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Case No. 96660-5

IN THE SUPREME COURT 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 RENTAL HOUSING ASSOCIATION OF WASHINGTON

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I INTRODUCTION

Amicus Rental Housing Association of Washington ("RHA") offers few new insights into the application of the First Amendment to Seattle's Democracy Voucher program. Under the guise of addressing the First Amendment, RHA expresses considerable irritation that the Seattle City Council chose to fund the program through property taxes, and in the process evinces overt contempt for the perceived political views of tenants residing in Seattle. But these are not constitutional limitations on the lawful use of property tax revenues, and RHA provides no grounds for this Court to reverse the decision of the Superior Court.

As Elster did previously, RHA argues that the voucher program must be subjected to some elevated level of First Amendment scrutiny, RHA Br. at 7-10, but is no more successful. As prior briefing has discussed, the voucher program is funded through an increase in an existing property tax that was approved by Seattle voters, the increase was enacted in full compliance with state law, and Seattle's use of the tax proceeds to fund a program of public financing of elections is fully consistent with the U.S. Supreme Court's decision upholding public funding of presidential campaigns in *Buckley v. Valeo*, 424 U.S. 1 (1976). Because public financing schemes do not abridge First Amendment rights, and instead

"facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people," *id.* at 92-93, no level of First Amendment scrutiny – strict or otherwise – was applied in *Buckley*, and none is mandated here.

RHA raises new legal issues, including how privately financed candidates may be affected by independent campaign expenditures, and a new claim based on the Washington constitution.[1] These arguments are briefly addressed below, and do not bear on the outcome of the case.

II ARGUMENT

A. Seattle's use of property taxes to fund Democracy Vouchers does not violate anyone's First Amendment rights.

There is only one thing that *anyone* is "compelled" to do with respect to the voucher program: property owners have to pay their property taxes. Period. No one is compelled to use their vouchers, associate with any political cause or viewpoint, speak or subscribe to particular beliefs, or express support for or opposition to a particular candidate. Without question, some taxpayers will disagree with the way government chooses to

[1] As a general rule, this Court does not "consider issues raised first and only by amicus." *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993).

spend tax money. That is, as countless courts have noted, simply a fact of life. *See, e.g.*, *Buckley*, 424 U.S. at 92-93 ("The fallacy of appellants' argument is therefore apparent; every appropriation made by Congress uses public money in a manner to which some taxpayers object.").

RHA, following Elster's lead, relies on decisions that examine (and in some cases restrict) the permissible uses of so-called "compelled subsidies," such as dues paid to a labor union, student fees paid to a university, and dues paid to a state bar association. RHA Br. at 5-6. Those cases do not involve the payment of taxes or the permissible uses of tax revenues by the government, and therefore do not govern or even apply to the present case. As a recent (post-*Janus*) law review article observes:

> [E]ach of us must pay taxes that will in part go to spread opinions many of us disbelieve and abhor – military recruiting campaigns, antidrug campaigns, publicity for or against abortion or contraception, public school and university curricula, and a vast range of other messages.
>
> . . . .
>
> Compulsory tax revenue also routinely ends up subsidizing private speech. Tax money funds private artists (through National Endowment for the Arts grants), private scientists (through National Science Foundation grants), public university professors writing law review articles (through faculty salaries), and much more. All that speech may well express private opinions that many taxpayers

> might reject; yet there is no First Amendment problem with tax money being used this way.

William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harvard L. Rev. 171, 180-83 (November 2018) (footnotes and citations omitted). No case law supports the proposition that a tax on Seattle property owners is unconstitutional, even if the proceeds of that tax fund contributions to candidates whose views certain taxpayers find objectionable.

RHA takes particular issue with the fact that the voucher program is funded through property taxes, noting that this results in "landlords . . . funding the political contributions of tenants." RHA Br. at 3. That is certainly true in part; property taxes are assessed against property owners, not tenants.[2] Seattle's property tax also funds (among other things) preschool education, libraries, and low-income housing. A property owner's obligation to pay taxes is not affected by whether or not he or she actually uses any of these services, or agrees with the substance of speech associated with them (e.g., the content of preschool curriculum, or the choice of books on library shelves). Property taxes are one of a relatively

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[2] The extent to which an increase in property taxes will be passed along to tenants in the form of higher rents – so that tenants also bear part of the cost of vouchers – is beyond the scope of this brief.

limited number of revenue-raising options available to cities in the State of Washington, and RHA cites no authority to suggest that taxpayers have the right to veto a city's choice as to which of several permissible sources will fund a particular program. Here, the initiative passed by Seattle voters expressly authorized an increase in an existing property tax to fund the voucher program,[3] and the Seattle City Council followed through on that authorization.[4]

In a particularly revealing sentence, RHA complains that by paying property taxes, landlords "fund the contributions of the very people likely to have political interests adverse to their own, especially in Seattle." RHA Br. at 3-4. First, RHA's premise is wrong; vouchers are sent to every Seattle voter, not just tenants or some subsection of the population. Second, this complaint is about pure electoral politics, not the constitutionality of the program. The "especially in Seattle" language is interesting since it suggests that, in the eyes of RHA, the constitutionality

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[3] I-122 contained the levy lift authorization required by RCW 84.55.050. CP 24 ("To allow funding of the Seattle Democracy Voucher Program, provided in Section 1 above, the qualified electors of the City of Seattle hereby resolve to allow funding through a levy lift under RCW 84.55.050").

[4] City of Seattle Ordinance No. 125195 (2016) (property tax levy for 2017 fiscal year, including funding for voucher program), http://clerk.seattle.gov/~archives/Ordinances/Ord_125195.pdf (accessed April 29, 2019).

of the voucher program turns on the particular ideological makeup of the populace in the city enacting a voucher program. (Would the program be constitutional in a City with a more conservative tenant population?) There is no legal authority to support such a proposition, and none is cited.[5]

B. The Program's provisions regarding independent expenditures do not implicate the rights of non-voucher candidates, because they do not confer any advantage on voucher candidates.

Relying heavily on *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008), and *Arizona Free Enterprise Club PAC v. Bennett*, 564 U.S. 721 (2011), RHA argues that the voucher program violates the First Amendment rights of candidates who do not accept vouchers and compete with other candidates who do. RHA Br. at 11-15. This argument, which is raised for the first time by an amicus and not properly before this Court, misperceives Seattle's voucher program, and misreads both cases.

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[5] RHA's discussion of the fairly limited use of the voucher program in its first year of existence (RHA Br. at 1-3) is irrelevant to its constitutionality. Participation in the program is, after all, purely a matter of choice. Nevertheless, while irrelevant to the legal issues before this Court, even the materials submitted by RHA show that the number of voucher users in the first year of the program far exceeded the number of donors making cash contributions to campaigns, both in that year and in prior elections. RHA Br., Ex. A at 1.

In *Davis*, a self-financed congressional candidate challenged the constitutionality of a federal election law provision (the so-called "Millionaire's Amendment") under which the standard $2,300 cap on individual donations would be tripled for those candidates whose opponents spent more than $350,000 in personal funds on their campaigns. The Supreme Court held that the Millionaire's Amendment imposed a substantial burden on the First Amendment right to expend personal funds for one's own campaign speech, and could survive scrutiny only if it were closely drawn to further a compelling state interest – a showing the government did not satisfy. Significant to the Court's reasoning – and the reason why *Davis* does not apply to Seattle's program – is the fact that the Millionaire's Amendment raised the contribution limit *only* for the candidate who was not self-financed:

> If § 319(a) simply raised the contribution limits for all candidates, Davis' argument would plainly fail. . . .
>
> [A] candidate who wishes to restrict an opponent's fundraising cannot argue that the Constitution demands that contributions be regulated more strictly. Consequently, *if § 319(a)'s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits*.

Davis, 554 U.S. at 737 (emphasis added).

Seattle's program does not present the asymmetry that led to the result in *Davis*. When a candidate who is not participating in the voucher program exceeds the contribution limit associated with the voucher program, including through independent expenditures, it allows the publicly financed candidate to similarly raise and spend money in excess of the limit imposed by participation in the voucher program. Seattle Municipal Code 2.04.634.B. It does *not*, however, entitle the publicly financed candidate to additional voucher funding. *Id.* That limit remains in place. As a result, the scenario presented in RHA's brief – in which a publicly financed candidate is released from the lower contribution limits because of independent spending for a privately financed candidate – does nothing more than equalize the opportunity for *all* candidates to seek *private* funding. There is no asymmetry, as in *Davis*, so no First Amendment concern is presented.

In *Arizona Free Enterprise*, the Supreme Court considered and sustained a First Amendment challenge to the matching funds provision of Arizona's public funding program. Under Arizona law, if a privately financed candidate's expenditures, including independent expenditures, exceeded the threshold for publicly financed candidates, *all* of the privately financed candidate's opponents would receive public matching

funds for every dollar spent above the cap. For example, if a privately financed candidate had three opponents, every dollar raised for that candidate would trigger three dollars of public funding that could be spent against that candidate's interest. As such, "[t]he direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival." 564 U.S. at 742.

Again, Seattle's program is distinguishable. When a privately financed candidate exceeds the spending threshold applicable to publicly financed candidates, the only effect is to allow all candidates to raise and spend *private* funds above that cap. It does not provide the "state-provided monetary subsidy" of concern in *Arizona Free Enterprise*, and provides no advantage to publicly financed candidates.

The critical First Amendment distinction between financing schemes that advantage one type of candidate as opposed to those in which publicly financed candidates are given *no* advantage over privately financed candidates, was explained by the Southern District of New York in a case arising under New York City's public funding scheme.

> While the campaign finance statutes in *Green Party* and *Davis* burdened the free speech activity of privately funded candidates by directly increasing the campaign warchests of publicly funded candidates in response to private expenditures, the Expenditure Relief provisions at issue here merely put publicly funded candidates in the same

> position as non-publicly funded candidates-they have the opportunity to spend competitively, provided that they can raise the funds with which to do so. This opportunity gives them no advantage over privately funded candidates, and certainly imposes no substantial burden on the privately funded candidates' decision to exercise their First Amendment rights.

Ognibene v. Parkes, 2013 WL 1348462 (S.D.N.Y. 2013), *6. Seattle's program is one under which publicly financed candidates are not advantaged. Rather, the program places an initial limit – a *disadvantage* – on publicly financed candidates' total fundraising, which is removed when a competing privately financed candidate crosses the funding threshold. As in *Ognibene*, this simply puts "publicly funded candidates in the same position as non-publicly funded candidates." Seattle's program is therefore not subject to First Amendment scrutiny under this line of cases.

C. The Voucher Program does not violate the Washington Constitution's promise of "free and equal" elections.

RHA raises another new legal claim, namely that the Democracy Voucher program violates a provision of the State constitution that guarantees "free and equal" elections. Elster did not include this claim in his complaint, has not raised in his briefing, and there is no merit to it.

Article I, Section 19 of the Washington Constitution states: "All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." RHA

concedes that there are no Washington cases that deal directly with this provision, and relies instead on a line of out-of-state cases in which the government directly supported or opposed a ballot measure. *See Burt v. Blumenauer*, 299 Or. 55, 699 P.2d 168 (1985) (public officials used public monies to promote water fluoridation when an anti-fluoridation measure was pending on the ballot)[6]; *Stanson v. Mott*, 17 Cal.3d 206, 130 Cal. Rptr. 697, 551 P2d 1 (1976) (director of California Department of Parks and Recreation ordered the expenditure of public funds to support passage of a park bond issue); *Miller v. Miller*, 87 Cal. App. 3d 762, 151 Cal. Rptr. 197 (1978) (state commission expended public funds to promote ratification of a proposed constitutional amendment). The principle underlying these cases is simple and uncontroversial: government may not take sides in elections, and may not advocate for or against particular candidates or ballot measures. *See, e.g., Burt*, 699 P.2d at 175 (government may not intervene "on behalf of its own candidates or against their opponents"); *Miller*, 151

[6] The *Burt* court relied in part on Article II, Section 1 of the Oregon Constitution ("All elections shall be free and equal"), from which the "free and equal" language in Article I, Section 19 was adopted.

Cal. App. 3d at 769 (government may not "use public funds to disseminate propaganda in favor of or against any issue or candidate").[7]

This is exactly what Seattle's Democracy Voucher program *does not do*. Seattle's program places no restrictions whatsoever on the "free exercise of the right of suffrage," and operates in an entirely neutral manner. Property tax proceeds are placed into a fund. Voters who choose to participate in the program may direct monies from that fund via vouchers to qualifying candidates, regardless of party, position or message. That decision is left entirely to the individual voter, which is the most fundamental of democratic controls. There is no allegation or evidence that Seattle has employed government resources to urge voters to direct their vouchers to particular candidates, parties or causes. The constitutional provision and the cases cited by RHA do not apply here, and provide no basis for reversing the decision of the Superior Court.

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[7] The Washington decisions cited by RHA reinforce this principle. *See, e.g., Knudsen v. Washington State Executive Ethics Bd.*, 156 Wn. App. 852, 235 P.3d 835 (2010) (college teacher violated state law prohibition against use of state resources for lobbying by sending email from community college computer urging support for legislation); *State ex rel. Port of Seattle v. Superior Court of King County*, 93 Wash. 267, 160 P. 755 (1916) (port commissioners prohibited from using public funds in support of ballot referendum).

III CONCLUSION

Seattle's Voucher Program is constitutional, and the decision of the Superior Court dismissing the complaint should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of April, 2019.

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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 Rental Housing Association of Washington to:

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