

# The Criminalization of Vehicle Residency and the Case for Judicial Intervention via the Washington State Homestead Act

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## INTRODUCTION

The most recent King County One Night Count reported a staggering 11,643 unhoused individuals living on the streets of King County in early 2017,<sup>1</sup> a 9% year-over-year increase from 2016.<sup>2</sup> This rise occurred despite King County Executive Dow Constantine and Seattle Mayor Ed Murray’s declaration of local homelessness as a “state of emergency” in 2015.<sup>3</sup> This critical declaration gave the municipalities access to emergency funding to begin addressing the underlying issues contributing to the dramatic rise in the unhoused population.<sup>4</sup> A prominent segment of the unhoused population is a group sometimes described as “hiding in plain sight”: vehicle residents.<sup>5</sup> While technically counted as unsheltered, vehicle

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1. ALL HOME, HOMELESSNESS IN KING COUNTY (2017) [hereinafter 2017 ONE NIGHT COUNT], <http://allhomekc.org/wp-content/uploads/2017/05/2017-Count-Us-In-Infographic.pdf>.

2. ALL HOME, KING COUNTY ONE NIGHT COUNT SUMMARY OF 2016 DATA, <http://allhomekc.org/wp-content/uploads/2015/09/2016-KC-ONC-numbers.pdf> [https://perma.cc/Q527-LVMP] (updated May 9, 2016).

3. Daniel Beekman and Jack Broom, *Mayor, County Exec Declare ‘State of Emergency’ Over Homelessness*, SEATTLE TIMES (Jan. 31, 2016, 10:41 AM), <https://www.seattletimes.com/seattle-news/politics/mayor-county-exec-declare-state-of-emergency-over-homelessness/> [https://perma.cc/Z4U5-NPSL] (“[L]ocal leaders Monday declared states of emergency in Seattle and King County.”).

4. *Id.*

5. Ashwin Warrior, *Everyone Counts: Including Vehicle Residents Hiding in Plain Sight*, FIRESTEEL (Jan. 29, 2013), <http://firesteelwa.org/2013/01/everyone-counts-including-vehicle-residents-hiding-in-plain-sight/> [https://perma.cc/AE5Q-PHLY].

residents are able to utilize their vehicle as a primary means of shelter and, unsurprisingly, make up a significant portion of the total unsheltered population<sup>6</sup>—42% per the 2017 One Night Count Results.<sup>7</sup>

“Banishing vehicle residency is one of the fastest-growing forms of criminalization.”<sup>8</sup> In 2014, a nationwide survey by the National Law Center on Homelessness and Poverty found that the number of cities with ordinances that effectively criminalized vehicle habitation increased by 119% between 2011 and 2014.<sup>9</sup> These ordinances take the form of metered street parking zones,<sup>10</sup> permit-only parking zones,<sup>11</sup> time restrictions,<sup>12</sup> restrictions on vehicle operability,<sup>13</sup> restrictions regarding licensing and registration,<sup>14</sup> and even prohibitions directed specifically at vehicle habitation.<sup>15</sup> Violations of these policies typically result in noncriminal citations imposing fees, requiring attendance at hearings, or inflicting other financial burdens, which nevertheless can have devastating impacts on someone with already limited resources.<sup>16</sup> Additionally, the effects of these typically noncriminal citations can be exacerbated by the implementation of “scofflaw ordinances.” Scofflaw ordinances escalate penalties and financial burdens by allowing for the extrajudicial impoundment of the targeted vehicle for specific violations, such as

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6. Heidi Groover, “My Van Was Just Gone.” *Homeless Advocates Ask City to Stop Ticketing, Towing Vehicles People Live In*, THE STRANGER (Oct. 3, 2017, 4:27 PM), <http://www.thestranger.com/slog/2017/10/03/25450050/my-van-was-just-gone-homeless-advocates-ask-city-to-stop-ticketing-towing-vehicles-people-live-in> [<https://perma.cc/G7EA-37XX>].

7. 2017 ONE NIGHT COUNT, *supra* note 1.

8. Jessica So et al., *Living at the Intersection: Laws and Vehicle Residency*, HOMELESS RIGHTS ADVOCACY PROJECT 3 (Sara Rankin ed., May 2016) [hereinafter “Living at the Intersection”], <https://ssrn.com/abstract=2776423> [<https://perma.cc/XFW5-G8BQ>].

9. See NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 15 (Nov. 2011) [hereinafter “NATIONAL LAW CENTER”], [https://www.nlchp.org/documents/No\\_Safe\\_Place](https://www.nlchp.org/documents/No_Safe_Place) [<https://perma.cc/FU3X-TEEH>].

10. *E.g.*, SAN DIEGO, CAL., LAND USE ORDINANCE § 86.0106 (2018); KIRKLAND, WASH., PARKING ORDINANCE § 12.45.230 (2018); SEATTLE, WASH., MUN. CODE § 11.76.015 (2018).

11. *E.g.*, SAN DIEGO, CAL., LAND USE ORDINANCE § 86.2014; SAN DIEGO, CAL., LAND USE ORDINANCE § 86.0143 (2018); KIRKLAND, WASH., PARKING ORDINANCE § 12.45.240 (2018); SEATTLE, WASH., MUN. CODE § 11.14.515 (2018).

12. *E.g.*, SAN DIEGO, CAL., LAND USE ORDINANCE § 86.0118 (2018); KIRKLAND, WASH., PARKING ORDINANCE § 12.45.300 (2018); SEATTLE, WASH., MUN. CODE § 11.72.240 (2018); SEATTLE, WASH., MUN. CODE § 11.72.260 (2018); SEATTLE, WASH., MUN. CODE § 11.72.440 (2018).

13. *E.g.*, SAN DIEGO, CAL., LAND USE ORDINANCE § 86.0137 (2018); SANTA BARBARA, CAL., ZONING ORDINANCES § 30.175.030(M) (2018); SEATTLE, WASH., MUN. CODE § 11.92.010; SEATTLE, WASH., MUN. CODE § 11.92.020 (2018).

14. *E.g.*, SANTA BARBARA, CAL., ZONING ORDINANCES § 30.175.030(M) (2018); KIRKLAND, WASH., PARKING ORDINANCE § 12.45.170 (2018); SEATTLE, WASH., MUNICIPAL CODE § 11.22.070 (2018); SEATTLE, WASH., MUN. CODE § 11.72.145 (2018).

15. *E.g.*, SAN DIEGO, CAL., LAND USE ORDINANCE § 86.0137 (2018).

16. Rianna Hidalgo, *The Pile Up*, REAL CHANGE (Aug. 5, 2015), <http://realchangenews.org/2015/08/05/pile> [<https://perma.cc/Q5J8-CKNN>].

accumulating a certain threshold of unpaid fines, or exceeding specified time restrictions.<sup>17</sup> These restrictions are typically justified by municipalities as necessary to address public order or health and safety concerns;<sup>18</sup> however, the policies are also driven by pressure from community members who fear that allowing overnight parking will invite problems stereotypically associated with vehicle residents.<sup>19</sup>

In addition to being disproportionately impacted by these laws due to limited financial resources, vehicle residents also have limited alternative options. Most of the available public parking infrastructure is restricted.<sup>20</sup> And the alternatives that do exist are insufficient for the demand.<sup>21</sup> In other words, parking violations can lead to the government pushing vehicle residents out of their vehicles—their *homes*—and onto the street.<sup>22</sup> Many of these ordinances require attendance at special hearings to contest or mitigate the violations.<sup>23</sup> The most harmful ones allow for the conversion of unpaid, noncriminal violations into misdemeanors, having the compounding effect of dragging vehicle residents into the criminal justice system and exposing them to its subsequent financial burdens and social penalties.<sup>24</sup>

Meanwhile, courts have been hesitant to wade into what is potentially one of the “thorniest” of “political thickets,”<sup>25</sup> given the complexity of issues underlying the dramatic growth of the unhoused population and the competing sociopolitical philosophies about how to best address those

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17. Living at the Intersection, *supra* note 8.

18. NATIONAL LAW CENTER, *supra* note 9.

19. Rianna Hidalgo, *Nowhere To Go*, REAL CHANGE (Jul. 22, 2015), <http://www.realchange.org/2015/07/22/nowhere-go> [<https://perma.cc/U4QL-D9KM>] (“[W]hat is happening at large when it comes to the nearly 800 people who live in their vehicles in Seattle . . . has all the elements: parking regulations that offer limited options and lead to a concentrated area of vehicle residents; visible poverty and safety concern that fuels neighborhood tensions until they reach a boiling point; [] law enforcement officials caught inbetween [sic] the rock-and-hard-place of trying to enforce rules without harming vulnerable population . . . and public misperceptions about who the people truly are who reside within the RVs, trucks and cars on the streets of Seattle.”).

20. See *supra* notes 8–13 and accompanying text.

21. See generally T. Ray Ivey & Jodylyn L. Gilleland, *Hidden in Plain Sight: Finding Safe Parking for Vehicle Residents*, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT (Sara Rankin ed., May 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3173221](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173221) [<https://perma.cc/KSK4-L5HW>] (advocating for local governments or social service organizations to implement Safe Parking Programs, which “utilize existing public- or privately-owned parking infrastructure to provide vehicle residents with a safe, reliable, and legal place to park,” as part of a locality’s overall strategy for addressing homelessness).

22. Groover, *supra* note 6.

23. Living at the Intersection, *supra* note 8.

24. *Id.*

25. Paraphrasing the general proposition announced by Justice Frankfurter in reasoning against the justiciability of an issue arising in a legislative redistricting case because of the politically charged implications. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (“Courts ought not to enter this political thicket.”).

issues. In terms of a constitutional right to housing, the Supreme Court has stated that “the Constitution does not provide judicial remedies for every social and economic ill . . . [and w]e are unable to perceive [] any constitutional guarantee of access to dwellings of a particular quality.”<sup>26</sup> Courts have routinely refused to recognize people experiencing homelessness as a possible “suspect class” under equal protection doctrine.<sup>27</sup> And courts have stated that parking regulations on their own, without otherwise “attempt[ing] to regulate any constitutionally protected activity,” cannot be attacked as unconstitutional because “there is no constitutional or statutory right to park one’s car wherever one wants.”<sup>28</sup> In short, in the current judicial environment, one would not expect much in the form of judicial activism on behalf of those impacted by the overcriminalization of homelessness, especially not in the field of parking regulation.

That said, two recent Ninth Circuit opinions indicate a possible shift in the bench’s general reluctance to entertain judicial interventions on behalf of homeless individuals.<sup>29</sup> Because of those indications, actions seeking other such novel interventions could be filed as potential test cases. A case raising such a novel statutory claim, under Washington’s Homestead Act, was recently rejected in Seattle Municipal Court; however, that decision was subsequently overturned on appeal in King County Superior Court.<sup>30</sup> That action and the specific novel claim raised will be introduced in Part II of this Note. Part III will explore two federal cases that signal a possible shift away from the bench’s general hostility toward judicial activism on issues of homelessness and homeless rights by reaching limited constitutional interventions. Part IV will present a closer

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26. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

27. *See, e.g., Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000) (“Homeless persons are not a suspect class”); *see also Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242, 1269 n.36 (3d Cir. 1992) (homeless not a suspect class); *D’Aguanno v. Gallagher*, 50 F.3d 877, 879 n.2 (11th Cir. 1995) (homeless not a suspect class); *Joyce v. City of San Francisco*, 846 F. Supp. 843, 859 (N.D. Cal. 1994) (declining to be the first court to recognize fundamental right to sleep), *dismissed*, 87 F.3d 1320 (9th Cir. 1996); *Johnson v. City of Dallas*, 860 F. Supp. 344, 355 (N.D. Tex. 1994) (homeless not a suspect class), *rev’d on other grounds*, 61 F.3d 442 (5th Cir. 1995); *Davison v. City of Tucson*, 924 F. Supp. 989, 993 (D. Ariz. 1996) (homeless not a suspect class); *State of Hawaii v. Sturch*, 921 P.2d 1170, 1176 (Haw. Ct. App. 1996) (noting that there is “no authority supporting a specific constitutional right to sleep in a public place” unless it is expressive conduct within the ambit of the First Amendment or is protected by other fundamental rights). *But see Pottinger v. City of Miami*, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992) (indicating in dicta that homeless might constitute a suspect class), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir. 1994).

28. *Int’l Union of Operating Engineers, Local 150, AFL-CIO v. Vill. of Orland Park*, 139 F. Supp. 2d 950, 961 (N.D. Ill. 2001).

29. *See infra* Part III.

30. Amended Decision and Order on RALJ Appeal at 26, *City of Seattle v. Long*, No. 17-2-15099-1 SEA (King Cty. Super. Ct. Mar. 9, 2018).

examination of Washington's Homestead Act from both a textual interpretation and historical perspective to determine how amenable it might be as a path for judicial intervention. Part V will conclude by describing why Washington State courts should heed the signals of the Ninth Circuit and apply similar interventionist reasoning as the superior court in the Seattle test case when interpreting the Homestead Act.

#### I. THE NOVEL STATUTORY CLAIM: HOMESTEAD ACT TEST CASE

Mr. Steven Long is a long-time Seattle resident. He, like so many others, has found himself surviving without a permanent home since 2014.<sup>31</sup> Since then, he has depended on his truck as his primary means of shelter.<sup>32</sup> For all intents and purposes, Mr. Long's truck is his home.

In the summer of 2016, Mr. Long had to find a new location to park his truck, which was experiencing mechanical issues—a common concern for vehicle residents attempting to survive while maintaining the few resources they possess. Mr. Long landed in a spot that he hoped was perfect; a spot that was out-of-the-way, unmarked, and unobtrusive.<sup>33</sup> He even sought permission from the nearest local business owner.<sup>34</sup> For three months, Mr. Long enjoyed a fleeting sense of stability.<sup>35</sup>

Inevitably, Mr. Long's luck ran out. Later that year, the Seattle Police Department, responding to an unrelated call in the area, were made aware of Mr. Long's presence and cited him for violating Seattle's ordinance prohibiting a vehicle from occupying a public parking spot for more than seventy-two hours.<sup>36</sup> As a result, Mr. Long's truck was impounded.<sup>37</sup> With the assistance of a local legal aid and advocacy organization, Mr. Long challenged the impoundment of his vehicle under several constitutional and statutory theories.

Although none of Mr. Long's claims found success at the municipal court level,<sup>38</sup> he successfully appealed the denial of his motion for summary judgment in King County Superior Court, which resulted in a critical win for vehicle residents.<sup>39</sup> Among his claims, Mr. Long advocated

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31. Defendant's Motion for Summary Judgement at 1–2, *City of Seattle v. Long*, No. 203641306 (Seattle Mun. Ct. Mar. 13, 2017).

32. *Id.*

33. *Id.* at 2.

34. *Id.* at 2–3.

35. *Id.* at 3.

36. *Id.* at 3–4.

37. *Id.*

38. Order on Defense Motion for Summary Judgement at 3, *City of Seattle v. Long*, No. 203641306 (Seattle Mun. Ct. May 10, 2017).

39. Laurel Wamsley, *A Homeless Man's Truck Is His Home, Judge Rules In Seattle*, NPR: THE TWO-WAY (Mar. 6, 2018, 6:54 PM), <https://www.npr.org/sections/thetwo-way/2018/03/06/591300547/a-homeless-mans-truck-is-his-home-judge-rules-in-seattle>.

for a novel intervention by the Washington State courts on behalf of similarly situated vehicle residents. He sought and appears to have received a holding that will allow future vehicle residents to invoke Washington State's Homestead Act as an affirmative protection barring, at least, enforcement of the specific Seattle ordinance Mr. Long was said to have violated,<sup>40</sup> and potentially any other ordinance that would allow for extrajudicial impoundment of a known vehicle resident's vehicle.<sup>41</sup> The City of Seattle intends to appeal the superior court's decision.<sup>42</sup>

This Note will argue that the relief that Mr. Long won on appeal and the interpretation of the Homestead Act announced by that court—allowing for homestead exemption status to attach to a vehicle immediately upon its occupation as a primary means of residence by an otherwise unhoused individual<sup>43</sup>—is an entirely appropriate form of judicial intervention. Homestead status would bar enforcement authorities, such as the Seattle Police Department, from utilizing the impoundment mechanisms otherwise authorized by Chapter 46.55 of the Revised Code of Washington (RCW) (for reasons explored more fully in Part IV) against a known vehicle resident's vehicle. Such a holding (especially in a court with a broader jurisdictional scope than King County Superior Court) could be criticized as a blatant act of judicial activism departing from the greater jurisprudential climate that cautions against such intervention on issues of homelessness and homeless rights.<sup>44</sup> It is to this generally inhospitable jurisprudential environment where we turn next.

## II. RECENT EXAMPLES OF JUDICIAL INTERVENTIONS

Before exploring why Washington's Homestead Act is especially suited for judicial intervention on behalf of vehicle residents, this section will highlight two recent Ninth Circuit opinions that indicate a shift in the bench's general hostility toward judicial interventions on behalf of homeless individuals.

### *A. Jones v. City of Los Angeles*

The Ninth Circuit's opinion in *Jones v. City of Los Angeles* is a relatively early example of the court signaling to "local governments [that

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40 Amended Decision, *supra* note 30, at 26.

41. See generally WASH. REV. CODE ANN. § 46.55 (West, Westlaw through 2018 Reg. Sess.).

42. Vianna Davila, *Seattle Will Appeal Ruling that Man Living Inside His Truck Should Not Have Had to Pay High Fines After Vehicle was Towed*, SEATTLE TIMES (Mar. 7, 2018, 8:40 PM), <https://www.seattletimes.com/seattle-news/homeless/city-of-seattle-appeals-ruling-that-a-truck-is-a-home/> (updated Mar. 8, 2018, 7:28 PM).

43. Amended Decision, *supra* note 30, at 26.

44. Davila, *supra* note 42 (quoting Deputy Seattle City Attorney John Schochet calling the ruling "legally wrong and unworkable").

they] could not deny homeless populations shelter on the one hand and criminalize the only alternative they had—sleeping in the street and in public places—on the other.”<sup>45</sup> The *Jones* case was brought by six unhoused individuals who had been arrested for violating what the court described as “one of the most restrictive municipal laws regulating public spaces in the United States” at the time.<sup>46</sup> The ordinance stated that “[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way.”<sup>47</sup>

In district court, the plaintiffs sought a permanent injunction prohibiting enforcement of the ordinance between the hours of 9:00 p.m. and 6:30 a.m.<sup>48</sup> They argued that due to the extreme breadth of the ordinance, allowing enforcement “twenty-four hours a day against persons with nowhere else to sit, lie, or sleep, other than on public streets and sidewalks” constituted criminalization of status as homeless individuals in violation of the Eighth Amendment.<sup>49</sup>

The district court disagreed, concluding that the ordinance simply penalized the conduct specified and therefore did not violate the Eighth Amendment.<sup>50</sup> This determination was grounded in the bench’s general reluctance to recognize homelessness as a constitutionally cognizable status by relying heavily on *Joyce v. City & County of San Francisco*, in which a similar argument was rejected.<sup>51</sup> The court in *Joyce* reasoned that

Court[s] must approach with hesitation any argument that science or statistics compels a conclusion that a certain condition be defined as a status. The Supreme Court has determined that drug addiction equals a status, and this Court is so bound. But the Supreme Court has not made such a determination with respect to homelessness, and because that situation is not directly analogous to drug addiction, it would be an untoward excursion by this Court into matters of social policy to accord to homelessness the protection of status.<sup>52</sup>

Thus, the importance of the Ninth Circuit’s opinion in *Jones* can only be truly understood in light of this historical judicial prudence in homeless rights litigation.

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45. Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U.L. REV. 879, 900 (2015).

46. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1123 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1125.

51. *Id.*

52. *Joyce v. City of San Francisco*, 846 F.Supp. 843, 858 (N.D. Cal. 1994).

By reversing the district court and remanding the issue back with instruction to grant appropriate injunctive relief,<sup>53</sup> the Ninth Circuit was forced to justify its decision in an incongruous precedential environment. To accomplish this, the court grounded its analysis in the U.S. Supreme Court cases establishing addiction as a constitutionally recognized status under the Eighth Amendment: *Robinson v. California*<sup>54</sup> and its progeny.<sup>55</sup> A task easier said than done, given the fact that “[t]he Court did not articulate the principles that undergird its holding [in *Robinson*],”<sup>56</sup> which led to a fractured decision delivered by the Court in *Powell v. Texas* subsequently testing the addiction-as-status doctrine.<sup>57</sup>

In *Powell*, an Eighth Amendment challenge was brought by a chronic alcoholic convicted under an ordinance prohibiting public drunkenness.<sup>58</sup> The *Powell* Court’s 4-1-4 split centered on whether *Robinson* stood for the proposition that criminalizing conduct that was involuntarily incidental to a cognizable status was precluded by the Eighth Amendment.<sup>59</sup> Four members of the 4-1 plurality in *Powell* concluded that the Eighth Amendment prohibited only regulations that facially penalized status and did not apply because the State was free to regulate socially unacceptable conduct.<sup>60</sup>

To reach its decision, the *Jones* court had to combine the four-justice dissent from *Powell* with the concurrence of the single justice that refused to join the plurality’s opinion despite agreeing with its result.<sup>61</sup> This bit of judicial gymnastics allowed the *Jones* court to find that a five-member majority of the Court in *Powell* actually agreed that the correct construction of the rule from *Robinson* is “that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being.”<sup>62</sup>

The *Jones* court’s willingness to flex its analytical muscle to square the Eighth Amendment jurisprudential circle left by the *Robinson* and *Powell* decisions clearly signals that the court may be willing to intervene on the behalf of unjustly penalized individuals experiencing homelessness. Nonetheless, the court also took great pains to ensure that its opinion was

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53. *Jones*, 444 F.3d at 1138.

54. See generally *Robinson v. California*, 370 U.S. 660 (1962).

55. *Jones*, 444 F.3d at 1131 (“The district court erred by not engaging in a more thorough analysis of Eighth Amendment jurisprudence under *Robinson v. California* and *Powell v. Texas*.”) (internal citations omitted).

56. *Id.* at 1133.

57. See generally *Powell v. Texas*, 392 U.S. 514 (1968).

58. *Id.* at 517.

59. See generally *id.*

60. See generally *id.*

61. *Jones*, 444 F.3d at 1135.

62. *Id.*



highly restrained. In its conclusion, the court prudentially hedged its opinion, stating:

We do not suggest that Los Angeles adopt any particular social policy, plan, or law to care for the homeless. We do not desire to encroach on the legislative and executive functions reserved to the City Council and the Mayor of Los Angeles. There is obviously a “homeless problem” in the City of Los Angeles, which the City is free to address in any way that it sees fit, consistent with the constitutional principles we have articulated. By our decision, we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets of Los Angeles at any time and at any place within the City. All we hold is that, so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds, the City may not enforce section 41.18(d) at all times and places throughout the City against homeless individuals for involuntarily sitting, lying, and sleeping in public. Appellants are entitled at a minimum to a narrowly tailored injunction against the City’s enforcement of section 41.18(d) at certain times and/or places.<sup>63</sup>

Additionally, the opinion itself was subsequently vacated upon notice that the parties had settled the case and jointly agreed to dismiss their appeal.<sup>64</sup>

That said, the analytical force and persuasive value of the *Jones* court’s construction of Eighth Amendment doctrine cannot be ignored. In fact, the U.S. Department of Justice issued a statement of interest in a subsequent similar case out of Idaho and clarified that it understood the correct construction of the Eighth Amendment to be the rule announced in *Jones*.<sup>65</sup>

### *B. Desertrain v. City of Los Angeles*

*Desertrain* involved a challenge to another Los Angeles municipal ordinance. This ordinance made it a crime for anyone to utilize a vehicle for habitation on public property for more than one consecutive night anywhere within the city.<sup>66</sup> The challenge was brought by multiple

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63. *Id.* at 1138 (citations omitted).

64. *See Jones*, 505 F.3d at 1006.

65. Statement of Interest of the United States at 4, *Bell v. Boise*, 834 F.Supp. 2d 1103 (D. Idaho Aug. 6, 2015) (No. 1:09-cv-00540-REB) (“[T]he United States files this Statement of Interest to make clear that the *Jones* framework is the appropriate legal framework for analyzing Plaintiffs’ Eighth Amendment claims.”) *rev’d and remanded*, 709 F.3d 890 (9th Cir. 2013), *partial summary judgement granted*, 993 F.Supp. 2d 1237 (D. Idaho 2015), *dismissed for lack of standing, sub nom. Martin v. Boise*, No. 1:09-cv-00540-REB, 2015 WL 5708586 (D. Idaho 2015), *appeal filed*, *Martin v. Boise*, No. 15-35845 (9th Cir. Oct. 29, 2015).

66. *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1149 (9th Cir. 2014).

plaintiffs who were arrested for violating the ordinance after the City began aggressively enforcing it in late 2010.<sup>67</sup> Several constitutional claims were raised to challenge the ordinance, but the lower court granted the City summary judgment and refused to hear the plaintiff's Fourteenth Amendment vagueness claim because it was not raised in the first amended complaint.<sup>68</sup> On appeal, the Ninth Circuit not only found that the lower court's refusal to hear the vagueness claim was an abuse of discretion but further held that the ordinance was void because it both failed "to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" and "encourage[d] arbitrary and discriminatory enforcement."<sup>69</sup>

The *Desertrain* opinion is an example of both judicial interventionism and prudential caution by the Ninth Circuit in addressing constitutional attacks to municipal legislation alleged to unfairly criminalize homelessness. By linking its opinion to past judicial efforts to deal with perceived legislative and executive injustices through the application—and to some degree, the contortion—of vagueness doctrine,<sup>70</sup> the court highlights its growing impatience with the continued criminalization of poverty and homelessness.

The *Desertrain* court signals its interventionist intent in two primary ways. First, the court's forceful language in concluding the opinion clearly indicates the interventionist principles underlying the decision. The court not only directly acknowledges the unique challenges that many vehicle residents face; it also sends a strong message to municipal legislators when it declares that "[the city] has many options at its disposal to alleviate the plight and suffering of its homeless citizens . . . [but s]electively preventing the homeless and the poor from using their vehicles for [otherwise legal] activities . . . should not be one of those options."<sup>71</sup>

Second, the court's decision to review the Fourteenth Amendment vagueness claim on the merits to void the ordinance indicates the court's waning tolerance of municipal legislation that targets and penalizes people experiencing poverty. The court's waning tolerance can be seen in the grounding of its opinion in two historically significant Fourteenth Amendment cases.

The court references the first of these two landmark cases in finding that the ordinance did not provide adequate notice to the public by

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67. *Id.*

68. *Id.* at 1153.

69. *Id.* at 1155–57.

70. Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 102 (2002).

71. *Desertrain*, 754 F.3d at 1157–58.

analogizing to *City of Chicago v. Morales*, where the Supreme Court struck down a controversial anti-gang loitering prohibition.<sup>72</sup> The *Morales* decision has been criticized as having “stretched vagueness doctrine nearly to its logical breaking point.”<sup>73</sup> Nonetheless, the *Morales* Court’s opinion seemed to “harken[] back to [its] legendary effort to deal with obscenity: as with obscenity laws, the Court in effect indicated it could not define what constituted an unconstitutional anti-gang ordinance, but it knew one when it saw one.”<sup>74</sup>

In its second historically significant case reference, the *Desertrain* court based its arbitrary and discriminatory enforcement decision on possibly the most famous of all vagueness doctrine cases, *Papachristou v. Jacksonville*.<sup>75</sup> The court in fact states directly that the Los Angeles ordinance “raises the same concerns of discriminatory enforcement . . . [as the historically racist] city ordinance prohibiting vagrancy” struck down in *Papachristou*.<sup>76</sup>

Despite this strong signaling by the court, the *Desertrain* opinion is still quite prudentially restrained. This prudential restraint is seen in the court’s choice not to address the merits of any of the other potential constitutional issues raised on appeal. By choosing to address the dispositive vagueness question, having to overrule a lower court procedural decision in order to do it,<sup>77</sup> and cleanly resolving the presented controversy, the court was able to avoid addressing the potentially thornier—and the potentially more impactful, from a homeless rights advocacy perspective—constitutional questions regarding whether the Fourteenth Amendment right to travel and Fourth Amendment search and seizure doctrines provide viable claims to protect the rights of people experiencing homelessness.<sup>78</sup>

### III. A DEEPER DIVE INTO THE HOMESTEAD ACT

All of the potential interventionist signaling in the world would be of no avail in this instance, though, if the act under which the novel statutory claim is raised is not amenable to an interpretation necessary for the court

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72. *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999).

73. Strosnider, *supra* note 70.

74. *Id.*

75. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972); see Risa Goluboff, *The Forgotten Law That Gave Police Nearly Unlimited Power*, TIME: HISTORY (Feb. 1, 2016), <http://time.com/4199924/vagrancy-law-history/> [<https://perma.cc/5AZD-BYKK>] (discussing the historical significance of *Papchristou* in limiting the spread and impact of vagrancy laws); see also Melissa J. Gismondi, *Backstory’s Top 5 Trials of the Century*, BACKSTORY: BLOG (Feb. 4, 2016), <https://www.backstoryradio.org/blog/backstory-top-5-trials-of-the-century/> [<https://perma.cc/VLP4-UE53>].

76. *Desertrain*, 754 F.3d at 1156 (internal quotations omitted).

77. *Id.* at 1154–55.

78. *Id.* at 1153 n.2.

to reach a favorable decision. Fortunately, from a textual analytical approach, Washington's Homestead Act appears to be ripe for just such an interpretation. Additionally, the underlying policies that have historically animated application and expansion of the Act's exemptions further encourage an interventionist interpretation.

One of the key reasons that the Homestead Act is an excellent candidate for an interventionist reading is because its language speaks in an exceptionally clear, unambiguous, and declarative manner. The operative language of the Act is codified generally in RCW chapter 6.13. Of significance, RCW § 6.13.010 defines a homestead as simply "real or *personal property* that the owner uses as a residence,"<sup>79</sup> which would include a vehicle resident's personal vehicle. The only relevant limitation expressed in the statute is that the owner of the property must intend to utilize the property as their principal residence.<sup>80</sup> Once this definitional requirement is met, the Act is equally clear about its application of an automatic exemption from any form of forced sale to satisfy a judgement.<sup>81</sup> In fact, the Act expressly requires that a claimed homestead be presumed valid unless its validity is successfully contested in court.<sup>82</sup>

In addition to these unambiguous mandates, the Act has historically been construed liberally and given broad effect.<sup>83</sup> In fact, from a public policy perspective, homestead exemptions have been described as necessary "to prevent the weak from being overpowered by the strong."<sup>84</sup> This combination of unambiguous mandate and liberal construction sets up a perfect playfield for judicial activism.

However, even from this seemingly favorable statutory background, asserting homestead rights to protect a vehicle from authorized extrajudicial impoundment presents a few thorny questions that could allow a prudentially inclined bench to avoid the type of judicial intervention being sought. One obstacle, a potential interpretative conflict between the operative statutes, also appears to be the easiest to overcome.

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79. WASH. REV. CODE ANN. § 6.13.010 (West, Westlaw through 2018 Reg. Sess.) (emphasis added).

80. *Id.*

81. WASH. REV. CODE ANN. § 6.13.040 ("A homestead [] is automatically protected by the exemption . . . from and after the time the personal property is occupied as a principal residence by the owner."); WASH. REV. CODE ANN. § 6.13.070 ("[T]he homestead is exempt from attachment and from execution or forced sale for the debts of the owner up to the amount specified."). The term "forced sale" is never expressly defined in the statute.

82. WASH. REV. CODE ANN. § 6.13.070.

83. See *Lien v. Hoffman*, 306 P.2d 240, 244–45 (Wash. 1957) ("Homestead and exemption statutes are favored in the law and should be liberally construed."); *First Nat'l Bank of Everett v. Tiffany*, 242 P.2d 169, 173 (Wash. 1952) ("As a matter of public policy, homestead and exemption laws are to secure and protect the homesteader . . . . They do not protect the rights of creditors.").

84. ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION* 237 (2d ed. 2013).

As addressed, the Homestead Act speaks directly to the question of whether homestead status should extend to a vehicle being used as a primary residence.<sup>85</sup> The question then becomes whether the operative impoundment statute can be interpreted as authorizing a “forced sale to satisfy a judgement” from which the vehicle would be exempted as a homestead.

From a purely textual analysis of the governing statute, the answer would presumably be yes. The statutory chapter governing the operations of authorized impoundments states that 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.”<sup>86</sup> That is to say that the operator’s lien attaches immediately upon valid authorization of impoundment. Additionally, the same statute grants the operator an immediate “deficiency claim against the registered owner of the vehicle for services provided in the towing and storage of the vehicle.”<sup>87</sup> In executing this deficiency claim, the operator is authorized to sell the vehicle at auction to satisfy the debt incurred by the registered owner.<sup>88</sup> On the face of these provisions, it would appear extremely difficult to argue that this is not the exact type of “attachment and [] execution or forced sale for the debts of the owner” upon which the homestead exemption is supposed to operate.<sup>89</sup>

Nonetheless, there are three additional lines of prudential arguments that could complicate what seems like a straight forward application of the Homestead Act’s protections in a case such as *Long*: (1) that the Homestead Act should not act as a procedural bar to the execution of an authorized impoundment; (2) that the type of lien that is authorized by the impoundment ordinance is included in the list of statutory exceptions to the Act’s protections; and (3) that the Act’s protections might be fraudulently invoked to avoid otherwise valid exercises of routine police activity.

#### *A. The Homestead Act as a Procedural Bar to Impoundment*

The first argument questions the procedural timing of the assertion of the exemption. Ideally, the most far reaching and impactful result from a homeless rights interventionist perspective would be a holding that would allow the assertion of the homestead exemption as a categorical bar

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85. WASH. REV. CODE ANN. § 6.13.010 (“The homestead consists of real or personal property that the owner uses as a residence.”).

86. *Id.* § 46.55.140.

87. *Id.*

88. *Id.* § 46.55.130.

89. *Id.* § 6.13.070.

to any authorization of an impoundment, whether valid or otherwise. That is to say, a holding that would allow a vehicle resident who has been notified of a violation that might otherwise result in the eventual impoundment of the vehicle (such as a violation of Seattle's ordinance requiring a vehicle to move at least one block every seventy-two hours)<sup>90</sup> to inform the enforcement authority (e.g., the Seattle Police Department) of the vehicle's homestead status to bar authorization of impoundment. While it is unclear if the court's holding in the *Long* appeal goes this far, such a holding's vulnerability in a future challenge would be two-fold.

On one hand, there is concern that the ideal outcome would not actually be practical in operation. A reviewing court could find that an attachment or forced sale as contemplated by the Homestead Act is not implicated until after the actual removal of the vehicle as authorized by the city for violation of a public health and safety law.<sup>91</sup> On another hand, because the registered owner has recourse after the removal of the vehicle to challenge the validity of any impoundment action,<sup>92</sup> a more prudential reading of the statutes would indicate that the appropriate time to raise the homestead objection would be at an impoundment validity hearing.

Either of these potentially more prudential interpretations run expressly counter to not only a textual reading of the relevant Homestead Act provisions but also to the spirit of the law as historically applied. As previously discussed, courts have construed the Act liberally and given it broad effect.<sup>93</sup> The Homestead Act unambiguously states that homestead status attaches automatically to any personal property that is utilized as a person's primary place of residence.<sup>94</sup> Thus, the Act's protections are invoked immediately upon authorization of impoundment of an otherwise eligible vehicle. Additionally, any argument that subordinates the Act's exemption to employment only at an impoundment validation hearing would be contrary to the direct textual application of the governing statute. The Act is equally clear that homestead status is "presumed to be valid to the extent of all the property claimed exempt, until the validity thereof is contested in a court of general jurisdiction."<sup>95</sup> From a plain-language

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90. See SEATTLE, WASH., MUN. CODE § 11.72.440(B) (2018).

91. See *id.* § 11.10.040 ("This subtitle is enacted as an exercise of the police power of the City to protect and preserve the public peace, health, safety and welfare, and its provisions shall be liberally construed for the accomplishment of these purposes."). *Contra* Amended Decision, *supra* note 30, at 10.

92. WASH. REV. CODE ANN. § 46.55.120 (2018).

93. See *Lien v. Hoffman*, 306 P.2d 240, 244–45 (Wash. 1957) ("Homestead and exemption statutes are favored in the law and should be liberally construed."); *First Nat'l Bank of Everett v. Tiffany*, 242 P.2d 169, 173 (Wash. 1952) ("As a matter of public policy, homestead and exemption laws are to secure and protect the homesteader . . . They do not protect the rights of creditors.").

94. WASH. REV. CODE ANN. § 6.13.040.

95. *Id.* § 6.13.070.

interpretation of the statute, once a homestead exemption has been raised, the exemption is presumed valid and the burden falls on the enforcement agency to defeat the exemption in court in order to authorize any form of attachment, not the other way around.<sup>96</sup> Thus, any attempted interpretation by a court that a homestead exemption would operate only as a means of invalidating the otherwise valid impoundment of a vehicle, after the impoundment and lien attachment had already occurred, is specifically violative of the express language of the homestead statutes.

*B. The List of Exceptions in the Homestead Acts*

The second line of prudential reasoning that could potentially limit the prospective scope of the *Long* appeal's holding argues that a reviewing court should read the tow truck operator's lien into the list of exceptions to the application of the homestead exemption included in the Act. Specifically, the Act states that the homestead status cannot be invoked to protect against "debts secured by mechanic's, laborer's, construction, maritime, automobile repair, material supplier's, or vendor's liens."<sup>97</sup> A prudentially-minded bench might choose to interpret the stated class of, for example, "vendor's liens," as ambiguous enough to include the type of lien contemplated by RCW § 46.55.140,<sup>98</sup> applying the maxim of *noscitur a sociis*.<sup>99</sup>

Arguably, the specific type of lien granted to the operator in RCW § 46.55.140, is a garageman's lien.<sup>100</sup> Thus, a more favorable construction of RCW § 6.13.080, from an interventionist perspective, would be to apply the maxim of *expressio unius est exclusio alterius*<sup>101</sup> to the list of excluded liens. If the legislature was intentionally specific when

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96. *Id.*

97. *Id.* § 6.13.080.

98. *Id.*

99. *See, e.g.,* Burns v. City of Seattle, 164 P.3d 475, 485 (Wash. 2007) (stating "a doubtful term or phrase in a statute or ordinance takes its meaning from associated words and phrases"); City of Mercer Island v. Kaltenbach, 371 P.2d 1009, 1012 (Wash. 1962) ("That a term in a statute or ordinance takes its meaning from the context in which it is employed is so well accepted that citation of authority is unnecessary[.]").

100. *See generally* David Harrison, *Lien for Towing or Storage, Ordered by Public Officer, of More Vehicle*, 85 A.L.R.3d 199 (2011) (defining the lien authorized for the towing or storage of a motor vehicle, ordered by a public officer, as a garageman's lien); Marjorie Dick Rombauer, *Tow Truck Operator's Lien on Impounded Vehicle*, 27 WASH. PRAC. § 4.177 (2017) (discussing the specifics of the tow truck operator's lien on impounded vehicle as a separate class of liens).

101. *In re* Cunningham, 163 B.R. 593, 595 (Bankr. W.D. Wash. 1994) ("If the legislature wishes to create additional exceptions to the homestead exemption, it must do so clearly and specifically by adding them to the statute's list of exceptions."). *See also In re* Killian v. Seattle Pub. Sch., 403 P.3d 58, 65 (Wash. 2017) ("When the legislature expresses one thing in a statute, we infer that omissions are exclusions."); Det. of Williams, 55 P.3d 597, 604 (Wash. 2002) ("Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other.").

it crafted the list of equitable liens that would warrant exception from the application of the Homestead Act, then it was similarly intentional in deciding not to include a garageman's lien in the list. This interpretation is in line with the legislature's intent that the Act's protections be given a very liberal construction.<sup>102</sup> Thus, because this type of garageman's lien, granted to tow truck operators by the impoundment statute,<sup>103</sup> is not specifically listed among the types of liens exempted by the Homestead Act—"mechanic's, laborer's, construction, maritime, automobile repair, material supplier's, or vendor's liens"<sup>104</sup>—then it is not an exception to the homestead exemption.

### C. *The Potential for Misuse of the Homestead Exemption*

The last bit of prudential reasoning that a reviewing court might fall back on in refusing to interpret the *Long* holding as allowing the homestead exemption to bar police from enforcing all impoundment ordinances would be a general concern for the potential misuse of such exemptions by people not actually experiencing homelessness. This fear could lead a reviewing court to decide that the Homestead Act was never meant to operate as a bar to routine police activity.

But even this potential line of reasoning fails in the face of the plain text and historical application of homestead exemptions in Washington. The statute itself contemplates the possibility of fraudulent claims of homestead protection by those not actually residing in the property.<sup>105</sup> That said, it also clearly shifts the burden of disproving the validity of the homestead exemption away from the property owner raising it.<sup>106</sup>

There does, though, appear to be some contention in the courts regarding the procedural effect of this burden shifting.<sup>107</sup> Most of the cases testing this procedural scheme arise in the form of interlocutory objections to execution of liens granted prior to the declaration of homestead in a bankruptcy action,<sup>108</sup> but the factual scenario in the case of an extrajudicial impoundment authorization is completely different. In this case, the question is how the automatic attachment of homestead status contemplated by the Act operates in the face of the extrajudicial

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102. See *Lien v. Hoffman*, 306 P.2d 240, 244–45 (Wash. 1957).

103. WASH. REV. CODE ANN. § 46.55.140 (West, Westlaw through 2018 Reg. Sess.).

104. *Id.* § 6.13.080.

105. *Id.* § 6.13.010 (“Property included in the homestead must be actually intended or used as the principal home for the owner.”); *Webster v. Rodrick*, 394 P.2d 689, 692 (Wash. 1964) (“The homestead exemption statute cannot be used as an instrument of fraud and imposition.”).

106. WASH. REV. CODE ANN. § 6.13.070 (“Every homestead created under this chapter is presumed to be valid . . . until the validity thereof is contested in a court of general jurisdiction.”).

107. See generally *Traverso v. Cerini*, 263 P. 184, 185–86 (Wash. 1928).

108. *Id.* at 184–85; see also *Enyart v. Humble*, 562 P.2d 648, 649 (Wash. Ct. App. 1977).



attachment of a lien authorized by the combination of a municipal ordinance and a state statute. An interventionist court could seize on the strong language used by past courts regarding the policies underpinning the Homestead Act to conclude that in such cases the Act operates to protect the property owner at the point of lien attachment.<sup>109</sup>

Additionally, it is not as if the local police (who are being asked to enforce these extrajudicial impoundment ordinances) are incapable of deciphering between a vehicle being used for habitation from those impermissibly parked for other reasons.<sup>110</sup> Many of these same enforcement officials feel “caught inbetween [sic] the rock-and-hard-place of trying to enforce rules without harming vulnerable populations.”<sup>111</sup> By allowing them to presume the validity of a homestead exemption<sup>112</sup> when they encounter a vehicle resident who otherwise might be in violation of the seventy-two hour time limit, they would have a harm-reducing option that they currently lack. Thus, the clash of policy concerns that such an interpretation might engender—the poorly defensible public health and safety concerns supposedly addressed by the impoundment ordinances versus the forcefully articulated and historically grounded protection of homestead rights intended “to prevent the weak from being overpowered by the strong”<sup>113</sup>—can hardly be defended as a rationale against the *Long* appeal’s holding.

#### CONCLUSION

Washington’s Homestead Act is the perfect vehicle, no pun intended, for judicial intervention in Washington courts to protect vehicle residents from the harms of criminalizing a life-sustaining activity—utilizing their vehicle as a primary means of shelter. Unlike the judicial activism you see in cases like *Jones* and *Desertrain*, the intervention being advocated for here, as seen in the *Long* appeal’s Homestead Act holding, is necessarily already constrained by the fact that it entails interpretation of local laws rather than the expansion of federal constitutional law. Also, the holding is limited in scope by attaching only to vehicles being utilized as a primary form of residence. That said, its potential impact as a signal to state and local lawmakers cannot be overstated. The *Long* court’s interpretation of the Homestead Act could force both municipal and state lawmakers to

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109. *Webster*, 394 P.2d at 691 (“The homestead exemption must be used as a shield to protect the homesteader and his dependents in the enjoyment of a domicile.”); *UTTER*, *supra* note 84 (describing the historical understanding of the Homestead Act as necessary “to prevent the weak from being overpowered by the strong”).

110. *See* Hidalgo, *supra* note 19.

111. *Id.*

112. WASH. REV. CODE ANN. § 6.13.070 (West, Westlaw through 2018 Reg. Sess.).

113. *UTTER*, *supra* note 84.

reconsider the use of punitive ordinances and statues as a means of addressing the “homelessness problem,” at least as it relates to vehicle residency.<sup>114</sup> Of course, the full implications of *Long*’s holding and the Homestead Act’s viability as a pressure release valve for vehicle residents are yet to be realized. As the case makes its way through the appeals process, vehicle residents, both in Seattle and across the state, will be watching and waiting to see if the Washington courts continue the tradition of construing the Homestead Act liberally to protect the vulnerable from the powerful—to protect their homes.

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114. See Martin Cizmar, *This Seattle Man Won the Constitutional Right to Live in His Truck—It Could Be the Start of a Revolution in How We Handle the Homeless*, RAWSTORY (May 10, 2018), <https://www.rawstory.com/2018/05/seattle-man-won-constitutional-right-live-truck-start-revolution-handle-homeless/> [https://perma.cc/K887-NVFD].