UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| JAMES BARNHART, an individual,<br><br>Plaintiff,<br><br>v.<br><br>CITY OF BOTHELL, a Municipal Corporation; Mayor MARK LAMB, in his official and personal capacity; City Attorney JOE BECK, in his official and personal capacity; and Police Chief CAROL CUMMINGS, in her official and personal capacity,<br><br>Defendants. | No. 2:13-cv-00598<br><br>PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION<br><br>NOTE ON MOTION CALENDAR:<br>FRIDAY, APRIL 26, 2013<br><br>ORAL ARGUMENT REQUESTED |

## I. INTRODUCTION

For years, the City of Bothell has authorized its Mayor to "interrupt" speech he does not like during the "Visitor" comment period at City Council meetings. For years, this facially unconstitutional policy has gone untested. Many months ago, however, Plaintiff James Barnhart began peacefully standing in the back of the room at City Council meetings with poster board-sized signs bearing a variety of political, legal, and religious messages, all of which related to issues of public concern and interest.

Then, on January 8, 2013, Mr. Barnhart displayed a sign that criticized the City's investigation into rape allegations against a Bothell Police Officer . The sign also criticized the City's decision not to terminate the Officer's employment. The very next week, when Mr. Barnhart arrived at the City Council meeting, he was handed a written "Public Comment



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705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

Notice" that banned speech and signs that "relate negatively to other individuals, or are otherwise inappropriate (personal, impertinent, slanderous, rude or boisterous)." The Notice also set forth a new policy that barred any sign or placard larger than 8 ½" x 11", the size of a sheet of computer paper. An assistant police chief told him he could not enter the Council Meeting with his sign.

Again on March 5 and March 19, 2013, Defendant Mayor Mark Lamb Mayor and the City Council, assisted by Defendants Chief of Police Carol Cummings, City Attorney Joe Beck, and others, prohibited Mr. Barnhart from holding his placard at City Council Meetings. Various City officials then threatened him with removal, arrest, and prosecution if he persisted to hold up his signs.

On March 19, 2013, the City Council formally amended its Protocol Manual to forbid speech, whether spoken during the "General" meeting time allotted for "non-agenda items" or expressed through signs or placards, which "relate negatively to other individuals, or are otherwise inappropriate (personal, slanderous, or boisterous)." The Council also formally adopted restrictions on sign viewpoint and size, with a warning that persons refusing to remove such signs "may themselves be barred from the meeting." The Council then reinforced the Mayor's power to "interrupt" any speech he found, in his opinion, to be "personally attacking."

The City's speech and sign policies are fatally vague and overbroad, and grant standardless and unbridled discretion to City Officials to eject Bothell citizens like Mr. Barnhart for expressing viewpoints they do not approve of. Plaintiff respectfully moves the Court for a preliminary injunction restraining enforcement of these policies as unconstitutional under the First and Fourteenth Amendments, both facially and as applied to Mr. Barnhart.

## II. FACTUAL BACKGROUND

For a number of years, the City of Bothell has permitted citizen speech at City Council meetings during the "Visitor" portion of the agenda during "General" meetings. Bothell's "City Council Protocol Manual" provided for public comment on non-agenda topics, but empowered the Mayor to "interrupt citizen comments that continue too long, relate negatively to other individuals, or are otherwise inappropriate." Declaration of Joe Shaeffer ("Shaeffer Dec."), Ex. 1.



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705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

Bothell resident James Barnhart regularly attends Bothell City Council meetings. He participates in appropriate free speech activities at those meetings, including but not limited to displaying signs with various political, legal, and religious messages, and verbally commenting during the "Visitor" portion of the General meeting agenda where attendees may speak to non-agenda items. Declaration of James Barnhart ("Barnhart Dec."), ¶ 1.

Mr. Barnhart displays his signs by standing quietly in the back of the Council chambers, holding his signs in front of him. Barnhart Dec., ¶ 2. He does not obstruct anyone's view, does not talk out of turn, does not affix the signs to the walls, does not brandish the signs at anyone, and does not otherwise disrupt the orderly progress of the meetings. *Id.*

On January 8, 2013, Mr. Barnhart displayed a 2' x 3' sign at the General City Council meeting that contained the following message:

> Brady List: Cops that have been caught lying under Oath.
> Former Bo. Cop Frank McCahill is on that list.
> He was also investigated for Rape, carelessly discharging his firearm and violated 16 of 20 Bothell Cop Codes. Three out of four Captains recommended he be terminated but wasn't. (Arnold wasn't available) ☺

Barnhart Dec., ¶ 3 (under lineation in original). Several City officials noticed this sign, and commented to one another while looking at Mr. Barnhart. *Id.*, ¶ 4. Present at the January 8, 2013 meeting were Defendants Mayor Mark Lamb, City Attorney Joe Beck, and Chief of Police Carol Cummings. *Id.*, ¶ 5.

On Sunday, January 13, 2013, Bothell Police Officer John Valentino called Mr. Barnhart at home and left the following message:

> Hello, this message is for James Barnhart. James, John Valentino with the Bothell PD. I have been assigned to look into an incident that happened at the last city council meeting. Um, apparently from what I've got, ah, you were there with a sign that said that McCahill is a rapist. Um, the, what they are saying is that, you know, he's never been convicted of that or anything else, so you shouldn't be having that sign or anything like that that says that he is. So what I would suggest



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Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

> is if you go to the next council meeting, or out and about town or whatever, you do not have that sign visible. Don't be showin' it around or bringin' it to the meetings. Um anyway, so, it's 5:30, uh, Sunday evening. I'm off for two days, be back Wednesday, you wanna give me a call 425-486-1254 and uh we can discuss it then if you want. But I'm just advising you and letting you know that it would probably be better if you don't bring that sign or have it displayed anywhere. OK? Allright. We'll talk to you later. Allright, James. Bye bye.

Barnhart Dec., ¶ 10. A public disclosure request has revealed that Officer Valentino opened an investigation into Mr. Barnhart's speech activities at the behest of Officer McCahill, warned Mr. Barnhart that he might "find himself looking at charges or a civil law suit," and collected other officials' statements about Mr. Barnhart's speech activities on another occasion where he was displaying signs in public areas. Barnhart Dec. ¶ 23, Ex. E.

On January 15, 2013, Mr. Barnhart then attended the next City Council meeting. When he arrived, Assistant Chief of Police Henry Simons handed him a notice entitled "PUBLIC COMMENT NOTICE" setting forth the following restrictions:

> No speech, comments or remarks that continue too long, relate negatively to other individuals, or are otherwise inappropriate (personal, impertinent, slanderous, rude or boisterous) will be allowed in the meeting. These restrictions apply equally to all forms of speech including signs, placards and other forms of written communication. Signs will be allowed in the meeting by the presiding officer so long as they are limited in size to 93.5 square inches (8.5 x 11). In order to avoid disruption and crowding in the meeting, any person bearing a sign or other form of written comment larger than 93.5 square inches will be required to remove such sign from the meeting chambers and may themselves be barred from the meeting if they refuse.

Barnhart Dec., ¶ 6, Ex. B. Assistant Chief Simons then told Mr. Barnhart that he could not bring his signs into the Council meetings. *Id.*, ¶ 7.

As on the previous occasion, Defendants Lamb, Beck, and Cummings were present at the January 15 meeting. *Id.*, ¶ 8. In response to the order prohibiting his signs, Mr. Barnhart told City Attorney Beck that in his view the "Public Comment Notice" was not supported by the City Council Protocol.[1] The City Attorney responded that Mr. Barnhart "was wrong and didn't know what [he] was talking about, as he [Beck] was the 'City Attorney.'" *Id.*, ¶ 9.

[1] Sometime after the January 8, 2013 Council meeting, the City Council and/or other City officials must have met, informally or in a purported "Executive Session," to formulate the ad hoc



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705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

On March 5, 2013, Mr. Barnhart attended the General Meeting of the Bothell City Council with the same sign about Police Officer McCahill. Barnhart Dec., ¶ 11. Again, Bothell prominently displayed its "PUBLIC COMMENT NOTICE" outside the Council Chambers. *Id.* Mr. Barnhart entered and stood in the back of the Chambers, and did not obstruct anyone's view or otherwise disrupt the proceedings. *Id.*

Before the meeting began, City Attorney Joe Beck approached Mr. Barnhart with two police Captains, and told Mr. Barnhart to remove his sign. Barnhart Dec., ¶ 11. Mr. Barnhart asked what would happen if he did not comply. *Id.* Defendant Beck responded that they would not start the Council meeting until Mr. Barnhart removed the sign. *Id.* Under this duress, Mr. Barnhart said he would remove his sign "under protest" and on condition that the officials discussed the matter with him outside the meeting. *Id.* Outside, Defendant Beck told Mr. Barnhart that he was acting on the Mayor's authority, that Council Meetings are not a "public forum," and that holding a sign in chambers was "the same thing as shouting." *Id.*, ¶ 12.

On March 12, 2013, counsel for Mr. Barnhart contacted Mr. Beck and Mayor Lamb by letter in regard to the City's speech restrictions. The letter gave notice that the City's restrictions were unconstitutional, in particular that the City was engaging in impermissible viewpoint discrimination; that the Public Comment Notice as displayed on January 15 and March 5, 2013, was vague and overbroad; and that the limitation on sign size was an unreasonable restriction on citizen speech. *See* Shaeffer Dec., Ex. 4. The City did not respond.

On March 19, 2013, Mr. Barnhart attempted to attend a General Council Meeting, this time with a sign that read: "Power Corrupts–Absolute Power Corrupts Absolutely." Barnhart

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speech and sign policy that ultimately appeared as the "Public Comment Notice." After Mr. Barnhart pointed this out to City Attorney Beck on January 15 (and Mr. Beck rebuffed him), the City Council must have again met to consider incorporating the ad hoc policy into the "City Council Protocol Manual." As discussed below, the Protocol Manual was not formally amended by resolution until March 19, 2013. However, during prior meetings the Council took "actions" in discussing, evaluating, deliberating, and/or informally voting on the proposed changes behind closed doors in violation of Washington's Open Public Meetings Act, RCW 42.30 *et seq.* Plaintiff has alleged these violations in his Complaint. *See* Dkt. 1, ¶¶ 6.21-6.25.



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Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

Dec., ¶ 15, Ex. C. The City had again posted its "PUBLIC COMMENT NOTICE," prominently displayed outside the Council Chambers. *Id.*, ¶ 16.

This time, Chief Cummings approached Mr. Barnhart and stood in his path to prevent him from entering Chambers with his sign. Barnhart Dec., ¶ 17. Chief Cummings asked if Mr. Barnhart intended to take his sign into the meeting, to which he responded that he did. *Id.* Chief Cummings then said something like: "You don't really want to do this. Why would you want to do this? Why would you want to violate a City ordinance?" *Id.* Chief Cummings instructed Mr. Barnhart to wait outside Council Chambers while she sought out Mr. Beck. *Id.*

Soon thereafter, Police Captain Mike Johnson and Police Officer Kerzman approached Mr. Barnhart, threatening that if he entered the Council Chambers with his sign and remained in the room, they would write a police report and forward it to the prosecutor. Barnhart Dec., ¶ 18. Chief Cummings, Joe Beck, and assistant prosecuting attorney Paul Byrne then joined them, and Mr. Beck reiterated that if Mr. Barnhart were to display his sign in Chambers, the police would write a report to be forwarded to the prosecutor. *Id.*, ¶ 19.

Mr. Beck rebuffed Mr. Barnhart when he questioned the constitutionality of the City's speech restrictions, stressing that *he* was the lawyer, knew more about the Constitution, and would not discuss the issue further. Barnhart Dec., ¶ 20. After Mr. Beck, Chief Cummings, and Mr. Byrne returned into Chambers, Captain Johnson reiterated his threat to seek criminal prosecution, asking Mr. Barnhart, "do you really want to take a chance of us writing a report and sending it to Rhonda Gieger [prosecutor]." *Id.*, ¶ 21.

That same day, March 19, the City Council passed a resolution that in large part ratified the policies stated in the "Public Comment Notice," incorporating them into Section 8.09 ("Order of Business") of the "City Council Protocol Manual." This resolution formally adopts the sign policy, albeit with a few differences:

> Addressing the Council – Signs at Meetings – Limits. General public comment is invited and encouraged during the Visitor section of the Agenda only. All other comment is limited to specific items and issues as noted in the Agenda or otherwise allowed by Council with regard to specific items of business. During the



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705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

> Visitor portion of the meeting, the Mayor will invite citizens to speak to Council about topics that are not scheduled for public testimony. Comments on any non-agenda items will not be allowed other than during the Visitor section of the Agenda. No speech, comments, or remarks or behaviors that are disruptive because they continue too long, relate negatively to other individuals, or are otherwise inappropriate (personal, slanderous, or boisterous) will be allowed in the meeting. *These restrictions apply equally to all forms of speech including signs, placards and other forms of written communication.* Signs will be allowed in the meeting by the presiding officer so long as they are limited in size to 93.5 square inches (8.5 x 11) and are not displayed or otherwise employed in a manner that disturbs or threatens others as determined by the presiding officer. Any person bearing a sign or other form of public display type written comment larger than 93.5 square inches will be required to remove such sign from the meeting chambers *and may themselves be barred from the meeting if they become disruptive by refusing to remove such signs.*

Shaeffer Dec., Ex. 3 at 5-6 (emphasis added).

The salient import of this resolution is that the City Council now equates refusal to removal a sign with "disruptive" behavior, even if the sign contains otherwise protected speech and the sign holder is not engaging in any actual disruptive conduct. The amendment also removes "impertinent" and "rude" comments from the ambit of purportedly "inappropriate" speech contained in the Public Comment Notice posted outside the earlier meetings. In addition, the City Council's March 19, 2013 resolution amended Section 8.09 to allow the Mayor to "interrupt citizen comments that continue too long, relate negatively to other persons, *are personally attacking or otherwise disruptive*." Shaeffer Dec., Ex. 3 at 5 (new language in italics).

On April 2, 2013, Mr. Barnhart attended the General Meeting of the Bothell City Council Meeting. Barnhart Dec. ¶ 22, Ex. D. On entry, he was provided a copy of the City Council Agenda for the meeting. *Id.* Under the time slot for "Visitors" comments, the Agenda advised the new Protocol Manual provisions related to Visitor comments. *Id.* The Agenda warned: "The Mayor may interrupt citizen comments that continue too long, relate negatively to other individuals, are personally attacking, or are otherwise disruptive." *Id.*

There is no reason to believe that, absent a court order, the City of Bothell will discontinue its unconstitutional policy.



MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

## III. ARGUMENT AND AUTHORITY

### A. Preliminary Injunction Standard

When asked to grant a preliminary injunction, the Court must consider whether: (1) the plaintiff is likely to succeed on the merits, (2) the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. Fed. R. Civ. P. 65(a); *Winter v. Nat'l Res. Def Council, Inc.*, 555 U.S. 7, 20 (2008); *California Pharmacists Assoc. v. Maxwell-Jolly*, 563 F.3d 847, 849 (9th Cir. 2009).

### B. Plaintiff Is Likely to Succeed on the Merits of His First Amendment Claims.

"The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace." *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012). "The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person." *Id.* at 2550.

The City's policy banning speech that "relate[s] negatively to other individuals" and to restrict the size of signage to an 8 ½" x 11" letter-size are unreasonable and viewpoint-based. The change in policy to restrict size is also in clear retaliation for Mr. Barnhart's messages, in particular those comments expressed on January 8, 2013 that criticized the City's failure to terminate Officer McCahill. Bothell City Council meetings are a limited public forum in which the City must tolerate "negative" comments even if they do relate negatively to other individuals. The City cannot unreasonably eject Mr. Barnhart for carrying the larger, 2' x 3' placards he has quietly held at the back of City Council meetings, *for many months before*, without any record of actual disruption.

#### 1. A City Council Meeting Is a Limited Public Forum and Visitors Cannot Be Subjected to Viewpoint Discrimination.

The Supreme Court recognizes three types of public fora: the traditional public forum, the designated public forum, and the limited public forum. *See Pleasant Grove v. Summum*, 555 U.S. 460, 466-67 (2009).



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705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

> "City Council meetings . . . where the public is afforded the opportunity to address the Council, are the focus of highly important individual and governmental interests. Citizens have an enormous first amendment interest in directing speech about public issues to those who govern their city. It is doubtless partly for this reason that such meetings, once opened, have been regarded as public forums, albeit limited ones."

*White v. Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).

As a limited public forum, a "council can regulate not only the time, place, and manner of speech in a limited public forum, but also the content of speech—*as long as content-based regulations are viewpoint neutral and enforced that way*." *Norse v. Santa Cruz*, 629 F.3d 966 975 (9th Cir. 2010) (en banc) (emphasis added); *see also Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 270–71 (9th Cir.1995) ("limitations on speech at [city council] meetings must be reasonable and viewpoint neutral"). As discussed below, a city's ability to regulate the limited public forum of a city council meeting does not depend on whether the "public comment period" is closed or open. As *Norse* made clear: "What a city council may not do is, in effect, close an open meeting by declaring that the public has no First Amendment right whatsoever once the public comment period has closed." 629 F.3d at 975.

**2. The City's Policy of Excluding Speech Activities That "Relate Negatively To Other Individuals" Is Unconstitutional Viewpoint Discrimination, Facially and As Applied to Mr. Barnhart.**

Even before the key events in this case, Bothell empowered its Mayor to "interrupt" speech he didn't like. Shaeffer Dec., Ex. 1. On January 15, March 5, and March 19, 2013, when Mr. Barnhart attempted to attend the Bothell City Council meeting with his signs, the City prohibited speech, "including signs, placards and other forms of written communication" that "continue too long, relate negatively to other individuals, or are otherwise inappropriate (personal, impertinent, slanderous, rude or boisterous)." Barnhart Dec., Ex. B. On March 19, the City formally adopted a restriction that is substantially the same, except it no longer screens for "impertinent" or "rude" speech. Shaeffer Dec., Ex. 3 at 5.

Bothell's restrictions, before and after the events of this case and the March 19, 2013 resolution, constitute facial viewpoint discrimination that violates the First Amendment. *See*



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Tel 206.622.1604 Fax 206.343.3961

*Norwalk*, 900 F.2d at 1426 ("a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing," even if the city council "may stop him if his speech becomes irrelevant or repetitious"); *see also Alvarez*, 132 S. Ct. at 2551. The City cannot exclude only those remarks or signs that "relate negatively to other individuals." This is so, of course, because this prohibition captures remarks critical of city officials expressed in the public comment period. *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 971 (9th Cir. 2002) ("[W]here the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint.") *Flint v. Dennison*, 488 F.3d 816, 833 (9th Cir. 2007) ("When government has excluded perspectives on a subject matter otherwise permitted by the forum, the government is discriminating on the basis of viewpoint.") (citation and internal quotation marks omitted).

Simply put, the City cannot ban criticism of its officials. *See Leventhal v. Vista Unified School Dist.*, 973 F.Supp. 951, 958 (S.D.Cal.1997) ("Debate over public issues, including the qualifications and performance of public officials (such as a school superintendent), lies at the heart of the First Amendment." (citing U.S. Supreme Court authority)). And, whether or not this policy was previously enforced makes no difference. The existence of such a policy would foreseeably chill criticism by citizens who abide by the rules.

*Leventhal*, a case with remarkably similar facts, illustrates the facial infirmity of Bothell's speech restrictions. There, a school board had authority under its bylaws to "terminate a presenter's address" if the speaker "engages in improper conduct or remarks," which included "a complaint or charge against an employee of the District." 973 F.Supp. at 954-55. When a parent (Leventhal) raised questions about a romantic relationship between the superintendent and a fellow board member and the superintendent's ability to conduct contract negotiations and performance reviews, the board president "interrupted her [because she was] 'moving into a personnel issue,' and, pursuant to the Bylaw, informed her that her criticisms could not be made in a public Board meeting." *Id.* at 954. When Leventhal persisted with her criticisms, the board "threatened to clear the room." *Id.*



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The district court granted a preliminary injunction because these restrictions "were "violative of the core of the First Amendment." 973 F. Supp. at 956. Directly analogous to Bothell's ban on speech that "relate[s] negatively to an individual," *Leventhal* struck down the school board's restriction because:

> The Bylaw effectuates a classic form of viewpoint discrimination. . . . [T]he regulation allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance). This system engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and, ultimately, dynamic political change.

*Id.* at 960 (internal citation and quotation marks omitted); *see also Bach v. School Bd. of Virginia Beach*, 139 F.Supp.2d 738, 741, 743 (E.D.Va. 2001) (invalidating bylaw that allowed school board to silence speakers who made "attacks or accusations regarding the honesty, character, integrity or other like personal attributes of any identified individual or group" because restriction connotes to ordinary persons that they may not criticize officials); *Gault v. Battle Creek*, 73 F.Supp.2d 811, 817-18 (W.D.Mich. 1999) (granting preliminary injunction when citizens were ruled "out of order" because they questioned conduct of police chief at city council meeting).

Here, as in *Leventhal*, *Bach*, and *Gault*, a Bothell citizen would reasonably understand that the City's ban on speech that "relate[s] negatively to other individuals"—either as spoken or communicated by placard—includes criticism of an official's job and myriad potential issues of public concern. Even if the City claimed that the "relate negatively" clause was modified by the string of adjectives that followed "personal, slanderous, or boisterous," (or "impertinent" and "rude" in the version of the restriction articulated in the "Public Comment Notice"), that would still not pass constitutional muster because exclusion of a speaker must hinge on "actual disruption." *Norse*, 629 F.3d at 976. "Boisterous" speech might conceivably subject the speaker to exclusion; but that has nothing to do with his or her expressed viewpoint. The prohibition on "negative" comments is thus superfluous and demonstrates both the viewpoint-based nature of the discriminatory policy and its overbreadth.



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Even under the March 19 amendments, the City still bans "personal" comments that are "negative," terms might be construed by the presiding officer, under his or her unfettered discretion, to be "inappropriate" and thus "disruptive." This policy cannot stand because, whether the presiding officer deems citizen comments to be "personal" or not, remarks like Mr. Barnhart's undoubtedly raise matters of public concern. *See Marez v. Bassett*, 595 F.3d 1068, 1074 (9th Cir. 2010) ("Claims of government corruption, maladministration, or misuse of funds fall squarely within the First Amendment" and were thus "matters of public concern.").

The potential chilling effect is vividly illustrated in Mr. Barnhart's case. On January 15 and March 5, Mr. Barnhart displayed signs that mentioned respectively the City's failure to terminate an officer investigated for rape and what he viewed as the corrupting influence of power, but was deterred from displaying that sign by overbearing City officials. That Bothell Police Officer John Valentino called Mr. Barnhart two days before the January 15 meeting, with an explicit warning not to display the McCahill sign, reinforces Plaintiff's claim that the City was targeting Mr. Barnhart because of his message. *See* Barnhart Dec., ¶ 10 (" So what I would suggest is if you go to the next council meeting, or out and about town or whatever, you do not have that sign visible. Don't be showin' it around or bringin' it to the meetings."). Finally, the threat to charge Mr. Barnhart and refer the case to the City Prosecutor, conveyed by both the City Attorney and Chief of Police, certainly underscores the risk of making "negative" comments at a Bothell City Council meeting.

**3. The City's Change In Policy To Exclude Signs Larger Than 8 ½ " x 11" and That "Relate Negatively To Other Individuals" Is Retaliation In Violation of the First Amendment.**

The change in policy embodied in the "Public Comment Notice" after Mr. Barnhart's January 8 sign display was retaliatory conduct aimed at suppressing Mr. Barnhart's message, as was the wholesale adoption of this unconstitutional policy in the March 19 formal amendments to the Protocol Manual.

A person makes out a successful First Amendment retaliation claim where, as here, "(1) [he] engaged in expressive conduct that addressed a matter of public concern; (2) the government



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officials took an adverse action against [him]; and (3)[his] expressive conduct was a substantial or motivating factor for the adverse action." *Marez*, 595 F.3d at 1074.

> To demonstrate retaliation in violation of the First Amendment, [Plaintiff] must ultimately prove first that [Defendants] took action that would chill or silence a person of ordinary firmness from future First Amendment activities.... The second requirement is [that] ... [Plaintiff] must ultimately prove that [Defendants'] desire to cause the chilling effect was a but-for cause of [Defendants'] action.

*Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900-01 (9th Cir. 2008). "Informal measures, such as 'the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,' can violate the First Amendment also." *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)).

Here, Mr. Barnhart was raising issues of public concern at the meetings he attended. For many months, the City had tolerated his placards that he customarily displayed in 2' x 3' size and from the same static and quiet position at the rear of the city council meeting. But when he displayed the McCahill sign, the City immediately took an adverse action against him when, under the reinforced speech policy and new sign size policy, it threatened to prosecute Mr. Barnhart on March 5 and 19, if he persisted in displaying his placards. And Officer Valentino's threatening phone message on January 13 is strong evidence that the City had Mr. Barnhart and his message in mind when, on January 5, they first blocked him from entering the meeting with his signs. In his own words, Officer Valentino warned Mr. Barnhart that he might "find himself looking at charges or a civil law suit" if he displayed his signs in public. Barnhart Dec. ¶ 23, Ex. E. In short, all the evidence, including the timing of the policy change, suggests that the McCahill sign was the motivating factor in the City changing its policies and enforcing them against Mr. Barnhart.

On all occasions when City officials blocked Mr. Barnhart from attending the council meetings with his larger signs, they pointed only to the "policy" and did not articulate how the larger 2 x 3 size could have amounted to any disruption. *See infra*, Part III.B.6, for argument that size restriction is not reasonable. The City Council's new restrictions were aimed at Mr. Barnhart's particular viewpoint. Indeed, Defendants' viewpoint discrimination has sharpened



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705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

through the show of authority by Chief Cummings and her captains and the threats to have Mr. Barnhart criminally prosecuted if he refused to remove his signs. This intimidation, coupled with the City Attorney's overbearing posture that "he is the lawyer," is plainly aimed at chilling Mr. Barnhart's speech and is thus retaliatory. *Cf. Beck v. City of Upland*, 527 F.3d 853, 869 (9th 2008) ("Beck could make out a case that the confrontation was the culmination of a longer conflict rooted in his First–Amendment–protected contract protest, and that the arrest was in retaliation for Beck's overall role in that conflict").

**4. The City May Not Confine Expressive Activity To The Three-Minute Public Comment Period For Non-Agenda Items.**

The City may not prohibit legitimate expressive activity based on viewpoint, even if that expression occurs outside the City's "three-minute public comment period." The Ninth Circuit in *Norse* made this clear: "What a city council may not do is, in effect, close an open meeting by declaring that the public has no First Amendment right whatsoever once the public comment period has closed." 629 F.3d at 975. There, the Ninth Circuit held the city could not eject a man who gave a Nazi salute at a city council meeting once the public comment period had closed: "[E]ven though . . . Norse's provocative gesture was made after the public comment period closed, Norse still had a First Amendment right to be free from viewpoint discrimination at that time." *Id.* at 976.

The City also may not curtail speech it deems "disruptive" based on nominal "decorum rules" such as Bothell's ban on "inappropriate" speech. *See* Shaeffer Dec., Ex 1 and Ex. 3.[2] *Norse* made this principle equally clear:

> We must respectfully reject the City's attempt to engage us in doublespeak. Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, nunc pro tunc disruption, or

[2] As mentioned, the exception under either set of speech restrictions is that "boisterous" comments could conceivably be halted because such a manner of speaking may usually be disruptive.



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705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

> imaginary disruption. The City cannot define disruption so as to include non-disruption to invoke the aid of *Norwalk*."[3]

*Norse*, 629 F.3d at 976; *see also Osborne v. Burns*, 11cv0080, 2012 WL 930815, *5 (D.Or. Feb. 27, 2012) (unpublished) (concluding that encounters between city official and citizen while council meeting not in session and when citizen had, on "prior occasions, shaken his head or made disapproving facial expressions when others were speaking," insufficient evidence to find actual disruption under *Norse*). *Norse* mandates that the City must permit Mr. Barnhart to display his signs at the back of the City Council meeting, as he has done for years, even if the City Council finds Mr. Barnhart irksome. *See Norse*, 629 F.3d at 979 ("[U]nlike der Führer, government officials in America occasionally must tolerate offensive or irritating speech.") (Kozinski, C.J., concurring) (citing *Cohen v. California*, 403 U.S. 15 (1971); *Duran v. Douglas*, 904 F.2d 1372, 1378 (9th Cir.1990)).

Mr. Barnhart's placards are no different, and indeed far less provocative than the Nazi salute in the Santa Cruz city council meeting. Therefore, Mr. Barnhart's placards cannot reasonably be deemed disruptive. And, the fact that he has displayed signs of this 2' x 3' size for years, without disruption to City business, is further evidence that the signs could not reasonably have caused any disruption on January 8, 2013, or the following two occasions when Mr. Barnhart tried to attend the council meetings with his signs in March.

The City's newly minted policy, per the March 19, 2013 resolution, which defines "disruptive" conduct as "refusing to remove such signs," Shaeffer Dec., Ex. 3 at 6, cannot save the City from its First Amendment quandary. For similar reasons as in *Norse*, this is unconstitutional "doublespeak." Bothell cannot, consistent with the First Amendment, ban signs because of their "negative" viewpoint, and then turn around and characterize a refusal to remove such protected speech as "disruptive."

[3] In *Norwalk*, the Ninth Circuit held "a city's 'Rules of Decorum' are not facially over-broad where they only permit a presiding officer to eject an attendee for actually disturbing or impeding a meeting." *Norse*, 679 F.3d at 676 (citing *Norwalk*, 900 F.2d at 1424–26).



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705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

**5. The City's Speech and Sign Policy Is Void-for-Vagueness and Unconstitutionally Overbroad.**

The City's policies to ban speech and signs that "relate negatively to an individual" is unconstitutionally vague and overbroad. The policies also afford Bothell officials, and particularly the Mayor, unbridled discretion to determine what speech is offensive or "negative" or "otherwise inappropriate," encouraging impermissible viewpoint discrimination as demonstrated above. [4]

"The standard for unconstitutional vagueness is whether the statute 'provide[s] a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Maldonado v. Morales*, 556 F.3d 1037, 1045 (9th Cir. 2009) (quoting *U.S. v. Williams*, 553 U.S. 285, 304 (2008)); *see also Miller v. Cincinnati*, 622 F.3d 524, 539-40 (6th Cir. 2010) (preliminarily enjoining regulation on access to the interior of city hall because officials were subject to no standard in choosing group for admittance); *Nunez v. San Diego*, 114 F.3d 935, 940 (9th Cir. 1997) (ordinance unconstitutionally vague if language lacks sufficient definiteness and does not "establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner"). "A greater degree of specificity and clarity is required when First Amendment rights are at stake." *Gammoh v. La Habra*, 395 F.3d 1114, 1119 (9th Cir. 2005).

"Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish . . . standing to raise an overbreadth challenge." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972); *see also Pest Committee v. Miller*, 626 F.3d 1097, 1110-11 (9th Cir. 2010) (discussing overlap in vagueness and overbreadth doctrines). "Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by

[4] Though Plaintiff's challenge to the City's public comment and sign policies sounds in the First Amendment, the specific claim that the "Public Comment Notice" and the amendments to Section 8.09 of the Protocol Manual are facially unconstitutional on vagueness and overbreadth grounds arises from the Due Process Clause of the Fourteenth Amendment. *See Hunt v. City of Los Angeles*, 638 F.3d 703, 710 (9th Cir. 2011). Thus Plaintiff's contention that the speech restriction is exercised with unbridled discretion goes to the First Amendment claim; and the contention that the policy can be enforced, as it was here, under threat of criminal prosecution, raises a Fourteenth Amendment claim.



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705 Second Avenue, Suite 1500
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Tel 206.622.1604 Fax 206.343.3961

their broad sweep, might result in burdening innocent associations," *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), and "where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights." *Id.* at 613. "An overbreadth challenge is appropriate . . . because there is a credible risk the Ordinance could cause self-censorship and chilling of expression." *Clark v. Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001).

Here, the City Council has vested itself with unbridled discretion under Section 8.09 of the Protocol Manual to eject speakers or sign bearers whose speech "negatively relate[s] to an individual or [is] otherwise inappropriate (personal, slanderous, or boisterous)." Shaeffer Dec., Ex. 3 at 5-6. Under the "Public Comment Notice" invoked to exclude Mr. Barnhart on January 15, March 5, and March 19, 2013, the Bothell City Council granted itself authority to exclude speech it deemed "rude" or "impertinent."

These screening policies are fatally vague, ambiguous, and overbroad. It is impossible to discern what a "personal" or "negative" remark might be so as to qualify for exclusion under Bothell's policies, not to mention a "rude" or "impertinent" comment proscribed under the Public Comment Notice. More dramatically, the prohibited comments that "relate negatively to an individual" would clearly capture persons who seek to criticize anyone on the city council or in the City's employ. *Cf. Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1208-09 (9th 2010) (law that criminalizes a "substantial amount of constitutionally protected speech," along with pornographic material, is unconstitutionally overbroad).

The effect of Bothell's policy will plainly chill speech, especially where, as here, Bothell police and the City Attorney threaten investigations, police reports, and criminal prosecution for refusing to be silent or remove non-disruptive signs. An ordinary citizen has no idea what is prohibited and, conversely, the City's broad standardless policies encourage city officials to engage in discriminatory enforcement. Plaintiff's sign about the McCahill investigation



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705 Second Avenue, Suite 1500
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Tel 206.622.1604 Fax 206.343.3961

highlights this vagueness problem. All the statements on Plaintiff's sign were true.[5] Mr. Barnhart seeks to bring this issue to the City Council's attention. Yet Mr. Barnhart faces the predicament that these comments could be excluded as "personal" or "negative," even though they are also matters of public concern. And, terms such as "inappropriate", "personal", "rude", and "impertinent" also provide no substantive guidance to the City Council about which signs might run afoul of the policy. Again, these descriptors are particularly inadequate and misplaced where the only proper consideration is whether an attendee's speech activity is an "actual disruption." *Norse*, *supra*.

In *Miller*, the Sixth Circuit struck down as unconstitutional a city's standardless regulation on access to the interior of city hall. 622 F.3d at 539-40. The regulation there provided in pertinent part that "'[n]o private signs or advertising materials should be displayed on or in City buildings unless for an approved public purpose authorized by the Department Head,'" and that "'[i]n making any exceptions to the above policies, Department Heads are urged to consider not only what is proper, but also how it appears to the public.'" *Id.* at 529. *Miller* held that the regulation was void for vagueness because council members and department heads had complete discretion to select whom they would sponsor and thus allow access. *Id.* at 540.

*Miller*, *Sammartano*, *Nunez*, and the other authority cited above raise the legitimate fear that city officials will exploit vague and ambiguous language to engage in viewpoint discrimination, as the Bothell officials here did. *See also*, *e.g.*, *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012) (unbridled authority to revoke permits violated the First Amendment in part because "standardless discretion … makes it difficult to detect, and protect the public from, unconstitutional viewpoint discrimination by the licensing official"); *Child Evangelism*

[5] Even if the sign contained untrue and arguably "slanderous" comments, it is questionable whether such comments could be banned. In *United States v. Alvarez*, the Supreme Court recently invalidated the "Stolen Valor Act," which provided for criminal prosecution of persons falsely claiming military honors because it violated the First Amendment. 132 S. Ct. 2537, 2550 (2012) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.").



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*Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir.2006) ("[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints.") (principle adopted in *Kaahumanu*, 682 F.3d at 806); *Desert Outdoor Adver. Inc. v. Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996) (striking down sign regulation in part because "City officials have unbridled discretion in determining whether a particular structure or sign will be harmful to the community's health, welfare, or 'aesthetic quality.' . . . [and] can deny a permit without offering any evidence to support the conclusion that a particular structure or sign is detrimental to the community.").

Plaintiff is likely to succeed on the merits of proving that the policies here are standardless, overbroad, and impermissibly vague, and so cannot withstand constitutional scrutiny.

**6. The Size Restriction On Signs Is Unreasonable.**

To be valid, the City's restriction on sign size and content must meet standards that apply to time, place and manner restrictions. Even where such restrictions are permitted, the government must prove that its chosen restrictions are reasonable: "A time, place, and manner restriction on speech is reasonable if it is (1) content-neutral, (2) narrowly tailored to serve an important governmental interest, and (3) leaves open ample alternatives for communication of information."[7] *Galena v. Leone*, 638 F.3d 186, 199 (3d Cir. 2011) (recognizing application of this standard in context of city council meeting) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791–803 (1983)).

This standard may be different depending on whether the Court finds that the City's speech and sign policy impacts only the course of the city council meeting as a limited public forum, *see Norse*, 629 F.3d at 975, or if it has broader application covering all of City Hall. If the sign policy only applies with respect to the meeting as a limited public forum, the following

[7] As stated above, Plaintiff contends that the policy is not content or viewpoint neutral, as it selected "negative" or "inappropriate" comments for exclusion.



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Tel 206.622.1604 Fax 206.343.3961

standard would likely apply: "In limited public forums, to avoid infringing on First Amendment rights, the governmental regulation of speech only need be viewpoint-neutral and 'reasonable in light of the purpose served by the forum[.]'" *Galena*, 638 F.3d at 198 (alteration in original) (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001); *but see Leventhal*, 973 F.Supp. at 957-58 ("content-based restrictions in a limited public forum (beyond those defining the forum's boundaries) are permissible only if they are narrowly drawn to advance a compelling state interest" ) (citing *Internat'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)). In any event, the City may not "regulat[e] speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

Under either standard, Bothell's restriction on placard size fails. In the "Executive Summary" that accompanied the March 19 resolution to amend the Protocol Manual, there was no mention of the purpose for the amendments that limited sign size and speech content. *See* Shaeffer Dec., Ex. 3 at 1-2. The cover memorandum states only that "at the Council meeting on March 5, 2013, the City Council requested that proposed amendments." The March 19 amendment to the sign policy itself provides: "Signs will be allowed in the meeting by the presiding officer so long as they are limited in size to 93.5 square inches (8.5 x 11) and are not displayed or otherwise employed *in a manner that disturbs or threatens others* as determined by the presiding officer." *Id.* at 6 (emphasis added).

Absent a stated purpose, the timing of the proposed changes—on March 5, coincident with Mr. Barnhart's attendance with signs at that meeting—strongly suggests Mr. Barnhart's display of the McCahill sign spurred the City Council into action. Officer Valentino's investigation into Mr. Barnhart's January 8, 2013 sign display, *see* Barnhart Dec., Ex. E, is further evidence that the McCahill sign was the seminal event behind the policy change. There is thus a strong likelihood that the City was impermissibly motivated by the message. *See Rosenberger*, *supra*.

Yet even if the City argued some unrelated basis prompted the policy change, it is unclear how the new 8 ½" x 11" size limitation could be reasonable or reasonably necessary. Reading



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between the lines of the "Signs in meetings" policy, it appears the City Council is concerned about threats and disruption. Size would then matter if, for instance, signs were so large that they obstructed participants' views, or were placed in a manner so as to block ingress and egress to the meeting Chambers, or were wielded in some way that physically menaced the Council or audience members.

Limiting a sign to letter-size is also not "narrowly tailored" to achieve the City's interest in maintaining a safe and efficient meeting, *i.e.*, free of threats and disruption. Even under a time, place, and manner standard more forgiving to the City, it is unclear how a 2' x 3' placard could reasonably be considered disruptive or threatening. The size restriction is thus unreasonable in light of the purpose of the limited forum and the implicit interests in orderly and safe meetings.

In sum, Plaintiff asserts several First and Fourteenth Amendment claims for injunctive relief, including the aforementioned claims of viewpoint discrimination, retaliation, void-for-vagueness, overbreadth, unbridled discretion, and unreasonable time, place, and manner restriction. There is a strong likelihood of success on the merits of any and all of these claims.

**C. Plaintiff Is Likely To Suffer Irreparable Harm Absent an Injunction.**

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "Constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir.1997).

Mr. Barnhart has long exercised his First Amendment freedoms by expressing his opinions at City Council meetings by speaking and displaying signs quietly at the back of the room. Defendants' continued suppression of his speech will work an irreparable injury on Mr. Barnhart, especially if he must risk criminal prosecution should he decide to raise concerns that the City Council may deem to be "negative" or otherwise inappropriate.



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705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

**D. The Balance of Equities Tips Heavily In Mr. Barnhart's Favor.**

The City's new speech and sign policies, as set forth in the Public Comment Notice and amended Protocol Manual, serve to silence Mr. Barnhart's speech critical of the City, its officers, and or/its employees. Mr. Barnhart has long attended City Council meetings, and spoken and displayed signs, without any record of actual disruption. Thus the City will not suffer disruption of future meetings or any other hardships if Plaintiff is allowed to engage in the same speech acts during the pendency of this case. The balance of hardships thus strongly favors Plaintiff.

**E. An Injunction That Prevents Bothell City Officials From Blocking Comment and Criticism By Its Citizenry Is In the Public Interest.**

"It is always in the public interest to prevent the violation of a party's constitutional rights." *Summartano*, 303 F.3d at 974. Mr. Barnhart's speech activities, aimed at addressing public officials on issues of public concern, lie "at the heart of the First Amendment's protection." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776–77 (1978).

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. . . . [I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion.

*New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (internal quotations and citations omitted).

In this particular case, Mr. Barnhart has stepped forward to challenge the City's muzzling policies so that any Bothell citizen may address "negative" or critical remarks to City officials or employees without fear of criminal prosecution. There is an indisputable public interest in preserving the rights of Bothell residents and other private citizens to engage in this core political activity.

**F. Plaintiff Seeks a Waiver of the Bond Requirement.**

Because Defendants will suffer no conceivable loss or damages from the entry of a preliminary injunction, Plaintiff requests that the Court waive the requirement to post a security



MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

bond during the pendency of the litigation. There is no conceivable potential loss to the City for which a bond would be required.

## IV. CONCLUSION

For the reasons stated above, the Court should grant Plaintiff's Motion and preliminarily enjoin the City of Bothell and its agents from enforcing its restrictions on speech and signage, as set forth in the "Public Comment Notice" and March 19, 2013 amendments to the Bothell City Council Protocol Manual.

DATED this 3rd day of April, 2013.

MacDONALD HOAGUE & BAYLESS

By */s/Joseph Shaeffer*
Joe Shaeffer, WSBA # 33273
josephs@mhb.com

*/s/David Whedbee*
David J. Whedbee, WSBA #35977
DavidW@mhb.com

Attorneys for Plaintiff



MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961