

67908-2

67908-2

NO. 67908-2
COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

TIM EYMAN,
Plaintiff/Appellant,

v.

MICHELLE MCGEHEE, REDMOND CITY CLERK,
Defendant/Respondent,

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE LAURA INVEEN

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

APPELLANT’S OPENING BRIEF.....1-18

I. INTRODUCTION.....1-3

II. STANDARD OF REVIEW.....3

III. RECORD ON APPEAL.....3

IV. ASSIGNMENT OF ERROR.....3

V. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....3-4

VI. STATEMENT OF THE CASE.....4-6

VII. ARGUMENT.....6-12

 A. Introduction.....6

 B. Redmond Initiative No. 1 is a valid expression of political speech that allows the citizens of Redmond to voice their wishes to Redmond’s elected officials.....6-9

 C. Allowing the Redmond Initiative No. 1 to be transmitted will have extensive political effects regardless of the initiative’s potential legal effect.9-11

 D. Allowing the City to stop Redmond Initiative No. 1 before the signature-counting phase will cause irreparable harm to this initiative and to the Redmond initiative process as a whole.11-12

VIII. CONCLUSION.....12-13

TABLE OF AUTHORITIES

Cases

1. <i>1000 Friends of Wash. v. McFarland</i> , 159 Wn.2d 165, 172 (2006)..3	
2. <i>Amalgamated Transit Union v. State</i> , 142 Wn. 2d 183 (2000).....8	
3. <i>American Traffic Solutions, Inc. v. Bellingham</i> , 163 Wn.App. 427 (2011).....2,6,9,10,11	
4. <i>Buckley v. American Constitutional Law Foundation, Inc.</i> , 525 U.S. 182 (1999).....7	
5. <i>Coppernoll v. Reed</i> , 155 WN.2d 290 (2005).....7,8	
6. <i>Meyer v. Grant</i> , 486 U.S. 414 (1988).....7	
7. <i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968).....7	
8. <i>Save our State Park v. Hordyk</i> , 71 Wn.App. 84 (1993).....8	
9. <i>State ex. Rel. Lukens v. Spokane School Dist. No. 81 of Spokane County</i> , 147 Wash. 467 (1928).....10	
10. <i>State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.</i> , 142 Wn.2d 328 (2000).....10	

Other Authority

1. U.S. Const. Art. I.....7	
2. RCW 7.16.160.....6,12	
3. RCW 35A.01.040.....1,2,3,4,5,6,12,13	
4. RCW 35A.11.110.....4	

5. RCW 35.17.260.....	9,10
6. RCW 35.17.270.....	5
7. RCW 35.21.005(4).....	5,6
8. RCW 47.46.030(3).....	10
9. RCW 46.63.170.....	10

I. INTRODUCTION

Appellant Tim Eyman is a co-sponsor of Redmond Initiative No. 1, which would prohibit the city of Redmond from using camera surveillance to impose fines unless a majority of the Council and voters approve and the fines are limited. The initiative also seeks to repeal ordinances allowing the cameras and requires the removal of automatic ticketing cameras not approved by voters at an election. Under the applicable statutory scheme, sponsors of Redmond Petition No. 1 were required to collect “fifteen percent of the total number of names of persons listed as registered voters within the city on the day of the last preceding city general election.” Once they collected the signatures they were to turn the petition in to the city clerk, who was then required under RCW 35A.01.040 to transmit the petition to the county auditor within three days to have the signatures verified. Sponsors of Redmond Initiative No. 1 collected 6,050 voter signatures and turned the petition in to the city clerk, Michelle McGehee, on September 14, 2011. They were notified on September 20, 2011 that the petition would not be forwarded to the county auditor until “legal review” of the petition

was completed. The petition was never transferred.

Appellant filed this suit to compel Respondent Michelle McGehee to transmit the petition to the county studio for review, as is her duty under RCW 35A.01.040. The case was heard in King County Superior Court by Judge Inveen. Judge Inveen found that Michelle McGehee did have a legal duty under RCW 35A.01.040 to transmit the petition to the county auditor within three days. Though the Superior Court found that Respondent did not have discretion to decide whether or not the petition should be forwarded, she also found that forwarding the petition on at this point would be a “useless act” in light of the Court of Appeals’ recent holding in *American Traffic Solutions*, which involved a similar petition in Bellingham. The facts in *American Traffic Solutions*, as well as the procedural history, are far different than the case at hand.

In *American Traffic Solutions*, the company supplying the traffic cameras to the city was appealing denial of an injunction that would have kept the initiative off of the ballot. In this case, Respondent chose to stop the initiative before the signatures on the petitions could even be counted. Generally, a court will not inquire

into the validity of a proposed initiative before it is enacted.

Washington Courts have held that the time for determining whether an initiative might violate the code should not come any earlier than after signature validation. The ruling that the transfer of Redmond Initiative No. 1 to the County auditor to have the signatures validated would be “useless” *is* essentially a ruling on the scope of the initiative power; a ruling that is premature. Ballot measures are used to express the will of the people to their elected officials.

Whether or not a measure is subsequently invalidated, the people have the right to make their opinions heard. Respondent had a clear duty to transmit Appellant’s petition under RCW 35A.01.040, a statute that does not allow for any exercise of discretion on the city clerk’s part.

The claim that the processing of Redmond Initiative No. 1 would be a useless act fails to recognize that the initiative is a valid expression of political speech. The Redmond voters who signed petitions were sending a message to the city that they want their voices heard on the issue of automatic ticketing cameras. Validation of the initiative would have a political impact and a lobbying effect

on the city on this issue, just as the submission of signatures did. If the city chooses to put the initiative on the ballot the vote, even if advisory, will be a valid expression of political speech.

Because Respondent clearly violated her duty under RCW 35A.01.040, and compelling her to fulfill that duty would not be a useless act, Appellant seeks direct review of the King County Superior Court's decision that denied his Motion to Show Cause on Respondent's refusal to process Appellant's initiative petition as required under RCW 35A.01.040.

II. STANDARD OF REVIEW

Whether or not Respondent should be compelled to fulfill her statutory duty and transmit Appellant's petition for signature validation is a question of law, and therefore should be reviewed de novo. *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 172, 149 P.3d 616 (2006) (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000)).

III. RECORD ON APPEAL

The relevant Clerks' papers have been provided to the court. This is believed to comprise the total record available to the

judge in denying Appellant's Motion to Show Cause.

IV. ASSIGNMENT OF ERROR

The Appellant assigns error to the Trial Courts' decision to deny Appellant's Motion to Show Cause re: Refusal to Process Initiative Petition and to the Trial Court's finding that transmitting the initiative petition to the County Auditor would be a useless act.

V. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Whether the trial Court should have granted Appellant's Motion to Show Cause re: Refusal to Process Initiative Petition, and compelled Respondent to transmit the initiative to the County Auditor's office as was her clear duty under RCW 35A.01.040.

VI. STATEMENT OF THE CASE

A. Relevant Factual Background

Appellant is co-sponsor of Redmond Initiative No. 1. Respondent, Michelle McGehee, is the Redmond City Clerk. On March 25th, 2011 Sponsors notified city officials by letter that they would begin collecting signatures for Redmond Initiative No. 1. The proposed ballot title for the initiative was:

Redmond Initiative No. 1 concerns automatic ticketing cameras. This measure would prohibit Redmond from using camera surveillance to impose fines unless a majority of the Council and voters approve, limit fines, repeal ordinances allowing the cameras, and require the removal of automatic ticketing cameras not approved by voters at an election.

Should this measure be enacted into law? Yes [] No [].

As the petition made clear:

Concise statement of the action or relief sought: We, the undersigned voters of Redmond, require that, unless passed by the City Council, this ordinance -- Redmond Initiative No. 1 -- be submitted to a vote of the registered voters of the city of Redmond, subject to the requirements of Redmond Municipal Code Chapter 1.12 and RCW 35A.11.080.

Under RCW 35A.11.100, sponsors were required to collect "fifteen percent of the total number of names of persons listed as registered voters within the city on the day of the last preceding city general election." When submitting signatures, RCW 35.17.270 applies and it states:

The petitioner preparing an initiative petition for submission to the commission shall follow the procedures established in RCW 35.21.005.¹

RCW 35.21.005(4) states:

¹ Emphasis added.

Within three working days after the filing of a petition, the officer with whom the petition is filed shall transmit the petition to the county auditor for petitions signed by registered voters.²

RCW 35A.01.040 (4) contains this same language.

On Wednesday, September 14, 2011, Plaintiff turned in petitions for Redmond Initiative No. 1 to the City Clerk totaling 6,050 voter signatures. Clerk's Papers (CP) 020.

On September 20th, 2011, sponsors were notified by King County Elections that the petitions had not been delivered or received by Monday, September 19th, 2011, the deadline required under state law. CP 021. That same day, Plaintiff sent an email to the city clerk and other city officials requesting that the petition be forwarded on to the county auditor as required by law. *Id.* Plaintiff received an email from Redmond's city clerk Michelle McGehee that read, in part: "The City of Redmond has not transmitted the petition to the county as of this time. It is currently with the attorney receiving legal review." *Id.* The City Clerk did not transfer the petitions to the County auditor for signature verification in the required 3 day period required by RCW 35.21.005(4) and RCW

² Emphasis added.

35A.010.040, and to date has not transferred the petitions.

B. Relevant Procedural Background

Plaintiff filed a Motion and Memorandum for Order to Show Cause on September 28, 2011, and the Motion was heard by the Court on October 11, 2011. At the hearing, Judge Inveen found that Respondent did have a duty to transmit the petition to the county auditor under RCW 35A.01.040. By not transmitting the petition, this duty was breached. Judge Inveen further found, however, that the Court could not compel Respondent to transmit the initiative because doing so would be a “useless act” in light of the Court of Appeals’ decision in *American Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427 (2011), which is currently being appealed to the Washington State Supreme Court. Plaintiff filed a Motion for Reconsideration on November 14, 2011, which was denied on December 13, 2011.

VII. ARGUMENT

A. Introduction

A writ of mandamus is appropriate to “compel the performance of an act which the law especially enjoins as a duty

resulting from an office." RCW 7.16.160. As the Trial Court found, Michelle McGehee had a duty to transmit Appellant's petition to the county auditor under RCW 35A.01.040. She failed to perform this duty of office, and should therefore be compelled to do so.

B. Redmond Initiative No. 1 is a valid expression of political speech that allows the citizens of Redmond to voice their wishes to Redmond's elected officials.

The city's refusal to process Redmond Initiative No. 1 has free speech and right to petition government implications, founded in the First Amendment to the United States Constitution and Article I, Sections 4, 5, and 19 of the Washington State Constitution.

The United States Supreme Court has made clear that the process involved in proposing legislation by means of initiative involves core political speech. *See Meyer v. Grant*, 486 U.S. 414 (1988) (overturning state's prohibition on using paid petition circulators); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (overturning various registration requirements for petition circulation). The Supreme Court has also noted that the core value of the Free Speech Clause of the First Amendment is the public interest in having free and unhindered

debate on matters of public importance. See *Pickering v. Board of Education*, 391 U.S. 563 (1968).

The Washington State Supreme Court echoed these concerns in *Coppernoll v. Reed*, 155 Wn.2d 290 (2005) (preelection review of an initiative can infringe upon the constitutional rights of the people). In *Coppernoll*, opponents of a proposed initiative on tort reform petitioned the Washington State Supreme Court to reverse a trial court order dismissing their action to enjoin the Secretary of State from placing three sections of the initiative on the ballot, arguing that those sections were unconstitutional. *Id.* at 294. The Washington Supreme Court held that the proposed initiative did not exceed the scope of the legislative power and ordered the Secretary of State to place the initiative on the general election ballot. *Id.* at 304. In reaching this conclusion, the Court recognized its historical practice of refraining from inquiring into the validity of a proposed initiative before it is enacted. *Id.* at 297. The Court also recognized that First Amendment rights were implicated:

Because ballot measures are often used to express popular will and to send a message to elected representatives (regardless of potential subsequent invalidation of the measure), substantive preelection

review may also unduly infringe on free speech values.

Id. at 298 (emphasis added). In making this argument, the Court noted that after the trial court invalidated Initiative 695 (requiring \$30 vehicle license tabs) at issue in *Amalgamated Transit Union v. State*, 142 Wn.2d 183 (2000), the Legislature quickly responded by passing an almost identical measure that was subsequently signed by the Governor. *Id.* at 304.

Courts have resolved questions as to the scope of the initiative power only after sufficient signatures have been granted.³ For example, then Court of Appeals Justice Gerry Alexander specifically addressed this issue in *Save Our State Park v. Hordyk*, 71 Wn. App. 84 (1993). “The time for determining whether an initiative might violate the code should not come any earlier than after signature validation.” *Id.* at 92 (emphasis added). The ruling

³ See, e.g., *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 7 (2010) (“the auditor found that enough had been gathered to qualify the initiatives for the ballot”); *League of Women Voters of Washington v. King County Records, Elections and Licensing*, 133 Wn. App. 374, 377 (2006) (petitioners “obtained sufficient signatures to place a referendum” on the ballot); *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 52 (2003) (“secretary of state then certified Referendum 53 as supported by a sufficient number of signatures of registered voters”); *Save Our State Park v. Board of Clallam County Com’rs*, 74 Wn. App. 637, 639 (1994) (“the Auditor determined that there was a sufficient number of signatures for validation”); *Yelle v. Kramer*, 83 Wn.2d 464, 469 (1974) (“supported by sufficient voter signatures”).

that the transfer of Redmond Initiative No. 1 to the County auditor to have the signatures validated would be “useless” *is* essentially a ruling on the scope of the initiative power; a ruling that is premature. Striking down the initiative at such an early stage infringes on the rights of the Redmond voters that signed petitions with the expectation that their voices would at least be heard.

C. Allowing the Redmond Initiative No. 1 to be transmitted will have extensive political effects regardless of the initiative’s potential legal effect.

The claim that the processing of Redmond Initiative No. 1 would be a useless act fails to recognize that the initiative is a valid expression of political speech. The 6,050 Redmond voters who signed petitions were sending a message to the city that they want their voices heard on the issue of automatic ticketing cameras. Validation of the initiative would have a political impact and a lobbying effect on the city on this issue, just as the submission of signatures did. If the County Auditor finds that sufficient signatures were submitted, that, too, will have a lobbying effect and put pressure on the city to pay closer attention to public sentiment on the issue. If the initiative is validated, state law (RCW 35.17.260)

requires that the city adopt the initiative or put it on the ballot for a public vote. Regardless of what the city chooses to do with the initiative, the mere process of validation will spur further discussion and further debate on the issue. If the city chooses to put the initiative on the ballot the vote, even if advisory, will be a valid expression of political speech.

American Traffic Solutions, Inc. v. City of Bellingham, the case relied on by the Respondent in claiming that fulfilling her duty would be “useless,” in fact supports the proposition that the people should be permitted to vote on an initiative whether or not the vote will be legally binding. At the trial court level, Judge Uhrig dismissed the lawsuit by ATS, the company supplying red-light traffic cameras to the City of Bellingham, and refused to prevent the voters from voting on the initiative – it was on the November 2011 ballot. The Court of Appeals, even though they found the initiative would have no legal effect, still allowed the voters to vote and express their views on the initiative in an advisory capacity.

American Traffic Solutions, 163 Wn.App. at 435.

Advisory votes have a well-established place in Washington

State's election history. As early as 1928, courts recognized that an advisory vote could be held. *State ex. Rel. Lukens v. Spokane School Dist. No. 81 of Spokane County*, 147 Wash.467, 473-74 (1928).

Since then, advisory votes have been used in a variety of contexts. See, e.g., *State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.*, 142 Wn.2d 328 (2000)(legislature authorized an advisory vote); RCW 47.46.030(3)(advisory vote for traffic proposals). Further, RCW 46.63.170, the statute governing automatic traffic cameras, does not in any way prohibit an advisory vote.

If there is a public vote on the initiative, even a non-binding one (as Bellingham's vote was), there will be a public debate and public discussion. Everyone's vote will be counted and that collective voice will be heard both by the citizens and their elected representatives. Even an initiative that has no legal effect retains political effects, making it a "useful", not a "useless", act.

Every hurdle that an initiative clears validates the decision by petition signers to participate. Signing a petition gives voice, having that signature validated gives voice, having the initiative validated

gives voice, having the initiative considered by the city under RCW 35.17.260 gives voice, having the initiative voted on, even if in an advisory capacity, gives voice. None of these steps in the process are “useless” acts. They may not have legal effect, but they do have a lobbying effect on their elected representatives.

The voters in Mukilteo were allowed to vote on ticketing cameras. The voters in Bellingham were allowed to vote on ticketing cameras. The voters in Longview were allowed to vote on ticketing cameras. The voters in Monroe were allowed to vote on ticketing cameras. Every initiative in every other city where sponsors submitted signatures, those signatures were counted and the initiative resulted in a public vote. In none of those cases did a court stop the people from having their signatures counted and having their voices heard.

D. Allowing the City to stop Redmond Initiative No. 1 before the signature-counting phase will cause irreparable harm to this initiative and to the Redmond initiative process as a whole.

One of the reasons the signature verification process is conducted before any legal review concerns the shelf-life of signatures. The King County Elections Division is constantly

updating the voter rolls because voters are constantly moving in and out of the city, changing names, etc. The legal environment around this issue is fluid; any day now the state supreme court will issue a ruling in the Mukilteo case, and the ruling in *American Traffic Solutions, Inc. v Bellingham* has been appealed to the Washington State Supreme Court. If the court eventually green-lights Redmond Initiative No. 1 but does so weeks from now, months from now, or even years from now, the voters who signed the initiative will be irreparably harmed. Signatures that are valid now may not be valid later. Delays in verifying the signatures could result in the initiative failing to qualify not because there weren't enough valid signatures, but because there weren't enough valid signatures at the time the verification process was allowed to proceed. Verifying the signatures now involves no marginal increase in costs to the city or the county, but further delays in the validation of the signatures will imperil the entire initiative. It is not a 'useless act' for the citizens of Redmond to have their signatures verified by the county auditor in a manner that facilitates the initiative process.

Finally, this is the first initiative in Redmond's city history.

If the city succeeds in stopping the initiative at such an early stage, it will deter future citizens from exercising their right to initiative, something that is supposedly guaranteed by Redmond's city charter. The counting of signatures and validation of Redmond Initiative No. 1 by the County Auditor would be a useful act in that it would validate the effort by the scores of citizens who spend hundreds of hours collecting signatures and validate the decision by 6,050 citizens to sign these petitions. It is not a "useless" act for citizens to have a voice in their government.

III. Conclusion

A writ of mandamus is appropriate to "compel the performance of an act which the law especially enjoins as a duty resulting from an office." RCW 7.16.160. Respondent had a duty to transmit Appellant's petition to the county auditor under RCW 35A.01.040. She failed to perform this duty of office, and should therefore be compelled to do so.

Compelling Respondent to fulfill her duties as City Clerk would not be "useless" because any public vote on the initiative, even an advisory one, will spur a public debate and public discussion

of the issue. Everyone's vote will be counted and that collective voice will be heard both by the citizens and their elected representatives. Even an initiative that has no legal effect retains political effects, making it a useful, rather than a useless, act.

For the reasons stated above, the Court should reverse the district court's order denying Appellant's Motion to Show Cause on Respondent's refusal to process Redmond Initiative No. 1 as required under RCW 35A.01.040.

Dated this 9th day of February, 2012.

Respectfully submitted,



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Docket No. 67908-2-I

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TIM EYMAN, an individual person,

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Respondent/Defendant,

CERTIFICATE OF SERVICE

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I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 10th day of February, 2012:

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