McConahy* did not have the same cumulative
19 effect as the myriad ordinances at issue in *Pottinger*. In addition, while *McConahy* referenced
20 *Pottinger*, it did not adopt its legal analysis or reasoning nor did not have the benefit of later

21 ⁵⁸ The scope of this term is unclear to this Court, but it could include many things that
22 governments do not provide to their citizenry. For example, health care has been determined to
be such a “basic necessity of life” under *Memorial Hospital*, but no court has ever determined
that a state *must* provide health care to its citizens, only that when it does so it must do so in a
manner that does not discriminate or penalize recent migration.

1 right to travel cases addressing *Pottinger* or cases issued by the United States Supreme Court
2 such as *Saenz, supra*, which placed the Court's right to travel jurisprudence into sharper focus.

3 In the end, whatever the contours of the right to intrastate travel under Washington law
4 are (to the extent one exists), it does not include the right to reside or sleep on public property
5 without fear of arrest. Consequently, even if the Washington Constitution protects the right to
6 intrastate travel, Burien is nonetheless entitled to judgment as a matter of law because the
7 Ordinance does not implicate, much less violate, the purported right Plaintiffs advance.

8 **D. The Ordinance Does Not Violate Article 1, section 7.**

9 Article 1, section 7 of the Washington State Constitution provides, "No person shall be
10 disturbed in his private affairs, or his home invaded, without authority of law." Our Supreme
11 Court has "identified two constitutional interests protected by this right to privacy: the right to
12 autonomous decision-making and the right to nondisclosure of intimate personal information,
13 or confidentiality." *Wash. Pub. Emps. Ass'n v. Wash. State Ctr. for Childhood Deafness &*
14 *Hearing Loss*, 194 Wn.2d 484, 504, 450 P.3d 601 (2019) (*WPEA*).⁵⁹ The latter, which is at
15 issue here, "has never been recognized . . . as a fundamental right." *Id.* In analyzing such
16 claims, courts engage in a two-step analysis. "First, we determine whether the action
17 complained of disturbs one's private affairs. If so, we look to the second inquiry: whether
18 authority of law justifies the intrusion." *City of Seattle v. Long*, 198 Wn.2d 136, 156, 493 P.3d
19 94 (2021).

20 ⁵⁹ "Recognized as a fundamental right, the autonomy interest confers heightened constitutional
21 protection. This right involves issues related to marriage, procreation, family relationships,
22 child rearing and education." *WPEA* at 612. Infringement on this right is subject to strict
scrutiny, requiring the government to demonstrate a compelling state interest. *See id.* Plaintiffs
do not assert this right is implicated by the Ordinance.

1 The starting point of this Court's analysis is whether any "private affairs" are
2 implicated. To the extent Burien argues no privacy rights can exist in a tent or one's belongings
3 wrongfully occupying public property, it is wrong as a matter of law. In *State v. Pippin*, the
4 court held that a homeless individual had a protectable privacy interest in the contents of a tent
5 and such "privacy interests are not diminished by his lack of permission to camp at that
6 location." 200 Wn. App. 826, 844, 403 P.3d 907 (2017). This ruling makes perfect sense. Just
7 as an illegally parked vehicle cannot generally be searched without a warrant, the same holds
8 true for a tent serving as one's home. This does not mean, however, as Plaintiffs appear to
9 suggest, that article 1, section 7, constitutionalizes a right to erect a tent or to store one's
10 belongings on public land.

11 Accepting the core premise of *Pippin*—that individuals have a privacy interest in their
12 homes even when they are illegally residing on public land—does not mean that article 1,
13 section 7 creates a constitutional right to reside or store property on public land. A world of
14 difference exists between recognizing privacy interests in a tent being used as one's home even
15 if illegally pitched on public land, versus determining that such an interest creates a right to
16 reside on public land free from any governmental interference. While article 1, section 7
17 protects the privacy interests of the homeless in their belongings and their makeshift homes, it
18 does not create a constitutional right to place those belongings or erect a tent on public
19 property. To the extent Plaintiffs argue to the contrary, those arguments must be rejected
20 because it would allow individuals, homeless or otherwise, through article 1, section 7 to
21 adversely possess government property to the detriment of all other members of the public.
22 Article 1, section 7 creates no constitutional right to camp or store belongings on public
property.

1 Having established that a privacy interest exists in tents, for example, illegally
2 occupying public property, nothing on the Ordinance's face implicates the right to
3 nondisclosure of personal information. The Ordinance at issue bans "camping," which includes
4 "storage," but does not allow for the "indiscriminate and standardless removal" of any person's
5 belongings. *But see Kitcheon*, 2024 WL 5040630, at * 13 (holding that certain Seattle
6 regulations related to removal of "encampments" was facially invalid because rules allowed for
7 removal of belongings with no direct relation between removal and a "public health or safety
8 threat."). In fact, nothing in the Ordinance says anything about the removal of property or
9 encampments.

10 The ink is barely dry on the Ordinance. Under the Ordinance, the Chief of Police, with
11 the approval of the City Manager, has the authority to draft certain policies and procedures. It
12 may be that the implementation of those policies and procedures implicates article 1, section 7
13 to the extent they address removal procedures regarding tents illegally placed on public land.
14 There is not, however, any evidence before this Court as to what those policies and procedures
15 are, or how the Ordinance will be enforced. This Court will not speculate on hypothetical facts
16 and issue a ruling on the constitutionality of the Ordinance absent a concrete set of facts. To be
17 sure, if an individual is arrested under the Ordinance (no one has been), then, and only then,
18 would Burien need to secure their possessions and belongings, but this is no different than what
19 occurs when an individual is arrested in their vehicle or is required to turn over their
20 possessions when being booked into jail. That homeless individuals have a privacy interest in
21 not having their personal effects subject to unwarranted search and/or seizure even if they are
22 not legally allowed to be on certain property, does not mean that if they are arrested that there

1 personal belongings cannot be collected and indexed incident to arrest or that a law
2 enforcement officer will not first seek a warrant to seize whatever property is left behind.

3 Nothing on the face of the Ordinance requires the immediate or summary destruction of
4 any unhoused person's property, nor have Plaintiffs pointed to any policy, whether formal or
5 informal, that Burien has under which such indiscriminate destruction of property would occur.
6 Such a policy would, of course, raise constitutional concerns. *See, e.g., Kitcheon* at *9-13; *see*
7 *also Garcia v. City of Los Angeles*, 11 F.4th 1113, 1124 (9th Cir. 2021) (city may not
8 "summarily destroy the unabandoned personal property of homeless individuals that is kept in
9 public areas") & *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1025-32 (9th Cir. 2012)
10 ("because homeless persons' unabandoned possessions are property [city] must comport with
11 the requirements of the Fourteenth Amendment's due process clause" including "procedural
12 protections" such as notice and an opportunity to be heard before permanent deprivation may
13 occur). Here, any disclosure of intimate personal information is not the intended aim of the
14 Ordinance, but rather a potential byproduct of its enforcement.

15 Plaintiffs raise concerns with how prior encampment removals unfolded.
16 Notwithstanding the fact that the Ordinance does not address removals of encampments, it is
17 undisputed that each of the three named Plaintiffs were given notice several weeks prior to the
18 removal of the Ambaum encampment. *See* Dkt. No. 77 at Exhibits 1-3 (deposition testimony).
19 Mr. Paz does not allege that he lost any property in that removal because he "had already
20 packed my own things" prior the removal, Dkt. No. 38 at ¶8; but the Hales, who are not
21 currently homeless and had several weeks' notice, nevertheless lost "a bicycle, tools, stereo
22 equipment, clothes, and other stuff." *See* Dkt. No. 37 at 9. While it is not acceptable that
23 personal items may have been lost in a prior encampment removal, there is no dispute that all

1 named Plaintiffs had ample notice that the removal was going to occur, the Hales not have
2 explained why they, unlike Mr. Paz, did not timely remove any items, and the Hales have not
3 sought any relief based on this loss of property because they only seek only prospective
4 injunctive and declaratory relief. If anything, the Hales' complaints in this regard sound more
5 in due process based on deprivation of property, not article 1, section 7. *Cf. Long* at 157-58.
6 The Hales bring no due process claim.

7 For article 1, section 7, to even come into play, the Ordinance must first be enforced.
8 Only at that point would any unhoused individual's private affairs potentially become subject
9 to governmental intrusion, whether through search or seizure. Our Supreme Court's decision in
10 *Long* is instructive. Among other claims, *Long* addressed whether the impoundment of a
11 vehicle being used as a home violated article 1, section 7. *Id.* at 155-58. The Court rejected Mr.
12 Long's challenge because Seattle had the "authority of law to seize" the truck because it
13 violated a parking ordinance and Mr. Long "had no right to park on a public right of way." *Id.*
14 at 157. Like Mr. Long, Plaintiffs have no constitutional right to erect a tent or store belongings
15 on public property under article 1, section 7 (or any other constitutional provision).⁶⁰ Because
16 nothing on the face of the Ordinance implicates this right, and the right may only be implicated
17 by future enforcement efforts, Plaintiffs' article 1, section 7 claim, fails as a matter of law.

18 While article 1, section 7 protects the privacy interests of paupers and princes alike, it
19 does not create a right to reside or store one's personal belongings on public property, nor does
20 it categorically prohibit the seizure of someone's possessions, which are illegally occupying
21 public property, incident to arrest. Because the Ordinance does not implicate, at this point, the

22 ⁶⁰ Even if this Court were to accept, for example, Plaintiffs' article 1, section 14 claim, this
23 would only preclude enforcement of the Ordinance to a subset of individuals, not *create an*
24 *affirmative right* to erect a tent or store one's belongings on public property.

1 named Plaintiffs' article 1, section 7 rights, Burien is entitled to judgment as a matter of law.
2 Burien's Motion is **GRANTED** in this regard.

3 III CONCLUSION

4 This Court is not blind to the stark reality the homeless face day in and day out, nor is it
5 blind to the immense suffering those living on the streets must endure to just to make it through
6 the day. This Court sees it first-hand every day, whether in the issues that come before this
7 Court, or whether it is simply out for a walk through the streets of downtown Seattle or a local
8 park in King County. The homeless crisis is all around us. This Court has much sympathy for
9 the unhoused, and is as frustrated and saddened by what it sees in our parks and on our
10 sidewalks as other concerned citizens. While Plaintiffs and other unhoused individuals are most
11 certainly worthy of society's best efforts to get them into affordable housing, treatment, or at
12 least temporary shelter, their constitutional claims cannot succeed.

13 Ruling in Plaintiffs' favor will not fix this crisis, may well exacerbate it by limiting a
14 potentially effective tool from policy makers, and would be a departure from settled law. Some
15 may say this Court is shirking its responsibility to protect the most vulnerable among us and
16 that constitutional rules should be crafted to meet the moment. That the judiciary should step in
17 when the other branches of government have failed. No constitutional ruling this Court issues
18 will create affordable housing, build temporary shelters, or increase funding for mental illness
19 or addiction treatment. Likewise, ruling in Burien's favor will not fix this crisis and nothing in
20 this ruling should be construed as endorsement of the wisdom or efficacy of its chosen method
21 of regulation. That is not the proper role of this Court. This Court's role is to adjudicate cases
22 before it based on the facts and the law, it is not to write homelessness policy through
23 constitutional adjudication or expand our State Constitution under inapposite legal theories

24 ORDER RE: SUMMARY JUDGMENT

Judge Michael K. Ryan
King County Superior Court

1 based on the exigencies of the day. The State Constitution cannot fix every societal problem.
2 Such work is left to the other branches of government. Burien has made their policy choice and
3 because nothing in the Washington State Constitution prohibits that choice, Burien's Motion is
4 **GRANTED** and Plaintiffs' Motion is **DENIED**.

5 DATED this 15th day of May, 2025.

6 
7 Judge Michael K. Ryan