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NO DIRECTION HOME: CONSTITUTIONAL LIMITATIONS ON WASHINGTON'S HOMELESS ENCAMPMENT ORDINANCES

Jordan Talge

Abstract: The Washington State Constitution protects the free exercise of religion. It also vests strong police power in local governments. When these two constitutional provisions conflict, the Washington State Supreme Court must draw the line between valid police power action and impermissible burden on free exercise. In *City of Woodinville v. Northshore United Church of Christ*,¹ a municipal government crossed that line. The City of Woodinville, Washington refused to consider a church's application to host a homeless encampment. The Court held this outright refusal to be an unjustified infringement on the church's free exercise of religion. The Court did not, however, articulate permissible steps a municipality could take to regulate homeless encampments on church property. Absent further guidance on the appropriate reach of homeless encampment ordinances, religious organizations and municipalities lack clarity in hosting and regulating these sites. More than a dozen municipalities in Washington have taken action to regulate temporary homeless encampments, and legal challenges surrounding these encampments are likely to persist.² This Comment applies the Washington State Supreme Court's strict scrutiny test to municipal homeless encampment regulations, distinguishing valid exercises of police power from undue restrictions on religious free exercise.

INTRODUCTION

As homelessness continues to plague cities across the United States,³ advocacy groups have implemented numerous strategies to address the unfortunate consequences. One such effort has been the organization and erection of temporary homeless encampments or "tent cities," several of

1. 166 Wash. 2d 633, 211 P.3d 406 (2009).

2. *See, e.g., Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wash. App. 393, 400, 232 P.3d 1163, 1167 (2010). This is the most recent Washington appellate case involving homeless encampments. Though the court decided the case on statutory grounds not implicating constitutional protections of municipal police power or religious free exercise, the case demonstrates the likelihood that legal challenges to homeless encampments will continue. *See* Act of March 23, 2010, ch. 175, 2010 Wash. Sess. Laws 1092 (acknowledging litigation between municipalities and religious organizations over homeless encampments).

3. *See* DEP'T OF HOUS. & URBAN DEV., 2009 ANNUAL HOMELESSNESS ASSESSMENT REPORT TO CONGRESS, at i (2010), available at <http://www.hudhre.info/documents/5thHomelessAssessmentReport.pdf> ("On a single night in January 2009, there were an estimated 643,067 sheltered and unsheltered homeless people nationwide."). This report estimates that up to 37% of these homeless persons were "unsheltered or on the 'street.'" *Id.*

which have been located in Washington State.⁴ Religious organizations—claiming a mandate to aid the homeless⁵—often host temporary encampments on their property.⁶ Cities and municipalities typically subject these religious organizations and the encampments they host to specific regulations as conditions for approval.⁷

In regulating homeless encampments, municipalities exercise the inherent police power of all local governments.⁸ This municipal police power is expressly authorized by article XI of the Washington State Constitution, allowing “[a]ny county, city, town or township [to] make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”⁹ The Washington State Supreme Court has interpreted this provision broadly,¹⁰ upholding municipal regulations that have a direct bearing on public health or

4. See Young Chang, *New Tent City Revisits Issues Seattle Faced*, SEATTLE TIMES, July 6, 2004, at B1 (reporting that tent cities have been hosted in Burien, Tukwila, and Shoreline, Wash.); Sonia Krishnan, *Issaquah Church May Host Tent City in August*, SEATTLE TIMES, May 12, 2007, at B3; Don Mann, *Smooth Sailing for Church and Tent City 4, but Not All Are Happy*, WOODINVILLE WEEKLY, Aug. 2, 2010, http://www.nwnews.com/index.php?option=com_content&view=article&id=1747:smooth-sailing-for-church-and-tent-city-4-but-not-all-are-happy&catid=34:news&Itemid=72 (referencing a homeless encampment in Woodinville, Wash.); Rachel Pritchett, *What Tent Cities Are Really Like*, KITSAP SUN, Aug. 7, 2010, at A1 (referencing a homeless encampment in Olympia, WA and a proposed homeless encampment on the Kitsap Peninsula); Amy Roe, *Mercer Island May Host Tent City*, SEATTLE TIMES, June 15, 2007, at B1.

5. See, e.g., Nicole Tsong, *Clergy Disputes Mercer Island’s Tent City Rules*, SEATTLE TIMES, Mar. 15, 2010, at B1 (quoting Michael Ramos, Executive Director of the Greater Church Council of Seattle, as stating that hosting a homeless encampment furthers “a fundamental religious duty to shelter those who are homeless and feed those who are hungry”); see also *City of Woodinville v. Northshore United Church of Christ*, 166 Wash. 2d 633, 642, 211 P.3d 406, 410 (2009) (noting that the City of Woodinville “conceded . . . the Church’s sincerity of belief” in hosting a homeless encampment as a religious requirement).

6. See, e.g., Will Mari, *Another U District Church Agrees to Host Nickelsville Encampment*, SEATTLE TIMES, Dec. 1, 2008, at B1 (referencing a homeless encampment in a church parking lot near the University of Washington in Seattle, Wash.).

7. See *infra* text accompanying notes 33–35, 53–56 (outlining the health and safety regulations included in municipal homeless encampment ordinances).

8. Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 497 (2000) (describing traditional concepts of police power as including the “general governance of the community” (citing ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* § 2, at 2 (1904))).

9. WASH. CONST. art. XI, § 11.

10. See Spitzer, *supra* note 8, at 495 (explaining that municipalities in Washington have enjoyed “strong regulatory powers” under the state constitution’s police power provision); see also Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 880 (2000) (explaining that early police power cases in Washington demonstrated that “[t]he legislature is itself primarily the judge of how far police restrictions shall go.” (quoting *State v. Nichols*, 28 Wash. 628, 632, 69 P. 372, 373 (1902))).

safety.¹¹ The Court has affirmed municipal police power actions regulating sewage treatment, clean water, waste disposal, fire safety, and weapon possession, as well as aesthetic regulations aimed at mitigating specific threats to public health or safety.¹² Most municipal homeless encampment ordinances include similar regulations,¹³ and Washington courts are likely to uphold these measures as applied to secular actors.¹⁴

As applied to religious organizations, however, homeless encampment regulations implicate the Washington State Constitution's "absolute" protection of religious freedom.¹⁵ To maintain this strong protection, Washington courts analyze all government actions affecting a party's religious exercise under "strict scrutiny."¹⁶ Under the strict scrutiny standard, the reviewing court conducts three distinct analyses of the government action in question. First, the court decides whether the government action actually burdens the free exercise of religion.¹⁷ Second, the court decides whether a compelling state interest justifies the government's burden on free exercise.¹⁸ Third, the court decides whether the government's action is the least restrictive means of achieving its compelling interest.¹⁹

11. See Spitzer, *supra* note 8, at 500 (noting that the Washington State Supreme Court has historically upheld "ordinances protecting the physical health and safety of citizens").

12. See *infra* text accompanying notes 24–29.

13. See *infra* text accompanying notes 33–35, 53–56 (outlining the health and safety regulations included in municipal homeless encampment ordinances).

14. See *infra* text accompanying notes 24–29.

15. WASH. CONST. art. I, § 11.

16. See, e.g., *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 218, 840 P.2d 174, 183 (1992) (stating that the Washington State Supreme Court will subject any infringement on religious free exercise to strict scrutiny); see also *infra* text accompanying note 102 (explaining the Washington State Supreme Court's reliance on the strict scrutiny test).

17. See, e.g., *First Covenant*, 120 Wash. 2d at 226, 840 P.2d at 187 (explaining that government action can be upheld if it does not burden religious free exercise under the first prong of the strict scrutiny test); see also *infra* text accompanying notes 106–130 (describing the Washington State Supreme Court's burden analysis).

18. See, e.g., *First Covenant*, 120 Wash. 2d at 226, 840 P.2d at 187 ("State action is constitutional under the free exercise clause of article 1 if the action results in no infringement of a citizen's right or if a compelling state interest justifies any burden on the free exercise of religion." (citing *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1123 (1989); *City of Sumner v. First Baptist Church of Sumner*, 97 Wash. 2d 1, 7–8, 639 P.2d 1358, 1362 (1982))); see also *infra* text accompanying notes 131–138 (explaining the Washington State Supreme Court's requirement for finding a compelling government interest).

19. See, e.g., *First Covenant*, 120 Wash. 2d at 227, 840 P.2d at 187 ("The State also must demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available." (citing *Sumner*, 97 Wash. 2d at 8, 15, 639 P.2d at 1366 (Utter, J., concurring); *State ex rel. Holcomb v. Armstrong*, 39 Wash. 2d 860, 864, 239 P.2d 545, 548 (1952))); see also

This Comment applies the strict scrutiny test to municipal homeless encampment regulations in Washington. Part I reviews the Washington State Supreme Court's police power jurisprudence, demonstrating the Court's willingness to uphold measures designed to protect public health and safety. Part II analyzes the Court's treatment of the state constitution's free exercise clause, outlining the difficulty municipal governments face in surviving the Court's strict scrutiny test.

Finally, Part III applies the Washington State Supreme Court's three-pronged strict scrutiny test to municipal homeless encampment regulations. Under the first prong of the strict scrutiny test, all homeless encampment regulations burden religious free exercise. Under the second prong, however, many of these regulations serve a compelling government interest in protecting public health and safety. Such measures include sanitation, clean water, and security mandates. Nevertheless, even if homeless encampment regulations serve a compelling health and safety interest, they must be the least restrictive means of achieving that interest under the third prong of the strict scrutiny test. This Comment argues that uniform caps on the number of residents a homeless encampment may host and blanket restrictions on the length of time an encampment may remain at a particular site are not the least restrictive means of protecting public health and safety and are therefore invalid impositions on religious free exercise.

I. MUNICIPAL GOVERNMENTS MAY PROTECT PUBLIC HEALTH AND SAFETY UNDER THEIR INHERENT POLICE POWER

More than a dozen municipalities in Washington currently regulate homeless encampments within their jurisdictions.²⁰ Each of these

infra text accompanying notes 139–145 (describing the Washington State Supreme Court's least restrictive means requirement).

20. At least thirteen municipalities in Washington have taken action to regulate homeless encampments. Municipalities have approved city ordinances, updates to municipal zoning codes, conditional use permits, and consent decrees regulating these encampments. This Comment uses “regulations” and “ordinances” as generic terms to refer to these kinds of municipal actions. *See* Auburn, Wash., Ordinance 6014 (May 2, 2006) [hereinafter Auburn]; BOTHELL, WASH., MUN. CODE § 12.06.160 (2010) [hereinafter BOTHELL], <http://www.codepublishing.com/wa/bothell>; Burien, Wash., Temporary Use Permit BUR 02-0979-LU-A (Nov. 1, 2002) [hereinafter Burien]; Issaquah, Wash., Special Event/Use Permit SPE07-00032 (June 11, 2007) [hereinafter Issaquah]; KIRKLAND, WASH., ZONING CODE § 127.05-.45 (2010) [hereinafter KIRKLAND], http://kirklandcode.ecitygov.net/CK_KMC_Search.html; LYNNWOOD, WASH., MUN. CODE § 21.74.010-.070 (2010) [hereinafter LYNNWOOD], <http://www.mrsc.org/mc/lynnwood/Lynnwood21/lynnwood2174.html>; Mercer Island, Wash., Ordinance 10C-01 (Feb. 1, 2010) [hereinafter Mercer Island]; OLYMPIA, WASH., MUN. CODE § 18.50.000-.060 (2010) [hereinafter

regulations is based on police power authority vested in municipal governments, a power that has been described as “the inherent power of the community to regulate activities for the protection of public health and safety.”²¹

In Washington, article XI of the state constitution governs the police power, authorizing “[a]ny county, city, town or township [to] make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”²² The Washington State Supreme Court has recognized the broad municipal authority afforded by this constitutional provision.²³ The Court has consistently upheld government action directly affecting public health, including ordinances governing sewage treatment,²⁴ clean water,²⁵ and solid waste disposal.²⁶ The Court has also regularly upheld government efforts to protect public safety and security, including ordinances governing fire safety²⁷ and restrictions on weapon possession.²⁸ In cases where the government’s action only indirectly affects health and safety, such as ordinances regulating outdoor aesthetics, the Court has required that the government action further a health and safety purpose to constitute a valid exercise of the police power.²⁹

OLYMPIA], <http://www.codepublishing.com/wa/olympia/>; SEATAC, WASH., MUN. CODE § 15.20.045 (2010) [hereinafter SEATAC], <http://www.codepublishing.com/wa/seatac/>; Seattle, Wash., Consent Decree in *SHARE/WHEEL v. City of Seattle*, 49428-7-I (Mar. 13, 2002) [hereinafter Seattle Decree]; Shoreline, Wash., Administrative Order 301138-A (Apr. 23, 2003) [hereinafter Shoreline]; SPOKANE, WASH., MUN. CODE § 10.08C (2010) [hereinafter SPOKANE], <http://www.spokane.org/services/documents/smc/default.aspx>; Woodinville, Wash., Ordinance 369 (Aug. 10, 2004) [hereinafter Woodinville].

21. See Spitzer, *supra* note 8, at 497.

22. WASH. CONST. art. XI, § 11.

23. See Spitzer, *supra* note 8, at 497.

24. *Morse v. Wise*, 37 Wash. 2d 806, 810–11, 226 P.2d 214, 216 (1951); *Elliot v. City of Leavenworth*, 197 Wash. 427, 435–36, 85 P.2d 1053, 1056–57 (1938).

25. *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 620, 277 P.2d 352, 354 (1955).

26. *City of Spokane v. Carlson*, 73 Wash. 2d 76, 79, 436 P.2d 454, 456 (1968); *Cornelius v. City of Seattle*, 123 Wash. 550, 559, 213 P. 17, 21 (1923).

27. *Haas v. City of Kirkland*, 78 Wash. 2d 929, 932, 481 P.2d 9, 11 (1971); *Coffin v. Blackwell*, 116 Wash. 281, 287, 199 P. 239, 241–42 (1921); *City of Seattle v. Hinckley*, 40 Wash. 468, 470–71, 82 P. 747, 748 (1905).

28. *City of Seattle v. Montana*, 129 Wash. 2d 583, 595, 919 P.2d 1218, 1225 (1996); *State v. Krantz*, 24 Wash. 2d 350, 353, 164 P.2d 453, 454 (1945).

29. *Ackerly Commc’ns, Inc. v. City of Seattle*, 92 Wash. 2d 905, 920, 602 P.2d 1177, 1186–87 (1979); *Markham Adver. Co. v. State*, 73 Wash. 2d 405, 424, 439 P.2d 248, 260 (1968); *Lenci v. City of Seattle*, 63 Wash. 2d 664, 676, 388 P.2d 926, 934 (1964).

A. *Municipal Governments May Take Action Necessary to Protect Public Health*

The Washington State Supreme Court has upheld municipal police power laws protecting public health.³⁰ As the Court announced in *State v. Boren*,³¹ “[t]he state, under its police power, has the right, and it is its duty, to protect its people This is especially true as to the health of the people, which affects every man, woman and child within the state.”³² Homeless encampment regulations in Washington almost uniformly include provisions designed to protect public health.

Homeless encampment regulations in Washington require effective sewage treatment,³³ adequate clean water,³⁴ and regular trash collection.³⁵ Recognizing municipal authority to protect public health,

30. See Spitzer, *supra* note 8, at 500 (noting that the Washington State Supreme Court has historically upheld “ordinances protecting the physical health and safety of citizens”).

31. 36 Wash. 2d 522, 219 P.2d 560 (1950).

32. *Id.* at 525, 219 P.2d at 568.

33. See, e.g., Auburn, *supra* note 20, at 4 (requiring host to accommodate “sanitary portable toilets in the number required to meet capacity guidelines”); BOTHELL, *supra* note 20, § 12.06.160(B)(3)(d)(4) (“Adequate toilet facilities shall be provided on-site.”); Burien, *supra* note 20, at 2 (requiring host to include “sanitation facilities”); KIRKLAND, *supra* note 20, § 127.25(2)(l) (requiring host to comply with human waste regulations); LYNNWOOD, *supra* note 20, § 21.74.030(K) (requiring host to provide “sanitary portable toilets”); Mercer Island, *supra* note 20, at 4 (requiring host to comply with human waste regulations); SEATAC, *supra* note 20, § 15.20.045(B)(2) (requiring host to provide sanitary portable toilets); SPOKANE, *supra* note 20, § 10.08C.120(H) (requiring host to provide “[o]ne sanitary portable toilet per twenty persons on-site”).

34. See, e.g., Auburn, *supra* note 20, at 4 (requiring host to provide “hand washing stations by the toilet and by the food areas” of the encampment and also to “provide an adequate water source to the Homeless Encampment”); BOTHELL, *supra* note 20, § 12.06.160(B)(3)(d)(4) (“[An] adequate supply of potable water shall be available on-site at all times.”); Burien, *supra* note 20, at 2 (requiring host to provide “hot water for sanitation purposes”); KIRKLAND, *supra* note 20, § 127.25(2)(l) (requiring host to comply with drinking water regulations); LYNNWOOD, *supra* note 20, § 21.74.030(K) (requiring host to provide “[h]and-washing stations by the toilets and food preparation areas”); Mercer Island, *supra* note 20, at 4 (requiring host to comply with drinking water standards); SEATAC, *supra* note 20, § 15.20.045(B)(2) (requiring host to provide hand washing stations and an adequate water source to the encampment); SPOKANE, *supra* note 20, § 10.08C.120(H) (requiring host to provide hand washing stations by the toilets and food areas, and to provide showers and an adequate water source).

35. See, e.g., Auburn, *supra* note 20, at 4 (requiring host to provide adequate number of “refuse receptacles”); BOTHELL, *supra* note 20, § 12.06.160(B)(3)(d)(5) (“Adequate facilities for dealing with trash shall be provided on-site.”); KIRKLAND, *supra* note 20, § 127.25(2)(l) (requiring host to comply with solid waste disposal regulations); LYNNWOOD, *supra* note 20, § 21.74.030(N) (“Facilities for dealing with trash shall be provided on-site.”); Mercer Island, *supra* note 20, at 4 (requiring host to comply with solid waste disposal regulations); Seattle Decree, *supra* note 20, at 6 (requiring trash patrol in the host site neighborhood); SEATAC, *supra* note 20, § 15.20.045(B)(2) (requiring host to provide adequate refuse receptacles); SPOKANE, *supra* note 20, § 10.08C.120(N), (requiring host to provide refuse containers and remove solid waste from the site).

the Washington State Supreme Court has upheld municipal regulations mandating sewage treatment,³⁶ clean water,³⁷ and waste cleanup³⁸ in previous police power cases.

The Washington State Supreme Court has long recognized municipal authority to mandate sewage and sewer services.³⁹ In *Elliot v. City of Leavenworth*,⁴⁰ the Court held that the public health threat posed by raw sewage justified an ordinance creating a new sewage system and its financing scheme.⁴¹ The Court affirmed the validity of sewage regulations in *Morse v. Wise*.⁴² In *Morse*, the Court held that when a city regulates sewage, it “acts pursuant to the police power granted to it to provide sewer service to protect the health of its inhabitants.”⁴³

The Court has also upheld local drinking water regulations as valid exercises of municipal police power.⁴⁴ In *Kaul v. City of Chehalis*,⁴⁵ the Court held it was “the duty of the city to furnish [residents] with wholesome water, free from contamination.”⁴⁶ Because of this municipal public health duty, the city’s drinking water regulation “violate[d] none of [the public’s] constitution[al] rights.”⁴⁷

Sanitation regulations, including garbage cleanup and collection ordinances, are also constitutional exercises of municipal police power. The Washington State Supreme Court has held that regulation of “noxious, unwholesome substances” directly promotes public health, therefore falling within the police power of the municipality.⁴⁸ In one particular case, the Court upheld a sanitation ordinance despite evidence that the ordinance itself was enacted to satisfy questionable legislative motives.⁴⁹ The Court has even upheld a municipal ordinance requiring

36. *Morse v. Wise*, 37 Wash. 2d 806, 810–11, 226 P.2d 214, 216 (1951); *Elliot v. City of Leavenworth*, 197 Wash. 427, 431, 85 P.2d 1053, 1054–55 (1938).

37. *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 620, 277 P.2d 352, 354 (1955).

38. *City of Spokane v. Carlson*, 73 Wash. 2d 76, 79, 436 P.2d 454, 456 (1968); *Cornelius v. City of Seattle*, 123 Wash. 550, 559, 213 P. 17, 21 (1923).

39. *Elliot*, 197 Wash. at 431, 85 P.2d at 1054–55.

40. 197 Wash. 427, 85 P.2d 1053 (1938).

41. *Id.* at 431, 85 P.2d at 1054–55.

42. 37 Wash. 2d 806, 226 P.2d 214 (1951).

43. *Id.* at 810–11, 226 P.2d at 216.

44. *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 621, 277 P.2d 352, 355 (1955).

45. 45 Wash. 2d 616, 620, 277 P.2d 352, 354 (1955).

46. *Id.*

47. *Id.*

48. *City of Spokane v. Carlson*, 73 Wash. 2d 76, 79, 436 P.2d 454, 456 (1968) (quoting *Smith v. City of Spokane*, 55 Wash. 219, 221, 104 P. 249, 250 (1909)).

49. *Cornelius v. City of Seattle*, 123 Wash. 550, 559, 213 P. 17, 21 (1923) (affirming the power

disposal of non-threatening cardboard,⁵⁰ further demonstrating the strong municipal police power to regulate sanitation.

B. Municipal Governments May Enact Measures to Protect Public Safety

In addition to broad authority to protect public health, municipalities may protect public safety under their constitutional police power.⁵¹ This ability to maintain “the safety of the community” is a “universally recognized right of the community in all civilized governments” and falls squarely within the police power.⁵² Homeless encampment regulations in Washington include many provisions designed to protect public safety.

Most municipal homeless encampment ordinances include public safety provisions mandating fire safety,⁵³ restrictions on weapons,⁵⁴ and

of the City of Seattle to enact a law requiring food waste from city restaurants and hotels to be collected by a city contractor despite strong evidence that the ordinance was adopted not as a public health measure but as a means of discouraging Japanese hog farmers who relied on the food waste for feed).

50. *Carlson*, 73 Wash. 2d at 80–81, 436 P.2d at 457 (“The mere fact that the particular refuse picked up and disposed of by the defendant may not have been injurious to the public health does not mean that the city could not reasonably decide that the control of the disposition of such materials was necessary for the protection of the public health and sanitation.”).

51. *See* Spitzer, *supra* note 8, at 500 (noting that the Washington State Supreme Court has historically upheld “ordinances protecting the physical health and safety of citizens”).

52. *City of Seattle v. Hinckley*, 40 Wash. 468, 471, 82 P. 747, 748 (1905).

53. *See, e.g.*, Auburn, *supra* note 20, at 6–7 (requiring that tents be made of “fire-retardant material,” prohibiting open fires, and requiring fire extinguishers and proper electrical cords); BOTHELL, *supra* note 20, § 12.06.160(B)(3)(d)(2) (subjecting homeless encampments to review by fire marshal for proper spacing of tents at any time); Burien, *supra* note 20, at 2 (requiring that tents be made of flame-retardant material, prohibiting open flames and smoking, and requiring adequate electrical cords); Issaquah, *supra* note 20, at 2 (requiring that tents be made of flame-retardant material, and prohibiting open flames and smoking); KIRKLAND, *supra* note 20, § 127.25(2)(k)(4) (prohibiting open flames in encampment); Mercer Island, *supra* note 20, at 4 (requiring that flame-retardant materials be used, and prohibiting open flames); SEATAC, *supra* note 20, § 15.20.045(E)(2) (requiring that tent materials be flame-retardant, prohibiting open flames, and requiring fire extinguishers and proper electrical equipment); SPOKANE, *supra* note 20, §§ 10.08C.120(N), 10.08C.140(B) (requiring that host site provide fire extinguishers, mandating that tent materials be flame-retardant, and prohibiting open fires).

54. *See, e.g.*, Auburn, *supra* note 20, at 5–6 (requiring that host agency provide “Operations and Security Plan” and enforce a code of conduct that prohibits weapons, drugs, and alcohol); BOTHELL, *supra* note 20, § 12.06.160(B)(3)(e)(3)(F) (stating that host “shall provide on-site security” for the encampment); KIRKLAND, *supra* note 20, § 127.25(2)(k) (requiring host site to enforce code of conduct prohibiting weapons, drugs and alcohol, and violence); Mercer Island, *supra* note 20, at 4 (requiring host to enforce code of conduct prohibiting drugs and alcohol, violence, and weapons, including knives over three-and-a-half inches in length); SEATAC, *supra* note 20, § 15.20.045(C) (requiring host site to provide security plan and enforce code of conduct prohibiting drugs and

prohibitions against sex offenders residing in homeless encampments.⁵⁵ The ordinances also include aesthetic requirements to screen homeless encampments from neighboring properties.⁵⁶ Recognizing the rights of local governments to protect public safety, the Washington State Supreme Court has consistently upheld municipal ordinances mandating fire safety,⁵⁷ and has also recognized the right of local governments to place reasonable restrictions on weapon possession.⁵⁸ The Washington State Supreme Court has not had occasion to rule on the constitutionality of sex offender residency restrictions, but other courts have generally found such ordinances to fall within the police power.⁵⁹ Finally, the

alcohol, violence, and weapons); Seattle Decree, *supra* note 20, at 6 (requiring enforcement of homeless encampment code of conduct prohibiting drugs and alcohol, violence, and weapons, including knives over three-and-a-half inches in length); SPOKANE, *supra* note 20, § 10.08C.120(P) (requiring host site to have “operations and security plan” to prohibit drugs and alcohol, disorderly conduct, and weapons).

55. *See, e.g.*, Auburn, *supra* note 20, at 6 (mandating that host obtain a sex offender check from the local sheriff or police department and reject any resident who is a registered sex offender); BOTHELL, *supra* note 20, § 12.06.160(B)(3)(e)(3) (mandating that host obtain a sex offender check from the local sheriff or police department and reject any resident who is a registered sex offender); KIRKLAND, *supra* note 20, § 127.25(2)(m) (requiring host to obtain sex offender checks and comply with police reporting based on results of those checks); LYNNWOOD, *supra* note 20, §§ 21.74.030(O)–(P) (requiring host to obtain sex offender check and reject any registered sex offender from homeless encampments); Mercer Island, *supra* note 20, at 4 (“No convicted sex offender shall reside in the temporary encampment.”); SEATAC, *supra* note 20, § 15.20.045(C) (requiring host site to obtain sex offender checks and reject any resident who is a registered sex offender); SPOKANE, *supra* note 20, § 10.08C.120(P) (requiring host site to prohibit sex offenders from entering encampments).

56. *See, e.g.*, Auburn, *supra* note 20, at 5 (requiring that homeless encampments be “adequately buffered and screened” with “fencing [or] landscaping” at “a minimum height of six (6) feet”); BOTHELL, *supra* note 20, § 12.06.160(B)(3)(b)(3) (requiring that homeless encampments be screened from adjacent properties by “a minimum six-foot-high temporary fence, an existing fence, existing dense vegetation, [or] an existing topographic difference”); KIRKLAND, *supra* note 20, § 127.25(2)(m) (requiring “sight obscuring fencing” around encampments); LYNNWOOD, *supra* note 20, § 21.74.030(C) (“A six-foot-tall sight-obscuring fencing is required around the perimeter of the encampment”); Mercer Island, *supra* note 20, at 3 (requiring a “six-foot high sight obscuring fence” or other vegetation or landscaping to “provide a privacy and visual buffering among neighboring properties”); SEATAC, *supra* note 20, § 15.20.045(B)(9) (requiring that encampments be “adequately buffered and screened” by fencing or landscaping at least six feet in height); Seattle Decree, *supra* note 20, at 5 (requiring a buffer of “established vegetation sufficiently dense to obscure view and at least eight feet in height” or “an eight-foot high, view-obscuring fabric fence”).

57. Haas v. City of Kirkland, 78 Wash. 2d 929, 932, 481 P.2d 9, 11 (1971); Coffin v. Blackwell, 116 Wash. 281, 287, 199 P. 239, 241–42 (1921); *Hinckley*, 40 Wash. at 470–71, 82 P. at 748.

58. City of Seattle v. Montana, 129 Wash. 2d 583, 595, 919 P.2d 1218, 1225 (1996); State v. Krantz, 24 Wash. 2d 350, 353, 164 P.2d 453, 454 (1945).

59. *See, e.g.*, Weems v. Little Rock Police Dep’t, 453 F.3d 1010, 1016–20 (8th Cir. 2006) (holding that Arkansas law barring sex offenders from living near schools was not an unconstitutional ex post facto law, did not violate substantive due process, did not violate equal protection, and did not violate constitutional right to intrastate travel); *see also infra* text

Washington State Supreme Court has approved regulations of outdoor aesthetics, but only when those regulations are designed to promote public safety.⁶⁰

The Washington State Supreme Court has long upheld the right of municipalities to enforce fire safety and fire hazard regulations.⁶¹ In a decision announced shortly after Washington attained statehood, the Court held that “[t]here can be no doubt as to the constitutionality” of a Seattle ordinance designed “to protect persons from fire.”⁶² The Court has since affirmed that “[i]t is well settled that the enactment of reasonable ordinances regarding the protection of the lives and safety of persons, as well as the protection of property against fire, is within the police power of a municipality.”⁶³ The Court has also upheld enforcement of fire ordinances through fines and possible criminal sanctions as a valid exercise of the police power.⁶⁴

In addition to fire safety provisions, most homeless encampment ordinances require hosts to keep their encampment free of weapons.⁶⁵ The Washington State Supreme Court has upheld municipal regulations of weapon possession.⁶⁶ Washington courts have approved limitations on pistol ownership for violent criminal convicts,⁶⁷ bans on weapons in penal institutions,⁶⁸ restrictions on guns where alcohol is served,⁶⁹ and prohibitions against carrying guns that alarm or frighten other persons.⁷⁰

accompanying notes 73–78 (describing sex offender registry restrictions in Washington and the treatment of similar restrictions in other jurisdictions).

60. See *Ackerly Commc'ns, Inc. v. City of Seattle*, 92 Wash. 2d 905, 920, 602 P.2d 1177, 1186–87 (1979); *Markham Adver. Co. v. State*, 73 Wash. 2d 405, 424, 439 P.2d 248, 260 (1968); *Lenci v. City of Seattle*, 63 Wash. 2d 664, 676, 388 P.2d 926, 934 (1964).

61. See *Coffin*, 116 Wash. at 287, 199 P. at 240–41; *Hinckley*, 40 Wash. at 470–71, 82 P. at 748.

62. *Hinckley*, 40 Wash. at 470–71, 82 P. at 748.

63. *Haas v. City of Kirkland*, 78 Wash. 2d 929, 932, 481 P.2d 9, 11 (1971).

64. *City of Everett v. Unsworth*, 54 Wash. 2d 760, 764, 344 P.2d 728, 730–31 (1959).

65. See, e.g., *Mercer Island*, *supra* note 20, at 4 (requiring host to enforce code of conduct prohibiting drugs and alcohol, violence, and weapons, including knives over three-and-a-half inches in length); see also *supra* text accompanying note 54 (describing homeless encampment weapons restrictions).

66. See *City of Seattle v. Montana*, 129 Wash. 2d 583, 595, 919 P.2d 1218, 1225 (1996); *State v. Krantz*, 24 Wash. 2d 350, 353, 164 P.2d 453, 454 (1945).

67. *State v. Tully*, 198 Wash. 605, 607, 89 P.2d 517, 518 (1939).

68. *State v. Barnes*, 42 Wash. App. 56, 58, 708 P.2d 414, 415 (1985).

69. *Second Amendment Found. v. City of Renton*, 35 Wash. App. 583, 587, 668 P.2d 596, 598 (1983).

70. *State v. Spencer*, 75 Wash. App. 118, 124, 876 P.2d 939, 942 (1994).

The Court has even upheld municipal restrictions on “ordinary” fixed-blade knives to protect public safety.⁷¹

Unlike fire safety and weapons ordinances, the constitutionality of sex offender laws has not been tested in Washington State.⁷² The Washington State Legislature has passed laws mandating that criminals convicted of sex crimes register with appropriate law enforcement agencies,⁷³ and that law enforcement agencies release sex offender information to the public.⁷⁴ Washington has placed residency restrictions on some classes of sex offenders.⁷⁵ Sex offenders convicted of sex crimes involving minors are not allowed to live within “community protection zone[s],”⁷⁶ defined as areas within “eight hundred eighty feet of the facilities and grounds of a public or private school.”⁷⁷ To date, no constitutional challenge to these statutes has been brought before a Washington appellate court. Courts in other jurisdictions have upheld sex offender residency restrictions based on the government’s compelling interest in protecting children.⁷⁸

71. *Montana*, 129 Wash. 2d at 590, 919 P.2d at 122.

72. Washington appellate courts have not addressed the legality of the state’s sex offender laws. The constitutionality of sex offender laws falls outside the scope of this Comment.

73. WASH. REV. CODE § 9A.44.130 (2008).

74. *Id.* §§ 72.09.345, 4.24.550 (2008).

75. *Id.* § 9.94A.703 (2008) (prohibiting sex offenders convicted of child sex crimes from living within “community protection zones”).

76. *Id.*

77. *Id.* § 9.94A.030(8) (2008).

78. *See* *Weems v. Little Rock Police Dep’t*, 453 F.3d 1010, 1016–20 (8th Cir. 2006) (holding that Arkansas law barring sex offenders from living near schools was not an unconstitutional ex post facto law, did not violate substantive due process, did not violate equal protection, and did not violate constitutional right to intrastate travel); *Doe v. Miller*, 405 F.3d 700, 708–22 (8th Cir. 2005) (holding that Iowa law preventing sex offenders from living within 2,000 feet of a school did not violate substantive or procedural due process, did not abridge any constitutional right to travel, did not violate the Fifth Amendment’s protection against self-incrimination, and was not an ex post facto law); *Doe v. Baker*, No. Civ.A. 1:05-CV-2265, 2006 WL 905368, *2–9 (N.D.Ga. Apr. 5, 2006) (holding that Georgia state law prohibiting sex offenders from living within 1,000 feet of school or childcare facility was not an ex post facto law, did not violate the Eighth Amendment’s prohibition on cruel and unusual punishment, did not violate substantive or procedural due process, and did not result in a “taking” under the Fifth Amendment); *People v. Leroy*, 828 N.E.2d 769, 776–77 (Ill. App. Ct. 2005) (holding that Illinois statute prohibiting sex offenders from living within 500 feet of schools was reasonably related to the government’s compelling interest in protecting children from known sex offenders). Although the Washington State Supreme Court has not ruled on the validity of sex offender residency restrictions, it has recognized a compelling interest in state protection of children in other contexts. *See* *State v. Meacham*, 93 Wash. 2d 735, 738, 612 P.2d 795, 797 (1980) (upholding paternity test law because “the interest of the State in the welfare of its minor children has long been a compelling and paramount concern.” (citing *Heney v. Heney*, 24 Wash. 2d 445, 165 P.2d 864 (1946); *State v. Coffey*, 77 Wash. 2d 630, 465 P.2d 665 (1970); *State v. Bowen*, 80 Wash. 2d 808, 498 P.2d 877 (1972); *State v. Wood*, 89 Wash. 2d 97, 569 P.2d 1148 (1977))); *see*

In addition to fire safety ordinances, weapons restrictions, and prohibitions on sex offenders, most municipal homeless encampment ordinances regulate the aesthetic impact of encampments.⁷⁹ The Washington State Supreme Court has upheld aesthetic regulations when enacted for a public safety purpose.⁸⁰ The Court first addressed a challenge to a municipal regulation of outdoor aesthetics in *Lenci v. City of Seattle*.⁸¹ In *Lenci*, the Court considered the validity of a Seattle city ordinance requiring the premises of a motor vehicle wrecker to be “enclosed by a view obscuring, firm and substantial fence or a solid wall, at least eight (8) feet high.”⁸² The plaintiffs, owners of wreck yards in the city, argued that the ordinance was based on aesthetic considerations beyond the valid exercise of the police power.⁸³ The Court acknowledged that “[t]he basic rule . . . is that aesthetic conditions alone will not support invocation of the police powers,” but held that if the regulation protected public safety, “the fact that aesthetic considerations play a part in its adoption does not affect its validity.”⁸⁴ The Court reviewed legislative findings surrounding the screening ordinance and testimony that the view-obstructing fence was needed to lessen the “volume of thefts of parts of automobiles.”⁸⁵ Because “[m]inimizing crime, vandalism, and petty thievery is an objective well within the recognized scope of municipal police power,” the Court upheld the ordinance.⁸⁶

also State v. Motherwell, 114 Wash. 2d 353, 365, 788 P.2d 1066, 1072 (1990) (upholding child abuse reporting statute because “the State’s interest in the protection of children is unquestionably of the utmost importance.”).

79. See *supra* text accompanying note 56; see also Shoreline, *supra* note 20, at 3–4. In 2002, the City of Shoreline denied Shoreline Free Methodist Church’s application to host a homeless encampment because of the project’s “appearance.” Officials from the city visited another homeless encampment site, a visit that “confirmed that although clean and orderly, the appearance of the encampment is visually incompatible with a low or medium density residential neighborhood.” Only after reapplying with a plan for a “temporary screening fence” was the church able to host a homeless encampment. Observing tents of “various materials and colors,” the City of Shoreline agreed with a previous homeless encampment host that an encampment is “not a pleasant thing to look at.”*Id.*

80. See *Ackerly Commc’ns, Inc. v. City of Seattle*, 92 Wash. 2d 905, 920, 602 P.2d 1177, 1186–87 (1979); *Markham Adver. Co. v. State*, 73 Wash. 2d 405, 424, 439 P.2d 248, 260 (1968); *Lenci v. City of Seattle*, 63 Wash. 2d 664, 676, 388 P.2d 926, 934 (1964).

81. 63 Wash. 2d 664, 388 P.2d 926 (1964).

82. *Id.* at 666, 388 P.2d at 928.

83. *Id.* at 676, 388 P.2d at 934.

84. *Id.* at 676–77, 388 P.2d at 934.

85. *Id.* at 673, 388 P.2d at 932.

86. *Id.* at 676, 388 P.2d at 934.

Four years after *Lenci*, the Court employed similar reasoning to uphold a state highway beautification measure in *Markham Advertising Co. v. State*.⁸⁷ In that case, several advertising companies challenged the State's Highway Advertising Control Act.⁸⁸ The advertising companies, like the auto-wreckers in *Lenci*, argued that the statute was based on aesthetic considerations alone and was thus an invalid exercise of municipal police power.⁸⁹ The Court disagreed. As it did in *Lenci*, the Court afforded broad deference to legislative findings that demonstrated "a substantial relation between traffic safety and the regulation of outdoor advertising."⁹⁰ Because traffic safety "is clearly a proper purpose for the exercise of the police power,"⁹¹ the Court upheld the statute.⁹²

C. *The Washington State Supreme Court Has Not Addressed the Validity of Maximum-Resident or Maximum-Duration Regulations*

Municipal homeless encampment ordinances in Washington typically limit the number of residents who can live in a proposed encampment.⁹³ Most of the ordinances restrict all homeless encampments to 100 residents,⁹⁴ irrespective of a host's capacity to serve additional persons. Most homeless encampment ordinances also include blanket limitations

87. 73 Wash. 2d 405, 439 P.2d 248 (1968).

88. *Id.* at 408, 439 P.2d at 251.

89. *Id.* at 421, 439 P.2d at 258.

90. *Id.*

91. *Id.*

92. *Id.* at 424, 439 P.2d at 260.

93. *See, e.g., Auburn, supra* note 20, at 5, 6 ("[N]o more than 100 residents shall be allowed" at any homeless encampment, and the maximum duration of any homeless encampment "shall be ninety (90) days"); *BOTHELL, supra* note 20, § 12.06.160(B)(3)(c)(1) ("[U]nder no circumstances shall a proposed transitory accommodation be allowed in one location for more than 90 days."); *KIRKLAND, supra* note 20, at 1 ("The maximum number of residents within a homeless encampment is 100."); *LYNNWOOD, supra* note 20, §§ 21.74.030(E), 21.74.040 (stating that the maximum number of homeless encampment residents shall not "be greater than 100 people" and that "[t]emporary tent encampments may be approved for a period not to exceed 90 days"); *Mercer Island, supra* note 20, at 2 ("The encampment shall be limited to a maximum of 100 persons," and no encampment may operate for more than "90 consecutive days" in the same location); *SEATAC, supra* note 20, § 15.20.045(B), (D) ("No more than one hundred (100) residents shall be allowed," and "[t]he duration of the homeless encampment shall not exceed ninety (90) days"); *Seattle Decree, supra* note 20, at 5, 7 ("The maximum number of residents at an encampment is 100," and "the maximum duration of a SHARE/WHEEL tent encampment at a site is three (3) consecutive months."); *SPOKANE, supra* note 20, § 10.08C.120(A), (C) ("No more than one hundred residents shall be allowed," and "[t]he maximum continuous duration of a homeless encampment shall be ninety days.")

94. *See, e.g., Auburn, supra* note 20, at 5 ("[N]o more than 100 residents shall be allowed.")

on the time period an encampment may stay at one host site.⁹⁵ No homeless encampment is allowed to stay at one host site longer than three consecutive months,⁹⁶ regardless of the host's capacity to maintain the encampment for longer periods of time. Organizations are also prohibited from hosting an encampment at the same site for more than six months during a two-year period.⁹⁷ Unlike the homeless encampment provisions previously discussed, these maximum-resident and maximum-duration restrictions lack analogous precedent in Washington case law. The validity of these provisions, even as applied to secular actors, is not as clear as the other health and safety provisions discussed in this Comment.

II. ONLY POLICE POWER ACTIONS PROTECTING PUBLIC HEALTH AND SAFETY CAN JUSTIFY A BURDEN ON FREE EXERCISE

The Washington State Constitution provides for “absolute freedom of conscience in all matters of religious sentiment, belief and worship.”⁹⁸ Despite this “absolute” protection, however, Washington citizens may not use religious freedom to “justify practices inconsistent with the peace and safety of the state.”⁹⁹ By including this important caveat, the constitution protects religious freedom while also subjecting it to valid police power regulations.¹⁰⁰ Establishing a line between valid police power action and unconstitutional infringement on free exercise has required the Washington State Supreme Court to update its religious freedom jurisprudence in the last two decades. Since 1992, the Court has interpreted the state constitution to provide more protection for free exercise than the federal constitution¹⁰¹ and has continued to review any governmental interference with free exercise under strict scrutiny.¹⁰²

95. *See, e.g.*, LYNNWOOD, *supra* note 20, §§ 21.74.030(E), 21.74.040 (“Temporary tent encampments may be approved for a period not to exceed 90 days.”).

96. *Id.*

97. *See, e.g.*, Mercer Island, *supra* note 20, at 2.

98. WASH. CONST. art. I, § 11.

99. *Id.*

100. *See* City of Woodinville v. Northshore United Church of Christ, 166 Wash. 2d 633, 642, 211 P.3d 406, 410 n.3 (2009) (explaining that the religious exercise protected by the Washington State Constitution is not so broad as to prohibit the government from requiring “compliance with reasonable police power regulation”); *see also* State v. Gohl, 46 Wash. 408, 410, 90 P. 259, 260 (1907) (“A constitutional guaranty of certain rights to the individual citizen does not place such rights entirely beyond the police power of the state.”).

101. When assessing differences between the state and federal constitutions, the Washington State Supreme Court applies a six-factor test to determine which constitution provides greater

A. *The Washington State Supreme Court Applies a Strict Scrutiny Test to Government Actions that Affect Religious Free Exercise*

Under the Washington State Supreme Court's strict scrutiny test, the Court conducts three distinct analyses of the government action in question. First, the Court decides whether the government action actually burdens the free exercise of religion.¹⁰³ Second, the Court decides whether a compelling state interest justifies the government's burden on free exercise.¹⁰⁴ Third, the Court decides whether the

protection for certain activities. This six-factor test was announced in *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986). The first time the Court applied the *Gunwall* factors to the free exercise of religion was in *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 840 P.2d 174 (1992). The Court found that “[t]he language of our state constitution is significantly different and stronger than the federal constitution.” *Id.* at 225, 840 P.2d at 186. The Court thus distinguished its religious freedom jurisprudence from the U.S. Supreme Court's more restrictive view of free exercise expressed in its contemporaneous decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). Under the more protective standard announced in *First Covenant*, the Washington State Supreme Court held, contrary to the U.S. Supreme Court's decision in *Smith*, that a “facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate [the Washington State Constitution], if it indirectly burdens the exercise of religion.” *First Covenant*, 120 Wash. 2d at 226, 840 P.2d at 187. *First Covenant* thus created a distinct religious freedom jurisprudence in Washington, insulated from federal religious freedom cases and the federal legislative reaction to *Smith*. See *Northshore United Church of Christ*, 166 Wash. 2d 633, 645, 211 P.3d 406, 411 (2009) (explaining that the Washington constitution provides greater protection for religious freedom, and “[s]ince we hold for the Church on state constitutional grounds, we need not, and therefore do not, decide whether there is violation of [the federal Religious Land Use and Institutionalized Persons Act (RLUIPA)].”).

102. *Munns v. Martin*, 131 Wash. 2d 192, 199, 930 P.2d 318, 321 (1997) (“This Court applies a strict scrutiny test to the analysis of religious exercise cases.”); *First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Pres. Bd.*, 129 Wash. 2d 238, 247, 916 P.2d 374, 378 (1996) (noting that the Washington State Supreme Court applies a strict scrutiny test); *First Covenant*, 120 Wash. 2d at 218, 840 P.2d at 183 (stating that the Washington State Supreme Court will subject any infringement on free exercise to strict scrutiny). The elements of the strict scrutiny test the Washington State Supreme Court employs are the same as those outlined by the U.S. Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963). Although the Washington State Supreme Court did not determine that the Washington State Constitution provided greater protection for religious free exercise than the U.S. Constitution until its decision in *First Covenant* in 1992 (see *supra* text accompanying note 101), earlier Washington cases still provide guidance on the application of the strict scrutiny test and will be discussed throughout this Comment.

103. *Munns*, 131 Wash. 2d at 199, 930 P.2d at 321 (noting that the first part of the strict scrutiny test is to identify whether a burden has been placed on the free exercise of religion); *First United Methodist*, 129 Wash. 2d at 246, 916 P.2d at 378 (noting that the first part of the strict scrutiny test is to identify whether a burden has been placed on the free exercise of religion); *First Covenant*, 120 Wash. 2d at 226, 840 P.2d at 187 (explaining that government action can be upheld if it does not burden religious free exercise under the first prong of the strict scrutiny test).

104. *Munns*, 131 Wash. 2d at 199, 930 P.2d at 321 (requiring that government infringement on free exercise be justified by “a compelling state interest”); *First United Methodist*, 129 Wash. 2d at 246, 916 P.2d at 378 (explaining that government restrictions on free exercise must “serve a compelling state interest”); *First Covenant*, 120 Wash. 2d at 226, 840 P.2d at 187 (“State action is

government's action is the least restrictive means of achieving its compelling interest.¹⁰⁵ Only if the government action advances a compelling interest by the least restrictive means will a burden on religious free exercise be upheld.

1. The Government Action Must Be More than a "Slight Inconvenience" to Burden Free Exercise

The Washington State Supreme Court begins its strict scrutiny examination by determining whether the government action has burdened the free exercise of religion.¹⁰⁶ This first prong of the strict scrutiny test requires the party alleging restraint of free exercise to demonstrate "the coercive effect of the enactment as it operates against him in the practice of his religion."¹⁰⁷ As a preliminary matter, the complaining party must demonstrate that its religious beliefs are sincere.¹⁰⁸ The religious activity need not be a "fundamental tenet" of

constitutional under the free exercise clause of article 1 if the action results in no infringement of a citizen's right or if a compelling state interest justifies any burden on the free exercise of religion." (citing *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1123 (1989); *City of Sumner v. First Baptist Church of Sumner*, 97 Wash. 2d 1, 7–8, 639 P.2d 1358, 1362 (1982))).

105. *Northshore United Church of Christ*, 166 Wash. 2d at 642, 211 P.3d at 410 (explaining that government must demonstrate that "it has a narrow means for achieving a compelling goal" (citing *Open Door Baptist Church v. Clark County*, 140 Wash. 2d 143, 152, 995 P.2d 33, 39 (2000))); *Open Door Baptist*, 140 Wash. 2d at 154, 995 P.2d at 39 (holding that the government's action must be "the least restrictive available to achieve the ends sought" (quoting *Sumner*, 97 Wash. 2d at 8, 639 P.2d at 1362)); *Munns*, 131 Wash. 2d at 199, 930 P.2d at 321 (the government's action must be "the least restrictive means for achieving the government objective" (citing *First United Methodist*, 129 Wash. 2d at 246, 916 P.2d at 378)); *First United Methodist*, 129 Wash. 2d at 246, 916 P.2d at 378 (explaining that government action must be the "least restrictive means for achieving the government objective"); *First Covenant*, 120 Wash. 2d at 227, 840 P.2d at 187 ("The State also must demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available." (citing *Sumner*, 97 Wash. 2d at 8, 15, 639 P.2d at 1366 (Utter, J., concurring); *State ex rel. Holcomb v. Armstrong*, 39 Wash. 2d 860, 864, 239 P.2d 545, 548 (1952))).

106. *Munns*, 131 Wash. 2d at 199, 930 P.2d at 321 (noting that the first part of the strict scrutiny test is to identify whether a burden has been placed on the free exercise of religion); *First United Methodist*, 129 Wash. 2d at 246, 916 P.2d at 378 (noting that the first part of the strict scrutiny test is to identify whether a burden has been placed on the free exercise of religion); *First Covenant*, 120 Wash. 2d at 226, 840 P.2d at 187 (explaining that a government action can be upheld if it does not burden religious free exercise under the first prong of the strict scrutiny test).

107. *First Covenant*, 120 Wash. 2d at 218, 840 P.2d at 183 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963)).

108. *Northshore United Church of Christ*, 166 Wash. 2d at 642, 211 P.3d at 410 (explaining that "a party challenging government action must show two things: that the belief is sincere and that the government action burdens the exercise of religion." (citing *Open Door Baptist*, 140 Wash. 2d at 152, 995 P.2d at 38)); see also *Munns*, 131 Wash. 2d at 199, 930 P.2d at 321 ("The first prerequisite

the complaining party's religion for the religious activity to be protected.¹⁰⁹

The Washington State Supreme Court's standard for determining whether government action has a coercive effect on a party's religious beliefs is not clearly defined.¹¹⁰ The Court has concluded that a "slight inconvenience" on free exercise is permissible, but a "substantial burden" is not.¹¹¹ Although the Court has not articulated the difference between a slight inconvenience and an impermissible burden, it has explained that its determination depends on "the context in which [the government action] arises."¹¹²

Even when evaluating government actions in similar contexts, the Washington State Supreme Court has evaluated burdens on free exercise differently. In three cases decided in the 1990s, the Court held that forcing religious organizations to follow municipal land use application procedures constituted an "administrative burden" that could be justified only by a compelling government interest.¹¹³ In those cases, the Court held that simply requiring a religious organization "to seek the approval of a government body" established an impermissible burden on the free

for any free exercise challenge is that the parties have a sincere religious belief."). Washington courts have interpreted religious beliefs broadly. *See In re Marriage of Jensen-Branch*, 78 Wash. App. 482, 490, 899 P.2d 803, 808 n.2 (1995) (noting that "religious beliefs" should be interpreted broadly). The government is often willing to concede the sincerity of the complaining party's religious beliefs, including the concession that helping the homeless is a sincere religious belief. *See Northshore United Church of Christ*, 166 Wash. 2d at 641, 211 P.3d at 410 (noting that the government conceded the sincerity of the church's religious belief in hosting a homeless encampment).

109. *See Sumner*, 97 Wash. 2d at 7, 639 P.2d at 1362 (rejecting the argument that "because the regulation here involved does not impact directly a fundamental tenet of the church, it does not violate a member's First Amendment rights."); *State v. Motherwell*, 114 Wash. 2d 353, 361, 788 P.2d 1066, 1070 n.6 (1990) (explaining that in federal constitutional jurisprudence, "[t]he Supreme Court has in some cases discussed the centrality of a claimant's religious tenets, but it has never expressly required claimants to establish centrality.").

110. *See* Christopher W. Rosenbleeth, Note, *Free Exercise of Religion—An Ordinance Requiring a Church to Apply for a Conditional Use Permit Does Not Violate the Free Exercise Clause*, 32 RUTGERS L.J. 1100, 1110 (2001) (explaining an "impermissible inconsistency" in the U.S. Supreme Court's burden analysis).

111. *Northshore United Church of Christ*, 166 Wash. 2d at 644, 211 P.3d at 411.

112. *Id.*

113. *Munns*, 131 Wash. 2d at 195, 930 P.2d at 319 (holding that landmark ordinance created an "administrative burden" that was not justified by a compelling interest); *First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Pres. Bd.*, 129 Wash. 2d 238, 251, 916 P.2d 374, 381 (1996) (noting that religious institutions cannot be restricted by "administrative" burdens); *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 219, 840 P.2d 174, 183 (1992) ("The [historic preservation] ordinances burden free exercise 'administratively' because they require that First Covenant seek the approval of a government body.").

exercise of religion.¹¹⁴ By 2000, however, the Court held that land use application procedures did not burden free exercise.¹¹⁵ Unlike its earlier determination of “administrative burdens,” the Court characterized the impact of land use application procedures as “little more than the inconvenience of filling out paperwork.”¹¹⁶ Commentators have criticized this inconsistency in the Court’s burden analysis,¹¹⁷ and the Court itself has had difficulty reconciling its burden determinations following these decisions.¹¹⁸

Despite the inconsistent standard for determining whether a burden has been placed on a party’s free exercise, the Washington State Supreme Court usually recognizes a burden when the government action has a financial impact on the complaining party.¹¹⁹ The Court has maintained that “not all financial burdens” are onerous enough to impair free exercise.¹²⁰ “Gross financial burdens,” however, can be justified only by a compelling government interest.¹²¹ “Gross financial burdens” have never been clearly defined, but the Court has recognized a burden on free exercise when government action has reduced the value of

114. *First Covenant*, 120 Wash. 2d at 219, 840 P.2d at 183 (“The [historic preservation] ordinances burden free exercise ‘administratively’ because they require that First Covenant seek the approval of a government body.”).

115. *Open Door Baptist Church v. Clark Cnty.*, 140 Wash. 2d 143, 166, 995 P.2d 33, 46 (2000) (holding that application requirements for a zoning permit did not cause “anything more than an incidental burden upon the free exercise of religion”).

116. *Id.* at 160, 995 P.2d at 43.

117. *See* Rosenbleeth, *supra* note 110; *see also* Beth Prieve, Comment, *Religious Land Use Jurisprudence: The Negative Ramifications for Religious Activities in Washington After Open Door Baptist Church v. Clark County*, 26 SEATTLE U. L. REV. 365, 388 (2002) (“The Washington Supreme Court displayed a far less protective treatment of church organizations than previously reflected in other decisions.”).

118. *See* *City of Woodinville v. Northshore United Church of Christ*, 166 Wash. 2d 633, 642, 644, 211 P.3d 406, 410, 411 (2009) (offering the ambiguous explanation that “a burden can be a slight inconvenience without violating article I, section 11, but the State cannot impose a substantial burden on exercise of religion.”).

119. *See* *Open Door Baptist*, 140 Wash. 2d at 160, 995 P.2d at 42–43 (discussing in dicta that an application fee could be a financial burden on a religious organization); *First United Methodist Church of Seattle v. Hearing Exam’r for the Seattle Landmarks Pres. Bd.*, 129 Wash. 2d 238, 251–52, 916 P.2d 374, 381 (1996) (holding that ordinance prohibiting church from selling its property to generate revenue placed a financial burden on religious free exercise); *First Covenant*, 120 Wash. 2d at 219, 840 P.2d at 183 (explaining that the landmark ordinance in question burdened the church financially).

120. *First United Methodist*, 129 Wash. 2d at 249, 916 P.2d at 380 (“While not all financial burdens have a coercive effect on the practice of religion, gross financial burdens violate the right to free exercise.” (citing *First Covenant*, 120 Wash. 2d at 219, 840 P.2d at 183)).

121. *Id.*

church property.¹²² The Court has also suggested the possibility that a \$5,523 application fee would place a financial burden on a religious organization.¹²³

Washington courts have recognized burdens on free exercise when the government has required parties to take action prohibited by their religious beliefs, even if the action appears minimally invasive and reasonable. Washington courts have recognized burdens on free exercise resulting from government-mandated paternity testing,¹²⁴ tuberculosis screening,¹²⁵ flag saluting,¹²⁶ driver licensing,¹²⁷ and malpractice insurance.¹²⁸ Washington courts have also recognized burdens on free exercise when the government has prevented citizens and religious organizations from participating in activities required by their religious beliefs, such as restrictions against marijuana use,¹²⁹ and housing the homeless.¹³⁰

122. *First United Methodist*, 129 Wash. 2d at 251–52, 916 P.2d at 381 (holding that ordinance prohibiting church from selling its property to generate revenue placed a financial burden on religious free exercise); *First Covenant*, 120 Wash. 2d at 219, 840 P.2d at 183 (explaining that the landmark ordinance in question burdened the church financially by decreasing the church’s property value by almost one half).

123. *Open Door Baptist*, 140 Wash. 2d at 160, 995 P.2d at 42–43 (discussing in dicta that an application fee could be a financial burden on a religious organization).

124. *State v. Meacham*, 93 Wash. 2d 735, 740, 612 P.2d 795, 798 (1980) (discussing the fact that the government may only “restrict an individual’s exercise of conduct under a religious belief” as it did with its blood testing regulation if such an action is justified by a compelling interest).

125. *State ex rel. Holcomb v. Armstrong*, 39 Wash. 2d 860, 863, 239 P.2d 545, 547–48 (1952) (explaining that the plaintiff whose religious beliefs prohibited her from undergoing an x-ray as part of a campus tuberculosis screening program had a right that was protected against infringement and that the university’s board of regents infringed that right).

126. *Bolling v. Super. Ct. for Clallam Cnty.*, 16 Wash. 2d 373, 387, 133 P.2d 803, 810 (1943) (holding that a state law requiring school children to salute the flag placed a burden on the children of Jehovah’s Witnesses).

127. *State v. Clifford*, 57 Wash. App. 127, 130, 132, 787 P.2d 571, 574 (1990) (finding that statute requiring a party to obtain a driver’s license against his religious beliefs placed a burden on free exercise).

128. *Backlund v. Bd. of Comm’rs*, 106 Wash. 2d 632, 641, 724 P.2d 981, 986 (1986) (finding that rule requiring doctor to purchase malpractice insurance was protected belief that could only be infringed by a compelling government interest).

129. *State v. Balzer*, 91 Wash. App. 44, 55, 954 P.2d 931, 937 (1998) (explaining that a restriction on marijuana use burdens a party who believes marijuana use is part of his religion).

130. *City of Woodinville v. Northshore United Church of Christ*, 166 Wash. 2d 633, 644, 211 P.3d 406, 411 (2009).

2. *Protecting Health and Safety Is the Only Government Interest Compelling Enough to Justify a Burden on Free Exercise*

If a government's police power action burdens the free exercise of religion, the government must demonstrate that its action serves a "compelling state interest [that] justifies any burden on the free exercise of religion."¹³¹ The Court has described the compelling interest standard in lofty terms, stating that an interest can be compelling only if it "has a 'clear justification . . . in the necessities of national or community life' that prevents a 'clear and present, grave and immediate' danger to public health, peace, and welfare."¹³² The Court has refused to find a government interest compelling absent a "grave danger to the public health, peace, or welfare."¹³³ Even when government regulations "further cultural and esthetic interests," the Court will not uphold the regulations unless they "protect public health or safety."¹³⁴ Commentators have identified protection of health and safety as the crucial component of compelling government interests.¹³⁵

Contrary to its treatment of measures protecting health and safety, the Washington State Supreme Court has refused to recognize a compelling interest in government regulation of outdoor aesthetics and historic preservation of buildings. The Court applied its compelling interest standard in three cases in which religious organizations were burdened by aesthetically motivated historic preservation ordinances.¹³⁶ In each case, the Court held that the preservation ordinances failed to qualify as

131. *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 226, 840 P.2d 174, 187 (1992) (citing *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1123 (1989); *City of Sumner v. First Baptist Church of Sumner*, 97 Wash. 2d 1, 7–8, 639 P.2d 1358, 1362 (1982)).

132. *First Covenant*, 120 Wash. 2d at 226–27, 840 P.2d at 187 (quoting *Bolling v. Super. Ct. for Clallam Cnty.*, 16 Wash. 2d 373, 385, 133 P.2d 803, 809 (1943); *State ex rel. Holcomb v. Armstrong*, 39 Wash. 2d 860, 864, 239 P.2d 545, 548 (1952)).

133. *First Covenant*, at 227, 840 P.2d at 188 (citing *State ex rel. Holcomb*, 39 Wash. 2d at 864, 239 P.2d at 548).

134. *Id.* at 222, 840 P.2d at 185.

135. Katie Hosford, Comment, *The Search for a Distinct Religious-Liberty Jurisprudence Under the Washington State Constitution*, 75 WASH. L. REV. 643, 658 (demonstrating that, in the absence of well-developed Washington State Supreme Court case law, the Washington State Court of Appeals has limited compelling interests to only those that protect peace and safety (citing *State v. Norman*, 61 Wash. App. 16, 808 P.2d 1159 (1991); *State v. Balzer*, 91 Wash. App. 44, 954 P.2d 931 (1998))).

136. *Munns v. Martin*, 131 Wash. 2d 192, 195, 930 P.2d 318, 319 (1997) (landmark ordinance); *First United Methodist Church of Seattle v. Hearing Exam'r for the Seattle Landmarks Pres. Bd.*, 129 Wash.2d. 238, 251, 916 P.2d 374, 381 (1996) (historic preservation ordinance); *First Covenant*, 120 Wash. 2d at 219, 840 P.2d at 183 (historic preservation ordinance).

compelling interests justifying their burden on free exercise.¹³⁷ The fatal flaw in each case was the failure of the aesthetic ordinances to “protect public health or safety.”¹³⁸

3. *The Government Action Will Fail If Less Restrictive Measures Could Achieve the Compelling Interest*

If the government establishes that its burden on religious free exercise is justified by a compelling interest, it still has one final hurdle to clear: The government must show that its action is the least restrictive means of achieving its compelling interest.¹³⁹ To determine whether the government has met this least restrictive requirement, the Washington State Supreme Court inquires “whether there are less restrictive alternatives . . . still fulfilling the legitimate governmental interests”¹⁴⁰ The Court will “‘searchingly examine’ the asserted

137. *Munns*, 131 Wash. 2d at 195, 930 P.2d at 319 (landmark ordinance); *First United Methodist*, 129 Wash.2d. at 251, 916 P.2d at 381 (historic preservation ordinance); *First Covenant*, 120 Wash. 2d at 219, 840 P.2d at 183 (historic preservation ordinance).

138. *Munns*, 131 Wash. 2d at 201, 930 P.2d at 322 (holding that historic preservation ordinances “do not protect public health or safety”); *First United Methodist*, 129 Wash. 2d at 250, 916 P.2d at 380 n.6 (explaining that landmark ordinances might further aesthetic and historical interests but are not compelling (citing *First Covenant*, 120 Wash. 2d at 223, 840 P.2d at 185)); *First Covenant*, 120 Wash. 2d at 222, 840 P.2d at 185 (holding that despite cultural and aesthetic interests protected by historic preservation ordinances, those ordinances do not further compelling interests because they “do not protect public health or safety”).

139. *City of Woodinville v. Northshore United Church of Christ*, 166 Wash. 2d 633, 642, 211 P.3d 406, 410 (2009) (requiring the government to demonstrate that “it has a narrow means for achieving a compelling goal” (citing *Open Door Baptist Church v. Clark Cnty.*, 140 Wash. 2d 143, 152, 995 P.2d 33, 39 (2000))); *Open Door Baptist*, 140 Wash. 2d at 154, 995 P.2d at 39 (holding that the government’s action must be “the least restrictive available to achieve the ends sought” (quoting *Sumner v. First Baptist Church of Sumner*, 97 Wash. 2d 1, 8, 639 P.2d 1358, 1362 (1982))); *Munns*, 131 Wash. 2d at 199, 930 P.2d at 321 (requiring that the government’s action be “the least restrictive means for achieving the government objective”); *First United Methodist*, 129 Wash. 2d at 246, 916 P.2d at 378 (explaining that government action must be the “least restrictive means for achieving the government objective”); *First Covenant*, 120 Wash. 2d at 227, 840 P.2d at 187 (“The State must also demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available.” (citing *Sumner*, 97 Wash. 2d at 8, 15, 639 P.2d at 1366 (Utter, J., concurring))).

140. *Sumner*, 97 Wash. 2d at 10, 639 P.2d at 1363–64; *see also Open Door Baptist*, 140 Wash. 2d at 166–67, 995 P.2d at 46 (observing, in dicta, that the government had “no less restrictive alternative to requiring” a church to apply for a zoning exemption without completely exempting churches from zoning requirements); *State v. Motherwell*, 114 Wash. 2d 353, 366, 788 P.2d 1066, 1073 (1990) (holding that child abuse reporting statute was the least restrictive means of accomplishing government’s interest in protecting children from abuse because protecting children from abuse could not be “accomplished in a less inhibitory manner... while still allowing the state to satisfy its interests”); *State v. Meacham*, 93 Wash. 2d 735, 740, 612 P.2d 795, 798 (1980) (“If the statute’s purpose may be achieved by measures less drastic than restriction of First Amendment rights, the state must utilize such other measures.” (citing *State v. Loetze*, 92 Wash. 2d 52, 58–59,

interest of the [government], and should consider the effect of allowing specific exceptions or deviations” to accommodate free exercise.¹⁴¹ When government regulation and religious free exercise conflict, the government must approach such conflicts “with flexibility,” striving toward “accommodation between the competing interests.”¹⁴² Rigid enforcement of government regulations demonstrates that the least restrictive means have not been employed.¹⁴³ The government action must also be a “narrow” approach to achieving its interest¹⁴⁴ and must share a nexus of necessity with the interest.¹⁴⁵

B. The Court’s Only Decision Affecting Homeless Encampments on Church Property Provides Little Guidance on the Valid Reach of the Police Power

In *City of Woodinville v. Northshore United Church of Christ*,¹⁴⁶ the Washington State Supreme Court applied its strict scrutiny test for the first time to a government action that affected a homeless encampment on church property.¹⁴⁷ In 2004, the Northshore United Church of Christ entered into a consent agreement with the City of Woodinville, Washington regarding temporary homeless encampments.¹⁴⁸ The contract prohibited the church from hosting any homeless encampment “without a valid temporary use permit.”¹⁴⁹ After signing the agreement,

593 P.2d 811, 814 (1979)).

141. *Sumner*, 97 Wash. 2d at 10, 639 P.2d at 1363 (internal citation omitted) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

142. *Sumner*, at 9–10, 639 P.2d at 1363–64.

143. *See id.* at 9–10, 639 P.2d at 1363 (“An effort to accommodate the religious freedom of appellants while at the same time giving effect to the legitimate concerns of the City . . . would seem to be in order.”).

144. *See Northshore United Church of Christ*, 166 Wash. 2d at 645, 211 P.3d at 411 (holding that a blanket restriction on all conditional use permits was not a “narrow means for achieving a compelling goal”).

145. *See Meacham*, 93 Wash. 2d at 740–41, 612 P.2d at 798 (holding that the state’s compelling interest in collecting child support from fathers had a nexus of necessity with a blood-drawing requirement in paternity tests); *see also Backlund v. Bd. of Comm’rs of King Cnty. Hosp. Dist. 2*, 106 Wash. 2d 632, 646–47, 724 P.2d 981, 989 (1986) (holding that a public hospital’s requirement that doctors carry malpractice insurance had a nexus of necessity with the compelling interest of providing adequate funds for patients who successfully litigate malpractice claims against the doctor).

146. 166 Wash. 2d 633, 211 P.3d 406 (2009).

147. *Id.* at 637, 211 P.3d at 407–08.

148. *Id.* at 638, 211 P.3d at 408 (“The City, Share/Wheel, and the Church executed a contract spelling out conditions for the temporary use and the parties’ rights and duties.”).

149. *Id.*

the city adopted a moratorium on all temporary use permits.¹⁵⁰ While the moratorium was still in place, the church applied for a permit to host a homeless encampment.¹⁵¹ The city rejected the application because of its moratorium.¹⁵² The church proceeded to host the encampment without the permit and the city filed for a temporary restraining order.¹⁵³ The trial court enjoined the church from hosting the encampment and the Washington Court of Appeals affirmed on federal constitutional and statutory grounds.¹⁵⁴ The church appealed the decision to the Washington State Supreme Court,¹⁵⁵ and the Court addressed whether the city's refusal to consider the church's application violated the state constitution's protection of free exercise.¹⁵⁶

Under the first prong of the strict scrutiny test, the Court analyzed whether the city's actions placed a burden on the church.¹⁵⁷ The Court reasoned that a burden on free exercise "must be evaluated in the context in which it arises."¹⁵⁸ The Court analyzed the homeless encampment context, finding that "[h]ousing the homeless affects those outside the church in a way that private prayer or religious services inside the church buildings do not."¹⁵⁹ The Court reasoned that "[c]ities may mediate these externalities reflecting concerns for safety, noise, and crime" based on the police power of the state and the limits placed on free exercise in the state constitution.¹⁶⁰ Nevertheless, the Court held that a city "may not outright deny consideration of permitting."¹⁶¹ The city's complete refusal to consider a church's application to host the homeless encampment thus "placed a substantial burden on the Church."¹⁶²

150. *Id.*

151. *Id.*

152. *Id.* ("The City refused to process the application, citing the moratorium on all permits . . .").

153. *Id.* at 639, 211 P.2d at 408.

154. *City of Woodinville v. Northshore United Church of Christ*, 139 Wash. App. 639, 654, 162 P.3d 427, 434 (2007).

155. *City of Woodinville v. Northshore United Church of Christ*, 162 Wash. 2d 1019, 178 P.3d 1033 (2008) (granting review).

156. *Northshore United Church of Christ*, 166 Wash. 2d at 640, 211 P.3d at 409.

157. *Id.* at 642, 211 P.3d at 410 ("[A] party challenging government action must show . . . that the government action burdens the exercise of religion.").

158. *Id.* at 644, 211 P.3d at 411.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

The Court only briefly discussed whether the city's moratorium served a compelling interest.¹⁶³ Because the city failed to brief the matter, the Court summarily determined that no compelling interest was present.¹⁶⁴ While the Court noted that municipal police power still provides a valid check on religious free exercise,¹⁶⁵ it provided little guidance as to the valid reach of municipal regulation of homeless encampments.

III. WHILE MANY HOMELESS ENCAMPMENT REGULATIONS ARE VALID POLICE POWER ACTIONS, SOME FAIL THE STRICT SCRUTINY TEST

Even though municipal governments may regulate a broad range of activities under their constitutionally protected police power,¹⁶⁶ police power actions affecting the free exercise of religion are still subject to the Washington State Supreme Court's strict scrutiny test.¹⁶⁷ Such is the case when municipalities regulate homeless encampments hosted by religious organizations. The strict scrutiny test requires that homeless encampment regulations burdening religious exercise be justified by a compelling government interest.¹⁶⁸ The homeless encampment regulations must also be the least restrictive means of achieving the government's goal.¹⁶⁹

163. *Id.* at 642, 211 P.3d at 410 (discussing that the city had not briefed whether its actions served a compelling interest and that "the only issue presented is whether the city's actions substantially burden the free exercise" of the church).

164. *Id.*

165. *Id.* at 642, 211 P.3d at 410 n.3 (explaining that "[o]f course, the government may require compliance with reasonable police power regulation").

166. *See* Spitzer, *supra* note 8.

167. *See, e.g.,* First Covenant Church of Seattle v. City of Seattle, 120 Wash. 2d 203, 218, 840 P.2d 174, 183 (1992) (stating that the Washington State Supreme Court will subject any infringement on free exercise to strict scrutiny); *see also supra* text accompanying notes 102–105 (explaining the Washington State Supreme Court's reliance on the strict scrutiny test).

168. *See, e.g.,* First Covenant, 120 Wash. 2d at 226, 840 P.2d at 187 ("State action is constitutional under the free exercise clause of article 1 if the action results in no infringement of a citizen's right or if a compelling state interest justifies any burden on the free exercise of religion." (citing Witters v. State Comm'n for the Blind, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1122–23 (1989); City of Sumner v. First Baptist Church of Sumner, 97 Wash. 2d 1, 7–8, 639 P.2d 1358, 1362 (1982))); *see also supra* text accompanying notes 131–138 (explaining the Washington State Supreme Court's burden analysis).

169. First Covenant, 120 Wash. 2d at 227, 840 P.2d at 187 ("The State also must demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available." (citing Sumner, 97 Wash. 2d at 14–15, 639 P.2d at 1366 (Utter, J., concurring))); *see also supra* text accompanying notes 139–145 (describing the Washington State Supreme Court's least restrictive means requirement).

A. *Municipal Homeless Encampment Regulations Create a Burden on Religious Free Exercise that Must Be Justified by a Compelling Government Interest*

Under the first prong of the strict scrutiny test, Washington courts decide whether a government action burdens the free exercise of religion.¹⁷⁰ Although the Washington State Supreme Court has never established a clear burden formula, Washington courts generally recognize a burden on free exercise if the government action causes a party to incur substantial financial expense,¹⁷¹ compels a party to act counter to its religious beliefs,¹⁷² or prevents a party from engaging in acts required by the party's religion.¹⁷³ Under this reasoning, homeless encampment regulations burden free exercise when applied to religious organizations.

The Washington State Supreme Court has held sanitation, sewage, clean water, and security regulations to be constitutionally protected exercises of municipal police power when applied to secular actors.¹⁷⁴ As applied to religious institutions, however, these regulations create a burden on free exercise that must be justified by a compelling government interest. Requiring a church to pay for additional sanitation, sewage, and drinking water service for temporary residents affects the organization financially. Fire safety provisions also have a financial impact by forcing a religious organization to shoulder the cost of flame-retardant tents and outdoor electrical equipment. The same is true for weapons bans and security patrols, which could require the retention of a private security firm. Visual screening regulations also add costs to the protected activity of housing the homeless. These regulations and other fees associated with hosting a homeless encampment¹⁷⁵ are a significant

170. *See, e.g., First Covenant*, 120 Wash. 2d at 226, 840 P.2d at 187 (explaining that government action can be upheld if it does not burden religious free exercise under the first prong of the strict scrutiny test).

171. *See, e.g., Open Door Baptist Church v. Clark Cnty.*, 140 Wash. 2d at 160, 995 P.2d at 42–43 (discussing in dicta that an application fee could be a financial burden on a religious organization); *see also supra* text accompanying notes 119–123 (explaining financial burdens on religious free exercise).

172. *See supra* text accompanying notes 124–128.

173. *See supra* text accompanying notes 129–130.

174. *See supra* text accompanying notes 24–28.

175. Anne Kim, *Tent City Hit With \$4,000 Bill*, SEATTLE TIMES, Sept. 9, 2006, at B3 (explaining that First Evangelical Lutheran Church, a homeless encampment host site, had been billed for the hours that Bothell city officials spent processing its application).

financial burden analogous to the burdens described in previous Washington cases.¹⁷⁶

The regulations would also burden religious organizations “administratively”¹⁷⁷ because they require religious institutions to follow secular standards when engaging in protected religious activity. Providing sewage, clean water, trash cleanup, and security support is much more burdensome than the mere “inconvenience of filling out paperwork.”¹⁷⁸ It requires a concentrated financial and administrative effort to comply with municipal standards for assisting the homeless.

A prohibition against hosting sex offender residents would also burden religious exercise. While many religious organizations do not want sex offenders living in their homeless encampments,¹⁷⁹ other religious organizations could argue that helping all homeless persons is part of their religious practice, regardless of a resident’s criminal history. Prohibiting such religious organizations from hosting homeless sex offenders prevents them from engaging in protected religious acts. This prohibition places a burden on free exercise analogous to burdens recognized in other Washington cases where government action has kept a party from participating in sincerely held religious activity.¹⁸⁰

Similarly, uniform limitations on the number of residents a church may host at its encampment and blanket restrictions on the duration an encampment may stay at a particular site both burden the free exercise of religion. When an organization has a religious mandate to provide housing for the homeless, capping the number of homeless persons the organization may serve directly limits its protected religious practice. Likewise, limiting the duration of a particular homeless encampment

176. *Open Door Baptist Church*, 140 Wash. 2d at 160, 995 P.2d at 42–43 (discussing in dicta that an application fee could be a financial burden on a religious organization); *First United Methodist Church of Seattle v. Hearing Exam’r for the Seattle Landmarks Pres. Bd.*, 129 Wash. 2d 238, 251–52, 916 P.2d, 374, 381 (1996) (holding that ordinance prohibiting church from selling its property to generate revenue placed a financial burden on religious free exercise); *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 219, 840 P.2d, 174, 183 (1992) (explaining that the landmark ordinance in question burdened the church financially).

177. *First Covenant*, 120 Wash. 2d at 219, 840 P.2d at 183 (“The [historic preservation] ordinances burden free exercise ‘administratively’ because they require that First Covenant seek the approval of a government body . . .”).

178. *Open Door Baptist Church*, 140 Wash. 2d at 160, 995 P.2d at 43.

179. *Tent City 3 Frequently Asked Questions*, MAPLE LEAF LUTHERAN CHURCH, http://peaceoutchurch.org/index.php?option=com_content&task=blogcategory&id=77&Itemid=228 (last visited Sept. 13, 2010) (explaining that homeless encampment residents “do not want sex offenders living in their tent community”).

180. *See, e.g., State v. Balzer*, 91 Wash. App. 44, 55, 954 P.2d 931, 937 (1998) (recognizing that laws criminalizing marijuana possession placed a burden on the defendant’s free exercise).

shortens the period a religious organization can serve the homeless. The two related restrictions prohibit a religious organization from participating in protected religious exercise. The limits must therefore be justified by a compelling government interest.

B. Sewage, Sanitation, Fire Safety, and Security Regulations Protect Public Health and Safety, but Aesthetic Screening Regulations Do Not

Even when a government action burdens free exercise, it may still be valid if it serves a compelling interest.¹⁸¹ Despite the burden that all municipal homeless encampment regulations place on religious organization hosts, sewage, clean water, sanitation, and security measures all serve a compelling government interest in public health and safety. Conversely, visual screening requirements serve aesthetic interests alone and do not further a compelling health and safety interest.

Homeless encampment ordinances requiring sanitation, sewage, drinking water, and security measures all serve a compelling government interest. The Washington State Supreme Court has repeatedly found a direct public health justification in municipal ordinances dealing with sewage,¹⁸² clean water,¹⁸³ and waste disposal.¹⁸⁴ The importance of sanitation, sewage, and clean water ordinances to public health outweighs the burden they place on free exercise. Likewise, fire safety provisions would meet the second prong of the strict scrutiny test by protecting the community from fire danger, an interest that has long been held to fall within the municipal police power.¹⁸⁵ Practices posing a fire hazard are also limited by article I, section 11, which bans religious activities jeopardizing public safety.¹⁸⁶

A compelling government interest also justifies the burden a ban on weapons in homeless encampments places on a religious organization

181. See, e.g., *First Covenant*, 120 Wash. 2d at 226, 840 P.2d at 187 (“State action is constitutional under the free exercise clause of article 1 if the action results in no infringement of a citizen’s right or if a compelling state interest justifies any burden on the free exercise of religion.” (citing *Witters v. State Comm’n for the Blind*, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1122–23 (1989); *City of Sumner v. First Baptist Church of Sumner*, 97 Wash. 2d 1, 7–8, 639 P.2d 1358, 1362 (1982))).

182. *Elliott v. City of Leavenworth*, 197 Wash. 427, 431, 85 P.2d 1053, 1054–55 (1938).

183. *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 620, 277 P.2d 352, 354 (1954).

184. *City of Spokane v. Carlson*, 73 Wash. 2d 76, 80, 436 P.2d 454, 457 (1968); *Cornelius v. City of Seattle*, 123 Wash. 550, 556–57, 213 P. 17, 19 (1923).

185. *Coffin v. Blackwell*, 116 Wash. 281, 287, 199 P. 239, 241–42 (1921); *City of Seattle v. Hinckley*, 40 Wash. 468, 471, 82 P. 747, 748 (1905).

186. WASH. CONST. art. I, § 11.

host. In its limited discussion of the valid reach of homeless encampment regulations, the Washington State Supreme Court explained in *Northshore United Church of Christ* that large numbers of outdoor residents could create “externalities” such as crime that would require government action.¹⁸⁷ Eliminating weapons from the area would mitigate this externality by protecting the safety of encampment residents and the surrounding neighborhood. The Court has already recognized weapons restrictions as valid restrictions on the constitutionally protected right to bear arms.¹⁸⁸ For the same reasons, the positive impact of weapons restrictions on safety makes such regulations compelling enough to survive the second prong of the strict scrutiny test.

Like challenges to weapons bans, challenges to sex offender residency restrictions are likely justified by a compelling interest. The Washington legislature has already recognized an interest in sex offender residency restrictions to prevent crime and protect public safety.¹⁸⁹ Although this statute’s constitutionality has not been evaluated by the Washington State Supreme Court, the Court has long recognized child protection as a compelling government interest,¹⁹⁰ a conclusion that courts in other jurisdictions have reached in upholding sex offender residency restrictions.¹⁹¹

187. *City of Woodinville v. Northshore United Church of Christ*, 166 Wash. 2d 633, 644, 211 P.3d 406, 411 (2009).

188. *See, e.g., City of Seattle v. Montana*, 129 Wash. 2d 583, 592, 919 P.2d 1218, 1223 (1996).

189. WASH. REV. CODE § 9.94A.703 (2008) (prohibiting individuals convicted of child sex crimes from living within “community protection zones”).

190. Although the Washington State Supreme Court has not ruled on the validity of sex offender residency restrictions, it has recognized a compelling interest in state protection of children in other contexts. *See State v. Meacham*, 93 Wash. 2d 735, 738, 612 P.2d 795, 797 (1980) (upholding paternity test law because “the interest of the State in the welfare of its minor children has long been a compelling and paramount concern.” (citing *Heney v. Heney*, 24 Wash. 2d 445, 165 P.2d 864 (1946); *State v. Coffey*, 77 Wash. 2d 630, 465 P.2d 665 (1970); *State v. Bowen*, 80 Wash. 2d 808, 498 P.2d 877 (1972); *State v. Wood*, 89 Wash. 2d 97, 569 P.2d 1148 (1977))); *see also State v. Motherwell*, 114 Wash. 2d 353, 365, 788 P.2d 1066, 1072 (1990) (upholding child abuse reporting statute because “the State’s interest in the protection of children is unquestionably of the utmost importance.”).

191. *See Weems v. Little Rock Police Dep’t*, 453 F.3d 1010, 1016–20, (8th Cir. 2006) (holding that Arkansas law barring sex offenders from living near schools was not an unconstitutional ex post facto law, did not violate substantive due process, did not violate equal protection, and did not violate constitutional right to intrastate travel); *Doe v. Miller*, 405 F.3d 700, 708–22 (8th Cir. 2005) (holding that Iowa law preventing sex offenders from living within 2000 feet of a school did not violate substantive or procedural due process, did not abridge any constitutional right to travel, did not violate the Fifth Amendment’s protection against self-incrimination, and was not an ex post facto law); *Doe v. Baker*, No. Civ.A. 1:05-CV-2265, 2006 WL 905368, *2–9 (N.D. Ga. April 5, 2006) (holding that Georgia state law prohibiting sex offenders from living within 1000 feet of school or child care facility was not an ex post facto law, did not violate the Eighth Amendment’s

Unlike the health and safety measures discussed above, aesthetic screening regulations do not further a compelling government interest. Even as applied to secular organizations, aesthetic screening requirements have been justified only on the basis of limiting criminal activity¹⁹² or protecting public safety,¹⁹³ thereby coupling their aesthetic purpose with a larger government interest in public health and safety. The purpose of the homeless encampment screening requirements is simply to lessen the visual impact of the encampment,¹⁹⁴ thus protecting aesthetic interests alone. The screening requirements do not attempt to cure a direct threat to public safety, in contrast to the valid ordinances upheld in *Markham*¹⁹⁵ and *Lenci*.¹⁹⁶ More importantly, the Washington State Supreme Court has previously held that the government's interest in outdoor aesthetics is not compelling enough to justify a burden on religious free exercise.¹⁹⁷ Aesthetic interests are not compelling because they do not protect "public health and safety."¹⁹⁸ The aesthetic screening requirements in Washington's municipal homeless encampment ordinances fail the strict scrutiny test.

Just as visual screening regulations require a link to the protection of public health and safety, maximum-resident and maximum-duration restrictions must show a connection to health and safety to justify their burden on free exercise. Homeless encampment ordinances include these resident and duration restrictions but do not include an explanation of

prohibition of cruel and unusual punishment, did not violate substantive or procedural due process, and did not result in a "taking" under the Fifth Amendment); *People v. Leroy*, 828 N.E.2d 769, 776–77 (Ill. App. 2005) (holding that Illinois statute prohibiting sex offenders from living within 500 feet of schools was reasonably related to the government's compelling interest in protecting children from sex offenders).

192. *Lenci v. City of Seattle*, 63 Wash. 2d 664, 676–77, 388 P.2d 926, 934 (1964).

193. *Markham Adver. Co. v. State*, 73 Wash. 2d 405, 421, 439 P.2d 248, 258 (1968).

194. *See supra* text accompanying note 79 (describing the purpose of aesthetic screening requirements in homeless encampment ordinances).

195. *Markham*, 73 Wash. 2d at 421, 439 P.2d at 258.

196. *Lenci*, 63 Wash. 2d at 676–77, 388 P.2d at 934.

197. *Munns v. Martin*, 131 Wash. 2d 192, 195, 930 P.2d 318, 319 (1997) (landmark ordinance); *First United Methodist Church of Seattle v. Hearing Exam'r for the Seattle Landmarks Pres. Bd.*, 129 Wash. 2d 238, 251, 916 P.2d 374, 381 (1996); *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 219, 840 P.2d 174, 183 (1992); *see also supra* text accompanying notes 136–138 (explaining the Washington State Supreme Court's treatment of historic preservation ordinances as applied to religious organizations).

198. *First Covenant*, 120 Wash. 2d at 222, 840 P.2d at 185 (holding that despite cultural and aesthetic interests protected by historic preservation ordinances, those ordinances cannot be compelling interests because they "do not protect public health or safety").

the compelling interest such restrictions aim to achieve.¹⁹⁹ While a health and safety purpose is clear from the face of homeless encampment provisions regulating sewage, clean water, sanitation, fire safety, sex offender residency, and weapons, a health and safety justification is more attenuated in uniform maximum-resident and maximum-duration restrictions. Specific findings explaining the relationship between these provisions and the protection of health and safety are necessary to prove their compelling government interest.²⁰⁰ Possible findings could include a study linking resident density to health and safety. By defining a “safe” number of residents per unit of land, municipalities could show a compelling interest in limiting the number of residents in a given location. Likewise, pairing health and safety with specific homeless encampment durations would clarify the compelling interest that duration limitations are designed to achieve. While a sympathetic court might find a compelling interest in these blanket limitations as they are currently written, specific findings relating to health and safety are necessary to justify resident and duration limitations as compelling government interests.

C. While Sewage, Sanitation, Fire Safety, and Security Regulations Are Sufficiently Narrow, One-Size-Fits-All Resident and Duration Restrictions Are Not

Even if a government burden on free exercise is justified by a compelling interest, the government action must still be the least restrictive means of achieving that interest.²⁰¹ Washington courts must “searchingly examine” the government’s effect on religious free exercise to determine if a less restrictive measure, or an exception or deviation from the government regulation, could accommodate religious free exercise while still furthering the government’s compelling interest.²⁰²

199. See *supra* text accompanying notes 93–96 (describing maximum-resident and maximum-duration restrictions).

200. See, e.g., *Ackerly Commc’ns, Inc. v. City of Seattle*, 92 Wash. 2d 905, 920, 602 P.2d 1177, 1186–87 (1979) (validating government police power action because of findings that measure would protect health and safety).

201. *First Covenant*, 120 Wash. 2d at 227, 840 P.2d at 187 (“The State also must demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available.” (citing *City of Sumner v. First Baptist Church of Sumner*, 97 Wash. 2d 1, 8, 15, 639 P.2d 1358, 1366 (1982) (Utter, J., concurring))); see also *supra* text accompanying notes 139–145 (explaining the Washington State Supreme Court’s least restrictive means requirement).

202. *Sumner*, 97 Wash. 2d at 10, 639 P.2d at 1363–64 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

The government's chosen regulation must be a "narrow means"²⁰³ selected in an overall effort toward accommodation.²⁰⁴

Sewage, clean water, sanitation, and security provisions in homeless encampment ordinances are all narrowly tailored to a single externality that outdoor homeless encampments present. It is difficult to imagine less inhibitory measures that would still achieve the government's health and safety goals. To protect against illness and disease, homeless encampment regulations require portable toilets, clean water, and trash collection. To protect the safety of residents and the surrounding neighborhood, homeless encampment regulations require reasonable fire prevention steps, prohibit sex offenders, and ban weapons. These provisions are narrowly tailored to the specific government interest they aim to achieve. Although the provisions burden the free exercise of religious organization hosts, they are narrow enough to demonstrate an effort at accommodation while still achieving their compelling government interest. Because of their narrow scope and their close nexus with the government interest they aim to promote, sewage, clean water, sanitation, and security measures are the least restrictive means of accomplishing compelling government interests in health and safety and are therefore constitutional.

Unlike the narrow health and safety regulations discussed above, uniform restrictions on the number of residents homeless encampments may host are not the least restrictive means of achieving their purported interest. Similarly, blanket limitations on the amount of time a religious organization may host a homeless encampment are not the least restrictive means of achieving a government goal. Homeless encampment regulations in Washington place a one-size-fits-all restriction on encampment residents at only 100 persons, irrespective of the size, location, or capacity of an encampment's host.²⁰⁵ Likewise, most homeless encampment regulations sharply limit all encampments to only ninety days at a particular site and flatly prohibit an organization from hosting a second encampment until two years after hosting its first.²⁰⁶ By rigidly enforcing these uniform restrictions on churches of varying size and capacity, municipalities fail to consider "exceptions or

203. *City of Woodinville v. Northshore United Church of Christ*, 166 Wash. 2d 633, 642, 211 P.3d 406, 410 (2009).

204. *Sumner*, 97 Wash. 2d at 10, 639 P.2d at 1363–64.

205. *See supra* text accompanying notes 93–97 (describing maximum-resident and maximum-duration restrictions).

206. *See supra* text accompanying notes 93–97.

deviations²⁰⁷ that would be less restrictive to the protected religious activity of ministering to the homeless. If the resident and duration restrictions are aimed at protecting health and safety, less restrictive health and safety measures are already included in homeless encampment ordinances.²⁰⁸ When less restrictive means not only exist but have already been enacted by the municipality, uniform caps on residents and duration cannot be the least restrictive means of protecting health and safety.

Maximum-resident and maximum-duration restrictions also fail because they are not “narrow”²⁰⁹ means connected by a “nexus of necessity”²¹⁰ to the interest they purport to advance. Resident and duration restrictions lack findings establishing a government interest in health and safety.²¹¹ Without such findings, uniform caps at 100 residents and blanket limitations of ninety days at all host sites become arbitrary figures lacking the health and safety nexus required by the strict scrutiny test. To qualify as a narrow means, maximum-resident restrictions must establish a public health or safety interest in a specific resident density, perhaps through legislative findings defining the safe number of residents per unit of land. This “safe” density could then be applied individually to homeless encampment hosts to determine a maximum resident capacity for that specific host site. By applying this tailored density formula to specific hosts, municipalities would provide a much narrower restriction on free exercise than current one-size-fits-all limitations. Applying a “safe” density formula would also demonstrate a nexus with the government’s interest in health and safety. Only through narrow tailoring, such as a density formula, could maximum-resident restrictions satisfy the third prong of the strict scrutiny test. As currently written, such restrictions are unconstitutional infringements on free exercise.

Similarly, municipalities must link their ninety-day limitations on homeless encampments to the protection of health and safety. The government’s interest in homeless encampments being “temporary” is

207. *Sumner*, 97 Wash. 2d at 10, 639 P.2d at 1363–64.

208. *See supra* text accompanying notes 33–35, 53–55 (outlining the health and safety regulations included in municipal homeless encampment ordinances).

209. *City of Woodinville v. Northshore United Church of Christ*, 166 Wash. 2d 633, 642, 211 P.3d 406, 410 (2009).

210. *State v. Meacham*, 93 Wash. 2d 735, 740, 612 P.2d 795, 798 (1980).

211. *See supra* text accompanying notes 93–96; *see also supra* Part III.B (explaining that homeless encampment ordinances do not include findings that link maximum-resident restrictions to public safety).

not enough. Municipalities must demonstrate a “nexus of necessity” between the duration an encampment stays at a given site and the protection of public health and safety.²¹² Until municipalities establish this nexus and tailor restrictions to specific hosts, blanket limitations on encampment duration will fail to satisfy the third prong of the strict scrutiny test.

CONCLUSION

The Washington State Constitution provides “absolute” protection for religious free exercise. It also vests strong police power in municipal governments. Homeless encampment regulations stand at the threshold between these two competing constitutional provisions. To distinguish valid police power actions from undue restrictions on free exercise, the Washington State Supreme Court has articulated a three-pronged strict scrutiny test. Under the first prong of the strict scrutiny test, all homeless encampment regulations burden the free exercise of religion. Under the second prong, however, many of these burdens are justified by a compelling government interest in public health and safety. Provisions regulating sewage, clean water, sanitation, fire safety, weapons possession, and sex offender residency all protect public health and safety; whereas aesthetic screening requirements do not. Finally, under the third prong of the strict scrutiny test, blanket restrictions on encampment population size and duration are not the least restrictive means of accomplishing a compelling government interest. Municipalities and religious organizations should consider these constitutional limitations on Washington’s homeless encampment ordinances in the years ahead.

212. *Meacham*, 93 Wash. 2d at 740, 612 P.2d at 798 (1980).