

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 PLAINTIFFS' CONSOLIDATED RESPONSE TO AMICUS BRIEFS FILED IN SUPPORT OF THE CITY
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INTRODUCTION

Seattle requires property owners to fund other private individuals' campaign contributions. Compelling some people to underwrite other peoples' political speech is a serious First Amendment violation. Like the City, Amici try to brush away First Amendment protections by misinterpreting caselaw and mischaracterizing the Plaintiffs' claim.

Amici and the City both latch onto *Buckley v. Valeo*, despite its far-flung context. 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). Since Plaintiffs discuss *Buckley* at length in their Response to the City, this brief will respond to three of Amici's other points: (1) the voucher program will

1 increase electoral opportunities and expand political participation; (2) the voucher program
2 combats corruption; and (3) Plaintiffs' legal theory would endanger accepted methods of public
3 campaign funding and general taxation.

4 **ARGUMENT**

5 **I. The benefits that Amici predict will flow from** 6 **the voucher program do not constitute compelling** 7 **interests sufficient to override First Amendment liberties**

8 Amici speculate at some length about the virtues of the voucher program. Even if such
9 speculation is valid, Amici fail to tie their predictions to a compelling interest necessary to justify
10 regulating core political speech.

11 The Supreme Court has recognized only one interest as compelling enough to regulate political
12 speech regarding campaigns: "preventing corruption or the appearance of corruption."
13 *McCutcheon v. Fed. Election Comm'n*, ___ U.S. ___, 134 S. Ct. 1434, 1450, 188 L. Ed. 2d 468
14 (2014). Most of the benefits from the voucher program predicted by Amici have nothing to do with
15 preventing corruption or its appearance. For example, Common Cause speculates that the voucher
16 program will enable more people to seek office, encourage voter participation, make candidates
17 more responsive to voter needs, and result in more minority candidates. *See* Common Cause Brief
18 at 12-18. Likewise, Washington CAN predicts an expanding pool of more diverse candidates and
19 contributors. Washington CAN Brief at 4-6. These purported benefits have no relationship to
20 preventing corruption. Indeed, similar interests in equalizing electoral opportunities have been
21 expressly rejected by the Supreme Court: any "ancillary interest in equalizing the relative financial
22 resources of candidates competing for elective office" is "clearly not sufficient to justify the . . .
23 infringement of fundamental First Amendment rights." *Davis v. Fed. Election Comm'n*, 554 U.S.
724, 738, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) (quoting *Buckley*, 424 U.S. at 54).

1 Even so, given the program's track record so far, there is good reason to question Amici's
2 sunny predictions. This year, an openly gay Muslim candidate and political newcomer had
3 tremendous difficulty qualifying for vouchers, finding it a barrier to his candidacy rather than a
4 blessing. Bob Young, *Seattle's democracy vouchers haven't kept big money out of primary*
5 *election*, Seattle Times (July 30, 2017).¹ This reflects an unfortunate and perverse truth about much
6 campaign finance reform: it often favors "those with the lawyers and the technical know-how to
7 comply with and take advantage of the system." See Bradley A. Smith, *Money Talks: Speech,*
8 *Corruption, Equality, and Campaign Finance*, 86 Geo. L.J. 45, 73 (1997). Amici's predictions
9 should be tempered by the sober reality that campaign finance programs can often "intimidate and
10 silence voices, especially political amateurs." *Id.* at 75.

11 The Amici's speculations regarding an uncertain future cannot justify actual burdens on First
12 Amendment rights in the present. Only an anticorruption interest can justify regulating vital
13 political speech because corruption can "directly implicate the integrity of our electoral process."
14 *Randall v. Sorrell*, 548 U.S. 230, 248, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006) (quoting
15 *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)).

16 Amici's speculation brings to mind Justice Brandeis's famous warning about well-intentioned
17 laws: "Experience should teach us to be most on our guard to protect liberty when the
18 government's purposes are beneficent." *Olmstead v. United States*, 277 U.S. 438, 479, 48 S. Ct.
19 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting). This warning rings with even greater truth
20 when government offers to regulate core political speech with the promise of good will.

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23 ¹ Available at <https://www.seattletimes.com/seattle-news/politics/seattles-democracy-vouchers-havent-kept-big-money-out-of-primary-election/>.

II. Amici’s argument that the voucher program combats corruption runs contrary to Supreme Court caselaw and the need to vigorously protect political speech

Amicus Washington CAN argues that vouchers will combat the appearance of corruption. Washington CAN Brief at 7-10. Its argument, however, suffers from two flaws: (1) it does not point to a concrete risk of corruption addressed by vouchers; and (2) it embraces a vast definition of corruption that the Supreme Court has rejected.

Combating the appearance of corruption requires more than speculation in order to justify burdening core political speech. The government must point to a “cognizable risk of corruption” beyond just general impressions. *McCutcheon*, 134 S. Ct. at 1452. “Mere conjecture” will not do. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000); *see McCutcheon*, 134 S. Ct. at 1456 (holding that “speculation” about clever attempts to circumvent campaign finance limits “cannot justify the substantial intrusion on First Amendment rights at issue in this case”).

Washington CAN otherwise relies on conjecture and amorphous perceptions from the electorate. It cites a poll alleging that less than half of Seattleites think corruption is a problem in Seattle. Washington CAN Brief at 7. But such polling data does not demonstrate a cognizable risk of corruption. Washington CAN relies on guesswork, speculating that “dollars being exchanged for political actions is not far-fetched when politicians are highly responsive to a wealthy donor class.” *Id.* at 8. This “mere conjecture” does not demonstrate that the voucher program combats an appearance of corruption. *Nixon*, 528 U.S. at 392.

Beyond conjecture, Washington CAN relies on a broad conception of corruption that the Supreme Court has rejected. Washington CAN cites studies alleging that wealthy donors enjoy more influence and access with candidates than average Americans. Washington CAN Brief at 8.

1 But mere “influence over or access to elected officials” does not “give rise to . . . *quid pro quo*
2 corruption.” *McCutcheon*, 134 S. Ct. at 1451 (internal quotation marks omitted). Nor do unequal
3 aggregations of wealth. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349, 130 S. Ct.
4 876, 175 L. Ed. 753 (2010).

5 Rather, legitimate campaign finance regulations target only *quid pro quo* corruption—“the
6 notion of a direct exchange of an official act for money.” *McCutcheon*, 134 S. Ct. at 1441.
7 Certainly, the line between corruption and influence can be evasive, but the line is nonetheless
8 vital to sheltering basic speech rights. *Id.* at 1451. That line-drawing should err on the side of civil
9 liberties, not government goodwill. *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449,
10 457, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (“In drawing that line, the First Amendment
11 requires us to err on the side of protecting political speech rather than suppressing it.”). Washington
12 CAN points to no evidence of a cognizable risk of corruption that crosses the line from influence
13 and access inevitable in a democratic republic.

14 Even assuming that Amici have successfully demonstrated a cognizable risk of corruption,
15 Amici fail to show how the democracy-voucher program actually deters corruption. Nothing about
16 the voucher program prevents private donors from continuing to give to voucher-eligible
17 candidates in exchange for favors.

18 Candidates who join the voucher program do have to submit to lower contribution limits, but
19 neither the City nor Amici even try to demonstrate that the lower contribution limits deter
20 corruption given the City’s already stringent contribution limits for all local candidates. *See SMC*
21 *§ 2.04.370(B)*. In *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, the Supreme
22 Court struck down a campaign-finance matching funds provision because, among other things,
23 Arizona failed to demonstrate that state contribution limits did not adequately protect against

1 corruption. 564 U.S. 721, 751-52, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011). With tight
2 contribution limits already in place, it was “hard to imagine what marginal corruption deterrence
3 could be generated by the matching funds provision.” *Id.* at 752.

4 Here, the contribution limits imposed on all Seattle candidates stands at \$500 per contributor.
5 SMC § 2.04.370(B). Those who opt in to the voucher program must agree to an even lower \$250
6 limit, though they can be released from that limit later if other candidates outspend them by a large
7 margin. *Id.* § 2.04.630(b), (f).

8 The general limit of \$500, however, is already quite low. Many cities have no contribution
9 limits at all for local elections, but among those that do, \$500 lingers at the low end.² As with
10 *Bennett*, the City and Amici carry the burden to show that the strict contribution limit applied to
11 all candidates—a much more direct route to squashing corruption than vouchers—does not
12 adequately serve the City’s interest in anticorruption. *Bennett*, 564 U.S. at 752; *see Toledo Area*
13 *AFL-CIO Council v. Pizza*, 154 F.3d 307, 318 (6th Cir. 1998). Without meeting that burden, the
14 free speech rights of plaintiffs may not be infringed.

15 Even assuming that the City and Amici can demonstrate (1) that the voucher program is
16 inspired by a cognizable risk of quid pro corruption and (2) that current contribution limits do not
17 adequately address that risk, they must still show that the voucher program is narrowly tailored.

19 ² For example, Sacramento, Washington, D.C., and New York City all have much higher contribution limits than
20 Seattle’s. *See* City of Sacramento, Contribution Limits, [https://www.cityofsacramento.org/Clerk/Elections/5-](https://www.cityofsacramento.org/Clerk/Elections/5-Contribution-Limits)
21 [Contribution-Limits](https://www.cityofsacramento.org/Clerk/Elections/5-Contribution-Limits); DC Office of Campaign Finance, Campaign Finance Guide 2015 13, *available at*
22 https://ocf.dc.gov/sites/default/files/dc/sites/ocf/publication/attachments/DCOCF_CampaignFinanceGuide.pdf; New
23 [York City Campaign Finance Board, Limits & Thresholds, https://www.nycfb.info/candidate-services/limits-](https://www.nycfb.info/candidate-services/limits-thresholds/2017/)
thresholds/2017/. Meanwhile, Austin, Texas, San Francisco, and Los Angeles have limits comparable to Seattle’s. *See*
Austin City Code; art. III, § 8(A)(1); Los Angeles City Charter § 470(c)(6); San Francisco Campaign Finance Reform
Ordinance 1.114(a)(1). Moreover, state-level contribution limits are much higher than Seattle’s, averaging over \$5,619
for gubernatorial candidates and about \$2,500 for legislative candidates. Nat’l Conf. of State Legislatures,
Contribution Limits Overview, [http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-](http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx#individual)
overview.aspx#individual.

1 Plaintiffs' Response to the City explains why the program cannot satisfy that standard. Plaintiffs'
2 Response at 30-33.

3 **III. Plaintiffs' legal theory would not invalidate**
4 **other common types of campaign financing**
5 **or question the legitimacy of traditional taxation**

6 Amicus Common Cause argues that Plaintiffs' legal theory would imperil other campaign
7 financing programs as well as traditional collection and use of revenue. Such fears misconstrue
8 Plaintiffs' basic legal claim.

9 **A. Plaintiffs' legal theory strikes at unique aspects**
10 **of the voucher program and thus would not endanger**
11 **other common methods of campaign financing**

12 The democracy-voucher program is unique among public campaign-financing schemes
13 because it places the destiny and control of public funds in the hands of private citizens. And it
14 draws those funds exclusively from property owners rather than general revenue or a voluntary tax
15 checkoff. These idiosyncratic characteristics of the law form the basis for Plaintiffs' challenge.
16 Such a campaign funding mechanism exists nowhere else in the country. A holding in Plaintiffs'
17 favor, therefore, would not threaten any other public financing scheme.

18 Other public funding programs across the country tend to take two general forms or a mixture
19 thereof. A lump-sum system covers the full cost of a campaign after qualifying contributions, and
20 candidates who opt in otherwise rely only on public funds. *See* The Campaign Finance Institute,
21 *Citizen Funding for Elections* 5-6 (2015). A matching-funds system, on the other hand, imposes
22 low contribution limits and matches donations with public dollars at a specified ratio. *Id.* Neither
23 of these systems face the same degree of constitutional peril as the voucher program.

24 Lump-sum systems are common and simple to distinguish. Unlike the voucher program, a
lump-sum system promises a particular quantity of funding distributed to candidates in an equal

1 and neutral manner. Voucher funds, by contrast, are distributed according to partisan preference.
2 Also unlike the voucher program, lump-sum systems are typically funded through general revenue
3 or a voluntary check-off as opposed to a tax imposed on a discrete group. *See, e.g.*, Montgomery
4 County, MD, Bill No. 16-14 § 19(b) (2014) (revenue for Montgomery County public funding
5 program comes from general appropriations, unspent surplus, and voluntary donations); 26 U.S.C.
6 section 6096(a) (Presidential Election Campaign Fund is funded through a voluntary tax checkoff);
7 Bradley A. Smith, *Separation of Campaign and State*, 81 Geo. Wash. L. Rev. 2038, 2047 (2013)
8 (“Many of the [public-funding] programs rely on voluntary earmarking of tax dollars by
9 taxpayers.”).

10 Several exceptions to these general funding methods deserve mention. For example, funding
11 methods that imposed a tax on discrete groups in Vermont and Florida were struck down. *See*
12 *Vermont Soc’y of Ass’n Execs. v. Milne*, 172 Vt. 375, 779 A.2d 20 (2001) (striking down tax on
13 lobbyists used to fund campaigns); *Butterworth v. Republican Party of Florida*, 604 So. 2d 477
14 (1992) (invalidating tax on political party contributions used to fund campaigns). The Florida case
15 relied expressly on a compelled-subsidy rationale in holding that “singling out” certain groups “to
16 support the [campaign] fund bears no relationship” to a compelling interest. *Butterworth*, 604 So.
17 2d at 480.

18 The Clean Elections Act is another exception, where funding for political candidates comes
19 from a tax checkoff, a lobbyist fee, and a surcharge on civil fines. *See May v. McNally*, 203 Ariz.
20 425, 426, 55 P.3d 768 (2002). The state supreme court rejected a First Amendment challenge to
21 the surcharge. *Id.* Unlike the voucher program, however, individuals subject to civil fines like
22 parking tickets are a fluid mix of people. By contrast, property owners are a more discrete group
23 with less change and turnover across time. A tax on property owners therefore affects a more fixed

1 population of the electorate and distinguishes the surcharge and the many other public financing
2 programs that rely on general appropriations or voluntary checkoffs.

3 Finally, lump-sum programs have a much stronger connection to preventing corruption
4 because publicly funded candidates generally must forgo private donations except for qualifying
5 contributions.

6 Here, by contrast, voucher candidates are free to accept money from private donors subject
7 only to contribution limits and a total spending limit. The voucher program here distributes public
8 funds through contributions made by individuals according to their partisan interests. Such funding
9 is neither neutral nor equal. The voucher program's deterrent effect on corruption, therefore, is far
10 more tenuous than lump-sum programs.

11 Matching-funds programs also have key differences, though they may share some of the flaws
12 of the voucher program.³ Matching funds do result in a disparate amount of public funding to
13 candidates based on contributions, since public funds are pegged to private donations. Unlike the
14 voucher program, though, private donors must put forward some of their own money before public
15 matching funds issue. The voucher program is less narrowly tailored, given that the vouchers are
16 offered to all residents without requiring any contribution of their own. And Plaintiffs know of no
17 matching-funds program that draws its funds from a discrete portion of the electorate, like the
18 voucher program does. If such a program exists, it may indeed raise similar constitutional
19 concerns. In short, however, the common methods of funding campaigns will not be imperiled
20 should Plaintiffs' challenge to the voucher program prevail.

21 ³ Plaintiffs have found no cases upholding matching-funds programs under a compelled-subsidy theory. Amicus
22 Common Cause notes that the Second Circuit "upheld" a matching-funds program, but this is misleading because that
23 case did not deal with a compelled-subsidy claim, nor did the claim even challenge the constitutionality of matching
private donations with public dollars. *See* Common Cause Brief at 11; *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir.
2011).

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Certification of Compliance

I certify that this document contains 2,847 words and complies with LCR 7.

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1 **CERTIFICATE OF SERVICE**

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

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