Honorable Beth Andrus
Dept. 35
Hearing with argument Oct. 27, 2017, 11 am

**SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY**

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| MARK ELSTER and SARAH PYNCHON,<br><br>Plaintiffs,<br><br>v.<br><br>THE CITY OF SEATTLE, a Washington Municipal corporation,<br><br>Defendant. | Case No. 17-2-16501-8 SEA<br><br>**PLAINTIFFS' CONSOLIDATED RESPONSE TO AMICUS BRIEFS FILED IN SUPPORT OF THE CITY** |

## INTRODUCTION

Seattle requires property owners to fund other private individuals' campaign contributions. Compelling some people to underwrite other peoples' political speech is a serious First Amendment violation. Like the City, Amici try to brush away First Amendment protections by misinterpreting caselaw and mischaracterizing the Plaintiffs' claim.

Amici and the City both latch onto *Buckley v. Valeo*, despite its far-flung context. 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). Since Plaintiffs discuss *Buckley* at length in their Response to the City, this brief will respond to three of Amici's other points: (1) the voucher program will



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increase electoral opportunities and expand political participation; (2) the voucher program combats corruption; and (3) Plaintiffs' legal theory would endanger accepted methods of public campaign funding and general taxation.

## ARGUMENT

### I. The benefits that Amici predict will flow from the voucher program do not constitute compelling interests sufficient to override First Amendment liberties

Amici speculate at some length about the virtues of the voucher program. Even if such speculation is valid, Amici fail to tie their predictions to a compelling interest necessary to justify regulating core political speech.

The Supreme Court has recognized only one interest as compelling enough to regulate political speech regarding campaigns: "preventing corruption or the appearance of corruption." *McCutcheon v. Fed. Election Comm'n*, __ U.S. __, 134 S. Ct. 1434, 1450, 188 L. Ed. 2d 468 (2014). Most of the benefits from the voucher program predicted by Amici have nothing to do with preventing corruption or its appearance. For example, Common Cause speculates that the voucher program will enable more people to seek office, encourage voter participation, make candidates more responsive to voter needs, and result in more minority candidates. *See* Common Cause Brief at 12-18. Likewise, Washington CAN predicts an expanding pool of more diverse candidates and contributors. Washington CAN Brief at 4-6. These purported benefits have no relationship to preventing corruption. Indeed, similar interests in equalizing electoral opportunities have been expressly rejected by the Supreme Court: any "ancillary interest in equalizing the relative financial resources of candidates competing for elective office" is "clearly not sufficient to justify the . . . infringement of fundamental First Amendment rights." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 738, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) (quoting *Buckley*, 424 U.S. at 54).



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Even so, given the program's track record so far, there is good reason to question Amici's sunny predictions. This year, an openly gay Muslim candidate and political newcomer had tremendous difficulty qualifying for vouchers, finding it a barrier to his candidacy rather than a blessing. Bob Young, *Seattle's democracy vouchers haven't kept big money out of primary election*, Seattle Times (July 30, 2017).[1] This reflects an unfortunate and perverse truth about much campaign finance reform: it often favors "those with the lawyers and the technical know-how to comply with and take advantage of the system." *See* Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 Geo. L.J. 45, 73 (1997). Amici's predictions should be tempered by the sober reality that campaign finance programs can often "intimidate and silence voices, especially political amateurs." *Id.* at 75.

The Amici's speculations regarding an uncertain future cannot justify actual burdens on First Amendment rights in the present. Only an anticorruption interest can justify regulating vital political speech because corruption can "directly implicate the integrity of our electoral process." *Randall v. Sorrell*, 548 U.S. 230, 248, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006) (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)).

Amici's speculation brings to mind Justice Brandeis's famous warning about well-intentioned laws: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent." *Olmstead v. United States*, 277 U.S. 438, 479, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting). This warning rings with even greater truth when government offers to regulate core political speech with the promise of good will.

[1] *Available at* https://www.seattletimes.com/seattle-news/politics/seattles-democracy-vouchers-havent-kept-big-money-out-of-primary-election/.



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## II. Amici's argument that the voucher program combats corruption runs contrary to Supreme Court caselaw and the need to vigorously protect political speech

Amicus Washington CAN argues that vouchers will combat the appearance of corruption. Washington CAN Brief at 7-10. Its argument, however, suffers from two flaws: (1) it does not point to a concrete risk of corruption addressed by vouchers; and (2) it embraces a vast definition of corruption that the Supreme Court has rejected.

Combating the appearance of corruption requires more than speculation in order to justify burdening core political speech. The government must point to a "cognizable risk of corruption" beyond just general impressions. *McCutcheon*, 134 S. Ct. at 1452. "Mere conjecture" will not do. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000); *see McCutcheon*, 134 S. Ct. at 1456 (holding that "speculation" about clever attempts to circumvent campaign finance limits "cannot justify the substantial intrusion on First Amendment rights at issue in this case").

Washington CAN otherwise relies on conjecture and amorphous perceptions from the electorate. It cites a poll alleging that less than half of Seattleites think corruption is a problem in Seattle. Washington CAN Brief at 7. But such polling data does not demonstrate a cognizable risk of corruption. Washington CAN relies on guesswork, speculating that "dollars being exchanged for political actions is not far-fetched when politicians are highly responsive to a wealthy donor class." *Id.* at 8. This "mere conjecture" does not demonstrate that the voucher program combats an appearance of corruption. *Nixon*, 528 U.S. at 392.

Beyond conjecture, Washington CAN relies on a broad conception of corruption that the Supreme Court has rejected. Washington CAN cites studies alleging that wealthy donors enjoy more influence and access with candidates than average Americans. Washington CAN Brief at 8.



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But mere "influence over or access to elected officials" does not "give rise to . . . *quid pro quo* corruption." *McCutcheon*, 134 S. Ct. at 1451 (internal quotation marks omitted). Nor do unequal aggregations of wealth. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 349, 130 S. Ct. 876, 175 L. Ed. 753 (2010).

Rather, legitimate campaign finance regulations target only quid pro quo corruption—"the notion of a direct exchange of an official act for money." *McCutcheon*, 134 S. Ct. at 1441. Certainly, the line between corruption and influence can be evasive, but the line is nonetheless vital to sheltering basic speech rights. *Id.* at 1451. That line-drawing should err on the side of civil liberties, not government goodwill. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) ("In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."). Washington CAN points to no evidence of a cognizable risk of corruption that crosses the line from influence and access inevitable in a democratic republic.

Even assuming that Amici have successfully demonstrated a cognizable risk of corruption, Amici fail to show how the democracy-voucher program actually deters corruption. Nothing about the voucher program prevents private donors from continuing to give to voucher-eligible candidates in exchange for favors.

Candidates who join the voucher program do have to submit to lower contribution limits, but neither the City nor Amici even try to demonstrate that the lower contribution limits deter corruption given the City's already stringent contribution limits for all local candidates. *See* SMC § 2.04.370(B). In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Supreme Court struck down a campaign-finance matching funds provision because, among other things, Arizona failed to demonstrate that state contribution limits did not adequately protect against



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corruption. 564 U.S. 721, 751-52, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011). With tight contribution limits already in place, it was "hard to imagine what marginal corruption deterrence could be generated by the matching funds provision." *Id.* at 752.

Here, the contribution limits imposed on all Seattle candidates stands at $500 per contributor. SMC § 2.04.370(B). Those who opt in to the voucher program must agree to an even lower $250 limit, though they can be released from that limit later if other candidates outspend them by a large margin. *Id.* § 2.04.630(b), (f).

The general limit of $500, however, is already quite low. Many cities have no contribution limits at all for local elections, but among those that do, $500 lingers at the low end.[2] As with *Bennett*, the City and Amici carry the burden to show that the strict contribution limit applied to all candidates—a much more direct route to squashing corruption than vouchers—does not adequately serve the City's interest in anticorruption. *Bennett*, 564 U.S. at 752; *see Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 318 (6th Cir. 1998). Without meeting that burden, the free speech rights of plaintiffs may not be infringed.

Even assuming that the City and Amici can demonstrate (1) that the voucher program is inspired by a cognizable risk of quid pro corruption and (2) that current contribution limits do not adequately address that risk, they must still show that the voucher program is narrowly tailored.

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[2] For example, Sacramento, Washington, D.C., and New York City all have much higher contribution limits than Seattle's. *See* City of Sacramento, Contribution Limits, https://www.cityofsacramento.org/Clerk/Elections/5-Contribution-Limits; DC Office of Campaign Finance, Campaign Finance Guide 2015 13, *available at* https://ocf.dc.gov/sites/default/files/dc/sites/ocf/publication/attachments/DCOCF_CampaignFinanceGuide.pdf; New York City Campaign Finance Board, Limits & Thresholds, https://www.nyccfb.info/candidate-services/limits-thresholds/2017/. Meanwhile, Austin, Texas, San Francisco, and Los Angeles have limits comparable to Seattle's. *See* Austin City Code; art. III, § 8(A)(1); Los Angeles City Charter § 470(c)(6); San Francisco Campaign Finance Reform Ordinance 1.114(a)(1). Moreover, state-level contribution limits are much higher than Seattle's, averaging over $5,619 for gubernatorial candidates and about $2,500 for legislative candidates. Nat'l Conf. of State Legislatures, Contribution Limits Overview, http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx#individual.



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Plaintiffs' Response to the City explains why the program cannot satisfy that standard. Plaintiffs' Response at 30-33.

## III. Plaintiffs' legal theory would not invalidate other common types of campaign financing or question the legitimacy of traditional taxation

Amicus Common Cause argues that Plaintiffs' legal theory would imperil other campaign financing programs as well as traditional collection and use of revenue. Such fears misconstrue Plaintiffs' basic legal claim.

### A. Plaintiffs' legal theory strikes at unique aspects of the voucher program and thus would not endanger other common methods of campaign financing

The democracy-voucher program is unique among public campaign-financing schemes because it places the destiny and control of public funds in the hands of private citizens. And it draws those funds exclusively from property owners rather than general revenue or a voluntary tax checkoff. These idiosyncratic characteristics of the law form the basis for Plaintiffs' challenge. Such a campaign funding mechanism exists nowhere else in the country. A holding in Plaintiffs' favor, therefore, would not threaten any other public financing scheme.

Other public funding programs across the country tend to take two general forms or a mixture thereof. A lump-sum system covers the full cost of a campaign after qualifying contributions, and candidates who opt in otherwise rely only on public funds. *See* The Campaign Finance Institute, *Citizen Funding for Elections* 5-6 (2015). A matching-funds system, on the other hand, imposes low contribution limits and matches donations with public dollars at a specified ratio. *Id.* Neither of these systems face the same degree of constitutional peril as the voucher program.

Lump-sum systems are common and simple to distinguish. Unlike the voucher program, a lump-sum system promises a particular quantity of funding distributed to candidates in an equal


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and neutral manner. Voucher funds, by contrast, are distributed according to partisan preference. Also unlike the voucher program, lump-sum systems are typically funded through general revenue or a voluntary check-off as opposed to a tax imposed on a discrete group. *See, e.g.*, Montgomery County, MD, Bill No. 16-14 § 19(b) (2014) (revenue for Montgomery County public funding program comes from general appropriations, unspent surplus, and voluntary donations); 26 U.S.C. section 6096(a) (Presidential Election Campaign Fund is funded through a voluntary tax checkoff); Bradley A. Smith, *Separation of Campaign and State*, 81 Geo. Wash. L. Rev. 2038, 2047 (2013) ("Many of the [public-funding] programs rely on voluntary earmarking of tax dollars by taxpayers.").

Several exceptions to these general funding methods deserve mention. For example, funding methods that imposed a tax on discrete groups in Vermont and Florida were struck down. *See Vermont Soc'y of Ass'n Execs. v. Milne*, 172 Vt. 375, 779 A.2d 20 (2001) (striking down tax on lobbyists used to fund campaigns); *Butterworth v. Republican Party of Florida*, 604 So. 2d 477 (1992) (invalidating tax on political party contributions used to fund campaigns). The Florida case relied expressly on a compelled-subsidy rationale in holding that "singling out" certain groups "to support the [campaign] fund bears no relationship" to a compelling interest. *Butterworth*, 604 So. 2d at 480.

The Clean Elections Act is another exception, where funding for political candidates comes from a tax checkoff, a lobbyist fee, and a surcharge on civil fines. *See May v. McNally*, 203 Ariz. 425, 426, 55 P.3d 768 (2002). The state supreme court rejected a First Amendment challenge to the surcharge. *Id.* Unlike the voucher program, however, individuals subject to civil fines like parking tickets are a fluid mix of people. By contrast, property owners are a more discrete group with less change and turnover across time. A tax on property owners therefore affects a more fixed



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population of the electorate and distinguishes the surcharge and the many other public financing programs that rely on general appropriations or voluntary checkoffs.

Finally, lump-sum programs have a much stronger connection to preventing corruption because publicly funded candidates generally must forgo private donations except for qualifying contributions.

Here, by contrast, voucher candidates are free to accept money from private donors subject only to contribution limits and a total spending limit. The voucher program here distributes public funds through contributions made by individuals according to their partisan interests. Such funding is neither neutral nor equal. The voucher program's deterrent effect on corruption, therefore, is far more tenuous than lump-sum programs.

Matching-funds programs also have key differences, though they may share some of the flaws of the voucher program.[3] Matching funds do result in a disparate amount of public funding to candidates based on contributions, since public funds are pegged to private donations. Unlike the voucher program, though, private donors must put forward some of their own money before public matching funds issue. The voucher program is less narrowly tailored, given that the vouchers are offered to all residents without requiring any contribution of their own. And Plaintiffs know of no matching-funds program that draws its funds from a discrete portion of the electorate, like the voucher program does. If such a program exists, it may indeed raise similar constitutional concerns. In short, however, the common methods of funding campaigns will not be imperiled should Plaintiffs' challenge to the voucher program prevail.

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[3] Plaintiffs have found no cases upholding matching-funds programs under a compelled-subsidy theory. Amicus Common Cause notes that the Second Circuit "upheld" a matching-funds program, but this is misleading because that case did not deal with a compelled-subsidy claim, nor did the claim even challenge the constitutionality of matching private donations with public dollars. *See* Common Cause Brief at 11; *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011).



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### B. Plaintiffs' theory does not jeopardize traditional taxation

Common Cause also worries that Plaintiffs' theory would raise questions about the legitimacy of long-standing taxes and government expenditures. Common Cause Brief at 6, 8-9. Again, Common Cause misconstrues Plaintiffs' claim. Its key error—one also committed by the City—is failing to acknowledge the distinction between subsidies of government speech and subsidies of private speech. As Plaintiffs discuss in their Response to the City, taxpayers can challenge subsidies of *private* speech; they just have no First Amendment claim against *government* advocacy sponsored by tax funds. *See* Plaintiffs' Response at 15-16; *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 560, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005).

Common Cause notes that property taxes have been a long-standing means of funding basic government institutions like school districts. Common Cause Brief at 8-9. Plaintiffs' theory would not have any impact on traditional property taxes or their uses. The unique use of democracy vouchers by *private* speakers creates the First Amendment problem. As Common Cause correctly notes, a school district might use property tax revenue to engage in advocacy. *Id.* But such advocacy would be government speech immune to First Amendment challenge. Nor, of course, does the lawsuit somehow endanger use of revenue for basic election expenses like ballot-counting—a fear raised by Common Cause—which would not constitute expressive activity in the first place. *Id.* at 6.

## CONCLUSION

Political speech plays a vital role in our democracy. Compelling individuals to pay for another person's political speech undermines rather than supplements that role. The motion to dismiss should be denied.



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**Certification of Compliance**

I certify that this document contains 2,847 words and complies with LCR 7.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon counsel for the Defendant by the Court's eService application on October 12, 2017.

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Additionally, a true copy of the above document was served upon counsel for the Amici contemporaneously via email at the addresses indicated:

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