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**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' SUPPLEMENTAL BRIEF

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INTRODUCTION

Two new Supreme Court decisions regarding compelled speech have caused an upheaval in the First Amendment law relating to this dispute: *Janus v. AFSCME* and *NIFLA v. Becerra*. *Janus v. American Federation of State, County, and Mun. Employees, Council 31 (AFSCME)*, ___ U.S. ___, 138 S. Ct. 2448 (2018); *Nat’l Institute of Family and Life Advocates (NIFLA) v. Becerra*, ___ U.S. ___, 138 S. Ct. 2361 (2018). *Janus* establishes a rigorous and uniform test for compelled-subsidy cases, and *NIFLA* confirms that the traditional scrutiny applied to content-based speech regulations extends to compelled speech. Both cases demonstrate that the trial court below erred in applying “reasonableness” review, a standard that the *Janus* decision called “foreign to our free-speech jurisprudence.” *Janus*, 138 S. Ct. at 2465. Elster asks this Court to remand this case to the trial court to apply strict scrutiny or exacting scrutiny as required by *Janus* and *NIFLA*.

ARGUMENT

Two new Supreme Court cases have bolstered and affirmed Elster’s First Amendment claim. In *Janus v. AFSCME*, the Court held that, under the First Amendment, public-sector unions cannot compel nonmembers to subsidize the union. *Janus*, 138 S. Ct. at 2460. This holding overturned *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L.

Ed. 2d 261 (1977), a case that the City has relied on heavily in defending the democracy voucher program. *See* Appellee’s Response Brief at 16-21. In *NIFLA v. Becerra*, the Supreme Court confirmed that the rules regarding content-based speech apply equally in the compelled-silence and compelled-speech contexts. *NIFLA*, 138 S. Ct. at 2371. This affirms Elster’s argument that the voucher program deserves heightened scrutiny because it is content-based—an argument left unaddressed by the trial court.

I. At Minimum, Compelled Subsidies on Speech Are Subject to Exacting Scrutiny

The Supreme Court has worked a dramatic change in the First Amendment doctrine of compelled subsidies. That change clashes with the “reasonableness” standard that the trial court used to assess Elster’s compelled-subsidy claim. This Court should reverse the trial court’s dismissal order and remand for further proceedings consistent with *Janus* and *NIFLA*.

In *Janus v. AFSCME*, the Supreme Court addressed an Illinois law that forced public employees to subsidize a union even if they aren’t union members. *Janus*, 138 S. Ct. at 2460. The Court held that “this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.” *Id.*

The *Janus* decision thereby overruled longstanding precedent that had laid the groundwork for all compelled-subsidy case law: *Abood*, 431 U.S. 209. *Id.* *Abood* had held that compelled agency fees from nonmembers were constitutionally permissible if the fees facilitated collective bargaining. *Id.* at 235-36. The *Janus* Court called *Abood*'s approach a "deferential standard that finds no support in our free speech cases." *Janus*, 138 S. Ct. at 2458. The Court then applied "exacting scrutiny" to the compelled subsidy. *Id.* at 2465. The Court declined to address whether strict scrutiny was in fact the proper standard because the agency-fee law could not satisfy exacting scrutiny. *Id.* The Court's holding on compelled subsidies extends beyond the union setting: "Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed." *Id.* at 2464 (employing the same standard for union fees and commercial ad assessments).

Janus confirms that the trial court in *Elster* erred in applying a deferential "reasonableness" standard. The court below held that the democracy voucher program only needed a "reasonable justification" to satisfy First Amendment scrutiny. Ruling on Motion to Dismiss at 7 (CP at 115). The court extracted this weak standard from *Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000). There, the Supreme Court had held that a mandatory

student fee that helped to fund student groups satisfied First Amendment scrutiny because it was viewpoint-neutral. *Southworth*, 529 U.S. at 221.

Elster has already discussed at length why the trial court misapplied *Southworth*.¹ The Supreme Court’s decision in *Janus* only confirms that *Southworth*’s deferential standard is improper here. Indeed, the dissent in *Janus* had proposed that a reasonableness standard like the rule in *Southworth* should apply to agency fees. *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting). The Court rejected this permissive approach: “This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here.” *Id.* at 2465.

While *Janus* did not directly overrule *Southworth*, it did overrule the *Abood* case that laid the foundation for every compelled-subsidy case that followed, including *Southworth*. See James Coppess, *Symposium: Four propositions that follow from Janus*, SCOTUSblog (June 28, 2018) (“Over four decades, *Abood* was treated by the Supreme Court as a foundational First Amendment precedent. This was true not only with respect to the First Amendment rights of public employees . . . but also with respect to an entire line of ‘compelled-subsidy cases’ stretching far beyond the realm of labor

¹ There are at least three reasons why *Southworth*’s reasonableness standard was improper here even prior to *Janus*: (1) the Supreme Court has expressly limited it to the university context; (2) unlike *Southworth*, the voucher program is content-based; and (3) unlike *Southworth*, the voucher program is viewpoint-based. See Appellants’ Opening Brief at 29-31; Appellants’ Reply Brief at 9-12.

relations . . .”).² Indeed, *Southworth* used *Abood* as the “beginning point for our analysis.” *Southworth*, 529 U.S. at 230. Given *Abood*’s broad influence over subsequent caselaw, it isn’t surprising that the Supreme Court spoke in broad language in overruling *Abood*. For example, the Court said of *Abood*: “Such deference to legislative judgments is inappropriate in deciding free speech issues.” *Janus*, *supra*. at 2480. The Court applied the rigorous scrutiny typical of other areas of First Amendment law because “[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns” to compelled speech. *Id.* at 2464.

Indeed, the Court indicated that compelling speech may well cause greater First Amendment injury than censorship:

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning and, for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence.

Id. (quoting *W. Va. State Board of Educ. v. Barnette*, 319 U.S. 624, 633, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)). Thus, a deferential standard is generally improper because “[f]undamental speech rights are at stake” when government compels people to subsidize “private speech on matters of

² Available at <http://www.scotusblog.com/2018/06/symposium-four-propositions-that-follow-from-janus/>.

substantial public concern.” *Id.* at 2460. The Supreme Court therefore sought to bring compelled-subsidy law into line with the more rigorous standards applied in other First Amendment settings.

Janus also puts to rest another rationale for the trial court’s deferential standard: a fabricated rule that compelled-subsidy claims are subject to lesser scrutiny if there is no “mandated association” between subsidizer and speaker. Ruling on Motion to Dismiss at 5 (CP 113). *Janus*, however, clarified that “the right to refrain from speaking” and the “right to eschew association for expressive purposes” are each independent and enforceable rights. *Id.* at 2463.

In short, while *Janus* did not directly overrule *Southworth*, *Janus*’s broad language and its transformative impact on the compelled-subsidy doctrine commend the narrow reading of *Southworth* that Appellants have articulated in prior briefing.

II. The Supreme Court’s Skeptical Approach to Content-Based Laws Applies Equally to Compelled Subsidies

The Supreme Court’s recent opinion in *NIFLA v. Becerra* confirms Elster’s argument that at least intermediate scrutiny applies to the voucher program as a content-based regulation of compelled speech. The trial court failed to address Elster’s argument regarding content-based speech regulations in its ruling, and the City only addressed the argument in a curt

footnote. *See* Appellee’s Response Brief at 32 n.17. Given the Supreme Court’s holding in *NIFLA*, Elster’s argument deserves a more careful analysis by either this Court or the trial court on remand.

The Supreme Court in *NIFLA* addressed whether requiring pro-life pregnancy centers to post prominent notices regarding abortion services violated the centers’ First Amendment rights against compelled speech. *NIFLA v. Becerra*, 138 S. Ct. at 2370. The Court held that the notice requirement was subject to, at minimum, intermediate scrutiny as a content-based speech regulation that targeted speech based on its communicative content. *Id.* at 2371. The notice rule was unlikely to satisfy that rigorous standard. *Id.* at 2374.

NIFLA’s holding confirms Elster’s argument that the voucher program is a content-based speech regulation subject to at least intermediate scrutiny. As *Janus* reiterated, compelled subsidies are treated like compelled speech claims under the First Amendment. *See Janus, supra* at 2464-65. And the voucher program, like the notice requirement in *NIFLA*, compels speech of a particular content—campaigns for locally elected office. *See Minnesota Voters Alliance v. Mansky*, _ U.S. _, 138 S. Ct. 1876, 1885-86 (2018) (Laws targeting political advocacy are content-based.).

Indeed, the voucher program’s content-based nature renders it more vulnerable even than compelled union fees. In the union context, non-

member subsidies went to a variety of activities, from lobbying to recreation. *Janus*, 138 S. Ct. at 2461. Here, however, the voucher funds are used solely for expression on “matters of substantial public concern.” *Id.* at 2460. Given its content-based nature, the voucher program must face heightened scrutiny just like the notice requirement in *NIFLA*.

The City’s short footnote about content-based speech misunderstands how the content-based rule operates with respect to compelled speech. The City argues that the program is not content-based because “no speech is being targeted by the tax in question—all property owners must pay the tax.” Appellee’s Response Brief at 32 n.17. But the question is not whether the regulation compels speech from a subset of speakers with a specific viewpoint; rather, as *NIFLA* confirms, the question is whether the speech that the government compels has a particular content. Under that analysis, the voucher program is clearly content-based because the vouchers are used for expression about specific content—local campaigns for elected office. The voucher program thus must face heightened scrutiny.

CONCLUSION

The trial court employed a tepid scrutiny inconsistent with Supreme Court case law. Elster asks this Court to reverse the dismissal of his First Amendment claim.

DATED: July 19, 2018.

Respectfully submitted,

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