Honorable Beth Andrus
Dept. 35
Hearing with argument Oct. 27, 2017, 11:00 a.m.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

MARK ELSTER and SARAH PYNCHON, Plaintiffs, v. THE CITY OF SEATTLE, a Washington Municipal corporation, Defendant.	Case No. 17-2-16501-8 SEA **RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

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INTRODUCTION AND RELIEF REQUESTED

Seattle's democracy-voucher program forces property owners to pay for other people's campaign contributions. This compelled subsidy of partisan political speech violates a "bedrock principle" of the First Amendment: "[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, __ U.S. __, 134 S. Ct. 2618, 2644, 189 L. Ed. 2d 620 (2014).

The City's motion to dismiss should be denied for two reasons:

1. Plaintiffs have standing because the voucher program injures them directly; and
2. the First Amendment forbids compelled sponsorship of private expression.

The bulk of the City's motion relies on *Buckley v. Valeo*, which upheld the Presidential Election Campaign Fund. 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). As shown below, *Buckley*'s public funding program is fundamentally different from the voucher program. *Id.* at 86. Unlike here, the program in *Buckley* gave taxpayers a choice about contributing to publicly financed campaigns. *Buckley*, moreover, involved an entirely different legal claim. The Supreme Court recently declined to extend *Buckley* beyond its facts and claims, noting: "We are confronted with a different statute and different legal arguments, at a different point in the development of campaign regulation." *McCutcheon v. Fed. Election Comm'n*, __ U.S. __, 134 S. Ct. 1434, 1447, 188 L. Ed. 2d 468 (2014). This Court should likewise reject the City's reliance on *Buckley* and deny the motion to dismiss.

STATEMENT OF FACTS

In 2015, Seattle adopted the democracy-voucher program through Initiative 122. Complaint ¶ 11; *see* SMC § 2.04. Every election year, Seattleites get four $25 vouchers. SMC § 2.04.620(d), (e). Voucher recipients may choose to donate their vouchers to any eligible

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candidate they wish to support. *Id.*

The voucher money comes from a dedicated property levy. I-122 § 2.

This year, five candidates qualified for vouchers. *See* Seattle Ethics and Elections Commission, Program Data.[1] Six hundred thousand dollars in campaign contributions funded by the property levy have gone to two candidates: Jon Grant and Teresa Mosqueda, both running for City Council Position Eight. *Id.* The three other eligible candidates have received in total about $250,000 in voucher contributions. *Id.*

Mark Elster and Sarah Pynchon are Seattle property owners who object to sponsoring other people's political speech. Complaint ¶¶ 3-6. Elster opposes all the candidates receiving the voucher funds that he subsidizes, nor would he support a candidate who chose to rely on the program. *Id.* Pynchon owns Seattle property but is ineligible to receive the vouchers herself because she is not a Seattle resident. *Id.* She does not want to subsidize other people's political speech when she cannot obtain her own vouchers. *Id.*

STATEMENT OF ISSUES

Seattle's democracy-voucher program forces property owners to fund campaign contributions by City residents through a property levy. The First Amendment applies strict scrutiny to compelled subsidies of a private speaker's viewpoint-based or content-based expression.

1. Do property owners subject to the levy have standing to challenge it?

2. Does the democracy-voucher program violate the First Amendment?

EVIDENCE RELIED UPON

Plaintiffs rely on the pleadings and motions to date.

[1] *Available at* http://www.seattle.gov/democracyvoucher/program-data. Timely voucher data kept by the SEEC is judicially noticeable. *See* ER 201(b).

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AUTHORITY AND ARGUMENT

The Plaintiffs have standing. They have properly alleged that the democracy-voucher program injures them by increasing their tax liability and compelling them to sponsor speech they oppose.

The Plaintiffs have also raised a legitimate First Amendment claim. Taxes and fees that fund private expression are subject to the First Amendment's compelled-subsidy doctrine. The voucher program, therefore, must satisfy strict scrutiny as a viewpoint-based and content-based speech regulation. The program fails this demanding standard.

I. The Plaintiffs have standing to bring this action because they are directly injured by the property levy

The Plaintiffs challenge the City's authority to collect a property tax levied against them. They have standing because the levy injures them and a favorable decision would redress that injury.

To have standing, a plaintiff must "allege a personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief." *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). Increased taxes injure taxpayers, and a taxpayer has standing to challenge the tax's collection because "if his argument is right, he must pay more in taxes than is legally allowed." *Lane v. City of Seattle*, 164 Wn.2d 875, 885, 194 P.3d 977 (2008).

Plaintiffs have alleged direct injury because of an increased tax burden under the levy. They further allege a First Amendment injury because the voucher levy burdens their interest in not being compelled to subsidize speech. Complaint ¶¶ 4, 6. The property levy at issue cannot be lawfully collected if Plaintiffs' claim prevails, so they have standing to challenge it.

The City does not dispute whether Plaintiffs have suffered concrete injury. Instead, the City veers into taxpayer standing, arguing that Plaintiffs needed to first seek help from the attorney general. The City confuses taxpayer standing with standing for those directly injured. Under

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certain circumstances, taxpayer standing allows an *uninjured* plaintiff to sue as "a taxpayer interested in making his government follow the law." *Lane,* 164 Wn.2d at 885.

Plaintiffs here are directly injured by the property levy at issue, so they need not petition the attorney general. *Id.* They have standing to sue.

II. The democracy-voucher program violates the First Amendment's prohibition on compelled subsidies of private speech because it forces property owners to pay for other people's campaign contributions

Any First Amendment analysis must address three questions:

1. Does the First Amendment apply?

2. If yes, what standard of scrutiny applies?

3. Does the law satisfy that scrutiny?

See Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 797, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). Each of these questions are addressed in turn.

A. Seattle's democracy-voucher program triggers the First Amendment because it forces property owners to fund private campaign contributions

The democracy-voucher program compels private individuals to pay for the political speech of other private individuals. Contrary to the City's selective and misleading review of caselaw, such a compelled subsidy triggers First Amendment scrutiny. In answering this threshold question, the Court is only determining that First Amendment analysis applies. The actual application of that analysis follows in Sections B and C.

1. *Every court to address the issue has held that the compelled-subsidy analysis applies to taxes that fund private speech, even outside the context of compulsory associations like unions*

Compelled subsidies of private speech are subject to the First Amendment, regardless of whether the subsidies come through union fees, bar fees, or taxation. While many compelled-

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subsidy cases arise in the context of compulsory associations like unions, the Supreme Court has also applied the compelled-subsidy doctrine to taxes used to fund speech disconnected from any association.

The courts have applied the First Amendment's compelled-subsidy doctrine in at least four contexts:

- Union and bar fees. *See, e.g.*, *Harris*, 134 S. Ct. 2618.
- Student activity fees. *See, e.g.*, *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000); *Amidon v. Student Ass'n of the State Univ. of N.Y.*, 508 F.3d 94 (2d Cir. 2007).
- Taxes to fund commercial ads. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001).
- Taxes or fees that fund political campaigns. *See, e.g.*, *May v. McNally*, 203 Ariz. 425, 55 P.3d 768 (2002); *Butterworth v. Republican Party of Florida*, 604 So. 2d 477 (Fla. 1992).

The caselaw in each of these areas demonstrates that the compelled-subsidy analysis applies to taxes that fund private speech.

Compelled dues to a union or similar compulsory association raises First Amendment concerns for both free speech and free association. In most of these cases, non-union members forced to pay union fees object to the advocacy sponsored on their dime. In *Abood v. Detroit Board of Education*, the Supreme Court forged the key principle for many compelled-subsidy cases that have followed: "For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state." 431 U.S. 209, 234-35, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).

Abood, however, upheld the union fees—a holding severely criticized by subsequent caselaw. *Id.*; *see Harris*, 134 S. Ct. at 2632-34. *Abood* drew a line between permissible subsidies for

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collective bargaining and impermissible subsidies for ideological activities. 431 U.S. at 236. Subsequent cases molded this into a specialized test for compelled subsidies in the context of associations. Compulsory associations can fund activities germane to their central functions through mandatory fees. *Keller v. State Bar of California*, 496 U.S. 1, 14, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990). Associations cannot, however, use dissenters' money to fund expressive activities that stray from the non-political goals of the association. *Id.*

Seattle ignores the fact that the compelled-subsidy doctrine is not limited to the context of associations. Indeed, cases striking down taxes on food producers demonstrate that the compelled-subsidy doctrine applies to taxes used to fund private speech with even greater force than in the association context. Seattle does not even mention *United States v. United Foods*, a key example on this point. There, a government agency imposed a per-pound assessment on mushroom producers and importers. *United Foods*, 533 U.S. at 408. That tax funded mushroom ads that several businesses subject to the tax opposed. *Id.*

The Supreme Court struck down the tax. *Id.* at 417. The First Amendment, the Court said, "may prevent the government from compelling individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object." *Id.* at 410. Unlike in the union or bar cases, the mushroom tax did not relate to any compulsory association, so the Court employed a stricter First Amendment scrutiny instead of the more permissive germaneness test. *Id.* at 413-16. In fact, the Supreme Court recently opined that even *United Foods*' less forgiving test might be "too permissive." *Harris*, 134 S. Ct. at 2639.

The student activity fee cases also demonstrate that taxes or fees that compel sponsorship of speech must face First Amendment scrutiny. In *University of Wisconsin v. Southworth*, students challenged an activity fee that funded student groups engaged in expression. *Southworth*, 529 U.S.

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at 217. Such a compelled subsidy burdened students' speech rights: "We conclude the objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support." *Id.* at 229.

The *Southworth* Court rejected the First Amendment challenge in part, but not because the First Amendment did not apply. *Id.* at 236. Rather, the Court confirmed that First Amendment principles constrained the university's use of the fee, requiring that funding be distributed neutrally. *Id.* at 229.

In fact, the Court expressed concern over a funding mechanism by referendum that "appears to permit the exaction of fees in violation of the viewpoint neutrality principle." *Id.* at 221. Because of an undeveloped record, the Court remanded. *Id.* On remand, the district court and the Seventh Circuit held that portions of the funding-by-referendum mechanism unaddressed by the Supreme Court violated the compelled-subsidy doctrine. *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566, 568, 592 (7th Cir. 2002) (*Southworth II*).

The two cases that have addressed compelled subsidies in the context of public campaign financing both held that the First Amendment applied. In *Butterworth v. Republican Party*, the Florida Supreme Court reviewed a campaign financing scheme funded by a tax on the campaign contributions of political parties. 604 So. 2d at 478-79. The court held that the program violated the compelled-subsidy doctrine. *Id.* at 479. Similarly, in *May v. McNally*, the Supreme Court of Arizona applied the compelled-subsidy doctrine to a program that funded campaigns through a surcharge on civil fines. 203 Ariz. at 426-27. The court upheld the program, but not because the First Amendment had no say at all; rather, like *Southworth*, the court held that viewpoint neutrality mitigated First Amendment concerns. *See id.* at 431.

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Indeed, the case for applying the First Amendment to compelled subsidies is strongest in the context of political speech. Speech regarding electoral campaigns enjoys the First Amendment's "fullest and most urgent application." *Eu v. San Francisco Cty. Democratic Ctr. Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989). The First Amendment applied to compelled subsidies in the commercial speech setting—a traditionally less-protected area of First Amendment jurisprudence—where the dispute involved "minor debates about whether a branded mushroom is better than just any mushroom." *United Foods*, 533 U.S. at 411. If individuals are protected from subsidizing ads about mushrooms that they oppose, then they surely enjoy the same protection against subsidizing political speech. Compelled subsidies of speech related to elections are especially pernicious because the "binary nature of elections indeed makes government involvement in campaigning much more salient than government subsidies for other types of programs, even those that involve speech, such as the subsidies to university student groups or the arts." Bradley A. Smith, *Separation of Campaign and State*, 81 Geo. Wash. L. Rev. 2038, 2092-93 (2013).

The Supreme Court's compelled-subsidy precedent applies to the democracy-voucher program. Like the per-pound tax on mushrooms to fund ads, Seattle has imposed a levy on property owners to fund campaign contributions—a well-recognized form of protected speech. *See Buckley*, 424 U.S. at 16-17. Plaintiffs do not wish to support candidates receiving private contributions made with their money. *United Foods* compels a straightforward solution: "First Amendment concerns apply here because of the requirement that [property owners] subsidize speech with which they disagree." *United Foods*, 533 U.S. at 410-11.

The City argues that the First Amendment has no say over whether a person can be taxed to pay for another person's partisan political speech. According to the City, compelled subsidies only

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violate the First Amendment in the context of compulsory membership associations like unions. MTD at 10-11. The City says where the germaneness test does not apply, the First Amendment does not apply, either. *Id.*

This argument directly contradicts Supreme Court caselaw. When the specialized germaneness test is not applicable to a compelled subsidy, then normal First Amendment principles still apply. *Harris*, 134 S. Ct. at 2639. In *United Foods*, the mushroom tax was *more* problematic, not *less*, because the "[m]ushroom producers are not forced to associate as a group which makes cooperative decisions." *United Foods*, 533 U.S. at 413. Subsidies tethered to an association face a more *relaxed* scrutiny: "it is only the overriding associational purpose which allows *any* compelled subsidy for speech in the first place." *Id.* (emphasis added). Thus, when the germaneness test does not apply to a compelled subsidy, the government has leapt from the frying pan into the fire, not the fridge.

The student activity fee cases likewise contradict the City's argument. In fact, the university in *Southworth* made the same argument that the City parrots here, urging the Court to limit *Abood* and its progeny to the context of compulsory associations. *See* Brief for Petitioner at 23; *Southworth*, 529 U.S. 217. The Court rejected this crabbed view of the First Amendment because the students were "required to pay fees which are subsidies for speech which they find objectionable" and therefore "[t]he *Abood* and *Keller* cases [] provide the beginning point for our analysis." *Southworth*, 529 U.S. at 230. Indeed, multiple circuit court cases since *Southworth* have applied the compelled-subsidy doctrine to strike down student activity fees that did not protect student speech in the manner *Southworth* required. *See, e.g.*, *Southworth II*, 307 F.3d 566; *Amidon*, 508 F.3d 94. In short, courts have consistently applied the compelled-subsidy doctrine outside the context of the germaneness test.

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As the City recognizes, the germaneness test does not apply here, just as it did not apply in *Harris* or *United Foods*, where the Court invalidated compelled subsidies. Forcing people to pay for other people's campaign contributions is not a "necessary incident" of the broader enterprise of campaign-finance reform. Indeed, public campaign-funding programs have existed for decades without employing this forced subsidy. The City, however, fails to see that the germaneness test's irrelevance does not insulate the voucher program from First Amendment scrutiny.

2. *The democracy voucher program is subject to First Amendment scrutiny because it compels the funding of private speech rather than government advocacy*

Plaintiffs generally cannot challenge subsidies of government speech. When forced to sponsor private speech, however, a plaintiff will have a valid First Amendment claim. The voucher program is subject to the First Amendment because it mandates that property owners pay for private citizens' speech.

In general, a taxpayer has no First Amendment claim against subsidized government speech. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 560, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005). In determining whether this government-speech exception applies, the key factor is the degree of government control over the message being funded. *Id.* at 561.

Private speech does not become government speech solely because the government has sponsored, approved, or set criteria for the speech. For example, in *Matal v. Tam*, a band challenged the PTO's authority to deny trademark protection to disparaging marks. __ U.S. __, 137 S. Ct. 1744, 1751, 198 L. Ed. 2d 366 (2017). The Court rejected the government's argument that trademarks were government speech: "If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently." *Id.*

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at 1758. First Amendment doctrine distinguishes private expression under the umbrella of state sponsorship from the government speaking in a single, sovereign voice.

Voucher contributions are private speech. While the City prints the vouchers and limits their use, the key act of expression—contributing to a candidate—is a private act. A private money donation is not government speech even though the government designs, prints, and regulates currency; the same is true with vouchers. Voucher recipients are like the trademark applicants in *Matal v. Tam*—they speak in their individual capacity when they assign the voucher to a candidate, even if that speech occurs under the umbrella of state sponsorship. Plaintiffs thus have a valid First Amendment claim.

3. Buckley v. Valeo *does not bar Plaintiffs' First Amendment claim because* Buckley *did not address compelled subsidies*

The City argues that *Buckley v. Valeo* forecloses any First Amendment challenge to the democracy-voucher program, even though *Buckley* upheld a drastically different public-funding scheme. MTD at 7-9. This theory fails for two reasons:

1. The funding scheme in *Buckley* was voluntary; and

2. campaign-finance cases following *Buckley*—none of which the City cites—contradict the City's interpretation.

Buckley upheld the Presidential Election Campaign Fund (PECF) against a challenge under the General Welfare Clause. 424 U.S. at 90. The PECF allowed taxpayers to donate a bit of their tax liability to a fund for presidential candidates. *Id.* at 86. *Buckley*'s approach to the PECF has no bearing on this case.

Unlike the voucher program, *Buckley* is not a case about compelled subsidies. The Supreme Court has warned about wresting judicial opinions from their context: "We must read . . . general language in judicial opinions [] as referring in context to circumstances similar to the

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circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois v. Lidster*, 540 U.S. 419, 424, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004). This is even truer when the actual legal claims differ.

The City also argues that the voucher program does not raise a First Amendment question because the vouchers foster speech, like the PECF in *Buckley*. *Buckley* did say the PECF was in harmony with First Amendment values because the donations helped "to facilitate and enlarge public discussion and participation in the electoral process." *Buckley*, 424 U.S. at 92-93. But neither *Buckley* nor its progeny said that government can—in the name of fostering speech—compel some people to sponsor the personal campaign contributions of those with opposing political views. In fact, *Buckley* warned that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49.

Since *Buckley*, the Supreme Court has clearly held that government cannot burden some individuals' speech rights in order to foster others' speech. In *Arizona Free Enterprise v. Bennett*, the Supreme Court invalidated a law that fostered speech. Arizona's Clean Elections Act granted a windfall of matching dollars to publicly funded candidates, if funding for private candidates exceeded the public funding cap. 564 U.S. 721, 727-28, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011). The Court, however, rejected the notion that fostering speech could forgive a violation of other speakers' rights. *Id.* at 741. While government can seek ways to foster speech—like in *Buckley*—it cannot "do so at the expense of impermissibly burdening" others' First Amendment rights. *Id.*

Indeed, every unconstitutional compelled subsidy struck down by the Supreme Court could be said to foster speech. In each case, compelled speech increased the quantity and variety of speech in the marketplace of ideas. Yet the Court has rejected this flimsy excuse for burdening First

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Amendment rights. In *Miami Herald Publishing Co. v. Tornillo*, for instance, a Florida statute forced newspapers to publish political candidates' replies to published criticism. 418 U.S. 241, 243, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974). Like the City here, Florida argued that the law furthered First Amendment interests by diversifying the marketplace of ideas. *Id.* at 251. While recognizing the value of fostering speech, the Court held that this interest could not be pursued through compulsion. *Id.* at 256. The same is true with vouchers. The City cannot foster private speech on the dime of those who oppose that speech.

The plain language of the First Amendment itself buttresses this conclusion. Its language is framed as a constraint on government power: "Congress shall make no law abridging the freedom of speech." U.S. Const. amend. I. This prohibitory language affirms the common-sense notion that the First Amendment "is a source of negative rights against the government, not a repository of positive entitlement to government favors." *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 319 (6th Cir. 1998) (quoting Lillian R Bevier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 Colum. L. Rev. 1258, 1277 (1994)). Speech's success in the marketplace should depend on persuasion rather than government subsidy, for "the ultimate good desired is better reached by free trade in ideas" and "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919) (Holmes, J., dissenting).

The answer to the first question is clear. The First Amendment applies when government seeks to force someone to pay for another person's political speech.

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B. Strict scrutiny applies to the democracy-voucher program as a viewpoint-based and content-based speech regulation

After determining the First Amendment applies, a court must decide the level of scrutiny. Strict scrutiny applies when a law is either viewpoint-based or content-based. The voucher program is both. Thus, even if the court holds that the voucher program is not viewpoint-based, it still must face strict scrutiny as a content-based speech regulation.

1. *First Amendment tiers of scrutiny apply with equal force to censorship, compelled speech, and compelled subsidies of speech*

Controlling Supreme Court precedent applies the First Amendment with equal vigor to compelled silence, compelled speech, and compelled subsidies of speech. As the Court said in *Harris v. Quinn*, compelled speech and compelled subsidies present equal hazards to First Amendment rights: "'[C]ompelled funding of the speech of other private speakers or groups' presents the same dangers as compelled speech." *Harris*, 134 S. Ct. at 2639 (quoting *Knox v. SEIU*, 567 U.S. 298, 309, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012)). Compelled speech and compelled subsidies therefore face the same degree of scrutiny.

Compelled speech, in turn, receives the same scrutiny as outright censorship. The Supreme Court has long recognized "[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression." *Riley v. Nat'l Fed'n of the Blind of N.C. Inc.*, 487 U.S. 781, 797, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988). Thus, compelled speech, compelled subsidies, and censorship all face the same degree of First Amendment scrutiny.

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2. *The democracy-voucher tax is a viewpoint-based speech regulation because voucher funds are distributed to candidates in a partisan manner*

A regulation is viewpoint-based if it either (1) expressly targets or favors particular viewpoints; or (2) has the practical effect—regardless of intent—of disadvantaging or favoring certain views. The democracy-voucher program falls into the second category; by distributing voucher funds through the majoritarian preferences of Seattle residents, the program disfavors dissenting views. The voucher program must therefore satisfy strict scrutiny.

To be considered viewpoint-based, a speech regulation need not evince an intent to disfavor particular viewpoints. If the unintended outcome undermines particular speakers, then the regulation is viewpoint-based. A law's effect on speech matters as much as its purpose: "Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983); *see also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987) (A First Amendment claimant need not show an "improper censorial motive.").

This holds true in the campaign finance context. The Supreme Court has held that burdens on core political speech must face strict scrutiny, whether the law burdens speech "by design or inadvertence." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). As the Supreme Court said in *Buckley v. Valeo*: "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct." *Buckley*, 424 U.S. at 65.

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A stilted allocation of funds that favors majoritarian views is viewpoint-based. The Supreme Court made this point in *Southworth*. The Court upheld the student activity fee in part, but it remanded a mechanism that allowed funding by student referendum. *Southworth*, 529 U.S. at 235. The Court expressed skepticism over whether the referendum method could satisfy strict scrutiny because it would subject speech subsidies to a majoritarian distribution:

> To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here.

Id.

On remand, The Seventh circuit struck down aspects of the referendum policy. *Southworth II*, 307 F.3d at 595. The Second Circuit likewise invalidated another university fee distributed by advisory referendum: "Viewpoint discrimination arises because the vote reflects an aggregation of the student body's agreement with or valuation of the message [a student organization] wishes to convey." *Amidon*, 508 F.3d at 101-02. Thus, a subsidy is viewpoint-based if the government leaves the distribution of a compelled subsidy up to voter preferences.

The democracy-voucher program is viewpoint-based. The "unintended but inevitable result" of the voucher program disfavors minority viewpoints. *Buckley*, 424 U.S. at 65. Because the actual campaign contributions are determined through voter choice, the allocation of funds will inevitably reflect majoritarian interests. The voucher program effectively determines which candidates receive taxpayer funds through a public referendum—like the funding by referendum disapproved in *Southworth* and invalidated by multiple circuits. Such funding "substitutes majority determinations for viewpoint neutrality." *Southworth*, 529 U.S. at 235.

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Ironically, the City relies on *Southworth* to argue that the voucher program is viewpoint-neutral. But the City makes the wrong comparison: it compares the voucher program to the genuinely neutral funding mechanism in *Southworth*, when in fact the voucher program is more akin to the referendum policy that the Supreme Court expressly disapproved.

3. *The democracy-voucher program is content-based because it only funds campaigns for local elected offices*

In addition to being viewpoint-based, the democracy-voucher program must satisfy strict scrutiny as a *content*-based speech regulation.

As with speech restrictions, even a viewpoint-neutral but content-based speech compulsion will face strict scrutiny. *See Riley*, 487 U.S. at 795-98. A content-based speech regulation is one that regulates speech on a particular subject matter. *See Burson v. Freeman*, 504 U.S. 191, 197, 112 S. Ct 1846, 119 L. Ed. 2d 5 (1992). Regulations of speech relating to an election are content-based. *Id.* For example, in *Clifton v. Federal Election Commission*, the First Circuit addressed a First Amendment challenge to a Federal Election Commission (FEC) regulation that required advocacy groups to give equal space and prominence to all candidates in their voter guides. 114 F.3d 1309, 1311 (1st Cir. 1997). The FEC regulation, by forcing advocacy groups to offer equal promotion to candidates they opposed, had to face strict scrutiny. *See id.* at 1314. That level of scrutiny was the proper standard even though the regulation did not discriminate based on viewpoint; it sufficed that the regulation compelled speech on a particular topic: political candidates. *Id.* A regulation imposed on speech relating to an election—even if the regulation does not discriminate by viewpoint—is content-based and deserves this Court's highest scrutiny.

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The bulk of precedent regarding campaign-finance reform laws confirm the conclusion that regulations of campaign speech are subject to strict scrutiny. Indeed, aside from limits on campaign contributions, every Supreme Court case to address First Amendment burdens in the campaign finance context has applied strict scrutiny, regardless of whether the program was viewpoint-based or not. *See, e.g.*, *Bennett*, 564 U.S. at 734 (applying strict scrutiny to Arizona's public financing scheme); *Citizens United*, 558 U.S. at 340 (applying strict scrutiny to limits on corporate independent expenditures); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 743, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) (applying strict scrutiny to a federal law regulating self-funded candidates). The reason for this is simple: the First Amendment's foremost purpose is to restrain laws that target core political speech. *Citizens United*, 558 U.S. at 340.

Campaign finance regulations of speech have received less than strict scrutiny in only one context: campaign contribution limits. These limits face "closely drawn" scrutiny. *McCutcheon v. Fed. Election Comm'n*, _ U.S. _, 134 S. Ct. 1434, 1445-46, 188 L. Ed. 2d 468 (2014). Even then, however, the law must satisfy "rigorous" review and must not engage in "unnecessary abridgment" of First Amendment rights. *Id.*

The voucher program is a content-based speech regulation. Voucher holders can only use the vouchers to contribute to a local candidate. The compelled subsidy therefore targets particular content. Just like *Clifton*, compelling speech on the subject of political campaigns constitutes a content-based speech regulation. The program therefore violates the First Amendment unless it furthers a compelling interest in a narrowly tailored manner. *Bennett*, 131 S. Ct. at 2817.

C. The democracy-voucher program fails to satisfy strict scrutiny

The voucher program does not further a compelling government interest in preventing corruption—the only interest recognized by the Supreme Court as compelling enough to justify

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regulating campaign-related speech. Even if the program did serve a compelling interest, it fails to do so in a narrowly tailored manner because the voucher distribution disfavors minority viewpoints and the tax burdens a discrete group of individuals.

1. *The voucher program does not serve a compelling interest*

Only one government interest is compelling enough to justify regulating campaign speech: preventing quid pro quo corruption or its appearance. The voucher program does not further that interest.

Buckley first recognized that preventing corruption was a compelling government interest. *Buckley*, 424 U.S. at 26-27. Since then, the Supreme Court has repeatedly refused to recognize any other interest as compelling in the campaign-finance context. *McCutcheon*, 134 S. Ct. at 1450. *Bennett* rejected a government interest in "equalizing speech." *Bennett*, 564 U.S. at 749. *Davis v. Federal Election Commission* rejected an interest in leveling "electoral opportunities for candidates of different personal wealth." *Davis*, 554 U.S. at 741. *Citizens United* rejected an "antidistortion interest" in preventing wealth aggregation from distorting the electoral process. *Citizens United*, 558 U.S. at 348. The Court's refusal to recognize interests beyond anticorruption respects political speech's role as "an essential mechanism of democracy." *Id.* at 312. The courts, moreover, have narrowly defined corruption as quid pro quo, or "direct exchange of an official act for money." *McCutcheon*, 134 S. Ct. at 1441.

When analyzing whether an interest is compelling, courts should not defer to legislative statements of purpose or litigation postures. *See Bennett*, 564 U.S. at 748 (holding that the Clean Elections Act's purpose was not to prevent corruption despite legislative statements to that effect). Rather, courts must assess the practical operation of the law to determine whether it in fact furthers a compelling interest. Judicial engagement is vital when considering the government's purported

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interest, lest strict scrutiny become more usher than guardsman.

The Supreme Court has examined government interests with a skeptical eye in its campaign finance caselaw. In *Arizona Free Enterprise v. Bennett*, the Clean Elections Act's formal findings expressly relied on an anti-corruption interest. *See* Ariz. Code § 16-940. The Court, however, skeptically reviewed the text of the law to determine whether the Act's matching funds program truly embodied that purpose.

The Court held that anticorruption was not the true thrust of the Act because the public funding program still allowed publicly funded candidates to receive private dollars if the public funds ran dry. *Bennett*, 564 U.S. at 749. The Court said that this ability to still seek out private donors demonstrated that "when confronted with a choice between fighting corruption and equalizing speech," the state "chose the latter." *Id.* Thus, *Bennett* makes clear that the ability of a publicly funded candidate to continue to solicit private contributions undermines anticorruption interests.

The voucher program has a more tenuous relationship to a compelling interest in anticorruption than the Clean Elections Act in *Bennett*. As with *Bennett*, the democracy-voucher program allows publicly funded candidates to accept other private contributions. But the Clean Elections Act only allowed publicly funded candidates to accept private contributions if the public money ran out. Even this modest allowance was enough to demonstrate that the Clean Elections Act was really geared toward an improper purpose.

Here, democracy-voucher candidates are entirely free to accept private money, subject only to contribution limits and a spending limit. Thus, the public funding scheme at issue does not remove candidates from the temptations and influence of private donors. As with the Clean Elections Act, the freedom of publicly funded candidates to continue to receive private money and embrace the influence of private donors indicates that the public funding scheme is not about preventing

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corruption or its appearance.

Moreover, the program relieves democracy-voucher candidates of the spending and contribution limits required by the program if privately funded candidates materially outspend them. SMC § 2.04630(f). In both Supreme Court cases that considered the constitutionality of programs in which private expenditures triggered benefits for the publicly funded candidate, the Court held that the programs did not pursue a compelling interest. *See Bennett,* 564 U.S. at 748-50; *Davis*, 554 U.S. at 743. The same is true here.

The operation of the program also has no bearing on preventing corruption. Vouchers only mean more individuals will be contributing money to campaigns. This, however, just creates more opportunity for improper influence, not less. After all, this program *increases* candidate dependency on donors. Voucher holders are just as likely to engage in quid pro quo corruption as any other contributor. While each voucher holder only has $100 in voucher money, groups could still coordinate to promise vouchers to candidates in exchange for favors. This reality only confirms that the voucher program does not further an anticorruption interest.

The Initiative also claims that vouchers are "vital to ensure the people of Seattle have equal opportunity to participate in political campaigns and be heard by candidates." SMC § 2.04.620. This is not a compelling interest recognized by the Supreme Court. Even so, the City, neither in litigation nor legislative findings, has presented any evidence that the vouchers are necessary to bolster Seattleites' ability to participate in politics.

Indeed, research indicates that, even without vouchers, the broader public has become more involved in political campaigns over time, not less: "The role of the small contributor in financing campaigns may border on insignificant, but it has increased, rather than declined, over the years." Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance*

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Reform, 105 Yale L.J. 1049, 1056 (1996).

Moreover, we live in an age when the poor and rich alike have extensive means of communication. Speech is cheaper than ever. *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805 (1995). Everyday people of small means can and do broadcast their political views in a vast array of inexpensive venues, such as: social media sites, blogs, and phone or email messages to representatives. A myopic focus on money fails to contemplate the growing expansion in the volume and quantity of political speech from normal people. The City has not even attempted to demonstrate that these speech venues must be shored up by compelling the few to pay for the speech of the many.

In the context of campaign-speech regulations, the Supreme Court has declined to recognize any compelling interest save anticorruption. The voucher program does not further that interest. Even if giving Seattleites a greater voice in politics could be a compelling interest in some circumstances, the City has failed to show here that the need is pressing enough to justify regulating core political speech.

2. *If the program does pursue a compelling interest in anticorruption, it fails to do so in a narrowly tailored fashion because less oppressive means of achieving that interest exist*

To satisfy strict scrutiny in the context of political speech, a law must employ a "precision of regulation that must be the touchstone in an area so closely touching our most precious freedoms." *Buckley*, 424 U.S. at 41. If less intrusive means exist that would also further the government's interest, then the choice of the more oppressive option will fail to satisfy scrutiny. "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes*, 414 U.S. 51, 59, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973).

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The voucher program is not narrowly tailored in at least two key respects:

1. The voucher program distributes the voucher funds in a manner that unnecessarily disfavors minority viewpoints.

2. The voucher program targets a discrete group of individuals to pay for the vouchers.

Assuming the voucher program in fact does further a compelling interest in preventing corruption or its appearance, it need not do so in a manner that systematically favors majoritarian views. By subjecting the distribution of voucher funds to majority preferences, the voucher program suffers from the same flaws as the referenda in student fee cases like *Southworth* and *Amidon*. *Southworth*, 529 U.S. at 217; *Amidon*, 508 F.3d at 94. It "substitutes majority determinations for viewpoint neutrality." *Southworth*, 529 U.S. at 235. Yet the common alternative of providing neutral sums for all publicly funded candidates would easily bypass this problem.

The City points out that *Buckley* upheld eligibility requirements for public funding that disadvantaged minority candidates. MTD at 7. In *Buckley*, eligibility for public funding required that minority candidates demonstrate a past showing of popular support before they could participate in public funding. *Buckley*, 424 U.S. at 96. Plaintiffs had argued that this disadvantaged minority candidates who could not access the public funds as easily as the major party candidates.

The government in *Buckley*, however, had a legitimate interest in limiting eligibility that does not justify the voucher program's funding method. *Id.* at 96. First, *Buckley* recognized that if any candidate—regardless of their likelihood of success—could access public campaign funds, then the public money would soon run dry. *Id.* Second, requiring a showing of support fostered a broader interest in limiting elections to a select number of strong candidates, which "serves the important public interest against providing artificial incentives to splintered parties and unrestrained factionalism." *Id.* Because of the need to protect the treasury from a free-for-all and

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to protect the integrity of the election process itself, public funding schemes can limit eligibility for public funds based on popular support.

Limited eligibility based on popular support and distribution of funds based on popular support are fundamentally different. Unlike the eligibility requirement in *Buckley*, the voucher program does not serve an interest in protecting the public fisc or restraining factionalism. When the distribution of funds hinges on popular support rather than eligibility, such interests are simply not at stake.

The *Buckley* program did allocate public funds based on a matching formula pegged to the quantity of private contributions received. *Id.* at 89. That fact, however, does not affect the analysis here. After all, all the matching funds came from a voluntary tax checkoff, thus precluding any compelled-subsidy concern. *See supra* Part II.A.3.

The voucher program's distribution is also not narrowly tailored to serve an interest in creating opportunities for Seattleites to participate in politics—assuming that any such interest would be compelling in the first place. Anyone can receive vouchers, regardless of their wealth or relative voice in the community. The vouchers are not limited to those of lesser means who might not otherwise have enough money to make a contribution. This overinclusive reach does not match up to the "precision of regulation" that narrow tailoring requires. *Buckley*, 424 U.S. at 41.

Second, the voucher program is not narrowly tailored because it targets a particular segment of the population to fund the program: property owners. By imposing a speech burden on a discrete group with political and economic interests that are not shared by non-property owners, the program unnecessarily abridges speech rights where other funding alternatives exist.

Singling out discrete groups to pay compelled subsidies of speech undermines narrow tailoring. For instance, in *Butterworth v. Republican Party of Florida*, the Florida Supreme Court struck

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down a mechanism for public campaign funding because it targeted a discrete group to pay for political campaigns. Florida law created a scheme to publicly fund candidates for state offices. *Butterworth*, 604 So. 2d at 478. The funding for the candidates came from a 1.5 percent assessment on all campaign contributions made by political parties. *Id.*

The Court held that the program was not narrowly tailored because "singling out political parties and associations to support the fund bears no relationship to the interest advanced." *Id.* at 480. Instead, the Court noted, the state could have funded the program in a manner less offensive to First Amendment rights by relying on general revenue. *Id.*

Funding vouchers through a property levy deepens the First Amendment injury to property owners. Based on City findings, more than 54 percent of Seattle households are renters. Complaint ¶ 36. Renters and property owners—particularly landlords—often have disparate economic and political interests. *Id.* ¶ 37. For example, the political interests of Seattle's many renters and their landlords often clash before the City council. *Id.* Landlord groups like the Rental Housing Association, for example, actively opposed recent legislation such as the Seattle Renters' Commission, caps on move-in fees, and the first-in-time rule limiting landlord discretion to select tenants. *Id.* Pro-renter groups such as the Tenants Union of Washington State and Washington CAN supported these measures. *Id.*

Seattle imposes the burden of funding renters' political speech—in the form of vouchers—solely on the shoulders of landlords and other property owners. It thus forces landlords to fund the speech of the very interest group that they often oppose before the City council. This is especially burdensome for small-time landlords who reside outside Seattle, like Ms. Pynchon. They are forced to fund the vouchers of an opposing interest group but cannot themselves receive vouchers.

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The current distribution of 2017 voucher funds underscores this reality. City Council candidate Jon Grant—a housing advocate and former head of the Tenants Union of Washington—has tied with Ms. Mosqueda in scooping up the most voucher money. *Id.* ¶ 42. If elected, Mr. Grant promises, among other things, to grant renters collective bargaining rights, a proposal that will affect the political and economic interests of Seattle's landlords. *Id.* ¶ 44. By funding vouchers through a property levy, the City has compelled those most likely to oppose Mr. Grant's landlord-tenant policies to disproportionately fund his campaign more than other campaigns.

The voucher levy, by targeting a discrete group to fund everyone else's campaign contributions, unnecessarily abridges property owners' speech rights.

CONCLUSION

A tax that compels people to pay for other individuals' partisan campaign contributions must satisfy strict scrutiny. The City does not even attempt to satisfy that demanding standard here, nor could it hope to do so. The voucher program does not prevent corruption, nor does it operate in a narrowly tailored manner. The motion to dismiss should be denied.

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CERTIFICATION OF COMPLIANCE

I certify that this document contains 7,616 words and complies with LCR 7.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon counsel for the Defendant by the Court's eService application on October 12, 2017.

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