Hon. Beth M. Andrus
ORAL ARGUMENT SET
October 27, 2017 @ 11 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MARK ELSTER and SARAH PYNCHON, Plaintiffs, vs. THE CITY OF SEATTLE, Defendant.	No. 17-2-16501-8 SEA CITY OF SEATTLE'S REPLY IN SUPPORT OF ITS RULE 12(b)(6) MOTION TO DISMISS

All Plaintiffs are required to do is pay a tax. Nothing more. That those tax dollars may be used to advance messages Plaintiffs disagree with is a fact of American life. We all pay taxes, and we all don't agree with how those tax dollars are spent. Paying the tax does not restrict anyone's speech, burden any form of expression, or require anyone to associate (even indirectly) with any message, group or person they disagree with. As *Buckley v. Valeo*, 424 U.S. 1 (1976), made clear: Public financing schemes advance, not hinder, core First Amendment values. No fine parsing of First Amendment tests is necessary. To the extent a "test" is necessary, viewpoint neutrality in the allocation of funds is all that is required to uphold the Democracy Voucher Program. *See, e.g.*, *May v. McNally*, 55 P.3d 768, 772 (Ariz. 2002).

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1. The tax in question does not restrict or burden speech.

The Program does not restrict anyone's speech, nor does it "inhibit robust and wide-open political debate," the cornerstones of what the First Amendment protects against. *Arizona Free Enterprise v. Bennett*, 564 U.S. 721, 754-55 (2011). Plaintiffs' reliance on campaign finance decisions addressing various restrictions on candidates and their supporters are misplaced. All the tax does is fund a scheme that is at peace with *Buckley*. If there was merit to the contention that funding political candidates with public money somehow restricts or compels speech, *Buckley* would have employed some sort of heightened review. Rather, it dismissed a similar challenge "out of hand." *Green Party of Conn. v. Garfield*, 616 F.3d 213, 227 (2d Cir. 2010).

The linchpin of Plaintiffs' argument—that they are compelled to subsidize speech—rests on a fundamental misreading of *Buckley*. From the perspective of the First Amendment, *Buckley* did not consider the distributed funds "to be contributing to the spreading of a political message, but rather [as] advancing an important public interest, the facilitation of 'public discussion and participation in the electoral process, goals vital to a self-governing people.'" *Libertarian Party of Ind. v. Packard*, 741 F.2d 981, 989 (7th Cir. 1984) (quoting *Buckley* at 92-93); *see also Buckley* at 93 n.127.[1] It is for this reason *Buckley* held "that the use of the public's tax dollars to finance qualifying political parties does not implicate taxpayers' first amendment rights." *Libertarian Party* at 990. Public financing of elections itself does not burden speech. After all, "every appropriation made by Congress uses public money in a manner to which some taxpayers object." *Buckley* at 92.

United States v. United Foods, Inc., 533 U.S. 405 (2001), does not assist Plaintiffs. There, the

[1] Public financing of campaigns is not a "gift" or even a "subsidy" because "[s]uch funds never leave the public arena; they never go into the private pockets of the candidate for his own personal purpose. The candidate holds the funds in a fiduciary capacity and can spend only to further the objectives of the ordinance." *City of Seattle v. State*, 100 Wn.2d 232, 240-41, 668 P.2d 1266 (1983).

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Court framed the issue as "whether the government may underwrite and sponsor speech *with a certain viewpoint* using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." 533 U.S. at 410. The same is not true of the Program because just like the scheme in Arizona, it "allocates money," through private choice, "to all qualifying candidates, regardless of party, position, or message." *May*, 55 P.3d at 772 (Ariz. 2002).

2. The Program allocates funds in a viewpoint neutral manner.

While Plaintiffs concede the Program is facially neutral, they argue instead that because the Program disproportionally impacts "dissenting views," the Program somehow morphs into a "viewpoint-based speech regulation." Response at 21.

"This argument stumbles from its first step because a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has the incidental effect on some speakers or messages but not others." *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 695 (2010); *see also Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 650 (7th Cir. 2013) ("That the benefits of [the] subsidy may fall more heavily on groups with one particular viewpoint does not transform a facially neutral statute into a discriminatory one."). This is so because "there is no disparate-impact theory in First Amendment law." *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996); *Pahls v. Thomas*, 718 F.3d 1210, 1235-36 (10th Cir. 2013) ("Beyond doubt, disparate impact is not enough to render a speech restriction content- or viewpoint-based."); *see also iMatter Utah v. Njord*, 980 F. Supp.2d 1356, 1370 (D. Utah 2013); *Van Arnam v. GSA*, 332 F. Supp.2d 376, 399 (D. Mass. 2004).

Under viewpoint neutrality, the First Amendment is concerned with the government's method of allocating funds, not with the viewpoints being subsidized. *May*, 55 P.3d at 430. Acknowledging this, Plaintiffs make an inapt comparison to the referendum process that concerned the Court in *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). The Program,

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however, bears no resemblance to the referendum process.

In *Southworth*, a "student referendum" provided one method of funding and under that process "the student body can vote either to approve or to disapprove an assessment for a particular" student organization. 529 U.S. at 224. In other words, an organization seeking funding was subject to an up or down vote on whether they could receive funds. This was troubling because "the whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. *Access to the public forum*, for instance, does not depend upon *majoritarian consent*." *Id.* at 235 (emphasis added); *see also Southworth v. Bd. or Regents of Univ. of Wis. Sys*., 221 F.3d 1339, at * 3 (7th Cir. 2000) (unpublished order) ("Moreover, by voting—here via a referendum—the students appear to make funding decisions based on the speech of various student groups; their votes for funding will advance certain viewpoints, while their votes against funding will suppress others."); *see also Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 595 (7th Cir. 2002) ("the University cannot use the popularity of the speech as a factor in determining funding.").

Under the Program, no "majoritarian consent" is afoot. The Program is open to all qualifying candidates and no evidence suggests the City allocates funds in a manner that considers the views of the person receiving funds. Plaintiffs' own cases support the City. For example, the Second Circuit rejected the same argument: "[W]e have no concern with differential funding so long as *the allocation decisions* are made without regard to the recipients' viewpoints. [The University] is therefore free to allocate based upon neutral, objective criteria, that *ultimately have a disparate impact* on different viewpoints so long as the university's purpose is not to discriminate based on viewpoint." *Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 105 (2d Cir. 2007) (emphasis added).

The City's purpose in distributing vouchers is not to pick and choose among favored viewpoints; but rather, it is to facilitate public discussion and participation in the electoral process, a

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plainly legitimate governmental objective. By design, the Program does not allow for allocation decisions to be based on the message any speaker seeks to convey, nor does it contain any mechanism remotely similar to the referendum provision at issue in *Southworth*.

Plaintiffs believe that the Program's Achilles' heel is the use of vouchers by private individuals. *See, e.g.*, Response to Amicus at 10. If anything, the First Amendment requires the opposite conclusion. *First*, Plaintiffs cannot predicate a First Amendment claim based the independent actions of non-governmental actors. *See, e.g.*, *McGuire v. Reilly*, 386 F.3d 45, 60 (1st Cir. 2004). The City has no control or say in how individual citizens choose to distribute their vouchers. If, for example, the City mandated that each citizen who received a voucher send that voucher to a candidate, any candidate, this might be a different case.

Second, the Supreme Court has approved of similar "true private choice" programs in another First Amendment context—the Establishment Clause. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (collecting cases). It is significant that, under the Establishment Clause, the Court routinely upholds the indirect flow of tax dollars to religious institutions because it was in that context that Thomas Jefferson famously remarked "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 13 (1947) (quotation omitted). If Plaintiffs are correct, then vouchers given to religious schools violate the Establishment Clause. The Court has said they do not.

3. The Program addresses corruption.

While unnecessary to the disposition of this case, the Program also serves to avoid corruption, and it is beyond peradventure that "[t]he integrity of elections is essential to the very preservation of a free society." *City of Seattle*, 100 Wn.2d at 244. Plaintiffs argue the Program does not address corruption. That is incorrect. The Program allows elected officials in Seattle to remain independent

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of the influence of special interest campaign funding. Put differently, the program plainly addresses the dependence corruption that has infected so many representative systems. As many have demonstrated, the framers of the First Amendment were as focused on institutional corruption as on individual corruption. *See* Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Cambridge, MA: Harvard University Press, Kindle Edition, 2014), Kindle Locations 723-24, 821–22; Lawrence Lessig, *Republic Lost v2* 246-48 (2015); *see also Brief Amicus Curiae of Professor Lawrence Lessig*, 2013 WL 3874388, at **5-21 (July 25, 2013). Developing an improper dependence upon the funders of political campaigns is just one example of such corruption. Public funding is the simplest way for a democracy to avoid dependence corruption. That is precisely what Seattle has tried to do.

And that, perhaps, is exactly why some are so opposed to the Program. Across America, campaigns are increasingly dependent upon large donors. The Program weakens the influence of such donors over Seattle's elected officials. The First Amendment does not mandate aristocracy. Seattle is permitted to avoid its government becoming dependent upon the favor of a few by enacting a viewpoint neutral mechanism for funding local candidates that enhances, not inhibits, First Amendment values. That is precisely what Seattle has done.

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CERTIFICATE OF COMPLIANCE

I certify that this Motion to Dismiss contains 1748 words in compliance with the Local Civil Rules of the King County Superior Court as amended September 1, 2016.

DATED this 20th day of October, 2017.

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CERTIFICATE OF SERVICE

I certify that on the 20th day of October, 2017, I caused a true and correct copy of this document along with the Proposed Order to be served on all counsel of record as noted below:

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