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No. 86554-0

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

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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.

APPELLANT'S REPLY BRIEF

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RESPONSE TO CITY'S STATEMENT OF THE CASE

Before responding to the more substantive portions of the City's opening brief, Wallin is compelled to briefly address and clarify certain portions of the City's rendition of the Case which are misleading.

First, the City notes that the Auditor determined that Wallin had originally submitted an insufficient number of valid signatures on petitions. City's Brief, at 10. The City claims "[s]ince it appeared Initiative No. 1 did not have sufficient signatures . . . , the City moved to voluntarily dismiss. *Id.* at 10-11. The timing suggests something entirely different in that it knew on June 23, 2011, that the initiative lacked proper signatures for certification, but the City did not file its motion to dismiss until July 7, 2011, the day a response to Wallin's motion to strike was due. CP 224. The City left the cloud of litigation hovering over Longview Initiative No. 1 until the final hour, hampering Wallin from gaining the remaining signatures to certify the initiative.

Second, throughout the City's brief, it claims that Initiative No.1 would be "an illegal impairment of contract" in violation of the Washington State Constitution. City's Brief, at 19, 20 and 44. However, this argument ignores the simple fact that any discussion of illegal impairment of contract is dependent on circumstances two steps into the future. In order for there to be a cognizable argument of impairment of contract, Longview Initiative No. 1 must have 1) been certified; and 2) received the requisite number of votes to be enacted. This Court is

prevented from analyzing this argument as the City sued Wallin before the first step, certification, had been completed. Even after the initiative was certified, it is unclear whether or not the people of Longview would have voted to repeal the automatic traffic camera ordinance.

Finally, if the court entertains the City's argument of impairment of contracts, it still fails. It fails for the simple reason that the contract with the camera company is explicit that the term of the contract lasts "until expiration of the [City's] authorizing ordinance." CP 49.

The City's invitation to assume that the initiative would result in a contract breach should be rejected.

ARGUMENT

I.

INITIATIVE NO. 1 IS NOT BEYOND THE SCOPE OF THE INITIATIVE POWER

A. Initiatives Are Presumptively Valid.

As a preliminary matter, the Court should keep in mind that it 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).

This 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. Invalidating an initiative, as being beyond the scope of initiative power, is the *exception* rather than the rule. *Coppernoll*

v. Reed, 155 Wn.2d 290, 304 (2005). Only by keeping this foundation in mind can the determination be made as to whether people should be allowed to vote regarding a matter of disputed public policy.

B. The Legislature did not Clearly Prohibit Initiatives That Would Discontinue a Traffic Camera Program Simply Because it Required a City Council Decision to Initiate Such a Program.

A test for determining whether an initiative is beyond the scope of the initiative power is whether the Legislature delegated authority to the governing body exclusively to enact the ordinance proposed in the initiative petition. *See City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 10 (2010).¹

Whether or not there was an exclusive and unequivocal delegation of power to a local legislative body must first be determined by considering the context of the delegating language. As this Court opined in *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165 (2007), 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,

¹ In its brief, the City cites the Court of Appeals’ decision in *Priorities First v. City of Spokane*, 93 Wn. App. 406, 411 (1998), claiming that the test for determining whether or not an initiative is beyond the scope of the initiative power is whether the initiative would “interfere with the exercise of a power delegated by state law to the governing body of the city.” City’s brief at 14 (emphasis added). However, this is not the proper test for pre-election review. Whether the initiative **interferes** with state law is a *post-election* question. *Coppernoll*, 155 Wn.2d at 297. This Court should instead determine whether the State Legislature intended to prohibit initiatives on traffic cameras by exclusive and unequivocal delegation to local legislative bodies.

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.

Here, the Court is being asked to conclude 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 (emphasis added). The statute describes the basic minimum requirements for **establishing** automated traffic cameras.² The Legislature was clear that an ordinance must be adopted by the legislative authority before automated traffic cameras can be used, instead of just a decision by a city manager or even a resolution by the City Council.

² The City’s argument that Longview Initiative No.1 somehow “interferes” with the overall statutory scheme of RCW 46.63 does not hold water. According to the City, “Chapter 46.63 RCW shows the Legislature’s intent was to create a uniform, statewide system to decriminalize certain traffic offenses and promote public safety.” City’s brief at 16. However, this begs the question: how does the initiative affect or interfere with *Washington’s* decriminalization of traffic offenses or interfere with the State’s uniform traffic camera system? The simple answer is that it doesn’t

However, the statute is silent on how a decision to stop using these cameras must be made.

American Traffic Solutions, Inc. v. City of Bellingham, 163 Wn. App. 427 (2011) did not address Wallin’s specific argument that there is a distinction between the establishment of an automated traffic safety camera program, and its termination. There is no legislative restriction on how discontinuation of traffic cameras must be implemented, namely, no reference to adopting an ordinance or otherwise. Additionally, doubts about the scope of the initiative power must be resolved in favor of allowing the citizens to initiate the legislation. *Maleng v. King County Corrections Guild*, 150 Wn.2d 325 (2003).

Given the presumption of validity, 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 trial court should have allowed the entire initiative to be placed on the ballot.

C. Longview Initiative No. 1 Only Seeks to Exert Legislative Power, Not Exercise Purely Administrative Functions.

In *Ruano v. Spellman*, 81 Wn.2d 820 (1973), this Court laid out the constraint that the initiative process “extends only to matters legislative in character as compared to administrative actions.” *Id.* at 823. The difference between the two, this Court later stated, is “whether the [initiative] is one to make a **new law or declare a new policy**, or merely

to carry out and execute law or policy already in existence.” *Id.* (citations omitted) (emphasis added). For the reasons that follow, Initiative No. 1 sought to exercise legislative power.

1. Because state law requires an ordinance to initiate traffic cameras, the decision whether or not to have traffic cameras is a legislative decision.

The City argues that Initiative No. 1 only affects administrative subjects and not legislative subjects. City’s Brief, at 17. Looking at the text of RCW 46.63.170, the decision to have automatic traffic cameras requires an ordinance, which is a legislative act. This clearly demonstrates that such action is legislative in nature.

Additionally, decisions on cameras is not simply the administration of a policy decision by the state legislature because whether to have automatic traffic cameras is completely *optional*. RCW 46.63.170 does not mandate that cities or counties adopt an automatic traffic camera ordinance. As the City recognizes, RCW 46.63 was enacted specifically to “facilitate the implementation of a **uniform** and expeditious system for the **disposition of traffic infractions**” for those cities or counties that wish to have such a system. RCW 46.63.010, *cited in* City’s Brief, at 17. Initiative No. 1 has nothing to do with altering the disposition of traffic infractions. Rather, it deals with the public policy decision on whether to have automated traffic cameras.

This decision to have or not to have traffic cameras is starkly different than the case in *Our Water*, 170 Wn.2d 1. In that case, this Court

determined that the initiative to stop fluoridation of the city’s water supply “explicitly [sought] to **administer the details** of the city’s existing water system,” thus rendering the initiative “administrative in nature.” *Id.* at 13 (emphasis added). Conversely, Initiative No. 1 sought not to “administer the details” of Longview’s traffic camera ordinance, but rather sought to repeal it. CP 79.

Ultimately, the decision whether or not to utilize traffic cameras is wholly a legislative decision which the legislature has left at the local level. While there may be a dispute as to whether the Legislature took away the right of initiative based on delegation to the City Council, there should be no dispute that the initiative is exercising legislative power and not merely exercising administrative power.

2. Whether an initiative is legislative or administrative does not depend on future effects of the initiative.

The City also argued that its actions were administrative, relying upon the fact that it had “entered into contracts with ATS.” City’s Brief, at 19. As addressed *infra* at 2, the contract expressly provided for termination if the City’s ordinance was repealed. Nevertheless, the City’s argument is a red herring because the Court does not **look** at the **effect** of the initiative, only whether or not the initiative itself is legislative or administrative in nature. The reasoning for this is quite clear. Whenever a local government implements new legislation, existing or pending contracts are usually affected. Halting every new piece of legislation due

to the fact that it would affect existing contracts would significantly hamper the legislative process. As such, the City's argument is unpersuasive on this matter.

D. Mandating an Advisory Vote in Section 3 of the Initiative is Exercising Legislative Power.

The City argues that Section 3, requiring an advisory vote, is “nonbinding” and thus does not “further a legislative purpose.” City’s Brief, at 28, (citing *Ruano v. Spellman*, 81 Wn.2d 820, 823-24 (1973)). However, though it cited *Ruano*, the City failed to address the complete rule articulated in that case. The rule in *Ruano* stands for the proposition that an initiative must make a **new law** or declare a **new policy** in order to be a valid legislative action. *Ruano*, 81 Wn. 2d at 823. Even a cursory reading of Section 3 demonstrates that, requiring an advisory vote every time (at the next general election) a new ordinance on automatic traffic cameras is proposed, is *new, binding* law which directly affects the adoption of new legislation. As such, Section 3 does not “merely carry out and execute law or policy already in existence.” *Id.* Rather, it implements and creates new standards by which future, binding legislation is adopted. Section 3, if enacted, binds the City to seek advice from its Citizenry. The City is not obligated to accept the advice, but it is **required** to seek it. This obligation to hold an election, to seek advice from the public, **is** an exercise of legislative power.

E. Advisory Votes are Legitimate Tools for Weighing, Expressing and Considering Public Opinion In Washington.

Finally, the City argues that “[c]ase law in every jurisdiction...agrees that advisory votes are not a permissible subject of the initiative power.” City’s Brief, at 29. However, the City cites no Washington precedent for this argument, but instead is forced to look elsewhere to support its position. The reason for this is obvious: Washington recognizes that advisory votes are legitimate tools for gauging public opinion and are thus well within the initiative power.

In general, advisory votes have a well-established place in Washington election history. As early as 1928, the Court recognized in *State v. Spokane School Dist. No. 81, Spokane County*, 147 Wash. 467 (1928) (regarding school construction), that advisory votes **could** be held, even though the vote was purely advisory. *Id.* at 473-74. Since then, advisory votes have been used in a variety of contexts. *See, e.g., State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.*, 142 Wn.2d 328 (2000) (legislature authorized an advisory vote); RCW 43.135.041 (requiring advisory votes for taxes); RCW 47.46.030(3) (advisory votes for traffic proposals).

Critically, RCW 46.63.170 gives no indication that at an advisory vote would be prohibited. Section 3 calls for advisory votes **after** the establishment of a camera program is established. It clearly is useful on the question as to whether such programs should be discontinued or

continued. But, an advisory vote which does not have the force of law cannot be said to interfere with the legislature's delegation of authority to the City's "legislative authority" in RCW 46.63.170 to initiate such programs. Just as there is no prohibition on the City Council referring matters to a planning commission, police department, workshops, focus groups, or town hall meetings on a subject, there is no prohibition in the statute on advisory votes. Section 3 of the initiative is not prohibited by RCW 46.63.170.

The City argued that the courts from the states of Nebraska, Massachusetts, and Oregon have all prohibited advisory votes. City's Brief, at 30. However, it is important to distinguish between an initiative which merely seeks an advisory election and an initiative such as Longview Initiative No. 1 which seeks to adopt an ordinance which would require advisory votes in the future.

Each of the cases relied upon by the City are in the former category, where the initiative was not proposing to establish any law. For instance, *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984), is a case in which the Nebraska Supreme Court held that the vote on a measure which would tabulate the public's views on a bilateral nuclear freeze, was something that was not within the scope of the initiative power.

Beermann and the case on which it relies, *Opinion of Justices Relative to the Eighteen Amendment*, 262 Mass. 603, 160 N.E. 439 (1928),

and *City of Eugene v. Roberts*, 91 Or. App. 1, 756 P.2d 643 (Or. Ct. App. 1988), *aff'd*, 305 Or. 641, 756 P.2d 630 (1988), all establish that a proposal which does not purport to enact a statute, and thereby exercise legislative power, is improper. Here, Section 3 of Longview Initiative No. 1 does purport to establish law—a new ordinance that requires advisory votes. Section 3 would be binding; it is the creation of a law just as RCW 43.135.041 requires advisory votes after tax increases.

However, the cases from states relied upon by the City are not the only ones dealing with advisory votes. In fact, other state courts have upheld or agreed with the use of advisory votes. For instance, in *American Federation of Labor v. Eu*, 36 Cal.3d 687, 686 P.2d 609 (1984), the California Supreme Court held that statewide advisory votes initiated by petition were valid. *Id.* at 707. It relied upon the Nevada Supreme Court decision in *Kimble v. Swackhamer*, 94 Nev. 600, 584 P.2d 161, 162 (1978), wherein the Nevada court allowed an initiative that created an advisory vote on whether the legislature should ratify the Equal Rights Amendment. The Nevada court allowed the initiative

on the ground that the proposal “does not concern a binding referendum, nor does it impose a limitation upon the legislature.... [T]he legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote.”

Kimble, 94 Nev. at 162, *quoted in American Federation of Labor*, 36 Cal.3d at 705.

Also of interest and relied upon by the California Supreme Court is the fact that when opponents of the Nevada initiative sought a stay from the United States Supreme Court, the stay was denied because of “the nonbinding character of the referendum I can see no constitutional obstacle to a nonbinding advisory referendum of this sort.” *Kimble v. Swackhamer*, 439 U.S. 1385, 1387–1388, 99 S.Ct. 51, 53–54, 58 L.Ed.2d 225 (1978), *quoted in American Federation of Labor*, 36 Cal.3d at 705.

All things considered, the City has simply provided zero Washington case law that disallows or even disfavors the use of advisory votes. Furthermore, the City failed to address the Washington precedent cited by Wallin *supporting* the use of advisory votes. Instead, in a last ditch effort, the City argues that because “[t]he Legislature, and the City, have provided a lawful means to test legislation in an appropriate case [which is] a referendum,” that advisory votes are improper for initiatives. City’s Brief, at 30. This argument is fundamentally flawed because referenda and advisory votes are different in function. A referendum petition would suspend the operation of an ordinance and could invalidate an ordinance depending upon the vote at the polls. RCW 35.17.240. An advisory vote, on the other hand, does *none* of these things. Rather, it simply advises the City Council of its citizens’ position on a subject, such as the operation of automated traffic cameras. As such, the City’s argument on this matter is unpersuasive.

Given the long history of advisory votes in this state and the lack of any persuasive out of state authority, the Court should not assume that Section 3 is invalid.

F. The Advisory Vote in Section 3 Only Affects Ordinances on Automatic Traffic Cameras and Will Only Be Held During The General Election in November.

The City disingenuously misapplies Section 3 in its relation to special elections. In essence, the City states that, because initiatives are called a “special election” in the statute—as opposed to “general election”—Section 3 creates “future special election advisory votes.” City’s Brief, at 23. The City thus implies that these special elections could be held at any time as “they are not required to be held at regular intervals.” City’s Brief, at 23. Such an interpretation completely disregards the language of Section 3. Though the City is correct in stating that initiatives are referred to as “special elections” pursuant to RCW 29A.04.175, Section 3 explicitly states that the advisory vote would only be held **during** “the next **general** election.” CP at 273 (emphasis added). In essence, the City’s argument is refuted by the plain language of Section 3.

Additionally, the City wildly claims that, allowing an advisory vote, would subject “[a]ny action of a city council, even actions outside of the local initiative and referendum authority,” to an advisory initiative. City’s Brief, at 31. Again, this argument completely disregards the plain language of the initiative. As Section 3 clearly states, the advisory vote

will only be triggered if the city proposes “[a]ny ordinance **that authorizes the use of automatic ticketing cameras** after January 1, 2007.” CP 273 (emphasis added). This language does not apply to “any action of the city council,” as the City claims. Rather, Section 3 is specifically binding *only* on when the city enacts an ordinance to establish automatic ticketing cameras, nothing more. The City’s argument is based completely on disregarding the text of Section 3.

II.

SECTION 3 OF LONGVIEW INITIATIVE NO. 1 IS SEVERABLE BECAUSE IT CAN STAND ALONE; IT IS GRAMMATICALLY, FUNCTIONALLY, AND VOLITIONALLY SEVERABLE FROM THE REMAINING PORTIONS OF THE INITIATIVE

“Generally, if portions of an initiative are valid, the valid portions must be put on the ballot.” *Priorities First v. City of Spokane*, 93 Wn.App. 406, 412 (1998)(citing *Leonard v. City of Spokane*, 127 Wn.2d 194, 201 (1995)). Given the public policy favoring the exercise of the right of initiative, even local initiatives, *Maleng*, 150 Wn.2d at 334, a refusal to sever should be rare and occur in only the most extreme circumstances. This case is not one of them.

The basic test for whether an initiative may be severable was reiterated by this Court in *McGowan v. State*, 148 Wn. 2d 278 (2002).

Portions of an act are severable unless:

[1]It cannot reasonably be believed that the legislative body would have passed one without the other, [and]³

³ Wallin has substituted the word “and” for the word “or” in the original text of *McGowan* for purposes of providing the Court a linear test for analysis. The original text

[2] elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes.

McGowan v. State, 148 Wn. 2d 278, 294 (2002)(citing *Gerberding v. Munro*, 134 Wn.2d 188, 197 (1998))(numbering and spacing breaks added).

In regard to the first element of this test, this Court stated that “[a] severability clause may provide the assurance that the legislative body would have enacted remaining sections even if others are found invalid.” *Id.* at 294-95. Longview Initiative No. 1 contains a severability clause which meets the first element of the test. CP 278-79.

However, when considering the second element of the test, the presence of a severability clause will not save a portion of an initiative that **cannot stand on its own**, or, in other words, is “rendered...useless” if severed. *Id.* In order for a provision to stand on its own, the “invalid provision must be grammatically, functionally, and volitionally severable” from the rest of the initiative in order for the remainder to survive.⁴ *Id.* at 295.

Section 3 meets the second element of the severability test.

Section 3 simply calls for an advisory vote on “[a]ny ordinance that

used the word “or” as describing two situations where severability would not occur. In describing when severability would occur, a provision needs to meet both of these requirements.

⁴ Though this Court in *McGowan* spoke of the necessity for an invalid provision to be grammatically, functionally, and volitionally severable from the rest of the initiative, the converse is equally as true. That is to say, a section of an initiative may be held as valid, so long as it is grammatically, functionally, and volitionally severable from the invalid portions of the initiative. Thus, it is upon this premise that Longview Initiative No. 1 section 3 is evaluated.

authorizes the use of automatic ticketing cameras.” CP 273. Such a vote would be far from “useless.” Furthermore, Section 3 can stand on its own as it is “grammatically, functionally, and volitionally severable” from the remainder of the initiative. Section 3 makes grammatical sense. It does not require dissecting and excising invalid language from Section 3. Functionally, the plain reading of the initiative simply calls for an advisory vote by the people, soliciting their input regarding the adoption of automatic traffic cameras. *Id.* It requires none of the other sections to function.

Finally, Section 3 is volitionally severable.

A clause is volitionally severable if the balance of the legislation would have likely been adopted had the legislature foreseen the invalidity of the clause at issue.

State v. Abrams, 163 Wn.2d 277, 288 (2008) (citations omitted).

Therefore, the question is whether the voters of Longview would want to vote on Section 3 if Sections 1 and 2 were stricken. The answer is affirmative for two reasons. First, there is no reason to assume that people would not want an advisory vote if they could not have a binding vote as provided in Sections 1 and 2. Second, the advisory vote provision in Section 3, coupled with the severability clause, is obviously intended to apply in precisely the present circumstances. If Sections 1 and 2 were binding, there would be no need for an advisory vote because people would be allowed to vote *before* traffic camera programs were initiated. It is reasonable to conclude that Section 3 was intended to apply if Sections

1 and 2 were not available. Ultimately, considering all of these factors, Section 3 is easily severable as the lower court properly concluded.

Although the above reasoning should be sufficient to establish the severability of Section 3, Wallin will briefly address the City's arguments even though they do not deal with test articulated in *McGowan* and *Gerberding*. The City, as it did in the lower court, places all of its argumentative weight in a **Court of Appeals** decision—*City of Seattle v. Yes for Seattle*, 122 Wn. App. 382 (2004). City's Brief, at 24 – 27.

According to the City, if the remaining sections of a severed initiative do “not accomplish the [central] goals of the initiative,” they are not severable. City's Brief, at 25 (citing *Yes for Seattle*, 122 Wn.2d at 394-395). The City also referred to “fundamental goals.” City's Brief, at 23. These references to central, or fundamental goals, however, miss the point. Nothing within *Gerberding* or *McGowan* refers to the centrality or importance of the goals of an initiative for determining severability.

In fact, relying upon the “central goals” of an initiative to determine whether or not a section is severable is ripe for manipulation. Courts should not be put in the position of choosing among goals or purposes of an initiative in order to decide which ones are central, are more heavily weighted, or are more important to the overarching policy or objective of the initiative.

This manipulation is actually what the City encourages by extrapolating the central purpose of Initiative No. 1 from narrow

campaign slogans, rather than the actual words of the initiative. Such is the argument the City has attempted to make in this case. City’s Brief, at 25–26. Ultimately, this serves to accentuate the fact that the court in *Yes for Seattle* was not clear on the correct test for severability. As such, the majority of the City’s argument relying upon *Yes for Seattle* is unhelpful and unpersuasive. Rather, this Court should maintain the clear rule found within *Gerberding* and *McGowan*.

Even under the City’s analysis, Section 3 is severable. According to the City, the goals of an initiative are to be divined from its “proposed ballot title.” City’s Brief, at 26. Looking at the ballot title for Initiative No. 1, the City defines the initiatives goals as “limit[ing]...the adoption of Safety Camera ordinances, limiting fines, and repealing the existing City Safety Camera ordinance.” *Id.* However, the City blatantly left out the fact that the proposed ballot title for Longview Initiative No. 1 explicitly states that it would “mandate an advisory vote.” CP 79. If the centrality of the goals can be determined from a proposed ballot title, one can only conclude that an advisory vote is not one of the central goals by ignoring the express reference to advisory votes in the proposed ballot title.

All things considered, public policy favors the exercise of the right of initiative; a refusal to sever should be rare and occur in only the most extreme circumstances. *Maleng*, 150 Wn.2d at 334. Section 3 of Initiative No. 1 is easily severable as it can stand on its own and would not be rendered useless, even if the remainder of the initiative were found to

be invalid. As such, the trial court was correct in allowing Section 3 to be severed, allowing the people of Longview the opportunity to voice their opinion regarding the City's adoption of an automatic traffic camera program.

III.

THE CITY LACKED STANDING TO BRING AND MAINTAIN ITS SUIT

A. The City's Case Was Not Ripe at the Time It Filed Its Complaint and Motion For Declaratory Judgment as The Initiative Had Yet to be Certified as Having Sufficient Signatures.

As stated in Wallin's opening brief, 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))(emphasis added).

The City has failed to address the particular merits of Wallin's arguments concerning ripeness. The City never attempted to address why it brought this action against Wallin **before** the initiative was certified. In regard to the maintenance of this suit, the City never provided any evidence of the "financial burden" it would suffer from placing Longview Initiative No. 1 on the ballot.

Instead, the City argues that it had standing, so long as the Court looks at events two steps into the future, not at the time it filed suit. For example, the City states “[i]n the context of a DJA action regarding an initiative, a party has standing if the result of the initiative, **if passed**, would impair that party’s contract.” City’s Brief, at 44 (emphasis removed and added). Wallin agrees the City may have had standing **if** the initiative passed; however, at the time the City brought its suit, the initiative had yet to be certified, let alone voted upon. As such, the City’s actions run contrary to *Save Our State Park v. Hordyk*, 71 Wn. App. 84 (1993):

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

Id. at 92 (emphasis added). The City incorrectly states that *Hordyk* has nothing to do with ripeness. City’s Brief, at 48. However, *Hordyk* dealt primarily with the **proper timing** of initiative review. *Hordyk*, 71 Wn. App. at 92. “[R]ipeness is largely a question of timing.” *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985).

Furthermore, the City attempts to confuse the issues by obfuscating the fact that, while the declaratory judgment action was decided *after* the initiative was certified, the City nevertheless brought its action *before* the certification. City’s Brief, at 48-49. The timing is crucial, as the City is well aware.

In an effort to support its argument justifying its premature filing, the City cites *First United Meth. Church v. Hearing Examiner*, 129 Wn.2d 238 (1996). In *First United*, the United Methodist Church sought declaratory judgment to stop historical landmark designation of its building in downtown Seattle which would prohibit it from making any alterations or significant changes to the church without City approval. *Id.* at 241-243. On the issue of ripeness, the city claimed that the church's declaratory judgment was not yet ripe because the city had not yet formally designated the church's property as being historic. *Id.* at 244.

Examining the City of Seattle's argument, this Court ultimately disagreed with the city. Because the Landmarks Preservation Ordinance, enacted by the city, had already placed constraints on the church, the case was ripe for review. *Id.* at 245.

Turning to the case at hand, the facts in *First United* are far from analogous to those found here. Contrary to the church's claim, the City's declaratory action was completely based upon "possible, dormant, hypothetical, [and] speculative" facts which were merely "potential [and] theoretical." *Id.* The initiative had the *possibility* of affecting the City's contracts *if* the initiative actually passed. Simply stated, the City brought its claim too early; its claims were not ripe.⁵ Pallid arguments relying

⁵ This fact is further supported by the City's actions. When Wallin filed his first motion to strike against the City, the City sought to voluntarily dismiss, consistent with the fact that its claims were not yet ripe as the initiative had yet to be certified.

upon the “liberal construction” of the UDJA, City’s Brief, at 42, do nothing to contradict this fact.

The City next argued that, even if its suit against Wallin is not yet ripe, “the courts will grant relief under the [Declaratory Judgment Act] when the merits are unsettled and there is a continuing question of great public importance.” City’s Brief, at 45 (citing *Ackerly Communications v. City of Seattle*, 92 Wn.2d 905, 912 (1979)). However, what the City fails to mention is that this is an exception to ripeness, rather than the rule. Just because there is an important dispute does not mean the court should or can automatically step in and adjudicate the matter. This is particularly true in the initiative context. This Court in *Futurewise v. Reed*, 161 Wn. 2d 407, 410 (2007) specifically warned against “unwarranted judicial meddling with the legislative process” before the election. *Id.*

B. Even After the Initiative Petitions Had Sufficient Signatures, The City Failed to Prove That It Had or Would Suffer An Justiciable Injury In Fact If The Citizens of Longview Were Able to Vote on the Initiative During a Regular General Election.

Assuming, *arguendo*, that the City’s claims were ripe when it filed its declaratory judgment action against Wallin before the initiative was certified, the City still failed to demonstrate a concrete injury in fact to establish standing. Again, Wallin’s opening brief has fully briefed this issue (Appellant’s Opening Brief at 17-20) and the City has merely repeated the same arguments it made below.

It is a rudimentary principle that 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). Here, the City has provided no evidence about how it will suffer an injury in fact by allowing its citizens to vote on a measure. Instead, the City claimed that its “allegation” that Initiative No. 1 would “improperly interfere with the exercise of a power delegated by state law to a local legislative authority...is a concrete and specific injury sufficient to confer standing.” City’s Brief, at 45. Contrary to the City’s hopes, the anti-SLAPP statute requires it to provide “clear and convincing **evidence**” to withstand a motion to strike, RCW 4.24.525(4)(b), not mere *allegations*.

Ultimately, though the City claims that holding an arguably invalid initiative would be financially burdensome upon the taxpayers, it does nothing to quantify this burden, despite this issue being raised several times below. *See* CP 106 and 301. Additionally, the City’s claim of additional financial burden begs the question: How much extra cost warrants a burden sufficient to justify judicial intervention in the initiative process before the election? Is it the extra cost of ink for inserting another paragraph of text? Or is it the few additional minutes it takes to tabulate the results?

Of course, these questions must be made considering the fact that these costs would be **in addition to those already being expended** during the regular general election. That is to say, an election was to be held

regardless. See www.vote.wa.gov/results/2011108/cowlitz/ (numerous state-wide and local matters in November 2011 election). Thus, the inclusion of Longview Initiative No. 1 would result only in an incidental cost, if any.

As stated above, the City has provided no evidence of any extra financial burden the taxpayers would suffer if they were given opportunity to voice their opinion on a matter of public importance. Instead, the City has painted in broad strokes, encouraging the Court to not require proof of an injury in fact to establish standing.

IV.

TRIAL COURT PROPERLY REFUSED TO GRANT THE CITY'S MOTION TO DISMISS

A. The Trial Court's Refusal to Dismiss Was Appropriate in Light of Wallin's Objection to The City's Request to Shorten Time.

After Wallin brought his special motion to strike, the City sought to voluntarily dismiss its case before the court could hear Wallin's motion, by moving to shorten time. CP 224. Though the City claims that this was done, "[n]ot wishing to spend public money challenging an initiative that might not obtain sufficient signatures," it waited until two court days prior to the hearing on Wallin's special motion to strike before filing its own motion for voluntary dismissal. *Id.* This was not only several weeks after the City knew that the initiative lacked enough signatures, but was on the last day it could have brought such a motion prior to the Court considering

Wallin's motion. As such, it is hard to believe that City truly was concerned about the cost of pursuing an unripe claim when it sought to dismiss. Rather, the City simply wished to avoid having to compensate Wallin for dragging him into court prematurely.

Additionally, the City places emphasis on the fact that Wallin "opposed" the City's motion to dismiss. City's Brief, at 32. This is patently false. Wallin *only* opposed the City's motion to shorten time, asserting that Wallin's motion to strike should be decided before the City's motion to dismiss. CP 238. Wallin simply contended that there was no basis for the City to shorten time. CP 240. Rather, the City attempted to "avoid its responsibility for attorney's fees and the statutory penalty" by seeking to dismiss before Wallin's motion to strike could be heard. *Id.*

The trial court decision to refuse to grant the motion to dismiss prior to considering Wallin's special motion to strike can be sustained by simply refusing to shorten time on the dismissal motion. "[O]n appeal, an order may be sustained on any basis supported by the record. *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 493 (1997). Here, the basis for supporting the denial of the motion for voluntary dismissal is supported by the record. CP 240.

B. Refusal to Grant The City’s Motion to Dismiss was Appropriate because the Filing of a Motion to Strike Stays all other Hearings and Motions.

In addition to lacking any basis to shorten time, under RCW 4.24.525(5)(c) “[a]ll discovery and any pending hearings or motions in the action shall be **stayed** upon the filing of a special motion to strike.” (emphasis added). Applying this language to Wallin’s case, the City’s motion for voluntary dismissal could not have been heard until *after* Wallin’s motion to strike had been fully heard.

The City argued below that this provision only applies to **pending** hearings at the time the motion to strike is filed. CP 246. Because its motion was filed after the motion to strike, the City asserted that no stay exists. While the word “pending” exists in this section, a reading of the entire section suggests that the stay imposed by filing a special motion to strike stays more than just motions pending at the time of filing. RCW 4.24.525(5)(c) states that “the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.” The use of the broader reference to “other hearings or motions” would include the City’s motion to voluntarily dismiss. However, it requires a motion and good cause shown for the hearing to go forward, neither of which occurred in this case. The City’s position that they stay only applies to motions “pending” at the time of the special motion to strike, frustrates the purpose of the statute if, in response to an

anti-SLAPP motion, the responding party can file an unlimited number of motions.

C. The Trial Court properly found that Wallin’s Special Motion to Strike was a Counterclaim, precluding Mandatory Voluntary Dismissal.

Finally, coupled with the arguments above, the trial court properly noted, Wallin’s motion to strike had the *effect* of being a counterclaim; the motion was in the *nature* of a counterclaim. CP 298. Though the City attempts to argue that a special motion to strike is not a “pleading” and therefore not a traditional counterclaim, City’s Brief, at 33, its argument is unpersuasive. Simply stated, RCW 4.24.525 is a *remedial statute* designed to give a remedy to innocent people dragged into court. As such, it should be interpreted liberally. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 236 P.3d 182 (2010). When the City forced Wallin to respond to its premature motion for declaratory judgment, Wallin was entitled to recourse and the recouping of attorney’s fees and a statutory penalty pursuant to the anti-SLAPP statute. This statute, thus, has all the hallmarks of a traditional counterclaim and should not be dismissed as doing so would foreclose any opportunity for “independent adjudication by the court.” CR 41(a)(3).

The City also argues that the trial court ignored the decision in *Arata v. City of Seattle*, 2001 WL 248200 (W.D. Wn., Jan. 25, 2011). However, the City quotes a line within the decision that is woefully out of context. In *Arata*, the petitioner moved to amend his complaint to dismiss

claims asserted against nine individuals and to dismiss certain causes of action. *Id.* at *1. One of the defendants opposed the plaintiff's motion as that defendant wished to pursue a special motion to strike under the anti-SLAPP statute. Though the court noted that dismissal at the "very beginning of this case would serve the interests of the anti-SLAPP statute by resolving claims...expeditiously and without discovery," the court nevertheless had a very specific concern. The court was concerned that the plaintiff, after dismissing his claim *without prejudice*, would later refile the claim.⁶ *Id.* Addressing this problem, the court ultimately dismissed the claims against the defendants, but *with prejudice*. *Id.* While denying the defendant relief under anti-SLAPP, this ruling at least allowed him to be unburdened by the threat of future litigation on the same matter.

Looking at *Arata* within its proper context casts a new light on the City's suit against Wallin. Like the defendant in *Arata*, Wallin opposed a ruling on the City's motion for voluntary dismissal until his anti-SLAPP motion was heard. He did so as such a dismissal by the City was only a ploy to deny Wallin his statutory penalty and attorney's fees under anti-SLAPP for prematurely filing a claim before Longview Initiative No. 1

⁶ In the courts own words:

If plaintiff were [after voluntarily dismissing his suit based on public participation] then to reassert his claims, McLean and the other individual defendants would be forced to defend a suit in which they had not been participating and McLean would again incur the fees and costs necessary to remove this action and seek protection under the anti-SLAPP statute. Such an outcome would be antithetical to the purposes of the anti-SLAPP statute and would be inefficient and unjust.

was certified. CP 239. However, unlike the plaintiff in *Arata*, the City sought to dismiss its claims, only to bring them later. It is this kind of tactic that the court in *Arata* referred to as being “antithetical to the purposes of the anti-SLAPP statute and would be inefficient and unjust,” *Arata*, 201 WL 248200 at *1

All things considered, the trial court did not err in refusing the City’s motion for voluntary dismissal. In addition to placing a stay on all proceedings and motions, RCW 4.24.525 also is the functional equivalent of a counterclaim, thus foreclosing the City’s opportunity for voluntary dismissal under CR 41. If a plaintiff seeks voluntarily dismissal while a motion to strike is pending, the court should adjudicate the motion to strike **before** the motion for voluntary dismissal.

V.

WALLIN IS ENTITLED TO RELIEF UNDER THE ANTI-SLAPP STATUTE, RCW 4.24.525

A. Wallin was Sued Solely for Sponsoring Initiative No. 1, Adversely Affecting his Ability to Gather the Requisite Signatures Needed

The City argues that “the court committed error when it determined that...the City’s claim was ‘based on an action involving public participation.’” City’s Brief, at 34 (citing RCW 4.24.525(4)(a)). To support this, the City generally claims that “the City’s Complaint did not purport to” interfere with Wallin’s initiative activities. City’s Brief, at 34. Wallin is confused as to how this argument demonstrates that the City’s

claim was not, *in effect*, a suit against public participation. Just because the City might not “purport to” interfere with Wallin’s public participation does not diminish the fact that it did.

Looking more closely at this issue, the phrase “public participation and petition” is broadly defined in the statute to include the submission of petitions to the government in connection with any lawful government proceeding and “any ... lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.” RCW 4.24.525(1)(a)(2). The sponsorship of an initiative petition is an exercise of free speech. *See Meyer v. Grant*, 486 U.S. 414 (1988).

The City’s argument that its suit against Wallin was not “based on an action involving public participation” as defined in RCW 4.24.525, runs contrary to common sense. Wallin was sued exclusively due to his efforts in obtaining the requisite signatures for Longview Initiative No. 1. *See* CP 3. If Wallin had not sponsored the initiative, there would be no reason to name him in this suit. Though the City attempts to justify its actions claiming that its suit against Wallin “did not *seek* to chill Wallin’s speech or right to petition in any way,” City’s Brief, at 35, the effect was still the same. By seeking declaratory relief *before the signature gathering phase of the initiative was completed*, the City adversely affected Wallin’s efforts to obtain the requested signatures needed to place

an initiative on the ballot in the next general election. CP 192. Looking at both Wallin's own words taken together with the circumstances within which the City filed its suit, it is hard to see that a suit is anything but an action based on public participation.⁷

To support these general arguments, the City is forced to look to outside of Washington for support, namely, *City of Riverside v. Stansbury*, 155 Cal.App.4th 1582, 66 Cal.Rptr.3d 862 (2007).⁸ The California Court of Appeals explained its position:

Underlying Stansbury's position is the faulty premise that his right to petition is not complete—and thus cannot be challenged—until after the proposed initiative is placed on the ballot and the electorate determines whether it should pass. ... Stansbury ignores that “it is well accepted that **preelection review of ballot measures is appropriate where the validity of a proposal is in serious question**, and where the matter can be resolved as a matter of law before unnecessary expenditures of time and effort have been placed into a futile election campaign.”

Id. at 1591-92 (quoting *City of San Diego v. Dunkl*, 86 Cal.App.4th 389 (2001))(emphasis added).

Stansbury is not persuasive because California does not have the same narrow exception for allowing pre-election review of initiatives as does Washington. In *Coppernoll v. Reed*, 155 Wn.2d 290, 297 (2005) and in *Futurewise v. Reed*, 161 Wn.2d 407, 410-11 (2007), the Court was clear

⁷ In fact, even after the requisite signatures were gathered, Wallin was still forced into court to defend the initiative due to his public participation. Such an action is equally chilling.

⁸ The City also relies on *City of Cotati v. Cashman*, 29 Cal.4th 69, 76, 124 Cal.Rptr.2d 519, 52 P.3d 695 (2002). *Cotati* involved a city seeking declaratory relief to settle a controversy about the construction of an ordinance. It had nothing to do with any initiative, petition or proposed legislative process.

that pre-election review of initiatives is the exception and is limited to questions as to scope of the initiative power. All other alleged defects, including constitutional defects, must wait until after the election.

Coppernoll, 155 Wn.2d at 302. In California, however, the scope of pre-election review is much broader.⁹

Moreover, the California Court of Appeals cases cited by the City are not the exclusive word of the California judiciary on whether pre-election review of initiatives are subject to the anti-SLAPP motion. See *City of Santa Monica v. Stewart*, 126 Cal.App.4th 43, 75, 24 Cal.Rptr.3d 72 (2005) (anti-SLAPP motion appropriate because defendant was “sued because it ... sponsored the Initiative and supported its constitutionality”).

Given the conflict between the Court of Appeals decisions in *Stansbury* and *Stewart* and California’s greater leniency in allowing pre-election review of initiatives, *Stansbury* is not persuasive. The purpose of RCW 4.24.525 includes protecting citizens from litigation arising from engaging in protected petitioning activity. Wallin was sued because he submitted petitions. As such, the City’s suit levied against him was

⁹ *Senate v. Jones*, 21 Cal. 4th 1142, 988 P.2d 1089, 90 Cal Rptr. 810 (1999) (single subject rule), *Save Stanislaus Area Farm Economy v Board of Supervisors*, 13 Cal App. 4th 141, 16 Cal. Rptr. 2d 408 (1993) (“trial court has the power to order an initiative removed from the ballot if the court is convinced during preelection review that the matter is **invalid for any reason**”) (emphasis added). The *Stansbury* case implicitly recognizes the broader scope of pre-election review allowed in California. In discussing why the anti-SLAPP motion fails, the California Court of Appeals explains that “the City was simply asking for guidance as to the constitutionality of the proposed initiative.” 155 Cal. App 4th at 1590-91. In Washington, suing for pre-election “guidance” is not allowed

“based on an action involving public participation” as described in RCW 4.25.525(4)(a).

B. The City’s Suit is Not Exempt from the Anti-SLAPP Statute under RCW 4.24.525 (3) as a Prosecutorial Action by the City Attorney to enforce Public Protection Laws.

The City argues that Wallin is not entitled to relief because of an exemption in RCW 4.24.525 (3). City’s Brief, at 37.

This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

RCW 4.24.525 (3).

Initially, it is important to remember in the context of statutory construction, *exemptions* from a statute are to be construed *narrowly*. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301 (2000). Additionally, the Legislature was explicit in the enactment of RCW 4.24.525 that the statute should be “construed liberally.” Laws of Washington, 2010 c 118, § 3. When analyzing this exception under this framework, it is apparent that the exception does not apply in this case.

1. This suit was not to enforce public protection.

Although the City’s action against Wallin was brought by a city attorney, the city attorney was not “acting as a public prosecutor,” nor is the action aimed at “enforce[ing] laws aimed at public protection.” *Id.* The City’s strained argument strongly suggests desperation by the City.

For the exemption to apply in the context of a city, there must be a lawsuit “[1] brought by a city attorney, [2] acting as a public prosecutor, [and 3] to enforce laws aimed at public protection.” RCW 4.24.525 (3) (numbering added). The latter two requirements of the exemption are not met in this case; the exemption fails.

The second requirement, as defined above, requires that the action be filed by the attorney “acting as a public prosecutor.” RCW 42.4.525(3). While it is not entirely clear, this language must mean something other than the fact that the city attorney filed an action on behalf of the city, as exists in the first requirement. *Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88 (2011) (court should avoid interpreting statute in a way that makes language surplusage). However, the City never differentiates between the City attorney acting a litigator for the city and acting as a public prosecutor.

Wallin contends that the term “prosecutor” means prosecuting a violation of the law, even if the remedy is criminal, civil penalties, restitution or injunctive relief. Here, the City’s lawsuit is not prosecuting Wallin for violating a law, but rather an action seeking declaratory relief. There is nothing illegal about proposing and collecting signatures for an initiative, regardless of the legality of the measure. The second requirement of the exemption fails.

The third requirement that the suit must be to “enforce laws aimed at public protection,” fails as well. RCW 4.24.525(3). Only by stretching

the limiting language of “public protection” completely out of any recognizable form can one conclude that a suit seeking to stop people from voting is somehow “public protection.” The City can point to no rational reason that allowing people to vote endangers the public in any way.¹⁰

2. California cases are unpersuasive in that the California statute does not require public protection as an element of the exemption; it is less restrictive than the language in RCW 4.24.525(3).

The City attempts to support its argument by claiming that the “California courts have construed a nearly identical provision in that state’s anti-SLAPP statute to permit a city attorney to initiate legal actions.” City’s Brief, at 37. While some of the language in the California statute might be identical, California omits a significant limiting feature of this exemption. RCW 4.24.525(3) specifically requires that only actions brought by the City attorney, “**aimed at public protection**” are exempt. California’s anti-SLAPP statute does not have this key, narrowing language. Thus, the City’s argument that Washington should look to California law for interpretive help is unpersuasive as this modifying language substantive changes the scope of Washington’s exemption to RCW 4.24.525.

C. RCW 4.24.525 does not Unconstitutionally Amend the UDJA.

In a surprising last ditch effort, the City brashly states that Washington’s anti-SLAPP statute “unlawfully amends the Uniform

¹⁰ It appears far more likely that exemption for prosecutorial actions to protect the public even though they impact public petitioning was intended to apply in circumstances like the WTO riots in 1999.

Declaratory Judgment Act (DJA).” City’s Brief, at 42. This argument fails for the simple reason that it is a completely new argument that was neither raised in the City’s Complaint or any prior briefing. *See, e.g., Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999). The Court should not allow the argument to be made at this late.

If, however, this Court does consider the City’s newly minted argument, it is still unpersuasive for several reasons. First, the City contends that the anti-SLAPP statute, “[a]s interpreted by Wallin” would no longer allow the City “any right to a declaratory judgment as it would have no standing until after an election were held.” City’s Brief, at 42. Wallin does not contend that the enactment of RCW 4.24.525 is what causes the City to lack standing or ripeness to challenge the initiative. The application of *common law* standing requiring these facts does not constitute an amendment of the UDJA by the anti-SLAPP statute.

Next, the City attacks the statutory award and attorney fees provision of RCW 4.25.525 as also being an unconstitutional amendment of the DJA under Article II, Section 37 of the Washington Constitution. City’s Brief, at 43. As this Court noted in *American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570 (2008).

‘Nearly every legislative act of a general nature changes or modifies some existing statute, either directly or by implication,’ but this, alone, does not inexorably violate the purposes of section 37.” *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 640, 71 P.3d 644 (2003) (quoting *Holzman v. City of Spokane*, 91 Wash. 418, 426, 157 P. 1086 (1916)).

If the City's argument were correct that a statute which provides for a provision for attorneys' fees and defines costs is an unconstitutional amendment of the UDJA, few statutes providing for specific fee or cost awards would be safe. *See, e.g.*, The Public Records Act, RCW 42.56.550(4).

The ultimate fact is that Washington's anti-SLAPP statute does not unconstitutionally amend the DJA. The anti-SLAPP statute does not prevent a City from bringing a declaratory judgment action against a pending initiative. It just runs the risk of having its case dismissed if it cannot meet the burden of proof contained within RCW 4.24.525 (4)(b).¹¹

VI.

INITIATIVE NO. 1 IS ENTITLED TO FIRST AMENDMENT, FREE SPEECH PROTECTION THUS REQUIRING THE CITY'S CONTENT-BASED SUIT TO PASS STRICT SCRUTINY

At its fundamental level, the City's suit against Wallin was based on his exercise of free speech. Though the City claims that its suit wasn't trying to limit Wallin's speech, City's Brief, at 49, he was nevertheless sued, hauled into court, and forced to defend the initiative or default on the City's suit.

¹¹ RCW 4.24.525(4)(b) reads 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. 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. If the responding party meets this burden, the court shall deny the motion. (emphasis added).

The City also attempts to distinguish *Coppernoll*, 155 Wn.2d 290 in order to undercut the proposition that “substantive pre-election review may...unduly infringe on free speech values.” *Id.* at 298. First, the City asserts that *Coppernoll* involved a state-wide initiative and not a local initiative. City’s Brief, at 50. While true, the source of law establishing the forum for speech, whether it be state statute or the state constitution, does not make speech any less protected under the First Amendment and related state constitutional protections.¹²

Second, the City states that *Coppernoll* dealt with pre-election review of “substantive” challenges to initiatives, thus implying that First Amendment concerns do not exist if the suit is challenging whether the initiative is within the scope of the initiative power. There is no reason that the impact on speech is any less if the pre-election challenge to the proposed initiative is based on questions as to the scope of the initiative power or to the substantive legality of the measure.

Apart from this attempt to distinguish *Coppernoll*, the City fails to respond to Wallin’s arguments concerning free speech rights. Having received no argument to the contrary, the Court may conclude the following:

1. The initiative process involves the exercise of First Amendment rights to Free Speech.
2. Although not constitutionally required, the initiative process at the local level, once established, constitutes a public forum for the expression of public opinion.

¹² Article I, Section 4 and 5 of the Washington Constitution.

3. The City's pre-election review of Longview Initiative No. 1 is a prior restraint, aimed at prohibiting the expression of public will at the ballot box.
4. Being a prior restraint and content-based, the City's actions must satisfy strict scrutiny.

In summation, 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. 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.

VII.

WALLIN IS ENTITLED TO ATTORNEYS FEES AND THE STATUTORY PENALTY UNDER RCW 4.24.525(6)

RCW 4.24.525(6)(a) provides that the "court shall award to a moving party who prevails, **in part or in whole**, on a special motion to strike. RCW 4.24.525(6)(a) (emphasis added). Wallin prevailed in part on Section 3 of the initiative and prevailed entirely in opposing the City's motion for reconsideration. If the Court agrees that the entire initiative should have been allowed to go on the ballot, Wallin will have prevailed

entirely. Wallin seeks attorney's fees and the statutory penalty for *both* of his motions to strike. *See* CP 166 and 370.¹³

The City's counter to Wallin's second motion is to emphasize that "RCW 4.24.525 authorizes a (one) special motion to strike." City's Brief, at 41. The reference to "a" motion to strike is not as limiting as the City argues, any more than the opportunity to request "an order" compelling discovery in CR 37 only allows one such motion in the entire litigation.

Moreover, the City's argument ignores that the statute specifically refers to recovering fees on *multiple* motions:

- (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;

RCW 4.24.525(6)(a) (emphasis added). The plain language of the statute refutes the City's argument that ant-SLAPP only entitles a party to one, single motion to strike.

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

¹³ Wallin's section motion to strike the City's motion for reconsideration was also appropriate because the City raised an entirely new argument for its assertion that Section 3 was beyond the scope of the initiative power. CP 373. Namely, the City claimed for the first time that RCW 29A.04.330(2) gave the City complete discretion on whether to hold certain elections.

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. 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 27th day of February, 2012.

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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 February 27, 2012, I caused the foregoing document to be served upon the following persons via the following means:

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| Stephen C. Shuman City of Longview 1525 Broadway St. P.O. Box 128 Longview, WA 98632-7080 | <input type="checkbox"/> Hand Delivery /Legal Messenger <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Federal Express Overnight <input checked="" type="checkbox"/> E-Mail: <u>stephen.shuman@ci.longview.wa.us</u> |
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 27th day of February, 2012 at Bellevue, Washington.

s/ Linda Hall
Linda Hall

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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 Reply Brief filed by Richard M. Stephens, attorneys for Appellant, Mike Wallin.

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

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