

No. 26-

IN THE
Supreme Court of the United States

MARK MILLER, PASTOR, AND THE BURIEN FREE
METHODIST CHURCH,

Petitioners,

v.

CITY OF BURIEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a church believes that it has a religious duty to “welcome the stranger” which requires it to allow its unhoused neighbors to live on its land, do either the Free Speech or Free Exercise Clauses of the First Amendment prohibit a city from imposing a prior restraint on hosting the homeless by requiring the church to first secure a permit when the municipal permitting ordinance contains no objective criteria for determining whether to grant such a permit; places no limit on the amount of time it will take before the city makes a decision on whether to grant such a permit; and requires the Church to prove that its hosting of the homeless will not be “materially detrimental to the public welfare”?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Pastor Mark Miller and the Burien Free Methodist Church are the sole plaintiffs in the district court and the sole appellants in the court of appeals. The City of Burien, Jeffrey D. Watson, Planning Representative for the City, and Joseph Stapleton, Building Representative for the City, are the defendants in the district court and the appellees in the court of appeals.

STATEMENT OF RELATED CASES

Miller v. City of Burien, No. 24-cv-01301-BJR, U.S. District Court for the Western District of Washington. Judgment entered February 3, 2025.

Miller v. City of Burien, No. 25-1192, U.S. Court of Appeals for the Ninth Circuit. Judgment March 13, 2026.

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PETITION FOR A WRIT OF CERTIORARI

Mark Miller, and the Burien Free Methodist Church respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This case involves the prior restraint doctrine. For more than 80 years it has been clearly established that laws that require a person to obtain a permit or license before they can engage in conduct protected by the First Amendment are unconstitutional if they vest unfettered discretion in government officials to deny such a license. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). *Accord Niemotko v. Maryland*, 340 U.S. 258, 71 S.Ct. 325, 95 L.Ed.2d 267 (1951); *Espinosa v. Rusk*, 456 U.S. 951 (1982), *affirming* 634 F.2d 477 (10th Cir. 1980)); *Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951).

The Ninth Circuit refused to even discuss Petitioners' claim that the prior restraint doctrine applies to religious conduct covered by the Free Exercise Clause. Ignoring these cases, the court below silently restricted the applicability of prior restraint doctrine to cases involving freedom of expression. This restriction cannot be squared with this Court's recent decisions that expressly reaffirmed the principle that both Clauses of the First Amendment can simultaneously apply. "[T]he Free Exercise and Free Speech Clauses of the First Amendment work in tandem. When the Free Exercise Clause protects religious exercises, whether communicative or not, the

Free Speech Clause provides overlapping protection for expressive religious activities.” *Kennedy v. Bremerton School District*, 597 U.S. 507, 523, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022). “[P]ersonal religious observance [is] doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment.” *Id.* at 548. In this case, the Ninth Circuit failed to recognize that the prior restraint doctrine “doubly protects” the religious activity of welcoming the stranger, a duty expressly recognized not only by Christians, but by adherents to many other world religions, because such conduct is both expressive and a form of religious worship.

The Court of Appeals closed its eyes to the message conveyed when a church welcomes unhoused people and provides them shelter on its own land. This is “expressive conduct.” It expresses the message to the unhoused that Jesus loves you, and that we (the Burien Free Methodist Church) love you.” Similarly, in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018), the Eleventh Circuit recognized that providing food to poor unhoused people is an expressive activity entitled to protection under the Free Speech Clause. In both cases, the conduct also expresses a message to anyone else who sees what the Church (or as in *Food Not Bombs*, the nonreligious nonprofit organization) is doing. It says to them, “we think these unhoused people should be helped, we are helping them, and you should help them too.”

Thus, the court below “doubly” failed to protect the Church and its pastor from governmental enforcement of a zoning ordinance which unconstitutionally obstructs and delays their ability to exercise both their freedom of expression and their freedom of religious exercise.

OPINIONS BELOW

The Court of Appeals' unpublished opinion can be found in the Appendix at 1a-5a. The denial of Petitioners' petition for rehearing can be found at Appendix 31a-32a. The district court's order granting the City of Burien's motion to dismiss for failure to state a claim can be found at Appendix 6a-30a.

STATEMENT OF JURISDICTION

The Court of Appeals issued its decision on March 13, 2026, 2025. It denied rehearing and the suggestion for rehearing en banc on April 24, 2026. This court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Free Exercise and Free Speech Clauses of the First Amendment to the U.S. Constitution and these sections of the Burien Municipal Code: §§ 8.45.015, 19.10.011, 19.10.450, 19.75.010, and 19.75.090, which can be found in Appendix D 33a-34a.

STATEMENT OF THE CASE

a. Factual Background

In September of 2023, the City of Burien enacted a law making it a misdemeanor offense for any person to live on any public property. Scores of Burien's homeless people who had been living in tents on a parcel of city owned land known as the Ambaum encampment were faced with the

problem that as of November 1, the effective date of the law, there would no longer be any place in Burien where they could lawfully live. To help these unhoused people, on November 7, the Burien Free Methodist Church (also known as the Oasis Home Free Church) began hosting them on the Church's own property. For the next three months the Church hosted approximately 100 people, allowing them to live in tents on Church property.

The City insisted that before it could host the homeless, the Church had to apply for a "temporary use permit" pursuant to Burien Municipal Code §19.75.010, and if the City denied a permit request then it would be illegal for the Church to host the homeless. The Church maintained that both on its face, and as applied to it, the City's permitting ordinance was an unconstitutional prior restraint because (a) it vested City officials with completely unfettered discretion to deny a permit simply by asserting that such an encampment would be "annoying" or "unreasonably offensive"; (b) it failed to limit the time period during which a permit application could be considered before rendering a decision; (c) it failed to provide for swift judicial review of any administrative decision denying a permit; and (d) it shifted the burden of proof to the Church to prove that issuance of the permit would not be materially detrimental to the public. The Church also maintained that as applied to it, the municipal zoning ordinance violated the Religious Land Use and Institutional Persons Act ("RLUIPA"), 42 U.S.C. §2000cc, *et seq.*

The City sent Pastor Miller a Demand Letter asserting that using the Church's land as a hosted encampment site for the unhoused was an "unpermitted use" under its zoning code. The Demand Letter stated that

although “Burien understands, supports and welcomes the religious intent behind providing shelter to the unhoused, the Burien Municipal Code [“BMC”] requires a temporary use permit before this can be done at your facility.” The Church responded that under the City’s own code, the Church’s use was *not* a unpermitted use because BMC §19.15.005.9 explicitly permitted a “religious facility” to operate in the zone where the Church was located, and BMC §19.10.450 defined the term “religious facility” as any place “the principal purpose of which is religious worship” and “includes related accessory uses.” Since the municipal code explicitly required a temporary use permit only if a use was “not otherwise permitted” (BMC §19.75.010), and since religious worship and related uses already *were* expressly permitted uses, the Church argued that under the municipal code it was clear that a temporary use permit was not required because the ordinance simply was not applicable. But even assuming that the permit ordinance did apply to the Church’s religious use, the Church asserted that application of the temporary use permit law to its hosting conduct would violate the First Amendment because it imposed a prior restraint on both expression and religious exercise.

On November 29, the City responded with another letter which again acknowledged that hosting the unhoused was religious conduct: “Burien neither questions Oasis’ purpose, its religious conduct, nor the sanctity of hosting unhoused people,” but simultaneously asserted that the City was simply “regulating religious conduct through permits.”

On December 1, city law enforcement officers told the unhoused people living in tents at the Ambaum encampment they could not remain there and that they

would be arrested if they did not leave. They left. Several of them, however, moved to the Church's encampment and started living there. On December 7, the City issued a Notice of Violation and sent it to Pastor Miller and the Church. The Notice informed them that the City was fining them for five different code violations and that the fines would increase by \$1,250 every day for as long as the encampment lasted, because the Church did not have a temporary use permit. The Church responded that it "held the sincere religious belief that the provision of outdoor space for the homeless is a religious duty and an integral part of its religious mission," and noted that if it were to apply for a permit it could take a very long time, before a final decision was rendered, possibly more than a year.

The Church never applied for a temporary use permit. It continued to host the homeless until February 5, 2024, when the encampment ended and all the unhoused tent residents left. During the three-month encampment, no one ever asserted that there were any sanitation or public health problems, or any reported threats to public safety. The Church and the Pastor never paid any part of the City's monetary fines.

Given the dire need for a safe place where unhoused people can live, particularly in the cold winter months, the Church made it clear that it intended to host the homeless again in the future. The City, in turn, made it clear that any such future hosting would require a permit and that the City would require the Church to apply for one.

b. Procedural History

The Church and the Pastor filed a declaratory judgment action in federal district court challenging the constitutionality of Burien's permitting ordinance to its religious exercise, both facially and as-applied. The district court granted the City's motion to dismiss for failing to state a claim and the Church and the Pastor appealed.

On appeal, as it had in the district court, the Church argued that its conduct was protected by both the Free Speech Clause and the Free Exercise Clause, and that because the municipal permitting ordinance acted as an unlawful prior restraint it violated both clauses of the First Amendment.

The Court of Appeals simply ignored Petitioners' contention that the First Amendment prior restraint doctrine applies to conduct covered by the Free Exercise Clause.

The Ninth Circuit addressed *only* the Free Speech argument. It concluded that allowing 100 or more unhoused people to live on its property for three months did not constitute expressive conduct. In a single sentence, ignoring the fact that Petitioners were also making an "as applied" challenge to Burien's ordinance, the Court held that Petitioners' Free Speech prior restraint claim failed because "the challenged ... provision of the [Burien Municipal Code] is not addressed to expressive conduct."

Petitioners' petition for rehearing was denied.

REASONS WHY WRIT SHOULD BE GRANTED

- a. **There is a split of authority as to whether providing highly visible support to the homeless is expressive conduct that is entitled to some degree of First Amendment protection against ordinances that impose a prior restraint by requiring a permit.**

It has long been recognized that constitutional protection for freedom of speech “does not end at the spoken or written word.” *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). “The Constitution looks beyond written or spoken words as mediums of expression.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). “[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

In this case, the Ninth Circuit held that sharing one’s land with poor unhoused people so that they have a place to sleep and live is not protected by the Free Speech Clause of the First Amendment because it is not expressive conduct. But in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018), the Eleventh Circuit held that act of sharing food with poor hungry people, many of whom were homeless, *was* expressive conduct and *was* protected by the Free Speech Clause of the First Amendment.

When deciding whether conduct is sufficiently expressive to warrant Free Speech Clause protection,

the pertinent question is whether a reasonable person viewing the conduct would infer that it was intended to convey a message. *See Spence v. Washington*, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (reasonable person would understand that display of upside down flag was meant to convey anti-war message); *United States v. O'Brien*, 391 U.S. 367, 37-77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (burning draft card would be understood to convey anti-war message); *Brown v. Louisiana*, 383 U.S. 131, 141-42, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (the act of sitting down, though ordinarily not expressive, communicated a message of protest against racial segregation when conducted by African-Americans at a segregated facility). Even erotic nude dancing is recognized as expressive conduct entitled to some slight amount of Free Speech Clause protection. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566, 111 S.Ct 2456, 115 L.Ed.2d 504 (1991).

In *Food Not Bombs*, a Fort Lauderdale nonprofit organization (“FLFNB”) sued a city and challenged an ordinance and a park rule that required a permit before it could share food with others in public places. The district court held that food sharing was not expressive conduct, but the Eleventh Circuit reversed, holding that given the contextual circumstances, “we have no doubt that FLFNB intended to convey a certain message.” 901 F.3d at 1240. The Court of Appeals noted that “the record demonstrates without dispute that the treatment of the City’s homeless population is an issue of concern in the community,” and that “local discussion regarding the City’s treatment of the homeless is significant because it provides background for FLFNB’s events, particularly in light of the fact that many of the participants are homeless.” *Id.* at 1243.

Moreover, as the Eleventh Circuit noted, although FLFNB was not a religious organization and was not intending to convey a religious message, the historical association between food sharing and religious belief was significant because it made food sharing a clear symbol of concern for the plight of the poor. The Court observed that “the significance of sharing meals with others dates back millennia. The Bible recounts that Jesus shared meals with tax collectors and sinners to demonstrate that they were not outcasts in his eyes.” *Id.* at 1243, citing *Mark* 2:13-17 and *Luke* 5:29-32. Similarly, the duty to “welcome the stranger” by taking him in to one’s home and providing shelter has Biblical roots that go back to the Old Testament, as well as to the New Testament. Thus, the message that the Burien Free Methodist Church was conveying to the unhoused of Burien was the same easily recognizable message: You are not outcasts in this place; you are welcome here. *See also Fifth Avenue Presbyterian v. New York*, 293 F.3d 570, 575 (2nd Cir. 2002) (“[I]n ministering to the homeless, the Church is ‘giving [them] the love of God.’”).

The Eleventh Circuit relied on Ninth Circuit precedent for the proposition that whether food sharing “can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in as-applied challenge.” *Food Not Bombs*, at 1241, citing *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006). But ironically, in this case the Ninth Circuit failed to follow its own precedent and failed to employ an as-applied analysis when it decided that sharing space to live and sleep was not expressive activity and therefore not entitled to any Free Speech protection.

The Ninth Circuit's decision is also hard to square with this Court's decisions in *Clark* and *Spence*. In *Clark*, demonstrators "intended to draw attention to the plight of the homeless" by having an overnight "sleep-in" in a government owned park. 468 U.S. at 289. But the parks department denied their request for a permit due to a concern that having hundreds of protesters sleep on park property would injure the grass and shrubbery. In the present case, the homeless slept on the Church's private property, in a parking lot, at the invitation of the Church which was not concerned with the risk of any kind of property destruction, and no property destruction ever occurred. As this Court noted in *Spence*, this difference is quite significant. Unlike the expressive activity in *Clark*, which occurred on public land "over which the State by necessity must have certain supervisory powers unrelated to expression," in *Spence* the expressive "activity occurred on private property." *Spence*, at 411. As this Court noted, obviously government may forbid a person "from mishandling a flag that is public property. But that is a different case." *Spence* "displayed his flag on private property." *Id.* at 409. He hung "the flag out of his own window." *Id.* Similarly, in the present case, the Church's expressive conduct in welcoming and hosting the unhoused occurred entirely on private land owned by the Church.

In *Clark*, the lower court held that "overnight sleeping in connection with the demonstration is conduct protected to some extent by the First Amendment." *Clark*, at 293. This Court stated, "We need not differ with the view of the Court of Appeals ... We assume for present purposes, but do not decide, that such is the case, [citing *O'Brien*, 391 U.S. at 376], but this assumption only begins the inquiry." *Clark*, at 293.

In the present case, although it was cited to it, the Ninth Circuit did not discuss *Clark*, and never undertook the inquiry of whether the City of Burien's refusal to allow a Church to use its own property to communicate its message of love and concern for the unhoused was an unconstitutional interference with freedom of expression.

In *Occupy Columbia v. Haley*, 738 F.3d 107, 118-19 (4th Cir. 2013), the Court held that sleeping overnight on the grounds of the South Carolina State House constituted protected expressive conduct. Members of Occupy Columbia asserted that “physically occupying the State House grounds, including sleeping overnight on the grounds, is the only effective manner in which Occupy Columbia can express their message of taking back our state to create a more just, economically egalitarian society.” *Id.* at 112. After living on the State House grounds, for 31 continuous days, government officials ordered them to leave. When the Occupy protesters refused, they were arrested. Later, after all charges against them were dismissed, they brought suit seeking both injunctive relief and damages from the officials who ordered their arrest. The defendants moved to dismiss their suit for failure to state a claim. The district court *denied* the defendants' motion to dismiss the suit and the Fourth Circuit *affirmed* that ruling.

The plaintiffs alleged that their First Amendment rights were violated when [the defendant government officials] prevented members of Occupy Columbia from engaging *in the expressive conduct of living continuously living on State House grounds.*” *Id.* at 119. The Fourth Circuit agreed with the Occupy protesters that they had “unquestionably alleged that its First Amendment rights

were violated when [they were] required to remove their camping equipment and vacate the State House grounds by 6 p.m.” *Id.*

In the present case, the Burien Free Methodist Church’s message of support and concern for the unhoused is the *exact same message* that the demonstrators in *Occupy Columbia* were communicating. In the present case, the sleeping took place on the Church’s *own* property, and the hosting lasted for three months. Thus, the message communicated by Petitioners’ expressive conduct is clearer, more powerful, and much more visible, than the message communicated by the nonprofit organizational plaintiff in *FLFNB* which wanted to provide food to the poor on sporadic occasions. Petitioners’ message is also clearer and more powerful than the message conveyed by the *Occupy* Plaintiffs, who were not sharing their own private property with any poor people. *See also Watters v. Otter*, 955 F.Supp.2d 1178, 1185 (D. Idaho 2013) (“The act of sleeping in the tents conveys a level of personal commitment and sacrifice to the political cause that is not conveyed by the tent city alone.”); *Phillips v. City of Cincinnati*, 479 F.Supp.3d 611, 635 (S.D. Ohio 2020) (“[S]everal courts have found that sleeping and/or camping in a public park in connection with the occupy movement amounts to protected expressive conduct.”).

The Fourth and Eleventh Circuits have held that nonverbal conduct which provides support to the unhouse can be expressive conduct protected by the Free Speech Clause. The Ninth Circuit has dismissively concluded that allowing the unhoused to live on one’s own property is not expressive conduct. Given the conflict between the Ninth Circuit decision in this case, and the decisions of

the Fourth and Eleventh Circuits, this Court should grant certiorari and resolve this conflict.

Similarly, certiorari should be granted to resolve the tension between this Court's statement in *Clark* that it would assume that sleeping outdoors can be expressive conduct under some circumstances, and the Ninth Circuit's conclusion in this case that allowing the homeless to sleep outdoors on the Church's own property was not expressive conduct.

- b. The decision below ignores several prior decisions of this Court which unequivocally hold that the prohibition against laws that confer unfettered discretion on government officials to deny permission to engage in acts of religious exercise, or which permit unlimited delay before any licensing decision is reached, are unconstitutional prior restraints on the First Amendment freedom of free exercise of religion.**

The City argued below that “[t]he Church did not plead a valid prior restraint claim because Burien’s land use code does not implicate speech.” *Corrected Answering Brief of Appellees*, at 28. According to the city, prior restraint doctrine applies *only* to restraints on freedom of expression and simply has no application to restraints on religious exercise.

Pointing to several prior decisions of this Court, the Church argued that the prior restraint doctrine does apply to restraints on religious freedom. Beginning with *Cantwell v. Connecticut*, this Court expressly held that a licensing law that vests an official with discretion

“to determine whether the cause is a religious one” and authorizes the official to deny a requested license if he determines that it is not, is an unconstitutional prior restraint. 310 U.S. at 305. “Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment.” *Id.* The religious conduct at issue in *Cantwell* was the solicitation of financial donations. This Court held that “to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what constitutes a religious cause is to lay a forbidden burden on the exercise of liberty protected by the Constitution.” *Id.* at 306-07.

Relying on *Cantwell*, the Tenth Circuit held that conditioning a church’s solicitation of money to be used “for the purchase of food, clothing *and shelter*” for the poor on compliance with a licensing ordinance violated the Free Exercise Clause. *Espinosa v. Rusk*, 634 F.2d 477, 480 (10th Cir. 1980). The Tenth Circuit noted that in *Cantwell* “[t]he Supreme Court held that the statute constituted a prior restraint *on the free exercise of religion*.” *Id.*, (italics added), citing *Cantwell*, 310 U.S. at 305. The Tenth Circuit made no mention of the Free Speech Clause. The Second Circuit reached the same conclusion in *International Society for Krishna v. Barber*, 650 F.2d 430, 445 (2nd Cir. 1981).

Any doubt that *Cantwell* held the statute at issue to be a forbidden restraint *on the exercise of religion* was dispelled when this Court granted certiorari in *Espinosa* and then summarily affirmed the Tenth Circuit’s decision. *Espinosa v. Rusk*, 456 U.S. 951 (1982). Thus, the Tenth

Circuit’s ruling that the restraint doctrine applies to licensing restraints on the exercise of religious freedom became the law of the land. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (“Summary affirmance ‘prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided’ by the Court.”).

In keeping with its affirmance in *Espinosa*, in *Niemotko* this Court explicitly stated that the prior restraint doctrine applied to *all* First Amendment freedoms. This Court noted that it had examined licensing laws “many times” and had “condemned statutes and ordinances which required that permits be obtained from local officials” because “a licensing requirement constituted a *prior restraint on freedom of speech, press, and religion*, and in the absence of narrowly drawn reasonable and definite standards for the officials to follow, must be invalid.” *Niemotko*, 340 U.S. at 271.

Thus, as one court recognized, “prior restraint claims arise most commonly in the free speech context but *apply with equal force* to the free exercise of religion context.” *Russian Community Synagogue v. Baltimore*, 2019 WL 13084437, *2 (D. Maryland), citing *Cantwell* and other cases. *See, e.g., United States v. Silberman*, 464 F.Supp. 866, 872-73 (M.D. Fla. 1979) (permit requirement held to violated Free Exercise Clause because it was a forbidden prior restraint; “Any ... ordinance ... restricting the exercise of fundamental freedoms, like the exercise of religion, must contain standards and criteria that are narrow and strict, definitive and objective.... Without those kinds of standards, the restriction ... amounts to a prior restraint on the exercise of constitutional freedoms.”); *Hollywood Community Synagogue v.*

Hollywood, 430 F.Supp.2d 1296, 1326-27 (S.D. Fla. 2006) (Ordinance requiring places of worship to be “compatible with the existing natural environment” held to be an unconstitutional prior restraint because it lacked objective standards).

Had the Ninth Circuit followed this Court’s precedents and applied prior restraint case law to the City’s ordinance, the conclusion that Burien’s law was an unconstitutional prior restraint would have been inescapable. Burien’s ordinance does not contain any narrow, definitive, and objective standards to be used to determine whether to grant a temporary use permit. The lack of such narrow, objective standards has been held to be a fatal defect in licensing statutes that regulate First Amendment activities for decades. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Lovell v. Griffin*, 303 U.S. 444, 449-51, 58 S.Ct. 666, 82 L.Ed.2d 949 (1938).

Moreover, the ordinance not only uses a patently vague and meaningless standard, it places the burden of proof on the permit applicant to “demonstrate that that [t]he proposed temporary use will not be materially detrimental to the public welfare.” Burien Municipal Code §19.75.090. At the same time the City’s Code flatly asserts as an absolute proposition that: “[a]ll violations of city of Burien ordinances are found and declared to be detrimental to the public health, safety, and welfare and are further found to be public nuisances.” Burien Municipal Code §8.45.015. Thus, the City makes it legally impossible for any Church to ever host the homeless

because as a condition of obtaining the required permit the Church must “prove” a fact that the City has concluded can never be proved.

Finally, the City’s Temporary Use Permit laws lack any procedural requirement that the City “will, within a specified brief period, either issue a license or go to court.” *Freedman*, 380 U.S. at 59. In *City of Littleton v. Z.J. Gifts*, 541 U.S. 774, 778, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004), this Court reaffirmed the principle that where First Amendment freedoms are at issue, to be constitutional the ordinance in question must guarantee the permit applicant not only a prompt initial administrative decision, but also prompt access to judicial review of any permit denial. Burien’s temporary use permit laws do not provide *either*. Nothing prevents the City of Burien from taking a year or more to decide whether to permit a Church to host the homeless on its own property. As this Court has recently said in different contexts, requiring religious believers to wait for even minimal periods of time before securing governmental permission to commit acts religiously mandated by their faith violates the Free Exercise Clause. *Mahmoud v. Taylor*, 606 U.S. 522, 569, 145 S.Ct. 2332, 222 L.Ed.2d 695 (2025); *Tandon v. Newsom*, 593 U.S. 61, 64, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021); *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 19, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020).

Thus the City’s attempt to subject the exercise of religious freedom to the prior restraint of a permit requirement is constitutionally flawed for three reasons: the City’s ordinances (1) lack objective standards; (2) lack time limits which provide assurance that the Church need not wait for an indefinite period of time before it can

exercise its religious freedom, and (3) shift the burden of justification by relieving the City from having to justify the denial of a permit, and requiring the Church to prove that granting the permit will not materially harm the public.

The City never contended that hosting the homeless was not an act of religious exercise. Nor could it, since it expressly conceded that it understood and did not question the Church's purpose, and did not question "its religious conduct, nor the sanctity of hosting unhoused people." *Complaint*, ¶ 37, Exhibit D. Moreover, neither the City nor the Court below disputed the fact that "[c]ourts across the country have recognized that ministering to the poor is an exercise of a sincerely held religious duty." *St. Timothy's v. Brookings*, 726 F.Supp.3d 1231, 1244 (D. Ore. 2024). See, e.g., *Stuart Circle Parish v. Bd. Of Zoning Appeals*, 948 F.Supp. 1225, 1236 (E.D. Va. 1996) ("Feeding the poor constitutes a central tenet of the [plaintiff's] religion"); *Western Presbyterian v. Bd. Of Zoning*, 862 F.Supp. 538, 544, 547 (D.D.C. 1994) ("Acts of charity as an essential part of religious worship is a central tenet of all major religions," and noting that feeding the poor is "a form of worship their religion mandates"); *St. John's Evangelical v. City of Hoboken*, 195 N.J. Super. 414, 479 A.2d 935, 938 (1983) (given "centuries old church tradition of sanctuary for those in need of shelter," by "sheltering the homeless" the Church was "engaging in the free exercise of religion," and therefore the city "cannot constitutionally use its zoning authority to prohibit that free exercise.").

In this case, the City of Burien passed a law which made it a crime for unhoused people to live anywhere in the City on any public land. Winter was coming upon

them. The law swiftly went into effect on November 1. The homeless who had been living on public land had to leave Burien unless they could find a private landowner who would welcome them and offer them shelter. They found the Burien Free Methodist Church and Pastor Miller. By agreeing to host them on the Church's property for a three-month period, the Church effectively prevented the City from driving the unhoused out of their city altogether. In this situation, to contend that the City could block the congregation of the Church from exercising their First Amendment protected religious freedom to welcome the stranger by employing a licensing law which contained no meaningful objective standards and no time limit for a decision, runs counter to every prior restraint decision that this Court has rendered in the past 80 years.

c. The decision below conflicts with the Second Circuit's decision in *Fifth Avenue Presbyterian v. New York*.

The conflict between the Ninth Circuit's unpublished decision in this case, and the decision in *Fifth Avenue Presbyterian v. New York*, 293 F.3d 570 (2nd Cir. 2002) is striking. In both cases a Church decided to allow homeless people to sleep on its property. In both cases, the city in question sought to block the Church from doing so. New York said the Church could not do that because municipal law required a license to operate a shelter and the Presbyterian Church had no such license and had not applied for one. Similarly, Burien told the Burien Free Methodist Church that it could not let the homeless sleep on its property because it had not applied for a Temporary Use Permit, even though the Church was located with a zone where religious activity was expressly permitted, and

even though the City acknowledged that the Church was acting to fulfill a religious duty. Like the Presbyterians, the Methodist Church of Burien also declined to apply for a permit and to wait and see whether one was granted. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (“Our decisions have made it clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.”).

When New York City threatened to arrest the homeless sleeping on the Church’s property, the Church sued and sought a preliminary injunction. The district court granted the injunction and the Second Circuit affirmed, holding that the Church was likely to succeed on its claim that “its provision of outdoor sleeping space for the homeless effectuates a sincerely held religious belief and therefore is protected under the Free Exercise Clause.” 293 F.3d at 575.

When Burien imposed massive monetary fines on Pastor Miller and the Church, they went ahead and hosted the homeless for three months anyway and simply refused to pay the fines. Moreover, the Petitioners told Burien they intended to host the homeless on their property again in the future. When Burien said they could not do that without first obtaining a permit, they sued for a declaratory judgment. The Ninth Circuit, however, affirmed the dismissal of their complaint for failure to state a claim.

Thus, on one side of the country, a Church’s First Amendment claim is deemed not even sufficiently plausible

to survive a motion to dismiss. While on the other side of the country, the same claim brought by a Church is pronounced likely to succeed and thus warrants immediate injunctive relief. Religious freedom should be protected equally on both sides of the country.

CONCLUSION

This Court should grant the petition for certiorari in order to resolve this disparity and the many conflicts identified above.

Respectfully submitted,

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July 21, 2026

APPENDIX

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**APPENDIX A — MEMORANDUM OF THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT, FILED MARCH 13, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25-1192
D.C. No. 2:24-cv-01301-BJR

MARK MILLER, PASTOR;
BURIEN FREE METHODIST CHURCH,
ALSO KNOWN AS OASIS HOME CHURCH,

Plaintiffs-Appellants,

v.

CITY OF BURIEN, A MUNICIPAL CORPORATION;
JEFFREY D. WATSON, PLANNING
REPRESENTATIVE FOR THE CITY OF
BURIEN; JOSEPH STAPLETON, BUILDING
REPRESENTATIVE FOR THE CITY OF BURIEN,

Defendants-Appellees.

Filed March 13, 2026

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

Argued and Submitted February 11, 2026
Seattle, Washington

Before: McKEOWN, W. FLETCHER, and BUMATAY,
Circuit Judges.

The Burien Free Methodist Church and Pastor Mark Miller appeal from the district court’s dismissal of their claims for declaratory relief against the City of Burien. We have jurisdiction under 28 U.S.C. § 1291 and review dismissals under Federal Rule of Civil Procedure 12(b)(6) de novo. *In re Apple iPhone Trust Litigation*, 846 F.3d 313, 317 (9th Cir. 2017). We affirm.

In November 2023, the Church began hosting an encampment of about 100 unhoused persons in its parking lot. In a series of letters, the City informed the Church that the encampment required a Temporary Use Permit (TUP) under § 19.75.010 of the Burien Municipal Code (BMC). The City asked the Church to submit a two-page application for a TUP, indicating that it supported the Church’s efforts and had waived the application fee. The Church refused to submit an application, and continued to host the encampment until February 5, 2024. The City assessed over \$100,000 in fines against the Church for operating the encampment without a permit, but eventually waived all fines. The Church plans to host similar encampments in the future. It seeks a declaratory judgment that the TUP requirement violates the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

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Appellants first claim that the TUP requirement is a facially unconstitutional prior restraint. Facial challenges are “allowed against laws aimed at expressive conduct but disallowed against laws of general application not aimed at conduct commonly associated with expression.” *Spirit of Aloha Temple v. Temple of Maui*, 49 F.4th 1180, 1188 (9th Cir. 2022) (citing *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1135 (9th Cir. 2004)). The challenged TUP provision of the BMC is not addressed to expressive conduct. Rather, the BMC requires a TUP to use a parking lot for a monthslong encampment. The facial prior restraint challenge therefore fails.

Appellants next claim that the TUP requirement fails strict scrutiny under the Free Exercise Clause. But “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). Laws that are generally applicable and neutral need only be rationally related to a legitimate government interest. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004). Here, appellants fail to show that the TUP requirement is not neutral or generally applicable. Secular and religious institutions alike must apply for a TUP before hosting a monthslong encampment in a parking lot. Moreover, none of the limited exemptions to the TUP requirement upon which the Church seeks to rely are comparable to a monthslong 100-person encampment in a parking lot. Since the TUP requirement is neutral, generally applicable, and rationally related to legitimate

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government interests in public safety, appellants' free exercise claim fails.

Appellants suggest that the City's efforts to require a TUP constitute evidence of non-neutrality because, in their view, the BMC does not require a TUP for the encampment. We disagree. The BMC requires TUPs for temporary uses not otherwise permitted under the code. BMC 19.75.010. The Church is designated as a religious facility, which is defined by the BMC as an establishment "the principal purpose of which is religious worship," and includes "related accessory uses." BMC 19.10.450. Accessory use is in turn defined as "[a] use that is subordinate and incidental to a primary permitted use" and is "permitted only in conjunction with, and because of, the existence of a primary use." BMC 19.10.011. Parking space is separately defined as "[a]n area . . . for the sole purpose of parking a motor vehicle." BMC 19.10.394. Nothing in the City's interpretation of the BMC as requiring a TUP for the monthslong encampment in the Church's parking lot suggests animus or non-neutrality.

Finally, appellants bring several claims under RLUIPA. A plaintiff asserting a substantial burden RLUIPA claim must first demonstrate a substantial burden on religious exercise. *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011). Appellants' substantial burden claim fails because the requirement to apply for a land use permit does not constitute a substantial burden, especially where there is no indication that an application would be denied. *San Jose Christian College*, 360 F.3d at 1035.

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Appellants next claim that the TUP requirement violates the equal terms provision of RLUIPA. *See* 42 U.S.C. § 2000cc(b)(1). As discussed above, the TUP requirement does not subject similarly situated religious and secular institutions to unequal terms. Appellants' remaining two RLUIPA claims were not raised in the district court. "Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so." *Baccei v. U.S.*, 632 F.3d 1140, 1149 (9th Cir. 2011). Even so, these claims fail on the merits. The discrimination claim under 42 U.S.C. § 2000cc(b)(2) fails because, again, appellants have not alleged disparate treatment of similarly situated religious and secular institutions. The "unreasonable exclusion" claim under 42 U.S.C. § 2000cc(b)(3) fails because the city is not excluding the Church; it is merely requiring application for a TUP in order to host a monthslong encampment.

The dismissal by the district court is therefore **AFFIRMED.**

**APPENDIX B — ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS OF THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT
SEATTLE, FILED FEBRUARY 3, 2025**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. 2:24-cv-1301-BJR

PASTOR MARK MILLER, AND THE
BURIEN FREE METHODIST CHURCH,
ALSO KNOWN AS THE OASIS HOME CHURCH,

Plaintiffs,

v.

CITY OF BURIEN, A MUNICIPAL CORPORATION;
JEFFREY D. WATSON, PLANNING
REPRESENTATION FOR THE CITY OF
BURIEN; AND JOSEPH STAPLETON, BUILDING
REPRESENTATION FOR THE CITY OF BURIEN

Defendants.

Filed February 3, 2025

*Appendix B***ORDER GRANTING DEFENDANTS' MOTION
TO DISMISS****I. INTRODUCTION**

Plaintiffs Pastor Mark Miller and the Burien Free Methodist Church, also known as Oasis Home Church (collectively, “the Church”) bring this action for declaratory relief against Defendants the City of Burien, Jeffrey D. Watson, and Joseph Stapleton (collectively, “Burien” or “the City”). Currently before the Court is the City’s motion to dismiss pursuant to Federal Rule 12(b)(6). Dkt. No. 14, Defendant’s Rule 12(b)(6) Motion to Dismiss (“Mot.”). The Church opposes the motion. Dkt. No. 17, Plaintiffs’ Opposition to Defendants’ Motion to Dismiss (“Opp. to Mot.”). Having reviewed the motion, opposition, and reply thereto, the record of the case, and the relevant legal authority, the Court will grant the City’s motion to dismiss. The reasoning for the Court’s decision follows.

II. FACTUAL BACKGROUND

Mark Miller is the pastor at the Burien Free Methodist Church located at 520 S. 150th Street in Burien, Washington. The Church is in an area of Burien that is zoned for multi-family use and is designated a religious facility. Burien is a municipality and political subdivision of the State of Washington and is governed, in part, by the Burien Municipal Code (“BMC” or “Burien’s code” or “the Code”).

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Burien’s code contains zoning ordinances that prescribe certain allowable land uses based on location or zone to “promote the general public health, safety, comfort and welfare of the residents of the city of Burien.” BMC 19.05.030(2). Relevant to this lawsuit, the Code specifically designates the following land uses in a multi-family zone: townhomes, apartments, family day care homes, day care centers, mixed use buildings, public park and recreation facilities, community residential facilities, nursing homes, religious facilities, schools, assisted living facilities, essential public facilities, government facilities, public utilities, personal wireless services facilities, community gardens, and enhanced services facilities. BMC 19.15.010.1. The Code further provides that if a landowner in a multi-family zone wants to use their land for a purpose not otherwise designated by BMC 19.15.010.1, the landowner must obtain a temporary use permit pursuant to BMC 19.75.010. BMC 19.75.010, in turn, provides that an application for a temporary use permit “shall be granted” if the applicant demonstrates that the proposed temporary use “will not be materially detrimental to the public welfare” and “is compatible with existing land use in the immediate vicinity in terms of noise and hours of operation” and that [a]dequate public off-street parking and traffic control . . . can be provided in a safe manner”. BMC 19.75.090(1)-(3).

In November 2023, the Church expressed interest in hosting an encampment for 100 unhoused individuals in its parking lot for a period of three months. The City asserts that because a homeless encampment is not a specifically designated land use for a multifamily zone

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under BMC 19.15.010.1, the Church was required to apply for a temporary use permit under BMC 19.75.010. As such, the City requested that the Church complete an application before hosting the encampment. The City claims that it repeatedly informed the Church that it supported the Church's desire to host the encampment, waived the permit application fee, and at no time indicated that it would deny the temporary permit application.

Despite the City's repeated requests and assurances, the Church refused to submit an application, claiming that being forced to do so violates its state and federal constitutional rights. On November 7, 2023, the Church started hosting the encampment without a permit. On December 7, 2023, the City issued a Notice of Violation ("NOV") to the Church, which is an enforcement tool prescribed by the BMC. The NOV imposed a monetary penalty of \$125 and notified the Church that the fee would increase each day that the Church continued to operate the encampment without a permit. However, the City proposed drafting a Memorandum of Understanding ("MOU") for the encampment (which would have also rescinded the fines imposed by the NOV). The Church and the City exchanged several drafts of the MOU, but the issue eventually became moot when, on February 5, 2024, the Church ended the encampment as it had planned to do. Thereafter, the City rescinded the fines that had accrued from the Church's failure to respond to the NOV. *Id.* at ¶ 76.

The Church claims that it intends to host the homeless encampment again in the future and fears being subject

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to further enforcement action by the City. Therefore, it filed this lawsuit seeking a declaratory judgment that the City is barred from requiring the Church to apply for and obtain a temporary use permit before hosting the encampment on its property because doing so violates the Church's state and federal constitutional rights, as well as its statutory rights under Religious Land Use and Institutionalized Persons Act ("RLUIPA") and RCW 35A.21.360. Amend Comp. at Relief Request ¶ 1.

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim under Federal Rule 12(b)(6) is properly granted if the complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "A complaint may fail to show a right to relief either by lacking a cognizable legal theory or by lacking sufficient facts alleged under a cognizable legal theory." *Woods v. U.S. Bank N.A.*, 831 F.3d 1159, 1162 (9th Cir. 2016). When considering a motion to dismiss under Federal Rule 12(b)(6), courts must accept the factual allegations in the complaint as true and construe such allegations in the light most favorable to the plaintiff. *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 886-87 (9th Cir. 2018) quoting *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017).

*Appendix B***IV. DISCUSSION**

The Church seeks a declaratory judgment that the City is barred from requiring it to apply for and obtain a temporary use permit before hosting a homeless encampment on its property, claiming that such a requirement violates the Church's state and federal constitutional rights, as well as its state and federal statutory rights. Specifically, The Church brings the following claims: (1) deprivation of its right to the free exercise of religion under the First and Fourteenth Amendments; (2) violation of its due process rights under the First and Fourteenth Amendments; (3) violation of its rights under RLUIPA; (4) deprivation of its right to freedom from prior restraint under Article 1 of the Washington constitution; (5) deprivation of its right to free exercise of religion under Article 1 of the Washington constitution; (6) violation of its rights under Article 11 of the Washington constitution to be free from local ordinances that conflict with state statutes; and (7) violation of its statutory rights under RCW 35.21.360.¹

The City moves to dismiss each of these claims pursuant to Federal Rule 12(b)(6). In its opposition to the

1. In its opposition to the City's motion, the Church appears to attempt to assert an adverse land use claim, arguing that the City incorrectly interpreted Burien's Code as it applied to the Church. The Church did not assert such a claim in its amended complaint. Even if it had, the claim would be barred by Washington's Land Use Petition Act, which is the exclusive means for securing relief from adverse land use decisions under Washington law. RCW 36.70C.10.

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motion to dismiss, the Church only presents arguments as to the RLUIPA claim, as well as the First Amendment Free Speech and Free Exercise Clauses claims; it does not dispute the City’s argument that the remaining claims must be dismissed as a matter of law. Accordingly, the Church has waived those claims, and they will be dismissed. *See Pers. Elec. Transports, Inc. v. Off of U.S. Tr.*, 313 Fed. Appx. 51, 52 (9th Cir. 2009) (holding that the “district court correctly opined” that the party waived its argument “for failing to raise it in their opposition to the [counterparty’s] motion to dismiss”); *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1211 (N.D. Cal. 2009), *aff’d*, 646 F.3d 1240 (9th Cir. 2011) (“Where plaintiffs fail to provide a defense for a claim in opposition, the claim is deemed waived.”); *Moore v. Effectual, Inc.*, 2024 WL 1091689, *10 (W.D. Wash. March 13, 2024) (“The failure to substantively oppose arguments can be construed as a waiver or abandonment of those issues thus warranting dismissal of those claims.”).

A. Article III Standing

As an initial matter, the City argues that this Court does not have jurisdiction to address the Church’s claims because the Church does not have Article III standing. Article III standing is a “bedrock constitutional requirement” that confines the jurisdiction of federal courts to “Cases” and “Controversies”. *United States v. Texas*, 599 U.S. 670, 675 (2023). “For a plaintiff to get in the federal courthouse door and obtain a judicial determination of what the governing law is, the plaintiff . . . must have a ‘personal stake’ in the dispute.” *Food*

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and Drug Administration v. Alliance for Hippocratic Medicine, 602 U.S. 367, 379 (2024) quoting *Trans Union LLC v. Ramirez*, 594 U.S. 413, 423 (2021). The question of constitutional standing “is not subject to waiver” so this Court must first determine whether the Church has standing before proceeding to the merits of the claims. *United States v. Hays*, 515 U.S. 737, 742 (1995).

To establish standing, the Church must demonstrate (i) that it has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the City, and (iii) that the injury likely would be redressed by the requested judicial relief. *See Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009). Here, the parties agree that the question of standing turns on whether the Church has alleged an injury in fact. The Church claims that it has because it “intends to conduct additional hosted encampments for the homeless people of Burien” in the future and when it does, “it has every reason to expect that the City will again impose, or threaten to impose, fines against [it].” Amended Comp. at ¶¶ 98, 102. The City counters that the Church’s claim that it may host another encampment in the future is a hypothetical allegation that is simply too speculative to satisfy the injury in fact requirement under Article III.

The City is correct that the alleged injury in fact for Article III purposes must be “‘concrete,’ meaning that it must be real and not abstract.” *Alliance*, 602 U.S. at 381 quoting *TransUnion*, 594 U.S. at 424. However, the Supreme Court has clarified that a plaintiff “does not have to await the consummation of threatened injury

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to obtain preventive relief.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979). Rather, it is “sufficient for standing purposes that the plaintiff intends to engage in ‘a course of conduct arguably affected with a constitutional interest’ and that there is a credible threat that the challenged provision will be invoked against the plaintiff.” *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154-55 (9th Cir. 2000) quoting *Babbitt*, 442 U.S. at 298. Thus, when a plaintiff seeks to establish standing to challenge a law or regulation that is not presently being enforced against him, he must simply demonstrate “that there is a credible threat that the challenged provision will be invoked against the plaintiff.” *Id.* quoting *Babbitt*, 442 U.S. at 298; *see also Blanchette v. Connecticut General Ins Corporation*, 419 U.S. 102, 143 (1974) (a plaintiff “does not have to await the consummation of threatened injury to obtain preventive relief”).

Here, the Church has hosted an encampment in the past and stated its intent to do so again in the future without applying for a temporary use permit. When the Church hosted the camp without a permit in the past, the City issued a NOV and imposed a monetary penalty that ultimately accumulated to over \$100,000 before the City eventually waived the fee. The City continues to assert that the Church must apply for a temporary use permit before hosting an encampment on its property. Accordingly, the Church has every reason to believe that it will be fined again if it hosts another camp without first obtaining a temporary use permit. Thus, the Court concludes that the Church has sufficiently alleged “a credible threat that the challenged provision will be invoked against [it]” and

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therefore has standing to bring its claims. *See LSO*, 205 F.3d at 1155 (stating that “past instances of enforcement” and the “Government’s failure to disavow application of the challenged provision” are “important” factors to consider in a standing inquiry). Having determined that the Church has standing, the Court will turn to the merits of the claims.

B. The RLUIPA Claim

As stated above, the City asserts that hosting a homeless encampment is not a designated use in multi-family residential zones under the Burien code. Nevertheless, the City “under[stood], support[ed], and welcome[d]” the Church’s desire to host an encampment on its property. Dkt. No. 11, Amended Complaint for Declarator Relief (“Amend. Comp.”) at Ex. B. Burien’s code allows for unpermitted zoning uses but requires that the property owner wishing to conduct the unpermitted use to first apply for a temporary use permit. Thus, the City informed the Church that it must submit an application for a temporary use permit prior to hosting the encampment. The City alleges that the permitting process allows it “to safeguard the public health and safety, as well as the health and safety of the individuals living in the encampment, through things like inspections of the electrical systems powering the camp; ensuring ingress/egress exists for emergency vehicles; and confirming adequate sanitation facilities (running water/restrooms, etc.).” Mot. at 2-3. The City further claims that it waived the application fee and repeatedly requested that the Church complete the application. The Church refused to

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submit the requested application, claiming that even just the requirement to submit a permit application constituted an infringement on its religious exercise in violation of RLUIPA.

Congress passed RLUIPA to protect the “free exercise of religion from government regulations.” *Milosavljevic v. City of Brier*, 2017 WL 3917015, *3 (W.D. Wash. Sept. 7, 2017) quoting *Anselmo v. County of Shasta, Cal.*, 878 F. Supp. 2d 1247, 1254 (E.D. Cal. 2012). RLUIPA “requires land-use regulations that substantially burden religious exercise to be the least restrictive means of advancing a compelling government interest.” *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760 (7th Cir. 2003) citing 42 U.S.C. § 2000cc(a). Thus, to succeed on a RLUIPA claim, “a plaintiff must first demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise.” *Id.*; see also *Int’l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011) (“[P]laintiff must demonstrate that a government action has imposed a substantial burden on plaintiff’s religious exercise.”). RLUIPA does not define what constitutes a “substantial burden” but the Ninth Circuit has concluded that within the context of the statute, “substantial burden” means that the government is prohibited “from imposing or implementing a land use regulation in a manner that imposes a significantly great restriction or onus on any exercise of religion . . . unless the government can demonstrate that imposition of the burden . . . is: (1) in furtherance of a compelling governmental interest, and (2) the least restrictive means of furthering that compelling governmental interest.” *San*

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Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034-35 (9th Cir. 2004) (internal quotation marks omitted).

The parties concede that caring for unhoused individuals is an “exercise of religion” for purposes of RLUIPA. However, the parties dispute whether requiring the Church to apply for a temporary use permit before it is allowed to host a homeless encampment constitutes “imposing a ‘substantial burden’ on religious exercise” under the statute. It is important to note that this is not a denial of application case; rather, the question here is whether the City can require the Church to submit a permit application. This Court finds the Ninth Circuit’s decision in *San Jose Christian College* instructive on this issue.

In *San Jose Christian College*, a religious institution sought to change its previously approved property use from a hospital to an educational facility. 360 F.3d at 1027. Because the original development plan for the land was designated solely for hospital use, the institution filed an application with the city seeking to amend the allowable property use to educational facilities. The city reviewed the application, determined it was incomplete, and outlined additional information that the institution needed to provide in order “to make the application complete.” *Id.* at 1028. Rather than submitting the requested additional material, the institution decided to submit a “scaled back” version of its first application. *Id.* Ultimately the city “denied [the institution’s] rezoning application due to [the institution’s] failure to comply with the [c]ity’s application requirements.” *Id.* at 1129.

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The institution sought injunctive relief in federal court, alleging among other claims, that the city's zoning ordinance violated RLUIPA because it prohibited the institution from using its property "to carry on its mission[s] of Christian education and transmitting its religious beliefs." *Id.* at 1035 (alternation in original). The Ninth Circuit rejected the institution's argument, stating that the institution's real objection was to having to comply with the city's ordinance application requirements:

The City's ordinance imposes no restriction whatsoever on [the institution's] religious exercise; it merely requires [the institution] to submit a *complete* application, as is required of all applicants. Should [the institution] comply with this request, it is not at all apparent that its re-zoning application will be denied.

Id. at 1035 (italics in original). The Ninth Circuit concluded that "'the costs, procedural requirements, and inherent political aspects' of the permit approval process were 'incidental to any high-density urban land use' and thus '[did] not amount to a substantial burden on religious exercise.'" *Id.* quoting *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (alternation in original). This, of course, is consistent with the case at hand where the Church was required to complete a temporary use permit application just like any secular organization would be if it wanted to host a homeless encampment on property located in multi-family zoning. Thus, the Court concludes that simply requiring the Church to submit an application does not constitute a

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substantial burden on the Church's religious exercise for purposes of RLUIPA. *Id.* at 1035.

This decision is consistent with decisions from other circuits that hold that requiring a church to comply with land-use regulations, in of itself, does not run afoul of RLUIPA. See e.g. *Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed. Appx. 729, 736-37 (6th Cir. 2007) (RLUIPA does not stand for the proposition that a religious institution is immune from zoning laws simply because it is pursuing a religious mission); *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 544 (S.D.N.Y. 2006), *aff'd*, 504 F.3d 338 (2d Cir. 2007) (“[C]ourts must ensure that the facts warrant protection under RLUIPA, rather than simply granting blanket immunity from zoning laws.”); *Civil Liberties for Urban Believers*, 342 F.3d at 762 (“[N]o such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.”); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 991 (7th Cir. 2006) (requiring a special use permit did not violate RLUIPA). Likewise, the Washington Supreme Court has held that the mere requirement of applying for a land-use permit does not unconstitutionally burden a church's religious freedoms. See *Open Door Baptist Church v. Clark County*, 140 Wash.2d 143, 160 (2000) (requiring a church to apply for a permit and “the inconvenience of filling out paperwork” that came with it was not an impermissible burden on church's free exercise of religion); *City of Woodinville v. Northshore United Church of Christ*, 166 Wash.2d 633, 643 (2009) (“[T]he burden of properly applying for a permit was not

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an excessive burden on religion” the burden of applying for a permit is “a slight inconvenience” that does not “impose [a] substantial burden on the exercise of religion”).

Of course, the result could be different if the Church *had* applied for the permit and the City *denied* the application. It is possible that the circumstances surrounding a particular permit application could result in a RLUIPA violation. *See e.g. Harbor Missionary Church Corp. v. City of San Buenaventura*, 642 Fed. Appx. 726, 729 (9th Cir. 2016) (holding that city’s denial of church’s conditional use permit application constituted a substantial burden on the church’s religious exercise because it required the church to sell its current property and relocate if it wanted to continue conducting its homeless ministry); *City of Woodinville*, 166 Wash.2d at 644-45 (city’s total moratorium on land use permit applications pending completion of a study on sustainable development placed a substantial burden on the church’s exercise of its religious exercise.) However, that is not the situation here. Here, the Church did *not* apply for a permit, the City did *not* deny the permit application, and the City did *not* deny the Church’s the right to host a homeless encampment—indeed, the City supported the Church’s endeavor. However, the City did require that the Church fill out a simple two-page application so that the City could ensure that the health and safety of the neighborhood residents, as well as the encampment occupants, was accounted for. Such minimum inconvenience does not constitute a substantial burden on the Church for purposes of RLUIPA. Because substantial burden is a threshold requirement under the statute, the Church’s failure to

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plausibly allege such a burden means that its RLUIPA claim fails as a matter of law and must be dismissed. *See Civil Liberties for Urban Believers*, 342 F.3d at 762 (holding that RLUIPA was inapplicable because plaintiffs failed to show that the challenged regulation imposed a substantial burden on religious exercise).

C. The First Amendment Claims

The Church also alleges that the City’s permit requirement violates its free speech and free exercise rights under the First Amendment. The Free Speech and Free Exercise Clauses “work in tandem . . . the Free Exercise Clause protects religious exercises, whether communicative or not [and] the Free Speech Clause provides overlapping protection for expressive religious activities.” *Kennedy v. Bremerton School District*, 597 U.S. 507, 523 (2022). The Free Speech and Free Exercise Clauses are made applicable to state and local governments by the Fourteenth Amendment. *Id.* at 524. It is the Church’s burden to demonstrate an infringement of its rights under these Clauses. If the Church carries its burden, the focus then shifts to the City to show that its actions “were nonetheless justified and tailored consistent with the demands of our case law.” *Id.*

1. The Free Speech Clause Claim

The Church argues that the City’s permitting requirement constitutes an unconstitutional prior restraint on its First Amendment free speech rights. It asserts a facial challenge, meaning that the Church is

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challenging the regulation as written. *Spirit of Aloha Temple v. County of Maui*, 49 F.4th 1180, 1188 (9th Cir. 2022). In general, courts disfavor facial challenges, and whether a “facial prior restraint challenge[] may proceed depends on the law being challenged.” *Id.* citing *Epona v. County of Ventura*, 876 F.3d 1214, 1220 (9th Cir. 2017). Facial challenges are “allowed against laws aimed at expressive conduct but disallowed against laws of general application not aimed at conduct commonly associated with expression.” *Spirit of Aloha*, 49 F.4th at 1188 citing *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1135 (9th Cir. 2004). “In other words, a facial challenge is proper only if the statute by its terms seeks to regulate spoken words or patently expressive or communicative conduct, such as picketing or handbilling, or if the statute significantly restricts opportunities for expression.” *Id.* quoting *S. Or. Barter Fair*, 372 F.3d at 1135.

Thus, permitting regulations are subject to facial challenges only if they have “a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat” that protected speech or conduct will be suppressed. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 759 (1988). “[F]acial challenges to a law ‘with no close connection to expression’” are “not permit[ted].” *Spirit of Aloha*, 49 F.4th at 1188 quoting *Gaudiya Vaishnava Soc’y v. City & County of San Francisco*, 952 F.2d 1059, 1062-63 (9th Cir. 2012). Therefore, in determining whether a plaintiff can maintain a prior restraint facial challenge, the court must first ask where the challenged law falls “along the spectrum from activity that is clearly protected

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by the First Amendment to activity with some expressive purpose to activity with no expressive purpose.” *Id.* quoting *S. Or. Barter Fair*, 372 F.3d at 1135.

The Church argues that because Burien’s code requires it to obtain a temporary use permit before hosting a homeless encampment, and because serving the unhoused population is a religious activity, the code is impacting its religious expression. The Church further argues that because the Code (1) lacks “narrow, objective, and definite standards” for issuing temporary use permits thereby giving the permitting authority unbridled discretion, and (2) “contains no time periods meaning that the permitting authority could delay issuing a decision indefinitely”, it constitutes an unlawful prior restraint on its free speech rights. The City counters that the Church cannot maintain a facial challenge to Burien’s code because the Code does not target speech nor expression—and thus does not implicate the Free Speech Clause of the First Amendment.

The Church relies heavily on the Ninth Circuit’s recent decision in *Spirit of Aloha* to support its free speech claim. In *Spirit of Aloha*, the Ninth Circuit reviewed a zoning regulation that related to property designated as agricultural land. For such properties that are smaller than fifteen acres, the regulation listed uses that were either allowed or that required a special use permit, which was issued at the discretion of the county planning commission. *Spirit of Aloha*, 49 F.4th at 1187. The zoning regulation specifically stated that churches and religious institutions required special use permits to operate on

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such land. The plaintiff, a nonprofit spiritual service organization, brought a prior restraint facial challenge to the regulation when its application for a special use permit was denied. The Ninth Circuit concluded that the plaintiff could bring a facial challenge to the regulation because “even though the permitting scheme was more broadly about agriculturally zoned land” it “expressly requires a special use permit for religious activity, which is commonly associated with expression” and although “the permitting scheme does not regulate the specificities of religious conduct, its regulation of where religious congregants may gather makes it ‘broad enough’ to provide a sufficient nexus to expression.” *Id.* at 1190 quoting *S. Or. Barter Fair*, 372 F.3d at 1135. The Ninth Circuit clarified that because the permitting scheme targeted “expressive conduct in the form of churches and religious institutions,” the scheme moved “from the ‘no expressive conduct’ portion of the spectrum to the ‘some expressive purpose’ portion.” *Id.*

The problem with the Church’s reliance on *Spirit of Aloha* is that the regulations in that case specifically targeted religious institutions, while the regulation in this case does not. Burien’s code prohibits *any* entity—secular or religious—from hosting a homeless encampment in a multi-family zone without first obtaining a temporary use permit. The mere fact that a regulation impacts a religious institution does not render it unconstitutional. *See e.g. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (“[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental

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effect of burdening a particular religious practice.”); *San Jose Christian College*, 360 F.3d at 103233 (denial of religious school’s rezoning application did not violate the school’s free speech rights because the zoning ordinance was generally applicable and served a purpose unrelated to the content of expression). Moreover, there is nothing in the challenged portions of Burien’s code that targets expressive conduct. As the Ninth Circuit stated in *Spirit of Aloha*, “laws of general application that are not aimed at conduct commonly associated with expression” are not subject to facial challenges. *Id.* at 1189; *see also C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903, 915-916 (N.D. Ill. 2001) (denying a free speech challenge to a zoning ordinance because the objective of the ordinance was harmonious land use not expression and just because the ordinance impacted a church does not mean it impacted “religious speech”; “the operation of a house of worship does not equate to ‘religious speech,’ any more than the operation of a shoe store equates with commercial speech”). Therefore, the Church has failed to plausibly allege that the challenged regulation impacts speech. As such, its prior restraint facial challenge fails as a matter of law and must be dismissed. *See Spirit of Aloha*, 49 F.4th at 1188 quoting *Gaudiya Vaishnava Soc’y*, 952 F.2d 1062-63 (“We do not permit facial challenges to a law ‘with no close connection to expression [even if it] provides an official with discretion that might be used to reward or punish speech.’”).

*Appendix B***2. The Free Exercise Clause Claim**

The Church also claims that Burien’s code violates its right to the free exercise of religion. “The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that ‘Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*. . . .’” *San Jose Christian College*, 360 F.3d at 1030 quoting *Employment Div., Oregon Dep’t of Human Resources v. Smith*, 494 U.S. 872, 876-77 (1990)) (emphasis in *Smith*). “While the First Amendment provides absolute protection to religious thoughts and beliefs, the free exercise clause does not prohibit Congress and local governments from validly regulating religious conduct.” *Grace United Methodist Church v. City Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006) citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878). Therefore, a regulation that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a free exercise challenge. *San Jose Christian College*, 360 F.3d at 1030 (stating the government can enforce neutral, generally applicable statutes that incidentally burden religious practice if there is a rational basis for the law). Thus, “a free exercise violation hinges on showing that the challenged law is either not neutral or not generally applicable.” *Id.* quoting *American Family Ass’n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1123 (9th Cir.), *cert. denied*, 537 U.S. 886 (2002).

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Here, the Church does not dispute that Burien's temporary use permitting requirement under BMC 19.75.010 is neutral or that the City has a rational basis for the requirement. Instead, the Church argues that the permitting requirement is not "generally applicable" and therefore must be supported by a compelling governmental reason. The City counters that the permitting requirement is generally applicable because it applies to all landowners who wish to conduct non-designated land use in a multi-family zone. In reply, the Church argues that this is not true and points to the fact that BMC 19.75.020.1 provides some exemptions to the permitting requirement for certain activities, thereby defeating the requirement's general applicability. The Church is correct that BMC 19.75.020.1 does allow for some exemptions (*e.g.*, Christmas tree lots, parking lot sales, and produce stands), but those exemptions only apply to land use within commercially zoned property. They do not apply to land use within multi-family zoned property. Thus, the permitting requirement under BMC 19.75.010 is generally applicable to all landowners within multi-family zoning.

The Church also points out that BMC 19.75.020.2 and .3 provide for exemptions to the temporary use permit requirement for "[a]ny use not exceeding a cumulative of two days each calendar year" or "[a]ny community event held in a public park" that does not exceed "seven days". While the Church is correct that these exemptions do apply to multifamily zoning, the exemptions are available for *any* use or *any* community event by *any* landowner within multi-family zoning so long as the use or event

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does not exceed two or seven days respectively. Thus, the permitting scheme remains generally applicable because the exemptions are available to all landowners. *Grace United*, 451 F.3d at 651 (noting that a zoning ordinance that permits some exemptions remains generally applicable if it is motivated by secular purposes and impacts equally all landowners seeking the exemptions).

Lastly, the Church points out that BMC 19.75.060 also exempts from the temporary use permit requirement mobile homes at construction sites that are used as temporary dwellings by landowners during construction. According to the Church, this means that the permitting requirement is not generally applicable to all landowners in multi-family zones because it requires the Church to obtain a permit to allow unhoused individuals to temporarily dwell on its property but does not require the same of a landowner if construction is being done on their property. Once again, the Church aims at a false target. The Supreme Court has clarified that all “laws are selective to some extent” but it is the “categories of selection” that are of “paramount concern”. *Church of Lukumi Babalu Aye*, 508 U.S. at 542. “The Free Exercise Clause ‘protect[s] religious observers against unequal treatment and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.’” *Id.* at 543-543 quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 148 (1987) (internal quotation marks and citation omitted). Thus, zoning laws that permit some individualized assessment for variances remain

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“generally applicable” so long as the laws are motivated by secular purposes and impact equally all landowners seeking the variances. That, of course, is the case here. No landowner—secular or religious—is permitted to host a homeless encampment within a multi-family zone without a permit. And any landowner—secular or religious—is allowed to use a mobile home as a temporary dwelling on its land during construction within a multi-family zone. Nor has the Church alleged that Burien’s regulatory scheme is religiously motivated. Indeed, it does not dispute the City’s claim that the reason it required the permit for the homeless encampment was to ensure the health and safety of the occupants of the encampment as well as the surrounding neighborhood. Therefore, because the Church has failed to plausibly allege that the challenged regulatory scheme was not neutral and not generally applicable, it has failed to state a free exercise claim under the First Amendment. *See First Assembly of God of Naples v. Collier County*, 20 F.3d 419, 423 (11th Cir. 1994) (city’s ordinance prohibiting homeless shelters in certain areas held neutral and of general applicability because it was motivated by health and safety concerns, applied to both church and secular group homes, and did not completely prohibit operation of homeless shelters).

V. CONCLUSION

For the foregoing reasons, the Court HEREBY GRANTS Defendants’ motion to dismiss for failure to state a claim on which relief can be granted. This matter is HEREBY DISMISSED.

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Dated this 3rd day of February 2025.

s/ Barbara J. Rothstein
Barbara Jacobs Rothstein
U.S. District Court Judge

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**APPENDIX C — ORDER DENYING PETITION
FOR REHEARING OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED APRIL 24, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25-1192
D.C. No. 2:24-cv-01301-BJR

MARK MILLER, PASTOR;
BURIEN FREE METHODIST CHURCH,
ALSO KNOWN AS OASIS HOME CHURCH,

Plaintiffs-Appellants,

v.

CITY OF BURIEN,
A MUNICIPAL CORPORATION; *et al.*,

Defendants-Appellees.

Filed April 24, 2026

ORDER

Before: McKEOWN, W. FLETCHER, and BUMATAY,
Circuit Judges.

Appellants filed a petition for panel rehearing with
suggestion for rehearing en banc on March 25, 2026 (Dkt.

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48). The panel has unanimously voted to deny the petition for panel rehearing. Judge Bumatay has voted to deny the petition for rehearing en banc, and Judge McKeown and Judge W. Fletcher have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for rehearing with suggestion for rehearing en banc is DENIED.

APPENDIX D — PROVISIONS OF THE BURIEN MUNCIPAL CODE

Burien Municipal Code Chapter 8.45 – Nuisances

§8.45.015 Declaration of nuisance.

All violations of city of Burien ordinances are found and declared to be detrimental to the public health, safety, and welfare and are further found and declared to be nuisances. It is unlawful and a violation of this chapter, whether by act or omission, to cause, create, maintain, suffer, or allow a nuisance to occur, exist, or remain. Each day any person allows or fails to abate such nuisance after notice shall constitute a separate violation. Nuisances create public harm. Prevention and correction of nuisances are necessary to prevent public harm. For purposes of this chapter, “public nuisances” and “private nuisances” shall have the same meaning.

Burien Municipal Code Chapter 19.10 – Definitions

§19.10.011 Accessory use.

A use that is subordinate and incidental to a primary permitted use and is located on the same site or within the same structure as the primary. Accessory uses are permitted only in conjunction with, and because of, the existence of a primary use.

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§19.10.450 Religious Facility.

An establishment, the principal purpose of which is religious worship, and for which the principal building or other structure contains the sanctuary or principal place of worship, and which includes related accessory uses.

**Burien Municipal Code Chapter 19.75 –
Temporary Use Permit**

§19.75.010 Uses Requiring Temporary Use Permits.

Except as provided by BMC 19.75.020, a temporary use permit shall be required for:

1. Uses not otherwise permitted in the zone that can be made compatible for periods of limited duration and/or frequency; or
2. Limited expansion of any use that is otherwise allowed in the zone but which exceeds the intended scope of the original land use approval.

§19.75.090 Temporary Use Permit.

A temporary use permit shall be granted by the city, only if the applicant demonstrates that:

1. The proposed temporary use will not be materially detrimental to the public welfare;

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2. The proposed temporary use is compatible with existing land use in the immediate vicinity in terms of noise and hours of operation;
3. Adequate public off-street parking and traffic control for the exclusive use of the proposed temporary use can be provided in a safe manner; and
4. The proposed temporary use is not otherwise permitted pursuant to BMC 19.75.010 in the zone in which it is proposed.