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Case No: 96660-5

**SUPREME COURT OF THE STATE OF WASHINGTON**

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MARK ELSTER and SARAH PYNCHON,

Plaintiffs/Appellants,

v.

THE CITY OF SEATTLE, a Washington municipal corporation,

Defendant/Respondent.

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**APPELLANTS' ANSWER TO AMICI CURIAE CAMPAIGN  
LEGAL CENTER AND WASHINGTON CAN!**

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## INTRODUCTION

Seattle requires property owners to fund other people's campaign contributions. Conscripting a subset of voters to pay for the partisan political speech of the rest of the community is an affront to free speech.

This brief is a consolidated response to two separate briefs filed by two coalitions of amici: Campaign Legal Center, Common Cause, and the Brennan Center for Justice (Campaign Legal Center), and Washington CAN!, Asian Counseling and Referral Service, Every Voice, Fuse, LGBTQ Allyship, OneAmerica, Washington Democracy Hub, WashPIRG, and Win Win Network (Washington CAN!).

Amici and the City both cling to *Buckley v. Valeo*, despite its far-flung context. 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). Since Appellants discuss *Buckley* at length in their Reply to the City, this brief will respond to four of amici's more unique points: (1) the voucher program will increase electoral opportunities and expand political participation; (2) the voucher program combats corruption; (3) the voucher program furthers First Amendment values; and (4) Appellants' legal theory would endanger accepted methods of public campaign funding.

## ARGUMENT

### I. The Supposed Benefits of the Voucher Program Cited by Amici Do Not Constitute Compelling Interests Sufficient To Override First Amendment Liberties

Amici laud the voucher program as a vehicle for creating more electoral opportunity and expanding political participation. Yet Seattle’s own evidence has demonstrated that the voucher program has failed to achieve these objectives. BERK Consulting, City of Seattle Ethics and Elections Commission, *Seattle Democracy Voucher Program Evaluation* i–ii (2018).<sup>1</sup> Even so, the virtues cited by the amici have been rejected as inadequate rationales for compelling speech.

The Supreme Court has recognized only one interest as compelling enough to regulate political speech regarding campaigns: “preventing corruption or the appearance of corruption.”<sup>2</sup> *McCutcheon v. FEC*, \_\_ U.S. \_\_, 134 S. Ct. 1434, 1450, 188 L. Ed. 2d 468 (2014). Many of the benefits from the voucher program extolled by amici have nothing to do with

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<sup>1</sup> Available at <http://www.seattle.gov/ethics/meetings/2018-05-02/item2.pdf>.

<sup>2</sup> Washington CAN! argues that “promoting democratic self-government is a compelling interest.” Washington CAN! Brief at 15 (citing *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *summarily aff’d*, 565 U.S. 1104 (2012)). But the compelling interest recognized in *Bluman* is not a general interest in democratic self-government. Instead, it’s limited to the government’s interest in restricting foreign citizens from participating in democratic self-government. *Bluman*, 800 F. Supp. 2d at 288 (“[T]he United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government.”); *id.* at 288 n.3 (“Here, the government’s interest is in preventing foreign influence over U.S. elections.”).

preventing corruption or its appearance. For example, Washington CAN! argues that the voucher program enabled more people to seek office and expanded the public debate. *See* Washington CAN! Brief at 6, 10. Likewise, Campaign Legal Center argues that the voucher program expanded the pool of diverse candidates and contributors. Campaign Legal Center Brief at 1320. These purported benefits have no relationship to preventing corruption.

Indeed, similar interests in equalizing electoral opportunities have been expressly rejected by the Supreme Court: any “ancillary interest in equalizing the relative financial resources of candidates competing for elective office” is “clearly not sufficient to justify . . . the infringement of fundamental First Amendment rights.” *Davis v. FEC*, 554 U.S. 724, 738, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) (quoting *Buckley*, 424 U.S. at 54). The Court reaffirmed this stance in 2014: “No matter how desirable it may seem, it is not an acceptable governmental objective to ‘level the playing field,’ or to ‘level electoral opportunities,’ or to ‘equaliz[e] the financial resources of candidates.’” *McCutcheon*, 134 S. Ct. at 1450. Just as government can’t censor a dissenting view on the theory that most people find it offensive, the government also can’t compel speech just because other members of society might benefit.

Additionally, there is good reason to question amici's praise for vouchers given the program's poor track record so far. *See* BERK, *supra* at i–ii. Most of the City Council candidates in the 2017 election who pledged to use vouchers failed to qualify. *Id.* at 13. Candidates with plenty of volunteers and paid canvassers had a natural advantage in qualifying early and gathering voucher contributions early in the election cycle. *Id.* at 14. Political amateurs, on the other hand, floundered. For example, an openly gay Muslim candidate and political newcomer had tremendous difficulty qualifying for vouchers, finding it a barrier to his candidacy rather than a blessing. Bob Young, *Seattle's democracy vouchers haven't kept big money out of primary election*, *Seattle Times* (July 30, 2017, 8:00 AM).<sup>3</sup> This reflects an unfortunate and perverse truth about much campaign finance reform: it often favors “those with the lawyers and the technical know-how to comply with and take advantage of the system.” *See* Bradley A. Smith, *Money Talks*, 86 *Geo. L.J.* 45, 73 (1997). Amici's adulation should be tempered by the less-than-sunny reality that campaign finance programs can often “intimidate and silence voices, especially political amateurs.” *Id.* at 75.

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<sup>3</sup> Available at <https://www.seattletimes.com/seattle-news/politics/seattles-democracy-vouchers-havent-kept-big-money-out-of-primary-election/>.

Amici’s prediction that the voucher program would expand political participation likewise fell flat. In the 2017 election cycle, only 4 percent of voucher recipients actually used them. *See* Jennifer Heerwig, Brian J. McCabe, *Expanding Participation in Municipal Elections: Assessing the Impact of Seattle’s Democracy Voucher Program*, Center for Studies in Demography and Ecology, University of Washington 1 (2018).<sup>4</sup> Of that measly fraction, the vast majority of voucher users were older, whiter, wealthier, and more politically engaged than the general population. *Id.* at 2. Hence, the groups already likely to engage with the political system were those most benefited by the voucher program. Political participation did not expand.

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

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<sup>4</sup> Available at [https://www.jenheerwig.com/uploads/1/3/2/1/13210230/mccabe\\_heerwig\\_seattle\\_voucher\\_4.03.pdf](https://www.jenheerwig.com/uploads/1/3/2/1/13210230/mccabe_heerwig_seattle_voucher_4.03.pdf).

## **II. Amici’s Argument That the Voucher Program Combats Corruption Runs Contrary to Supreme Court Caselaw and the Need To Vigorously Protect Political Speech**

Amici also argue that the voucher program combats corruption or the appearance of corruption. Their arguments, however, suffer from two flaws: (1) they embrace a vast definition of corruption that the Supreme Court has rejected; and (2) they fail to point to a concrete risk of corruption addressed by vouchers.

Legitimate campaign finance regulations target only *quid pro quo* corruption—“the notion of a direct exchange of an official act for money.” *McCutcheon*, 134 S. Ct. at 1441. Certainly, the line between corruption and influence can be evasive, but the line is nonetheless vital to sheltering basic speech rights. *Id.* at 1451. That line-drawing should err on the side of civil liberties, not government good will. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (“In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”). Amici’s claims about corruption rely on evidence of unequal influence, which the Supreme Court has unequivocally rejected as a form of corruption that governments can address through speech regulation.

Washington CAN! argues that wealthy donors have more influence and access with candidates than average Americans. Washington CAN!

Brief at 2–5. But mere “influence over or access to elected officials” does not “give rise to . . . *quid pro quo* corruption.” *McCutcheon*, 134 S. Ct. at 1451 (internal quotation marks omitted). Nor do unequal aggregations of wealth. *Citizens United v. FEC*, 558 U.S. 310, 349, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

To the extent that amici do present any argument about actual *quid pro quo* corruption, the meager evidence they marshal is too speculative. Supreme Court caselaw requires more than guesswork 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”).

Amici lean on conjecture and amorphous perceptions from the electorate. Washington CAN!, for instance, cites a poll alleging that most Seattleites believe that the wealthy have a stronger voice than others, a speculative point that addresses only influence, not corruption. Washington CAN! Brief at 2. Washington CAN! turns to national surveys as well, failing to cite any specific instances of corruption that would rise above conjecture.

*Id.* at 3. Even if this national data were concrete, courts have traditionally looked at evidence of corruption in the local polity, not far-flung national statistics. *See, e.g., Nixon*, 528 U.S. at 393–94 (surveying concrete evidence of corruption in Missouri politics); *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 386 (5th Cir. 2018) (Contribution limits “must be justified with some evidentiary showing that the state or locality enacting a contribution limit faces a problem of either actual corruption or its appearance.”); *Lair v. Motl*, 873 F.3d 1170, 1172 (9th Cir. 2017) (assessing state-level contribution limits by surveying evidence of corruption “in Montana politics”). Amici’s “mere conjecture” does not demonstrate that the voucher program combats an appearance of corruption. *Nixon*, 528 U.S. at 392.

Even assuming that amici have successfully demonstrated a cognizable risk of corruption, amici fail to show how the democracy voucher program actually deters corruption. Nothing about the voucher program prevents private donors from continuing to give to voucher-eligible candidates in exchange for favors. Campaign Legal Center extols public financing because a publicly financed candidate “is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign.” Campaign Legal Center Brief at 8 (quoting *Republican Nat’l Comm. v. FEC*, 487 F. Supp. 280, 284 (S.D.N.Y. 1980)). But the

voucher program does not liberate candidates from donor influence. The public dollars they receive via vouchers come from donors to whom candidates may feel accountable, and voucher candidates can still solicit traditional private contributions in addition to the public funds.

Candidates who join the voucher program do have to submit to lower contribution limits, but neither the City nor amici even try to demonstrate that the lower contribution limits are necessary given the City's already stringent contribution limits for all local candidates. *See* SMC § 2.04.370(B). In *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, the Supreme Court struck down a campaign-finance matching funds provision because Arizona failed to demonstrate that state contribution limits did not adequately protect against corruption. 564 U.S. 721, 751–52, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011). With tight contribution limits already in place, it was “hard to imagine what marginal corruption deterrence could be generated by the matching funds provision.” *Id.* at 752. Here, the contribution limit imposed on all Seattle candidates stands at \$500 per contributor. SMC § 2.04.370(B). Those who opt in to the voucher program must agree to an even lower \$250 limit, though they can be released from that limit later if other candidates outspend them by a large margin. *Id.* § 2.04.630(b), (f). Indeed, a number of voucher candidates in 2017 took advantage of this escape hatch, which indicates that the more

stringent limits on voucher recipients did not play a significant role in further deterring any potential corruption. *See* BERK, *supra* at 20-21.

In any case, the general limit of \$500 is already quite low. Many cities have no contribution limits at all for local elections, but among those that do, \$500 lingers at the low end.<sup>5</sup> As with *Bennett*, the City and amici carry the burden to show that the strict contribution limit applied to all candidates—a much more direct route to squashing corruption than vouchers—does not adequately serve the City’s interest in anti-corruption. *Bennett*, 564 U.S. at 752; *see Toledo Area AFL-CIO v. Pizza*, 154 F.3d 307, 318 (6th Cir. 1998). Without meeting that burden, Elster’s free speech rights may not be infringed. If a question exists as to the weight of this evidence, this Court should remand to require the trial court to consider the evidence.

Even assuming that the City and amici can demonstrate (1) that the voucher program is inspired by a cognizable risk of *quid pro quo* corruption

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<sup>5</sup> For example, Sacramento, Washington, D.C., and New York City all have much higher contribution limits than Seattle’s. *See* City of Sacramento, *Contribution Limits*, <https://www.cityofsacramento.org/Clerk/Elections/5-Contribution-Limits> (last visited Apr. 17, 2019); DC Office of Campaign Finance, *Campaign Finance Guide 2015*, 13, [https://ocf.dc.gov/sites/default/files/dc/sites/ocf/publication/attachments/DCOCF\\_CampaignFinanceGuide.pdf](https://ocf.dc.gov/sites/default/files/dc/sites/ocf/publication/attachments/DCOCF_CampaignFinanceGuide.pdf); New York City Campaign Finance Board, *Limits & Thresholds*, <https://www.nycffb.info/candidate-services/limits-thresholds/2017/> (last visited Apr. 17, 2019). 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, *Campaign Contribution Limits: Overview* (June 28, 2017), <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx#individual>.

and (2) that current contribution limits do not adequately address that risk, they must still show that the voucher program is narrowly tailored. That is an issue that has yet to be addressed by the trial court in the first instance and suffices to require a remand.

### **III. The First Amendment’s Primary Purpose Is To Protect Individual Autonomy and Freedom of Conscience**

The First Amendment’s foremost purpose is to protect the sanctity of self-expression. In defending the voucher program, however, amici instead argue that the First Amendment exists to promote deliberative democracy. While this is a treasured benefit of protecting free speech, amici are mistaken in subsuming the individual right to self-expression to a communal interest in strengthening democracy.

The First Amendment protects individual autonomy. Speech rights are a shelter for “the individual freedom of mind” and “the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); *see also NIFLA v. Becerra*, No. 16-1140 (S. Ct. June 26, 2018) (Kennedy, J., concurring) (“Freedom of speech secures freedom of thought and belief.”). While speech doubtless also offers tremendous benefits to society, its primary purpose is to protect the individual’s conscience.

Washington CAN!, however, focuses solely on the First Amendment’s “democracy-enhancing purpose.” Washington CAN! Brief at 20. Based on this collectivist reading of the First Amendment, Washington CAN! concludes that the voucher program is a “homerun for both democracy and the First Amendment: it gives more people a political voice and encourages more people to run for office while silencing no one.” *Id.* at 1–2.

Washington CAN!’s argument echoes Justice Kagan’s dissent in *Arizona Free Enterprise Club’s Freedom PAC v. Bennett*, 564 U.S. 721. The *Bennett* plaintiffs had challenged Arizona’s Clean Elections Act, which granted a dollar-for-dollar windfall of additional funds to publicly funded candidates if spending for privately financed candidates, including independent expenditures, exceeded a certain level. *Id.* at 728. The Court held that the scheme violated the First Amendment because it penalized privately financed candidates and their supporters for engaging in protected speech. *Id.* at 736–40.

Justice Kagan’s dissent, invoking a utilitarian vision of the First Amendment, mirrors Washington CAN!’s defense of democracy vouchers. According to Justice Kagan, “The First Amendment’s core purpose is to foster a healthy, vibrant political system full of robust discussion and debate.” *Id.* at 757 (Kagan, J., dissenting). Based on this faulty

understanding of the First Amendment’s core purpose, Justice Kagan would have upheld the Clean Elections Act because “additional campaign speech and electoral competition is not a First Amendment injury.” *Id.* at 763. Her argument parallels Washington CAN!’s claim that the voucher program furthers First Amendment values by creating additional speech.

The majority, however, rejected this argument in favor of the individualistic approach to free speech. The Court held that even if the Clean Elections Act did create more speech, it did so at the expense of others’ speech rights. *Id.* at 741. Such a “beggar thy neighbor” approach to free speech is “wholly foreign to the First Amendment.” *Id.* at 741 (quoting *Buckley*, 424 U.S. at 48–49). That Amendment’s core purpose is to protect individual freedom of conscience. Programs that “enhance” some people’s speech by compromising other people’s “freedom of mind” do not further First Amendment values. By forcing property owners to pay for other people’s campaign contributions, the voucher program compromises the freedom of conscience inherent in the right to refrain from supporting private expression.

#### **IV. Appellants' Legal Theory Would Not Invalidate Other Common Types of Campaign Financing**

Campaign Legal Center argues that Appellants' legal theory would imperil other campaign financing programs. Such fears misconstrue Appellants' basic legal claim.

The democracy voucher program is unique among campaign-financing schemes because it places the destiny and control of public funds in the hands of private citizens, and it draws those funds exclusively from property owners rather than general revenue or a voluntary tax checkoff. Such a campaign funding mechanism exists nowhere else in the country. A holding in Appellants' favor, therefore, would not threaten any long-standing public financing scheme.

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

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

Several exceptions to these general funding methods deserve mention. For example, funding methods that imposed a tax on discrete groups in Vermont and Florida were struck down. *See Vermont Soc. of Ass’n Executives v. Milne*, 121 Vt. 375, 779 A.2d 20 (2001) (striking down tax on lobbyists used to fund campaigns); *Butterworth v. Republican Party of Florida*, 604 So. 2d 477 (Fla. 1992) (invalidating tax on political party contributions used to fund campaigns). The Florida case relied expressly on

a compelled-subsidy rationale in holding that “singling out political parties and associations to support the fund bears no relationship” to a compelling interest. *Butterworth*, 604 So. 2d at 480.

The Clean Elections Act is another exception, where funding for political candidates comes from a tax checkoff, a lobbyist fee, and a surcharge on civil fines. *See May v. McNally*, 203 Ariz. 425, 426, 55 P.3d 768 (2002). The state supreme court rejected a First Amendment challenge to the surcharge. *Id.* Unlike the voucher program, however, individuals subject to civil fines like parking tickets are a fluid mix of people. By contrast, property owners are a more discrete group with less change and turnover across time. A tax on property owners therefore affects a more fixed population of the electorate and distinguishes *May v. McNally* and the many other public financing programs that rely on general appropriations or voluntary checkoffs.<sup>6</sup>

Finally, lump-sum programs have a much stronger connection to preventing corruption because publicly funded candidates generally must forgo private donations except for qualifying contributions. Here, by contrast, voucher candidates are free to accept money from private donors subject only to contribution limits and a total spending limit.

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<sup>6</sup> The Supreme Court later struck down the method by which Arizona’s Clean Elections Act allotted public funds to candidates. *See Bennett*, 564 U.S. 721.

The voucher program here distributes public funds through contributions made by individuals according to their partisan interests. Such funding is not neutral. And candidates who opt in can still receive private contributions at a lower contribution cap, though they can be freed from that contribution cap if they are outspent. SMC § 2.04.630(f). In fact, many candidates did just that in the last election, severely reducing any potential for the voucher program to impose a meaningful limit on private contributions. *See* BERK, *supra* at 20–21. The voucher program’s deterrent effect on corruption, therefore, is far more tenuous than lump-sum programs.

Matching-funds programs also have key differences, though they may share some of the flaws of the voucher program.<sup>7</sup> Matching funds do result in a disparate amount of public funding to candidates based on contributions, since public funds are pegged to private donations. Unlike the voucher program, though, private donors must put forward some of their own money before public matching funds issue. The voucher program is less narrowly tailored, given that the vouchers are offered to all residents without requiring any contribution of their own. And Appellants know of

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<sup>7</sup> Campaign Legal Center notes that the Second Circuit “upheld” a matching-funds program, but this is misleading because that 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* Campaign Legal Center Brief at 9; *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011).

no matching-funds program that draws its funds from a discrete portion of the electorate like the voucher program does. If such a program exists, it may indeed raise similar constitutional concerns. In short, however, the common methods of funding campaigns will not be imperiled should Appellants' challenge to the voucher program prevail.

### **CONCLUSION**

The First Amendment grants individuals a right to freedom of conscience. That includes a right to refrain from supporting others' political speech. Elster's claim should be remanded to the trial court to apply the searching review demanded by the First Amendment.

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Respectfully submitted,

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