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

RICHARD BONESTEEL; EDWIN YASUKAWA;)
STEVEN DAVIES; SALLY OLJAR; KELI)
CARENDER; MARK ELSTER; GREG MOON; and)
SCOTT SHOCK,)
Plaintiffs,)
v.)
THE CITY OF SEATTLE, a Washington Municipal)
Corporation; SEATTLE PUBLIC UTILITIES; RAY)
HOFFMAN, Director, in his official capacity,)
Defendants.)

No. 15-2-17107-1 SEA

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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1 **INTRODUCTION AND RELIEF REQUESTED**

2 Washington’s Constitution contains a robust privacy right that extends to the contents of
3 our garbage cans. Article 1, Section 7, of the Washington State Constitution says that each person
4 has a right to be free from unauthorized governmental intrusion into their private affairs.
5 Washington’s Supreme Court has held that a person has a legitimate expectation that, absent a
6 warrant, the contents of his or her garbage cans will remain private and free from government
7 inspection when placed curbside for collection. *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d
8 1112 (1990). Late last year, however, the City of Seattle enacted an Ordinance that penalizes
9 people for discarding food or recyclables in their garbage bins. Declaration of Ethan Blevins Ex.
10 1. To enforce that law, Seattle Public Utilities (SPU) adopted an Implementing Rule directing its
11 garbage collectors to search residential garbage cans, without suspicion or a warrant to determine
12 whether the residents are in compliance with the new law (the Ordinance and Implementing Rule
13 will be collectively referred to as the “garbage inspection law”). If collectors find a violation, the
14 garbage inspection law directs them to affix a brightly colored tag on the garbage can that notifies
15 the public of a violation of the City’s laws. *Id.* Ex. 3. These tags are accompanied by fines after
16 an initial warning. *Id.* The garbage inspection law offers no notice of how to appeal alleged
17 violations, nor does it provide a means to remedy the stigma or privacy intrusion that accompanies
18 enforcement. Additionally, residents who seek a hearing will face a non-neutral adjudicator,
19 contrary to the guarantee of due process in Article I, Section 3, of the State Constitution.

20 Plaintiffs Richard Bonesteel, Edwin Yasukawa, Steven Davies, Sally Oljar, Keli Carender,
21 Mark Elster, Greg Moon, and Scott Shock (collectively “Bonesteel”) move for summary judgment
22 seeking a declaration that City of Seattle Ordinance No. 124582 and SPU Director’s Rule
23 SW-402.1, on their face, violate Article I, Sections 3 (due process) and 7 (privacy), of the
24 Washington State Constitution, and are therefore invalid, unenforceable, and void. Bonesteel also
25 seeks a permanent injunction preventing the City of Seattle and SPU from enforcing the Ordinance

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1 and its Implementing Rule.

2 **STATEMENT OF ISSUES**

3 1. The Supreme Court holds that Article 1, Section 7, of the Washington State
4 Constitution prohibits warrantless searches of residential garbage cans. A City Ordinance and
5 Implementing Rule direct garbage collectors to inspect the contents of the garbage cans of all
6 Seattle residents, without warrant or suspicion, to investigate whether or not each and every
7 resident is complying with the City's composting and recycling requirements. Does the City's
8 program of systematic inspection of residential garbage cans for evidence of a code infraction
9 violate the right of privacy?

10 2. Due process, as guaranteed by Article I, Section 3, of the State Constitution,
11 demands that a person receive adequate notice and an opportunity for a fair hearing before he or
12 she can be deprived of life, liberty, or property. The Ordinance and the Implementing Rule fail
13 to provide: (1) an avenue for seeking relief from harms to privacy and reputations; (2) notice
14 regarding how to challenge a garbage collector's determination that a resident has violated the law;
15 and (3) a neutral adjudicator to resolve disputes. Do the Ordinance and Implementing Rule violate
16 due process?

17 **EVIDENCE RELIED UPON**

18 Plaintiffs rely upon the records and files herein and the declarations of Richard Bonesteel,
19 Edwin Yasukawa, Greg Moon, Scott Shock, Sally Oljar, Steven Davies, Mark Elster, and Keli
20 Carender. Plaintiffs also rely upon the declaration of Ethan Blevins in support of the motion for
21 summary judgment with exhibits thereto including:

- 22 1. Exhibit 1, a true and correct copy of City of Seattle Ordinance No. 124582;
23 2. Exhibit 2, a true and correct copy of City of Seattle Resolution 31426;
24 3. Exhibit 3, a true and correct copy of SPU Director's Rule SW-402.1;
25 4. Exhibit 4, a true and correct copy of SPU's "2015 FOOD WASTE

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1 REQUIREMENT: SPU Procedures for Enforcement and Fines”;

2 5. Exhibit 5, a true and correct copy of SPU’s training powerpoint, “Code 25 Training
3 FYW and Recycle in Garbage”;

4 6. Exhibit 6, a true and correct copy of SPU’s tag used to identify violators of the
5 garbage inspection law;

6 7. Exhibit 7, a true and correct copy of the City’s interrogatory responses to Plaintiffs’
7 First Set of Interrogatories;

8 8. Exhibit 8, a true and correct copy of the Seattle Public Utilities Rule CS-104
9 regarding service disputes; and

10 9. Exhibit 9, a true and correct copy of an SPU internal email regarding the purpose
11 of tagging.

12 STATEMENT OF FACTS

13 A. Seattle Adopts the Garbage Inspection Law

14 Seattle has one of the highest recycling and composting rates in the nation, diverting about
15 56 percent of all waste from the landfill in 2013. Blevins Decl., Ex. 1. The City wants to do
16 more. In 2013, Seattle adopted a resolution to boost the recycling and composting rate to 60
17 percent by 2015 and 70 percent by 2022. *Id.* Ex. 2. To reach that goal, the City Council decided
18 to “prohibit disposal of food waste and compostable paper as garbage.” *Id.* Ex. 1. On September
19 22, 2014, the Council passed Ordinance No. 124582. *Id.* The Ordinance, which amends Sections
20 21.36.082, 21.36.083, and 21.36.922 of the Seattle Municipal Code, took effect on January 1, 2015.
21 Blevins Decl., Ex. 1.

22 The Ordinance says, “no food waste or compostable paper shall be deposited in garbage
23 containers or drop boxes or disposed as garbage at the City’s transfer stations.” *Id.*; SMC §§
24 21.36.082(C), 21.36.083(B). The Ordinance directs SPU—which oversees garbage collection in
25 Seattle—to “monitor” residential and commercial garbage bins for compliance with the new law.

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1 Blevins Decl., Ex. 1. The Ordinance also imposes fines per violation—\$1 for residents and \$50
2 for businesses and multi-family housing. *Id.* The Ordinance offers no avenue to challenge a
3 garbage notice of violation. *See id.*

4 **B. SPU Adopts an Implementing Rule To Impose**
5 **Penalties for Noncompliance with the Ordinance**

6 The Ordinance instructs SPU to make rules that interpret and clarify the garbage inspection
7 law. Blevins Decl. at Ex. 1. Pursuant to that authority, the SPU Director amended Director’s Rule
8 SW-402.1, “Prohibition of Recyclables in Garbage” (Implementing Rule). Blevins Decl., Ex. 3.
9 The stated purpose of the Implementing Rule is to “impose[] penalties for noncompliance” with
10 the ban on “significant amounts” of food and recyclables in garbage cans. *Id.*

11 The Implementing Rule defines “significant amounts” as food waste and recyclables that
12 “alone or in combination[] make up more than 10 percent by volume of the contents of a garbage
13 can.” *Id.* It directs garbage collectors and SPU inspectors to determine compliance by “visual
14 inspection” of the contents of residential and commercial garbage containers. *Id.* The
15 Implementing Rule does not require that the collector or inspector be able to articulate any degree
16 of suspicion or obtain a warrant before searching a garbage can. *See id.* Instead, garbage
17 collectors subject Seattle residents to weekly, warrantless inspections as part of their scheduled
18 garbage collection. *See id.* Ex. 3, 4.

19 **1. Garbage Collectors Place Public Notices of Violation**
20 **on Noncompliant Garbage Cans and Impose Fines**

21 SPU directs its garbage collectors to “monitor all residential garbage cans routinely during
22 all garbage can servicing.” *Id.*, Ex. 4. The collectors place a brightly colored tag on garbage cans
23 upon their conclusion that the can contains a “significant” amount of food or recyclables. *Id.*, Ex.
24 4, 5. The tag bears SPU’s logo and states in large, bold font: “Items in Your Garbage Violate
25 Recycling, Food and Yard Waste Requirements!” *Id.*, Ex. 6. It does not tell residents how to

1 challenge the alleged violation. *See id.* The other side of the tag warns that each subsequent
2 violation will result in a \$1 fine.¹ *Id.*

3 The garbage inspection law does not provide residents notice of any procedures for
4 disputing an alleged violation, and the law does not offer relief from the public stigma of tagging
5 or any privacy intrusion. Garbage collectors need not preserve evidence of an alleged violation.

6 **2. SPU Targets Violators for Increased Surveillance**

7 When a garbage collector determines that a garbage can contains a sufficient amount of
8 food or recyclables, he or she reports the violation on an onboard computer. *Id.*, Ex. 4, Ex. 7,
9 Answer to Interrogatory 17. This notation is entered into a SPU database to help identify residents
10 who have violated the garbage inspection law. *Id.*, Ex. 7, Answer to Interrogatory 17. SPU relies
11 on these records to send field staff to “review and investigate routes, neighborhoods or customers
12 with high frequency of charges.” *Id.*, Ex. 4. Thus, violators face escalating levels of government
13 scrutiny.

14 **C. The Implementing Rule Contains an Inadequate and 15 Limited Dispute Process**

16 The Implementing Rule provides a limited dispute process through which a resident may
17 ask a customer service agent for relief from the fine, but the Rule does not provide any means to
18 challenge the notice of violation, the invasion of privacy, or the increased surveillance. Blevins
19 Decl., Ex. 3, 8. Operating under a billing and service dispute policy, an “SPU Contact Center
20 Agent[.]” has authority to “credit back the \$1 charges for all incidents contested by customers.”
21 *Id.* Ex. 4. There is no avenue for appeal outside the agency. The SPU policy limits the handling
22

23
24 ¹ Although the Ordinance and Implementing Rule referred to the monetary penalties as an
25 “additional collection fee,” the Rule clarified that the fees are intended as “penalties for
noncompliance.” *Id.*, Ex. 3. And SPU’s tag and training materials repeatedly refer to the monetary
penalties as “fines.” *See id.*, Ex. 5, 6.

1 of food waste and recyclable disputes to the contact center, stating that “[o]ther work groups will
2 not be involved.” *Id.* Ex. 4. Moreover, the policy vests ultimate authority over any dispute with
3 the SPU Director. *Id.* Ex. 8.

4 **D. SPU Trains Collectors To Examine the Contents of**
5 **Residential Garbage Cans**

6 SPU trains its garbage collectors to enforce the new garbage rules through routine
7 inspection of garbage cans. The training program says inspection and enforcement are mandatory:
8 any violation “will need to be noted and tagged.” *Id.* All collectors “must apply the same
9 standards for reporting and tagging.” *Id.* Ex. 5.

10 SPU instructs its garbage collectors to use “good judgment” in determining whether
11 restricted items such as food exceed 10 percent of a garbage can’s total volume. *Id.* Volume
12 measurements involve complicated mathematics. To accurately determine whether the 10 percent
13 threshold is exceeded, a garbage collector would have to solve the equation, $x > \pi r^2 h / 10$, where x
14 is the volume of prohibited materials, r is the can’s radius, and h is the can’s height. Garbage cans
15 range from 12 to 96 gallons, each demanding a separate calculation. This is a difficult calculation
16 to make during curbside garbage collection—a reality confirmed by a Waste Management
17 employee who admitted that the inspection process is basically a “guess.” Carender Decl. ¶ 3

18 Nonetheless, to make the volume determination, SPU training materials instruct garbage
19 collectors to inspect loose contents in the container, lift bags to see refuse located out of sight,
20 inspect the contents of clear plastic bags, and search opaque bags that are untied or torn. Blevins
21 Decl., Ex. 5. The collector is then supposed to mentally divide the can into 10 equal segments and
22 estimate whether the detected food and recyclables would fill one or more of the segments. *Id.*
23 Once a garbage collector decides that an individual violated the law, SPU requires that the
24 collector affix a brightly colored tag on the garbage can, noting the violation. *Id.* An SPU official
25 stated in an internal email that one purpose of these brightly colored tags is to make the violation

1 visible to the surrounding community—i.e., a shame tag. *Id.* Ex. 9. After issuing a tag, the
2 garbage collector will empty the can into the garbage truck and mingle the contents with all of the
3 other garbage.

4 **E. Plaintiffs Suffer Actual and Ongoing Harm Because of**
5 **Frequent Intrusion Into Private Affairs**

6 Each of the plaintiffs lives in a single-family house in Seattle.² They are subject to the
7 garbage inspection law. *Id.* Since the Ordinance went into effect on January 1, 2015, SPU has
8 inspected Plaintiffs' garbage every week—like every other Seattle resident.³ *See id.*; Blevins Decl.
9 Ex. 4.

10 Plaintiffs do not always place their garbage in opaque sealed bags that hide the contents
11 from inspectors. They often use plastic and paper grocery bags, take-out bags, and other containers
12 that are either transparent or untied. *See, e.g.*, Yasukawa Decl. ¶2, Shock Decl. ¶2, Bonesteel Decl.
13 ¶ 2, Oljar Decl. ¶ 2, Davies Decl. ¶ 2. They also place loose items in the garbage can. *Id.* Thus,
14 garbage collectors searching for food waste and recyclables can see much of what Plaintiffs discard
15 without opening sealed bags.

16 Plaintiff Keli Carender received two notices of violation on her garbage cans since the
17 garbage inspection law came into effect. Carender Decl. ¶ 2. During two consecutive weeks in
18 January or February of 2015, Ms. Carender received tags on her garbage cans notifying her that
19 she had violated food waste and recycling requirements. *Id.* During both collection cycles, all of

21 ² Decls. of Richard Bonesteel, Edwin Yasukawa, Greg Moon, Scott Shock, Mark Elster, Sally
22 Oljar, and Steve Davies. Keli Carender, who was tagged for violating the garbage inspection law
23 in early 2015, has since moved to Tacoma. Carender Decl. ¶ 2.

24 ³ The City of Seattle has a duty to collect residential garbage pursuant to a waste management
25 plan. RCW 70.95.080, .090, .094; KCC 10.25.040. Waste disposal companies, contracted by the
City and under the direction and control of SPU, collect garbage and organic waste on a weekly
basis, while recycling is collected on a bi-weekly basis.

1 Ms. Carender’s garbage was contained in opaque, tied, plastic bags. *Id.*

2 **ARGUMENT AND AUTHORITY**

3 **I**

4 **SUMMARY JUDGMENT IS APPROPRIATE FOR RESOLUTION**
5 **OF FACIAL CONSTITUTIONAL CLAIMS**

6 Summary judgment shall be rendered “[i]f the pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
8 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
9 of law.” CR 56(c). The issues in this case—whether Ordinance No. 124582 and SPU Director’s
10 Rule SW-402.1, on their face, violate Article I, Sections 3 and 7, of the State Constitution—present
11 questions of law appropriate for summary judgment. *See Hontz v. State*, 105 Wn.2d 302, 305, 714
12 P.2d 1176 (1986). As this case raises a facial challenge to the Ordinance and Implementing Rule,
13 there are no material facts at issue. Summary judgment is therefore appropriate.

14 **II**

15 **THE ORDINANCE AND IMPLEMENTING RULE VIOLATE**
16 **THE RIGHT OF PRIVACY**

17 In Washington, the constitutional right to privacy extends to the garbage can. Government
18 agents cannot inspect its contents without a warrant. A case alleging a violation of Washington’s
19 right to privacy is analyzed under a two-part test.⁴ *State v. Surge*, 160 Wn. 2d 65, 71, 156 P.3d
20 208 (2007). First, the court “must determine whether the state action constitutes a disturbance of

21 _____
22 ⁴ Article I, section 7, of the Washington Constitution says, “No person shall be disturbed in his
23 private affairs, or his home invaded, without authority of law.” The Supreme Court of Washington
24 has held that this unique language is “qualitatively different from the Fourth Amendment and
25 provides greater protections.” *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). Unlike
the Fourth Amendment, Washington’s Constitution recognizes an individual’s right to privacy with
no express limitations. *State v. Ferrier*, 136 Wn.2d 103, 110, 960 P.2d 927 (1998).

1 one’s private affairs.” *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995
2 (2008). If so, then the court must determine whether the intrusion was authorized by law. *Id.*
3 Visual inspections under the garbage inspection law fail this test.

4 **A. The Contents of One’s Garbage Cans Are Private**

5 The Supreme Court of Washington has held that garbage ranks among the private interests
6 deserving constitutional protection. In *Boland*, the Supreme Court held that individuals have a
7 reasonable expectation that the contents of their garbage cans will remain free from government
8 inspection, absent a warrant, when placed curbside for collection. 115 Wn.2d at 581. That case
9 involved a police investigation of a tip that Bradley Boland was dealing drugs. *Id.* at 573. After
10 a failed attempt to buy drugs from him, the police searched Boland’s curbside garbage can,
11 discovering evidence that led to his arrest and conviction. *Id.* at 574. Boland appealed, arguing
12 that the search of his garbage can violated Article I, Section 7.

13 In analyzing Boland’s claim, our Supreme Court diverged from a U.S. Supreme Court
14 decision two years prior, which had declined to extend Fourth Amendment protections to the
15 garbage can. *See California v. Greenwood*, 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988).
16 The *Boland* Court deviated from *Greenwood* for two reasons. First, under Article I, Section 7, “the
17 location of a search is indeterminative when inquiring into whether the State has unreasonably
18 intruded into an individual’s private affairs.”⁵ *Boland*, 115 Wn.2d at 580. Second, the Court
19 rejected the notion that accepting garbage collection service waives legitimate privacy expectations
20 in garbage. Garbage collection, the Court reasoned, is “necessary to the proper functioning of
21 modern society.” *Id.* at 581. If individuals lost legitimate privacy expectations through
22 participation in fixtures of modern life, the right to privacy could erode over time. Thus, the Court
23 concluded that “[w]hile a person must reasonably expect a licensed garbage collector will remove

24
25 ⁵ The *Greenwood* decision largely turned on the fact that the garbage can had been placed on the public curb and was not next to a house.

1 the contents of his garbage can, this expectation does not infer an expectation of governmental
2 intrusion.” *Id.* Many state cases have since reaffirmed this settled right of privacy in one’s
3 garbage cans. *See, e.g., State v. Evans*, 159 Wn.2d 402, 412, 150 P.3d 105 (2007); *Matter of*
4 *Maxfield*, 133 Wn.2d 332, 340, 945 P.2d 196 (1997); *State v. Sweeney*, 125 Wn. App. 881, 885-88,
5 107 P.3d 110 (2005).

6 The protection of garbage from prying eyes serves essential privacy interests. As the
7 dissent in *California v. Greenwood* said,

8 A single bag of garbage testifies eloquently to the eating, reading, and recreational
9 habits of the person who produced it. A search of garbage, like a search of the
10 bedroom, can relate intimate details about sexual practices, health, and personal
11 hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging
12 through garbage can divulge the target’s financial and professional status, political
affiliations and inclinations, private thoughts, personal relationships, and romantic
interests. It cannot be doubted that a sealed garbage bag harbors telling evidence
of the intimate activity associated with the sanctity of a man’s home and the
privacies of life.

13 *Greenwood*, 486 U.S. at 50 (Brennan, J., dissenting). Montana Supreme Court Justice James
14 Nelson stated similar concerns:

15 My garbage can contains the remains of what I eat and drink. It may contain
16 discarded credit card receipts along with yesterday’s newspaper and junk mail. It
17 might hold some personal letters, bills, receipts, vouchers, medical records,
18 photographs and stuff that is imprinted with the multitude of assigned numbers that
allow me access to the global economy and vice versa. . . . I also know that much
of my life can be reconstructed from the contents of my garbage can.

19 *State v. Blue in Color, 1993 Chevrolet Pickup*, 328 Mont. 10, 19-20, 116 P.3d 800 (2005) (Nelson,
20 J., concurring); *see also State v. Tanaka*, 67 Haw. 658, 662, 701 P.2d 1274 (1985) (“Business
21 records, bills, correspondence, magazines, tax records, and other telltale refuse can reveal much
22 about a person’s activities, associations, and beliefs.”). The lid of a garbage can conceals a
23 window into one’s private affairs as surely as a drawn curtain conceals the activities in one’s home.

24 There can be no question that *Boland* applies here. As in *Boland*, government agents,
25 acting under the authority of the garbage inspection law, search through curbside garbage cans,

1 looking for evidence of code violations. The City garbage collectors' weekly inspections of every
2 residential garbage can across the City violate well-recognized privacy interests wholesale.

3 Moreover, the requirement that the collectors determine whether food and recyclables
4 constitute 10 percent or more of the total volume of the garbage can involves more than passive
5 observation. City garbage cans range from 12 to 96 gallons. Under the Implementing Rule and
6 training guidelines, garbage collectors must search these varying can sizes and calculate the
7 volume of food waste and recyclables relative to the rest of the garbage. Only an active and
8 purposeful search can adequately satisfy the 10 percent enforcement standard.

9 Garbage collectors see an array of private information through this inspection process. No
10 filter prevents visual inspection from revealing more than what is necessary for enforcement. Plus,
11 the 10 percent rule requires collectors to compare the prohibited materials to the volume of the
12 remaining garbage. Garbage collectors thus must look at all of the contents of a can to fulfill their
13 duty under the Implementing Rule. This system of "visual inspection" necessarily intrudes into
14 affairs that our High Court has declared private.

15 Moreover, training materials demonstrate that garbage collectors invade private affairs.
16 SPU instructs its collectors to look through loose materials in the container or visible through
17 plastic bags. Blevins Decl., Ex. 5. If a bag is already open, SPU directs the garbage collectors to
18 investigate its contents. *Id.* As an intrusion into private affairs, such warrantless searches
19 constitute a per se violation of Washington's right to privacy. *State v. White*, 135 Wn.2d 761, 769,
20 958 P.2d 982 (1998). In fact, this case presents a more severe threat to privacy than ad hoc police
21 searches, because the garbage inspection law envisions systematic surveillance involving frequent
22 and widespread searches across Seattle without any standard of suspicion or oversight.

23 It should be noted that the privacy interest here does not hinge on whether garbage
24 collectors tear open tied bags or not—the above discussion of garbage bags simply provides an
25 example of how far beyond the privacy threshold Seattle has ventured. In *Boland*, the privacy

1 interest resided in the garbage container itself, not the garbage bags. Because the police in *Boland*
2 had torn open sealed garbage bags, the High Court had an opportunity to limit the privacy interest
3 to only the garbage enclosed in tied bags. It declined to do so. Instead, the Court drew the line at
4 the garbage container as a whole. *See Boland*, 115 Wn.2d at 578 (“[A]verage persons would find
5 it reasonable to believe the garbage they place *in their garbage cans* will be protected from
6 warrantless governmental intrusion.”) (emphasis added).

7 As *Boland* recognized, a citizen’s consent to garbage collection, a necessary component
8 of modern life, does not imply abandonment of privacy expectations in the intimate details
9 scattered throughout our refuse. *See Boland*, 115 Wn.2d at 578, 581. Although garbage collectors
10 handle and see garbage in the course of their everyday activities, visual inspection under the
11 garbage inspection law changes the nature of garbage collectors’ interaction with the private affairs
12 of residents. This inspection violates the expectations of privacy held by Seattle residents.

13 The right to privacy deserves vigilant protection—even in the mundane field of garbage
14 collection. Our garbage betrays much about our identity and lifestyle. And the Washington
15 Constitution reminds us, “A frequent recurrence to fundamental principles is essential to the
16 security of individual right and the perpetuity of free government.” Wash. Const. Art. I, § 32.
17 Threats to liberty arise from unlikely places, including weekly garbage service. The response to
18 these threats reveals our commitment to the fundamental right of privacy.

19 **B. The Garbage Inspection Program Lacks Authority of Law**

20 The inspection process imposed by SPU disturbs private affairs and therefore must be
21 authorized by a warrant. “Any analysis of article I, section 7 in Washington begins with the
22 proposition that warrantless searches are unreasonable per se.” *White*, 135 Wn.2d at 769. To
23 satisfy the authority of law requirement, “a search warrant or subpoena must be issued by a neutral
24 magistrate to satisfy the authority of law requirement.” *State v. Miles*, 160 Wn.2d 236, 247, 156
25 P.3d 864 (2007). And a government body “cannot render warrantless [privacy invasions] lawful

1 by the simple expedient of adopting a rule to that effect.” *State v. Butterworth*, 48 Wn. App. 152,
2 158, 737 P.2d 1297 (1987); *see also Miles*, 160 Wn.2d at 248.

3 A warrant ensures “that some determination has been made which supports the scope of
4 the invasion.” *Id.* This warrant requirement derives from the axiom that individual liberty “will
5 best be preserved through a separation of powers and divisions of functions among the different
6 branches and levels of government.” *State v. Wisdom*, 187 Wn. App. 652, 668, 349 P.3d 953
7 (2015) (citing *United States v. United States District Court*, 407 U.S. 297, 317, 92 S. Ct. 2125, 32
8 L. Ed. 2d 752 (1972)).

9 The protections of the warrant process are absent here. The garbage inspection law directs
10 SPU investigators and garbage collectors to search residential garbage cans for evidence of
11 unlawful activities. Then, based on evidence discovered in the search, SPU will punish residents
12 by affixing a brightly colored tag notifying the public of the alleged violation, imposing fines, and
13 targeting the alleged violator for increased surveillance. The City cannot circumvent the warrant
14 requirement by passing a law authorizing the inspection. No neutral oversight graces this program
15 with “authority of law.”

16 III

17 THE ORDINANCE AND IMPLEMENTING 18 RULE VIOLATE DUE PROCESS

19 The garbage inspection law violates procedural due process because residents accused of
20 violating the law are not provided with adequate notice and an opportunity to challenge SPU’s
21 notice of violation before they are deprived of liberty and property interests. Moreover, the SPU
22 procedure offers no remedy for privacy intrusions or public stigma resulting from enforcement of
23 the law, and the final word on all disputes rests with the very person charged with promulgating
24 and enforcing the garbage inspection law.

25 ///

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1 **A. Due Process Protections Apply to the Garbage Inspection Law Because Its**
2 **Enforcement Deprives Residents of Constitutionally Protected Interests**

3 The garbage inspection law deprives residents of liberty and property interests protected
4 by the due process guarantee. Wash. Const. art. I § 3 (“No person shall be deprived of life, liberty,
5 or property, without due process of law.”).⁶ At a minimum, due process requires that any
6 “deprivation of life, liberty or property . . . be [accompanied] by notice and opportunity for a
7 hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339
8 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950). The due process inquiry involves three
9 questions: (1) is a constitutionally protected interest at stake? (2) has the government deprived the
10 plaintiff of that interest? and (3) what process is due? *See Kerry v. Din*, _ U.S. _, 135 S. Ct. 2128,
11 2132, 192 L. Ed. 2d 183 (2015). The procedures offered by SPU do not satisfy this standard.

12 The garbage inspection law deprives Seattle residents of three interests: an interest in
13 personal privacy, an interest in reputation, and an interest in money. Privacy is a liberty interest
14 recognized by due process. *See O’Hartigan v. Dep’t of Personnel*, 118 Wn.2d 111, 125, 821 P.2d
15 44 (1991) (“[T]he United States Supreme Court has recognized that one aspect of the liberty
16 interest protected by the Fourteenth Amendment is a right of personal privacy, or a guaranty of
17 certain areas or zones of privacy.”). The Implementing Rule deprives Plaintiffs of this liberty
18 interest through a systematic program of visual inspection into private affairs. And a determination
19 that a resident has thrown out too much food or recyclable material triggers increased scrutiny by
20 SPU. *See Blevins Decl.*, Ex. 4. This intrusion into private affairs deprives residents of a
21 constitutionally protected liberty interest.

22 Additionally, the garbage inspection law deprives alleged violators of a property interest

23 _____
24 ⁶ Washington’s due process right affords the same protection provided by its federal counterpart,
25 and caselaw interpreting the federal right applies to the state right. *See In re A.W.*, 182 Wn.2d 689,
703, 344 P.3d 1186 (2015).

1 in money. Due process rights may not attach if a property interest is *de minimis*. See *Goss v.*
2 *Lopez*, 419 U.S. 565, 576, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). However, even if a property
3 deprivation is nominal, it can become a constitutionally protected due process interest in tandem
4 with a stigmatic harm to reputation.

5 Injury to reputation burdens liberty interests. “[W]here the State attaches ‘a badge of
6 infamy’ to the citizen, due process comes into play.” *Wisconsin v. Constantineau*, 400 U.S. 433,
7 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971). In *Constantineau*, police posted a notice at local
8 liquor stores prohibiting the sale of alcohol to an alleged excessive drinker. *Id.* at 434-35. The
9 Court held that this “unsavory label” could not be imposed without due process. *Id.* at 437.
10 “Where a person’s good name, reputation, honor, or integrity are at stake because of what the
11 government is doing to him, notice and an opportunity to be heard are essential.” *Constantineau*,
12 400 U.S. at 437.

13 However, stigma must be accompanied by an additional injury to constitute an interest
14 protected by due process. *In re Meyer*, 142 Wn.2d 608, 620, 16 P.3d 563 (2001) (“[For the]
15 government’s conduct to be actionable, [it] must not only affect the individual’s reputation, but
16 must be accompanied by some other injury.”). This “other injury” need not by itself constitute a
17 constitutionally protected interest. Otherwise, *Constantineau*’s solicitude for harm to reputation
18 would lose any meaning. Thus, a *de minimis* interest when combined with stigmatic injury
19 qualifies for due process protection.

20 Here, the stigma imposed by tags placed on garbage cans combined with the monetary
21 penalty imposed trigger due process. Garbage collectors enforcing the garbage inspection law
22 place large colored tags on the garbage cans of alleged violators, visible to the surrounding
23 community. An internal email from a Recycling and Waste Prevention Specialist at SPU
24 confirmed that one purpose of the brightly colored tags was to display the violation to
25 neighbors—publicizing what SPU found when it intruded upon the resident’s private affairs.

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1 Blevins Decl., Ex. 9. This “unsavory label”—this shame tag—implicates the liberty interest in a
2 person’s “good name, reputation, [and] integrity.” *Constantineau*, 400 U.S. at 437. A fine
3 accompanies this stigmatic harm, thus combining it with a tangible interest. The garbage
4 inspection law therefore must satisfy due process before depriving residents of these interests.

5 **B. The Garbage Inspection Law Deprives**
6 **Residents of Liberty Without Due Process**

7 SPU procedures do not provide any means to address the City’s decision to deprive
8 residents of their liberty interests in privacy and reputation. The guarantee of due process requires
9 notice and a hearing. Yet the dispute process offered by SPU offers no relief for the worst
10 deprivations imposed by the garbage inspection law—public stigma and increased privacy
11 intrusion.

12 Courts analyze the adequacy of procedures under the framework outlined in *Mathews v.*
13 *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *Tellevik v. Real Property*, 120
14 Wn.2d 68, 78, 838 P.2d 111 (1992) (adopting and applying *Mathews*). Under *Mathews*, courts
15 weigh the due process claim in light of the private interests at stake, the risk of erroneous
16 deprivation of those interests, the probable value of additional procedural safeguards, and the
17 public interest. *Id.* at 335. Each of these factors weigh in the Plaintiffs’ favor.

18 Courts first turn to “the private interest that will be affected by the official action.” *Id.* at
19 321. Here, the garbage inspection law affects at least three private interests. The foremost interest
20 imperiled by the City’s program of systematic surveillance is personal privacy. As determined
21 above, garbage inspections trespass on significant privacy interests. Any claim that a resident has
22 violated the composting or recycling mandates stems from an invasive search. Moreover, garbage
23 collectors’ determination that a resident has thrown out prohibited amounts of food or recyclables
24 exposes that resident to increased surveillance. SPU procedures state that SPU field staff will
25 “review and investigate routes, neighborhoods or customers with high frequency of charges.”

1 Blevins Decl., Ex. 4. Thus, garbage collectors' enforcement of the Ordinance against residents
2 results in greater privacy deprivation.

3 SPU's enforcement of the Ordinance also result in stigmatic injury. The agency's
4 notification of wrongdoing is public and open to the surrounding community. Garbage collectors
5 are trained to place large, brightly colored tags on non-compliant garbage cans which are readily
6 visible to neighbors and passersby. This harms relations with neighbors and the public by
7 declaring residents openly as lawbreakers. It also operates to publicize what the City found when
8 it invaded a resident's private affairs.

9 The garbage inspection law also imposes per violation fines. While nominal, these weekly
10 fines exacerbate the harm to privacy and reputation. The private interests at stake merit more than
11 the limp tribute to due process currently offered by the City.

12 *Mathews* directs courts to then consider "the risk of an erroneous deprivation of such
13 interest through the procedures used." *Mathews*, 424 U.S. at 321. Here, that risk is unacceptably
14 high. Garbage collectors must determine, for each garbage container on their route, whether
15 prohibited materials exceed 10 percent of the volume of the garbage can. They make such a
16 determination by "visual inspection" alone. Training materials, understandably at a loss for how
17 the naked eye can make a volume determination in a short time frame, counsel garbage collectors
18 to just use "good judgment." Blevins Decl., Ex. 5. When Plaintiff Keli Carender asked Waste
19 Management personnel how garbage collectors make these decisions, she was told that "it's just
20 a guess, really." Carender Decl. ¶ 3. Worse yet, garbage collectors have no duty to preserve
21 evidence before mingling the garbage with other refuse. These determinations made on the fly as
22 garbage collectors race through their routes have a high risk of erroneously depriving residents of
23 their interests in privacy, reputation, and money.

24 Next, courts should weigh "the probable value, if any, of additional or substitute procedural
25 safeguards." *Mathews*, 424 U.S. at 335. Here, the value of additional procedure is high. The

1 customer service dispute process does not address the increased scrutiny and stigma flowing from
2 a garbage collector's determination that a resident has violated the law. Instead, it is a policy for
3 "billing and service disputes within the customer service branch." Blevins Decl., Ex. 8. A resident
4 challenging an allegation of noncompliance must work with "SPU Contact Center Agent[]." *See*
5 *Id.* Ex. 4, 8. These agents are authorized to "credit back the \$1 charges for all incidents contested
6 by customers." *Id.* Ex. 4. That is all. They are not empowered to offer any relief or hearing for
7 the privacy intrusions or public stigma. And SPU policy specifically limits the handling of food
8 waste and recyclable disputes to the contact center, stating that "[o]ther work groups will not be
9 involved." *Id.* Ex. 4.

10 Thus, residents who seek to contest a garbage collector's determination will only be heard
11 regarding the deprivation of a \$1 property interest. No hearing opportunity exists for the public
12 stigma and privacy intrusion caused by enforcement of the garbage inspection law. The probable
13 value of additional safeguards is considerable.

14 Finally, courts should look to "the Government's interest, including the function involved
15 and the fiscal and administrative burdens that the additional or substitute procedural requirement
16 would entail." *Mathews*, 424 U.S. at 335. The burden of allowing residents to seek relief from
17 public shaming and increased privacy intrusion is low. Indeed, for most disputes, SPU already
18 provides the ability to appeal issues beyond the limited authority of the SPU contact center. SPU
19 already has procedures in place for appealing other matters to upper management, a hearing
20 officer, and even the SPU director. Blevins Decl., Ex. 8. So, too, does the civil infraction statute.
21 Ch. 7.80 RCW (The government must provide all persons accused of civil infractions with notice
22 and opportunity to challenge the determination that he/she committed a civil infraction in court.).
23 Opening the established dispute process to residents challenging an accusation under the garbage
24 inspection law will not strain resources. The current SPU policy does not comport with the due
25 process guarantee of a hearing when the government deprives residents of recognized liberty

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1 interests.

2 **C. The Garbage Inspection Law Fails To Provide**
3 **Adequate Notice of Hearing Rights**

4 SPU and its agents also fail to provide adequate notice because the tags placed on garbage
5 cans do not inform residents how to challenge the government’s assertion of wrong-doing. Blevins
6 Dec., Ex. 6. The government must offer notice “reasonably calculated, under all the
7 circumstances, to apprise interested parties of the pendency of the action and afford them an
8 opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S.
9 at 314. Reasonableness of notice hangs on the “practicalities and peculiarities of the case.” *Id.* at
10 314-15. This includes notification not only of the government action against them, but also notice
11 of the means by which they may present such objections. *See, e.g., Gonzalez-Gonzalez v. United*
12 *States*, 257 F.3d 31, 38 (1st Cir. 2001) (notice of property forfeiture did not satisfy due process
13 unless it also included notice of forfeiture proceedings).

14 Here, the current notice of violation, placed on garbage cans in the form of a large brightly
15 colored tag, only announces to the recipient that they have violated food, yard waste, or recycling
16 requirements. The City’s failure to give notice regarding how to appeal from a notice of violation
17 of the garbage inspection law does not satisfy the reasonableness standard because it does not
18 notify residents of how to appeal the accusation. As an easily available step that would inform
19 residents of the path to challenging the City’s allegations, due process requires some notice of the
20 administrative process set in place by the garbage inspection law. An additional line of text
21 informing residents of a right to appeal and how to begin the appeals process would be of
22 significant value to the public, who otherwise would remain ignorant of how to challenge a
23 garbage collector’s determination. Thus, the probable value of the additional procedure, under
24 *Mathews*, is high.

25 Moreover, a brief procedural description on tags or a SPU bill would involve little strain

1 on government resources. The City’s failure to notify residents of how to appeal the notice of
2 violation does not satisfy due process.

3 **D. The Garbage Inspection Law Violates Due Process**
4 **by Vesting Ultimate Review Authority in the SPU Director**

5 The current appeals process also violates due process because SPU does not provide a
6 neutral adjudicator. Due process demands a “neutral and detached judge in the first instance.”
7 *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1982). “Even
8 appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator.”
9 *Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*,
10 508 U.S. 602, 618, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).

11 This neutrality requirement applies to any government official exercising a judicial or
12 quasi-judicial function. *Concrete Pipe*, 508 U.S. at 618. “That officers acting in a judicial or
13 quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of
14 course, the general rule.” *Tumey v. Ohio*, 273 U.S. 510, 522, 47 S. Ct. 437, 71 L. Ed. 2d 749
15 (1927). Such a function involves actions such as ruling on disputed factual or legal questions.
16 *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980).

17 Those who operate in such a capacity cannot have an “interest in the controversy to be
18 decided.” *Tumey v. Ohio*, 273 U.S. at 522. Everyone facing government action is entitled “to an
19 adjudicator who is not in a situation which would offer a possible temptation to the average man
20 as a judge . . . which might lead him not to hold the balance nice, clear and true.” *Concrete Pipe*,
21 508 U.S. at 618-19 (internal quotation marks omitted) (alteration in original).

22 Here, the Director of SPU “has the ultimate review authority” for any dispute regarding
23 alleged violations of the garbage inspection law. Blevins Decl., Ex. 3, 8.

24 The Director, however, is the person who wrote and adopted the Implementing Rule. He
25 is the person tasked with enforcing the law. Blevins Decl., Ex 1. He is also responsible for

1 developing “a program of education outreach regarding the food waste and compostable paper
2 recycling requirements” and to “establish a program of placing educational notice or tags on
3 garbage containers with significant amounts of food waste and compostable paper.” *Id.*

4 By placing enforcement, rule-making, and adjudicative authority over the same matter in
5 the same individual, the Ordinance violates the “general rule” that an officer is “disqualified by
6 their interest in the controversy to be decided.” *Tumey*, 273 U.S. at 522. An average person,
7 assigned to judge those accused of violating a rule that he promulgated and is duty-bound to
8 enforce, cannot satisfy the high threshold of demonstrating freedom from temptation to decide the
9 matter in an unbiased fashion.

10 CONCLUSION

11 The Supreme Court of Washington has extended constitutional protections to the intimate
12 privacy interests contained in the garbage can. The City’s frequent inspections of these private
13 affairs, without warrant or suspicion, does not satisfy Washington’s robust privacy right.

14 Nor can the City’s slim procedural offerings satisfy due process of law. The City’s dispute
15 process does not afford protection for the liberty interests of privacy and reputation. SPU fails to
16 offer adequate notice of how to challenge any allegation of wrong-doing. And SPU’s dispute
17 policy places ultimate authority over any dispute with the enforcer of the garbage inspection law.
18 Due process demands more.

19 The Plaintiffs request that this Court grant Plaintiffs’ motion for summary judgment,
20 declare that the garbage inspection law violates constitutional rights to privacy and due process,
21 and enjoin the law’s enforcement.

1 DATED: March 16, 2015.

2 Respectfully submitted,

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