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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,

RESPONSE BRIEF OF RESPONDENT CITY OF SEATTLE

SEATTLE CITY ATTORNEY'S OFFICE

Michael K. Ryan, WSBA #32091
Assistant City Attorney
Lawrence Lessig, *pro hac vice*
Harvard Law School
Attorneys for Respondent
City of Seattle

Seattle City Attorney's Office
701 – 5th Avenue, Suite 2050
Seattle, Washington 98104-7097
(206) 684-8200

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I INTRODUCTION

All that Elster is required to do by the initiative he challenges in this case is pay a tax. Nothing more. That his tax dollars may be used to advance messages he disagrees with is a fact of American life. We all pay taxes, and we all don't agree with how our tax dollars are spent. Paying the tax is not speech nor does it restrict anyone's speech, burden any form of expression, or require anyone to associate (even indirectly) with any message, group, or person they disagree with. As *Buckley v. Valeo*, made clear: Public financing schemes advance, not hinder, core First Amendment values because they "facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. 1, 92-93 (1976).

Buckley's holding is as solid today as it was over forty years ago. And this is especially so where, as here, the financing scheme operates in an entirely neutral fashion. Even more clearly than the scheme upheld in *Buckley*, the Democracy Voucher Program ("Program") promotes First Amendment values: for unlike the scheme in *Buckley*, the Program is open to all-comers. Thus, no fine parsing of First Amendment tests is even necessary for this Court to uphold this Program. If a "test" is necessary, viewpoint neutrality in the *allocation of funds* is all the First Amendment requires. *May v. McNally*, 55 P.3d 768 (Ariz. 2002).

In the world of the First Amendment, and campaign finance jurisprudence specifically, the nature of the challenge and the parties are critical. It is important to understand what this case is *not* about. This case is not about a candidate who is claiming the Program gives her opponent an unfair advantage,¹ limits her access to the ballot, or inhibits the amount of money she may spend in support of her candidacy.² This case is not about donors challenging contribution limits.³ This case is not about an advocacy group challenging limits on independent expenditures or coordinating political spending with a preferred candidate.⁴ This is not a case about forced association, or being required to pay dues to an organization with a specific viewpoint.⁵ This case is only about whether a tax on individuals who own property in Seattle violates the First Amendment. Because the tax does not implicate, much less violate, the First Amendment, the Superior Court should be affirmed.⁶

II STATEMENT OF ISSUES

- 1) Does the tax implicate the First Amendment? **No.**

¹ *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

² *Davis v. FEC*, 554 U.S. 724 (2008).

³ *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

⁴ *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁵ *Abod v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

⁶ Given his participation in the Program, City Attorney Peter S. Holmes has ethically screened himself and he has not participated in this case in any respect.

2) Assuming it does, does the tax, which funds a program that allocates funds in a viewpoint neutral manner, violate the First Amendment rights of taxpayers who own property in Seattle? **No.**

III FACTUAL AND PROCEDURAL HISTORY

A. Factual Background.

In November 2015, Seattle’s voters overwhelmingly approved Initiative I-122 (“Initiative”). Two individual taxpayers (collectively “Elster”) seek to invalidate a single, yet important, aspect of the Initiative that facilitates speech: The Democracy Voucher Program.

The Initiative was filed with the City Clerk on April 3, 2015. CP 51. On July 2, 2015, the City Clerk received a certificate of sufficiency from the King County Elections Director certifying that the Initiative had sufficient valid petition signatures. CP 52. Normally, one option for the City Council in response to an initiative petition is to adopt the initiative as an ordinance. *See* Seattle Charter Article IV § 1.C. That option was not available here because, in addition to containing other regulations relating to public participation in government, the Initiative contained a system of publicly financing political campaigns potentially funded by a property tax. RCW 42.17A.550 provides that local governments must submit any proposal for public financing of local elections to voters for their approval or rejection. The property tax increase proposed by the

Initiative also required voter approval. *See* RCW 84.55.050. Thus, the Initiative went on the November 2015 ballot. CP 53-64.

More than 63 percent of those voting approved the Initiative, now titled Honest Elections Seattle in the Seattle Municipal Code. SMC 2.04.600—690.⁷ The overall purpose of the Initiative is stated as follows:

This people’s initiative measure builds honest elections in the City of Seattle (“City” or “Seattle”) and prevents corruption, by: giving more people an opportunity to have their voices heard in our democracy; ensuring a fair elections process that holds our elected leaders accountable to us by strengthening voters’ control over City government; banning campaign contributions by City contractors and entities using paid lobbyists; lowering campaign contribution limits; tightening prohibitions on lobbying by former elected officials (the “revolving door” problem); expanding requirements for candidates to disclose their financial holdings and interests; and increasing fines on violators of campaign rules. This measure also creates a Democracy Voucher campaign public finance program (“Democracy Voucher Program” or “Program”) to expand the pool of candidates for city offices and to safeguard the people’s control of the elections process in Seattle.

SMC 2.04.600(a). While the Initiative enacted several changes to fulfill its purpose,⁸ Elster challenges only the tax that funds the Program.

⁷ For ease of reference, the City will refer to the relevant codified sections of the Seattle Municipal Code rather than to the Initiative’s section.

⁸ For example, civil penalties for election law violations increased from \$10/day to \$75/day and a \$250-1000/day penalty is created for violations within 30 days before an election. CP 24-25. reduced maximum campaign contributions from \$700 to \$500, and then provides for periodic adjustments for inflation. SMC 2.04.370; Elected officials and candidates are prohibited from accepting or soliciting campaign contributions from

The Program is “vital to ensure the people of Seattle have an equal opportunity to participate in political campaigns and be heard by candidates, to strengthen democracy, fulfill other purposes of this subchapter and prevent corruption.” SMC 2.04.620(a). The Program provides four \$25 vouchers be given to each Seattle voter per city election, assignable to and redeemable by candidates who voluntarily agree to campaign spending and contribution limits. SMC 2.04.620. The vouchers are funded in part by a property tax levy approved by the voters as part of the Initiative in accordance with RCW 84.55.050. The levy will raise a maximum of \$30,000,000 over its ten-year duration. Initially, the vouchers can only be used for City Council and City Attorney elections. SMC 2.04.690. Vouchers can be used for Mayoral elections starting in 2021. *See id.*

Importantly, the program is voluntary. If candidates elect to participate, they must agree to lower contribution limits and to take part in at least three public debates. *See* SMC 2.04.630(b). To qualify to receive democracy vouchers a candidate is required to collect a certain

anyone having at least \$250,000 in contracts with the City in the last two years or who has paid at least \$5,000 in the last 12 months to lobby the City. *See* SMC 2.04.601-.602. If technologically feasible, candidates are required to disclose electronic transfers into their accounts. *Id.* Compensated signature gatherers must display “PAID SIGNATURE GATHERER” on a sign, placard, or badge. SMC 2.04.606. Elected officials and their top-paid aides/employees are prohibited from lobbying the City for pay for three years after leaving the office/position. *See* SMC 2.04.607.

number of qualifying signatures and contributions from Seattle residents. *Id.* Nothing in the Initiative conditions the receipt of funds on the political party (or lack thereof) or the views and positions of the candidate. Candidates for district City Council and City Attorney races may receive no more than \$150,000 from redeemed vouchers in an election cycle. *See* SMC 2.04.630(d). Candidates for Council at-large races may receive no more than \$300,000 from redeemed democracy vouchers in an election cycle. *Id.* Candidates in mayoral races may receive no more than \$800,000 from redeemed democracy vouchers in an election cycle. *Id.* All unspent funds received from the Program must be returned. *See* SMC 2.04.630(j).

B. Procedural History.

On June 28, 2017, Elster filed his Complaint. CP 1-28. Elster elected to conduct no discovery, nor did he avail himself of seeking public records under Washington's Public Records Act prior to filing suit. Almost three months after the Complaint was filed, the City filed its Motion to Dismiss. CP 31-65. Several amicus briefs were filed in support of the Initiative. CP 138-194. In opposition, Elster made no argument that discovery was necessary, nor did he attempt to convert the City's Motion to one for summary judgment by attempting to place evidence into the record. *See generally* CP 66-99.

On November 17, 2018, Judge Andrus granted the City’s Motion. CP 109-116. Elster sought reconsideration, arguing only that additional briefing was necessary on certain issues, not (as he does now) that discovery was necessary. *Compare* CP 117-126 with Op. Br. at 37-38. The motion was denied. CP 127-28. Elster appealed.

IV LEGAL ARGUMENT

Buckley v. Valeo decides this case. The payment of a tax does not restrict anyone’s speech, *Buckley*, 424 U.S. at 92-93; nor does it “inhibit robust and wide-open political debate,” the cornerstones of what the First Amendment protects against. *Bennett*, 564 U.S. at 754-55 (2011). In fact, the Program does the opposite: it facilitates increased participation in the electoral process and therefore does not implicate the First Amendment. Even if the tax implicates the First Amendment, the allocation of the funds by the City is done in a manner that is entirely viewpoint neutral, which is the most the First Amendment requires.

A. The First Amendment is not implicated.

The First Amendment does not prohibit the City from fostering and promoting participation by more of its citizens in the electoral process through public financing of campaigns. Elster’s entire argument rests on a false premise—that the payment of a tax, without more, carries with it First Amendment consequences. Seattle has not restricted

or abridged Elster's speech in any way, nor has it compelled Elster to speak or to stay silent. Seattle has simply taxed Elster's property for a plainly legitimate governmental purpose. No court has ever recognized any First Amendment right by taxpayers to invalidate a government program with which they disagree. *Buckley*, 424 U.S. at 91-92 & n.125.

Elster is not required to support any specific candidate or be associated with any message or candidate with which he agrees or disagrees. He must only pay a tax. Thus, this is decidedly not a case where the government is requiring Elster to utter or associate with a message he disagrees with or engage in any specific act to which he objects. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977) (state may not compel individuals to display "Live Free or Die" on their license plates); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compelled flag salute and Pledge of Allegiance violates the First Amendment); *State v. K.H.—H.*, 185 Wn.2d 745, 749, 374 P.3d 1141 (2016) ("The compelled speech doctrine generally dictates that the State cannot force individuals to deliver messages they do not wish to make."). "There is nothing in this case approaching a Government-mandated pledge or motto that [Elster] must endorse." *Rumsfeld v. Forum for*

Academic & Institutional Rights, Inc., 547 U.S. 47, 62 (2006).⁹

As the Supreme Court explained in a similar context:

The use of assessments to pay for advertising does not require respondent to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another's message. Respondents are not required themselves to speak, but are merely required to make contributions for advertising.

Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 470-71 (1997) (citations omitted); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-88 (1980) (rejecting property owner's First Amendment claim based on alleged right to exclude speech at private shopping mall).

While Elster spills considerable ink discussing inapt authority and various levels of judicial scrutiny, he completely ignores *Buckley's* unequivocal holding that public financing of elections does “not abridge, restrict, or censor speech, but rather [uses] public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.” 424 U.S. at 92-93.

Elster's omission is truly remarkable because he cites and

⁹ Paying a tax is not an expressive act. *Johanns v. Livestock Mktg. Assoc.*, 544 U.S. 550, 559 (2005) (“Compelled support of government—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest.”) (internal quotation omitted).

discusses *Buckley* almost *ten times* in his Opening Brief yet fails to address its most relevant holding.¹⁰ The Court in *Buckley* made plain—the First Amendment is not even implicated, much less violated, by using tax dollars to fund political campaigns. That the tax funds political speech is of no constitutional moment. The Court’s decision in *Buckley* fully resolves any First Amendment issue.

In *Buckley*, the Court considered, among other issues, a federal statute that created a system of public financing for presidential campaigns. 424 U.S. at 85. This system was challenged by several individuals and entities, including minor parties and potential candidates. *Id.* at 7-8. The system at issue in *Buckley* provided public funding for presidential nominating conventions and general and primary election campaigns, drawing distinctions between “major,” “minor,” and “new” political parties in allocating funds from the system. *Id.* at 87-90 (explaining mechanics of the system). The challengers claimed, among other things, that the system violated the First Amendment and the Fifth Amendment on equal protection grounds. *Id.* at 90.

With respect to the First Amendment challenge, the Court held

¹⁰ Elster’s omission is also misleading because when he does discuss *Buckley*, he cites it several times for the proposition that some form of heightened scrutiny must be applied in this case. *See, e.g.*, Op. Br. at 1, 8, 18, & 28. As explained in the main, *Buckley* employed no scrutiny, heightened or otherwise, to a similar challenge.

that public financing of campaigns “is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [public financing of campaigns] furthers, not abridges, pertinent First Amendment values.” 424 U.S. at 92-93.¹¹ In fact, the Court specifically rejected the argument that the scheme involved “any compulsion upon individuals to finance the dissemination of ideas with which they disagree.” *Id.* at 92 n.124. Thus, any claim that public financing of elections implicates, much less violates, the First Amendment is foreclosed by *Buckley*. *Id.* at 92 n.125 (noting alternative voucher program).

As the Arizona Supreme Court held: “*Buckley* thus affirms the proposition that the public financing of political campaigns, in and of itself, does not violate the First Amendment, even though the funding

¹¹ *Butterworth v. Republican Party of Florida*, 604 So.2d 477 (Fla. 1992), is of no help to Elster. In that case, after recognizing that “publicly funding candidates advances the interests put forth by the State and does not abridge First Amendment values,” the court concluded that “singling out political parties and associations to support the fund bears no relationship to the interest advanced.” 604 So.2d at 480. Here, the Program is funded by a tax on individuals who own property in the City and is not directed at any political party or association of individuals as was the case in *Butterworth*. *Id.* at 478-79 (noting that fund was funded in part by “a 1.5 percent assessment on all contributions,” with certain exemptions, received by political parties and political committees). Likewise, *Vermont Society of Association Executives v. Milne*, 779 A.2d 20 (Vt. 2001), is equally unhelpful. *Milne* addressed a specific tax on lobbying expenditures, which violated the First Amendment because it singled-out First Amendment activities (*i.e.*, lobbying) for special tax treatment. *Id.* at 31. The tax at issue here is not based on any First Amendment right to petition the government; but rather is triggered by property ownership.

may be used to further speech to which the contributor objects.” *May v. McNally*, 55 P.3d 768, 771 (2002); *see also Libertarian Party of Ind. v. Packard*, 741 F.2d 981, 990 (7th Cir. 1984) (“the use of the public’s tax dollars to finance qualifying political parties does not implicate taxpayers’ first amendment rights.”); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (upholding statute authorizing use of state revenue to finance primary elections of certain political parties).

The fact that the program at issue in *Buckley* was funded through a voluntary check-off, as opposed to a tax levied on people who own property, does not distinguish it from the Program. *Buckley* strongly suggests that Congress, if it had chosen to do so, could have funded the system out of the general fund; thus, its ruling did not turn on the fact that the system was based on a voluntary check-off provision. 424 U.S. at 91-92; *see also May*, 55 P.3d at 771 n.2 (Az. 2002); *Little v. Fla. Dep’t of State*, 19 F.3d 4, 5 (11th Cir. 1994) (“the holding of *Buckley* was not founded or dependent upon the characterization of the check-off as voluntary.”); *Libertarian Party*, 741 F.2d at 990 (“this element of control in and of itself clearly is insufficient to implicate the first amendment”); *Bang v. Chase*, 442 F. Supp. 758, 768 (D. Minn. 1977) (per curiam; three-judge panel) (since *Buckley* held “that a tax check-off system which allows the taxpayer no choice as to where his contributions

will go meets constitutional standards, a fortiori a system which affords the taxpayer some choice cannot be invalid”), *summarily aff’d sub nom.*, 436 U.S. 941 (1978).

In fact, one of the challenges to the scheme at issue in *Buckley* was that it offended the First Amendment because an individual could not specifically direct to which candidates the funds went. *Buckley* rejected this claim because appropriating money out of the fund “is like any other appropriation from the general revenue” and the “fallacy” inherent in this argument is that “every appropriation made by Congress uses public money in a manner in which some taxpayers object.” 424 U.S. at 91-92. Yet, obviously, such an objection did not raise First Amendment concerns. Thus, consistent with the First Amendment, “Congress need not provide a mechanism for allowing taxpayers to designate the means in which their particular tax dollars are spent.” *Id.* at 92 n.125. Accordingly, the Program at issue here does not implicate, much less violate, the First Amendment.

Elster’s concession that funding the Program from the “general revenue,” as opposed to property tax, would be consistent with the First Amendment fatally undermines his claim. Op. Br. at 35-36. Despite his arguments to the contrary, this concession shows the true nature of Elster’s complaint: That property owners alone, as opposed to all other

taxpayers, must fund speech they may disagree with. The Supreme Court has held, however, that in matters of taxation “[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes.” *Regan v. Taxation Without Representation of Wash.*, 461 U.S. 540, 547 (1983). If Elster believes that the tax improperly targets property owners, the proper recourse is through some form of an equal protection challenge, not through a radical transformation of the First Amendment that eschews *Buckley*’s central teaching in this regard.

If there were any merit to the contention that funding political candidates with public money somehow restricts or compels speech, subjecting the tax to full First Amendment scrutiny, the Court in *Buckley* would have employed some level of First Amendment balancing when addressing the public-financing scheme at issue. It did not. The Court in *Buckley* did, however, employ various levels of scrutiny when addressing contribution limits, independent expenditures, and reporting and disclosure requirements. *Buckley*, 424 U.S. at 17-59 (addressing contribution and expenditure limits) & 60-84 (addressing disclosure provisions). Rather, than employ some form of balancing test to the public financing scheme at issue, *Buckley* dismissed a similar challenge “out of hand.” *Green Party of Conn. v. Garfield*, 616 F.3d 213, 227 (2d Cir. 2010).

The linchpin of Elster’s argument—that he is compelled to subsidize speech—thus rests on a fundamental misreading of *Buckley*. From the First Amendment’s perspective, *Buckley* did not consider the distributed funds “to be 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, goals vital to a self-governing people.’” *Libertarian Party*, 741 F.2d at 989 (7th Cir. 1984) (quoting *Buckley* at 92-93); *see also Buckley* at 93 n.127.¹² It is for this reason *Buckley* held “that the use of the public’s tax dollars to finance qualifying political parties does not implicate taxpayers’ first amendment rights.” *Libertarian Party* at 990. Public financing of elections does not burden speech. After all, “every appropriation made by Congress uses public money in a manner to which some taxpayers object.” *Buckley* at 92.

The First Amendment does not prohibit the government from providing “financial assistance to the exercise of free speech[.]” *Buckley*, 424 U.S. at 93 n.127. Nor does it forbid Seattle from fostering and promoting free expression through a system of public financing. The

¹² Public financing of campaigns is not a “gift” or even a “subsidy” because “[s]uch funds never leave the public arena; they never go into the private pockets of the candidate for his own personal purpose. The candidate holds the funds in a fiduciary capacity and can spend only to further the objectives of the ordinance.” *City of Seattle v. State*, 100 Wn.2d 232, 240-41, 668 P.2d 1266 (1983).

Program promotes increased participation in the electoral process by more Seattle citizens, a goal essential to self-governance. Elster's Complaint was properly dismissed.¹³

B. No authority subsequent to *Buckley* draws its conclusions into doubt.

Elster seeks to change the rule of *Buckley*. But there is no authority that gives this Court any reason to remake First Amendment law fundamentally. The cases Elster cites in support of his novel theory of the First Amendment have never been extended as far as he would stretch them. And, in fact, the Supreme Court has refused to apply these cases in a related context, and the Arizona Supreme Court and U.S. Court of Appeals for the Seventh Circuit have both rejected their application in virtually identical contexts.

1. *Abood* and its progeny.

Elster relies on a series of cases in which the Court has upheld the rights of citizens not to be compelled to associate either with a message or movement. These cases have nothing to do with a tax that facilitates speech in a viewpoint neutral fashion. The progenitor of these

¹³ The City disagrees with the Superior Court's determination that the First Amendment is implicated in this case. CP 112. Nevertheless, this Court may affirm on any basis supported by the record. *See, e.g., Bavand v. OneWest Bank*, 196 Wn. App. 813, 825, 385 P.3d 233 (2016). What is more, even if the First Amendment is implicated, all that is required is viewpoint neutrality in the allocation of the funds and therefore this Court can assume, without deciding, that the First Amendment is implicated and still affirm.

cases is *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which was decided a Term after *Buckley*.

Abood involved a challenge by nonunion public-school teachers to an agreement that required them, as a condition of employment, to pay a service fee equal in amount to union dues. *Id.* at 211-12. The teachers objected to paying the fee and claimed that union's use of the fees to engage in political speech violated their "freedom of *association* protected by the First and Fourteenth Amendments[.]" *Id.* at 213 (emphasis added). The Court agreed and held that the First Amendment prohibited the forced contribution of fees "to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235. Despite this ruling, the Court said: "We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as a collective-bargaining representative," so long as the dues payers were not "coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 236.

Next came *Keller v. State Bar of California*, 496 U.S. 1 (1990). There, the Court held that lawyers admitted to practice in California could be required to join the bar association and to fund activities

“germane” to the bar’s mission of “regulating the legal profession and improving the quality of legal services.” *Id.* at 13. The lawyers could not, however, be required to fund the political messages of the bar association itself. *See id.* at 16.

In *Knox v. SEIU, Local 1000*, the Court addressed the question of “whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union’s political activities.” 567 U.S. 298, 302 (2012). In resolving that question, the Court held only that “when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson*^[14] notice and may not exact any funds from nonmembers without their affirmative consent.” *Id.* at 322 (2012).

In *Harris v. Quinn*, the Court addressed “whether the First Amendment permits a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support.” 134 S. Ct. 2618, 2623 (2014). In ruling that the First Amendment did not allow such compulsion, the Court held that a “State may not force every person who benefits from [a union’s] efforts to make payments to the group.” *Id.* at 2638.

¹⁴ This refers to *Teachers v. Hudson*, 475 U.S. 292 (1986), which identified procedural requirements unions must follow in order to collect fees from nonmembers.

These cases have never been read to imply a general immunity from taxation for any speech related activity that a taxpayer opposes. To the contrary, we are all required to subsidize expressive activity we disagree with, whether we are Democrats during a Republican administration or Republicans during a Democratic administration. As the Supreme Court indicated: “*Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute *to an organization* whose expressive activities conflict with one’s freedom of belief.” *Glickman* 521 U.S. at 471 (1997) (quotation omitted; emphasis added). In each of these cases, the scheme at issue worked both a form of “compelled speech and association,” and it was that combination which imposed upon the First Amendment rights of dissenting individuals. *Knox*, 567 U.S. at 310-11.

United States v. United Foods, Inc., 533 U.S. 405 (2001), does not assist Elster either. There, a mushroom producer objected to an assessment that was used to provide a generic marketing message for all mushroom producers. *Id.* at 408. The Court framed the issue as “whether the government may underwrite and sponsor speech *with a certain*

viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced.” *Id.* at 410. In simple terms, the producer was being required to directly subsidize a message that its competitors’ mushrooms were as good as its mushrooms, a message “favored by the majority of producers.” *See id.* at 411. Thus, not only was the producer forced to directly associate with a message with which it disagreed, that message was created by an association the mushroom producer was required to join.

The same is not true of the Program, because just like the scheme in Arizona, it “allocates money,” through private choice, “to all qualifying candidates, regardless of party, position, or message.” *May*, 55 P.3d at 772 (Ariz. 2002). Thus, the purpose of the Program, unlike the assessment on mushroom producers in *United Foods*, or the union dues in *Abood*, or the bar dues in *Keller*, is not to fund, advance or support any specific message or any specific association’s point of view. Rather, it is to facilitate increased participation in the electoral process by more Seattle citizens. Given *Buckley*’s holding in this regard—that public financing of elections is not viewed as funding political speech, but rather as facilitating participation in the electoral process—this Court should reject Elster’s invitation to extend the *Abood* line of cases further than any other court has been willing to stretch them.

2. *Southworth's rejection of applying Abood.*

Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217 (2000), affirms this view. There, the Court rejected a First Amendment challenge to the imposition of “a mandatory student activity fee” that was used to fund student organizations who engaged in “political or ideological speech.” *Id.* at 221. The Court held that the “First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.” *Id.*

At issue in *Southworth* was a mandatory activity fee that “amounted to \$331.50 per year,” which was “segregated from the University’s tuition charge.” *Id.* at 222. The fee funded, among other things, such groups as the “College Democrats,” the “College Republicans,” and activities ranging from “displaying posters and circulating newsletters throughout the campus, to hosting campus debates and guest speakers, and to what can best be described as political lobbying.” *Id.* at 223. Several students alleged that the imposition of the fee, without any ability to opt-out of funding organizations “that engage in political and ideological expression offensive to their personal beliefs,” “violated their rights of free speech, free association, and free exercise under the First Amendment.” *Id.* at 227.

The Court first recognized this unremarkable proposition:

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties.

Id. at 229; *see also United States v. Lee*, 455 U.S. 252, 260 (1982) (“The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”). Like Elster here, the objecting students relied on *Aboud* to argue that compelling them to fund speech with which they disagreed violated the First Amendment. “While those precedents identify the interests of the protesting students, the means of implementing First Amendment protections adopted in those decisions are neither applicable nor workable in the context of extracurricular student speech at a university.” *Southworth*, 529 U.S. at 230.

In rejecting the application of *Aboud* and its progeny, the Court noted that the “standard of germane speech as applied to student speech at a university is unworkable, however, and gives insufficient protection both to the objecting students and to the University program itself.” *Id.* at 231. This was so because the fee at issue was designed “to stimulate the whole universe of speech and ideas.” *Id.* at 232. And although it was

“inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs,” the Court refused to “impose” any requirement that a student be able to opt out of the system or to allow students to direct the specific groups to which their respective fees should go. *Id.*

That said, the Court did note that “University must provide some protection to its students’ First Amendment interests” and it found that “protection for objecting students [in] the requirement of viewpoint neutrality *in the allocation* of funding support.” *Id.* at 233 (emphasis added). In other words, so long as the money in the fund was allocated in a viewpoint neutral manner, the objecting students’ First Amendment interests were adequately protected.

C. Viewpoint neutrality adequately protects whatever First Amendment interests may be at stake.

There is no authority for this Court rejecting *Southworth*, and radically extending the reach of the *Aboud* line of cases. Facilitating increased participation in the electoral process through a property tax is not forced association with any message or candidate, nor is it even seen as funding political speech from the perspective of the First Amendment.

As the Seventh Circuit explained:

As we interpret *Buckley*, the reason that government constitutionally may be allowed to use public funds to

finance political parties is that the funds *are not considered to be contributing to the spreading of a political message, but rather are advancing an important public interest*, the facilitation of public discussion and participation in the electoral process, goals vital to a self-governing people. In contrast, the fees at issue in *Abood* were being used to support the particular partisan viewpoints of one private organization.

[. . .]

According to *Buckley*, [Plaintiffs'] money would be going to facilitate and enlarge public discussion and participation in the electoral process, that these [Plaintiffs] may have a different view does not create in them the type of first amendment rights afforded to dissenters in a case such as *Abood*.

Libertarian Party, 741 F.2d at 989-90 (emphasis added; citations and quotations omitted).¹⁵

In *Abood* and its progeny, the objecting party had to directly fund the very organization with whom they disagreed. Thus, the funds were directly traceable from the individual to the organization or message they opposed, sharpening associational concerns. In contrast, Elster does not directly fund any candidate with whom he disagrees. Rather, he merely pays a tax, which then goes into a fund, which is then neutrally distributed to qualifying candidates who elect to participate in the

¹⁵ Elster's counsel in this case conceded in *May v. McNally*, *supra*, that "tax dollars . . . may be spent on expressive activity without violating taxpayers' First Amendment rights[.]" 55 P.3d at 773; *see also* Amicus Brief of Pacific Legal Foundation, 2002 WL 32881004 at * 3 (July 22, 2002). This was so because only assessments, not taxes, "implicate First Amendment rights of people who must pay them." *Id.*

Program. This lack of directness is constitutionally significant because there is no “clear connection between [the] fee payer and offensive speech that loomed large in our decisions in the union and bar cases[.]” *Southworth*, 529 U.S. at 240 (Souter, J., concurring); *see also PruneYard*, 447 U.S. at 87 (1980) (noting that First Amendment was not violated where “views expressed by members of the public . . . will not likely be identified with those of the owner.”). What is more, unlike in the *Abood* cases, the Program’s aim is to broaden public discourse by providing a mechanism to allow more, not less, participation in the political process by residents of Seattle. That is completely appropriate under *Buckley*.

The irrelevance of *Abood* is underscored by the Arizona Supreme Court’s decision in *May v. McNally*, *supra*, another decision that Elster entirely ignores. In *May*, the court addressed whether a ten-percent surcharge on civil and criminal fines that helped fund Arizona’s public-financing scheme for political campaigns violated the First Amendment. 55 P.3d at 770. The challenger in that case was an Arizona state legislator who refused to pay the ten-percent surcharge on a parking ticket on the grounds “that doing so would violate his First Amendment right to free speech because the money might be used to fund the campaigns of candidates whose views he might oppose.” *Id.* Relying on

Buckley, the court initially determined “that the public financing of political candidates, in and of itself, does not violate the First Amendment, even though the funding may be used to further speech to which the contributor objects.” *May* at 771.

The court also went on to address why *Abood* and its progeny did not apply, concluding that to the extent the First Amendment was implicated, the viewpoint neutrality requirement announced in *Southworth* was more appropriate, given the purpose of the program.

While a university is certainly one venue in which the free and open exchange of ideas is encouraged, it is not the only one. Encouraging public debate in the political arena is at least as compelling a public purpose as encouraging speech on a university campus. Moreover, limiting *Southworth* to a university setting overlooks the thrust of the Court’s analysis: If the government seeks to facilitate or expand the universe of speech and accomplishes its goal in a viewpoint neutral way, the question whether speech is germane is simply inapposite.

We find the *Southworth* approach better suited than the *Abood* line of cases for analyzing the constitutionality of the Clean Elections Act. The university’s goals in *Southworth* and the government’s goals in funding clean elections are similar: Both seek to facilitate free speech. Moreover, both funding systems protect free speech rights by requiring viewpoint neutrality in the allocation of funds and attenuating the connection between the payers of funds and the message communicated. The principles of *Buckley*—that government may use public funds to finance political speech—and *Southworth*—that viewpoint neutrality in the allocation of funds adequately safeguards First Amendment rights—support the conclusion that

collecting a surcharge on civil and criminal fines to fund political campaigns does not violate the First Amendment.

May at 772-73. The principle that viewpoint neutrality can adequately protect First Amendment rights in cases not involving forced association has not been undermined by *Knox* or *Harris* and applies here. *Harris*, 134 S. Ct. at 2644 (“Our decision today thus does not undermine *Southworth*.”); *see also id.* at 2652 (Kagan, J., dissenting) (noting application of *Abood* was unique to union context).

D. The Program is viewpoint neutral.

Viewpoint neutrality requires that government “abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Thus, if a program or restriction on speech favors one viewpoint or another, it is likely unconstitutional because viewpoint discrimination is “an egregious form of content discrimination.” *Id.*

The tax itself is viewpoint neutral because it is not directed at the suppression of ideas or the opinions or perspective of any property owner. Likewise, the tax funds a program that is viewpoint neutral in its *allocation of funds*, which is the constitutional touchstone. It does not provide funds only to Democrats or Republicans, but to all qualifying

candidates. It does not provide funds only to candidates that are pro-tenant or pro-renter, but to all qualifying candidates. In fact, the recipient of such funds is under no restrictions whatsoever in their freedom to say whatever they want in the heat of a campaign. For example, if a voucher recipient wanted to run on a platform that the Program is bad policy or unconstitutional, nothing prevents her from doing so. As in Arizona, Program funds are allocated “to all qualifying candidates, regardless of party, position, or message, and thus the surcharge payers are not linked to any specific message, position, or viewpoint. The viewpoint of the disposition of the funds distinguishes this case from *Abood*” and its progeny. *May*, 55 P.3d at 772 (Ariz. 2002). Under viewpoint neutrality, allocation of the funds is dispositive.

Indeed, Elster does not complain that only favored viewpoints can participate in the program. If anything, Elster’s Complaint supports the opposite conclusion. The Complaint does not allege that his preferred candidate—Sara Nelson—could not muster sufficient support to receive funds under the program; rather, it only alleges that certain candidates “declined to participate because of ethical and constitutional objections to the program.” CP 8, at ¶41; CP 11 at ¶¶ 57-58. Even assuming this is true, this was a choice Elster’s preferred candidate chose to make, and he cannot create a constitutional claim over a choice that was completely

beyond the City's control. At base, the law is completely neutral as to who receives funds. No candidate is required to participate in the program, and no candidate is prevented from participating in the program if they receive a basic threshold of support.

As *Buckley* acknowledged, public funding schemes like this one do not in any way prohibit candidates who choose not to participate from raising “money from private sources[.]” 424 U.S. at 99. Nor do they impact voters' rights because

the denial of public financing to some Presidential candidates *is not restrictive of voters' rights* and less restrictive of candidates. [The funding mechanism] does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions.

Id. at 94-95 (emphasis added). The same is true here. No candidate is prevented from participating in the Program, and the lack of participation in the Program by a preferred candidate does not harm the First Amendment rights of any voter or individual whose tax dollars flow into the Program. As with the funding of Arizona's Clean Elections Law upheld in *May*, “the safeguard of viewpoint neutrality *in the allocation of funds* suffices to mitigate any First Amendment concerns.” 55 P.3d at 431 (emphasis added); *see also Southworth*, 529 U.S. at 233 (2000)

(“The proper measure, and the principle standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the *allocation of funding* support.”) (emphasis added).

By arguing only that the Program “has the practical effect . . . of disfavoring or favoring certain viewpoints,” Op. Br. at 17; Elster concedes that the Program is facially neutral. Without citing any authority, Elster proclaims that regulations are “viewpoint-based” if the regulation “has the practical effect—regardless of intent—of disfavoring certain views.” Op. Br. at 17. This view of the First Amendment’s prohibition against viewpoint discrimination has been expressly rejected by the United States Supreme Court.

In *Christian Legal Society v. Martinez*, a Christian student organization, much like Elster here, argued that a nondiscrimination policy was constitutionally suspect because “it systematically and predictably burdens most heavily those groups whose viewpoints . . . out of favor with the campus mainstream.” 561 U.S. 661, 695 (2010). The Court held: “This argument stumbles from its first step because a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has the incidental effect on some speakers or messages but not others.” *Id.*; see also *id.* at 700 & n. 2 (Stevens, J., concurring) (collecting cases) (“And it is a basic tenet of First

Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination.”);¹⁶ *Wis. Educ. Ass’n Council v. Walker*, 705 F.3d 640, 650 (7th Cir. 2013) (“That the benefits of [the] subsidy may fall more heavily on groups with one particular viewpoint does not transform a facially neutral statute into a discriminatory one.”); *Pahls v. Thomas*, 718 F.3d 1210, 1235-36 (10th Cir. 2013) (“Beyond doubt, disparate impact is not enough to render a speech restriction content- or viewpoint-based.”). Thus, far from being a “catchphrase from markedly different cases,” Op. Br. at 21; the notion that a facially neutral law that disproportionately impacts certain individuals does not raise First Amendment concerns is well-settled.

In fact, if there was any doubt that Elster’s novel view of the law should be rejected, his citation to *Buckley* in support of this position lays those doubts to rest. Op. Br. at 22. *Buckley* itself held that it was constitutionally permissible for Congress to allocate taxpayer funds based on whether a party was “major” or “minor,” because the “Constitution does not require the Government to finance the effort of

¹⁶ Not even the dissent stretched this view as far as Elster would have this Court. *Id.* at 735-36 (Alito, J., dissenting) (“The adoption of a facially neutral policy for *the purpose of suppressing the expression of a particular viewpoint* is viewpoint discrimination.”) (emphasis added). Here, Elster does not claim, nor could he, that Seattle’s citizens passed the Initiative for the “purpose of suppressing the expression of a particular viewpoint;” rather, the Program was passed to increase participation by more of Seattle residents—regardless of their views on any subject or topic—in the electoral process.

every nascent political group[.]” 424 U.S. at 98 (quotation omitted). Thus, the law in *Buckley* discriminated on its face between different political parties, yet it still did not implicate, much less violate, the First Amendment.¹⁷

Elster claims that *Citizens United v. FEC*, 558 U.S. 310 (2010), supports his position, but he does so only by cherry-picking the phrase “by design or inadvertence” from its proper context. Op. Br. at 18. What the Court said was “political speech must prevail against laws that *would suppress it*, whether by design or inadvertence.” *Citizens United* at 340 (emphasis added). When placed in proper context—a complete ban on corporate independent expenditures—it becomes apparent that Elster stretches this out-of-context phrase too far. And this is even more so

¹⁷ The same is true for Elster’s argument that the Program is content-based. See Op. Br at 13-17. As the Supreme Court explained:

The principal inquiry in determining content neutrality, in speech cases generally . . . is whether the government had adopted a regulation of speech because of disagreement with the message it conveys. The government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech.

Ward v. Rock Against Racism, 491 U.S. 781, 791-92 (1989) (internal citation omitted; emphasis in original). At their heart, content-based laws are “those that target speech based on its communicative content[.]” *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). Here, no speech is being targeted by the tax in question—all property owners must pay the tax. And the Program does not only provide funds to certain candidates, it provides funds to all qualifying candidates. At bottom, the Program does not target speech, it facilitates speech.

given that the Program does not, under any conceivable theory suppress, ban, or prohibit political speech like the complete prohibition on corporate independent expenditures at issue in *Citizens United*. Quite the contrary, the Program promotes speech by “facilitate[ing] and enlarge[ing] public discussion and participation in the electoral process, goals vital to a self-governing people.” *Buckley*, 424 U.S. at 92-93.

Under viewpoint neutrality, the First Amendment is concerned with the government’s method of allocating funds, not with the viewpoints being subsidized. *May*, 55 P.3d at 430. Acknowledging this, Elster make an inapt comparison to the referendum process that concerned the Court in *Southworth*. *See Op. Br.* at 18-19. The Program, however, bears no resemblance to the referendum process.

In *Southworth*, a “student referendum” provided one method of funding and under that process “the student body can vote either to approve or to disapprove an assessment for a particular” student organization. 529 U.S. at 224. In other words, an organization seeking funding was subject to an up or down vote on whether they could receive funds. This was troubling because “the whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon *majoritarian consent*.” *Id.* at 235 (emphasis added); *see also*

Southworth v. Bd. of Regents of Univ. of Wis. Sys., 221 F.3d 1339 at * 3 (7th Cir. 2000) (unpublished order) (“Moreover, by voting—here via a referendum—the students appear to make funding decisions based on the speech of various student groups; their votes for funding will advance certain viewpoints, while their votes against funding will suppress others.”); *see also Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 595 (7th Cir. 2002) (“the University cannot use the popularity of the speech as a factor in determining funding.”).

Under the Program, no “majoritarian consent” is afoot. The Program is open to all qualifying candidates and no evidence suggests the City allocates funds in a manner that considers the views of the person receiving funds. Elster’s own cases support the City. For example, the Second Circuit rejected the same argument: “[W]e have no concern with differential funding so long as *the allocation decisions* are made without regard to the recipients’ viewpoints. [The University] is therefore free to allocate based upon neutral, objective criteria, that *ultimately have a disparate impact* on different viewpoints so long as the university’s purpose is not to discriminate based on viewpoint.” *Amidon v. Student Ass’n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 105 (2d Cir. 2007) (emphasis added).

The City’s purpose in distributing vouchers is not to pick and

choose among favored viewpoints; rather, it is to facilitate public discussion and participation in the electoral process, a plainly legitimate governmental objective. By design, the Program does not allow for allocation decisions to be based on the message any speaker seeks to convey, nor does it contain any mechanism remotely similar to the referendum provision at issue in *Southworth*.

Elster believes the Program's Achilles' heel is the use of vouchers by private individuals. *See, e.g.*, Op. Br. at 26. If anything, the First Amendment requires the opposite conclusion. First, Elster cannot predicate a First Amendment claim based the independent actions of non-governmental actors. *See, e.g., McGuire v. Reilly*, 386 F.3d 45, 60 (1st Cir. 2004). The City has no control or say in what individual citizens do with their vouchers. If, for example, the City mandated that each citizen who received a voucher send that voucher to a candidate, any candidate, this might be a different case. Under the Program, however, no citizen is compelled to do anything with the vouchers, they can send them to the candidate of their choice or send them to the circular file.

Second, the Supreme Court has approved of similar "true private choice" programs in another First Amendment context—the Establishment Clause. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (collecting cases). It is significant that, under the

Establishment Clause, the Court routinely upholds the indirect flow of tax dollars to religious institutions because it was in that context that Thomas Jefferson famously remarked “that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.” *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 13 (1947) (quotation omitted). While it is true that *Buckley* cautioned against using the Establishment Clause as a guide, this was only so because under the Clause government “may not even aid all religions.” 424 U.S. at 93 & n. 127. It was in this context that *Buckley*’s central holding, one which Elster ignores completely, sprung: that public financing of elections is not properly viewed as supporting a candidate’s message, or as an effort “to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.” *Id.* at 93-94.

In summary, the Program, like the program in *Southworth*, (1) serves the compelling governmental interests of promoting discussion of, and participation in, the electoral process and (2) adequately protects whatever First Amendment rights are at stake by allocating funds in a viewpoint neutral manner, which attenuates any connection between a taxpayer and any message candidates may communicate.

E. The Program addresses corruption.

While unnecessary to the disposition of this case, the Program also serves to avoid corruption, and it is beyond peradventure that “[t]he integrity of elections is essential to the very preservation of a free society.” *City of Seattle v. State*, 100 Wn.2d 232, 244, 668 P.2d 1266 (1983). Elster argues the Program does not address corruption. That is incorrect. The Program allows elected officials in Seattle to remain independent of the influence of special interest campaign funding. Put differently, the program plainly addresses the dependence corruption that has infected so many representative systems. As many have demonstrated, the framers of the First Amendment were as focused on institutional corruption as on individual corruption. *See Zephyr Teachout, Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United* (Cambridge, MA: Harvard University Press, Kindle Edition, 2014), Kindle Locations 723-24, 821–22; Lawrence Lessig, *Republic, Lost v2: How Money Corrupts Congress—and a Plan to Stop It*, 246-48 (2015); *see also Brief Amicus Curiae of Professor Lawrence Lessig in Support of Appellee*, 2013 WL 3874388, at **5-21 (July 25, 2013). Developing an improper dependence upon the funders of political campaigns is just one example of such corruption. Public funding is the simplest way for a democracy to avoid dependence corruption. That is

precisely what Seattle has tried to do.

And that, perhaps, is exactly why some are so opposed to the Program. Across America, campaigns are increasingly dependent upon large donors. The Program weakens the influence of such donors over Seattle's elected officials. The First Amendment does not mandate aristocracy. Seattle is permitted to avoid its government becoming dependent upon the favor of a few by enacting a viewpoint neutral mechanism for funding local candidates that enhances, not inhibits, First Amendment values. That is precisely what Seattle has done.

V CONCLUSION

For the foregoing reasons, the Superior Court should be affirmed in all material respect.

RESPECTFULLY SUBMITTED this 20th day of April 2018.

SEATTLE CITY ATTORNEY'S OFFICE

/s/ Michael K. Ryan
Michael K. Ryan, WSBA #32091
Lawrence Lessig, *pro hac vice*
Attorney for Respondents
City of Seattle
Tel: (206) 684-8200
Michael.Ryan@seattle.gov

CERTIFICATION OF SERVICE

The undersigned certifies that she caused to be filed with the court and served on this day, the foregoing Brief of Respondent City of Seattle to:

Ethan W. Blevins, WSBA #48219 Brian T. Hodges, WSBA @31976 PACIFIC LEGAL FOUNDATION 10940 Northeast 33 rd Place, Suite 210 Bellevue, WA 98004 (425) 576-0484	To be served via email: EBlevins@pacificlegal.com
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DATED this 20th day of April 2018.

s/ Lisë M.H. Kim
Lisë M.H. Kim, Legal Assistant

SEATTLE CITY ATTORNEY'S OFFICE - GOVERNMENT AFFAIRS

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