Honorable Catherine Shaffer

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

CITY OF SEATTLE, Respondent, v. STEVEN GREGORY LONG, Appellant.	NO. 17-2-15099-1 SEA RALJ BRIEF OF APPELLANT

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A. INTRODUCTION

In March 2014 Steven Long became homeless and began living in his truck and storing all his worldly possessions in it. In October 2016, a parking enforcement officer ("PEO") put a sticker on his truck which referenced Seattle Municipal Code § 11.72.440(B), the ordinance that prohibits parking in one spot for more than 72 hours. Long did not move his truck within that period. A week later, while Long was working, the City of Seattle ("City") had his truck towed and impounded. When he finished work, Long went back to where it had been parked and discovered that the truck – his home – was gone.

Long unsuccessfully challenged the impound before a City Magistrate. The Magistrate ruled that he could get his truck back provided he agreed to pay $547 in towing and storage fees in installment payments and Long "agreed" to do this (he had no choice). For 21 days, Long had no home and no access to the tools of his trade. He regained possession of his truck just three days before it was scheduled to be sold at an auction. Long maintains that the impounding of his home violated the Excessive Fines Clause of the Eighth Amendment, the homestead protection provisions of Wash. Const., art. 19, §1 and RCW 6.13.070, and substantive due process. These constitutional and statutory provisions prohibit government from imposing punishments so severe that they reduce offenders to poverty, prevent them from earning a living, or deprive them of their home. Long also maintains that the City violated his substantive due process rights by taking away his home and exposing him to the elements for 21 days. The Municipal Court rejected these arguments and entered summary judgment in favor of the City. This appeal follows.

B. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the Municipal Court's decision, entered on June 28, 2017, granting summary judgment in favor of the City of Seattle.

2. Appellant assigns error to the Municipal Court's decision, entered on May 10, 2017, to deny Appellant Long's motion for entry of summary judgment in his favor.

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C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did impounding Long's home and imposing fees as a requirement for regaining possession of it, violate the Excessive Fines Clause of the Eighth Amendment?

2. Did withholding his home until he agreed to pay fees to get it back, violate the Homestead Act and Wash. Const., art. 19, §1?

3. Did depriving Long of his only shelter, exposing him to rain and cold weather, and causing him to contract an illness, violate Long's substantive due process rights?

D. STATEMENT OF THE CASE

Steven Long, age 57, and a tribal member of the Flathead Nation, has been homeless since he was evicted from rental housing in March of 2014. *Dkt.* 6, at 89, ¶¶1-2. Thereafter, Long used his GMC Sierra truck as his home. *Id.*, ¶3. Usually he slept in the front seat of the truck. *Dkt.* 7, at 214:23-24. In addition to providing shelter, the truck served as a place for Long to keep his personal property. *Dkt.* 6, at 89-90, ¶3. Because Long's trades include plumbing, painting, and construction, he kept many tools in his truck, including a power washer, ratchet sets and wrenches, drills, saws, painting tools, ladders, car repair tools, and a small crane. *Id.* He also stored the essentials of home life in his truck, such as cooking and eating utensils, bedding, blankets, clothing and personal hygiene items. *Id.*

In June 2016, the truck began making grinding noises as Long drove to a dental appointment in Seattle. *Dkt.* 6, at 90, ¶4. He pulled into a nearby Goodwill and received permission to park there for a few weeks until he could get the truck fixed. *Id.*; *Dkt.* 7, at 208:1-16. Unable to afford the necessary parts, and not wanting to overstay his welcome, Long found an unused gravel lot at 951 Poplar Place South and moved his truck there on July 5, 2016. *Dkt.* 6, at 90, ¶5; *Dkt.* 7, at 212:7-17. There are no private homes on the block. *Dkt.* 6, at 90, ¶5. Two nearby businesses told Long they had no objection to his parking there. *Dkt.* 7, at 210:3-22. Long felt this was an appropriate spot since it was seldom used or traveled by the public. *Dkt.* 6, at 90, ¶5. "Peter's Place," a day center for homeless people

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where Long could take showers and get food and coffee was located nearby. *Id.*

On October 5, 2016, Seattle police officers were dispatched to an area near Long's truck to deal with an unrelated complaint regarding homeless people camped out in tents. *Dkt.* 1, at 5:21-22; *Dkt.* 6, at 91, ¶8. After responding to that complaint, the officers' attention was drawn to Long's truck by a business owner who claimed that someone associated with the truck had threatened one of his employees on some prior occasion. *Dkt.* 1, at 5:22-25. As the officers approached, Long came out from underneath a tarp that was next to his truck. *Dkt.* 6, at 62:16-21. One officer referred to the area covered by the tarp as Long's "patio." *Id.* at 68:2-3.

SMC §11.72.440(B) provides:

> No person shall park a vehicle on any street or other municipal property for a period of time longer than seventy-two (72) hours, unless an official posted sign provides a shorter period of time, or unless otherwise provided by law.

As noted in the Municipal Court's May 10th *Order*, the officers notified Long that he would have to move his truck:

> They . . . informed Mr. Long that he could not remain on the property for more than 72 hours and summoned a parking enforcement officer (PEO) to affix notice to Mr. Long's truck.
>
> The SPD officers, while waiting for the PEO to arrive observed that it appeared that Mr. Long lived in his truck. Mr. Long told the officers that he would move the truck, but he needed a part to repair it. Mr. Long removed the 72 hour tag placed on his truck by the PEO and remained by the truck for three days to ensure that it was not towed. He made no attempt to move his truck. Nor did he repair the truck.

Dkt. 1, at 6:1-10. Long told the officers that he had nowhere to go, that he could not move the truck because it was "broke down" [sic], and that he needed a part to repair it, but the officers said that the parking enforcement officer still had to put a 72-hour parking notice on the truck. *Dkt.* 7, at 222:16-19; *Dkt.* 7, at 227:18-21; *Dkt.* 7, at 228:1-2. The notice stated that if the truck was not moved in 72 hours it would be towed. *Dkt.* 6, at 91, ¶9.

To fix the truck Long needed a part called a "spider gear." *Dkt.* 7, at 213:5-9. Long

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was unable to repair the truck because he did not have enough money to buy that part. *Id.* at 212:7-17; 228:16. Nor did he move the truck because he was afraid that it was "not … running well enough to drive it without additional damage." *Dkt.* 6, at 91, ¶10.

> I was afraid that if I used it to drive much further it would break down in a worse location, like on the road. And, if I only moved it close by, I believed I would simply be posted again. Even if the truck had been running well, I had no other place to live. The unused gravel spot in the parking lot at Poplar Place not only gave me a place for my truck – it provided a place for me to live and use my truck as my home.

Id. Concerned that his truck would be towed at the expiration of the 72-hour period, Long kept close watch on his truck for the next 72 hours:

> For the next three days I stayed by my truck as much as possible, and I did not leave the area on the third day to make sure that no impound occurred while I was away. On October 8, 2016, I did see what I believed to be a City parking vehicle. I spoke to a uniformed individual in the vehicle, and learned that he was not there to arrange for my truck to be towed. There was no attempt to contact me or tow my truck on October 8th.

Id., ¶11. The PEO Long spoke to told Long not to worry about his truck being towed because, "we'll let you know when they come and get it. We have no complaints against it." *Dkt.* 7, at 217:16-18; *Dkt.* 7, at 218:4-13.

The 72-hour period expired and no one came to tow the truck on October 8, 9, 10 or 11. Accordingly, on the evening of October 12, Long went to work at Century Link Field.[1] *Dkt.* 6, at 92, ¶12; *Dkt.* 1, at 6:11. While Long was at work, at the request of a PEO, Lincoln Towing impounded Long's truck. *Dkt.* 1, at 6:11-14. When Long got off work at midnight he walked to where his truck had been for the last three months and discovered that his truck was gone. *Dkt.* 1, at 6:14. "He immediately called 911 and learned that his truck had been towed. Mr. Long then spent part of the early morning hours of October 13th trying to make a shelter with the remaining property. At some point he gave up and spent the remaining of the early

[1] Long has worked for People Ready, a labor agency, since September of 1988. *Dkt.* 7, at 202:5-15.

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morning hours at Peter's Place, a homeless shelter that provides services to Long and others." *Id.* at 6:16-20. While trying to construct a makeshift shelter with a tarp, Long was exposed to the wind and rain; he slept wet that night, came down with the flu, and was unable to work for a week as a result. *Dkt.* 6, at 92, ¶¶14-16.

On October 20, Long requested a hearing to contest the impound of his truck and that hearing took place on November 2. *Dkt.* 1, at 4:1-2. In the interim, because all of his possessions were in the truck, Long was without his winter coat, spare clothes, sleeping bag, blankets, personal bathing and cleaning supplies, cooking utensils, and all of his work tools. *Dkt.* 6, at 92, ¶17. On October 18, Lincoln Towing allowed him to access his truck and he retrieved some warm clothes and a few other items that he could carry. *Dkt.* 6, at 92-93, ¶17-18. Most of his belongings he could not take because they were too big or too heavy to carry. *Dkt.* 6, at 92-93, ¶¶17-18. He left behind his tools and more valuable items because without the truck he had no way to store them while living outside on the ground. *Dkt.* 6, at 93, ¶18.

At Long's November 2 impound hearing a Magistrate found that the infraction (violation of the 72-hour parking ordinance, SMC §11.72.440) had been committed and that the impound of Long's truck was proper. *Dkt.* 6, at 93, ¶19. The Magistrate waived the $44 traffic infraction fine and reduced the amount of the impound fees assessed against Long from $917.57 to $547.12. *Dkt.* 1, at 4:2-4. As a precondition for getting his truck out of the impound lot, Long agreed to enter into a time payment agreement plan. *Dkt.* 1, at 4:2-5. As Long said, "I had to agree to a payment plan of $50 a month. If I did not do so, my truck would not have been released to me and would have been auctioned off. I could not lose my truck and had no real choice but to agree." *Dkt.* 6, at 93, ¶19.

On November 2, Long went to the impound lot and retrieved his truck. *Dkt.* 6, at 93, ¶20. "On the back window, [Long] saw that someone had written 'A 11/5' When [he] inquired, an employee of Lincoln Towing told [him] that this meant [his] truck was scheduled to go to auction on November 5, 2016." *Id.* Thus, Long was able to get his truck back just

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three days before it was scheduled to be sold at auction. *Id.*; *Dkt.* 7, at 240:15-22.[2] In sum, Long was deprived of his home, his work tools, his clothes and all of his other worldly possessions except for what he could carry in his hands, for a total of 21 days.

Fearing that his truck would be impounded again if he parked it in Seattle, Long took it to Brier, where a friend let him store it on his property. *Dkt.* 6, at 93, ¶21. But in order to be close to his worksites, Long continued to live in Seattle, in a "makeshift shelter" sleeping on the ground under a tarp, in the exact same location at Poplar and Norman streets where he had previously been living in his truck. *Dkt.* 1, at 7:1-2; *Dkt.* 6, at 93, ¶22; *Dkt.* 6,. at 94, ¶28.

Pursuant to SMCLR 73, Long appealed the Magistrate's decision and obtained a *de novo* review before a judge of the Municipal Court. As he explained to the Court, besides being without shelter, the impound caused him great financial hardship. *Dkt.* 6, at 94, ¶23.

> I work as a laborer and use staffing companies to find work opportunities, as well as working for friends. I earn between $300 and $600 a month, depending on the work I can get. I also receive $100 a month in tribal dividends. I am not receiving any public benefits other than food assistance, which begins on November 21, 2016. I am trying to save money to move into an indoor living location, such as an apartment or shared housing, but I have not been able to do so in the past few years.
>
> I have no financial accounts. I currently have about $25 in cash. My only possession of value is my truck, which I understand to be worth approximately $4,000 according to the Kelly Bluebook.
>
> As a result of the impoundment, I had to purchase new clothes, bedding, and other survival necessities. I continue to be responsible for the 547.12 impound fee. This has made it nearly impossible for me to save money for housing and other necessities.
>
> As a result of the impoundment, I have also had to miss several days of work. I do not have my tools, which allow me to obtain much better paying work as a carpenter, painter or plumber. This is because I store my tools in three toolboxes, which are lockable and attached to my truck bed.

[2] As the City acknowledged, under state law if an impounded vehicle is not reclaimed by the owner within fifteen days then it is mandatory that the vehicle be sold at auction. *Dkt.* 8, at 95, ¶6.

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Dkt. 6, at 94, ¶¶24-27.

Long filed a motion for summary judgment which the Court denied on May 10, 2017. *Dkt.* 1, at 3-16. On June 28th, the City made a cross-motion for summary judgment that the Court granted, and the Court entered judgment in favor of the City on that date. *Dkt.* 9, at 5.

E. APPELLATE REVIEW STANDARD

Orders granting summary judgment are reviewed *de novo. Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Questions of constitutional law and of statutory construction are also reviewed *de novo*. *State v. Montfort*, 179 Wn.2d 122, 129, 312 P.3d 637 (2013). Thus, *de novo* appellate review applies to all the issues raised in this RALJ appeal. The ruling of the trial court is not entitled to any deference, and this Court must independently decide all of the issues raised by Appellant Long.

F. ARGUMENT

1. The impound of Long's home, and the requirement that he pay to get it back, violated the Excessive Fines Clause.

(a) The Excessive Fines Clause applies to both civil and criminal cases. The purpose of the Clause was to limit government's power to oppress people by reducing them to poverty. The Clause prohibits the exaction of excessive payments whether they be payments "in cash or in kind." Forfeitures are payments in kind and are thus considered to be fines.

The complete text of the Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Notwithstanding the reference to bail, it is well-settled that the Excessive Fines Clause applies to both civil and criminal cases. *Austin v. United States*, 509 U.S. 602, 608-610 (1993).[3] The

[3] *Austin* itself was a *civil* forfeiture proceeding. One month after being sentenced to prison for possession of cocaine with intent to distribute, the Government filed a civil forfeiture action and sought an order forfeiting Austin's mobile home because Austin sold drugs out of it. Austin argued that such a forfeiture would violate the Eighth Amendment. The district court ruled that the Excessive Fines Clause did not apply to civil proceedings, and ordered the mobile home forfeited. *Id.* at 605. But the Supreme Court set aside the forfeiture and rejected the argument that the Excessive Fines Clause did not apply to civil proceedings. *Id* at 607-08. The Court held that a forfeiture imposed for the purpose of punishment was within the purview of the Excessive Fines Clause regardless of whether the proceeding in which it was imposed is labeled civil or criminal. *Id.* at 610.

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Austin Court held that "the purpose" of the Clause "was to limit the government's power to punish" by "limit[ing] the government's power to extract payments, whether in cash or in kind." *Id.* at 609-10.

Whenever a fine or a forfeiture serves, even in part, a punitive purpose, it is subject to the Excessive Fines Clause. *Austin*, 509 U.S. at 610. Historically, "the First Congress viewed forfeiture as punishment." *Id.* at 613. Although the Eighth Amendment uses the word "fines" and not the word "forfeitures," the Supreme Court held that this was of no consequence because in the parlance of the late 18th century, a "'fine' was understood to include a 'forfeiture' and vice versa." *Id.* at 614 & n.7. *Accord United States v. Bajakajian*, 524 U.S. 321, 328-29 (1998) (because "forfeiture serves, at least in part, to punish the owner," it is subject to the limitations of the Excessive Fines Clause).

Here, as the Municipal Court recognized, the plain language of the City's ordinance demonstrates that one of its purposes is to punish – to impose a penalty upon a person who commits the infraction of parking for more than 72 hours in one spot. *Dkt.* 1, at 14:1-3.

> A plain reading of the language of SMC 11.72.440(E) supports Mr. Long's argument that impound is, at least in part, a penalty. "Vehicles in violation of this section are subject to impound as provided for in Chapter 11.30 SMC, in addition to any other *penalty* provided by law." (emphasis added.)

Dkt. 1, at 14:4-7. Thus, the Excessive Fines Clause applies to the impound of Long's truck.

(b) The Excessive Fines Clause traces its lineage to the English Bill of Rights and to the Amercements Clause of the Magna Charta. These ancient provisions of law were designed to protect subjects from penalties that would reduce them to penury or prevent them from earning a living.

The Eighth Amendment was "based directly on Art. I, §9 of the Virginia Declaration of Rights," which "adopted verbatim the language of the English Bill of Rights." *Solem v. Helm*, 463 U.S. 277, 285, n.10 (1983). The English version, was intended to curb the excesses of English judges under the reign of James II. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). English subjects found that "they could not pay the huge monetary penalties that

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had been assessed" by the judges of the King's bench. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (1989).

Long before the English Bill of Rights, similar experiences prompted the English to exact concessions from the King which were memorialized in the Magna Charta. One of these concessions was the agreement to prohibit excessive "amercements" that reduced subjects to a state of penury, or imposed disproportionate penalties for minor offenses:

> Amercements were payments to the Crown, and were required of individuals who were "in the King's mercy," because of some act offensive to the Crown. Those acts ranged from what we today would consider minor criminal offenses, such as breach of the King's peace with force and arms, to "civil" wrongs against the King, such as infringing "a final concord" made in the King's court. … The use of amercements was widespread; one commentary has said that most men in England could expect to be amerced at least once a year.

Browning-Ferris at 269-70. Tired of being impoverished by crushing fines, the barons forced King John to agree to specific limitations on his power to impose amercements:

> The Amercements Clause of Magna Carta limited these abuses in four ways: by requiring that one be amerced ***only for some genuine harm*** to the Crown; by requiring that ***the amount of the amercement be proportioned to the wrong***; by requiring that ***the amercement not be so large as to deprive him of his livelihood***; and by requiring that the amount of the amercement be fixed by one's peers, sworn to amerce only in a proportionate amount.

Id. at 271 (emphasis added). Thus, for over 800 years, Anglo-American common law has protected the people against "tyrannical" or "oppressive" financial penalties. *Id.* at 271-72. While an amercement might begin as a fine to be paid in cash, if it was not paid it could be converted into a forfeiture of a man's estate:

> Although most amercements were not large, [citation], being placed in the King's mercy meant, at least theoretically, that ***a man's estate was in the King's hands, and it was within the King's power to require its forfeit.***

Browning-Ferris at 271, n. 15 (emphasis added).

The impoundment of Long's home left him at the mercy of a city magistrate in the same way that an amercement left an English subject at the mercy of the King:

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> [A]fter the court found a person to be in the King's mercy, and that person obtained a pledge for the payment of whatever sum was to be amerced, the court would go on to other cases. ... "At the end of the session some good and lawful men, the peers of the offender (two seem to be enough) were sworn to 'affeer' the amercements. They set upon each offender some fixed sum of money that he was to pay; this sum is his amercement."

Browning-Ferris, 492 U.S. at 271, n. 16 (citation omitted).

In this case, (1) the impoundment of Long's home, (2) the "merciful" tardy return of his home after payment of the first installment of a fine, and (3) an agreement to make more payments over time, amounted to the perpetration and violation of each one of the four prohibitions set forth in Magna Charta. If Long does not pay his fines, his truck remains subject to forfeit, in exactly the same way that an Englishmen's failure to pay his amercement could subject him to the forfeiture of all his lands, which of course would include his home.

(c) A fine or forfeiture is constitutionally excessive if the severity of the penalty is grossly disproportionate to the gravity of the offense.

Five years after *Austin* was decided, the Supreme Court set aside a forfeiture as constitutionally excessive in *Bajakajian.* There, the defendant plead guilty to the felony offense of failure to report the transportation of more than $10,000 in currency. While leaving for Cyprus, Bajakajian failed to disclose that he was carrying $357,144 in cash in his luggage. The Government sought forfeiture of the entire amount and Bajakajian objected that such a penalty would be unconstitutionally excessive. "The touchstone of the constitutional inquiry," said the Court, was "the principle of proportionality." *Bajakajian,* 524 U.S. at 334. "[T]he harm that [Bajakajian] caused was minimal . . . There was no fraud on the United States and [Bajakajian] caused no loss to the public fisc." *Id.* at 339. The Court held that such a forfeiture violated the Excessive Fines Clause because it was "grossly disproportionate to the gravity of his offense." *Id.* at 324.

Similarly, to punish the infraction of illegal parking by towing away the vehicle owner's home, and requiring him to pay hundreds of dollars in order to get his home back three weeks later, is "grossly disproportionate to the gravity of" a parking infraction. It is

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especially disproportionate when it is undisputed that the illegally parked truck was not blocking anything and was not causing any problem. *Dkt.* 6, at 44:11-25.

(d) Courts must consider the individual circumstances of the defendant when deciding whether a penalty is excessive.

For hundreds of years, when deciding whether a penalty is constitutionally excessive, English and American courts have considered the individual circumstances of the defendant before the Court. In *Bajakajian,* the Court noted that the Excessive Fines Clause was a reaction to fines that were described as "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land," because Magna Charta required that fines "should not deprive a wrongdoer of his livelihood." *Bajakajian*, 524 U.S. at 335. Since one man's livelihood is not the same as every other's, *Bajakajian* explicitly recognizes that an Excessive Fines inquiry necessarily requires consideration of the offender's individual circumstances. Similarly, in *Browning-Ferris*, Justice O'Connor noted that under Magna Charta, after "the amount of an amercement was initially set by the court: "[a] group of the amerced party's peers would then be assembled to reduce the amercement *in accordance with the party's ability to pay*." *Browning-Ferris,* at 289 (O'Connor, J., concurring in part and dissenting in part) (italics added).

Blackstone wrote that the basic rule laid down by Magna Charta, chapter 14 was "that no man shall have a larger amercement imposed upon him *than his circumstances or personal estate will bear . . . .*" 4 *Blackstone Commentaries* at 372 (Univ. Chicago Press ed. 1979). Justice O'Connor quoted Blackstone with approval on this very point:

> Blackstone remarked that the "*quantum,* in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, ***what is ruin to one man's fortune, may be a matter of indifference to another's***."

Browning-Ferris, 492 U.S. at 300 (Op. of O'Connor, J.) (emphasis added).

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More recently, when analyzing an Excessive Fines Clause challenge to the forfeiture of lottery winnings purchased with a stolen credit card, the Oregon Court of Appeals focused on the individual financial circumstances of the defendant:

> When assessing the severity of a defendant's forfeiture, ***courts consider the amount of the forfeiture and the effect of the forfeiture on the defendant.*** [Citations]. Whether an otherwise proportional fine is excessive can depend on, for example, ***the financial resources available to a defendant***, the other financial obligations of the defendant, ***and the effect of the fine on the defendant's ability to be self-sufficient.***

State v. Goodenow, 251 Or. App. 139, 282 P.3d 8, 17 (2012), citing *Bajakajian*, at 335-36 (emphasis added). *Accord State v. Staub*, 182 La. 1040, 162 So. 766, 768 (La. 1935);[4] *United States v. Levesque*, 546 F.3d 78, 83-84 (1st Cir. 2008).[5]

(e) The forfeiture of a home is particularly likely to be found unconstitutional.

When the effect of a forfeiture on an individual defendant is loss of his home, courts are quick to determine that such a forfeiture violates the Excessive Fines Clause. *See von Hofe v. United States*, 492 F.3d 175, 188-89 (2d Cir. 2007) (a forfeiture that would "amount to eviction" from family home is an excessive fine). Because it is such a "hardship to the defendant," forfeiture of the family home weighs heavily in the scales against the constitutionality of the proposed forfeiture. *United States v. 6380 Little Canyon Rd.,* 59 F.3d 974, 985-86 (9th Cir. 1985). Several courts have specifically held that the Excessive Fines Clause is violated by the forfeiture of the defendant's home because the home has a special protected status under the Constitution. *See, e.g., State v. Real Property at 633 East 640 North,* 2000 UT 17, 994 P.2d 1254, 1257-59 (Utah 2000) (because it is an especially onerous punishment, forfeiture of the defendant's family home, which was used for drug trafficking,

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[4] "What constitutes an excessive fine . . . depends in part . . . upon the ability of the defendant to pay. A fine which in one case might be only slight punishment, because easily paid, might in another case be excessive, because its payment would be ruinous to the convict."

[5] "'[T]he great object' of this provision was that '[i]n no case could the offender be pushed absolutely to the wall; his means of livelihood must be saved to him."

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violated the Excessive Fines Clause). The Court in *United States v. 461 Shelby Cty. Rd.*, 857 F. Supp. 935, 938 (N.D. Ala. 1994) reasoned:

> [The offender's home is] property historically given a high degree of protection. It is much more likely that the talking of the homeplace would constitute an excessive fine than the taking of other property of equal value. Society already has more homeless people than it wants or can take care of, and this court is wary of adding the Brashers to the list of the homeless.[6]

Other state and federal courts have similarly held that a home is entitled to extra protection under the Excessive Fines Clause.[7]

(f) The trial court's insistence upon uniformity in the punishment of parking ordinance violators ignores the Constitutional command that the poor must be treated differently if treating them the same as more affluent offenders subjects them to excessive punishment.

When reading the Municipal Court's decision it is immediately apparent that the Court below placed great weight on the expressed legislative desire of the City Council to make sure that all offenders received exactly the same treatment. The Court's *Order* relies specifically on the following language contained in SMC §11.10.040:

> Going back to the language of the city traffic code: "It is expressly the purpose of this subtitle to provide for and promote the health, safety and welfare of the general public, and not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by the terms of this subtitle." SMC 11.10.040 (emphasis added). In other words, the traffic ordinance is to be administered uniformly.

Dkt. 1, at 12:24 – 13:4.

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[6] The Court went on to comment that it did "not mean to condone what the Brashers did, but the fact that drug trafficking cannot be condoned does not lead inexorably to the taking away of the only residence of two small drug traffickers long after those traffickers have paid their debts to society and have cooperated fully with law enforcement. A taking that would be as 'unfair' as this one would be 'excessive.'" *Id.* at 940.

[7] *See, e.g., United States v. One Single Family Residence*, 13 F.3d 1493, 1498 (11th Cir. 1994) (notwithstanding "the fact that Emilio Delio used his home for a gambling operation" the Court found that the forfeiture of his home was "a disproportionate penalty."); *United States v. Real Property Located at 6625 Zumirez Drive,* 845 F. Supp. 725, 734, 737 (C.D. Cal. 1994) ("Society and the courts place a higher value on real property, in particular the home." "[A] comparison of the gravity of the offense with the harshness of the penalty weighs in favor of [the] . . . position that forfeiture of his home would violate the Excessive Fines Clause."); *United States v. Dodge Caravan,* 387 F.3d 758, 763 (8th Cir. 2004) ("we have criticized an excessive fines analysis that failed to consider factors, such as . . . the fact that the property was a residence").

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The Court apparently interpreted the language of the ordinance as an inflexible command that whenever a person violated the 72-hour parking ordinance, the offending vehicle *must* be impounded. This is a misreading of the law. The Municipal Court did not consider the fact that SMC §11.30.060 – the applicable[8] impound authorization statute – explicitly states that a vehicle "*may* be impounded after notice of such proposed impoundment has been [provided] . . . (A) when such vehicle is parked and/or used in violation of any law, ordinance, or regulation . . . ." It is axiomatic that the word "may" is permissive and not compulsory. Thus, the Municipal Court erred when it interpreted SMC 11.10.040 as prohibiting it from considering the harsh punitive effect of impoundment and the imposition of hundreds of dollars in fees as excessive.

Moreover, even if that were the correct reading of the ordinance, the Eighth Amendment Excessive Fines Clause would trump it. *Even if it were true* that the City Council wanted every violation of the 72-hour parking law to result in an impound and in the imposition of the cost of storage and towing on the parking violator, the Excessive Fines Clause compels every court to ignore the City Council's command and to invalidate excessive fines and forfeitures whenever they are imposed. The Municipal Court's decision simply ignores settled constitutional law. Literary characters may espouse the principle that "the law in its majestic equality, forbids the rich as well as the poor to sleep under bridges."[9] But the Excessive Fines Clause prohibits our government from treating the rich and the poor in this simplistically "equal" way.

The Excessive Fines Clause requires every court to consider whether the imposition of a fine or a forfeiture would be unconstitutional *as applied* to the offender before the Court. The Court must consider whether the impoundment of the vehicle that a homeless person relies upon for shelter is unconstitutional *as applied* to that person. In this case Long was

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[8] The city's other impound authorization statute, which does not apply in this case, *also* uses the word "may."

[9] *See* Anatole France, *The Red Lily* (1894).

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using his truck both as his only shelter and as his only storage place for the tools of his trade. Long has never asked any court to declare the 72-hour parking law or the applicable impoundment ordinance as unconstitutional *on its face*. He acknowledges that in most instances, the impoundment of a vehicle will not constitute an unconstitutionally excessive forfeiture. But in the case of many homeless people whose only shelter is their vehicle – such as Long – *the application* of the vehicle impoundment statute *against them* is unconstitutional. The Excessive Fines Clause grants special protection to those people who would be reduced to penury, financially ruined, or unable to survive if their vehicle/homes were taken away from them – as applied to that class of people the impounding of their homes is unconstitutional.[10] Even if the Municipal Court was correct in its assessment that the Seattle City Council wanted every illegally parked vehicle to be impounded, the Excessive Fines Clause does not permit the mandatory impound of every such vehicle.[11]

(g) Courts regularly hold that forfeiture of a home is disproportionate to a criminal drug offense.

Since *Bajakajian,* most of the decisions addressing Excessive Fines Clause arguments have arisen in the context of crimes involving the possession and/or sale of illegal drugs. Several cases have dealt with the forfeiture of the defendant's home, but all of these cases have concerned the more conventional type of home: a house. In many of these cases the courts have decided that the forfeiture of a person's home – even for a felony drug offense – was, or might be, constitutionally excessive.

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[10] Similarly, art. 19, §1 guarantees special protection to debtors against the execution of judgments against them by the seizure of their homes.

[11] Similarly, the Eighth Amendment does not permit the mandatory imposition of a death sentence on all persons convicted of murder. Such mandatory sentences were struck down those statutes because they violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (statute's "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant" rendered it unconstitutional). The Excessive Fines Clause is found within the same constitutional amendment. To paraphrase *Woodson*, an impound ordinance that treats all persons who violate the 72-hour parking law "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of" homelessness, violates the Eighth Amendment Excessive Fines Clause. Such uniformity is unconstitutional.

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For example, in *United States v. 6380 Little Canyon Road,* 59 F.3d 974 (9th Cir. 1995), the Court considered the forfeiture of 29 acres of property as a punishment for the offense of possession of marijuana for sale. The property owner, Robert Price, was growing marijuana inside a barn "which served as Price's residence." *Id.* at 978. To determine whether "the harshness" of the proposed forfeiture would be constitutionally excessive, the Court considered not only the market value of the house, but also "the intangible, subjective value of the property, e.g., *whether it is the family home*," and "*the hardship to the defendant*, including the effect of the forfeiture on defendant's family or financial condition." *Id.* at 985 (italics added). The Court weighed these severity factors against the home owner's culpability and "the harm caused by [his] illegal activity," including the amount of drugs sold, the duration of the illegal activity, and the effect on the community. *Id.* at 986. Recognizing that Price *lived* in the barn, the Ninth Circuit remanded the case to the district court to consider whether the size of the forfeiture had to be reduced in order to stay within the bounds of the Excessive Fines Clause. *Id.* at 987.

In *United States v. 461 Shelby County Road*, 857 F. Supp. 935 (N.D. Ala. 1994), the Court held that it would violate the Excessive Fines Clause to forfeit the home of Perry and Patricia Brasher, who had both been convicted of distributing illegal drugs. The Court held that the proposed forfeiture of a *home* is entitled to heightened judicial scrutiny:

> Simply put, courts cannot order a culprit to pay more money in fines or restitution than he can reasonably be expected to pay, no matter how heinous his crime. This principle rarely comes into play in forfeiture cases because the mere fact that the wrongdoer owns the property to be forfeited proves his ability to turn it over, no matter what it is worth. ***But, this principle does dominate the excessiveness inquiry if the property to be forfeited is the offender's homestead, property historically given a high degree of protection. It is much more likely that the taking of the homeplace would constitute an excessive fine than the taking of other property of equal value. Society already has more homeless people than it wants or can take care of, and this court is wary of adding the Brashers to the list of the homeless. . . .***

Id. at 938 (emphasis added). Despite the fact that the Brashers were drug dealers, the court

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found that forfeiture of the Brashers' home would be unconstitutional:

> The court does not mean to condone what the Brashers did, but the fact that drug trafficking cannot be condoned does not lead inexorably to the taking away of the only residence of two small drug traffickers long after those traffickers have paid their debts to society and have cooperated fully with law enforcement. A taking that would be as "unfair" as this one would be, would be "excessive."
>
> In conclusion, this court will not go so far as to hope that its conscience is not too easily shocked. Nobody has ever accused this court of being a bleeding heart, but its conscience nevertheless would be shocked if the Brashers' residence were forfeited to the United States in this case.

Id. at 940.

Similarly, in *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994), the Court refused to permit the forfeiture of Gene Wall's home notwithstanding the fact that his son sold cocaine out of it. Like the court in the *Shelby County Road* case, the Court found it especially significant that the property sought to be forfeited was the defendant's residence:

> In evaluating the harshness of the penalty imposed, the court must not only consider the monetary value of the property forfeited, but also the intangible value of the particular type of property involved. ***Society and the courts place a higher value on real property, in particular the home,*** than on personal property. In a recent forfeiture decision, the Supreme Court affirmed the essential principle that "individual freedom finds tangible expression in property rights. ***At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it.***"

Zumirez Drive, 845 F. Supp. at 734, citing *Payton v. New York*, 445 U.S. 573, 601 (1980) ("[R]espect for the sanctity of the home ... has been embedded in our traditions since the origins of the Republic."). Noting that forfeiture of Wall's home "does not rid society of the instrumentality of the crime or eliminate the resources of any criminal enterprise," but instead "evicts Wall and his son from their home for the purported purpose of deterring them from future unlawful activities," the Court concluded that "forfeiture of the Walls' family home

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does little to serve that purpose." *Id.* at 738.[12]

Appellant Long respectfully submits that if it is unconstitutional to forfeit a person's home as punishment for a felony drug offense, then *a fortiori* it is unconstitutional to forfeit a home as punishment for a parking infraction.

(h) The loss of one's home for 21 days and the imposition of an additional fine of $547 as the price one must pay in order to avoid the permanent loss of his home, is an Excessive Fine that violates the Eighth Amendment.

(i) The severity of "the offense" – an infraction – is miniscule. As the Municipal Court acknowledged, the parking violation caused virtually no harm whatsoever.

Steven Long's "offense" is so minor that it is not even a criminal offense at all; it's a civil infraction. Bajakajian's crime "was solely a reporting offense. It was permissible to transport the currency out of the country so long as he reported it." 524 U.S. at 337. In the present case, Long's "infraction" was to park for too long a period of time in one spot. To paraphrase *Bajakajian*, "It was permissible to [park where he parked] so long as he [did not park there for more than 72 hours].[13] In *Bajakajian* the Court held that "The harm that respondent caused was minimal. Failure to report his currency affected only one party, the Government, and in a relatively minor way." *Id.* at 339. In Long's case, so far as the record discloses his parking infraction affected no one at all. There is no evidence that by parking his vehicle in the same spot for more than 72 hours that Long made it impossible for anyone else to park there. The spot where he parked was *not* a residential neighborhood, and he did not take up a spot that one would expect to be used by customers of any business. So the "harm" caused by Long's infraction was not merely "minimal," it was utterly nonexistent.

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[12] Other courts have reached the same conclusion when government has sought to forfeit a defendant's residence. The Utah Supreme Court reached this conclusion in *State v. Real Property at 633 East 640 North*, 2000 UT 17, 994 P.2d 1254, 1254-59 (Utah 2000) (defendant guilty of three felonies and a misdemeanor for selling drugs out of her house, nevertheless the forfeiture of her house would violate Excessive Fines Clause). The Eleventh Circuit held that forfeiture of a home used for operation of an illegal gambling operation was constitutionally excessive. *United States v. One Single Family Residence*, 13 F.3d 1493, 1498 (11th Cir. 1994).

[13] A violation of SMC §11.72.440 is not a *criminal* offense at all; it is merely a civil infraction.

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(ii) The penalties imposed upon Long are grossly disproportionate to the civil infraction he committed.

Whether considered separately or cumulatively, the punishments imposed upon Long were grossly disproportionate to his infraction. The infraction table contained in SMC §11.31.121 lists the standard penalty for violation of SMC §11.72.440(B) as a $44 fine. In the absence of a vehicle impound, a $44 fine would be the only penalty imposed for commission of this infraction. If the PEO had simply issued Long a citation but had not impounded his truck, Long would not be contending that the $44 fine was constitutionally excessive.

But Long's vehicle was impounded and towed and the total penalty imposed upon him was much higher than the ordinary $44 fine. First, Long lost his shelter – his home – for 21 days. While many people undoubtedly have the financial resources to pay for shelter for a three-week period, Long did not. He could not afford to rent a motel room for three weeks. As the record shows, he normally earns between $300 and $600 a month. *Dkt.* 6, at 94, ¶24. But because he was unable to access his tools (which were in his truck inside the Lincoln Towing impound lot), he could not earn as much as usual because he could only do unskilled labor jobs that did not require the skills of a carpenter, painter or plumber. *Dkt.* 6, at 94, ¶27. Finally, although the Magistrate did not require Long to pay the $44 fine for the parking infraction, he did require him to pay $547 – a sum more than 12 times the amount of the standard fine – to reimburse the City for the cost of towing and storing Long's truck. Thus the City "extract[ed] payments, [both] in cash [and] in kind." *Austin,* 509 U.S. at 609-10.

In sum, while no Court can give Long back the 21 days of shelterless living that he had to endure between October 12 and November 2, this Court can rule that Long cannot be required to pay the towing and storage costs, and it can order the City to refund the payments Long has already made pursuant to the payment installment plan.

(iii)The hardship to Long was extreme.

It is hard to imagine a harsher punishment than that which was inflicted on Steven

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Long. Struggling to survive on an extremely low income, Long works whenever he can. He performs clean-up janitorial services at Century Link Field after pro sports events. On October 12, 2016, after he finished working his janitorial job at the conclusion of a Sounders game, he walked back to the vacant lot at Poplar and Norman Streets where his truck had been parked for the previous three months. When he arrived there around midnight he discovered that his home was gone. *Dkt.* 6, at 92, ¶13. In the middle of an intense wind and rainstorm, he attempted to build himself a makeshift shelter with a tarp. *Id.*, ¶¶14-15. He eventually gave up and was allowed to spend the night in a chair at a nearby homeless shelter. *Id.*, ¶¶15-16. He missed work the next day and came down with the flu. *Id.*, ¶16. Thereafter he was forced to sleep outside on the ground. *Dkt.* 6, at 94, ¶28.

For the next 21 days, the City deprived Long of his truck and he could only retrieve clothing stored in it on one occasion. *Dkt.* 6, at 92-93, ¶18. He had to buy various items of clothing, bedding, and other necessities in order to survive until he could get his truck back. *Dkt.* 6, at 94, ¶26. And even after he was able to repossess his truck, he was obliged to pay $50 a month (which is a very large portion of his average monthly earnings) in order to fulfill the installment payment agreement.

By comparison with defendants who committed drug crimes involving felony offenses, Steven Long's parking infraction is a tiny, insignificant "offense" against the community. The penalty imposed upon him, for not moving his parked truck to a different location after 72 hours, was grossly disproportionate.

The absurdity of impounding his home as a penalty for a parking violation is even more outrageous than the forfeiture condemned by the district court in the *Shelby County Road* case. There the Court noted the absurdity of increasing the ranks of the homeless by taking away the house in which a person resided. The problem of homelessness in Seattle is no doubt considerably worse than the problem was in 1994 when the *Shelby County Road* case was decided. Recently collected data about homelessness in Seattle indicates that 2,942

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people sleep out on the streets every night.[14]

Long *was already homeless* in the sense that he had no house or apartment to shelter in. But at least he had his truck. He was *not* imposing a financial burden on the City. He was *working* and supporting himself, if just barely. The tools he used to earn his living were secure from theft because they were kept inside his truck which was securely locked. But then the City of Seattle undertook to deprive him of the only shelter that he had, and made him completely unsheltered.

As far back as Magna Charta, Anglo-American law has recognized that punishments must not be so excessive that they reduce people to extreme poverty. That is why amercements could not be so severe as to deprive people of the tools of their trade, or of their "wainage" (their carts with which they transported their tools and their few worldly possessions). Steven Long respectfully submits that the City's impoundment of his truck inflicted precisely the type of excessive injury that has been prohibited for more than 800 years, and that it violated the Excessive Fines Clause of the Eighth Amendment.

(i) The fact that a person "chooses" to commit a violation of law does not deprive them of the protection of the Excessive Fines Clause. If it did, no offender could *ever* establish a violation of the Clause.

In its opinion, the Municipal Court stressed the fact that Long deliberately violated the 72-hour parking law and attempted to avoid the impound by tearing the PEO's warning sticker off the truck. While the Court below said Long's conduct was not "reprehensible," she also said that his "behavior in ignoring the law does increase his culpability and changes the proportionality of the penalty. He ignored the opportunity he had to avoid getting a ticket in the first place by making no attempt to move the vehicle – whether it was by driving it or getting help pushing it to another location. He then purposefully removed the violation

[14] Seattle/King County Coalition on Homelessness, 2016 Annual Report (2016), http://www.homelessinfo.org/what_we_do/one_night_count/2016_results.php

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sticker and then stayed close to the truck with the hope that the matter would go away." *Dkt.* 1, at 14:23-15:3. The Court noted that if he had not violated the law, he would not have had to pay any towing or storage fees. *Id.*

As a matter of causation, the Municipal Court is entirely correct. Had he not chosen to violate the law, his home would not have been impounded and he would not have faced any penalties at all. And his conduct was clearly deliberate. He did not accidentally tear off the parking notice, he tore it off deliberately. But the Municipal Court's focus on the fact that Long acted intentionally misses the mark. The intent to violate the law does not exempt an offender from the protection of the Excessive Fines Clause. As the above cases illustrate, many drug dealers have intentionally used their homes as places to grow, store, and to sell illegal drugs from, and yet the courts were *still compelled* to undertake the Excessive Fines Clause analysis, and to prohibit the forfeiture of their homes as constitutionally excessive.

The Municipal Court's logic, if accepted by the Courts, would eviscerate the Excessive Fines Clause. Since most crimes and offenses are committed on purpose, the Clause would fail to protect the overwhelming majority of offenders. The Excessive Fines Clause is not restricted in its application to offenders who negligently or accidentally violate our laws. Indeed, it is precisely because the poor have so few resources that they must often resort to illegal behavior. The hungry man who steals a loaf of a bread deliberately chooses to break the law, and could have avoided any penalty at all had he refrained from committing the crime. Nevertheless, he is protected from excessive fines and forfeitures by the Eighth Amendment. So, too, is Steven Long, although in his desperation he tore the parking notice off his truck and deliberately tried to continue to leave his home parked in the same spot for more than 72 hours.

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2. The impound of Long's home violated article 19, §1 and RCW 6.13.070 which protect a person's home against forced sale or attachment.

(a) Long's truck is a Homestead entitled to the constitutionally mandated protections of the Homestead Act.

Homestead exemptions are "enacted as a matter of public policy in the interest of humanity and thus are favored in the law and accorded a liberal construction." *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981). The Legislature enacted RCW 6.13 to comply with Wash. Const., art. 19, §1, which states that "[t]he legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." "The legislature enacted the homestead statutes to promote the public policy of insuring shelter for each family." *Viewcrest Condo. v. Robertson*, 197 Wn. App. 334, 338-39, 387 P.3d 1147 (2016). *Accord Clark v. Davis*, 37 Wn.2d 850, 852, 226 P.2d 904 91951).

The court below correctly concluded that Mr. Long's truck meets the definition of "homestead" under the statutory language and legislative intent of the Homestead Act. *Dkt.* 1, at 12:5-6 ("...the Court agrees that Mr. Long has a homestead in his truck under the statutory language and the legislative intent...").

A homestead under RCW 6.13.010 "consists of real or personal property that the owner uses as a residence," and homesteads are automatically protected "from and after the time the real or personal property is occupied as a principal residence by the owner." RCW 6.13.010(1); RCW 6.13.040(1). The Washington State legislature expressly added "personal property" to the definition of homestead, with the intent that nontraditional residences, such as vehicles and boats, would be protected. The legislative history from 1993 states:

> Because some Washington citizens reside on their boats or in their cars or vans, it has been recommended that the homestead exemption's scope be expanded to include any real or personal property that the owner uses as a residence.

Final Bill Report, SSB 5068 (1993); Senate Bill Report, SB 5038 (February 4, 1993); Senate Bill Report, SSB 5038 (March 13, 1993); *Dkt.* 7, at 5-18. Under this statutory definition and

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legislative history, Mr. Long's truck is undoubtedly a homestead because it is personal property used as a residence.

(b) The applicable statutes and ordinances give the tow operator a lien on impounded vehicles, forbid release if storage and towing fees are not paid, and authorize sale at public auction if they are not paid within 15 days.

The moment a Seattle parking enforcement officer authorized Lincoln Towing to impound Long's truck, Lincoln acquired a statutory lien on the truck which secured its storage and towing fees. That statute provides in part:

> A registered tow truck operator who has a valid and signed impoundment authorization ***has a lien upon the impounded vehicle for services provided in the towing and storage of the vehicle***, unless the impoundment is determined to be invalid.

RCW 46.55.140(1) (emphasis added). In this case, the Magistrate judge determined that the impound was valid (because Long had violated the 72-hour parking ordinance). Thus, Lincoln Towing had both *possession* of Long's truck, *and a lien against* it for the amount of the towing and storage fees that the Magistrate ordered. But Long's ability to retrieve his home from impound was conditioned upon payment of the costs of the impound.

RCW 46.55.120(3)(c) directs that the Magistrate "shall determine whether the impoundment was proper, whether the towing or storage fees charged were in compliance with the posted rates, and who is responsible for payment of the fees." Although the Magistrate could authorize installment payments over time, the statute prohibits the Magistrate from adjusting the amount of the fees: "The court may not adjust fees or charges that are in compliance with the posted or contracted rates." *Id.* Magistrate Eng followed the statute, determined that Long was responsible for paying the fees, and authorized him to pay the total amount in installment payments.

The City ordinance governing "Redemption of impounded vehicles" requires that all accumulated fees must be paid *before* an impounded vehicle can be redeemed. SMC §11.30.120(B) provides:

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> Any person so redeeming a vehicle impounded by the City ***shall pay the towing contractor for costs of impoundment*** (removal, towing and storage) and administrative fee ***prior to redeeming such vehicle.***

(Emphasis added).

Similarly, SMC §11.30.160(B) provides that after an impoundment is determined to have been proper by a judicial officer, the vehicle shall not be released until all such fees are paid. This law also gives the Magistrate the power to order a time payment plan, but if such a plan is authorized the City pays the tow operator the accumulated costs and the vehicle owner acquires a debt to the City equal to the amount that the City paid:

> If the impoundment is found to be proper, the Municipal Court judicial officer shall enter an order so stating. ***In the event that the costs of impoundment (removal, towing, and storage) and administrative fee have not been paid*** or any other applicable requirements of Section 11.30.120B have not been satisfied or any period of impoundment under Section 11.30.105 has not expired, ***the Municipal Court judicial officer's order shall also provide that the impounded vehicle shall be released only after*** payment to the City of any *fines* imposed on the underlying traffic or parking infraction and satisfaction of any other applicable requirements of Section 11.30.120B and ***payment of the costs of impoundment and administrative fee to the towing company*** and after expiration of any period of impoundment under Section 11.30.105. In the event that the Municipal Court judicial officer grants time payments for the costs of impoundment and administrative fee, the City shall be responsible for paying the costs of impoundment to the towing company. The Municipal Court judicial officer shall grant such time payments only in cases of extreme financial need, and where there is an effective guarantee of payment.

(Emphasis added).

When Long went to the Lincoln Towing impound lot and redeemed his truck, he saw "11/5" written on the back window and he was told this meant his truck was scheduled to be sold at auction on November 5. *Dkt.* 6, AT 93, ¶20. By statute, if Long had not redeemed his truck before November 5, Lincoln Towing was authorized by law to sell it, and to apply the money realized from the sale to payment of the storage and towing fees.

RCW 46.55.130(1) gives the legal owner of an impounded vehicle fifteen days to redeem it, and that fifteen day period starts from the time the owner receives notice that the

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towing company has custody of his vehicle. The statute provides that after that period of time has elapsed, if "the vehicle remains unclaimed and has not been listed as a stolen vehicle . . . the registered tow truck operator having custody of the vehicle shall conduct a sale of the vehicle at public auction . . . ." Long received his notice on October 18 (*Dkt.* 6, at 92-93, ¶18 & Ex.1), so the fifteen day period actually expired at the end of the day on November 2. Thus, Lincoln Towing had a statutory right to sell Long's truck at public auction on November 5 (and could even have held the auction earlier and sold it on November 3).

During that fifteen-day period, storage charges continue to accrue and the owner of the vehicle is ultimately responsible for paying them. RCW 46.55.130(4)(a) provides in part:

> ***The accumulation of storage charges applied to the lien*** at auction under RCW 46.55.140 ***may not exceed fifteen additional days*** from the date of receipt of the information by the operator from the department as provided by RCW 46.55.110(3) ***plus the storage charges accumulated prior to the receipt of the information***. However, ***vehicles redeemed*** pursuant to RCW 46.55.120 prior to their sale at auction ***are subject to payment of all accumulated storage charges from the time of impoundment up to the time of redemption***.

(Emphasis added). The notice given to Long on October 18 explicitly warned Long of these charges, and he acknowledged that he understood this:

> If I do not redeem the vehicle before the hearing, the vehicle will not be released until the hearing process is completed and storage charges will continue to accrue. I will be responsible for paying such charges if the court finds the impound was valid. I further understand that I must pick up the vehicle on the day of the hearing; otherwise additional storage charges will be added at my expense.

Dkt. 6, at 92-93, ¶18 & Ex.1.

Finally, RCW 46.55.130(h) explicitly recognizes the right of tow operators to take money realized from sales at public auctions and to pay off all storage and towing fees that are owed to them by vehicle owners like Long. Any remaining funds realized from the sale are to be paid to the Washington Department of Motor Vehicles:

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> All surplus moneys derived from the auction ***after satisfaction of the tow truck operator's lien*** shall be remitted within thirty days to the department for deposit in the state motor vehicle fund.

RCW 46.55.130(h) (emphasis added).

> **(c) The Homestead Act protects a debtor against both a forced sale of his residence, and against an attachment of his residence as security for a debt. Given the liberal construction of the Act required by law, the Act protected Long from the *threat* of a forced sale, as well as from an actual forced sale.**

RCW 6.13.070(1) states in pertinent part:

> Except as provided in RCW 6.13.080, the homestead is exempt ***from attachment and from*** execution or ***forced sale for the debts of the owner*** up to the amount specified in RCW 6.13.030.

(Emphasis added). In this case, the City violated the Homestead Act *both* by threatening to carry out a forced sale, *and* by attaching his home as security for an unpaid debt.

When Long arrived at the tow yard to retrieve his home, his vehicle was already scheduled for auction. *Dkt.* 6, at 93, ¶20. After impoundment, the only way for Long to regain possession of his home was to agree to pay off all the impoundment fees by signing a promissory note payable to the Court in the amount of $547.12 plus interest. *Dkt.* 6, at 93, ¶19; *Dkt.* 8, at 62:8-13; *Dkt.* 8, at 95, ¶6; *Dkt.* 8, at 97. If Long had not signed this note and paid his first installment payment, his truck would have been sold a mere three days later and the proceeds would have been used to pay off his debt for the costs of impoundment.

The City argued below that since Long's vehicle was never sold at any public auction, there never was any "forced sale" of his homestead. Thus, the City asserts that the Homestead Act was never violated. But this argument ignores the explicit threat that was made that Long's truck *would* be sold at public auction if he did not "agree" to pay the storage and towing fees that had accumulated.

The City's position is that there is nothing unlawful against forcing a citizen to pay a fee as the price of ensuring that his constitutional rights are respected. Since Long's truck was his homestead, legally it could not be forcibly sold to satisfy his impoundment cost debt.

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The threat to sell his truck at public auction was a threat to do an illegal act. It was a threat to violate RCW 6.13.070 and a threat to violate Wash. Const., art. 19, §1. Despite the fact that a forced sale would have been blatantly unlawful, Long was told that *if* he promised to pay his debt in time payments *then* the City would *not* commit this unlawful act.

Such a threat is not only unlawful, it is a criminal offense called extortion. "'Extortion' means knowingly to obtain or attempt to obtain by threat property or services of the owner . . . ." RCW 9A.56.110. The statutory definition of "threat" includes "To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding." RCW 9A.04.110(28)(h). By permitting the towing company to conduct a forced sale if Long did not pay the total amount of accrued fees, the City was "attempting to obtain . . . property" belonging to Long (money) by means of a threat to "take wrongful action" against him by selling off his home in order to raise funds to pay that debt. Thus, the installment payment plan acted as a *successful* threat that forced sale would take place unless Long agreed to pay his debt.

Given the settled principle that the Homestead Act is to be accorded "liberal construction" (*Macumber*, 96 Wn.2d at 570; *In re Estate of Poli*, 27 Wn.2d 670, 674, 179 P.2d 704, 706 (1947)), this Court should conclude that the threat of a forced sale of Long's home violated the Homestead Act.

(d) The impoundment and retention of Long's home as security for his debt for unpaid storage and towing fees constituted an "attachment" of his residence in violation of the Homestead Act

Even if the Homestead Act was not violated by the threat of a forced sale, it was violated by an unlawful attachment. An "attachment" is "[t]he seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment." *Black's Law Dictionary*, (10th ed. 2014). *Accord Edgerly v. Emerson*, 23 N.H. 555 (1851) ("An attachment is a collateral security for the payment of the debt"); *Jesse v. Birchell*, 198 Or. 393, 257 P.2d 255 (1953) ("attachment is a provisional remedy granted to the plaintiff [that] enables him to have

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the property of the defendant attached as security"); *Myers v. Mott*, 29 Cal. 359, (1866) ("An attachment is a process under which the debtor's property may be seized and held as security for the satisfaction of any judgment"). It is often described as a "lien." *See, e.g., Stephenson Finance Co. v. Burgess*, 225 S.C. 347, 352, 82 S.E. 512 (1954) ("the purpose of an attachment to obtain security of a debt by securing a lien on property") (statute in question authorized the attachment of any car involved in an accident that caused injury). But as the Court recognized in *City of Algona v. Sharp*, 30 Wn. App. 837, 843 638 P.2d 627 (1982), a lien cannot be superior to a homestead.

In this case, the security interest in Long's car, which the Legislature created, is called a "lien." RCW 46.55.140. This lien is created the moment that a towing company impounds a vehicle. It provides security for the debt of unpaid storage and towing fees. The owner of the impounded car incurs this debt whenever a car is properly impounded. In Seattle, when the Court allows payment of these fees over time, the City of Seattle pays these fees to the towing company and the owner of the vehicle has a debt to the City. That is what happened in this case.

Steven Long's home was seized when it was impounded at the direction of Seattle Parking Enforcement Officer, towed away by Lincoln Towing, and stored in Lincoln's impound lot. It was held as security for the debt that Long incurred. Thus, Long's home was attached. But the attachment of a homestead – a person's residence – is prohibited by RCW 6.13.070 and by art. 19, §1 of the Washington Constitution.[15]

Since Long's truck was his residence, this Court should conclude that his home was attached in violation of the Homestead Act.

[15] Since the overwhelming majority of people do not live in their vehicles, the lien created by the statutes and ordinances in this case will rarely be unconstitutional. But in the case of a person whose vehicle is his residence, these statutes are simply unenforceable.

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3. The City's officers violated Long's substantive due process rights by exposing him to a known and obvious danger, with deliberate indifference to the danger they were creating. They deliberately deprived Long of his only shelter from cold and wet weather, and as a result of this exposure Long became sick.

(a) Substantive due process standard.

The substantive component of the Due Process Clause protects a person's liberty interest in his own bodily integrity. *See Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977); *Wood v. Ostrander*, 879 F.2d 583, 589 (9th Cir. 1989). Violations of substantive due process "comprise those acts by the state that are prohibited 'regardless of the fairness of the procedure used to implement them.'" *Wood*, 879 F.2d at 589 (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

As a general rule, liability for a violation of this right only applies to direct harm caused by a government official's individual actions. *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012). The relevant inquiry for determining liability is whether the official's conduct "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Collins v. City of Harker Heights*, 503 U.S 115, 128 (1992). But, this general rule has two exceptions. First, the "special-relationship" exception imposes a duty on the state to care for an individual's safety and well-being in the context of a custodial relationship, such as someone involuntarily committed or in foster care. *Henry A.*, 678 F.3d at 998 (citing *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th Cir. 2011)). Second, the "state-created danger" exception imposes liability for external harm suffered by an individual when an official has affirmatively placed that individual in harm's way "with deliberate indifference to a known and obvious danger." *Id.*

The "state-created danger" exception forms the basis of Long's substantive due process argument. To determine whether a violation occurred, the court must consider whether (1) a City official took an affirmative action that placed Long in a position of danger that he would not have otherwise faced; (2) this danger was known and obvious to the official; and (3) the official acted with deliberate indifference to such danger. *Id.* at 1002.

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Because the lower court failed to engage in the proper inquiry and Mr. Long has satisfied all of the elements, reversal is warranted.

(b) The City undertook action which exposed Long to harm.

To determine whether the "affirmative action" requirement has been satisfied, a court must not consider the agency of the impacted person or what other options may have been available to him, but rather must examine whether the official "left the person in a situation that was more dangerous than the one in which they found him." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006) (quoting *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000)). The Ninth Circuit has declined to require that the official do something more than expose the individual to a danger that already existed because such a test would render the exception meaningless. *See Henry A.*, 678 F.3d at 1002.

In the state-created danger context, numerous courts have recognized the danger of depriving a person of a vehicle. In *Wood*, a police officer stopped the car in which the plaintiff was a passenger, arrested the driver, and impounded the vehicle. 879 F.2d at 586. Though the stop occurred in a high-crime area, the police officer required the plaintiff to get out of the car and abandoned her. *Id.* Without her vehicle, the abandoned plaintiff was exposed to the dangers of the high-crime neighborhood and consequently she was raped. *Id.* For a "state-created danger" claim, these facts were enough to overcome a qualified immunity defense and reverse the lower court. *Id.* at 589. In *Munger*, the Court found that when police ejected an intoxicated man from a bar late on a freezing night knowing that he could not legally get into his vehicle and that he might walk home underdressed, the affirmative action prong had been satisfied. 227 F.3d at 1087.

There are important parallels between the present case and *Wood* and *Munger*. Like in *Wood*, the City impounded Long's source of safety and shelter. Like in *Munger*, the City knew that without access to his vehicle, Long would be exposed to inclement weather. But, unlike in *Wood* and *Munger*, Long needed his vehicle not just for safe transit—it was also his

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home. For his part, Long provided uncontested evidence that he suffered physical harm (illness), emotional harm (distress), and economic harm (loss of work) as a result of the City's affirmative action. Accordingly, Long has satisfied the affirmative action prong.

(c) There was a known and obvious danger to Long.

To determine whether a danger was known and obvious, courts generally apply a common sense approach. In *Wood*, for example, after considering official reports of the high violent crime rate for the area, the Court found it to be "common sense" that a woman left in such an area alone, at night, and without a vehicle would be placed in a position of danger. 879 F.2d at 590. In *Munger*, the Court reasoned that police officers knew that the plaintiff was wearing only a t-shirt and jeans, that he was intoxicated, and that he was not permitted to reenter the bar or use his vehicle. 227 F.3d at 1087. Here, it is common sense that the City, which declared a state of emergency around homelessness citing the dangers of living unsheltered in a county where 91 presumed-to-be-homeless individuals died on the streets, would know the obvious dangers posed by depriving Long of his truck on a cold and stormy October day. *See Dkt.* 6, at 71-84 (Mayoral Proclamation of Civil Emergency); *Dkt.* 6, at 86-88 (King County death records report). This is particularly true given the City's knowledge that Long's vehicle was his home and contained most of his possessions. Accordingly, Long has established that the dangers of inclement weather were known and obvious to the City.

(d) The City acted with deliberate indifference.

Deliberate indifference requires proof that the municipal actor disregarded a known or obvious consequence of his actions. *Bryan County v. Brown*, 520 U.S. 397, 410 (1997). This takes more than "mere negligence or lack of due care," *Wood,* 879 F.2d at 587–89, but it does not require evidence of specific intent or that the deliberate indifference would be conscience shocking. *Kennedy*, 439 F.3d at 1064-65 (citing *L.W. v. Grubbs*, 92 F.3d 894, 897-900 (9th Cir. 1996)). In practice, if a state actor's conduct is seen as "callous" or "capricious" given the circumstances, courts have found the deliberate indifference prong satisfied. *See Wood,*

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879 F.2d at 589 (reasoning that the standard was met because the official "allegedly acted in callous disregard for Wood's physical security."); *Kennedy*, 439 F.3d at 1065 (concluding that the police officer had acted "deliberately and indifferently to the danger he was creating" and that such "capricious behavior" was sufficient evidence of deliberate indifference.)

Here the City knew that Long used his vehicle as shelter. The consequences of impounding Long's only source of shelter were both known and obvious. As its declaration of a state of emergency around homelessness acknowledges, and the King County medical examiner's data further demonstrates, the City knows that reducing someone to sleeping under a tarp poses serious threats to health. Long presented undisputed and uncontroverted evidence that he experienced increased illness as a result of the impoundment, which caused him to miss work, on top of emotional distress. Impounding someone's only source of safety and shelter under the circumstances of this case is both capricious and callous. Long had no other options and the City, certainly, did not provide him any alternatives to living unsheltered. Regardless, the City impounded his vehicle and left him in the very same space to live under a tarp. Such utter disregard for Long and his difficult circumstances constitutes deliberate indifference.

(e) Uniformity of procedure is not relevant to Long's substantive due process claim. His claim is properly analyzed under the deliberate indifference standard.

The Municipal Court found that the City did not violate Long's substantive due process right because (1) the impound was "the uniform application of the City's traffic code," (2) Long "has not provided any evidence that his exposure to the wind and rain was the cause of" his illness, and (3) none of the City's actions can be characterized as arbitrary or conscience shocking. *Dkt.* 1, at 10. In reaching this conclusion, the lower court improperly considered the city's interest in "uniformity" and failed to apply the proper legal standards.

First, as mentioned above, the uniformity and procedural propriety of the City's actions are irrelevant to a substantive due process argument. *Wood*, 879 F.2d at 589

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(reasoning that substantive due process applies to prohibited acts regardless of procedural fairness). Second, the arbitrary and conscience shocking standard only applies to substantive due process arguments made under the general rule, not the relevant deliberate indifference standard controlling the state-created danger doctrine. *Kennedy*, 439 F.3d at 1064-65 (citation omitted). Finally, Long presented uncontroverted evidence that after being exposed to the elements he fell ill and thereafter experienced increased illness. This was both a foreseeable and proximate cause of the City's substantive due process violation. Long also presented evidence that he suffered emotional harm, which is also sufficient to establish a substantive due process violation. *See White v. Rochford*, 529 F.2d 381, 385 (7th Cir. 1979). In sum, the City knew of the danger that Long would face, it took an affirmative action with deliberate indifference to the consequences of that action, and Long suffered injury as a result. Thus, the City created danger to Long and violated his substantive due process rights.

G. CONCLUSION

By impounding his home, exposing him to the wind and rain, depriving him of shelter for 21 days, and forcing him to agree to pay large sums of money (for him) to regain possession of his home, the City of Seattle violated Steven Long's constitutional and statutory rights in three separate ways:

1. The City violated the Excessive Fines Clause of the Eighth Amendment by imposing a forfeiture and significant fines for a minor infraction on a poor person who had extremely limited financial resources.

2. The City violated the Homestead Act and Wash. Const., art. 19, §1 by attaching his residence, threatening to sell it, and using it as security for a debt.

3. The City violated his substantive due process rights by exposing him to the danger of inclement weather.

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Appellant Long asks this Court to reverse the decision entered below, to vacate the judgment entered against Long, to eliminate all financial obligations imposed upon him, and to enter summary judgment in favor of Long.

DATED this 29th day of September, 2017.

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CERTIFICATE OF SERVICE

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

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