

No. 86554-0

(Cowlitz County Superior Court No. 11-2-00634-5)

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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MIKE WALLIN, an individual,

Appellant,

vs.

CITY OF LONGVIEW, A Washington municipal  
corporation,

Respondent,

BANCAMS.COM, and unknown entity,  
WA CAMPAIGN FOR LIBERTY, a Washington non-profit corporation;  
VOTERSWANTMORECHOICES.COM, an unknown entity, COWLITZ  
COUNTY, a municipal corporation, and KRISTINA SWANSON,  
Cowlitz County Auditor,

Defendant-Respondents.

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APPELLANT'S OPENING BRIEF

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ORIGINAL

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## **INTRODUCTION**

Appellant, Mike Wallin (Wallin) filed an initiative in the City of Longview (City), related to automated traffic cameras. After the City dragged its heels in the processing of signed petitions, it chose to sue Wallin to get the Superior Court to bar the initiative from being placed on the ballot.

Simultaneous with the filing of the Complaint, the City filed what was essentially a motion for summary judgment to get the injunction it wanted in short order. In fact, the signature gathering process was still underway while Wallin was being forced to defend against the City's suit and motion. Having been summoned into this lawsuit, Wallin objected to the City's tactics and filed a special motion to strike under RCW 4.24.525, a new statute designed to provide relief to those who are sued because they were engaged in public participation or petition. The special motion to strike would allow Wallin to recover his attorneys' fees and a statutory penalty if the City could not show a probability of success on the merits.

In response to the motion, the City sought to voluntarily dismiss its own complaint in an effort to thwart Wallin's request for relief under the statute. Although the Court did not authorize

dismissal, the court nevertheless denied the recovery of fees and the statutory penalty because the court believed the City was likely to prevail on the merits. But when it came to actually deciding the merits later, the City only prevailed in part. Despite having defended the right of the public to vote on part of the measure, Wallin was still denied the relief RCW 4.24.525 provides.

In addition to prevailing in part, Wallin contends that he should have prevailed in whole. First, the City's lawsuit was not justiciable. Second, Initiative No. 1 was properly within the scope of the initiative power. Third, the City's suit violated Wallin's First Amendment rights. When the City filed suit against Wallin, it could not show that its action was ripe or that it would suffer an injury in fact. In addition to its premature nature, the City's suit is incorrect regarding the scope of the initiative power as it applies in this case. The controlling statute describes the basic minimum requirements for establishing automated traffic cameras, not how to discontinue them.

Wallin requests that the Court conclude that Initiative No. 1 should have been placed on the ballot in its entirety and that Wallin is entitled to the remedies in RCW 4.24.525, regardless of whether he prevails in whole or in part.

### APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in denying Wallin's Special Motion to Strike ("Special Motion to Strike") dated August 8, 2011. *See* CP 230. Specifically, the trial court erred in finding that the City showed by clear and convincing evidence that it was likely to prevail on its claims that Longview Initiative Measure No. 1 was not within the local initiative power. *Id.* at 298.

2. The trial court erred in entering the Order Granting Declaratory Judgment and Injunctive Relief in favor of the Defendants dated August 15, 2011. *See* CP 343. Specifically, the trial court erred in holding that the Washington State Legislature expressly delegated power to local legislative authorities to determine a city's use and operation of automated traffic safety cameras, thus precluding local initiatives and referenda on the matter. *Id.* at 344. The trial court further erred in invalidating initiative No. 1 (with the exception of §3) on the grounds that it exceeded the scope of local initiative and referendum power. *Id.*

3. The trial court erred in denying reconsideration of Wallin's motion to strike dated August 15, 2011. *Id.*

4. The trial court erred in denying Wallin's second special motion to strike dated September 15, 2011. CP. 403.

## **ISSUES PRESENTED**

1. Does a party seeking to enjoin both the County Auditor and the initiative petitioner from placing an initiative on the ballot prior to the election have the burden of showing that its claim is justiciable, including showing that the dispute is ripe, and that it will suffer an injury-in-fact if citizens are allowed to vote?

2. When a City sues an initiative petitioner to have a Court declare the initiative invalid and prohibit its placement on the ballot before the signature gathering phase is over, does RCW 4.24.525 provide a remedy for such premature suits?

3. Does RCW 46.63.170 prohibit initiatives that relate to automated traffic cameras?

4. Are rights of free speech and petition violated when government prevents citizens from voting on a matter of public concern and of local government controversy, without regard to whether it is within the scope of the initiative power of voters?

## **STATEMENT OF THE CASE**

Appellant, Mike Wallin (“Wallin”), lives and resides in Longview Washington, and is a co-sponsor of Longview Initiative

No. 1. CP 132.<sup>1</sup> In January of 2011, Petition Sponsors notified the City of Longview (“City”) that they would begin collecting signatures for Longview Initiative No. 1. CP 36. The Petition Sponsors’ proposed ballot title for the initiative reads as follows:

Longview Initiative No. 1 concerns automatic ticketing cameras. This measure would prohibit Longview from using camera surveillance to impose fines unless two-thirds of the Council and voters approve, limit fines, repeal Ordinance #3130 allowing the machines, and mandate an advisory vote.

CP 20.

RCW 35A.11.100 requires initiative sponsors 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."

In May of 2011, Petition Sponsors submitted petitions for Longview Initiative No. 1 to the City Clerk. CP 133. That same afternoon, the Longview City Council held an emergency meeting to consider how to proceed concerning the initiative and its accompanying voter signatures. *Id.*

Sensing that the City was considering a plan to do nothing with the petitions, Wallin’s attorney emailed a letter to the City

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<sup>1</sup> Other sponsors of the initiative include Washington Campaign for Liberty, Josh Sutinen, and Tim Sutinen (“Petition Sponsors”). *Id.*

Clerk, Mayor, City Council, and City Attorney, informing them that the law required them to forward the submitted petitions for the Initiative to the County for signature verification. CP 137 – 138.

After the emergency meeting and in spite of this letter, the City Clerk failed to transfer the petitions to the County auditor for signature verification within the 3-day period required by RCW 35.21.005(4). CP 133. As a consequence, Wallin, along with the other Petition Sponsors, filed a petition for writ of mandate to compel the City Clerk to submit the petitions to the County auditor for signature verification. *Id.*

The writ of mandate was ultimately agreed to by the parties, requiring the City Clerk to submit the signatures to the County Auditor for verification. CP 140. However, before the signatures were verified, the City filed its present suit against Wallin attacking the validity of the initiative itself. CP 3. In particular, the City's suit against Wallin alleged that the measure is beyond the scope of the local initiative power. CP 6 – 7.

As stated above, the City filed its suit before the County Auditor determined that Wallin had submitted sufficient signatures. *See* CP 133. In fact, the number of signatures

originally submitted was deemed insufficient, affording Wallin ten additional days to gather the remaining signatures pursuant to RCW 35.17.280. *Id.* Though the requisite signatures were ultimately obtained within the statutory grace period, the City's suit made the process extremely difficult. CP 133 – 134. In Wallin's words: "the [City's lawsuit] not only distracted myself and other key leaders from gathering signatures, but our volunteers, supporters, and many voters . . . expressed that they feel defeated already and believe there [was] just no sense in signing a petition or collecting signatures on a petition that the City [sued] to block." *Id.*

On the same day it filed the present suit against Wallin, and while signature gathering was still underway, the City moved for what it styled a "Motion for Declaratory Judgment," arguing that Initiative No. 1 exceeded the scope of the local initiative power. CP 24. In response to the City's motion, Wallin filed a Special Motion to Strike Under RCW 4.24.525(4), a new statute designed to protect citizens from having to defend costly suits based on public participation or petitioning the government.<sup>2</sup> CP 106.

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<sup>2</sup> This statute is designed to protect against "strategic lawsuits against public participation" or SLAPP. Thus, the statute is often referred to as the "Anti-SLAPP" statute.

Within the special motion to strike, Wallin argued that (1) the City's suit was based on public participation under RCW 4.25.525; (2) the City's complaint was not supportable by clear and convincing evidence; and, (3) the City's suit lacked sufficient standing and was premature.

Under RCW 4.24.525, when the moving party proves that the lawsuit is "based on an action involving public participation and petition," the burden of proof shifts to the plaintiff to establish that it will probably prevail on its claims. *Id.* However, instead of responding to Wallin's Special Motion to Strike under this statute, the City filed a motion to dismiss its case against Wallin, pursuant to CR 41(a)(1)(B),<sup>3</sup> coupled with a motion to shorten time which, if successful, might render Wallin's Special Motion to Strike moot. CP 224.

At the hearing on the motion to strike, motion to shorten time, and motion to voluntarily dismiss, the court first denied the City's motion for voluntary dismissal. CP. 297. The court reasoned that Wallin's Special Motion to Strike was tantamount to a counterclaim as it entitles the moving party to recover attorney's

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<sup>3</sup> CR 41(a)(1)(B) allows a plaintiff to voluntarily dismiss his case without prejudice, unless a counterclaim has been pleaded by a defendant.

fees and a statutory penalty if successful. *Id.* Thus, under CR 41(a)(3),<sup>4</sup> voluntary dismissal was inappropriate. *Id.*

In regard to Wallin’s Special Motion to Strike, the court recognized that RCW 4.24.525 imposes a two-step process that must be satisfied before relief can be granted. CP 298. The first requires the moving party to show that the complaint in this action is “based on an action involving public participation and petition.” RCW 4.24.525(4)(b). Addressing this, the court recognized that Wallin’s motion met this first requirement determining that the City’s claims were “based on actions involving public participation and petition.” *Id.* After all, the City’s suit targeted Wallin solely because he submitted initiative petitions to the City.

However, the Court ultimately denied the Special Motion to Strike for failure to satisfy the second step in the analysis. *Id.* Upon meeting the first step, the burden shifts to the City to prove by “clear and convincing evidence” that it was likely to prevail on the merits of its suit against Wallin. RCW 4.24.525(4)(b). In spite of Wallin’s procedural objections and justiciability arguments (*i.e.*

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<sup>4</sup> CR 41(a)(3) states: “If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff’s motion for dismissal, the *action shall not be dismissed* against the defendant’s objection unless the counterclaim can remain pending for independent adjudication by the court.” (emphasis added)

ripeness), the court stated it believed that, under *City of Sequim v. Malkasian*, 157 Wn.2d 251 (2006), the City was likely to prevail on its claim that Initiative No. 1 was beyond the scope of the initiative power as the legislature gave the authority to establish red light cameras to the “local legislative authority” in RCW 47.63.170. *Id.* Hence, the Special Motion to Strike was denied. *Id.*

Although it previously sought to voluntarily dismiss its action, five weeks later, the City noted a Motion for Summary Judgment, essentially a re-note of the City’s earlier Motion for Declaratory Relief, after the County confirmed there were sufficient signatures for Initiative No. 1 to be placed on the ballot. CP 320. Once again, the new motion resulted in Wallin bearing the entire cost of defending the proposed initiative on his own, for a second time.

Based on this second round of briefing, the trial court held that Section 3 of the initiative, establishing an advisory vote related to traffic cameras, was not beyond the scope of the initiative power and was severable from those portions that were. Therefore, Section 3 would be placed on the ballot for a public vote. CP 344.

Despite successfully defending the people's right to vote, Wallin did not recover his legal fees as RCW 4.24.525 requires. *Id.*

Remarkably, the litigation was still not over. The City subsequently filed a motion for reconsideration based on a new legal theory. CP 346. In response, Wallin opposed the City's Motion for Reconsideration and filed a Second Special Motion to Strike under RCW 4.24.525. The City's motion dealt with new substantive arguments as to why it should prevail. CP 370. Subsequently, the court denied both the City's Motion for Reconsideration allowing Section 3 of Initiative No. 1 to stay, but still refused to grant Wallin's Second Motion to Strike. CP 404. Ultimately, after multiple rounds of briefing and three hearings, Wallin successfully defended the right to vote; yet, he was still afforded no relief as provided in RCW 4.24.525.

This appeal follows the trial court's final decisions.

## **ARGUMENT**

### **I.**

#### **DE NOVO IS THE PROPER STANDARD OF REVIEW WHEN REVIEWING A SPECIAL MOTION TO STRIKE BROUGHT UNDER RCW 4.24.525 AND SUMMARY JUDGMENT**

Washington Law is well established that the proper standard of review for a grant of summary judgment is *de novo*. *Pierce County v. State*, 150 Wn. 2d 422, 429 (2003).

The standard of review regarding the special motion to strike is not settled. Under RCW 4.24.525, “[a] party may bring a special motion to strike any claim that is based on an action involving public participation and petition.” If the moving party can prove that the claim is based on an “action involving public participation and petition,” the responding party must establish a probability of prevailing on the claim by clear and convincing evidence. *Id.* If the non-moving party fails to carry their burden of proof, the claim is *dismissed* and the moving party is eligible for attorney’s fees, expenses, and statutory awards. *See id.*

Though Washington law has yet to articulate the proper standard of review for special motions to strike, the *effect* of the motion is exactly like a motion to dismiss. Thus, the logical and proper standard of review for special motions to strike is the same for the review of a motion to dismiss—*de novo*. *San Juan County v. No New Gas Tax*, 160 Wn. 2d 141, 164 (2007).

**II.  
THE CITY’S SUIT LACKS STANDING AS NO  
JUSTICIABLE CONTROVERSY EXISTED AT THE TIME  
THE CITY’S COMPLAINT AND “MOTION FOR  
DECLARATORY JUDGMENT” WERE FILED**

Washington courts have “steadfastly adhered to the virtually universal rule that, before the jurisdiction of a court may be invoked under the Uniform Declaratory Judgment Act [UDJA], there must be a justiciable controversy.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 (2001) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15 (1973)). The justiciability requirement is a basic function of subject matter jurisdiction.<sup>5</sup>

To invoke the jurisdiction of the Court under the UDJA, a plaintiff must establish:

- (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,
- (2) between parties having genuine and opposing interests,

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<sup>5</sup> See *High Tide Seafoods v. State*, 106 Wn 2d 695, 701–02 (1986), *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556–57 (1998) See also *Adams v. City of Walla Walla*, 196 Wash 268, 271 (1938) (“parties cannot stipulate that a justiciable controversy exists so as to clothe this court with jurisdiction, when it does not, in fact, exist under the pleadings ”)

(3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and

(4) a judicial determination of which will be final and conclusive.

*Coppernoll v. Reed*, 155 Wn.2d 290, 300 (2005) (spacing added).

“Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement.” *To-Ro Trade Shows*, 144 Wn.2d at 411.

A. The City’s Claim was Unripe as it was Unknown Whether the Initiative had the Requisite Signatures to be Placed on the Ballot.

As discussed above, the justiciability requirements under the UDJA include a ripeness requirement. In this matter, the City’s claim lacks ripeness when compared to legal precedent discussing this matter. This Court in *To-Ro Trade Shows* stated that “**before the jurisdiction of a court may be invoked**, under the [UDJA], there must be a justiciable controversy.” 144 Wn.2d at 411 (emphasis added). In regard to the timing of determining ripeness, federal courts have been more explicit that ripeness is determined at the date of filing the complaint. As stated by the Ninth Circuit in *Wilbur v. Locke*:

[A]ll **questions of subject matter jurisdiction**, except mootness, ...[are] **determined as of the date of the filing of the complaint**.... The party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint...

423 F.3d 1101, 1107 (9th Cir. 2005) (emphasis added), *overruled on other grounds by Levin v. Commerce Energy, Inc.*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2323, 2329 (2010) (quoting *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005)).<sup>6</sup>

In the context of the challenges to the subject matter of initiatives, courts have looked at subject matter questions only **after** sufficient signatures have been granted, consistent with traditional ripeness requirements. *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 (2006) (petitioners obtained sufficient signatures to place a

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<sup>6</sup> The Ninth Circuit’s language was merely a restatement of established legal rules. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) (“Jurisdiction ordinarily depends on the *facts as they exist when the complaint is filed*”), *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n. 4 (1992) (explaining that acts occurring after commencement of the suit cannot retroactively create jurisdiction); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (“Standing is examined at ‘the commencement of the litigation’”), *Park v. Forest Service of U.S.*, 205 F.3d 1034, 1037 (8th Cir. 2000) (holding that a plaintiff cannot rely on events occurring after commencement of the suit to establish injury-in-fact).

referendum” on the ballot); *Washington State Labor Council v. Reed*, 149 Wn.2d 48 (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 (1994) (“the Auditor determined that there was a sufficient number of signatures for validation”); *Yelle v. Kramer*, 83 Wn.2d 464 (1974) (“sponsors of the initiative filed sufficient signatures to place it on the ballot”).

In *Save Our State Park v. Hordyk*, 71 Wn. App. 84 (1993) the Court of Appeals was explicit:

[t]he time for determining whether an initiative might violate the code should not come any earlier than after signature validation

*Id.* at 92; *see also Edwards v. Hutchinson*, 178 Wn. 580, 584 (1934).

Critically, in this case, the City filed suit well before the County Auditor determined that sufficient signatures had been gathered. As a consequence, the City’s claims were unripe. The City’s premature filing before the conclusion of the signature gathering phase obviously frustrated the initiative process by diverting time and resources from the initiative effort and placed a

litigation cloud over the measure. Such tactics have been harshly decried by this Court:

Deliberate efforts by a legislative body to circumvent the initiative or referendum rights of an electorate will not be looked upon favorably by this court.

*Citizens for Financially Responsible Government v. City of Spokane*, 99 Wn.2d 339, 351 (1983).

Regardless of the City's motivation, the City's lawsuit nevertheless had significant negative effects. CP 133 – 134. Though Wallin eventually obtained enough signatures to certify the initiative, this does not dismiss the fact that the City's claims were unripe when filed and interfered with Wallin's efforts to take part in direct democracy.

B. The City Lacks Standing Because It Neither Pled Nor Proved that it Suffered or Would Suffer an Injury In Fact.

Notwithstanding claims of unripeness, the City must prove an "injury in fact" to establish standing. *American Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 593-94 (2008).

Rigorously upholding the "injury in fact" requirement is critically important to the viability of the initiative process because:

[a] lawsuit to strike an initiative...from a ballot is one of the deadliest weapons in the arsenal of the measure's political opponents.

James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 Notre Dame L. Rev. 298, 298 (1989), a law review article cited by the Supreme Court in *Coppernoll v. Reed*, 155 Wn.2d 290, 300 (2005). The short timelines and great expense of qualifying an initiative has already made the process out of reach for most citizen-backed efforts. Citizen petitioners should not be burdened with the additional expense of hiring lawyers to defend themselves and their initiative simply because elected officials oppose the measure and wish to avoid public input on the matter. Likewise, government bodies should not be able to freely use public resources on such legal tactics that starve initiative proponents of critical campaign resources.

Here, the City has provided no evidence or argument about how it will suffer an injury in fact by allowing its citizens to vote on a measure. Instead, the City asserted that Washington Courts “have routinely granted injunctive relief without requiring separate proof of harm where...an initiative goes beyond the scope of the initiative power and would... constitute an unlawful delegation of

authority.” CP 33 – 34 (citing *Ruano v. Spellman*, 81 Wn.2d 820; *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 391 (2004), and *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 709 (1996)).

However, these cases are incompatible with the City’s assertions. Simply because these cited cases did not address the issue of harm does not mean that harm is not required. In those cases, all parties may have conceded harm, thus rendering it a non-issue. Conversely, Wallin does not concede that the City has suffered any legally cognizable harm in having petitions submitted to it or in allowing people to vote. Ultimately, neither the City nor its cited cases demonstrate the requisite harm needed for an injury in fact.

It should be noted that the City may have harm if the question to be decided is whether Initiative No. 1 creates an *ordinance* that would change how the City makes traffic camera decisions. But that question can, and should be, reserved for decision only if the measure is adopted by the voters. Here, the question to be decided is whether the people should be allowed to vote and whether there is harm in allowing voters to cast a vote.

To reiterate, demonstrating an “injury in fact” in this case is a necessary threshold issue to establish the City’s standing. The

City has provided no evidence that anyone would be injured if people were allowed to vote on Initiative No. 1. Hence, the dispute was simply not justiciable, and would not be justiciable, until after an election—and, then only, if the matter was approved at the ballot box.

**III.  
RCW 46.63.525 PROVIDES THE APPROPRIATE REMEDY  
FOR LAWSUITS FILED PREMATURELY, WHICH  
CHALLENGE PUBLIC INITIATIVES, SUCH AS THE ONE  
FILED BY THE CITY**

In light of lack of the shortcomings of the City's premature suit against Wallin, the court should have provided Wallin the remedy in RCW 4.24.525.

In *City of Sequim v. Malkasian*, 157 Wn.2d 251, 290 (1994), the Court wrestled with whether a City which sought to challenge a particular local initiative could select the initiative sponsor as its defendant and whether an initiative sponsor placed in such a position was entitled to recover attorneys' fees for defending the public vote. The Court concluded that an initiative sponsor was an appropriate person to sue when a municipality sought to challenge the validity of an initiative. *Id.* at 269-70. It also concluded that the sponsor was not entitled to attorneys' fees

for defending the suit, absent legislative authorization. *Id.* at 271-72.

Justice Chambers' concurring and dissenting opinion is instructive:

The legislative branch has extensively and appropriately legislated in this field. Perhaps in the future, the legislature will provide **recourse for individuals dragooned against their will** to defend initiative petitions. With those reservations, I concur with the dissent that this case should have been dismissed as nonjusticiable.

*Malkasian*, 157 Wn.2d at 290 (Chambers, J., concurring and dissenting) (emphasis added).

Subsequent to Justice Chamber's opinion in *Malkasian*, the Legislature has provided recourse to initiative sponsors dragooned against their will to defend initiatives by the enactment of RCW 4.24.525. While the attorney fee and penalty in that statute are not automatic for the mere filing of a suit against an initiative sponsor, the Legislature has raised the stakes to the municipality when suing an initiative sponsor. When a city sues an initiative sponsor, the attorneys' fees and statutory penalty under RW 4.24.525 provide some relief when private citizens are forced to defend an initiative and the private citizen at least prevails in part.

As with any remedial statute, RCW 4.24.525 is to be “construed liberally to effectuate its general purpose of protecting participants in public controversies.” LAWS OF WASHINGTON, 2010 c 118 § 3. In essence, this statute creates a special procedure for citizens who find themselves as defendants in lawsuits simply because they have chosen to exercise their rights in the context of a public controversy participation in the initiative process.

Under RCW 4.24.525(4)(a), a party may bring a special motion to strike “any claim, however characterized, that is based on an action involving public participation and petition.” Upon the filing of a special motion to strike, all discovery and any pending hearings or motions in the action are stayed until the entry of an order ruling on the motion. RCW 4.24.525(5)(c).

RCW 4.24.525(4)(b) establishes a two-step process for this motion:

[1]A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition.

[2]If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim.

*Id.* (numbering and spacing added).

If the moving party prevails, “in part on in whole,” the court shall award the cost of litigation, including attorney’s fees and a statutory \$10,000 penalty, plus other sanctions that the court deems necessary.

A. The City’s Suit Against Wallin Was Based On an Action Involving Public Participation and Petition.

As the trial court properly pointed out in its August 8, 2011 order:

the City’s claims in this...action regarding Longview Initiative Measure No. 1 are **based on actions involving public participations and petition** as defined in RCW 4.24.525.

CP. 230 (emphasis added). The City’s suit against Wallin only pertained to Initiative No. 1—plain and simple. The City has not contradicted this fact, nor given any other reason for choosing to sue Wallin.

B. The City Failed to Prove a Probability of Prevailing on Its Claim By Clear and Convincing Evidence.

When the City was first called upon to provide clear and convincing evidence that it would prevail on its suit involving public participation and petition, it sought to voluntarily dismiss its claim. CP. 224. Such an action begs the inference that the City

believed its suit could not overcome the burden of proof required when it filed, and thus sought to withdraw the complaint instead of defending it.

While the City asserts, among other things, that Initiative No. 1 goes beyond the scope of initiative power, its claims suffer substantial foundational flaws. In particular, the City lacks the essential standing requirement of ripeness and injury in fact. These issues are discussed in greater detail *infra* at 14-16.

Ultimately, the City has not carried its burden of proof to demonstrate the probability of its claim. It has not because it cannot as this brief will further demonstrate.

C. The Only Appellate Decision Addressing RCW 4.24.525 in the Context of Initiatives is Inconsistent, Distinguishable, and Unpersuasive.

Only one Washington appellate court addresses SLAPP and initiatives. In *American Traffic Solutions [ATS] v. City of Bellingham*, 163 Wn.App. 427 (2011), Division 1 of the Court of Appeals reviewed a case similar to the present inasmuch as it involved a proposed local initiative dealing with automated ticketing cameras and an anti-SLAPP motion. However, even with this similarity, *ATS* involved several key facts that distinguish it from the case at hand. Simply, the Bellingham initiative within

*ATS* lacked certain features of the Longview Initiative No. 1, such as an advisory vote which the trial court in the present case found to be appropriate for the ballot. *ATS* also involved a preexisting contract between the city and a third-party, adding another layer of issues before the court. *See id.*

In addition to being distinguishable from the case at hand, the court in *ATS* issued its decision based on expedited briefing less than three weeks after the notice of appeal date. This fact might explain why the opinion is unfortunately internally inconsistent.

The Court of Appeals ruled that the initiative challenger had standing to pursue an action challenging the validity of the initiative's scope. *Id.* at 432 – 433. However, this reasoning was based on the *possibility* that “[I]f enacted, Initiative No. 2011-01 would **potentially** mandate termination of modification of *ATS*'s contract with the City.” *Id.* (emphasis added). This potential of harm was a far cry from demonstrating that a party must demonstrate “that is has or will suffer an injury in fact.” *Id.* (emphasis added). In spite of this, the Court of Appeals found that the challenger had “standing to challenge the proposed action” hinging on the possibility of harm. *Id.*

Yet, in a confusing twist, the court ultimately denied the challenger's request for preliminary injunction stating that it lacked any substantial injury. *Id.* at 433. The court reasoned that, because it deemed the initiative to be beyond the scope of the initiative power, the challenger would not suffer "substantial injury to [its] contractual interests" if the initiative were placed on the ballot. *Id.* Hence, the challenger could not "demonstrate any injury justifying injunctive relief." *Id.* A literal interpretation of the court's holding would lead one to conclude that a challenger may have standing to challenge the scope of an initiative (prohibiting or significantly hampering its ability to be placed in front of the public) and yet that same challenger may **lack** standing at the same time if the challenger seeks to enjoin the initiative being placed on the ballot.

With this glaring internal inconsistency in the Court of Appeals' reasoning, this Court should hold that an injury in fact is required for standing to challenge an initiative and whether people voting on a matter is injurious enough to warrant extraordinary judicial action **prior** to an election. Ultimately, this Court is called upon to answer whether any harm exists in holding an election, if at all.

In addition to its confusing analysis on standing, *ATS*'s treatment of the anti-SLAPP statute is also alarming. The court concluded that the initiative sponsor was not entitled to relief under the anti-SLAPP statute because it deemed the initiative to be beyond the scope of initiative power. *Id.* at 433. The conclusion without analysis, is disconcerting because RCW 4.24.525(6) plainly allows relief to a defendant who prevails "in whole or in part." Clearly, the initiative sponsor in *ATS* **did** prevail in part as the plaintiff's request for a preliminary injunction was ultimately denied.<sup>7</sup> Yet, the Court of Appeals vacated the sponsors' award under the statute without any analysis of the "prevail in whole or in part" language of the statute.

*ATS* is a published opinion, but its hurried reasoning is woefully lacking in internal consistency. This Court should clarify what has suddenly become murky in regard to this new statutory protection of constitutional rights.<sup>8</sup>

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<sup>7</sup> Under the *ATS* court's reasoning, the anti-SLAPP statute could easily be rendered completely impotent in a variety of contexts. A developer suing people to stop protesting the proposed construction project could escape the statutory consequences as long as he had a legal theory that was technically meritorious, but nevertheless insufficient to warrant the relief he wanted, such as an injunction to stop the protests.

<sup>8</sup> Though *ATS* is the only published case concerning this matter, the Court currently has pending before it *Mukilteo Citizens for Simple Government v City of Mukilteo*, No. 84921-8, argued on May 24, 2011. While that case involves an initiative that relates to automated ticketing cameras, the question presented in

If a cognizable rule could be extrapolated from *ATS*, it would be: a party seeking to enjoin an initiative being placed on a ballot must demonstrate that it would suffer **greater harm** than amount of harm required to establish threshold standing.<sup>9</sup> In the case at hand, the City cannot establish that it has satisfied the initial harm requirement for standing let alone meet the greater standard of harm required for injunctive relief.

D. RCW 4 24.525 Entitles Wallin to Attorney's Fees and Statutory Relief.

At its core, RCW 4.24.525 directly applies to the City's suit against Wallin as it specifically pertains to Initiative No. 1, which is a matter involving public participation and petition. As discussed *supra*, because Wallin's initiative had not yet been certified, the City's suit was unripe and filed prematurely. This fact is clearly apparent when compared to the Court of Appeals Justice Gerry Alexander's statement in *Save Our State Park v. Hordyk*: "The time for determining whether an initiative might violate the code **should not come any earlier than after**

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that case differs from Wallin's as it addresses whether the trial court properly allowed a vote when the city itself chose to place the initiative on the ballot. That case challenges the *city council's* power and not the power of citizens to require a vote by submitting initiative petitions.

<sup>9</sup> In *ATS*, the court never directly addressed this question as the initiative in question was already determined to be invalid as being beyond the scope of applicable power.

**signature validation.”** 71 Wn. App. 84, 92 (1993) (emphasis added). However, this is exactly what the City did when it filed its suit against Wallin.

While RCW 4.24.525 allows the responding party to establish the probability of prevailing on its claim, the City’s suit was plainly premature. *Hordyk*, 71 Wn.App. at 92. This is a crucial fact as it solely rests on timing, irrespective of the validity of the initiative itself. Therefore, applying *Hordyk*, the City needed to prove, by clear and convincing evidence that it was likely to **prevail on the legality of its premature filing** challenging an uncertified initiative still in the signature gathering process, which it could not do. Again, the City’s response to Wallin’s motion to strike (essentially his motion to dismiss the suit) was its own motion to voluntarily dismiss—an obvious attempt to prevent Wallin from obtaining the relief RCW 4.24.525 provides.

Although the trial court should have granted Wallin’s Special Motion to Strike, the trial court also abused its discretion in denying Wallin’s motion for reconsideration because Wallin demonstrated he was likely to prevail in part by keeping Section 3 of the initiative on the ballot. Section 3 of the initiative merely

established an advisory vote. CP 262. At the same time the court ruled that the City was unsuccessful in barring Section 3 from the ballot, the Court denied Wallin's motion for reconsideration. This was an abuse of discretion. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 671 (2002) (abuse of discretion standard applied to review of denial of reconsideration).<sup>10</sup>

RCW 4.24.525 clearly makes the attorneys' fee and statutory penalty mandatory for a moving party who prevails "in part or in whole." RCW 4.24.525(6)(a). Not only did the City fail to make any effort in response to the motion to strike to meet its burden to prove probability of success, it in fact did not prevail in regard to Section 3 and Wallin did prevail in part. CP 230. It was an abuse of discretion to deny Wallin the relief the Legislature provided.

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<sup>10</sup> *Rivers* applied an abuse of discretion standard to review a motion to reconsider a discovery motion, which is itself reviewed for an abuse of discretion. Whether the abuse of discretion standard is the appropriate one in the present case is unclear. Nevertheless, the standard of review cannot be critical because the trial court cannot have discretion to deny a partially prevailing party the statutory remedy because the statute is clear that the remedy must be provided to one who prevails in part.

RCW 4.24.525's provision for recovery of fees and expenses to the party who files a successful motion to strike is not discretionary.

(6)(a) The court **shall award** to a moving party who prevails, **in part or in whole**, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees;

RCW 4.24.525(6)(a) (emphasis added). The statute also refers to other relief to deter repetitive conduct, but unlike the attorneys' fees and statutory penalty, that other relief is discretionary. *See* RCW 4.24.525(6)(a)(iii) ("as the court determines to be necessary"). Wallin did not and still does not seek relief under subsection (iii).

The "in part or in whole" language is clear that the legislature intended for reimbursement to occur if the moving party is entitled to any relief. Even in the absence of such language, courts have held the same. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828 (2004) (prevailing party entitled to attorney fees

“regardless of whether the contract is invalidated in whole or in part”).

Unlike the discretionary remedies in subsection (iii), the attorney fee and penalty remedies in subsections (i) and (ii) are mandatory because it uses the mandatory word “shall.” The statute is clear that a moving party (here, Wallin) who prevails **even in part** is entitled to recover costs, attorneys’ fees and the statutory penalty. The City sought to prohibit a vote on a matter and chose to sue Wallin to accomplish that purpose. Because Wallin prevailed in defending the right to place Section 3 of the initiative on the ballot, the motion to strike should have been granted in regard to the City’s efforts to block a vote entirely and block a vote on Section 3 in particular.

Statutory language involving statutory penalties are mandatory. *See In re Marriage of Eklund*, 143 Wn.App. 207 (2008) (mandatory monetary penalty for noncompliance with parenting plan is mandatory); *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 433 (2004) (penalties for violations of the public records act are mandatory, although the amount within a range set by statute is discretionary); *State v. Richardson*, 105 Wn.App. 19

(2001) (\$500 victim penalty assessment is mandatory). The same result is appropriate here.

*Yousoufian* is instructive because of the particular statutory language regarding public records act violations.

In 1992, however, the statute was amended to provide that “it shall be within the discretion of the court to award such person an amount *not less than* five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.” Laws of 1992, ch. 139, 8.

*Yousoufian*, 152 Wn.2d at 433 (emphasis added by court). Based on the statutory language, the Court held the penalty must be at least \$5 per day and no more than \$100 per day, but the court has discretion within that range. In this case, the Legislature last year set the amount and has not given the Court discretion to alter the amount of the penalty.

Wallin should also recover fees and the statutory penalty for his second motion to strike, which was filed as part of his opposition to the City’s motion for reconsideration. After Wallin prevailed in keeping Section 3 of the initiative on the ballot, the City filed a motion for reconsideration. CP. 346. Though the trial court was concerned that by granting Wallin’s second motion to strike would create a “more piecemeal process” by subjecting one

side to a “\$10,000 hit were they to lose any procedural motion,” this was not the circumstance in which Wallin was seeking relief. Rather, Wallin’s second motion to strike came as a result of having to defend against significant **new arguments** raised by the City which were not present at the time it filed its suit. Specifically, these new arguments contested the validity of Section 3 of Initiative No. 1, arguments not raised in the City’s Complaint. CP 349 – 353. These new arguments were not mere “procedural motions” but arguments that required a considerable amount of additional attorney research and briefing at Wallin’s expense. Given this fact, Wallin should be entitled to the statutory relief for his *second* motion to strike in addition to the first motion.

**IV.  
INITIATIVE NO. 1 IS NOT BEYOND THE SCOPE THE OF  
INITIATIVE POWER BECAUSE THE LEGISLATURE IS  
SILENT AS TO HOW THE USE OF TRAFFIC CAMERAS  
MAY BE DISCONTINUED**

Assuming, *arguendo*, that the City somehow demonstrates the requisite standing to bring its suit, the City would still need to prove by clear and convincing evidence that Initiative No. 1 goes beyond the scope of the initiative power. To this point, the City contends that initiatives are inappropriate when the Legislature has

given responsibility to undertake matters specifically to a city's "governing body" or "legislative body." CP. 24.

While this focus on the precise words used in legislation has been the historical basis for determining whether a particular action is within the local initiative power, this Court has clarified in more recent cases that the mere incantation of "governing body" or "legislative body" is insufficient to conclude that the Legislature intended to deprive citizens of the right to vote. *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 193 (2006).

In *McFarland*, this Court recognized that legislative intent to preempt the initiative or referendum process cannot be determined simply because the words "legislative authority" are used. Instead, "reasoning is required." *Id.* at 177. Often the Legislature may not be considering the initiative and referendum powers in choosing its words, and "the phrase 'legislative authority' does not have a monolithic meaning." *Id.* (citation omitted). Therefore, "the entire statutory schema must be read with care to determine the intent of the legislature." *Id.* at 178.

Similarly, in *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1 (2010), this Court reviewed whether a local initiative was properly within the scope of the initiative power after

the election. Although that case was decided on the basis that the Port Angeles initiative was exercising administrative powers, and not legislative power, four justices in dissent concluded that the initiative was properly within the scope of the initiative power despite a legislative reference to a “local legislative body.” *Id.* at 10 (dissent). In response to the dissent, the five member majority essentially agreed that a statutory reference to the local legislative body did not automatically render a subject beyond the initiative power, but concluded that issue did not need to be decided in that case. *Id.* at 14 n.7. Based on *McFarland* and both the majority and dissenting opinions in *Our Water*, the Court needs to look at the entire statute rather than merely the phrase “legislative authority.”

Here, the trial court concluded that the following language in RCW 46.63.170 evidences a legislative intent to take away the right of people to vote on Initiative No. 1:

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.

Cities and counties using automated traffic safety cameras before July 24, 2005, are subject to the restrictions described in this section, but are not required to enact an authorizing ordinance.

RCW 46.63.170 (spacing and emphasis added). While the legislature was clear that an ordinance must be adopted by the legislative authority **before** automated traffic cameras can be used, it is **silent** on how a decision to discontinue them can be made. Stated another way, the statute describes the basic minimum requirements for **establishing** automated traffic cameras, not how to **discontinue** them. No legislative restriction exists pertaining to the discontinuation of traffic cameras—no reference to adopting an ordinance or otherwise.

As previously stated, there is a presumption in favor of the initiative process and all doubts should be resolved in favor of letting the people vote. Thus, courts must “liberally construe initiative proposals so as to give them effect,” and to avoid “a hyper technical construction which deprives them of effect.” *Maleng v. King County Corrections Guild*, 150 Wn.2d 325, 334 (2003). The presumption dictates that the power of the initiative

is presumptively allowed and the burden is on the challenger to the initiative to show otherwise. *Id.* at 334.

Given this presumption, the liberal construction of initiative powers, and the lack of a clear legislative prohibition on the citizens exercising legislative power to **end** a traffic camera program, the Court should find that the Initiative No. 1 is safely within the scope of initiative power.

**V.  
THE CITY'S SUIT VIOLATED WALLIN'S RIGHTS TO  
PETITION GOVERNMENT AND FREE SPEECH**

In addition to the protection that RCW 4.24.525 provides to Wallin, he is also protected by the First Amendment and Article I, Sections 4 and 5 of the Washington State Constitution. The City's actions, attempting to foreclose Wallin from taking part in direct democracy, directly violated Wallin's constitutionally protected rights of free speech. As discussed above, the City attempted to review the legality of the initiative *before* it was certified by having sufficient signatures to be placed on the ballot. Furthermore, the City sought an injunction to prohibit the placement of the measure on the ballot. CP 3.

- A. Petitioning the Government is Protected by the First Amendment.

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 further noted that the core value of the First Amendment, Free Speech Clause is the public interest in having free, unhindered debate on matters of public importance. See *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Addressing the issue of political speech, this Court stated the following:

[T]he First Amendment prohibits the State from silencing speech it disapproves, particularly silencing criticism of government itself. Threats of coerced silence chill uninhibited political debate and undermine the very purpose of the First Amendment.

*State ex rel. Public Disclosure Com'n v. 119 Vote No! Committee*, 135 Wn.2d 618, 626 (1998) (citations omitted).

In the initiative context this Court again echoed these concerns in *Coppernoll v. Reed*, 155 Wn.2d. 290. In *Coppernoll*,

opponents of a proposed initiative on tort reform petitioned this 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 293-296. While this Court held that the proposed initiative did not exceed the scope of the legislative power. *Id.* at 305, this Court nevertheless recognized its historical practice of refraining from inquiring into the validity of a proposed initiative before it is enacted. *Id.* at 304.

Simply, this Court recognized that First Amendment rights were implicated in pre-election review of initiatives:

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. This Court noted that after the trial court invalidated Initiative 695 (requiring \$30 vehicle license tabs) at issue in *Amalgamated Transit Union*, 142 Wn.2d 183 (2000), the Legislature quickly responded by passing an almost identical measure that was subsequently signed by the Governor. *Id.* The point of the example is that by exercising the right to initiative, the

people exercise their First Amendment right to petition the government.

The Court echoed this principle in *Futurewise v. Reed*, 161 Wn.2d 407 (2007).

Further, substantive preelection review could unduly infringe on the citizens' right to freely express their views to their elected representatives.

*Id.* at 410-11 (citations omitted).

While substantive pre-election review infringes on citizens' rights, there is no reason to conclude that pre-election review on any basis, including questions as to the scope of the initiative power, does not have that same negative impact on public debate of issues properly before the City.

B. The Initiative Process Itself is Political Speech Made Within a Public Forum.

Although this Court has allowed pre-election review in limited circumstances, it has never decided whether the First Amendment and rights to petition government under the United States Constitution and Sections 4 and 5 of Article I of the Washington constitution are violated by a content-based restriction on initiatives, regardless of whether the review is based on the legality of the measure or the scope of the initiative power. The

notion that the State can create a public forum for the communication of political speech (*i.e.*, the vote) and then restrict access based on the content (such as on automated ticketing cameras) is antithetical to the values inherent in the constitutional protection of rights to petition government and free speech.

Speech within the initiative and referendum process “is at the heart of the First Amendment’s protection.” *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (regarding a referendum proposal submitted to Massachusetts voters to amend the state constitution). As the U.S. Supreme Court said in *Mills v. State of Alabama*, 384 U.S. 214, 218 (1966), “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”

Initiatives, by their very nature, typically discuss governmental affairs. As such, the initiative process, as a whole, is protected political speech under the First Amendment. *See Meyer*, 486 U.S. at 1891-1893 (“the circulation of a petition involves... core political speech”).

While there is no federal right that a state have an initiative process, the initiative process, once established, constitutes a

public forum. Though the public forum doctrine first arose in the context of streets and parks, it has been extended to school publications (*Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995)), charitable contribution programs, (*Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985)), and school mail systems (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)). Like a state funded publication, the initiative process “is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.” *Rosenberger*, 515 U.S. at 830.

The right to engage in the initiative and referendum process was created within Article II, Section 1 of the Washington State Constitution. The bestowal of this right upon the citizens of Washington “opened for use by the public [] a place for expressive activity.” *Perry*, 460 U.S. at 45. As such “[t]he Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.” *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263 (1981) (university meeting facilities); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429

U.S. 167 (1976) (school board meeting); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theater)).

Thus, the initiative process is a limited-public forum for political speech. Being duly designated only “[r]easonable time, place and manner regulations are permissible, and [ ] **content-based prohibition[s] must be narrowly drawn to effectuate a compelling state interest.**” *Perry*, 460 U.S. at 46. (emphasis added). The restrictions on timing, number of signatures and initiative format are probably reasonable time, place and manner restrictions. But the City’s argument that the Legislature has prohibited all initiatives related to automatic traffic cameras puts the Legislature in the position of imposing a content restriction on speech in a public forum. The Court should not presume that the Legislature has done so.<sup>11</sup>

C. The City’s Complaint Seeking to Prohibit Public Voting Based on the Content of the Initiative Cannot Survive Strict Scrutiny.

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<sup>11</sup> This is not to say that the Legislature cannot restrict the exercise of the power to enact ordinances on a subject matter basis. The Legislature can and apparently has required that a city council adopt an ordinance before automated traffic cameras may be used, signaling that an initiative calling for the same would not be effective in adopting the ordinance. But whether an ordinance is adopted is a different question than whether citizens can propose such an ordinance by initiative and the citizenry be allowed to vote on it

Wallin exercised his constitutional rights of free speech when he, along with others, engaged in the initiative process. However, before the public's voice could be heard, the City sued Wallin to prohibit a vote based on the content of his message. As stated above in *Perry*, "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." 460 U.S. at 45 (citing *Widmar v. Vincent*, 454 U.S. 263, 269-270 (1981)). The City has neither articulated a compelling state interest nor shown that a prohibition on public expression through the ballot was narrowly drawn. Therefore, the City unconstitutionally abridged Wallin's First Amendment rights entitling Wallin to relief.

**VI.  
WALLIN IS ENTITLED TO ATTORNEY'S FEES AND  
EXPENSES FOR THIS APPEAL**

Pursuant to RAP 18.1, Wallin requests that the Court award attorneys' fees for this appeal. Specifically, RAP 18.1(a) authorizes the court to grant attorneys' fees "[i]f applicable law grants to a party the right to recover reasonable attorneys' fees or expenses." RAP 18.1(a). This Court's authority to award fees on appeal arises from a statute authorizing fees in the trial court. *See Cowiche Canyon Conservancy v. Bosely*, 118 Wn.2d 801, 825

(1992). As addressed *supra* at 30-31, Wallin is entitled to attorneys' fees under RCW 4.24.525 and is entitled to an award on appeal.

### CONCLUSION

Wallin was sued because he sponsored an initiative. In response to his Special Motion to Strike under the Anti-SLAPP statute, the City provided no defense other than to seek to voluntarily dismiss its complaint. It is this type of interference with the petitioning rights of citizens that the Legislature sought to prevent in the amendment of RCW 4.24.525. The above issues are significant to the public as they involve the interplay of state statutes and constitutionally protected rights. Given such importance, this Court should find that the City's actions were an unacceptable interference with the initiative process to which Wallin is entitled to remedy under RCW 4.24.525.

RESPECTFULLY submitted this 19<sup>th</sup> day of December, 2011.

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### DECLARATION OF SERVICE

I, Linda Hall, declare: I am not a party in this action. I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On December 19, 2011, I caused the foregoing document to be served upon the following persons via the following means:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 19<sup>th</sup> day of December, 2011 at Bellevue, Washington.

s/ Linda Hall

Linda Hall

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**To:** Linda Hall  
**Subject:** RE Filing in Wallin v. City of Longview, Supreme Court No. 86554-0, Appellant's Opening Brief

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**From:** Linda Hall [<mailto:lhall@GSKLegal.pro>]  
**Sent:** Monday, December 19, 2011 5:10 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Filing in Wallin v. City of Longview, Supreme Court No. 86554-0, Appellant's Opening Brief

To the Supreme Court Clerk:

In the matter of Mike Wallin v. City of Longview, et al., Supreme Court No. 86554-0, attached for filing with the Court please see Appellant's Opening Brief filed by Richard M. Stephens, attorneys for Appellant, Mike Wallin.

Thank you for your assistance. Please call us with any questions.

Linda Hall, Legal Secretary to  
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