

FILED
Court of Appeals
Division I
State of Washington
5/21/2018 12:00 PM
Case No: 77880-3

No. 96660-5

**IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

MARK ELSTER and SARAH PYNCHON,

Plaintiffs/Appellants,

v.

THE CITY OF SEATTLE, a Washington municipal corporation,

Defendant/Respondent.

APPELLANTS' REPLY BRIEF

ETHAN W. BLEVINS, WSBA # 48219
BRIAN T. HODGES, WSBA # 31976
Pacific Legal Foundation
10940 Northeast 33rd Place, Suite 210
Bellevue Washington 98004
Telephone: (425) 576-0484

Attorneys for Plaintiffs/Appellants

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. THE TRIAL COURT CORRECTLY HELD THAT THE DEMOCRACY VOUCHER IMPLICATES PROPERTY OWNERS' FIRST AMENDMENT RIGHTS	3
II. <i>BUCKLEY V. VALEO</i> DOES NOT DISPEL ELSTER'S FIRST AMENDMENT INTERESTS	5
III. THE VOUCHER PROGRAM IS VIEWPOINT-BASED BECAUSE IT ALLOCATES PUBLIC FUNDS BASED ON PRIVATE INDIVIDUALS' PERSONAL VIEWPOINTS	9
IV. THE CITY SHOULD CARRY THE BURDEN OF JUSTIFYING ITS COMPELLED SUBSIDY OF SPEECH	12
CONCLUSION.....	13

TABLE OF AUTHORITIES

	Page
Cases	
<i>Abood v. Detroit Bd. of Educ.</i> , 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977)	4
<i>Amidon v. Student Ass’n of the State Univ. of N.Y. at Albany</i> , 508 F.3d 94 (2d Cir. 2007).....	5, 13
<i>Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett</i> , 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011)	10, 14
<i>Bd. of Regents of the Univ. of Wis. Sys. v. Southworth</i> , 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000)	5-6, 12-14
<i>Buckley v. Valeo</i> , 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)	1-2, 7-9, 11
<i>Butterworth v. Republican Party of Florida</i> , 604 So. 2d 477 (Fla. 1992).....	5
<i>Cornelius v. NAACP Legal Defense Fund and Educ. Fund, Inc.</i> , 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)	2
<i>Glickman v. Wileman Bros. & Elliot, Inc.</i> , 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997)	5
<i>Harris v. Quinn</i> , 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014)	4, 14
<i>Illinois v. Lidster</i> , 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004)	8
<i>Libertarian Party of Indiana v. Packard</i> , 741 F.2d 981 (7th Cir. 1984).....	14
<i>May v. McNally</i> , 203 Ariz. 425, 55 P.3d 768 (2002).....	5, 14
<i>McCutcheon v. FEC</i> , 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014)	15
<i>Miami Herald Publishing Co. v. Tornillo</i> , 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974).	10-11
<i>United States v. United Foods, Inc.</i> , 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001)	4-5

INTRODUCTION

Seattle’s democracy voucher program compels property owners to pay for other peoples’ campaign contributions. The program is the first of its kind in the nation. It does not resemble any public campaign-finance scheme upheld against prior First Amendment challenges. It does, however, carry the hallmarks of a compelled subsidy of speech. The trial court correctly held that the program must satisfy First Amendment scrutiny. The trial court, however, erroneously imposed a weak “reasonableness” standard that does not comport with the robust protections afforded the First Amendment.

The city challenges the trial court’s holding that the First Amendment is implicated by the voucher program. The city’s key precedent on this point, *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), is not even a compelled subsidy case, as the public funding scheme in *Buckley* was voluntary. The city also argues that the First Amendment is satisfied because the voucher program is viewpoint-neutral. That argument, however, clashes with two principles laid down by the Supreme Court: (1) a program is viewpoint-based if it allows private individuals to decide how to distribute public funds earmarked for expressive activities; and (2) content-based speech regulations, just like viewpoint-based speech regulations, must satisfy heightened judicial scrutiny.

ARGUMENT

Any First Amendment analysis must address three questions:

1. Does the First Amendment apply?
2. If yes, what level of scrutiny applies?
3. Does the law satisfy that level of scrutiny?

See Cornelius v. NAACP Legal Defense Fund and Educ. Fund, Inc., 473 U.S. 788, 797, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

Here, the trial court answered “yes” to the first question—the First Amendment applies to the voucher program.¹ Order at 4 (CP 112). As to the second question, the trial court held that “reasonableness” review applies. *Id.* at 5 (CP 113). The trial court then held that, under the third question, the voucher program satisfied this low level of scrutiny because it is “viewpoint neutral.” *Id.* at 7 (CP 115). The trial court erred on questions two and three.

¹ The city repeatedly points out that Elster’s opening brief did not address whether *Buckley* forecloses a First Amendment claim here. But Elster won on that issue at the trial court. Elster’s opening brief properly focused on the trial court’s errors below, not the correct aspects of the ruling.

I
**THE TRIAL COURT CORRECTLY HELD THAT THE
DEMOCRACY VOUCHER IMPLICATES PROPERTY OWNERS’
FIRST AMENDMENT RIGHTS**

Forty years ago, the Supreme Court said, “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.” *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977). This principle means that a First Amendment injury arises when someone is forced to pay for another private individual’s speech, a rule many subsequent compelled subsidy cases have reaffirmed in contexts like union and bar fees, student activity fees, taxes to fund commercial ads, and taxes or fees that fund political campaigns. *See, e.g., Harris v. Quinn*, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014) (union fees); *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001) (commercial ad tax); *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) (student activity fee); *Amidon v. Student Ass’n of the State Univ. of N.Y. at Albany*, 508 F.3d 94 (2d Cir. 2007) (same); *May v. McNally*, 203 Ariz. 425, 55 P.3d 768 (2002) (campaign-finance scheme); *Butterworth v. Republican Party of Florida*, 604 So. 2d 477 (Fla. 1992) (same). In each of these settings, courts have

held that forcing someone to pay a tax or fee that sponsored private expressive activities implicated the First Amendment.²

The trial court adhered to this long line of caselaw in holding that the voucher program implicates Elster's First Amendment rights. Specifically, the court looked to *University of Wisconsin v. Southworth*. See Order at 4; 529 U.S. 217. There, students challenged an activity fee that funded student groups to facilitate expression. *Southworth*, 529 U.S. at 229. Such a compelled subsidy implicated students' speech rights. *Id.*

Like the students forced to pay a fee to fund student groups engaged in expression, Elster must pay a tax that funds other private individuals' political speech. It is noteworthy that, in *Southworth*, the students groups funded through the activity fee held diverse viewpoints. *Id.* at 223. In other words, the objecting students in *Southworth* were not forced to associate with or fund a specific viewpoint. See *id.* Nonetheless, the fee implicated their First Amendment rights. *Id.* at 229. Likewise, the voucher program implicates Elster's First Amendment rights, even if the voucher funds are

² The City relies on a block quote from *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997), that appears to reject the basic premise of compelled subsidies. See Response Brief at 9; *Glickman*, 521 U.S. at 470-71. That statement, however, does not reflect the current state of the law and was severely abrogated by *United Foods*, 533 U.S. at 410-13.

used to support a wide range of viewpoints.³ The trial court correctly held that the First Amendment applies.

II

***BUCKLEY V. VALEO* DOES NOT DISPEL ELSTER'S FIRST AMENDMENT INTERESTS**

The City's key authority supporting its argument that the First Amendment does not apply to the voucher program is not even a compelled subsidy case. *Buckley v. Valeo* addressed an entirely different constitutional claim and upheld an entirely different public-funding scheme. *Buckley* does not control this case.

In *Buckley*, the Supreme Court upheld the Presidential Election Campaign Fund (PECF) against a challenge under the General Welfare Clause and the First and Fifth Amendments. *Buckley*, 424 U.S. at 90. The PECF allowed taxpayers to donate a bit of their tax liability to a fund for presidential campaigns. *Id.* at 86. Political candidates had to meet certain criteria to be eligible to receive such funding. *Id.* at 86-88. The *Buckley* plaintiffs argued that the public funding of candidates caused unconstitutional "entanglement" of government with elections. *Buckley v. Valeo*, Brief of the Appellants *149, 1975 WL 441595. They also argued

³ The range and diversity of viewpoints funded by the voucher program may be pertinent to the second and third questions—setting and applying the proper level of scrutiny. Elster addresses those questions below.

that the eligibility requirements for public funding discriminated against minority party candidates. *Id.* at 152.

These challenges to the PECF bear no resemblance to compelled subsidy claims. The PECF was a voluntary program, and the *Buckley* plaintiffs did not challenge the PECF on a compelled-subsidy theory. No one is compelled to speak when no one is compelled to spend. 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 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 particularly true when the actual legal claims differ. The city plucks quotes from *Buckley* that may superficially support their defense of the voucher program when divorced from context. *See, e.g.*, Response Brief at 9. But *Buckley* presents no holding as to compelled subsidies, and its language should not be extended to a different claim against a different program, especially where more relevant cases abound.⁴

Grasping for a handhold, the city says that *Buckley* “strongly” implied that the legal challenge in that case still would have failed even if the PECF

⁴ Although *Buckley* does not control on the question of the First Amendment’s applicability, *Buckley* does have relevance to other issues in this case, such as the proper standard of review to apply in campaign-finance cases. *See* Opening Brief at 28.

was nonvoluntary. *Id.* at 12. Even if true, this observation means nothing. The voluntary or involuntary nature of the PECF would not have affected the *Buckley* plaintiffs’ theories about entanglement and discrimination because such theories did not hinge on voluntariness. Voluntariness, however, is a key element of any compelled-subsidy claim.

Even assuming *Buckley*’s broad language did apply to a distinct claim like this one, the city misreads that language. The city argues that *Buckley* forecloses a First Amendment claim here because the voucher program fosters 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 the 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 Club’s Freedom Club PAC v. Bennett*,

the Supreme Court invalidated a law that fostered others' 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, it cannot "do so at the expense of impermissibly burdening" others' First Amendment rights. *Id.*

Indeed, every 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 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 city also compares the voucher program to the eligibility criteria in *Buckley*, which limited public funds to candidates from parties that had received a specified percentage of the popular vote in a prior election. *Buckley*, 424 U.S. at 87-88; Response at 31. The eligibility criteria served two purposes: to prevent the wasting of public dollars on “hopeless candidacies” and to avoid encouraging splintered parties. *Id.* at 96. The Court upheld the eligibility criteria against a challenge that they discriminated against minority candidates. *Id.* But that holding cannot help the city because the voucher program serves different purposes—such as fostering speech and preventing corruption—and Elster is not challenging the eligibility criteria for receiving funds; he’s only challenging the means used to allocate funds to already eligible candidates.

Buckley v. Valeo does not affect the outcome of this case. It involved a voluntary funding scheme and a different legal claim. The trial court correctly held that the voucher program is subject to the First Amendment.

III

THE VOUCHER PROGRAM IS VIEWPOINT-BASED BECAUSE IT ALLOCATES PUBLIC FUNDS BASED ON PRIVATE INDIVIDUALS’ PERSONAL VIEWPOINTS

The city argues that the voucher program is viewpoint neutral because the city lets voucher recipients decide whom to support. Response at 36. The city cites to cases where the Supreme Court rejected challenges to

neutral policies that had an incidental impact on certain viewpoints. *See* Response at 29-31. But the voucher program does not have an *incidental* impact on viewpoint. Rather, it is *directly* viewpoint-based by design because it allots public funds according to the partisan views of voucher recipients. That is the design of the law.

Indeed, this is the same viewpoint problem that concerned the Supreme Court in *Southworth*. There, the Court said that allowing the student body to vote on which groups received funds was not a viewpoint-neutral method of distributing speech subsidies. *Southworth*, 529 U.S. at 221. Like the voucher program, such a referendum process did not favor one viewpoint over another on its face. Rather, it violated viewpoint neutrality by handing over the distributive process to a partisan body of student voters and allowing them to decide which viewpoints to favor with public money. *Id.* at 235. Likewise, the voucher program gives voucher recipients the choice about which campaigns receive funds, and the very purpose of the program is to allow such recipients to direct public funds to candidates based on political viewpoint. The final distribution of those funds is not what makes the program viewpoint-neutral or viewpoint-based. Rather, it is the process of distribution that defeats viewpoint-neutrality because it naturally favors the majority view, just like in *Southworth*. *See also Amidon*, 508 F.3d at 101-02 (“Viewpoint discrimination arises because the vote reflects an

aggregation of the student body's agreement with or valuation of the message [a student group] wishes to convey.”).

The city claims that “Elster cannot predicate a First Amendment claim based on the independent actions of non-governmental actors” because the city “has no control or say in what individual citizens do with their vouchers.” Response at 35. *Southworth* says otherwise. The unconstitutional referendum process also allowed “independent actions of non-governmental actors” to decide which groups got money and which did not. That is the feature of the referendum process in *Southworth* that the Supreme Court disapproved. *Southworth*, 529 U.S. at 221.

The viewpoint-based process of allocation also distinguishes the voucher program from other cases relied upon by the city, such as *May v. McNally*, 203 Ariz. 425, 55 P.3d 768 (2002), and *Libertarian Party of Indiana v. Packard*, 741 F.2d 981 (7th Cir. 1984). In *May*, plaintiffs unsuccessfully challenged a campaign funding scheme that drew some funds from a surcharge on civil fines. *See id.* at 431. The Arizona Supreme Court held that the program was constitutional because it was viewpoint-neutral. *Id.* But those funds were not distributed based on the partisan viewpoints of Arizona voters.⁵ Likewise, in *Packard*, a special fee imposed

⁵ The means used to allocate the campaign funds under Arizona's campaign financing program was later held to be unconstitutional in *Bennett*. 564 U.S. at 728. Further, *May*'s holding that *Southworth*'s permissive viewpoint-neutrality rule applies outside the

on specialty license plates went to fund qualifying political parties, but that money was not distributed based on private citizens' partisan preferences. *Packard*, 741 F.2d at 983.

Even if the city's viewpoint-neutrality argument is correct, however, heightened scrutiny should still apply because the voucher program is content-based and relates to the highest tier of protected expression—political speech. *See* Opening Brief at 13-17, 25-27.

IV THE CITY SHOULD CARRY THE BURDEN OF JUSTIFYING ITS COMPELLED SUBSIDY OF SPEECH

The trial court correctly held that the Democracy Vouchers implicate the First Amendment. Under normal First Amendment principles, the burden is on the government to justify its restrictions on speech. Courts have consistently applied at least intermediate scrutiny to regulations of core political speech in the campaign-finance context. *See, e.g., McCutcheon v. FEC*, 134 S. Ct. 1434, 1445-46, 188 L. Ed. 2d 468 (2014). Such scrutiny requires, at minimum, that the city prove that the voucher program pursues an anti-corruption interest in a closely drawn manner. *See id.* The importance of such scrutiny was recently highlighted by a city-commissioned report that found that the voucher program had failed to

university context has since been abrogated by the Supreme Court. *See Harris*, 134 S. Ct. at 2644 (limiting *Southworth's* viewpoint-neutrality holding to the university context).

achieve its purported goals.⁶ *See* City of Seattle Ethics and Elections Commission, Final Report: Seattle Democracy Voucher Program Evaluation (2018). The city should be called upon to prove that its abridgment of fundamental rights is justified.

CONCLUSION

The trial court correctly held that the voucher program must satisfy the First Amendment. This Court should remand and require the city to show that the burdens imposed on this fundamental right meet heightened scrutiny.

DATED: May 21, 2018.

Respectfully submitted,

By: s/ ETHAN W. BLEVINS
ETHAN W. BLEVINS, WSBA # 48219
BRIAN T. HODGES, WSBA # 31976
Pacific Legal Foundation
10940 Northeast 33rd Place, Suite 210
Bellevue Washington 98004
Telephone: (425) 576-0484
Email: Eblevins@pacificlegal.org

Attorneys for Plaintiffs/Appellants

⁶ Available at <http://www.seattle.gov/ethics/meetings/2018-05-02/item2.pdf>.

PACIFIC LEGAL FOUNDATION - BELLEVUE

May 21, 2018 - 12:00 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 77880-3
Appellate Court Case Title: Mark Elster and Sarah Pynchon, Apps. v. The City of Seattle, Res.
Superior Court Case Number: 17-2-16501-8

The following documents have been uploaded:

- 778803_Affidavit_Declaration_20180521115254D1203356_8916.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was 77880-3 Reply Brf Dec of Service.pdf
- 778803_Briefs_20180521115254D1203356_4576.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 77880-3 Appellant Elster Reply brief.pdf

A copy of the uploaded files will be sent to:

- bth@pacificlegal.org
- incominglit@pacificlegal.org
- jeff.slayton@seattle.gov
- kent.meyer@seattle.gov
- lessig@law.harvard.edu
- lise.kim@seattle.gov
- michael.ryan@seattle.gov

Comments:

Sender Name: Brien Bartels - Email: bbartels@pacificlegal.org

Filing on Behalf of: Ethan Blevins - Email: ewb@pacificlegal.org (Alternate Email:)

Address:
10940 NE 33rd Place Suite 210
BELLEVUE, WA, 98004
Phone: (425) 576-0484

Note: The Filing Id is 20180521115254D1203356