The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PATRICIA COLE-TINDALL, in her official capacity as the King County Sheriff and KING COUNTY, a home rule charter county, Plaintiffs, v. CITY OF BURIEN, a municipal corporation, Defendant.	NO. 2:24-cv-00325-RAJ DEFENDANT CITY OF BURIEN'S OBJECTION/MOTION TO STRIKE AND/OR MOTION TO CONTINUE PRELIMINARY INJUNCTION (DKT. #7) **NOTED FOR CONSIDERATION: Friday, April 5, 2024**

I. INTRODUCTION AND RELIEF REQUESTED

King County (the "County") and its sheriff, Patricia Cole-Tindall, (together, the "Plaintiffs") filed suit on March 15, 2024 against the City of Burien ("Burien") seeking a declaratory judgment under 28 U.S.C. §§ 2201 and 2202. The thrust of the complaint is that the King County Sheriff's Office ("KCSO") seeks interpretation of the parties' contract (an Interlocal Agreement ["ILA"] between the parties that essentially provides that KCSO must enforce all Burien laws and ordinances) to support KCSO's unilateral and sudden decision to not enforce Burien's newly enacted Ordinance No. 832 (the "Ordinance"). Dkt. 1. Notably, upon

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filing this action, Plaintiffs immediately filed for a preliminary injunction to justify its refusal to enforce the Ordinance. It is important to note, however, that Plaintiffs did *not* seek a temporary restraining order. *Dkt.* # 7. The preliminary injunction motion (the "Motion") is noted for consideration on April 5, 2024. The Court should strike the Motion, or at the very least continue the hearing date, for three equally availing reasons.

First, Plaintiffs did not (and continue to refuse to) comply with this Court's standing order requiring the parties to meet and confer in advance of filing motions, including preliminary injunctions. *See Dkt* # 14 (filed March 15, 2024) at ¶6 ("counsel contemplating the filing of any motion shall first contact opposing counsel to discuss *thoroughly*, preferably in person, the *substance* of the contemplated motion *and any potential resolution*. The Court construes this requirement strictly.") (emphasis in original). Despite being advised of this requirement in writing by opposing counsel twice and requesting that the Plaintiffs strike the premature Motion so that a good faith in-person, substantive conference could be had, Plaintiffs refused arguing that this "Standing Order for Civil Cases Assigned to Judge Richard A. Jones" did not apply to them because they quickly filed their Motion the day before this Court issued its standing order.[1] The Motion should be stricken, and the Plaintiffs should be ordered to have the requisite conference in good faith and in-person with defense counsel before being allowed to refile any such motion.

Second, Plaintiffs delayed Burien's ability to respond to the Motion by (wrongly) asserting that Burien's chosen outside counsel (the undersigned) were barred from representing

[1] As counsel knows, this "standing order" is just that – Judge Jones's standing order in all cases before him.

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Burien due to a perceived conflict. After thoroughly investigating such a serious accusation and responding in full, it was not until March 25, 2024, that King County finally relented on the issue, allowing the undersigned counsel to begin representing Burien in this matter. Accordingly, King County's flawed objection (and then withdrawal of the same) resulted in a delay to Burien's ability to appropriately and adequately respond to the motion (having first objected on March 15 to the Burien City Attorney) – results in Burien having insufficient time to adequately prepare a full-throated response to the Plaintiff's Motion and the serious and weighty issues, both factually and legally, contained therein.

Under LCR 7(d)(3), Burien is entitled to – and needs to, given the complicated issues presented in this motion – the full time allowed to respond to the Motion. If the Court does not strike the Motion for failing to comply with its standing order, it should at least continue the Motion to allow all the various issues to be thoroughly briefed.

Third, the ILA governs Plaintiffs' relationship with Burien, which requires KCSO to provide police services to Burien, including enforcing Burien ordinances. The ILA has a specific dispute resolution provision that requires the County and Burien to refer issues regarding its interpretation, scope, and operation to an Oversight Committee. If the parties and the Oversight Committee are unable to resolve their disputes, only then can the parties proceed further in accordance with the laws of the State of Washington. This instant case between Burien and KCSO is fundamentally a dispute over contract interpretation (a state law issue to be sure), scope, and operation, which must first go the Oversight Committee and which Plaintiff failed to do despite Burien's demand to do so before this errant suit was filed.

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In all candor, this Court does not currently have subject matter jurisdiction over this matter under 28 U.S.C. § 1331.[2] Further, and to underscore this resolution process, Burien has separately filed suit against the County in the Superior Court of Washington to enforce the ILA and address all issues as may be necessary to resolve the dispute between the parties.

The Motion (Dkt. 7) should be stricken or, at the very least, continued sufficiently for Burien to brief and respond to such important and complicated issues.

II. FACTUAL BACKGROUND

A. The Interlocal Agreement – the ILA

In 2000, Burien and the County entered into an ILA pursuant to RCW Chapter 39.34 under which the KCSO agreed to provide police services to Burien. *See* Exhibit A to the Complaint for Declaratory and Injunctive Relief, *Dkt.* # 1. Under similar agreements, the KCSO provides police services to twelve cities (including Burien), one Indian tribe, two transit agencies, and King County International Airport. The County and Burien periodically renewed the ILA and it remains in force today. Several provisions are pertinent to this motion.

First, under the ILA, KCSO is required to provide the following services:

> 1.1.1 Reactive patrol to enforce state law and City-adopted municipal, criminal, and traffic codes and to respond to residents' and business' calls for service;
> 1.1.2 Proactive patrol to prevent and deter criminal activity;
> . . .
> 1.13. Community service and community crime prevention detectives.

Id.

Second, Burien and the County agreed that Burien "shall indemnify and hold harmless

[2] Simply because Plaintiffs claim a constitutional infirmity with the Ordinance, does not create federal question jurisdiction in this Court. It is not the County's constitutional rights allegedly being imposed upon, but instead is simply a state court contract dispute that needs resolving, *if* the parties' agreed to dispute resolution process does not resolve matters first.

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the County, and its officers, agents, and employees" for claims arising out of any negligent act or omission by the City, its officers, agents, or employees for the performance of the ILA. Section 12.2. *Id*.

Section 12.3 specifically states:

> County does not assume liability or responsibility for or in any way release the City from any liability or responsibility which arises in whole or in part from the existence or effect of City ordinances, policies, rules or regulations. If any cause, claim, suit, action or administrative proceeding is commenced in which the enforceability and/or validity of any such City ordinance, policy, rule or regulation is at issue, the City shall defend the same at is whole expense, and, if judgment is entered or damages are awarded against the City, the County, or both, the City shall satisfy the same, including all chargeable costs and reasonable attorney's fees.

Id.

Third, unresolved issues between the parties shall be referred to the Oversight Committee:

> 16.2 Referral of Unresolved Problems. The City Chief Executive Officer shall refer any police service operational problem, which cannot be resolved, to the King County Sheriff. The Sheriff and the City Chief Executive Officer shall meet as necessary to resolve such issues. Unresolved problems shall be referred to the Oversight Committee.
>
> 16.3 Agreement Dispute Issues. Agreement dispute issues involving agreement language interpretation, cost, and other non-operational matters shall be referred to the Sheriff, the Chair of the Oversight Committee, the King County 's representative to the Oversight Committee, and the affected party or parties to review and resolve. In the event that the dispute involves the city of the Oversight Committee Chair, the Oversight Committee will designate an alternate City Chief Executive Officer to serve as Chair of the Oversight Committee for the purpose of resolving the specific issue. Any unresolved problems shall be referred to the Oversight Committee as a whole.

Fourth, the ILA specifies the makeup of the Oversight Committee:

> 17.1 Oversight Committee. The City and the County agree to establish an Oversight Committee consisting of the chief executive officers, or their designees, o the cities that contract with the County for law enforcement services, the King County Sheriff, one person designated by the County Executive, and one person

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> designated by the chair of the King County Council's Law, Justice, and Human Services Committee, or its successor.

Id.

Finally, the Oversight Committee process must first be exhausted *before* parties can pursue other remedies:

> 17.2.3 If an operational problem or agreement dispute is referred to the Oversight Committee pursuant to sections 16.2 or 16.3 of this agreement, the Oversight Committee will meet and attempt to resolve the problem or dispute. If the Oversight Committee is unable to resolve the problem or dispute, the agreement shall be construed in accordance with the laws of the State of Washington.

Id.

Under no circumstances should a court, much less this federal court, be the first stop for KCSO to resolve a contract dispute with Burien about the scope of KCSO's police services to Burien. Unfortunately, KCSO has refused to honor its contractual obligations in this matter.

B. The Ordinance

On March 4, 2024, Burien passed Ordinance No. 832, which made amendments to the existing Burien Municipal Code ("BMC") 9.85.150 to clarify and enhance its efforts to protect Burien residents, businesses, and property and to assist and provide clear guidance for the unhoused. *See* Exhibit E to the Complaint for Declaratory and Injunctive Relief, *Dkt.* # 1. The Ordinance prohibits individuals from sleeping overnight on public property if a shelter, bed, or treatment facility is available. *Id*. It prohibits individuals from setting up campsites in a manner which exercises nontransitory exclusive control over any portion of nonresidential public property. It also prohibits camping within 500 feet of sensitive sites, such as daycares or schools. *Id.* But, as permitted by BMC 9.85.150, a map allocates a significant portion of Burien, including

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much of its downtown, for the unhoused to sleep every night if there are no beds available, while protecting schools, libraries, daycare centers, and critical area from the negative secondary effect of rough sleeping.

C. Procedural History

On March 8, 2024, in violation of the ILA, the Sheriff directed KCSO officers serving as the Burien Police Department officers to not enforce BMC 9.85.150 based upon alleged and unspecified "constitutional concerns." *See* ¶50 to the Complaint for Declaratory and Injunctive Relief. *Dkt.* # 1. The following day, Burien informed Plaintiffs that such a refusal to enforce the Ordinance was a breach of the ILA. Burien also stated that the matter was an operational issue that needed to be referred to the Oversight Committee. *Id.* Instead of complying with their obligations in this regard, Plaintiffs doubled down and stated simply that they would not enforce the Ordinance.

Strangely, within 48 hours of Burien's insistence that the matter be referred to the Oversight Committee, and after agreeing to meet to discuss the disagreement, Plaintiffs instead filed this federal suit. *Dkt.* # 1 (Complaint dated March 11, 2024). Plaintiffs made no attempt to refer the dispute over KCSO's enforcement of the Ordinance to the Oversight Committee and have rebuffed Burien's attempt to do so.

On March 14, 2024, Plaintiffs filed and served the motion for preliminary injunction. *Dkt. #s* 7 – 12. It is unclear whether service of process was perfected on March 14, 2024, which Burien pointed out to Plaintiffs several times. *See* Declaration of Daniel Brown in Support of Burien's Objection/Motion To Strike and/or Motion to Continue Preliminary Injunction ("Brown Decl."), ¶¶ 3-5. Plaintiffs apparently acknowledging such potential problems, attempted service

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again on March 18, 2024. *Id.*, Exs. A through C thereto. At that time, Plaintiffs' process server was, in fact, the Burien Police Chief, who is also employed by the KCSO as a Sheriff's Office Major. *Id.* Burien again objected to this manner of service because Plaintiffs were essentially using Burien's own agent to attempt to serve Burien with legal process. This violation conflicts with the ILA's terms that "Police Chiefs are expected to represent the City's point of view, consider City needs in carrying out their duties and advocate on behalf of their City similar to other City departmental directors." *See* ILA, Exhibit C, I.B.3(f).

Once again, Plaintiffs apparently acknowledged the issues of such actions and served Burien again – this time through an independent process server – on March 26, 2024. *Id.*, Ex. C, thereto. Three attempts as service certainly make it unclear when this lawsuit was appropriately commenced, and that, in and of itself, substantially affects the timeline for the hearing (and hence the response) to the Motion if it was not timely filed in time for the stated noting date under the Court's Local Rules if the case was not legally commenced at that point.

Regardless, on March 15, 2024, this Court issued its (long) standing order which requires the parties to meet and confer the substance of the motion and its potential resolution *before* the filing of any such motion. *Dkt.* # 14 at ¶6. The standing order contains only one exception to this rule: motions for temporary restraining orders (as such motions by their very nature are emergencies). The Ordinance, and KCSO's refusal to enforce it as the ILA requires, is not an emergency for the Plaintiffs. Plaintiffs did not file a motion for TRO precisely because it is not an emergency since KCSO has made it clear that it will not enforce the Ordinance at this time. Plaintiffs did not attempt to comply with this requirement before filing the Motion nor have they agreed to strike the pending Motion to participate in good faith in the required conference despite

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twice having been requested to do so by defense counsel in writing. Brown Decl., ¶ 8, Exs. E & F, thereto. The Motion does not contain, as required, a certification of compliance with the standing order. *Dkt.* # 7. Plaintiffs re-served all pleadings (including a copy of the standing order) on March 18th, but again failed to comply with the requirements of that standing order. *Dkt.* # 15.

Burien notified Plaintiffs that it was contemplating hiring Williams Kastner & Gibbs PLLC (the undersigned) as counsel but was informed by Plaintiffs of a potential conflict (which was actually untrue). Brown Decl., ¶¶ 6-7, Ex. D, thereto. On March 18, Plaintiffs demanded Burien find different outside counsel and half-heartedly attempted to comply with the Court's standing order:

> **From:** Overbey, Erin
> **Sent:** Monday, March 18, 2024 10:28 AM
> **To:** Garmon Newsom II <GarmonN@burienwa.gov>
> **Cc:** Summers, Ann <Ann.Summers@kingcounty.gov>; Munoz-Cintron, Rafael <rmunozcintron@kingcounty.gov>; Boe, Theodore <Theodore.Boe@kingcounty.gov>; Nathan Hawthorne <nathanh@burienwa.gov>; Ndiabou Diagana <ndiaboud@burienwa.gov>
> **Subject:** RE: Standing Order—Service Arrangements
>
> Good morning.
>
> I was able to check in with our Chief Civil Deputy this morning regarding the issue of waiver of conflict. She declines to waive the conflict with Williams Kastner. It is the same position for all cases where the firm is representing the County in another matter and not a unique position specific to this particular lawsuit with Burien.
>
> From the KCSO's perspective there are two primary issues for discussion, which are : 1. the constitutionality of Ordinance 832 ; and 2. actions following the Sheriff's decision not to enforce Ordinance 832, which the KCSO contends are retaliatory. Can you meet and confer on these two issues while the City conducts a search for outside counsel? Ann is out of the office today and tomorrow, but I can be available either day to do that.
>
> Thank you.

Id., Ex. D (emphasis added).

In other words, Plaintiffs attempted to discuss (via email) the subject matter of the motion for preliminary injunction on March 18 – three days *after* filing that motion all while trying to

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deny Burien the opportunity for its counsel of choice to participate in the case. At the same time, Plaintiffs were throwing up roadblocks for Burien's chosen attorney appearing in this matter. Ultimately no discussion in person was had and Williams Kastner & Gibbs PLLC appeared in this matter on March 20, 2024. *Dkt.* #16 (Notice of Appearance of Sean D. Leake and Daniel A. Brown).

The same day, counsel for Burien notified Plaintiffs' counsel that Plaintiffs had failed to comply with Section 6 of the Court's standing order. Brown Decl., ¶8, Ex. E. Burien offered to conduct a meet-and-confer on any number of days and times. *Id*. Plaintiffs ignored the meet-and-confer request, but continued to assert counsel could not appear due to a conflict of interest. Brown Decl., ¶8, Ex. F. Investigating the allegations seriously, defense counsel ultimately found such complaints unfounded and on March 25, 2024, Plaintiffs were provided an August 2023 signed conflict waiver letter by Kim Frederick, the County's Chief Deputy Prosecuting Attorney, stating plainly that Williams Kastner was not precluded from representing clients adverse to the County under RPC 1.13(h). Brown Decl., ¶ 9, Ex. G.

It was not until the afternoon of Monday this week (March 25, 2024), that the Plaintiffs finally relented and acknowledged that Williams Kastner was free to represent Burien and that no conflict existed for the undersigned.[3] With a noting date of April 5, 2024, that gave Burien four business days to respond to the Motion (and less than three days to file this objection/request for relief from deadline) – which as pled by the Plaintiffs is the entire purpose of their lawsuit.

[3] Out of an abundance of caution, counsel did not work in this matter in earnest until the conflict issue was resolved pursuant to the RPCs.

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As for the in-person meet and confer, Plaintiffs strangely claimed they did not (and do not) need to comply with the Court's standing order because they filed their motion the day before the Court issued the order, *i.e,* before the Court even had the opportunity to issue its normal standing order. *Id.* at Ex. H, thereto (Plaintiffs claim that this Court's standing order had no application here because "the motion for preliminary injunction was filed before the standing order was entered and thus that requirement was not in place at the time of its filing."). Thereafter, the Plaintiffs have refused to strike their motion and have a good faith conference instead.

Plaintiffs also claim their March 18th email copied above was somehow a good faith effort to meet and confer. But having already filed the motion and objecting to Burien's choice of counsel, the Sheriff's putting of a proverbial "gun to the head" of Burien while persisting with the motion moving forward cannot be in good faith and in no way complies with the letter (or the spirit) of the Court's long standing general order. Brown Decl., ¶ 9, Exs. G and H, thereto.

As KCSO has failed to honor the ILA's dispute resolution process and has otherwise breached that agreement, Burien was left with no choice but to file suit in the Snohomish County Superior Court to enforce the ILA and force Plaintiffs to engage in the Oversight Committee resolution process. Brown Decl., ¶ 11, Ex. I, thereto (copy of March 27, 2024 complaint sans the exhibit).

III. EVIDENCE RELIED UPON

This motion relies on the Declaration of Daniel A. Brown and exhibis and attachments thereto, and the pleadings and records on file.

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IV. QUESTION PRESENTED

Should Plaintiffs' motion for preliminary injunction be stricken because it fails to comply with the Court's standing order, Dkt. 6, and because Plaintiffs failed to comply with the contractual obligations of the ILA? YES

In the alternative, should the motion for preliminary injunction be continued so Burien has sufficient time to respond on the merits? YES

V. AUTHORITY AND ARGUMENT

This case is not properly before this Court because Plaintiffs have failed to engage in the Oversight Committee resolution process. Plaintiffs failure to exhaust the ILA's resolution process means this matter is not yet ripe for judicial determination. Moreover, this Court simply does not have federal question jurisdiction to consider this case at all. Further, this Court should strike Plaintiffs' preliminary injunction motion because they failed to comply with the Court's standing order.

At the very least, the Court should continue the preliminary injunction motion because Plaintiffs unnecessarily erected barriers for Burien and deliberately delayed Burien's ability to adequately and effectively respond to the preliminary injunction motion. If the Court still requires a response to the merits of the motion, Burien briefly responds that preliminary injunction is not necessary because Plaintiffs cannot articulate a harm since Burien will indemnify Plaintiffs for enforcing the Ordinance. Moreover, simply because Plaintiffs claim that the Ordinance is unconstitutional does not create federal question jurisdiction when the underlying claim is simply a contract interpretation issue/breach. State courts routinely deal with constitutional issues and the Plaintiffs are not the aggrieved recipients of unconstitutional action.

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A. Plaintiffs Failed to Comply with the Standing Order

The standing order requires Plaintiffs to confer with Burien before (actually once they even contemplated) filing the motion, preferably in person, to try to resolve the issues and work out some or all attendant issues surrounding such a motion. Plaintiffs have never done so, limiting their meet-and-confer to a single email on March 18 (three days after first filing the motion), and have never certified (also in violation of the standing order) an attempt to comply with the order. In fact, Plaintiffs ignored several attempts to schedule a meeting between March 20 and March 25, 2024.

Now, Plaintiff takes the position that, because it filed the motion for preliminary injunction before the standing order was issued, it need not comply with the Court's directives. This would negate the standing order's entire purpose, force, and effect – a meaningful discussion to resolve issues before they become subject to motions practice – because a plaintiff could simply file any motion it wanted to when it filed the complaint because a standing order cannot issue until after the complaint is filed. Thus, if Plaintiffs theory on compliance was correct, they could always avoid ever having to comply with the court's standing orders here on in any other case. Of course, this is not what the standing order says or how it applies. The order already has a carve-out for emergency motions filed by excluding TROs. Plaintiffs did not file a TRO, and thus understand their motion is not an emergency that needs to be heard on shortened time.

Since Plaintiffs failed to comply with the standing order, the motion for preliminary injunction should be stricken.

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B. Plaintiffs Failed to Comply with the ILA

Likewise, by running to Court (a federal court with an assertion of dubious subject matter jurisdiction) rather than meeting with Burien to discuss the enforcement of the Ordinance, Plaintiffs also violated the ILA. Plaintiff's lawsuit, while styled a facial challenge to the constitutionality of the Ordinance, is in reality a contractual dispute about whether and how the KCSO will enforce Burien's laws as set forth in the ILA. By initiating a legal action alleging a breach of the ILA, Plaintiffs have breached the ILA by failing to comply with its dispute resolution provisions (Oversight Committee resolution process). "It is black letter law of contracts that the parties to a contract shall be bound by its terms." *Adler v. Fred Lind Manor,* 153 Wn.2d 331, 344, 103 P.3d 773 (2004).

Plaintiffs failed to address the Ordinance through the quarterly meeting between Burien and KCSO. Section 16.1. Due to this failure, Plaintiffs also failed to escalate the dispute to the Sheriff as required by Section 16.2. When Burien attempted to raise this issue, Plaintiffs responded that the Sheriff and KCSO have done their own analysis and determined the Ordinance was "apparently unconstitutional."

Plaintiffs failed to take this issue before the Oversight Committee as required. Sections 16.3, 17.1, 17.2.3. Before the Oversight Committee, or at any of the numerous steps along the way, Burien and KCSO might have worked out a plan to ensure the deputies tasked with enforcing Burien's ordinances would do so in a constitutional manner (just as is done in enforcing countless laws, statutes, and ordinances every day). Plaintiffs apparently do not even want to try to do so, but nonetheless are bound by their valid, enforceable contract. This dispute must be brought before the Oversight Committee, and this Court cannot review this matter, at

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the earliest, until Plaintiffs exhaust the resolution process required by the ILA. Thus, this case should be dismissed, and the very least, this motion for preliminary injunction should be stricken at this time.

C. The Preliminary Injunction Motion Should, at the Very Least, Be Continued

As made clear herein, Burien's ability to fairly contest the allegations in Plaintiffs' Motion requires more time than a few days to adequately and fairly respond. There are serious constitutional issues alleged in the motion, but first, there are basic issues of standing and subject matter jurisdiction to resolve, including whether this dispute must first be brought before the Oversight Committee pursuant to the ILA (Burien asserts that it must). *See* Brown Decl. (Snohomish County Complaint, thereto). Plaintiffs also prejudiced Burien through their baseless claim of an attorney conflict which slowed Burien's ability to have their chosen counsel to begin working on this matter. To avoid such obvious prejudice, Burien respectfully requests the Court to grant – at the very least -- additional time to respond prior to the hearing on the motion for preliminary injunction.

Additionally, Plaintiffs breached the ILA and public trust by filing their claim against Burien while partnering with and attaching a declaration from an attorney suing Burien in state court. This is especially true since the County staff member advising the Sheriff is the same staff member who wrongfully claimed a conflict and who has sat in litigation discussions as a legal advisor in the aforementioned other litigation before suing Burien in this action.[4]

Specifically, the clearest breaches of the ILA, not already mentioned, relate to the County and KCSO's failure to comply with the following provisions:

[4] If any conflicts exists, perhaps the County Prosecuting Attorneys' Office should examine their own ethical obligations first.

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1. The KCSO views the Contract Cities as customers and will maintain a customer service orientation to managing the contracts. (ILA Exhibit C, I.B.3(f))

2. Police Chiefs are expected to represent the City's point of view, consider City needs in carrying out their duties and advocate on behalf of their City similar to other City departmental directors. (ILA Exhibit C, I.B.3(f))

3. In the event a contracting entity's procedure, policy, goal or operation differs from that of the KCSO, that entity shall negotiate with the KCSO to reach a final determination. (ILA Exhibit C, I.B.4(a)(ii)).

4. The entity's Chief Executive Officer [for Burien that is the City Manager] or manager/administrator shall have the general duty and responsibility of providing the assigned police chief with general direction relative to the furnishing of law enforcement services to the contracting entity. (ILA Exhibit C, I.B.4(a)(iii)).

These provisions demonstrate that the County, including the KCSO, and their attorneys, should not frustrate Burien's attempts to be heard or to seek the benefits of the ILA. The County should be treating Burien as the customer. Under the ILA, the King County Major that serves as Burien's Police Chief should not only listen to the Sheriff, he must take "general direction" from Burien's City Manager. In addition, that "Police Chief" must represent Burien's interests (and should not be serving Burien with legal pleadings). Finally, in the event that the County or the KCSO disagrees with Burien about any operational matter, they should negotiate or as otherwise stated, take the matter to the Oversight Committee.

D. The Plaintiffs Will Not Overcome Extraordinarily High Burden to Merit a Preliminary Injunction.

"Municipal ordinances are presumed to be constitutional," and Plaintiffs "bear[] the burden of showing the invalidity of an enactment beyond a reasonable doubt." *Seattle v. State*, 100 Wn.2d 232, 238, 668 P.2d 1266 (1983). This presumption "should be overcome only in exceptional cases." *Seattle v. Eze,* 111 Wn.2d 22, 28, 759 P.2d 366 (1988). "Litigants mounting a facial challenge to a statute normally 'must establish that *no set of circumstances* exists under

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which the [statute] would be valid.'" *Tucson v. City of Seattle*, 91 F.4th 1318, 1327 (2024) (emphasis theirs) (quoting United *States v. Hansen*, 599 U.S. 762, 769 (2023)).

"To justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." *Tucson*, 91 F.4th at 1327, *quoting Hansen*, 599 U.S. at 769. "In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case." *Id.* The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

Plaintiffs, therefore, have to prove that either the Ordinance can never, under any circumstance, be constitutionally applied, or that as it is being applied, it is unconstitutional. Since the Ordinance has yet to even be enforced by the very organization charged with its enforcement – the KCSO (*see* Dkt. 1) – Plaintiffs cannot meet this high burden. Compounding this high burden for Plaintiffs is also the high burden for preliminary injunctions in general: A preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). The Supreme Court has also stressed, however, that a preliminary injunction cannot issue based on a mere "possibility" of harm. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). Rather, the moving party must establish that the claimed injury is "both certain and great," and "actual and not theoretical." *See, e.g., Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015).

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Plaintiffs cannot meet this high bar. Specifically, Plaintiffs cannot show certain and great harm to them for enforcing the Ordinance which is not being enforced by them. The ILA specifically indemnifies Plaintiffs for any harm they may suffer if they were to actually enforce the Ordinance as required by the ILA. Any of the scenarios that Plaintiffs will present to rebut these facts will be utterly theoretical. A motion for preliminary injunction consisting of a facial challenge to the constitutionality of a duly enacted ordinance will simply fail. Such a challenge should be heard on the merits with full opportunity for briefing *by both parties* and, if necessary, before the proper court – a court that Burien contends is the Snohomish County Superior Court.

VI. CONCLUSION

Since Plaintiffs failed to comply with the standing order or their contractual obligations before bringing this case and before filing their motion for preliminary injunction, the motion should be stricken. At a minimum, Burien requests the Court continue the motion so it may respond on the merits as required and/or properly file any other motion before this Court.

DATED this 28th day of March, 2024.

s/Daniel A. Brown
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Sumeer Singla, WSBA #32852
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Attorneys for City of Burien

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Leesa Manion
Ann M. Summers
PROSECUTING ATTORNEY
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Attorneys for Plaintiffs

Signed at Seattle, Washington this 28th day of March, 2024.

s/Diane M. Bulis
Diane M. Bulis, Legal Assistant

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The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PATRICIA COLE-TINDALL, in her official capacity as the King County Sheriff and KING COUNTY, a home rule charter county,

Plaintiffs,

v.

CITY OF BURIEN, a municipal corporation,

Defendant.

NO. 2:24-cv-00325-RAJ

ORDER ON DEFENDANT CITY OF BURIEN'S OBJECTION/ MOTION TO STRIKE AND/OR MOTION TO CONTINUE PRELIMINARY INJUNCTION (DKT. #7)

[Proposed]

THIS MATTER, having come before the Court on Defendant's Objection/Motion to Strike and/or Motion to Continue the Plaintiff's Motion for Preliminary Injunction (Dkt. 7), and the Court having considered the pleadings filed and the following evidence herein, including:

1. Defendant's Motion and supporting documents;
2. Plaintiffs' opposition, if any;
3. Defendant's reply;
4. And the records and pleadings filed in this matter.
5. _____

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NOW THEREFORE, THE COURT GRANTS Defendant's Motion and STRIKES Plaintiff's Motion for Preliminary Injunction (Dkt. 7).

The Parties are ordered to comply with the Court's Standing Order (Dkt. 6) and meet and confer in person at defense counsel's offices to discuss the substance of Plaintiffs' motion and potential resolution as well as any other motion that Defendant may be contemplating brining. Thereafter, the filing of any motion by any party must contain a certification of the parties' compliance with the Standing Order.

DONE IN OPEN COURT, this _____ day of April, 2024.

_____
The Honorable Richard A. Jones

Presented by:

WILLIAMS KASTNER & GIBBS PLLC

By: /s/ *Daniel A. Brown*
Daniel A. Brown, WSBA #22028
Sumeer Singla, WSBA #32852
Sean D. Leake, WSBA #51451

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, I caused to be served via email a true and correct copy of the foregoing document as follows:

Erin Overbey
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Attorneys for Plaintiffs

Signed at Seattle, Washington this 28th day of March, 2024.

s/Diane M. Bulis
Diane M. Bulis, Legal Assistant

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