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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK ELSTER and SARAH PYNCHON, Plaintiffs/Appellants,

vs.

THE CITY OF SEATTLE, Defendant/Respondent.

AMICUS CURIAE BRIEF OF THE FREEDOM FOUNDATION

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I. STATEMENT OF INTEREST

The Freedom Foundation (“Foundation”) is a nonprofit organization operating in Washington, Oregon and California. The Foundation’s mission is to advance individual liberty, free enterprise and limited, accountable government. The Foundation focuses on public sector labor reform through litigation, legislation, education and community activism. The Foundation has represented public employees in numerous cases involving issues of compelled speech and violations of the First Amendment. Since 2014, the Foundation has informed tens of thousands of workers affected by *Harris v. Quinn*, U.S. , 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014), of their First Amendment right to abstain from paying union dues. The case now before this court involves similar questions related to fundamental constitutional rights and the Foundation’s expertise in this area will assist the Court in making its ruling.

II. INTRODUCTION

In 2015, 63% of Emerald City registered voters chose to enact a Democracy Voucher Program (Program). The Program, the first of its kind nationwide, gives registered voters four \$25.00 vouchers which they can donate to candidates for city offices.

However, while those 111,000 Seattleites who feel the need to reinforce their progressive bona fides may have thought they were “safeguard[ing] the people’s control of the election process in Seattle,” the harsh reality is that the

Program has been nothing more than a ploy to limit the rights of Seattle businesses and property owners.

The Program resembles no other government funded campaign-finance system, such as those found in Los Angeles or New York City. Yet for a city whose residents so passionately stand up and exercise their free speech rights against those who they view as authoritarian despots, the Program they enacted actively and intentionally restricts the First Amendment rights of Seattle business and property owners.

Government leaders and activists in Seattle would have the casual resident believe that City Hall is amuck with big business and pay-to-play politics. That Seattle is Tammany Hall reborn, with business owners thwarting power like a reincarnation of Boss Tweed. Yet these fears are not borne of reality.

What is real, however, is that Seattle's Program, under the guise of free speech, is chilling the speech of residents who have alternative viewpoints, reinforcing the notion that, at least in Seattle, it is free speech for me, but not for thee.

III. SUMMARY OF ARGUMENT

The City of Seattle's (City) Program is unconstitutional in three ways. First, the Program's prohibition on corporate contributions is unconstitutional unless it is, at a minimum, "closely drawn" to further a "sufficiently important" government interest, traditionally satisfied under an anti-corruption standard. *FEC v. Beaumont*,

539 U.S. 146, 161-62 n.8, 123 S. Ct. 2200, 156 L. Ed. 2d 179 (2003); *McCutcheon v. FEC*, U.S., 134 S. Ct. 1434, 1450, 188 L. Ed. 2d 468 (2014).

The proffered government interest, stated plainly in the Program's text, does not satisfy this standard because, rather than legitimately prevent actual or apparent corruption, the Program seeks to limit the constitutional rights of Seattle companies who have an interest in the political dynamic of the Emerald City. *See Initiative 22; McConnell v. FEC*, 540 U.S. 93, 136, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).

Yet even if the interest were somehow warranted, the Program is still legally dubious because, contrary to what City officials would have Seattleites believe, for-profit companies maintain the same constitutional rights as do individuals. *See Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

Second, the Program is not viewpoint neutral, but is rather quite clearly viewpoint discriminatory. The government has an obligation to not prefer one sect of speech over another. However, that is precisely what the City is doing here when they allow the distribution of government funds to go to the ideological viewpoints of the voucher recipients.

Lastly, notwithstanding the recognized rights of companies, the Program violates the First Amendment rights of Seattle property owners who are now required to fund political speech with which they disagree.

Despite the City's condescending tone, advancing messages Appellant disagrees with is not just a "fact of American life." Under a strict scrutiny review,

required for all cases involving violations of the First Amendment, the City has no legal basis for enacting this legislation and forcing Seattle residents to support political speech they disagree with is without legal merit. Moreover, not only are the City's actions unconstitutional, but the Program is contradictory to this nation's founding principles.

IV. ARGUMENT

1. THE CITY'S REGULATION IS A DRACONIAN ATTEMPT TO LIMIT THE RIGHTS OF INDIVIDUALS AND COMPANIES TO ENGAGE IN THE POLITICAL PROCESS.

As a threshold matter, the lower court was correct in recognizing that this case presents significant First Amendment implications. Contributing money to a candidate is an exercise of an individual's right to participate in the electoral process through both political expression and political association. Just as "[t]he Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse," neither may it regulate the political participation of some in order to enhance the relative influence of others. *McCutcheon*, 134 S. Ct. at 1448.

A. The First Amendment Provides Broad Protection for Political Discourse.

The First Amendment broadly protects political expression in order to assure the unfettered exchange of ideas to advance the laws and policies desired by the people. *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

Free speech “is needed for republican government” and “informs voters about the conduct of elected officials, thereby helping voters to hold officials responsible at election time.” John Samples, *Move to Defend: The Case against the Constitutional Amendments Seeking to Overturn Citizens United*, *Cato Institute Policy Analysis No. 724* (Apr. 23, 2013); *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (“the central purpose of the Speech and Press Clauses was to assure a society in which ‘uninhibited, robust, and wide-open’ public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish”).

Despite the City’s rigorous opposition, their exclusionary Program directly affects speech that “is at the core of our electoral process and of the First Amendment freedoms.” *Eu v. San Francisco City Democratic Central Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) (quoting *Williams v. Rhodes*, 393 U.S. 23 (1968)).

The First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Id.* (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); *see also Mills v. Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966)).

The City lacks the authority to make laws that unduly restrict an individual’s or business’s ability to participate in the political process.

Contrary to what the City would have residents believe, Seattleites don't lose their rights upon *voluntarily* coming together and forming associations, be they unions, non-profit advocacy groups, private clubs, or – as is the case in this matter, for-profit corporations. *See e.g.* Ilya Shapiro & Caitlyn W. McCarthy, *So What if Corporations Aren't People?*, 44 J. Marshall L. Rev. 701, 707-08 (2011).

Indeed, restricting the liberty to engage in election campaigns because such engagement somehow injures the political system is fundamentally contrary to the constitutional structure of rights and powers. *See e.g.* James Madison, *Federalist No. 10* (1787-1788) (“it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency”).

“If the First Amendment has any force, it prohibits [government] from [preventing]...citizens, or associations of citizens from simply engaging in political speech.” *Citizens United v. FEC*, 558 U.S. at 349. Yet this “folly” is exactly what the City is attempting to achieve by restricting individuals and corporations from contributing to the election of members to the City Government patriarchy.

Having received clear instructions from the Supreme Court regarding the rights of corporations to engage in the political process, the City nonetheless seeks to restrict their residents' First Amendment rights.

B. The City's Exclusionary Program Is Unconstitutionally Discriminatory Against Seattle Businesses.

Perhaps it needs reiteration that “the First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.” *Citizens United*, 568 U.S. at 370 (Roberts, C.J., concurring). Though it causes City leaders great trepidation, corporations are not extraterrestrial beings seeking to overpower the authority of government nor are they in need of stringent barriers to protect the government from its influence.

Instead, corporations have long been afforded the same rights as individuals. *See Minneapolis & St. Louis Railroad Co. v. Beckwith*, 129 U.S. 26, 9 S. Ct. 207, 32 L. Ed. 585 (1889). This means they are afforded the same freedoms to speak, express and associate. *Citizens United*, supra.

“A major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. at 218. Yet this exclusionary Program is intended to restrict the rights of businesses from participating in the political process.

It has long been acknowledged that “corporations...contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.” *Pacific Gas & Elec. Co. v. Public Utilities Comm’n of Calif.*, 475 U.S. 1, 8, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) (plurality opinion) (quoting *Boston v. Bellotti*, 435 U.S. 765, 783, 98 S. Ct. 1407, 55 L. Ed. 2d 707

(1978)), rehearing denied, 475 U.S. 1133, 106 S. Ct. 1667 (1986). Because “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations,” the regulation the City has enacted cannot pass constitutional muster. *Citizens United*, 558 U.S. at 365.

Much to the City’s chagrin, “it is our law and our tradition that more speech, not less, is the governing rule” under the First Amendment. *Id.* at 361. More speech often means more money. The entity contribution ban is thus “not a permissible remedy” and does not accord with “our law and our tradition.” *Id.*

2. THE CITY’S RESTRICTION ON POLITICAL SPEECH IS WITHOUT FUNDAMENTAL MERIT.

The lower court here erred when it failed to acknowledge that, even where the government may have an interest in limiting First Amendment activity, a complete ban “during the critical preelection period is not a permissible remedy.” *Id.* at 361. Moreover, the City suggests that Seattle is subject to the Tammany Hall machine and City elections and policies are bought and paid for by fat cats in poorly tailored pinstriped suits. Unfortunately, any restrictions to political speech can only be justified if corruption actually exists and can “directly implicate the integrity of our electoral process.” *Randall v. Sorrell*, 548 U.S. 230, 248, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006).

The anti-corruption standard is a misnomer. The Supreme Court has recognized only one interest compelling enough to regulate political campaign

speech: “preventing corruption or the appearance of corruption.” *McCutcheon*, 134 S. Ct. at 1450 (acknowledging the standard created by *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)).

In *Buckley*, the Court held that restrictions on the financing of political speech could be justified by a government interest in preventing not just actual corruption, but the appearance of such corruption. Since then, the national standard has been to invoke the ‘actual-or-appearance’ standard as a justification for burdensome campaign finance regulations.

Yet “few campaign finance regulations would pass constitutional scrutiny” if their defenders had to demonstrate actual corruption. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 135 (2004). Campaign finance restrictions fashioned under the “appearance of corruption” standard are nothing more than regulations restricting the generic favoritism and influence that is at the heart of representative politics.

Even to the extent that the City believes corruption is running rampant at City Hall, the problem is less about corporate campaign donations and more about the unchecked ability of City politicians to reward powerful supporters. Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173 (2003); *see also* Brief of the Institute for Justice as Amicus Curiae in Support of Appellants; *McCutcheon*, 134 S. Ct 1434 (2014).

Where the City's defense fails is when they seek to exclude one portion of the Seattle population, here Seattle businesses, while simultaneously allowing another portion of the Seattle population, most notably, union leaders, to influence and dictate municipal policy.

The City seeks to restrict business contributions under the guise of 'campaign finance reform.' However, the City is conveniently ignoring the core problem of corrupt politics. They are simply seeking to cover up its most visible manifestation, and its easiest target, while continuing to allow the rest to continue unchecked.

Despite the unfathomable "grassroots" efforts by some members of the City Council to eradicate the City of all big business, mere "influence over or access to elected officials" does not "give rise to...corruption." *McCutcheon*, 134 S. Ct. at 1451. Nor does the ability to aggregate wealth or achieve financial business success. *Citizens United*, 558 U.S. at 349.

Corruption is simply the "notion of a direct exchange of an official act for money." *McCutcheon*, 134 S. Ct at 1441. Indeed, perhaps if the City were as concerned about the influence public-sector unions maintain while *simultaneously lobbying the government for pay and benefits*, the City would be able to eradicate the modern-day activities at City Hall that would make even Boss Tweed blush.

As it stands, however, if the City somehow does have an interest in preventing real or apparent *quid pro quo* corruption associated with entity

contributions to candidates, the permissible remedy is a contribution limit that eliminates large contributions that can give rise to that corruption. *E.g. Citizens United*, 558 U.S. at 344 (“large contributions ‘could be given to secure a political quid pro quo’”) (quoting *Buckley*, 424 U.S. at 26); *McConnell v. FEC*, 540 U.S. at 138 (“large financial contributions” can lead to corruption and its appearance); *Nixon v. Shrink Missouri Gov. PAC*, 528 U.S. 377, 393, 120 S. Ct. 897, 145 L. Ed. 2d 295 (2000) (“large contributions” can corrupt and create an appearance of corruption).

The City has, however, already thwarted the “evils” of business by capping contributions at \$500; the City is already combatting their perceived corruption by eliminating large contributions. The Program is therefore not necessary, nor justifiable under the anti-corruption standard.

Unfortunately, as it currently stands, the City is attempting to reinforce the notion that businesses in Seattle are the proverbial boogeyman, while unions under the auspice of “grassroots activism” are the savior to City politics.

3. THE PROGRAM IS NOT VIEWPOINT NEUTRAL.

The City consistently contends that their regulation is not a violation of the First Amendment because it is viewpoint neutral. Yet the City misunderstands what it means for a regulation to be “neutral.”

Viewpoint neutrality is a well-accepted concept under the First Amendment. When government actions implicate the speech rights of groups and

individuals, those actions must be done in an even-handed way. Thus, a city has the obligation to an all-or-none mentality; either all speakers are allowed to speak, or none are. Any deviation from that principle is considered viewpoint discrimination.

This discrimination occurs when the government uses its authority to advance one person's opinion over another's in such matters as religion, politics, and belief. Here, the City provides that a person "may only assign a Voucher to a candidate who has chosen to participate in the Seattle Democracy Voucher Program." They are therefore advocating for candidates who have chosen to be recipients of the Program.

Indeed, it is not so much the distribution of funds that make the Program either viewpoint neutral or viewpoint discriminatory, rather what makes the Program viewpoint based are the aspects of the program which fund speech and expressive activities. *Board of Regents v. Southworth*, 529 U.S. 217, 220, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000).

In other words, the Program loses its viewpoint neutrality when it distributes funds to the recipient with the implied intent that the recipient use those funds for a message they wish to convey. *See Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 508 F.3d 94, 101-02 (2nd Cir. 2007).

The City admirably defends the Program by believing that because the voucher recipients are not government actors, the City has no control over how the recipients donate their vouchers. Yet the independent actions of non-governmental

actors to decide which candidate or campaign receives a donation via government provided funding makes the speech viewpoint discriminatory in and of itself. The *Southworth* Court held a similar feature unconstitutional. *Southworth*, 529 U.S. at 221. So too should this Court.

Further, the cases which the City favorably cites in this matter are fundamentally different than the facts at hand. For example, in *May v. McNally*, plaintiffs challenged a campaign funding scheme that drew funds from traffic violation revenue. 203 Ariz. 425 (2002). The Arizona Supreme Court determined that program constitutional on viewpoint neutrality grounds. *Id.* However, those funds were pooled together; they were not, as is the case with the City's Program, distributed based on partisan viewpoints or affiliation. *Id.*

Thus, the City's contention that the Program is viewpoint neutral is misguided. However, if this Court were to somehow acknowledge some semblance of neutrality, the Program still does not satisfy heightened review.

4. THE DEMOCRACY VOUCHER PROGRAM INVOLVES POLITICAL SPEECH AND THEREFORE REQUIRES A HEIGHTENED SCRUTINY STANDARD.

The overwhelming majority of First Amendment campaign-finance cases have required strict scrutiny. *See e.g. Davis v. FEC*, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008); *Citizens United*, *supra*; *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664

(2011); *Riley v. Nat'l Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

Of course, subjecting the Program to strict scrutiny would put the onus on the City to establish that their interest in the program is strong enough to overcome the violations to Seattleite's personal liberty.

Yet the mere existence of the Program is precisely why this Court should utilize the strict scrutiny standard. This is because “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964). Thus, the First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office.” *Eu*, 489 U.S. at 223.

Because the regulation imposed by the City has a direct effect on the free-speech rights of property owners such as the Appellant here, strict scrutiny must apply. Moreover, the Program requires strict scrutiny because the Program is a content-based speech regulation.

The Supreme Court has consistently ruled that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972); *see also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 103 S. Ct. 2875, 77

L. Ed. 2d 469 (1983); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 64, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (per Justice Stevens joined by three other Justices); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 776, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 520, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).

“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, U.S. 136 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015); see e.g. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011); *Carey v. Brown*, 447 U.S. 455, 462, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980); *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. See *Burson*, 504 U.S. at 197. Thus, it logically follows that the First Amendment imposes tight constraints upon government efforts to restrict or limit political speech.

Such regulations are constitutionally dubious because individuals have both a right to speak and a right to refrain from speaking. *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 516-17, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991). The

“right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” *Id.*; see also *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (“freedom of association ... plainly presupposes a freedom not to associate”).

Despite what the City would have this Court believe, under the First Amendment, it is presumed that speakers, *not the government*, know best what they want to say and how to say it, or in the alternative, if people wish to refrain from speaking at all. *Riley*, *supra*.

Accordingly, the Supreme Court has consistently determined that strict scrutiny is the “standard First Amendment analysis.” *Id.* at 788; see also *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); *Perry Education Ass’n v. Perry Local Education Ass’n, Inc.*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). Therefore, the presumption of constitutionality gives way to a presumptive prohibition on infringement. See *Elrod*, 427 U.S. at 360.

Restrictions on an individual’s First Amendment rights are thus valid only if “necessary to serve a compelling state interest and ... narrowly drawn to achieve that end.” *Perry*, 460 U.S. at 45. Yet still further, “to survive strict scrutiny, a

[government] must do more than [identify] a compelling state interest – it must demonstrate that its law is necessary to serve the asserted interest” and “that it does not unnecessarily circumscribe protected expression” in the process. *Republican Party of Minnesota v. White*, 536 U.S. 765, 775, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

The City and its own *amici* ignore this traditional First Amendment standard; their contention allows for an assumption that the government knows how to best regulate the speech inherent in a political campaign. Yet, where political and ideological speech and association are concerned, “regulation of First Amendment rights is always subject to exacting judicial review.” *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981).

To justify their disingenuous mandate, the City must prove that it serves a compelling state interest, unrelated to the suppression [or coercion] of ideas, that cannot be achieved through means significantly less restricting of associational [and expressive] freedoms.” *Chicago Teachers Local 1 v. Hudson*, 475 U.S. 292, 303 n. 11, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986); *see also Roberts*, 468 U.S. at 623.

Consequently, strict scrutiny is necessary in determine whether, and to what extent, the Constitution permits the forced subsidization of objectionable speech. Because no legitimate interest can be satisfied, this Court has the opportunity to push back against the City’s illogical campaign laws.

V. CONCLUSION

For the foregoing reasons, this Court should find that the City's exclusionary Program is unconstitutional in three ways.

First, it unfairly excludes Seattle businesses from participating in the political process under the guise of seeking to stop corruption at City Hall.

Second, the Program is not viewpoint neutral, but is rather quite clearly viewpoint discriminatory. The government has an obligation to not prefer one sect of speech over another. However, that is precisely what the City is doing here when they allow the distribution of government funds to go to the ideological viewpoints of the voucher recipients.

Third, because the property owners who are challenging the City's regulations have a First Amendment right to not associate with political speech with which they disagree, the regulation requires a strict scrutiny review which the City cannot overcome.

RESPECTFULLY SUBMITTED this 4th day of June 2018.

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