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**IN THE SUPERIOR COURT OF WASHINGTON
FOR WHATCOM COUNTY**

AMERICAN TRAFFIC SOLUTIONS, INC., a)
Kansas corporation,)
)
Plaintiff,)
)
v.)
)
CITY OF BELLINGHAM, a Washington)
municipal corporation; WHATCOM COUNTY,)
a political subdivision of the State of Washington;)
SHIRLEY FORSLOF, in her official capacity as)
Whatcom County Auditor; WA CAMPAIGN FOR)
LIBERTY, a Washington non-profit corporation;)
TRANSPORTATION SAFETY COALITION, an)
unknown entity; BANCAMS.COM, an unknown)
entity; and VOTERS WANT MORE)
CHOICES, an unknown entity,)
)
Defendants.)
)

Case No. 11-2-01991-4

**DEFENDANT’S OPPOSITION
TO MOTION FOR A
PRELIMINARY INJUNCTION
AND SPECIAL MOTION TO
STRIKE PURSUANT TO
RCW 4.24.525(4)**

INTRODUCTION

City of Bellingham Initiative No. 2011-01 is designed to allow Bellingham voters to have a voice on the decision of whether or not the City will use automatic ticketing cameras.

STEPHEN PIDGEON
ATTORNEY AT LAW, P.S.
3002 COLBY AVENUE, SUITE 306
EVERETT, WASHINGTON 98201
(425)605-4774

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2 Defendant Transportation Safety Coalition (hereafter “Defendant” or “TSC”) and other
3 sponsors of Initiative No. 2011-01 have expended tremendous financial and volunteer
4 resources to earn the voters’ right to be heard on this public policy decision. After the
5 signature process began for the initiative, the City entered into a contract with American
6 Traffic Solutions (hereafter “Plaintiff” or “ATS”) which allowed ATS to bring a lawsuit to
7 enjoin voters from being able to vote on this initiative, but which also expressly allowed the
8 City to terminate the contract based on the results of a voter initiative.

9 The lawsuit brought by ATS fundamentally undermines not only the initiative process,
10 but also undermines the constitutionally protected right and civic value in citizen
11 communication with their elected representatives.

12 A lawsuit to strike an initiative or referendum from a ballot is one of the
13 deadliest weapons in the arsenal of the measure’s political opponents. With
14 increasing frequency, opponents of ballot proposals are finding the weapon
15 irresistible and are suing to stop elections... [I]t is generally improper for
16 courts to adjudicate pre-election challenges to a measure’s substantive
17 validity.

18 James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and*
19 *Referendums*, 64 Notre Dame L. Rev. 298, 298 (1989), a law review cited by the Supreme
20 Court in *Coppernoll v. Reed*, 155 Wn.2d 290, 300 (2005).

21 This lawsuit is an intimidation tactic and a political tactic designed to detract TSC
22 from its advocacy position on the initiative, in order to force the Coalition to expend funds
23 and resources for purposes other than informing the public of the benefits of voting for
Initiative No. 2011-01.

 Having succeeded to place Initiative No. 2011-01 on the ballot, initiative supporters
should not have to defend their position in court against the superior resources of out-of-state

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2 corporate entities in opposition to the ballot measure. This is especially true where, as in the
3 case here, the Plaintiff's claims are premature and completely without merit. Plaintiff's
4 lawsuit is designed to thwart the voting process itself.

5 Lawsuits brought to thwart the political process are the type of abuse that the State
6 Legislature sought to limit in its 2010 enactment of RCW 4.24.525. The Court should enforce
7 this statute and strike plaintiff's current claims in whole without prejudice.

8 **COUNTER-MOTION AND RELIEF REQUESTED**

9 Defendant TSC respectfully asks this Court to strike the Complaint and strike and
10 reject plaintiff's Motion for Temporary Order and Preliminary Injunction, and impose a
11 penalty and attorney's fees as provided in RCW 4.24.525(b)(i) and (ii).

12 Pursuant to RCW 4.24.525(5)(c), "[a]ll discovery and any pending hearings or
13 motions in this action shall be stayed upon the filing of a special motion to strike" under RCW
14 4.24.525(4). Defendant requests that this Special Motion to Strike be heard in conjunction
15 with the pending motion for a preliminary injunction to avoid unnecessary delay.

16 **1. SPECIAL PROCEDURES UNDER RCW 4.24.525**

17 Last year, the State of Washington enacted RCW 4.24.525 in 2010 to protect citizens
18 from "Strategic Lawsuits Against Public Participation," otherwise known as SLAPP suits.
19 The law is to be "construed liberally to effectuate its general purpose of protecting
20 participants in public controversies from an abuse use of the courts." Laws of Washington,
21 2010 c 118, § 3. The statute creates a special procedure for citizens who find themselves as
22 defendants in lawsuits simply because they have chosen to exercise their rights in the context
23 of a public controversy.

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2 A party may bring a special motion to strike any claim that is based on an action
3 involving public participation and petition. RCW 4.24.525(4)(a). Upon the filing of a special
4 motion to strike, all discovery and any pending hearings or motions in the action shall be
5 stayed upon the filing of the special motion to strike. RCW 4.24.525(5)(c). Every party has a
6 right of expedited appeal from a trial court order on the special motion or from a trial court's
7 failure to timely rule on it. RCW 4.24.525(5)(d).

8 RCW 4.24.525(4)(b) establishes a specialized burden of proof for this motion.

9 A moving party bringing a special motion to strike a claim under this
10 subsection has the initial burden of showing by a preponderance of the
11 evidence that the claim is based on an action involving public
12 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.

13 *Id.*

14 The Complaint in this action speaks for itself. ATS seeks a declaration that proposed
15 Bellingham Initiative No. 2011-01 is invalid, and seeks injunctive relief to prevent the
16 inclusion of the initiative on the general election ballot on November 8, 2011. Plaintiff's
17 Complaint, page 4, paragraphs 21 & 22.

18 An initiative is a constitutionally provided for process and a fundamental right
19 reserved unto the people under Washington's Constitution, Article II, Section 1(a) -- . . . "*the*
20 *people reserve to themselves the power to propose bills, laws, and to enact or reject the same*
21 *at the polls, independent of the legislature, and also reserve power, at their own option, to*
22 *approve or reject at the polls any act, item, section, or part of any bill, act, or law . . .*"

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2 The nexus of facts alleged by Plaintiff all involve public participation and the petition
3 to bring the initiative. See generally, Complaint.

4 **STATEMENT OF FACTS**

5 Defendant Transportation Safety Coalition was established and led by Johnny Weaver,
6 a college student who lives and resides in Bellingham. TSC is a co-sponsor of Bellingham
7 Initiative No. 2011-01.

8 On January 24th, 2011 a letter was sent to Bellingham's Mayor and City Council to
9 start the signature drive for Bellingham Initiative No. 2011-01. See Exhibit 1, attached
10 (Weaver's letter to Bellingham's Mayor and City Council).

11 Initiative sponsors were required to collect a certain number of signatures to qualify
12 Bellingham Initiative No. 2011-01 for the ballot. That number was 3,880.

13
14 On Feb 9, 2011, the city assigned a ballot title to Bellingham Initiative No. 2011-01.

15 On Feb 9, 2011, TSC commenced its signature drive for the initiative.

16 On May 6, 2011, the City entered into a contract with ATS, and included within it a
17 provision that “the City may terminate this Contract in the event that state or local legislation,
18 state or *local initiative*, state or local referendum, or a decision by a court of competent
19 jurisdiction prohibits the enforcement of Violations using image-capture technology or *in any*
20 way effects the terms of this agreement ...” [Emphasis added.]

21 On June 20, 2011, the first batch of signatures – 7,000 – were turned in.¹

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23 ¹ <http://www.thenewstribune.com/2011/06/20/1713912/bellingham-anti-camera-initiative.html#ixzz1PsMEvDn3>

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2 On Thursday, June 30th, the County Auditor certified the initiative, confirming that
3 the initiative had enough signatures.² See, Paben, Jared, *Bellingham anti-traffic camera*
4 *initiative qualifies for ballot*, THE BELLINGHAM HERALD, July 01, 2011.³

5 On July 12th, a unanimous vote by the Bellingham City Council allowed the initiative
6 on the ballot. See *Bellingham voters will decide fate of traffic cameras in November*, JARED
7 PABEN - THE BELLINGHAM HERALD, July 12, 2011.⁴

8 Nearly three weeks after the City Council's vote, on Friday, July 29, 2011, ATS filed
9 its lawsuit. On August 3, 2011, ATS sought a Temporary Restraining Order, initially ex
10 parte, but eventually before Judge Steven Mura, who found that ATS "has not demonstrated
11 that it will suffer immediate and irreparable injury" if the Temporary Restraining Order is not
12 granted, and denied the motion. The court then ordered the current show cause hearing
13 scheduled for August 17, 2011.

14 ISSUES

15 1. Has TSC shown by a preponderance of evidence that ATS's claims against them
16 are "based on an action involving public participation and petition," where the City
17 sued him only because he was exercising his First Amendment and state constitutional
rights and admit as much in their pleadings?

18 2. If TSC has met his burden under RCW 4.24.525(4)(b), can ATS avoid the
19 motion to strike by establishing "by clear and convincing evidence a probability of
20 prevailing on the claim."
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22 ² <http://media.bellinghamherald.com/static/images/downloads/JaredPaben/Sufficiencyletter.pdf>

23 ³ <http://www.bellinghamherald.com/2011/07/01/2083719/bellingham-anti-traffic-camera.html#ixzz1QrstjuDj>

⁴ <http://www.bellinghamherald.com/2011/07/12/2098679/bellingham-voters-will-decide.html#ixzz1RvLEsCt0>

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2 3. Can ATS prove “injury in fact” and justiciability in bringing this action after
3 sufficient signatures have been submitted and verified in order to avoid the striking of
4 its complaint and pending motion against TSC?

4 4. Can ATS prove that its pending motion to obtain judgment on its claim is not
5 premature?

6 ARGUMENT

7 **A. TSC easily meets its burden of proving the applicability of RCW 4.24.525,**
8 **thereby shifting the burden to ATS to prove its claims by “clear and convincing**
9 **evidence.”**

9 ATS admits in its own pleadings that it seeks to stop the initiative from reaching the
10 ballot, the placement of which constitutes the exercise of First Amendment rights and rights to
11 petition government under Article I, Sections 4 and 5 of the Washington Constitution.

12 Plaintiff’s complaint, paragraphs 21 and 22. Thus, TSC easily meets its burden of proving by
13 a preponderance of the evidence that the claim is based on an action “involving public
14 participating and petition.” RCW 5.24.525(4).

15 The phrase “public participation and petition” is broadly defined and is to be liberally
16 construed to include the submission of documents to government in connection with any
17 lawful government proceeding and “any ... lawful conduct in furtherance of the exercise of
18 the constitutional right of free speech in connection with an issue of public concern, or in
19 furtherance of the exercise of the constitutional right of petition.” RCW 4.24.525(1) (a)(2).

20 Having met this initial burden of proof, “the burden shifts to the responding party to
21 establish by clear and convincing evidence a probability of prevailing on the claim.” RCW
22 4.24.525(4)(b).

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2 **B. The Court Should Strike the Complaint and Motion for Declaratory and**
3 **Injunctive Relief Because it is not Supportable by Clear and Convincing**
4 **Evidence.**

5 The Court should strike the Complaint and pending motion because ATS cannot
6 support them with clear and convincing evidence. In addition to being authorized by RCW
7 4.24.525, this special motion to strike is necessary to protect the integrity of the
8 constitutionally protected petition gathering and submitting process from governmental
9 invocation of judicial process and the power of the summons to shut them down.

10 The Washington Supreme Court has held that “local initiative and referendum
11 provisions reserve a ‘fundamental right of a governed people to exercise their inherent right
12 and constitutional political power over governmental affairs.’” *1000 Friends of Washington*
13 *v. McFarland*, 159 Wn.2d 165, 193 (2006). “It is the general policy of [Washington courts]
14 to refrain from inquiring into the validity of a proposed law, including an initiative or
15 referendum, before it has been enacted.” *Seattle Building Council v. City of Seattle*, 94
16 Wn.2d 740, 746, 620 P.2d 82 (1980). The rule stems from “desire not to interfere in the
17 electoral process or give advisory opinions.” *Id.*

18 **C. ATS’s Argument that Initiative No. 1 is Invalid Because it is Administrative is**
19 **Unpersuasive.**

20 ATS raises the argument that Initiative No. 2011-01 is administrative, as opposed to
21 legislative, in nature. Complaint, paragraph 32.

22 Discerning whether a proposed initiative is administrative or legislative in
23 nature can be difficult. Justice Brachtenbach suggested that at least for the
case before the court at the time, the appropriate question was “whether the
proposition is one to make new law or declare a new policy, or merely to carry
out and execute law or policy already in existence.” *Ruano*, 81 Wash.2d at
823, 505 P.2d 447 (citing *People v. City of Centralia*, 1 Ill.App.2d 228, 117
N.E.2d 410 (1953)).

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2 *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 10, 239 P.3d 589 (2010).

3 Here, it is quite clear that Initiative No. 2011-01 seeks to make a new City law and thus to
4 declare a new City policy regarding automatic ticketing cameras.

5 Additionally, there are times (as in *Our Water-Our Choice*) when the existing law or
6 policy is at the state or federal level and the municipality is simply implementing it. But that
7 is not the situation here, because the Legislature was quite clear in RCW 46.63.170 that
8 municipalities had the *option* of using automatic ticketing cameras. There is no state policy
9 mandating their usage. Initiative No. 2011-01 does not implement or frustrate state policy,
10 nor does it relate to the implementation of City ordinances. It seeks to establish new law and
11 a new policy in Bellingham. It is not the exercise of administrative functions.

12 On similar facts, counsel for ATS told Justice Debra Stephens of the Washington
13 Supreme Court concerning the Mukilteo lawsuit, that the initiative was legislative. See
14 Declaration of Tim Eyman.

15 The adoption of RCW 4.24.525 protects initiative sponsors from just this type of
16 lawsuit. As a consequence of bringing such a pre-election challenge, ATS must now meet a
17 heightened burden of proof and risk paying the sponsor’s attorneys’ fees and costs, as well as
18 a statutory penalty.

19 ///

20 **1. The Court Lacks Jurisdiction Because ATS Cannot Prove “injury in fact”**
21 **Sufficient to Establish Standing by Clear and Convincing Evidence.**

22 The Court cannot ignore ATS’s complete failure to establish its standing or an “injury
23 in fact” to challenge Initiative No. 2011-01 before the voters have determined whether they

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2 will vote in the affirmative. The Court should strike ATS's Complaint and pending motion on
3 this basis alone.

4 The Complaint for Declaratory Judgment and Injunctive Relief, filed July 29, 2011,
5 seeks declaratory relief under the Uniform Declaratory Judgment Act, chapter 7.24 RCW.
6 Washington courts have "steadfastly adhered to the virtually universal rule that, before the
7 jurisdiction of a court may be invoked under the [UDJA], there must be a justiciable
8 controversy." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 (2001) (quoting
9 *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15 (1973))(emphasis added). The
10 justiciability requirement is a function of subject matter jurisdiction. *See High Tide Seafoods*
11 *v. State*, 106 Wn.2d 695, 701-02 (1986); *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit*
12 *County*, 135 Wn.2d 542, 556-57 (1998). *See also Adams v. City of Walla Walla*, 196 Wash.
13 268, 271 (1938) ("parties cannot stipulate that a justiciable controversy exists so as to clothe
14 this court with jurisdiction, when it does not, in fact, exist under the pleadings.").

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

16 (1) ... an actual, present and existing dispute, or the mature seeds of one, as
17 distinguished from a possible, dormant, hypothetical, speculative, or moot
18 disagreement, (2) between parties having genuine and opposing interests,
19 (3) which involves interests that must be direct and substantial, rather than
20 potential, theoretical, abstract or academic, and (4) a judicial
21 determination of which will be final and conclusive.

22 *Coppernoll v. Reed*, 155 Wn.2d 290, 300 (2005). "Inherent in these four requirements are the
23 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 (emphasis added).

In order for this dispute to be justiciable, ATS must prove "injury in fact" to establish
standing. *American Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 593-94 (2008).

DEFENDANT'S OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION AND SPECIAL
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STEPHEN PIDGEON
ATTORNEY AT LAW, P.S.
3002 COLBY AVENUE, SUITE 306
EVERETT, WASHINGTON 98201
(425)605-4774

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2 In an initiative case, the Supreme Court described this as a “threshold inquiry.” *Coppernoll v.*
3 *Reed*, 155 Wn.2d at 300 (rejecting pre-election challenge to initiative).

4 An entity moving for summary judgment has the “burden of establishing its standing
5 by proving its right to sue as a matter of law.” *MRC Receivables Corp. v. Zion*, 152 Wn. App.
6 625, 629-30 (2009) (reversing where summary judgment pleadings did not prove standing).
7 *See Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 290 (1994) (refusing to consider challenge to
8 initiative without proof of standing and justiciability). This threshold burden cannot be met in
9 a reply brief. *White v. Kent Medical Center*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991) (court
10 will not consider arguments raised for the first time in reply).

11 Rigorously upholding the injury in fact or standing requirement is critically important
12 to the viability of the initiative process. The short timelines and great expense of qualifying
13 an initiative has already made the process out of reach for most citizen-backed efforts.
14 Citizen petitioners should not have to carry the additional burden and expense of hiring
15 lawyers to defend themselves and their initiative simply because elected officials oppose the
16 measure and do not want to see petitions signed by their constituents on their desk.
17 Government bodies should not be able to freely use public resources on such a legal effort to
18 try to starve the initiative proponents of critical campaign resources.

19 Here, ATS claims in its first cause of action “Improper Impairment of Contract,”
20 claiming that Bellingham Initiative No. 2011-01 “will have the effect of limiting the City’s
21 ability to use Safety Cameras under the Contract with ATS.”

22 The contract itself, however, provides that “the City may terminate this Contract in the
23 event that state or local legislation, state or *local initiative*, state or local referendum, or a

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2 decision by a court of competent jurisdiction prohibits the enforcement of Violations using
3 image-capture technology or in any way effects the terms of this agreement.” It is therefore
4 impossible for the initiative to improperly impair the contract. ATS has no cognizable injury.

5 No one knows whether Bellingham's voters will approve or reject Initiative No. 1.
6 Plaintiff's argument is not a valid pre-election legal challenge. The removal of the cameras
7 *would be in compliance with the contract*, not a violation of it. Even if Bellingham were to
8 remove the ticketing cameras because of the initiative's changes to Bellingham Municipal
9 Code, the City would be in full compliance with the contract based on 12.2.

10 Alternatively, if the initiative is approved by voters, then the City may choose to
11 remove the ticketing cameras not because of the legal force of the initiative, but because they
12 decide that the will of the people should be respected. On similar facts, the City of Mukilteo
13 followed this course. ATS sued. Snohomish County Judge Michael Downes denied their
14 motion which included nearly identical arguments to the ones being made here. The Supreme
15 Court upheld Judge Downes' ruling.

16 When the voters in Mukilteo voted, 71% approved the initiative rejecting the cameras.
17 Although the Council did not consider the initiative legally binding, it nonetheless voted
18 unanimously to repeal the ticketing camera ordinance. Plaintiff is without standing.

19 **2. The Claim is Unripe.**

20 As discussed above, the justiciability requirements under the UDJA include ripeness.
21 The claim lacks ripeness as well.

22 [A]ll **questions of subject matter jurisdiction**, except mootness,
23 ...[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...

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3 *Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005) (emphasis added), *overruled on other*
4 *grounds by Levin v. Commerce Energy, Inc.*, 130 S.Ct. 2323, 2329 (2010) (quoting *Kitty Hawk*
5 *Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005)). *See also, Newman-Green, Inc. v.*
6 *Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)(“[J]urisdiction ordinarily depends on the *facts as*
7 *they exist when the complaint is filed*”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n. 4
8 (1992) (explaining that acts occurring after commencement of the suit cannot retroactively create
9 jurisdiction); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (“Standing is examined at ‘the
10 commencement of the litigation’ ”); *Park v. Forest Service of U.S.*, 205 F.3d 1034, 1037 (8th
11 Cir. 2000) (holding that a plaintiff cannot rely on events occurring after commencement of the
12 suit to establish injury-in-fact).

13 Until the voters vote in favor of Initiative 2011-01, Plaintiff’s claim is unripe. It is
14 possible that Bellingham voters may reject Initiative 2011-01, in which case, contract
15 impairment as alleged could not occur. It is possible that Bellingham voters could approve, and
16 yet the City may reject the results of the election and move forward with the cameras,
17 notwithstanding the will of the electorate they were elected to represent. Finally, even if the
18 voters approved and the City terminated the contract, such a result is contractually provided for,
19 and impairment is an impossibility. None of these events have yet occurred, and so the
20 complaint is not ripe.

21 As indicated, a lack of ripeness means that the court lacks subject matter jurisdiction.
22 When a court lacks subject matter jurisdiction, dismissal is the only permissible action the
23 court may take. *Young v. Clark*, 149 Wn.2d 130, 132 (2003). *Accord, Deschenes v. King*
County, 83 Wn.2d 714, 716 (1974). This case should be dismissed.

DEFENDANT’S OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION AND SPECIAL
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STEPHEN PIDGEON
ATTORNEY AT LAW, P.S.
3002 COLBY AVENUE, SUITE 306
EVERETT, WASHINGTON 98201
(425)605-4774

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2 **3. The City’s Motion is Premature under CR 56**

3 The City’s pending motion is essentially a motion for summary judgment on its
4 complaint. *See, e.g., Cle Elum Bowl, Inc. v. North Pacific Ins. Co., Inc.* 96 Wn. App. 698,
5 981 P.2d 872 (1999). However, CR 56(a) is explicit that a plaintiff “**may, after the**
6 **expiration of the period within which the defendant is required to appear**, or after service
7 of a motion for summary judgment by the adverse party, **move** with or without supporting
8 affidavits for a summary judgment in his favor.” Johnny Weaver has never been served. The
9 time in which he is required to appear is twenty days later. ATS has blatantly violated CR 56
10 by moving for a judgment well in advance of the date allowed by CR 56(a). If ATS moved
11 for judgment on the first available day, CR 56 would give TSC 28 days to respond to the
12 City’s motion. The present motion should be denied as a direct violation of the notice
13 requirements of CR 56.

14 **4. The Present Suit in its Present form frustrates constitutionally protected**
15 **activity.**

16 The Washington Supreme Court has repeatedly rejected the concept of the review of
17 the legality of an initiative prior to the election.

18 The fundamental reason is that “the right of initiative is nearly as old as
19 our constitution itself, deeply ingrained in our state's history, and widely revered
20 as a powerful check and balance on the other branches of government.”
21 [*Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005).] Given the
22 preeminence of the initiative right, preelection challenges to the substantive
23 validity of initiatives are particularly disallowed. *Id.* at 297, 119 P.3d 318. Such
review, if engaged in, would involve the court in rendering advisory opinions,
would violate ripeness requirements, would undermine the policy of avoiding
unnecessary constitutional questions, and would constitute unwarranted judicial
meddling with the legislative process. *Id.* at 298, 119 P.3d 318. Thus, preelection
substantive challenges are not justiciable. *Id.* at 300-01, 119 P.3d 318. Further,
substantive preelection review could unduly infringe on the citizens' right to

1
2 freely express their views to their elected representatives. *Id.* at 298, 119 P.3d
3 318.

4 *Futurewise v. Reed*, 161 Wn.2d 407, 410-11, 166 P.3d 708 (2007).

5 [T]he right of initiative is nearly as old as our constitution itself, deeply
6 ingrained in our state's history, and widely revered as a powerful check and
7 balance on the other branches of government. Accordingly, this potent vestige
8 of our progressive era past must be vigilantly protected by our courts.

9 *Coppernoll*, 155 Wn.2d at 296-97 (citing *In re Estate of Thompson*, 103 Wn.2d 292, 294-95, 692
10 P.2d 807 (1984)).

11 Hence, the general rule is that courts do not rule on the validity of an initiative before
12 its adoption. *Maleng v. King County Corrections Guild*, 150 Wn.2d 325, 300, 76 P.3d 727
13 (2003). “This reluctance stems from our desire not to interfere in the electoral process or give
14 advisory opinions.” *Id.* at 330. The presumption is that the power of initiative is allowed and
15 the burden is on the challenger to the initiative to show otherwise. *Id.* at 334.

16 The United States Supreme Court has made clear that the process involved in
17 proposing legislation by means of initiative involves core political speech. *See Meyer v.*
18 *Grant*, 486 U.S. 414 (1988) (overturning state’s prohibition on using paid petition
19 circulators); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999)
20 (overturning various registration requirements for petition circulation). Also, the U.S.
21 Supreme Court has noted that the core value of the Free Speech Clause of the First
22 Amendment is the public interest in having free and unhindered debate on matters of public
23 importance. *See Pickering v. Board of Education*, 391 U.S. 563 (1968).

24 The Washington State Supreme Court echoed these same concerns in *Coppernoll v.*
25 *Reed*, 155 Wn.2d. 290 (pre-election review of an initiative can infringe upon the

1
2 constitutional rights of the people). In *Coppernoll*, opponents of a proposed initiative on tort
3 reform petitioned the Washington State Supreme Court to reverse a trial court order
4 dismissing their action to enjoin the Secretary of State from placing three sections of the
5 initiative on the ballot arguing that those sections were unconstitutional. *Id.* at 3. The
6 Supreme Court held that the proposed initiative did not exceed the scope of the legislative
7 power and ordered the Secretary of State to place the initiative on the general election ballot.
8 *Id.* at 9. In reaching this conclusion, the Court recognized its historical practice of refraining
9 from inquiring into the validity of a proposed initiative before it is enacted. *Id.* at 4. The
10 Court also recognized that First Amendment rights were implicated in pre-election review.

11 Because ballot measures are often used to express popular will and to send a
12 message to elected representatives (regardless of potential subsequent
13 invalidation of the measure), substantive pre-election review may also unduly
14 infringe on free speech values.

15 *Id.* at 5 (emphasis added). In making this argument, the Court noted that after the trial court
16 invalidated Initiative 695 (requiring \$30 vehicle license tabs) at issue in *Amalgamated Transit*
17 *Union*, 142 Wn.2d 183, 11 P.3d 762 (2000), the Legislature quickly responded by passing an
18 almost identical measure that was subsequently signed by the Governor. *Id.* at 4. The point
19 of the example is that by exercising the right to initiative, the people exercised their First
20 Amendment right to petition the government. The people were permitted to since courts do
21 not review the legality of an initiative before the election because of First Amendment rights.

22 Specifically, the First Amendment prohibits the State from silencing speech it
23 disapproves, particularly silencing criticism of government itself. Threats of coerced
silence chill uninhibited political debate and undermine the very purpose of the First
Amendment. *See Riley*, 487 U.S. at 791, 108 S.Ct. 2667; *Brown*, 456 U.S. at 61, 102
S.Ct. 1523; *Meyer*, 486 U.S. at 419-20, 108 S.Ct. 1886.

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2 [The Founders of the nation] believed that freedom to think as you will and
3 speak as you think are means indispensable to the discovery and spread of
4 political truth.... Believing in the power of reason as applied through the public
discussion, they eschewed silence coerced by law-the argument of force in its
worst form.

5 *Whitney v. California*, 274 U.S. 357, 375-76, 47 S.Ct. 641, 71 L.Ed. 1095 (1927)
6 (Brandeis, J., concurring), *overruled on other grounds by Brandenburg v. Ohio*, 395
U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

7 *State ex rel. Public Disclosure Com'n v. 119 Vote No! Committee*, 135 Wn.2d 618, 626, 957
8 P.2d 691 (1998).

9 Although Washington Courts have allowed pre-election review in limited
10 circumstances, they have not addressed the implications of the First Amendment and rights to
11 petition government under Sections 4 and 5 under Article I of the Washington constitution.
12 This Court should not reward the heavy handed approach of ATS to sue in the absence of
13 certainty that this is the time and place to adjudicate these issues.

14 **C. TSC is entitled to an award of Attorneys' fees and the Statutory Penalty.**

15 RCW 4.24.525(6) provides:

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

- 18 (i) Costs of litigation and any reasonable attorneys' fees incurred in
19 connection with each motion on which the moving party prevailed;
20 (ii) An amount of ten thousand dollars, not including the costs of
litigation and attorney fees; and
21 (iii) Such additional relief, including sanctions upon the responding
party and its attorneys or law firms, as the court determines to be
22 necessary to deter repetition of the conduct by others similarly
situated.

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2 TSC seeks no sanctions against attorneys or relief other than dismissal of the suit and the
3 statutorily mandated remedy in subsection (i) and (ii) of costs and attorneys' fees and the
4 statutory penalty of ten thousand dollars. Clearly, the Legislature intended the suits that impact
5 petitioning should be treated seriously by including a mandatory and statutorily defined remedy
6 by using the phrase that "the Court shall award" attorneys' fees, costs and the statutorily defined
7 penalty. See *In re Marriage of Eklund*, 143 Wn.App. 207, 177 P.3d 189 (2008) (mandatory
8 monetary penalty for noncompliance with parenting plan is mandatory); *Spokane Research &*
9 *Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005) (penalties are mandatory
10 for violations of the public records act, although the amount is discretionary); *State v.*
11 *Richardson*, 105 Wn.App. 19, 19 P.3d 431 (2001) (\$500 victim penalty assessment is
12 mandatory).

13 Suits and motions that are brought prematurely negatively impact petitions to local
14 government and should be dismissed without prejudice and the statutory penalties should be
15 applied.

16 CONCLUSION

17 Last year's adoption of RCW 4.24.525 heightens the burden of proof ATS must meet
18 in a lawsuit filed against and initiative sponsor. TSC has met his burden of proving that it was
19 sued for protected activities, thereby shifting the burden of proof to ATS. ATS cannot
20 support its claims by clear and convincing evidence especially because they are clearly
21 unripe. The complaint and pending motion should be stricken and an award of attorneys' fees
22 and costs and statutory penalty awarded as set forth in the proposed order attached hereto as
23 Exhibit 1.

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DATED this 8th day of August, 2011.

STEPHEN PIDGEON, WSBA#25265
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306, Everett, WA 98201
(425)605-4774

DECLARATION OF SERVICE

The undersigned now declares that the foregoing was served on the following parties:

Vanessa Soriano Power
Gloria S. Hong
Stoel Rives LLP
600 University St., Ste. 3600
Seattle, WA 98101
vspower@stoel.com

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

By the means set forth above on August 8, 2011.

STEPHEN PIDGEON, WSBA#25265
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306, Everett, WA 98201
(425)605-4774