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DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MARK ELSTER and SARAH PYNCHON,

Plaintiffs/Appellants,

vs.

THE CITY OF SEATTLE, a Washington municipal corporation,

Defendant/Respondent,

**CITY OF SEATTLE'S BRIEF IN RESPONSE TO *AMICUS CURIAE*
BRIEF OF THE FREEDOM FOUNDATION**

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I INTRODUCTION

Amicus, the Freedom Foundation, derides Seattle’s Democracy Voucher Program (Program) as nothing more than Seattle voters “reinforce[ing] their progressive bona fides” in an attempt “to limit the rights of Seattle business and property owners.”¹ Not only are such rhetorical potshots unnecessary, unfounded, and unhelpful, most importantly, they ignore the fact that the United States Supreme Court has held, in no uncertain terms, that public financing schemes like the one at issue here “facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.” *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976). Like Elster before it, the Freedom Foundation refuses to address and take on *Buckley*’s most relevant holding.

Under the Supreme Court’s decision in *Buckley*, the Program does not implicate, much less violate, the First Amendment. As the City already explained in its Response Brief, *Buckley* does not view the public financing of political messages as “contributing to the spreading of a political message, but rather [as] advancing an important public interest, the facilitation of public discussion and participation in the electoral process,

¹ See Freedom Foundation’s Amicus Brief at 1-2; see also *id.* at 2 (“it is free speech for me, but not for thee.”).

goals vital to a self-governing people.” *Libertarian Party of Ind. v. Packard*, 741 F.2d 981, 989 (7th Cir. 1984) (quoting *Buckley*); *see also May v. McNally*, 55 P.3d 768, 771 (Ariz. 2002). Requiring an individual to pay a property tax, without more, carries with it no First Amendment consequences. Paying the tax is not expressive activity, burdens no one’s speech, nor does it force anyone, even indirectly, to associate with any particular message with which they disagree. But even if it did, the proper test would be viewpoint neutrality in the *City’s allocation of funds to voucher recipients* “not the resulting viewpoints supported.” *May* at 773 (discussing *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000)). This is so because the government “may support valid programs and policies by taxes or other exactions binding on protesting parties.” *Southworth* at 229.

Nothing in the Freedom Foundation’s amicus brief suggests a contrary result because rather than taking on these cases, amicus instead focusses on numerous issues that have nothing to do with Elster’s challenge. For the reasons set forth below, and for those already explained by the City, Judge Andrus’s determination that the Program is constitutional should be affirmed.

II ARGUMENT

This case only involves a challenge to the Program under the theory that the First Amendment is violated when an individual is required to pay a tax that in turn subsidizes speech that the individual may or may not agree with. The Freedom Foundation spends a considerable amount of time thrusting at lions of their own imagining,² rather than addressing the challenge Elster has brought.

This case has nothing to do with contribution limits or limits on anyone's, corporate or otherwise, ability to participate in the political process. Quite the opposite, the Program facilitates and expands public participation in the electoral process. Thus, the City is at a loss to understand why the Freedom Foundations spends considerable time complaining about "complete ban[s]" on political expenditures,³ "union leaders" influencing and dictating municipal policy,⁴ and the fact that corporations have a First

² *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 708 (1994) ("Justice Cardozo once cast the dissenter as the gladiator making a last stand against the lions. Justice Scalia's dissent is certainly the work of a gladiator, but he thrusts at lions of his own imagining.") (quotations & citations omitted).

³ See Freedom Foundation's Amicus Brief at 8; see also *id.* at 10 ("The City seeks to restrict business contributions under the guise of 'campaign finance reform.'").

⁴ See Freedom Foundation's Amicus Brief at 10. This aspersion is particularly confusing given that the Program is a result of direct democracy through the citizen initiative process.

Amendment right “to engage in the political process.”⁵ In the end, it matters not whether “businesses in Seattle are the proverbial boogeyman,” or whether unions “are the savior to City politics.”⁶ None of those issues speak to the central issue in this case: Whether a property tax that subsidizes political speech in a neutral fashion violates the First Amendment.

Perhaps the Freedom Foundation ratchets up the rhetoric and ignores controlling authority because it, like Elster, has no response as to why *Buckley*’s most relevant holding—that public financing of campaigns “furthers, not abridges, pertinent First Amendment values”—does not control the outcome of this case. *Buckley* at 93. As the City previously explained in detail, *Buckley* controls. See City’s Brief at 7-36.

Next, the City has already explained why its allocation of funds to its citizens—which is not based on the political views of any individual—is viewpoint neutral. See City’s Brief at 27-36. While unclear, the Freedom Foundation appears to assert that viewpoint neutrality is violated here because the money only goes to candidates who participate in the Program, and this, in turn, means the City is “advocating for candidates who have

⁵ See Freedom Foundation Amicus Brief at 6.

⁶ See Freedom Foundations Amicus Brief at 11.

chosen to be recipients of the Program.” Freedom Foundation Amicus Brief at 12. Under this logic, the scheme upheld in *Buckley* would be unconstitutional because there, like here, only certain qualified candidates could receive public money. *Buckley*, 424 U.S. at 94-97. Indeed, this argument is little more than a variant of the argument that the federal financing scheme worked “invidious discrimination against minor and new parties in violation of the Fifth Amendment.” *Id.* at 97. Unsurprisingly, the Supreme Court rejected this argument as it applied to multiple parts of the federal scheme. *See id.* at 97-107.

Any suggestion that there is some invidious “implied intent that the recipient use those funds for a message they wish to convey,” is pure fantasy. Freedom Foundation Amicus Brief at 12. Once the City sends the vouchers out, the citizens who receive those vouchers are under no compulsion to do anything with those vouchers. They can send those vouchers to a participating candidate, use them as a coaster for a beverage, or throw them into the garbage. At bottom, the only action the City takes with respect to the vouchers is sending them to Seattle’s citizens, and it does so without reference to the political or ideological views of those citizens.

Finally, any claim that the Program, even if viewpoint neutral, should still be subject to some form of heightened scrutiny makes no sense

unless one completely ignores *Buckley*'s most relevant holding.⁷ While *Buckley* is the font of much of the Supreme Court's modern-day campaign-finance related jurisprudence, it cannot be seriously argued that *Buckley* employed any form of heightened scrutiny to the public financing scheme at issue in that case. See City's Response at 14 (explaining how *Buckley* applied various levels of First Amendment scrutiny to certain limits and disclosures, but none to public financing provision); see also *Green Party of Conn. v. Garfield*, 616 F.3d 213, 227 (2d Cir. 2010). Again, the reason why the *Buckley* Court did not apply any level of First Amendment scrutiny to the public financing scheme at issue was because such schemes "further[], not abridge[], pertinent First Amendment values." *Buckley* at 93; see also *Libertarian Party*, 741 F.2d at 989-90.

While Elster and his amicus may believe *Buckley* was wrongly decided, or they may want to see *Buckley* overruled, the fact remains that *Buckley*'s holding with respect to public financing schemes is as solid today as it was when it was announced over forty years ago. Consequently, the trial court's conclusion that the Program passes constitutional muster should be affirmed.

⁷ See Freedom Foundation Amicus Brief at 13-18.

III CONCLUSION

The Program is constitutional and the Superior Court should be affirmed.

RESPECTFULLY SUBMITTED this 26th day of June 2018.

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CERTIFICATION OF SERVICE

The undersigned certifies that she caused the foregoing to be filed with the court and served electronically to all counsel of record via the Court's electronic service system and via email on this day, the foregoing City of Seattle's Brief in Response to *Amicus Curiae* Brief of the Freedom Foundation to:

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