

67908-2

67908-2

No. 67908-2

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

TIM EYMAN,

Plaintiff-Appellant,

v.

MICHELLE MCGEHEE, REDMOND CITY CLERK,

Defendant-Respondent.

BRIEF OF RESPONDENT-CROSS APPELLANT MICHELLE
MCGEHEE

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TABLE OF CONTENTS

Page

A. INTRODUCTION1

B. ASSIGNMENTS OF ERROR ON CROSS-APPEAL3

 Assignments of Error3

 Issues Pertaining to Assignments of Error.....3

C. STATEMENT OF THE CASE.....3

D. ARGUMENT9

 1. Introduction to the city clerk’s role in the local initiative process and case law regarding automatic traffic safety cameras in the initiative context.9

 2. Standard of Review.....15

 3. The trial court correctly determined that mandamus would not lie to compel the city clerk to transmit the initiative petition to the county auditor where it was a vain and useless act.....16

 a. Transmittal of the initiative petition to the county auditor would produce no legal effect because the proposed initiative is facially invalid.16

 b. The political or lobbying effect of signature validation is not a relevant factor in determining whether a writ of mandamus shall issue.21

 4. The trial court erred in determining that the City Clerk had a clear legal duty to transmit the initiative petition to the county auditor.31

E. CONCLUSION.....40

TABLE OF AUTHORITIES

	<i>Page</i>
Cases	
<i>1000 Friends of Wash. v. McFarland</i> , 159 Wn.2d 165, 149 P.3d 616 (2006).....	26
<i>American Traffic Solutions, Inc. v. City of Bellingham (“ATS”)</i> , 163 Wn. App. 427, 260 P.3d 245 (2011).....	1, 6, 9,12, 13, 14, 17, 19, 24, 26, 27, 28, 33, 34, 39
<i>Chelan County v. Anderson</i> , 123 Wn.2d 151, 868 P.2d 116 (1994).....	26
<i>City of Port Angeles v. Our Water-Our Choice</i> , 145 Wn. App. 869, 879, 188 P.3d 533 (2008).....	25, 26, 32, 35
<i>City of Seattle v. Yes for Seattle</i> , 122 Wn. App. 382, 93 P.3d 176 (2004).....	26
<i>City of Sequim v. Malkasian</i> , 157 Wn.2d 251, 138 P.3d 943 (2006).....	26
<i>Coppernoll v. Reed</i> , 155 Wn.2d 290 (2005).....	26
<i>Erection Co. v. Department of Labor & Indus.</i> , 121 Wash.2d 513, 518, 852 P.2d 288 (1993).....	37
<i>Eugster v. City of Spokane</i> , 118 Wn. App. 383, 402, 76 P.3d 741 (2003), <i>rev. denied</i> , 151 Wn.2d 1027, 94 P.3d 959 (2004).....	15, 31
<i>Fischnaller v. Thurston County</i> , 21 Wash.App. 280, 285, 584 P.2d 483 (1978).....	38
<i>Ford v. Logan</i> , 79 Wash.2d 147, 152, 483 P.2d 1247 (1971)	38
<i>Land Title of Walla Walla, Inc. v. Martin</i> , 117 Wn. App. 286, 289, 70 P.3d 978 (2003).....	15
<i>Leonard v. City of Bothell</i> , 87 Wn.2d 847, 852-54, 557 P.2d 1306 (1976).....	35
<i>Mukilteo Citizens for Simple Gov’t v. City of Mukilteo</i> , No. 84921-8, 2012 WL 748372, at *6 (Wash. Mar. 8, 2012).....	2, 12, 13, 15, 17, 19, 24, 28, 34
<i>Philadelphia II v. Gregoire</i> , 128 Wn.2d 707, 911 P.2d 389 (1996)..	18, 19, 21, 26, 36, 37, 38
<i>Priorities First v. City of Spokane</i> , 93 Wn. App. 406, 410, 968 P.2d 431 (1998).....	24
<i>Save Our State Park v. Hordyk</i> , 71 Wn. App. 84, 87, 856 P.2d 734 (1993).....	29, 30, 39, 40
<i>Seattle Bldg. & Constr. Trades Council v. City of Seattle</i> , 94 Wash.2d 740, 746, 620 P.2d 82 (1980).....	38

<i>SEIU Healthcare 775NW v. Gregoire</i> , 168 Wn.2d 593, 603-04, 229 P.3d 774 (2010).....	16
<i>State ex rel. City of Tacoma v. Rogers</i> , 32 Wn.2d 729, 203 P.2d 325 (1949).....	16, 22
<i>State ex rel. Close v. Meehan</i> , 49 Wn.2d 426, 302 P.2d 194 (1956)	16, 20, 21
<i>State ex rel. Munro v. Todd</i> , 69 Wash.2d 209, 213, 417 P.2d 955 (1966).....	38
<i>State ex rel. Northwestern Bond & Mortgage Corp. v. Hinkle</i> , 134 Wash. 140, 235 P. 359	20
<i>State v. Krall</i> , 125 Wash.2d 146, 148, 881 P.2d 1040 (1994)	37
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 624, 106 P.3d 196 (2005)	36
<i>Vashon Island Committee for Self-Government v. Washington State Boundary Review Bd. for King County</i> , 127 Wn.2d 759, 765, 903 P.2d 953 (1995).....	16, 22, 23, 24
<i>Walker v. Munro</i> , 124 Wn.2d 402, 407, 879 P.2d 920 (1994).....	15
<i>Washington State Highway Comm'n v. Pacific Northwest Bell Tel. Co.</i> , 59 Wash.2d 216, 222, 367 P.2d 605 (1961).....	38
<i>Whatcom County v. Brisbane</i> , 125 Wn.2d 345, 884 P.2d 1326 (1994)....	26

Statutes

Chapter 10.25 of the Redmond Municipal Code (RMC).....	3, 4, 8
Chapter 29.72 RCW	36
Chapter 35.17 RCW	32
Chapter 35A.29 RCW	32
RCW 29.72.040	37
RCW 29A.72.060.....	18
RCW 35.17.240	9, 10
RCW 35.17.260	10, 12, 21, 29
RCW 35.17.280	11
RCW 35.17.290	29
RCW 35.17.360	9, 10
RCW 35.21.005(4).....	12
RCW 35A.01.040.....	1, 3, 9, 10, 11, 17, 32
RCW 35A.01.040(4).....	10, 11, 12
RCW 35A.01.040(8).....	28
RCW 35A.11.080.....	4, 9, 25, 35
RCW 35A.11.090.....	9, 35
RCW 35A.11.100.....	4, 9
RCW 35A.29.170.....	1, 3, 9, 10, 18, 31, 32, 33, 36, 37

RCW 36.93.150(2).....	22
RCW 46.63.170	4, 13, 24, 27, 33
RCW 46.63.170(1).....	13
RCW 46.63.170(1)(a)	14
RCW 46.63.170(1)(c)	14
RCW 7.16.160	15, 31
RCW 80.40.070	20
RMC 1.02.010.....	4
RMC 1.12.010.....	4
RMC 10.25.050.....	4
Title 35A RCW	3, 4, 10, 32, 33, 35, 37, 40
Other Authorities	
1973 Wash. Laws, 1st Ex.Sess. Ch. 81 § 1	25
Ordinance No. 2542(AM).....	3, 5, 8

A. INTRODUCTION

Respondent Michelle McGehee, Redmond City Clerk, (“the City Clerk”) declined to transmit proposed Redmond Initiative No. 1, filed by Appellant Tim Eyman (“Eyman”), to the county auditor for a determination of the petition’s sufficiency under RCW 35A.29.170 and RCW 35A.01.040. The initiative, if enacted as proposed by Eyman, would prohibit the City of Redmond and its contractors from using automated traffic safety cameras to impose fines from camera surveillance unless approved by a majority vote of the City Council and a vote of the people at an election. The measure would also limit fines, repeal ordinances allowing automated traffic safety cameras, and require removal of automated traffic safety cameras upon the effective date of the initiative unless approved by voters at an election. CP 55 (proposed ballot summary).

Eyman filed proposed Redmond Initiative No. 1 despite the fact that this Court issued its decision in *American Traffic Solutions, Inc. v. City of Bellingham* (“ATS”), 163 Wn. App. 427, 260 P.3d 245 (2011), over a week earlier, which held that a nearly identical initiative regarding automated traffic safety cameras was invalid and beyond the scope of the local initiative power. Last week, the Washington Supreme Court

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concluded that “automated traffic safety cameras are not a proper subject for local initiative power.” *Mukilteo Citizens for Simple Gov’t v. City of Mukilteo*, No. 84921-8, 2012 WL 748372, at *6 (Wash. Mar. 8, 2012) (“*Mukilteo Citizens*”).

Notwithstanding the fact that the subject matter of Eyman’s sponsored initiative is invalid and that transmitting the initiative petition to the county auditor would have no legal significance, Eyman sought a writ of mandamus to compel such an act. In light of the abundantly clear case law regarding automated traffic safety cameras, this Court should affirm the trial court’s decision that because proposed Redmond Initiative No. 1 is obviously invalid, mandamus was not appropriate to compel the vain and useless act of transmittal.

This Court should also reverse the trial court’s conclusion that the City Clerk had a clear duty to act--an essential prerequisite to issuing a writ of mandamus. The City Clerk had no clear duty to act because controlling precedent already existed at the time the initiative petition was filed with the City. The City Clerk should not be obligated to ignore such plainly applicable law and transmit invalid petitions to the county auditor for signature verification. Such a requirement would result in waste of public resources.

B. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

Assignments of Error

Respondent Michelle McGehee assigns error to the trial court's decision that the city clerk had a clear legal duty under RCW 35A.01.040 and RCW 35A.29.170 to transmit the initiative petition to the county auditor within three days of receipt to determine the petition's sufficiency. [Paragraph 1, page 2 of Order Denying Motion For Order to Show Cause.]

Issues Pertaining to Assignments of Error

Whether the City Clerk had a clear duty to transmit the petition to the county auditor under RCW 35A.01.040 and RCW 35A.29.170 for a determination of sufficiency where proposed Redmond Initiative No. 1 was not authorized to be filed under the provisions of Title 35A RCW? [No.]

C. STATEMENT OF THE CASE

On September 7, 2010, the Redmond City Council adopted Ordinance No. 2542(AM), establishing the City's Automated Traffic Safety Camera program and codifying it at Chapter 10.25 of the Redmond Municipal Code (RMC). CP 35, 38-47. Tracking the substance of the

relevant Washington enabling statute, RCW 46.63.170, the City's code defines "Automated Traffic Safety Camera" as:

a device that uses a vehicle sensor installed to work in conjunction with an intersection traffic control system and a camera synchronized to automatically record one (1) or more sequenced photographs, microphotographs or electronic images of the rear of a motor vehicle at the time the vehicle fails to stop when facing a steady red traffic control signal or exceeds a speed limit in a school speed zone as detected by a speed measuring device.

CP 43-44 (RMC 10.25.050); *see also* RCW 46.63.170. Chapter 10.25 RMC contains regulations governing the placement, use, operation and enforcement procedures for the City's Automated Traffic Safety Camera program.

Redmond is a non-charter city organized and operating under the Optional Municipal Code of Title 35A RCW and has formally adopted the code city initiative and referendum powers provided under RCW 35A.11.080 - RCW 35A.11.100. *See* RMC 1.02.010; RMC 1.12.010. On or about March 25, 2011, circulation of an initiative petition, proposed Redmond Initiative No. 1, was commenced by Scott Harlan, Nick Sherwood of BanCams.com, Alex Rion of WA Campaign for Liberty, and Tim Eyman of VotersWantMoreChoices.Com. CP 36, 54. The proposed Redmond Initiative No. 1 provides as follows:

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**BE IT ENACTED BY THE PEOPLE OF THE
CITY OF REDMOND:**

Section 1. A new section is hereby added to the Redmond Municipal Code to read as follows:

10.25.100 Automatic Ticketing Cameras: The City of Redmond and for-profit companies contracted by the City of Redmond may not install or use automatic ticketing cameras to impose fines from camera surveillance unless such a system is approved by a majority vote of the City Council and a majority vote of the people at an election.

1. For the purposes of this chapter, “automatic ticketing cameras” means a device that uses a vehicle sensor installed to work in conjunction with an intersection traffic control system, or a speed measuring device, and a camera synchronized to automatically record one or more sequenced photographs, microphotographs, or electronic images of the rear of a motor vehicle at the time the vehicle fails to stop when facing a steady red traffic control signal, or exceeds a speed limit as detected by a speed measuring device.

10.25.110 Fines: if a majority of the City Council and a majority of Redmond voters at an election approve a system of automatic ticketing cameras to impose fines from camera surveillance, the fine for infractions committed shall be a monetary penalty of no more than the least expensive parking ticket imposed by law enforcement in the city limits of Redmond.

Section 2. Sections 10.25.010-10.25.090 of the Redmond Municipal Code and Ordinance #2542AM and #2576 are hereby repealed.

Section 3. Removal: all automatic ticketing cameras, as defined by Section 1 of this measure, installed or in use in the city limits of Redmond as of the date of passage of this measure must be removed no later than the

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effective date of this measure unless such cameras are approved by voters at an election.

Section 4. Severability: If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

CP 31-32; 55-56. On March 25, 2011, the initiative sponsors notified the City of their intent to collect signatures and submit the initiative for vote on the November 2011 ballot. CP 29; 54.

On September 6, 2011, the Court of Appeals published *American Traffic Solutions, Inc. v. City of Bellingham*, which held that an initiative petition identical in all material respects to proposed Redmond Initiative No. 1 was invalid and exceeded the scope of the local initiative power. *ATS*, 163 Wn. App. at 434. The proposed Bellingham Initiative provides as follows:

**BE IT ENACTED BY THE PEOPLE OF THE
CITY OF BELLINGHAM:**

Section 1. A new chapter 11.16 is added to the Bellingham Municipal Code Title 11, which shall read as follows:

11.16. - Automatic Ticketing Cameras

Section 2. A new section 11.16.110 is added to BMC chapter 11.16, which shall read as follows:

11.16.110 The city of Bellingham and for-profit companies contracted by the City of Bellingham may not install or use automatic ticketing cameras to impose fines from camera surveillance unless such a system is approved by a majority vote of the City Council and a majority vote of the people at an election.

A. For the purposes of this chapter, “automatic ticketing cameras” means a device that uses a vehicle sensor installed to work in conjunction with an intersection traffic control system, or a speed measuring device, and a camera synchronized to automatically record one or more sequenced photographs, microphotographs, or electronic images of the rear of a motor vehicle at the time the vehicle fails to stop when facing a steady red traffic control signal, or exceeds a speed limit as detected by a speed measuring device.

Section 3. A new section 11.16.120 is added to BMC chapter 11.16, which shall read as follows:

11.16.120 -- Fines: if a majority of the City Council and a majority of Bellingham voters at an election approve a system of automatic ticketing cameras to impose fines from camera surveillance, the fine for infractions committed shall be a monetary penalty of no more than the least expensive parking ticket imposed by law enforcement in the city limits of Bellingham.

Section 4. A new section 11.16.130 is added to BMC chapter 11.16, which shall read as follows:

11.16.130 -- Removal: all automatic ticketing machines, as defined by section 2 of this measure, installed or in use in the city limits of Bellingham as of the date of passage of this measure must be removed no later than 30 days following the effective date of this measure.

Section 5. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

CP 57, 61. The Bellingham initiative does not contain a similar section to Section 2 of the proposed Redmond initiative, which would repeal Ordinance No. 2542(AM) establishing the City's Automated Traffic Safety Camera program and codifying it at Chapter 10.25 RMC. In addition, the Bellingham initiative requires removal of the automatic ticketing machines within 30 days of passage of the measure, whereas the proposed Redmond initiative requires removal upon the effective date of the measure. However, aside from the names of the cities, in all other respects Bellingham Initiative No. 2011-1 and proposed Redmond Initiative No. 1 are identical.

On Wednesday, September 14, 2011, the initiative sponsors filed the petition for proposed Redmond Initiative No. 1 with the City Clerk, Michelle McGehee. CP 20; 36. The City Clerk declined to transmit the petition to the county auditor for a determination of the signatures' sufficiency. CP 36. Plaintiff thereafter commenced an action in King County Superior Court, seeking a writ of mandamus requiring the City Clerk to transmit the proposed initiative to the county auditor. CP 4. Following oral argument on October 11, 2011, Judge Laura Inveen issued her Order Denying Motion for Order to Show Cause, declaring (1) that under the local initiative process, the city clerk had a clear duty to transmit

the initiative petition to the county auditor under RCW 35A.01.040; but (2) that mandamus would not lie to compel the useless act of transmitting the initiative petition to the county auditor where the initiative was invalid according to *American Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 260 P.3d 245 (2011). CP 135-136. Eyman has appealed the second part of Judge Inveen’s holding, while the City had filed a cross-appeal as to the first part of the holding.

D. ARGUMENT

1. Introduction to the city clerk’s role in the local initiative process and case law regarding automatic traffic safety cameras in the initiative context.

Where noncharter code cities, such as the City of Redmond, have adopted the powers of initiative and referendum under the procedures described in RCW 35A.11.080, the initiative and referendum powers must be exercised in the manner set forth for the commission form of government in RCW 35.17.240 through RCW 35.17.360 and as described in RCW 35A.29.170. RCW 35A.11.100 (“Except as provided in RCW 35A.11.090, and except that the number of registered voters needed to sign a petition for initiative or referendum shall be 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, the powers of initiative and referendum in noncharter code cities shall be exercised in the manner set forth for the commission form of government in RCW 35.17.240 through RCW 35.17.360, as now or hereafter amended.”).

According to RCW 35.17.260, ordinances may be initiated by a petition of registered voters of the city by filing such ordinance with the city. The petitioner preparing an initiative petition for submission to the city must follow the procedures established in RCW 35A.01.040.

RCW 35A.29.170 and RCW 35A.01.040 describe the duties of the city clerk once a petition authorized to be filed under the provisions of Title 35A RCW is filed. Specifically, RCW 35A.29.170 provides: “The clerk shall transmit the petition to the county auditor who shall determine the sufficiency of the petition under the rules set forth in RCW 35A.01.040.”¹ RCW 35A.01.040(4) further describes these duties:

¹ RCW 35A.29.170 provides in full: “Initiative and referendum petitions authorized to be filed under provisions of this title, or authorized by charter, or authorized for code cities having the commission form of government as provided by chapter 35.17 RCW, shall be in substantial compliance with the provisions of RCW 35A.01.040 as to form and content of the petition, insofar as such provisions are applicable; shall contain a true copy of a resolution or ordinance sought to be referred to the voters; and must contain valid signatures of registered voters of the code city in the number required by the applicable provision of this title. Except when otherwise provided by statute, referendum petitions must be filed with the clerk of the legislative body of the code city within ninety days after the passage of the resolution or ordinance sought to be referred to the voters, or within such lesser number of days as may be authorized by statute or charter in order to precede the effective date of an ordinance: PROVIDED, That nothing herein shall be construed to abrogate or affect an exemption from initiative and/or referendum provided {KNE963603.DOC;1\00020.050317\}

“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, or to the county assessor for petitions signed by property owners for determination of sufficiency.”²

Thus, in the case of noncharter code cities, after receiving the initiative petition, the City Clerk typically transmits the petition signatures to the county auditor to determine if fifteen percent of the registered voters as of the last preceding city general election have signed the petition and if the signatures sufficiently satisfy the procedural requirements of RCW 35A.01.040. Finally, the county auditor has ten days from the filing of a petition to ascertain and append to the petition his or her certificate stating whether or not it is signed by a sufficient number of registered voters. RCW 35.17.280. After this initial process is complete, the City Council

by a code city charter. The clerk shall transmit the petition to the county auditor who shall determine the sufficiency of the petition under the rules set forth in RCW 35A.01.040. When a referendum petition is filed with the clerk, the legislative action sought to be referred to the voters shall be suspended from taking effect. Such suspension shall terminate when: (1) There is a final determination of insufficiency or untimeliness of the referendum petition; or (2) the legislative action so referred is approved by the voters at a referendum election.”

² RCW 35A.01.040(4) provides in full: “To be sufficient, a petition must contain valid signatures of qualified registered voters or property owners, as the case may be, in the number required by the applicable statute or ordinance. 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, or to the county assessor for petitions signed by property owners for determination of sufficiency. {KNE963603.DOC;1\00020.050317\ }

may adopt the ordinance without alteration or submit it to a vote of the people at a special election. RCW 35.17.260.

In this case, Appellant Eyman seeks review of a trial court order denying a writ of mandamus compelling the Redmond City Clerk to transmit the initiative petition to the county auditor for a determination of the signatures' sufficiency in accordance with RCW 35A.01.040(4) and/or RCW 35.21.005(4). However, for the reasons described below, the trial court correctly determined that mandamus will not lie to compel the City Clerk to perform this duty in this case.

Integral to determining whether a writ of mandamus is appropriate to compel the city clerk to transmit the initiative petition to the county auditor is an examination of *American Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 260 P.3d 245 (2011) and *Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, No. 84921-8, 2012 WL 748372 (Wash. Mar. 8, 2012). In *ATS*, this Court determined on September 6, 2011--over a week prior to the initiative sponsors filing the petition in Redmond--that a nearly identical initiative petition submitted in Bellingham was invalid and exceeded the scope of the local initiative power. *Id.* at 434. *ATS* held that the Bellingham initiative quoted above in the Statement of the Case exceeded the scope of the local initiative

power because RCW 46.63.170³ unequivocally provides that any ordinance authorizing the use and operation of automated traffic safety cameras must be enacted by “the appropriate local legislative authority.” (Emphasis added.) By specifically vesting the “local legislative authority” (*i.e.*, the City Council) with the exclusive power to enact automated traffic safety camera programs, the Legislature precluded the exercise of initiative and referendum on this subject matter. *Id.* at 433-34.

The Washington Supreme Court adopted the same reasoning in *Mukilteo Citizens* on March 8, 2012. There, residents of the city submitted Initiative 2 to the Mukilteo city clerk for inclusion on the ballot. Similar to the proposed Redmond initiative, “Initiative 2 forbade the city . . . from installing an automated traffic safety camera system unless approved by two-thirds of the voters, limited the amount of fines that could be imposed for infractions arising from camera surveillance, and repealed the existing ordinance allowing automated traffic safety cameras.” *Mukilteo Citizens*, 2012 WL 748372 at *1. Mukilteo Citizens for Simple Government sought a declaration that the initiative was beyond

³ RCW 46.63.170(1) provides, in relevant part: “The use of automated traffic safety cameras for issuance of notices of infraction is subject to the following requirements: (a) The appropriate local legislative authority must first enact an ordinance allowing for their use to detect one or more of the following: Stoplight, railroad crossing, or school speed zone violations. At a minimum, the local ordinance must contain the restrictions described in this section and provisions for public notice and signage.”
{KNE963603.DOC;1\00020.050317\}

the scope of the local initiative powers and an injunction preventing the inclusion of the measure on the ballot. *Id.* at *2. The superior court ruled that the pre-election challenge to the initiative was premature and denied the motion for an injunction. *Id.* The Supreme Court reversed, reasoning as follows:

We look to the language of the relevant statute to determine the scope of the authority granted from the legislature to the local governing body. *See Malkasian*, 157 Wn.2d at 262-63; *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 260 P.3d 245 (2011).

In RCW 46.63.170(1)(a), the legislature granted to local legislative bodies the exclusive power to legislate on the subject of the use and operation of automated traffic safety cameras: "The use of automated traffic safety cameras for issuance of notices of infraction is subject to the following requirements: (a) The appropriate local legislative authority must first enact an ordinance allowing for their use." Also, automated traffic safety cameras may be used during the 2009-2011 fiscal biennium "if the local legislative authority first enacts an ordinance authorizing the use." RCW 46.63.170(1)(c). The legislature's grant of authority does not extend to the electorate.

Proposition 1 attempted to expressly restrict the authority of Mukilteo's legislative body to enact red light cameras by requiring a two-thirds vote of the electorate for approval and by limiting the amount of traffic fines. Because automated traffic safety cameras are not a proper subject for local initiative power, Proposition 1 is invalid because it is beyond the initiative power.

Id. at *5-6 (emphasis added). Accordingly, it is crystal clear that regulation of automated traffic safety cameras is an improper subject for the exercise of the local initiative power.

2. Standard of Review.

Mandamus is an extraordinary writ. *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). Any court may issue a writ of mandamus to “any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station.” RCW 7.16.160. In other words, a writ of mandamus is usually “issued by a superior court to compel . . . a government officer to perform mandatory or purely ministerial duties correctly.” *Land Title of Walla Walla, Inc. v. Martin*, 117 Wn. App. 286, 289, 70 P.3d 978 (2003) (citing Black's Law Dictionary 973 (7th ed. 1999)). The applicant for a writ of mandamus is required to satisfy three elements before a writ will issue: (1) the party subject to the writ must be under a clear duty to act; (2) the applicant must have no plain, speedy and adequate remedy in the ordinary course of law; and (3) the applicant must be beneficially interested. RCW 7.16.160; accord *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003), *rev. denied*, 151 Wn.2d 1027, 94 P.3d 959 (2004). The Court of Appeals reviews a trial

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court's denial of a writ of mandamus de novo as a question of law. *Land Title of Walla Walla*, 117 Wn. App. at 288-89.

3. The trial court correctly determined that mandamus would not lie to compel the city clerk to transmit the initiative petition to the county auditor where it was a vain and useless act.
 - a. Transmittal of the initiative petition to the county auditor would produce no legal effect because the proposed initiative is facially invalid.

Related to the “clear duty to act” prong of the test applicable to writs of mandamus, Washington case law holds that writs of mandamus shall not issue to compel the doing of a vain, useless, or illegal act. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 603-04, 229 P.3d 774 (2010); *Vashon Island Committee for Self-Government v. Washington State Boundary Review Bd. for King County*, 127 Wn.2d 759, 765, 903 P.2d 953 (1995); *State ex rel. Close v. Meehan*, 49 Wn.2d 426, 302 P.2d 194 (1956); *State ex rel. City of Tacoma v. Rogers*, 32 Wn.2d 729, 203 P.2d 325 (1949) (Court will not compel, by mandamus, doing of act that will serve no useful purpose, nor should writ issue when by operation of law compliance with mandate could have no operative effect).

Thus, even assuming that the city clerk had a clear duty to transmit the petition for a determination of sufficiency (which the City contends is

{KNE963603.DOC;1\00020.050317\ }

not the case, *see infra* Section 4), such an act would have no operative effect in this case because the initiative is, on its face, invalid under both *ATS* and *Mukilteo Citizens*. As stated in *ATS*:

Because Initiative No. 2011–01 is beyond the scope of the initiative power, it is invalid. Even if placed on the ballot and passed by a majority of the voters the initiative would have no legal force.

ATS, 163 Wn. App. at 434 (emphasis added). Proposed Redmond Initiative No. 1 is nearly identical to the proposed Bellingham initiative that was invalidated in *ATS*. In addition, proposed Redmond Initiative No. 1 is substantively similar to the Mukilteo Initiative 2 invalidated in *Mukilteo Citizens*.⁴ Thus, the trial court correctly determined that mandamus should not lie to compel the City Clerk to transmit the initiative petition to the county auditor for a determination of its sufficiency. Transmittal would have no operative legal effect. The entire purpose of transmitting the petition is to determine the sufficiency of the petition's signatures (along with other criteria in RCW 35A.01.040) and, consequently, whether the requisite number of signatures have been

⁴ The Court described Mukilteo Initiative 2 as forbidding the city from installing an automated traffic safety camera system unless approved by two-thirds of the voters, limiting the amount of fines that could be imposed for infractions arising from camera surveillance, and repealed the existing ordinance allowing automated traffic safety cameras. As set forth in the Statement of Facts, proposed Redmond Initiative No. 1 attempts to accomplish exactly the same thing, except that it forbids the city from installing the automated traffic safety camera system unless approved by a majority of the voters.

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gathered to place the measure on the ballot under RCW 35A.29.170. Where the petition is invalid, there is no point in requiring the county auditor to make this determination.

Philadelphia II v. Gregoire, 128 Wn.2d 707, 911 P.2d 389 (1996), is instructive on this point because, in the context of the State initiative process, the Court declined to require the Attorney General to perform a ministerial act where the initiative was invalid. In *Philadelphia II*, the initiative petition sought to establish “direct democracy” in the United States by means of a federal, nationwide initiative process to complement the current congressional system, and ultimately to call a world meeting where representatives from participating countries would discuss global issues. *Id.* at 710. The Attorney General refused to prepare the ballot title or explanatory statement required under RCW 29A.72.060, explaining that the contents of the measure were beyond the legislative power reserved to the people under the Washington State Constitution. *Id.* at 711. After the Court held that the Attorney General should have prepared the ballot title and explanatory statement,⁵ the Court proceeded to the substantive question of whether the Philadelphia II initiative did in fact exceed the

⁵ The Court noted that If the Attorney General believes an initiative exceeds the scope of the initiative power, she should prepare the ballot *716 title and summary in accordance with her statutory duty and then seek an injunction to prevent the measure from being placed on the ballot.

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scope of the initiative power. *Id.* at 716. Concluding that it did exceed the scope of the initiative power, the Court held as follows:

While the goals of the Philadelphia II initiative may be laudable, it is simply not within Washington's power to enact federal law. Our initiative process establishes a method independent from the Legislature for enacting state laws and cannot be used to enact laws beyond the jurisdiction of the state. . . .

[I]n conclusion, the Attorney General should have prepared the ballot title and summary and then sought to enjoin its placement on the ballot. Nevertheless, because we determine that the initiative is beyond the scope of Washington's initiative power, we decline to direct the Attorney General to do so in this case.

Id. at 720 (emphasis added).

Thus, in *Philadelphia II*, the Washington Supreme Court declined to issue a writ of mandamus where the initiative was beyond the scope of the initiative power. This example in the State initiative context is equally applicable to the local initiative context, where previous Division I and Washington Supreme Court case law clearly holds that the subject of the proposed initiative is invalid. *ATS*, 163 Wn. App. at 434; *Mukilteo Citizens*, 2012 WL 748372 at *6.

Also in the initiative context, the Supreme Court has previously declined to issue a writ of mandamus where the local initiative petition violated state law. In *State ex rel. Close v. Meehan*, 49 Wn.2d 426, 302

P.2d 194 (1956), initiative petitioners sought a writ of mandamus commanding city commissioners to submit an initiative to a popular vote at a special election or pass the initiative without alteration.⁶ The initiative was intended to amend a previously adopted ordinance by changing the location of the sewage treatment plant site already chosen by the City Council. *Id.* at 429-30. The Court determined that, even assuming the selection of the sewage treatment plant site was a legislative function, the proposed initiative contained no plan or system for the financing and construction of the treatment plant at the new site or for its connection with the system already constructed. Therefore, the proposed initiative violated RCW 80.40.070, which authorized the construction of the sewage treatment plant in the first instance. *Id.* at 430. The Court declined to issue the writ of mandamus, stating:

We are satisfied, from the record, that if the proposed ordinance, amending Section 1 of Ordinance No. C8500, had been passed without alteration by the council, or had been submitted to popular vote at a special election, it would have been invalid because it did not contain a plan for the acquisition, construction and installation of a sewage treatment plant and the method of its financing. Mandamus does not lie to compel the doing of a vain and useless thing. *State ex rel. Northwestern Bond & Mortgage Corp. v. Hinkle*, 134 Wash. 140, 235 P. 359.

⁶ RCW 35.17.260
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Meehan, 49 Wn.2d at 432 (emphasis added). Likewise, mandamus should not lie to compel the Redmond City Clerk to transmit the initiative petition to the county auditor where the subject matter of the initiative petition exceeds the scope of the local initiative power. The trial court correctly relied upon well-established case law in reaching this conclusion.

- b. The political or lobbying effect of signature validation is not a relevant factor in determining whether a writ of mandamus shall issue.

Appellant Tim Eyman does not even attempt to distinguish *Philadelphia II* or *Meehan*; nor does he argue that the transmission of the initiative petition would have an operative legal effect.⁷ Rather, Eyman asserts that the transmission of the signatures to the county auditor would have a political effect, *i.e.*, a “lobbying effect” on the issue of automated traffic safety cameras.⁸ According to Eyman, if the county auditor finds the signatures sufficient, it will put pressure on the City to pay closer attention to public sentiment regarding automated traffic safety cameras.⁹

⁷ Eyman admits as much where he states : “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. They may not have legal effect, but they do have a lobbying effect on their elected representatives.” Appellant’s Opening Brief at 14-15 (emphasis added).

⁸ Appellant’s Opening Brief at 12.

⁹ Appellant’s Opening Brief at 12.
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Unfortunately for Eyman, the political or lobbying effect of an otherwise invalid initiative petition is not a relevant factor to be considered in determining whether a writ of mandamus shall issue. As described above, no writ should issue “when by operation of law compliance with the mandate could have no operative effect.” *Rogers*, 32 Wn.2d at 733 (emphasis added). The language “operation of law” necessarily implies that when determining whether to issue a writ of mandate, it is the legal, not political, effect that is of concern to the court.

The Supreme Court rejected an argument similar to Eyman’s in *Vashon Island Comm. for Self-Government v. Wash. State Boundary Review Bd. for King County*, 127 Wn.2d 759, 903 P.2d 953 (1995). There, the Committee sought a writ of mandamus to compel the Boundary Review Board to review its notice of intent to incorporate all of Vashon and Maury Islands as a city. *Id.* at 762. The Court determined that RCW 36.93.150(2) precluded incorporation of Vashon because the area comprising the proposed city was entirely outside of designated urban growth areas of King County. *Id.* at 772. Accordingly, a writ of mandamus would not issue:

While, arguably, a board is without authority to refuse to take action on a proposal to incorporate a city as was done here, mandamus does not, as we noted above, lie to compel a vain, useless or illegal act. Because all of Vashon lies

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outside of the designated urban growth areas of King County, the area cannot under current law be incorporated. It would, therefore, be a waste of time and taxpayer dollars to require the King County Boundary Review Board to further review a proposal to incorporate Vashon.

Id. at 772-73.

Despite the illegality of the petition, the Committee urged the Court to issue a writ of mandamus anyway on the grounds that the trial court's decision did not give effect to the political will of the people. The Court rejected this plea:

Finally, we note that the Committee makes the point that the trial court's decision is "contrary to our nation's long-held values of self-government and democracy" and should not, therefore, be allowed to stand. (Br. of Appellant at 1.) We do not see the lower court's decision as striking a blow against any principles of democracy. The manner in which cities are formed is a matter that is properly under the purview of the Legislature, the membership of which is popularly elected. It is, of course, not for this Court to comment on the wisdom of the statutory provisions we have been called upon to construe. We are satisfied, however, that current law does not permit incorporation of Vashon. If the Committee feels aggrieved by that determination, it can seek to obtain a change in the applicable statute.

Id. at 773 (emphasis added). The same reasoning undermines Eyman's assertion that the political or lobbying effect of validating the initiative petition renders the act "useful," thus precluding application of the vain and useless act standard. Like incorporation, the manner in which

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automated traffic safety camera programs may be enacted by local governments is within the purview of the Legislature. The Legislature vested the authority to enact such programs specifically in “local legislative authorities,” thereby precluding automatic traffic safety cameras as a proper subject for direct legislation. RCW 46.63.170; *ATS*, 163 Wn. App. at 434; *Mukilteo Citizens*, 2012 WL 748372 at *6; *see also Priorities First v. City of Spokane*, 93 Wn. App. 406, 410, 968 P.2d 431 (1998) (people cannot deprive the city legislative authority of power to do what a state statute specifically permits it to do). If Eyman “feels aggrieved” by this determination, he may lobby before the Legislature for a change in RCW 46.63.170 as suggested in *Vashon*, where his efforts may yield better results. In the alternative, Eyman and other Redmond residents may circulate petitions expressing voter approval or disapproval of automated traffic safety cameras, write letters to city government, attend council meetings to express their opinions, or engage in any number of other activities to achieve a political or lobbying effect. A writ of mandamus should not issue because Eyman perceives that validation of the petition will “spur further discussion and further debate on the issue.”¹⁰

¹⁰ Appellant’s Opening Brief at 13.
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Similarly, Eyman claims that the City's refusal to process proposed 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.¹¹ This is also incorrect. Eyman's statement disregards a basic principle concerning the local initiative and referendum process in Washington State: these powers are derived from statute, not a constitutional right of free speech or petition.

Though the right to state-wide initiative is protected by our state constitution, there is no similar constitutional protection or right of local initiative. Wash. Const. art. II, § 1. The legislature did not grant optional initiative powers in noncharter code cities . . . until 1973.

City of Port Angeles v. Our Water-Our Choice, 145 Wn. App. 869, 879, 188 P.3d 533 (2008) (citing RCW 35A.11.080; 1973 Wash. Laws, 1st Ex.Sess. Ch. 81 § 1). While initiative and referendum powers are available to code cities, they do not automatically apply either at the time of a city's incorporation or reclassification. Code cities must instead take the affirmative step of formally adopting these powers according to the procedures authorized in RCW 35A.11.080. Here again, refusing to

¹¹ Appellant's Opening Brief at 9.
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transmit the initiative petition does not strike a blow to democracy by impinging upon constitutional rights of free speech and petition; the local initiative power itself is a creature of the Legislature, and the Legislature controls the subjects that are appropriate for direct legislation.¹²

Furthermore, Eyman's argument that *ATS* "supports the proposition that the people should be permitted to vote on an initiative whether or not the vote will be legally binding" is a red herring.¹³ First, the *ATS* court did not send the Bellingham initiative forward for a vote of the people based upon the value of having an election. The injunction preventing an election was denied purely and simply because American Traffic Solutions, Inc. could not demonstrate the necessary harm required

¹² Appellant Eyman cites *Coppernoll v. Reed*, 155 Wn.2d 290 (2005), arguing that the Court there recognized that preelection review of an initiative can infringe upon the constitutional rights of the people and that the Court will typically refrain from inquiring into the validity of a proposed initiative before it is enacted. While this is true where substantive preelection review is sought to determine whether an initiative petition is unconstitutional, it is not the case that courts refrain from preelection review to determine whether the subject matter of the initiative exceeds the scope of the initiative power. Washington courts have consistently permitted subject matter preelection review to determine whether an initiative or referendum is within the scope of the initiative or referendum power. See *City of Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 188 P.3d 533 (2008), *rev. granted*, 165 Wn.2d 1053 (2009); *Chelan County v. Anderson*, 123 Wn.2d 151, 868 P.2d 116 (1994); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006); *Whatcom County v. Brisbane*, 125 Wn.2d 345, 884 P.2d 1326 (1994); *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 93 P.3d 176 (2004); *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2006); *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 716-17, 911 P.2d 389, *cert. denied*, 519 U.S. 862 (1996). Preelection challenges in this context are proper because they do not raise concerns regarding justiciability. See, e.g., *Malkasian*, 157 Wn.2d at 255 ("preelection events do not further sharpen the issues—the subject matter of the proposed measure is either proper for direct legislation or it is not") (emphasis added).

¹³ Appellant's Opening Brief at 13.
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to obtain injunctive relief because the initiative would be invalid, even if placed on the ballot and enacted by a majority of the voters. *ATS*, 163 Wn. App. at 435. The City of Bellingham, which could show such harm, chose not to oppose it. *Id.* at 435 n.4.

Second, proposed Redmond Initiative No. 1 is not presented or phrased as an advisory vote. The entire thrust of the proposed initiative is to repeal the City of Redmond's current automatic traffic safety program, require removal of the cameras unless approved by the voters, and to reduce the amount of fines if a new camera program were approved by a majority of the voters and a majority of the City Council. CP 31-32; 55-56. Eyman states that advisory votes have a well-established place in Washington State's election history and further asserts, without citation, that RCW 46.63.170 does not in any way prohibit an advisory vote.¹⁴ While the City Clerk strongly disagrees that an advisory vote can be compelled by initiative,¹⁵ the Court need not reach the merits of this argument because, quite simply, the proposed Redmond Initiative No. 1 does not call for an advisory vote. CP 31-32; 55-56. Thus, even if the city clerk were required to transmit the initiative petition to the county auditor

¹⁴ Appellant's Opening Brief at 13-14.

¹⁵ See *Mukilteo Citizens*, 2012 WL 748372 at *2 ("There are no statutory or constitutional provisions imposing a duty on a city council to call for an "advisory" vote.").
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for a determination of sufficiency, there would be no opportunity for an advisory vote; the initiative does not contain an advisory vote provision. There is absolutely no correlation between requiring the city clerk to transmit the proposed initiative petition to the county auditor for a determination of sufficiency and an advisory vote.

Eyman's only arguments that are unrelated to the alleged political and lobbying effect of transmitting the petition for auditor sufficiency also do not withstand scrutiny. First, Eyman argues that transmitting the petition for a determination of sufficiency would not be a vain and useless act because of the signatures' limited shelf-life under RCW 35A.01.040(8) ("Signatures followed by a date of signing which is more than six months prior to the date of filing of the petition shall be stricken."). Eyman is concerned that if *ATS* is overturned on appeal, the signatures may not be valid at that time.¹⁶ However, since filing Appellant's Opening Brief, the Washington Supreme Court conclusively decided the issue in *Mukilteo Citizens*. *ATS*' holding will not be overturned.

Second, Eyman suggests that, if the county auditor were to determine that sufficient signatures were submitted, state law requires that the city adopt the initiative or put it on the ballot of a public vote under

¹⁶ Appellant's Opening Brief at 15-16.
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RCW 35.17.260. This ignores the fact that RCW 35.17.290 allows the City another option -- it may refuse to do either. RCW 35.17.290 (“If the clerk finds the petition insufficient or if the commission refuses either to pass an initiative ordinance or order an election thereon, any taxpayer may commence an action in the superior court against the city and procure a decree ordering an election to be held in the city for the purpose of voting upon the proposed ordinance if the court finds the petition to be sufficient.”) (emphasis added). Thus, in no way does declining to transmit the petition for signature validation have the legal effect of thwarting RCW 35.17.260.

Finally, Eyman argues that the time for determining whether an initiative exceeds the scope of the local initiative power should not come any earlier than after signature validation.¹⁷ If this were the case, presumably transmittal and a determination of the signatures’ sufficiency would not be a vain and useless act. However, this argument mischaracterizes *Save Our State Park v. Hordyk*, 71 Wn. App. 84, 87, 856 P.2d 734 (1993). Though *Hordyk* is discussed further in Section 4, *infra*, it should suffice to state here that *Hordyk* involved the county auditor’s refusal to register an initiative petition because it substantively violated the

¹⁷ Appellant’s Opening Brief at 11 (citing *Save Our State Park v. Hordyk*, 71 Wn. App. 84, 92, 856 P.2d 734 (1993)).
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County Code. *Hordyk*, 71 Wn. App. at 91-92 (auditor refused to register petition because it violated county code provisions prohibiting initiatives establishing capital programs). The Court did not hold that review of whether an initiative exceeds the scope of the local initiative power should be performed only after signature validation. The portion of *Hordyk* quoted by Eyman should be read carefully: “The time for determining whether an initiative might violate the code should not come any earlier than after signature validation.” *Id.* (emphasis added). This holding is inapplicable to the type of pre-election review necessarily involved in this case. Unlike *Hordyk*, where the county auditor made a substantive determination that the initiative violated the County Code prior to registration, the present case involves only a determination of whether the proposed initiative regarding automated traffic safety cameras involves a proper subject for direct legislation. This type of subject-matter pre-election review is a well-recognized exception to the rule that pre-election review is unavailable to determine the constitutionality or substantive defects of a proposed initiative; a ruling of this kind is not premature.¹⁸

See supra, n. 12.

¹⁸ Appellant’s Opening Brief at 12.
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In sum, because the proposed initiative is invalid and would have no legal force, even if it were placed on the ballot, it would be a wasteful, useless consumption of public resources to compel the city clerk to transmit the petition and its signatures to the county auditor. Eyman has failed to present any persuasive legal argument that transmitting the petition to the county auditor would have a legal effect. None of Eyman's arguments regarding the political usefulness of processing the signatures is convincing in light of case law providing that the legal effect, rather than the political or practical effect, of the act should be considered when determining whether an extraordinary writ shall issue.

4. The trial court erred in determining that the City Clerk had a clear legal duty to transmit the initiative petition to the county auditor.

Even if this Court determines that transmitting the initiative petition to the county auditor would not be a vain and useless act, a writ of mandamus also shall not issue because the City Clerk had no clear duty to act. As stated above, the applicant for a writ of mandamus is required to demonstrate that the party subject to the writ is under a clear duty to act before a writ will issue. RCW 7.16.160; *accord Eugster*, 118 Wn. App. at 402. In this case, the trial court erred in determining that the City Clerk is subject to a clear duty to act because, according to RCW 35A.29.170, the

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requirement to transmit an initiative petition to the county auditor is only applicable to initiatives “authorized to be filed” under the provisions of Title 35A RCW. Again, the local initiative power in noncharter code cities, such as Redmond, arises from statute. *City of Port Angeles*, 145 Wn. App. at 879. Accordingly, the City Clerk’s duty to transmit the petition to the county auditor may only be analyzed in accordance with Chapter 35A.29 RCW and Chapter 35.17 RCW.

In RCW 35A.29.170, the Legislature clearly provides that the clerk shall transmit the petition to the county auditor only where the initiative and referendum petition is “authorized to be filed under the provisions of this title [Title 35A RCW].” The relevant text of RCW 35A.29.170 is repeated below for the convenience of the court:

Initiative and referendum petitions authorized to be filed under provisions of this title, or authorized by charter, or authorized for code cities having the commission form of government as provided by chapter 35.17 RCW, shall be in substantial compliance with the provisions of RCW 35A.01.040 as to form and content of the petition, insofar as such provisions are applicable; shall contain a true copy of a resolution or ordinance sought to be referred to the voters; and must contain valid signatures of registered voters of the code city in the number required by the applicable provision of this title. . . . The clerk shall transmit the petition to the county auditor who shall determine the sufficiency of the petition under the rules set forth in RCW 35A.01.040.

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(Emphasis added). “The petition” referenced in the underlined sentence of RCW 35A.29.170 relates only to initiative and referendum petitions “authorized to be filed under the provisions” of Title 35A RCW, as described in the first sentence of the paragraph. Thus, the City Clerk’s duty to transmit the petition turns upon whether the Plaintiff’s initiative petition is “authorized” under Title 35A RCW.

Controlling Washington precedent dictates that the proposed initiative is not “authorized” under Title 35A RCW. This Court determined on September 6, 2011--eight days prior to the initiative sponsors filing the petition in Redmond--that a nearly identical initiative petition submitted in Bellingham was invalid and exceeded the scope of the local initiative power because RCW 46.63.170 unequivocally provides that any ordinance authorizing the use and operation of automated traffic safety cameras must be enacted by “the appropriate local legislative authority.” *ATS*, 163 Wn. App. at 434. By specifically vesting the “local legislative authority” (*i.e.*, the City Council) with the exclusive power to enact automated traffic safety camera programs, the Legislature precluded the exercise of initiative and referendum on this subject matter.

Any doubt regarding this interpretation of RCW 46.63.170 was conclusively removed by the *ATS* decision:

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In determining whether the legislature granted authority to the local legislative body, we look primarily to the language of the relevant statute.

RCW 46.63.170 specifies that in order to use automatic traffic safety cameras for the issuance of traffic infractions, the “appropriate local legislative authority must first enact an ordinance allowing for their use.” For more than 70 years, Washington courts have consistently construed similar provisions as the grant of authority to the local legislative body:

It is well-settled that in the context of statutory interpretation, a grant of power to a city's governing body (“legislative authority” or “legislative body”) means exclusively the mayor and city council and not the electorate.

Initiative No. 2011–01 expressly restricts that authority by conditioning its use on a concurrence by the majority of the voters. The subject matter of the initiative is therefore clearly beyond the scope of the local initiative power. Initiative No. 2011–01 is invalid.

ATS, 163 Wn. App. at 433-34 (emphasis added) (citation omitted). This Court’s holding with respect to the scope of the local initiative power in this context could hardly be clearer, regardless of the procedural posture of the case.¹⁹ The Washington Supreme Court agreed with this analysis in *Mukilteo Citizens*. *Mukilteo Citizens*, 2012 WL 748372 at *6.

¹⁹ Appellant’s Opening Brief at 2. Eyman argues that *ATS* involved different facts and procedural history than the instant case. Specifically, Eyman states that in *ATS* the company supplying the traffic cameras to the city was appealing a denial of an injunction that would have kept the initiative off the ballot, whereas in this case, the City declined to

Therefore, because proposed Redmond Initiative No. 1 is likewise invalid and exceeds the scope of the local initiative power, it is not authorized by Title 35A RCW. *See Leonard v. City of Bothell*, 87 Wn.2d 847, 852-54, 557 P.2d 1306 (1976) (petitioners seeking writ of mandamus to compel referendum cited RCW 35A.11.080 and RCW 35A.11.090, claiming these provisions vested them with power to subject the ordinance to a referendum election; the court concluded those statutory powers cannot be exercised to nullify or restrict the broad grants of power to the legislative bodies of cities); *Cf. City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 8, 239 P.3d 589 (2010) (neither article II, section 1 nor RCW 35A.11.080, authorizing initiative powers, encompasses the power to administer the law, and administrative matters, particularly local administrative matters, are not subject to initiative or referendum). Accordingly, where proposed Redmond Initiative No. 1 is plainly not authorized by Title 35A RCW, the City Clerk's duty to transmit the petition signatures to the county auditor was never triggered. The City Clerk had no clear duty to act.

transmit the initiative signatures before they were even counted. Regardless of whether American Traffic Solutions sought an injunction in the case, the holding applies just the same. Initiative measures identical in all material respects to the Bellingham initiative are invalid.

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To hold otherwise would render the language in RCW 35A.29.170, prompting the city clerk's duty to transmit upon the filing a petition "authorized to be filed" by Title 35A RCW, completely superfluous. Thus, in its order, the trial court erred by effectively reading the "authorized to be filed under the provisions of this Chapter" language out of the statute. Every word of a statute should be given effect. *E.g.*, *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (it is a well-settled principle of statutory construction that each word of a statute is to be accorded meaning and that the drafters of legislation are presumed to have used no superfluous words; courts must accord meaning, if possible, to every word in a statute). To accomplish that here, the Court must hold that the City Clerk's duty is to transmit only petitions that are authorized, not illegal or invalid.

Philadelphia II v. Gregoire, 128 Wn.2d 707, 911 P.2d 389 (1996), referenced by the trial court in its Order, does not dictate a different result. As described above, in *Philadelphia II*, the Court concluded that under the state initiative process in Chapter 29.72 RCW, the Attorney General does not have discretion to refuse to prepare a ballot title where the initiative is beyond the scope of Washington's legislative power (even though the court ultimately determined a writ of mandamus would not issue). *Id.* at

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713. In its analysis, the Court cited former RCW 29.72.040, which provides that within seven calendar days after the receipt of an initiative measure the attorney general “shall” formulate and transmit to the secretary of state the concise statement. The Court stated:

The statutory term “shall” is presumptively imperative unless a contrary legislative intent is apparent. *State v. Krall*, 125 Wash.2d 146, 148, 881 P.2d 1040 (1994) (quoting *Erection Co. v. Department of Labor & Indus.*, 121 Wash.2d 513, 518, 852 P.2d 288 (1993)). No contrary legislative intent has been cited by the Attorney General. Furthermore, this presumption is strengthened where, as here, other sections of the same statute contain the word “may.” *Krall*, 125 Wash.2d at 148, 881 P.2d 1040; compare RCW 29.79.040 (Attorney General “shall” prepare title) with RCW 29.79.150 (Secretary of State “may” refuse to file initiative petition if not in proper form). There is simply no indication that the Legislature intended the Attorney General to review the petition for its substance.

Philadelphia II, 128 Wn.2d at 713.

In contrast to the statutory scheme establishing the statewide initiative process, a contrary legislative intent is apparent in the local initiative process for code cities because RCW 35A.29.170 limits the application of the City Clerk’s duties to initiative petitions that are authorized by Title 35A RCW.

In addition, the *Philadelphia II* Court determined that the Attorney General does not have the authority to refuse to prepare the ballot title

because the courts--not the Attorney General--has the authority to determine the validity of a proposed measure:

Moreover, the Attorney General's argument that if an initiative exceeds the scope of initiative power, it is not an initiative at all and that the Attorney General therefore has neither the duty nor the authority to prepare the ballot title and summary begs the question of whether the Attorney General or the courts should be determining the validity of the proposed measure. It is true that a court may review the substance of a proposed initiative to determine whether it exceeds the scope of initiative power described in article II, section 1, of the Washington State Constitution. *See, e.g., Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wash.2d 740, 746, 620 P.2d 82 (1980); *Ford v. Logan*, 79 Wash.2d 147, 152, 483 P.2d 1247 (1971). However, the construction of the meaning and scope of a constitutional provision is exclusively a judicial function. *State ex rel. Munro v. Todd*, 69 Wash.2d 209, 213, 417 P.2d 955 (1966) (interpreting article IV, section 1, of the state constitution), amended on other grounds by 426 P.2d 978 (1967); *Washington State Highway Comm'n v. Pacific Northwest Bell Tel. Co.*, 59 Wash.2d 216, 222, 367 P.2d 605 (1961) (interpreting article IV, section 1, of the state constitution). Accordingly, we hold that courts, not the Attorney General, should determine whether a proposed initiative exceeds the power reserved to the people in article II, section 1, of the state constitution. *See also Fischmaller v. Thurston County*, 21 Wash.App. 280, 285, 584 P.2d 483 (1978) (holding that county auditor could reject declaration of candidacy only if not required to interpret constitutional or statutory language), *review denied*, 91 Wash.2d 1013 (1979).

Id. at 714-15 (emphasis added). In light of *Philadelphia II*, Judge Inveen particularly pointed out in her oral ruling that the City Clerk assumed a

judicial function by applying case law and interpreting legislation as it related to the facts at hand. RP 33.

However, this truly overstates the City Clerk's decision-making process in this case because a published Court of Appeals case already existed, was directly on point, and held that a nearly identical initiative was invalid. All that was required of the City Clerk was to be aware of the recent decision and realize that the entire subject matter of the proposed initiative (automated traffic safety cameras) was improper for direct legislation. No detailed legal analysis was required; this Court had already held that automated traffic safety camera initiatives are invalid. As a matter of law and common sense, the City Clerk is not obligated to ignore this controlling authority.

Finally, *Save Our State Park v. Hordyk*, 71 Wn. App. 84, 87, 856 P.2d 734 (1993), does not support the proposition that the City Clerk had a nondiscretionary duty to transmit the petition to the county auditor. Eyman relies heavily upon a single sentence in *Hordyk*: "The time for determining whether an initiative might violate the code should not come any earlier than after signature validation." *Id.* at 92. Again, unlike the auditor in *Hordyk*, the Redmond City Clerk did not engage in substantive review of the initiative, but merely relied on the *ATS* decision determining

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the subject matter of the petition to be invalid. This type of subject matter review is permitted and not premature. Moreover, *Hordek* is inapplicable because the Court was analyzing Clallam County's Code, rather than the provisions of Title 35A RCW, which trigger the city clerk's duty to transmit the initiative petition only upon the filing of an authorized petition.

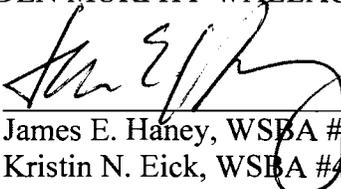
E. CONCLUSION

For the foregoing reasons, Respondent-Cross Appellant Michelle McGehee, Redmond City Clerk, requests that this Court affirm the trial court's ruling that a writ of mandamus is inappropriate to compel the transmittal of an initiative petition to the county auditor for a determination of sufficiency where the petition is clearly invalid. The City Clerk also requests this Court to reverse the trial court's ruling that she had a clear duty to act because a city clerk should not be required to ignore plainly applicable, controlling precedent in exercising her duties.

RESPECTFULLY SUBMITTED this 14th day of March, 2012.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By 
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Michelle McGehee, Redmond City Clerk

NO. 67908-2

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

TIM EYMAN,

Plaintiff-Appellant.

v.

MICHELLE MCGEHEE, REDMOND CITY CLERK

Defendant-Respondent.

DECLARATION OF SERVICE

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STATE OF WASHINGTON
2012 MAR 14 PM 2:54

N. Kay Richards hereby makes the following declaration: I am now and was at all times material hereto over the age of 18 years. I am not a party to the above-entitled action and am competent to be a witness herein.

I hereby certify that I caused the Brief of Respondent-Cross Appellant Michelle McGehee and this Declaration of Service to be served upon the below-named individual in the manner identified below on this 14th day of March, 2012.

Via First Class U.S. Mail:

Daniel Quick, Esq.
DANIEL QUICK, PLLC
701 Fifth Avenue, Suite 4720
Seattle, WA 98104
Daniel@danielquick.com

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

3/14/12 Seattle, WA
Date and Place

N. Kay Richards
N. Kay Richards, Legal Assistant