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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,

Defendants/Respondents.

**CITY OF SEATTLE'S BRIEF IN RESPONSE TO
APPELLANTS' SUPPLEMENTAL BRIEF**

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While Elster proclaims there has been an “upheaval in the First Amendment law relating to this dispute,” his bold proclamation rings hollow. Supp. Br. at 11. In keeping with past practice, Elster continues to wish away *Buckley v. Valeo*, 424 U.S. 1 (1976), which held that the public financing of campaigns reflect a governmental “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[,]” and, accordingly, programs like the Democracy Voucher Program “further[], not abridge[], pertinent First Amendment values.” *Id.* at 92-93. Because neither *Janus* nor *Becerra* call *Buckley* (or any other decision the City relies on) into question, the Superior Court should be affirmed.

A. *Janus* does not mark a “dramatic” change in the law relating to the public financing of political campaigns.

It is true that *Janus* overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), but only to the extent that *Abood* countenanced a First Amendment distinction between compelled subsidies of political and ideological actions of public unions (not allowed under *Abood*) versus

¹ Citing *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018) (hereinafter “*Janus*”) and *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (hereinafter “*Becerra*”).

compelled subsidies of collective bargaining, contract administration, and grievance issues (allowed under *Abood*). See *Janus*, 138 S. Ct. at 2479-2484. But that overruling is of no moment here. *Abood*'s holding that it violates the First Amendment to compel an individual "to contribute to the support of an ideological cause he may oppose as a condition of holding" public employment, *Abood* at 235, has always been the centerpiece of Elster's claim and the law for over forty years.²

The City has already explained why that holding of *Abood* does not control this case in light of *Buckley*'s holding that public financing schemes are not properly viewed as funding any ideological speech, but rather as facilitating speech and engagement in the political process, and even if it did, the Supreme Court's decision in *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), sets forth the proper test to evaluate any First Amendment concerns that the Program raises. See City's Br. at 7-36; see also *May v. McNally*, 55 P.3d 768 (Ariz. 2002).

Elster's claim that the City has "heavily" relied on *Abood* "in defending the democracy voucher program," purposefully mischaracterizes

² *Janus* did not disturb this holding; rather, it built upon it to conclude that it was impossible to decouple political versus non-political activities in the context of public sector union negotiations because during such negotiations unions "takes many positions . . . that have powerful political and civic consequences." *Janus*, 138 S. Ct. at 2464 (quotation omitted).

the City's position. Supp. Br. at 2 (emphasis added). Never once has the City maintained that *Abood* supports its position. Quite the contrary, the City has consistently maintained that *Abood* and its progeny "have nothing to do with a tax that facilitates speech in a viewpoint neutral fashion." City's Br. at 16; *see also id.* at 25 ("The irrelevance of *Abood* is underscored . . ."). No fair reading of the City's position supports Elster's mischaracterization. Elster's purposeful mischaracterization of the City's position, when coupled with his inability to meaningfully distinguish *Buckley*'s most relevant holding, is telling. Under *Buckley*, public financing schemes like the Program do not implicate the First Amendment at all because they are not viewed as subsidizing political speech, but rather as facilitating and enlarging public participation in the electoral process. *See, e.g., Libertarian Party of Ind. v. Packard*, 741 F.2d 981, 989-90 (7th Cir. 1984). Thus, unless one completely ignores *Buckley*, *Abood* and its progeny, including *Janus*, have no application in this case.

Instead of addressing *Buckley*, Elster pivots to *Southworth* and claims that even though *Janus* never mentions *Southworth*, that *Janus* supports his position that *Southworth* applies exclusively to the university setting. Supp. Br. at 4-6; *but see Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (noting decision "does not question" *Southworth*'s continued

validity); *see also Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) (“Our decision today thus does not undermine *Southworth*.”). Elster is wrong.

First, *Southworth* did not employ a “reasonableness” standard, notwithstanding Elster’s contrary claim. *See* Supp. Br. at 4. *Southworth* held: “The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of *viewpoint neutrality in the allocation of funding support*.” 529 U.S. at 233 (emphasis added); *see also May*, 55 P.3d at 430 (Ariz. 2002). In this regard, the Superior Court’s conclusion that *Southworth* applied a “reasonableness” standard is at odds with *Southworth*. *See* CP 113. Despite Elster’s dogged focus on the issue, whether the Superior Court was correct in applying a “reasonableness” test is beside the point. In the City’s view, under a plain reading of *Buckley*, the First Amendment is not even implicated in this case. *See* City’s Br. at 7-16.³ But even if the First Amendment is implicated, the proper test is not “reasonableness,” rather, it is whether the City’s allocation of funds is done in a viewpoint neutral matter. That is the teaching of *Southworth* and *May*.

³ Again, the City disagrees with the Superior Court’s conclusion to the contrary. *See* City’s Br. at 16 n.13. That disagreement is, however, immaterial because the City allocates the voucher funds to citizens in a manner that is viewpoint neutral, which is all that *Southworth* and *May* require. *See* City’s Br. at 23-36.

Second, Elster's argument ignores the fundamental differences between the union setting and the setting at issue here. As the Arizona Supreme Court explained, "limiting *Southworth* to a university setting overlooks the thrust of the Court's analysis," because both the university in *Southworth* and "the government's goals in funding clean elections are similar: Both seek to facilitate free speech." *May*, 55 P.3d at 772-73 (2002); *see also Buckley*, 424 U.S. at 92-93. The same is true here: The Program, like the student fees in *Southworth*, facilitates speech. The agency fees at issue in *Janus* did no such thing; rather, they were defended on the basis of "labor peace" and concerns regarding "free-riders," issues exclusive to the union setting. *See Janus* at 2465-2469.

In the union setting, moreover, the objecting individual was required to directly fund the very union he opposed. *Janus* at 2464 ("a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences.") (quotation omitted). This direct connection between the forced contributor and group who he opposed directly implicated "associational freedoms." *See id.* at 2466 & 2468. In contrast, in the student fee context at issue in *Southworth*, the objector was not forced to directly

subsidize or associate with any group or organization, rather the fees went into a fund that was distributed to any number of student groups, including groups with overtly political and ideological views. 529 U.S. at 223 (describing fund and allocation). In that setting, viewpoint neutrality in the allocation of funding to the student groups was all the Constitution required. *Id.* at 233. This was so because, unlike the union setting, the governmental purpose in funding the myriad student groups was not to advance any agenda or ideological position, but rather to facilitate a wide range of speech activities. *Id.* at 229. Here, the governmental purpose behind the Program is not to support any candidate or message, but rather to increase participation in the electoral process by more Seattle citizens by enabling them to contribute to political candidates. Like the university setting at issue in *Southworth*, but unlike *Janus*, there is no direct connection between Elster and any specific candidate.

Nothing in *Janus* calls into question *Buckley* or *Southworth*, the two cases that control. Even if this Court does not follow *Buckley* and concludes that the First Amendment is implicated, then it should apply the test enunciated in *Southworth*, which focuses not on the message of the person ultimately receiving government funds, but rather on the government's allocation of the funds at issue.

B. Elster’s reliance on *Becerra* is wholly misplaced.

Becerra involved a California law that required certain crisis pregnancy centers, who were opposed to abortion, to “provide a government drafted script about the availability of state-sponsored services,” including abortion services. *Id.* at 2371; *see also id.* at 2379 (Kennedy, J., concurring) (“For here the State requires primarily pro-life pregnancy centers to promote the State’s own preferred message advertising abortions.”). The law at issue in *Becerra* is far afield from the action Elster complains about—having to pay a property tax.

If anything, *Becerra* supports the conclusion that the Program is not a content-based regulation of speech. As the Court made clear, “[c]ontent-based regulations ‘target speech based on its communicative intent.’” *Id.* at 2371 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)) (emphasis added). Here, no speech is being targeted by the *tax* Elster challenges. Elster does not contend (nor could he) that *paying the tax*—the only thing he is required to do—is communicative in nature or has an expressive element. Nor could he contend that only certain property owners are required to pay tax because it is undisputed that all property owners, regardless of their political views or affiliations, must pay the tax.

Rather, what Elster complains about is *how* the City distributes the tax proceeds. But even Elster must concede that the City does not provide funds only to candidates with certain political views or political affiliations. Indeed, the Program is open to all-comers so long as certain minimal requirements are met. Under Elster’s view of the First Amendment, all public finance systems would be unconstitutional because such schemes necessarily fund political speech. *See* Supp. Br. at 7 (claiming the Program “compels speech of a particular content—campaigns for locally elected office.”).⁴ But again, this argument runs head long in *Buckley*, which held in unequivocal terms that such programs facilitate, not target, speech and therefore do not implicate, much less violate, the First Amendment. It is only by ignoring *Buckley*’s most relevant holding, something Elster has done throughout his briefing, that Elster can even begin to claim that a generally applicable tax targets speech in a content-based manner.

Elster begs the central question upon which his entire theory rests: What speech is being restricted in a content-based way? Unlike the crisis

⁴ Under Elster’s theory, the Court in *Janus* erred by not analyzing the agency fees in question as a content-based restriction on speech because to paraphrase Elster, the agency fee “compels speech of a particular content—” union support. That the Court did not analyze the compelled subsidy in *Janus* in this way highlights why Elster is wrong in trying to jam the square peg of a compelled subsidy, into the round hole of content-based restrictions on speech.

pregnancy centers in *Becerra*, Elster is not required to say something he disagrees with. The only action Elster must take is to pay a tax, nothing more. That the City, in turn, spends those tax dollars in a way in which Elster disagrees is of no constitutional moment because if it was then any taxpayer could claim a First Amendment right every time the government spent tax dollars on something they found objectionable. That, of course, is not the law. *Southworth*, 529 U.S. at 229 (“The government, as a general rule, may support valid programs and policies by taxes and other exactions binding on protesting parties.”).

Most importantly, *Buckley* itself did not conclude that the public financing scheme at issue was a content-based restriction on speech. Quite the opposite, it held that the scheme did not even implicate the First Amendment because, through the lens of the First Amendment, the money that eventually flowed to political parties was not viewed as supporting political speech but rather “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 93; *see also Libertarian Party*, 741 F.2d at 989-90 (7th Cir. 1984).

For any of Elster’s arguments to even gain a foothold one must completely ignore *Buckley*’s most relevant holding. A holding that has

never been questioned by the Supreme Court since it came down over forty years ago. Neither *Janus* nor *Becerra* mention, discuss, distinguish, or even hint at overruling *Buckley*'s most relevant holding. While Elster may wish *Buckley* would go away, unless and until the Supreme Court says otherwise, it controls the disposition of this case.

RESPECTFULLY SUBMITTED this 17th day of August 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 Appellants' Supplemental Brief to:

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DATED this 17th day of August 2018.

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