

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

MARK ELSTER and SARAH PYNCHON,	}	No. 17-2-16501-8 SEA
	}	
Plaintiffs,	}	
	}	AMICUS CURIAE BRIEF OF
vs.	}	WASHINGTON CAN!, APACEVOTES,
	}	EVERY VOICE, FIX DEMOCRACY FIRST,
THE CITY OF SEATTLE,	}	FUSE, LGBTQ ALLYSHIP,
	}	ONEAMERICA, REPRESENT.US,
	}	WASHINGTON DEMOCRACY HUB,
Defendant.	}	WASHPIRG, AND WIN WIN NETWORK

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1 **STATEMENT OF INTEREST**

2 This brief is filed on behalf of *amici curiae* Washington CAN!, APACEvotes, Every  
3 Voice, Fix Democracy First, Fuse, LGBTQ Allyship, OneAmerica, Represent.Us, the  
4 Washington Democracy Hub, the Washington Public Interest Research Group (“WashPIRG”),  
5 and Win Win Network. *Amici* collectively represent more than 20,000 Seattleites. *Amici* were  
6 among the community-based coalition and national advocacy organizations that developed and  
7 helped pass the Honest Elections Seattle Initiative I-122 (“Initiative” or “I-122”), including the  
8 challenged Democracy Voucher program. I-122 Sections 1-2, City’s Motion to Dismiss  
9 (“MTD”) App. C. *Amici* are groups committed to strengthening democracy and representation  
10 and/or groups whose members are served by the Democracy Voucher program.

11 **INTRODUCTION AND SUMMARY OF ARGUMENT**

12 As *amici* demonstrate in Part I, the Democracy Voucher program (“the program”) serves  
13 the City’s important interests in strengthening local democracy in Seattle by reducing wealth-  
14 based barriers to participation in electoral campaigns and reducing a legitimate perception of  
15 corruption. These democracy-strengthening interests are not only consistent with the First  
16 Amendment, but actually advance the First Amendment’s central aim of protecting our  
17 republican system of democratic self-government. Part II responds to Plaintiff’s fundamentally  
18 misguided argument that the program’s small-donor-driven mechanism for distributing funds to  
19 participating candidates violates the First Amendment because it is majoritarian. *See infra* Part  
20 II(A). The donor-driven distribution of funds does not amount to unconstitutional viewpoint  
21 discrimination, since unequal funding allotments are traceable not to decisions by the City, but to  
22 determinations of Seattleites engaged with the political marketplace of ideas. *See infra* Part II(B).  
23 Part III demonstrates that strict scrutiny review of the program is inappropriate, and that the

1 program is closely drawn and hence easily survives any other standard of review. For all these  
2 reasons, the City’s motion to dismiss must be granted.

### 3 ARGUMENT

#### 4 I. THE DEMOCRACY VOUCHER PROGRAM SERVES IMPORTANT 5 PUBLIC INTERESTS IN STRENGTHENING DEMOCRACY IN SEATTLE.

##### 6 7 A. The Democracy Voucher program increases political participation by reducing 8 wealth-based barriers to contributing to electoral campaigns. 9

10 In our majoritarian democracy the political views of individuals who lack economic  
11 resources are no less meritorious or important than those of wealthy individuals. *See Harper v.*  
12 *Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (explaining, in striking down poll tax,  
13 “[w]ealth, like race, creed, or color is not germane to one’s ability to participate intelligently in  
14 the electoral process.”); *The Federalist* No. 39 (James Madison), 1788 WL 453 at \*1 (Westlaw  
15 ed. 2017). Democracy generally, and First Amendment interests specifically, are served when  
16 these individuals are able to fully engage in the political marketplace of ideas through measures  
17 that address existing wealth-based barriers to participation.

18 The Supreme Court has hence looked favorably upon public financing programs and  
19 other measures that seek to *add more* speech to the public marketplace of ideas without  
20 restricting contributions or spending by others, since these measures *advance*, rather than violate  
21 First Amendment principles. *See Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (explaining the at-  
22 issue public financing program was an “. . . effort, not to abridge, restrict, or censor speech, but  
23 rather to use public money to facilitate and enlarge public discussion and participation in the  
24 electoral process, goals vital to a self-governing people”); MTD at 8; *Texas v. Johnson*, 491 U.S.  
25 397, 420 (1989) (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J.,  
26 concurring)). In other words, even if the First Amendment does not necessarily *require*

1 jurisdictions to provide public funding for election campaigns, governments clearly have an  
2 important interest in reducing wealth-based barriers to participating in the political marketplace  
3 through public financing programs that ultimately lead to *more*, not less, political participation.

4 Seattle’s Democracy Voucher program addresses a problem inherent in any privately-  
5 financed campaign finance system: many people, including members of Washington CAN!,  
6 LGBTQ Allyship, OneAmerica, Represent.Us, and WashPIRG, do not experience the actual,  
7 lived freedom to participate in the political marketplace of ideas as contributors because they  
8 lack disposable private funds, even though their comparative lack of wealth does not reflect their  
9 comparative lack of political worth. For instance, as of July 2016, an estimated 13.5 percent of  
10 Seattle residents lived in poverty. *See Quick Facts: Seattle, Washington*, U.S. Census Bureau,  
11 App. 2 at 406 & available [here](#) (last visited Sept. 16, 2017). Financial barriers hinder  
12 participation by people of color, homeless people, incarcerated people and people recently  
13 released from incarceration. *See Roi-Martin Brown, Democracy Vouchers Are Crucial for*  
14 *Communities of Color*, Seattle Patch (Sept. 15, 2017), App. 2 at 21 & available [here](#). Research  
15 demonstrates that donors are not only wealthier than average, but also disproportionately white;  
16 and that measures to empower small donors to participate advance racial equity *See Adam Lioz,*  
17 *Stacked Deck: How the Racial Bias in our Big Money Political System Undermines Our*  
18 *Democracy and Our Economy*, Dēmos, 20-23 (2014), App. 2 at 282 & available [here](#). *See also,*  
19 *generally, Alan Durning, Who Funds Seattle Campaigns?*, Sightline Institute (July 2015), App. 2  
20 at 165 & available [here](#) (finding the neighborhoods that gave the most money to Seattle  
21 candidates in 2013 were disproportionately wealthy and white).

1 The Democracy Voucher program affords Seattleites of all economic backgrounds and  
2 races an opportunity to participate in the political marketplace. As first-time contributor and  
3 Washington CAN! member Gina Owens describes:

4 . . . I realize that I can participate in a way I've never done before because of Seattle's  
5 new Democracy Voucher program. Taking big money out of politics, where even low-  
6 income people like myself can contribute to candidates, is why I supported passing  
7 Honest Elections and why I still support the voucher program.

8 Gina Owens, *Democracy Vouchers Fight Corruption in Elections*, Seattle Patch (Sept. 8, 2017),  
9 App. 2 at 381 & available [here](#). Thanks to the program, Ms. Owens and many similarly-situated  
10 Seattle residents have participated in the public debate about Seattle elections in ways they  
11 previously could not. For instance, in the first election under the program, homeless  
12 individuals—many of whom lack private resources needed for basic survival, let alone for  
13 making political contributions—participated as political contributors, and amplified their  
14 collective political voice by aggregating their democracy vouchers. See Josh Cohen, *'Democracy*  
15 *vouchers' aim to amplify low-income voices, to conservative ire*, The Guardian (July 7, 2017),  
16 App. 2 at 108 & available [here](#). This furthers both the democracy-strengthening objective of the  
17 First Amendment, and the City's related interest in fostering political participation by Seattleites  
18 who would otherwise be shut out of the debate due to their lack of economic resources.

19 **B. The program serves an important interest in expanding the public debate by**  
20 **reducing wealth-based barriers to running for office, thereby increasing the pool of**  
21 **candidates for Seattle elections.**

22  
23 In addition to expanding opportunities for non-wealthy individuals to engage as political  
24 donors, Seattle's program seeks to expand the political debate by increasing the pool of  
25 candidates, who, in turn, add their expression to the political marketplace. Seattle Municipal  
26 Code ("SMC") 2.04.600, subd. a (describing program's purpose of "expand[ing] the pool of

1 candidates for city offices”). The public’s interest in opening up electoral debates to candidates  
2 who might otherwise be excluded for wealth-related reasons is significant, and is distinct from an  
3 interest in enhancing some people’s political voices by *restricting* the relative voices of others.<sup>1</sup>  
4 Public financing programs that level up without chilling anyone’s expression are plainly  
5 consistent with the First Amendment. *See generally* MTD at 7-8; *Buckley*, 424 U.S. at 92-93.

6         Increasing candidate access to the political marketplace remains as important today as  
7 when *Buckley* was decided. Our nation’s democratic values are undermined when candidates are  
8 shut out of the political marketplace on the basis of their wealth. *See Bullock v. Carter*, 405 U.S.  
9 134, 142-44, 145-46 (1972); *Lubin v. Panish*, 415 U.S. 709, 716-718 (1974) (noting, in Equal  
10 Protection analysis, the value of “continued availability of political opportunity” for candidates,  
11 and a “tradition . . . of hospitality toward all candidates without regard to their economic  
12 status.”). Privately-funded, big-money-driven campaign finance systems do just this by filtering  
13 out candidates who are not wealthy and lack access to wealthy donor networks. *See generally*  
14 Adam Lioz & Karen Shanton, *The Money Chase: Moving from Big Money Dominance in the*  
15 *2014 Midterms to a Small Donor Democracy*, Dēmos (2014), App. 2 at 253 & available [here](#).  
16 Candidates filtered out in this way are disproportionately candidates of color. As one  
17 commentator has synthesized:

18             A history of state-sponsored oppression carries over into staggering wealth gaps between  
19 white people and people of color today, making it more difficult for people of color to

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<sup>1</sup> As the City points out, this case is *not* about restricting individuals from making independent expenditures. MTD at 2. It is not about matching or combating independent spending, which was at issue in *Arizona Free Ent. Club’s Freedom PAC v. Bennett*; in that case, the Court struck down a provision under which private spending—by privately-financed candidates and private individuals—triggered disbursement of public funds to particular, publicly-financed candidates opposed by the private spenders. 564 U.S. 721, 727-28 (2011). The Court held the allocation mechanism penalized political expression of independent spenders and privately-financed candidates since their choice to make private expenditures fueled not just their own political expression, but also that of particular publicly-financed candidates they opposed. *See id.* at 737-39. In contrast, Plaintiffs do not allege their independent expenditures are chilled by the program, *see generally* Compl.; and their payment of the challenged tax does not, as the City points out, “directly fund any candidate with whom the disagree.” MTD at 14.

1 make their voices heard in a system that runs on private wealth. Candidates of color are  
2 thus less likely to run for office in the first place, and raise less money when they do.

3  
4 Heather C. McGhee, *Foreword: New Approaches for Regulating Money in Politics*, 16 Election  
5 Law Journal 1, 5 (2017), App. 2 at 373 (footnotes omitted).<sup>2</sup> Indeed, a study of more than 3,000  
6 candidates running in more than 2,000 state legislative races in 2006—the most recently  
7 available data—showed that candidates of color raised 47 percent less money than white  
8 candidates, after adjusting for factors such as incumbency, partisanship, and district income. *See*  
9 Lioz, *Stacked Deck*, *supra*, at 28 (citation omitted). In a 2014 survey, “66 percent of . . . people  
10 of color agreed that lack of access to donors is an important reason preventing people of color  
11 from being represented in elected office.” *Id.* at 27 (citation omitted). It is therefore not  
12 surprising that more diverse candidates run for office under public financing systems. *See, e.g.*,  
13 Ctr. for Gov’t Studies, *Public Financing in California: A Model Law for the 21st Century* 11-12  
14 (2011), App. 2 at 112 & available [here](#); *see generally* DeNora Getachew & Ava Mehta, *Breaking*  
15 *Down Barriers: The Faces of Small Donor Public Financing*, The Brennan Center For Justice 2-  
16 3 (2016), App. 2 at 195 & available [here](#). Public financing programs that increase candidate  
17 access not only advance First Amendment interests, but racial equity interests as well.

18 Breaking down wealth-related barriers to candidate participation also creates  
19 opportunities for political expression by those candidates’ supporters, including supporters from  
20 communities that have been historically marginalized by wealth-related barriers. *See Bullock*,  
21 405 U.S. at 143-44 (finding the exclusionary ballot access fee’s effect on voters “neither  
22 incidental or remote.”); *Lubin*, 415 U.S. at 716 (explaining that hindrance of candidates’ political

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<sup>2</sup> *See also* Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, Pew Research Center (Dec. 12, 2014), App. 2 at 250 & available [here](#) (using Survey of Consumer Finances data, finding that the median white household held \$141,900 of wealth, compared to just \$11,000 held by the median black household, a 13x gap; and just \$13,700 held by the median Latino household, a 10x gap).



1 opportunity is “intertwined with the rights of voters,” for “voters can assert their preferences  
2 only through candidates or parties or both”).<sup>3</sup>

3 In sum, the program serves Seattle’s important interest in expanding the pool of  
4 candidates that Seattle voters can choose from—without chilling anyone’s free expression.

5 **C. The Democracy Voucher program strengthens democracy by reducing a valid**  
6 **perception of corruption.**

7  
8 The Supreme Court has long held that a “primary interest” served by campaign finance  
9 rules is “the prevention of corruption and the appearance of corruption[.]” *Buckley*, 424 U.S. at  
10 25. “Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of  
11 the appearance of corruption stemming from public awareness of the opportunities for abuse  
12 inherent in a regime of large individual financial contributions.” *Id.* at 27. *Buckley* held the at-  
13 issue public financing program served an interest in eliminating improper influence itself. *See id.*  
14 at 96. Courts have also upheld public financing measures as serving an important interest in  
15 preventing perceived corruption. *E.g., Gable v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998).

16 Seattleites have perceived corruption in their local government, which undermines their  
17 confidence in the local system of representation. Polling from 2015 shows that more than one-  
18 third of Seattleites believe that “corruption is a problem in Seattle politics” and nearly two-thirds  
19 feel that “lobbyists and big money interests in Seattle have a stronger voice in local government  
20 than ordinary people.” *See* Greenberg Quinlan Rosner Research *Honest Elections Seattle:*  
21 *Frequency Questionnaire 4-5* (Aug. 27-Sept. 1, 2015), App. 2 at 234. This perception of

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<sup>3</sup> This idea was crystallized by Gwendolyn Patton, a Civil Rights-era activist who observed, “People here were murdered trying to get the right to vote, but what good is it if there’s no one to vote for?” *See* Ari Berman, *How the Money Primary is Undermining Voting Rights*, *The Nation* (May 19, 2015), App. 2 at 5 & available [here](#). Washington CAN! member Gina Owens similarly explains: “[The Democracy Voucher program] gives me the opportunity to contribute and support people that represent my voice while others can support candidates that have their interests at heart.” Owens, *supra*.

1 corruption is not unwarranted. That dollars are being exchanged for political actions is not far-  
2 fetched when politicians are highly responsive to a wealthy donor class who can afford to  
3 contribute substantial amounts, but much less so to those who are able to make only small  
4 contributions, or none at all.

5 This is precisely what is happening at the national level. Affluent individuals are far more  
6 likely to donate to political campaigns than the public at large. A 2013 survey of wealthy  
7 Americans revealed that 68 percent of wealthy respondents had made political contributions in  
8 the previous 12 months. Benjamin I. Page et al., *Democracy and the Policy Preferences of*  
9 *Wealthy Americans*, 11 *Persp. on Pol.* 51, 53-54 & tbl. 2 (2013), App. 2 at 383 & available [here](#).  
10 This contrasts with just 0.68 percent of the adult population that made a disclosable contribution  
11 in the 2016 election cycle. See *Donor Demographics*, Center for Responsive Politics, App. 2 at  
12 161 & available [here](#) (last visited Sept. 16, 2017). These donors have substantially different  
13 policy preferences than Americans as a whole—and their policy preferences are vastly more  
14 likely to be mirrored in actual policy outcomes. See generally David Callahan & J. Mijin Cha,  
15 *Stacked Deck: How the Dominance of Politics by the Affluent and Business Undermines*  
16 *Economic Mobility in America*, Dēmos (2013), App. 2 at 23 & available [here](#). In fact, when the  
17 policy preferences of the wealthiest 10 percent of Americans conflict with those of the other 90  
18 percent, the 10 percent trumps the 90 percent, with “the starkest difference in responsiveness to  
19 the affluent and the middle class occur[ing] on economic policy.” Martin Gilens, *Affluence and*  
20 *Influence: Economic Inequality and Political Power in America* 101 (2012), App. 2 at 230. A  
21 Princeton political scientist concluded that “under most circumstances, the preferences of the  
22 vast majority of Americans appear to have essentially no impact on which policies the  
23 government does or doesn’t adopt[,]” and that “patterns of responsiveness...often correspond

1 more closely to a plutocracy than to a democracy.” *Id.* at 1, 234. As a result, eight-five percent of  
2 the public thinks that sometimes “candidates who win public office promote policies that directly  
3 help the people and groups who donated money to their campaigns,” and more than half (55%)  
4 of people across the country think it happens “most of the time.” *Americans’ Views on Money in*  
5 *Politics*, The New York Times & CBS News Poll (June 2, 2015), App. 2 at 3 & available [here](#).  
6 In sum, data fuels a rational perception that dollars are translated into policy outcomes.

7         The dominance of Seattle’s own elite donor class likewise fuels the local perception of  
8 corruption. Before I-122’s enactment, individuals could give up to \$700 to each City candidate,  
9 an amount well beyond the means of many Seattleites. *See* I-122 Section 5, MTD App. C. In the  
10 August 2015 primary, more than half of the \$2.5 million received by all local candidates came  
11 from a small group of donors who gave an aggregate of \$500 or more. *See* Bruce Speight, *The*  
12 *Outsized Influence of Big Money in Seattle Elections How Honest Elections Seattle Can*  
13 *Empower Regular Voters* 1-2 (Wash. PIRG, 2015), App. 2 at 409 & available [here](#). Large  
14 political donations shape Seattle candidate priorities. As City Council candidate Laura Gonzalez,  
15 who spent approximately 14 hours per week dialing for dollars, synthesized in 2015: “If I didn’t  
16 have to spend a significant amount of time fundraising I would be able to spend much more time  
17 in the field having that direct voter contact, which ultimately makes you a better policy maker.”  
18 *See* Paul Blumenthal, *Seattle Could Create an Entirely New Way to Fund Elections*, Huffington  
19 Post (Oct. 1, 2015), App. 2 at 18 & available [here](#). Against this backdrop, Seattleites’  
20 perceptions of corruption are hardly far-fetched.

21         The program was designed to prevent corruption, SMC 2.04.620, subd. a, and also serves  
22 to reduce a legitimate perception of corruption in Seattle. As explained by Seattle resident Mr.  
23 Roi-Martin Brown, a Washington CAN! member and long-time civil rights activist:

1 The [Vouchers'] monetary amount may be small by today's political standards, but I  
2 believe the Vouchers allow more voters to participate and counter other professional  
3 lobbying efforts to some degree. . . the Vouchers give voters like me, who don't have a  
4 PAC or support from an organization back[ed] by corporate money, an opportunity to  
5 support candidates whom I trust.

6 Brown, *supra*. By empowering individuals of all economic backgrounds to participate in  
7 electoral campaigns, the program helps to combat a reasonable public perception that dollars  
8 from an elite donor class are being traded for policy outcomes.

9 **D. The program's donor-directed distribution of funds ensures that candidates**  
10 **without significant public support do not receive large sums of public financing.**

11 Finally, the Democracy Voucher program serves the City's important interest in directing  
12 public funds to candidates with popular support. This interest has also been recognized since  
13 *Buckley*, when the Court upheld the presidential public financing program's qualifying threshold  
14 for minor parties, noting that "Congress' interest in not funding hopeless candidacies with large  
15 sums of public money . . . necessarily justifies the withholding of public assistance from  
16 candidates without significant public support." *Buckley*, 424 U.S. at 96.<sup>4</sup>

17  
18 Seattle's program serves this same purpose in a more targeted manner. The qualifying  
19 thresholds establish a floor of public support below which a candidacy cannot access public  
20 funds. SMC 2.04.630, subd. c. But the funding distribution mechanism also serves to direct more  
21 public funds to candidates who are backed by more Seattleites, thereby spending less public  
22 resources on candidates with less popular support and therefore less chance of being elected.

23 //

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<sup>4</sup> This same interest underlies basic qualifying thresholds in grant-based public financing schemes. *See, e.g., Green Party of Conn. v. Garfield*, 616 F.3d 213, 233-34 (2d Cir. 2010) (citing *Buckley*, 424 U.S. at 96, 103-04, to conclude a public financing system may "condition public funds on a showing of 'significant' public support. . ." and that "there is a range of permissible qualification criteria, and although a public financing system must be tailored to avoid an unfair or unnecessary burden on the political opportunity of a party or candidate, a court must defer to a legislature's choice of criteria so long as those criteria are drawn from the permissible range.").

1           **II.     PLAINTIFFS’ ATTACK ON THE PROGRAM’S MAJORITARIAN, DONOR-**  
2           **DIRECTED FUNDING MECHANISM TURNS A CENTRAL PURPOSE OF**  
3           **THE FIRST AMENDMENT ON ITS HEAD.**  
4

5           **A. The program’s donor-directed mechanism of distributing funds to participating**  
6           **candidates serves, rather than contravenes, a central purpose of our First**  
7           **Amendment: advancing democratic self-government.**

8           Plaintiffs allege the program unconstitutionally discriminates against minority viewpoints  
9 by “distributing. . . funds at the whim of majoritarian interests,” since participating candidates  
10 receive “unequal distribution of voucher funds based on voter preferences[.]” Compl. ¶¶ 51, 34.  
11 Plaintiffs turn the First Amendment’s essential democracy-enhancing purpose on its head. “The  
12 First Amendment reflects ‘a profound national commitment to the principle that debate on public  
13 issues should be uninhibited, robust, and wide-open.’” *Snyder v. Phelps*, 562 U.S. 443, 452  
14 (2011) (citing *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The public marketplace of  
15 ideas protected by the First Amendment does not exist in a vacuum, but rather is in service of our  
16 system of democratic self-government. *See, e.g., id.* (citation omitted) (explaining “speech  
17 concerning public affairs is more than self-expression; it is the essence of self-government.”);  
18 *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (stating, “our cases  
19 have often noted the close connection between our Nation’s commitment to self-government and  
20 the rights protected by the First Amendment.”); *Buckley*, 424 U.S. at 14 (citation omitted)  
21 (noting a “major purpose. . . was to protect the free discussion of governmental affairs”). Speech  
22 in a competitive political marketplace of ideas serves and protects our capacity to govern  
23 ourselves and hold elected officials accountable. *See Williams v. Rhodes*, 393 U.S. 23, 32 (1968);  
24 *Citizens United v. Fed’l Election Comm’n*, 558 U.S. 310, 339 (2010) (stating, “[s]peech is an  
25 essential mechanism of democracy, for it is the means to hold officials accountable to the people.

1 . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is  
2 a precondition to enlightened self-government and a necessary means to protect it.”).

3 Similarly foundational in a democracy is that there is no inherent correlation between a  
4 speaker’s wealth or poverty and the importance of her political views. As the Court has  
5 recognized in the context of ballot access and voting rights, the happenstance of a person’s  
6 economic circumstance says nothing about the popular support behind her ideas, nor their  
7 objective truth. *See Bullock*, 405 U.S. at 143–44, 146; *Harper*, 383 U.S. at 668. Instead, a  
8 democratic republic such as ours generally seeks to translate into government action those ideas  
9 with majoritarian support. Integral to the very nature of our Republic is some correlation  
10 between the exercise of state power and popular support. Democratic self-government can only  
11 be realized when ideas with the greatest public support are translated into government action—  
12 most often through effective representation and occasionally by the people directly through  
13 ballot initiatives or referenda; this is what it means to be governed by majority rule.<sup>5</sup> *See, e.g.,*  
14 *The Federalist* No. 39, *supra* at \*1 (James Madison) (defining a Republican form of government  
15 as one “. . . which derives all its powers directly or indirectly from the great body of the people. .  
16 . It is ESSENTIAL to such a government that it be derived from the great body of the society,  
17 not from an inconsiderable proportion, or a favored class of it. . .”); Guy-Uriel E. Charles,  
18 *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of*  
19 *Baker v. Carr*, 80 N.C. L. Rev. 1103, 1146 (2002), App. 2 at 65 (footnotes omitted) (explaining,  
20 “[b]y almost all conceptions of democracy, any polity that fancies itself democratic must at least  
21 be responsive to majoritarian interests, commonly referred to as majority rule. . . [Madison]

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<sup>5</sup> Majority rule is not an absolute in a democracy—protection for minority rights is essential. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 at n. 4 (1938). It is nonetheless a default condition to be pursued absent a compelling countervailing value.

1 understood that a democratic polity's legitimacy depended upon some form of majoritarian  
2 influence.”). It is true that the First Amendment is counter-majoritarian to the extent it protects  
3 individual rights to express unpopular opinions, *e.g.*, *Johnson*, 491 U.S. at 414, yet it cannot be  
4 read to uproot our entire system of majoritarian republicanism so integral to the Amendment’s  
5 purpose. The First Amendment’s democracy-strengthening objective is embodied not just in its  
6 Free Speech protections, but throughout the entire Amendment, which contains six guarantees  
7 that reflect a “rigorous chronological narrative of free citizens governing themselves in an ideal  
8 democracy.” *See* Burt Neuborne, *Madison’s Music: On Reading The First Amendment* 11-12  
9 (2015), App. 2 at 376.

10 The Supreme Court’s campaign finance cases, while consistently striking limits on  
11 political spending, do not in fact reject these foundational principles. The Court has suggested  
12 that, generally, the more money someone spends on independent expenditures, the more political  
13 speech she has engaged in, *see Buckley*, 424 U.S. at 19. And the Court has speculated that higher  
14 contributions may reflect greater intensity of support. *See id.* at 21.<sup>6</sup> Yet the Court has never  
15 suggested that the speech of the wealthy is inherently more meritorious or more politically  
16 important than anyone else’s, nor could it; to do so would run counter to our very system of  
17 democratic self-government, and to the premise that speech should not be favored or disfavored  
18 on the basis of the speaker’s identity or viewpoint. *See, e.g., Citizens United*, 558 U.S. at 340;<sup>7</sup>

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<sup>6</sup> The Supreme Court is almost certainly incorrect about this. As Judge Guido Calabresi observed in a 2005 opinion, “given the unequal distribution of wealth, money does not measure intensity of desire equally for rich and poor. In other words, and crucially, a large contribution by a person of great means may influence an election enormously, and yet may represent a far lesser intensity of desire than a pittance given by a poor person. . . .”). *Landell v. Sorrell*, 406 F.3d 159, 161 (2d Cir. 2005) (Calabresi, J., concurring in denial of rehearing *en banc*). However, this is of no consequence here since the present case does not involve any attempt to limit the spending of the wealthy.

<sup>7</sup> The *Citizens United* Court took this legitimate point about speaker identity to an illogical conclusion in collapsing the very real distinctions between corporate and human “speakers.” For this and other reasons, *amici* do not endorse the Court’s ruling in *Citizens United*.

1 *Johnson*, 491 U.S. at 414. Further, the Court has suggested that the amount of money raised or  
2 spent in a political campaign *should* at least loosely reflect the level of public support, and has  
3 looked favorably upon measures that aggregate, and thereby amplify, the political voices of  
4 individuals of modest economic means. *See Fed'l Election Comm'n v. Mass. Citizens for Life,*  
5 *Inc.*, 479 U.S. 238, 258 (1986) (observing, “[r]elative availability of funds is after all a rough  
6 barometer of public support.”), *Buckley*, 424 U.S. at 56 (footnote omitted) (assuming, “the  
7 financial resources available to a candidate’s campaign...will normally vary with the size and  
8 intensity of the candidate’s support.”); *see also Fed'l Election Comm'n v. Nat'l Conservative*  
9 *Pol. Action Comm'n*, 470 U.S. 480, 494 (1985) (citation omitted) (explaining that PACs “are  
10 mechanisms by which large numbers of individuals of modest means can join together in  
11 organizations which serve to ‘amplif[y] the voice of their adherents.’”).<sup>8</sup>

12 Plaintiffs’ assertion that the voluntary program is unconstitutional because it helps ideas  
13 with widespread public support compete effectively with ideas that happen to have the backing  
14 of (a relatively few) wealthy donors is simply absurd, and runs contrary to the core purpose of  
15 the First Amendment in our Republic. The donor-directed nature of Seattle’s voucher program  
16 serves the Amendment itself because it serves democratic self-government. As detailed above in  
17 Part I(A), the Democracy Voucher program affords Seattle residents of all backgrounds an  
18 opportunity to participate, which helps realize the First Amendment’s promise of a competitive  
19 political marketplace of ideas. Furthermore, that candidates with more popular support will  
20 generally receive more public funds serves to align public policy outcomes with public support.

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<sup>8</sup> To be clear, *amici* do not endorse the holdings of these cases, in large part because against a backdrop of severe economic inequality a system without limits on what the wealthy can contribute or spend on elections does not actually translate into a situation in which “the financial resources available to a candidate’s campaign...will normally vary with the size and intensity of the candidate’s support.” *Buckley*, 424 U.S. at 56. Nonetheless the Court’s aspiration for a correlation between resources and public support is a valid interpretation of the purpose of the First Amendment; and any disagreement regarding the ultimate holdings is immaterial in the present case since no limits on political spending are at issue.



1 And, as detailed below, the program accomplishes these ends while engaging in no viewpoint  
2 discrimination and restricting no speech.

3 **B. The program’s donor-directed mechanism for distributing public funds does not**  
4 **amount to unconstitutional viewpoint discrimination.**

5  
6 Plaintiffs’ argument that the Democracy Voucher program’s mechanism for distributing  
7 public funds constitutes unconstitutional viewpoint discrimination lacks merit. Most important,  
8 unequal public funding allotments received by candidates—including Plaintiffs’ candidates of  
9 choice—are not traceable to the *City’s* behavior at all, but rather to candidates’ own choices  
10 regarding participation and determinations of self-governing Seattleites interacting with the  
11 political marketplace of ideas. *See* SMC 2.04.620, subds. d-e; 2.04.630. The more support a  
12 participating candidate has, the more Democracy Voucher assignments she is likely to receive—  
13 regardless of a candidate’s viewpoints and irrespective of any opinion City officials may hold  
14 about a candidate’s (or taxpayer’s) party, position, or message. *See* MTD at 16-17. The City does  
15 not treat participants differently based on its views about the truth or desirability of a candidate’s  
16 ideas, which is the evil at the heart of the First Amendment jurisprudence on viewpoint  
17 discrimination. *E.g., Johnson*, 491 U.S. at 414 (citations omitted).

18 The program’s people-powered mechanism for funding candidate speech is far *more*  
19 consistent with the First Amendment’s self-government objective than candidate speech funded  
20 by private wealth that is not reflective of popular support, because it enhances robust discussion  
21 of diverse viewpoints, which is then translated by self-governing Seattleites into government  
22 action through majority rule. *See* Part II(A), *supra*. In sum, rather than constituting viewpoint  
23 discrimination, the program’s funding mechanism serves the First Amendment’s core purpose:

1 enhancing self-government through robust discussion of ideas and viewpoints, translated into  
2 government action through majority rule.

3 **III. STRICT SCRUTINY REVIEW OF THE DEMOCRACY VOUCHER**  
4 **PROGRAM IS INAPPROPRIATE, AND THE PROGRAM EASILY**  
5 **SURVIVES ANY OTHER STANDARD OF REVIEW.**  
6

7 **A. The program’s alleged burdens on Plaintiffs’ free speech rights do not come close**  
8 **to meriting strict scrutiny review.**

9 Plaintiffs’ argue that the program violates their fundamental First Amendment right not to  
10 subsidize expression with which they disagree, and that this right warrants strict scrutiny  
11 protection. Compl. ¶ 50. This argument is absurd on its face. The highest level of constitutional  
12 protection, strict scrutiny review is reserved for burdens on our most “core” constitutional rights;  
13 burdens on activities that are “closer to the edges than to the core of First Amendment  
14 expression” receive less-than-strict scrutiny. *See Fed’l Election Comm’n v. Beaumont*, 539 U.S.  
15 146, 161-62 (2003) (citations omitted), *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1036  
16 (D. Aka. 2017), *appeal docketed*, No. 17-35019 (9th Cir. Jan.10, 2017) (applying *Beaumont* on  
17 this point; concluding Alaska’s nonresident aggregate contribution limit is not subject to strict  
18 scrutiny). As the City explains, the burden that Plaintiffs allege— payment of a uniformly-  
19 applicable property tax— does not implicate Plaintiffs’ First Amendment expression or  
20 association at all. MTD at 6, 11.<sup>9</sup> Even assuming Plaintiffs have alleged some First Amendment  
21 interests, these interests are not so “core” to First Amendment expression or association as to as  
22 to merit a higher level of constitutional protection than the right to make political contributions

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<sup>9</sup> The First Amendment does not contain “a general immunity from taxation for any speech related activity that a taxpayer opposes[.]” MTD at 11, and “Plaintiffs are not required to support any specific candidate or be associated with any message or candidate they agree or disagree with.” MTD at 6.

1 or the right to vote, both of which have been afforded less-than-strict scrutiny protection.<sup>10</sup> For  
2 the foregoing reasons, application of strict scrutiny review in the instant case is plainly  
3 inappropriate. In fact, the burdens alleged do not even warrant the intermediate scrutiny  
4 protection afforded to base contribution limits. As the following subpart describes, however, the  
5 program easily survives even intermediate scrutiny review.

6 **B. The Democracy Voucher program is properly tailored because it imposes an**  
7 **insubstantial burden in service of important public interests.**  
8

9 Though the First Amendment interests implicated by the program are not substantial  
10 enough to merit the intermediate scrutiny afforded to contribution limits, the program easily  
11 survives this standard of review, or anything less than strict scrutiny review.<sup>11</sup> A campaign  
12 finance measure survives intermediate First Amendment scrutiny if it is “closely drawn” to serve  
13 “sufficiently important” government interests. *See Nixon*, 528 U.S. at 387-88. As demonstrated  
14 herein, the Democracy Voucher program serves important, democracy-strengthening interests  
15 that are at the heart of our First Amendment freedoms by reducing wealth-based barriers to  
16 participation in the political marketplace of ideas and reducing a valid perception of corruption in  
17 Seattle. *See supra* Part I. The fact that a super-majority of Seattle residents chose to tax  
18 themselves to serve these interests highlights their importance. *See* MTD App. D; I-122 Section  
19 2 (citing RCW 84.55.050), MTD App. C.

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<sup>10</sup> *See, e.g., Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 387-88 (2000) (subjecting contribution limits to a “closely drawn” standard of review); *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983) (suggesting not every burden on the right to vote is subject to strict scrutiny or to any litmus test; instead, a balancing test is often employed). Here *amici* do not endorse the notion that the right to contribute money to a political campaign should be protected at a higher level of constitutional scrutiny than the right to vote; but simply emphasize that even restrictions on the acts of making political contributions and voting, which are both much closer to core rights than the non-payment of the challenged property tax, have been subjected to less-than-strict scrutiny.

<sup>11</sup> *Amici* do not suggest that the program would fail strict scrutiny review; but rather do not address this question because it is so far-fetched.

1           The Democracy Voucher program is also plainly “closely drawn” to advance those  
2 interests. In considering whether a contribution limit is properly drawn under this standard, the  
3 Supreme Court has stated that the limit cannot be so “radical in effect as to render political  
4 association ineffective, drive the sound of a candidate’s voice below the level of notice, or render  
5 contributions pointless.” *Nixon*, 528 U.S. at 397. Here, the challenged program is not so radical  
6 as to render Plaintiffs’ political association or expression ineffective. On the contrary, the burden  
7 on Plaintiffs is insubstantial.<sup>12</sup> Moreover, numerous avenues remain open for the Plaintiffs to  
8 associate with or express support for the candidates of their choice, including candidates who are  
9 unpopular or choose not to participate in the voucher system. Plaintiffs remain free to engage in  
10 unlimited and unmatched independent expenditures in favor of their preferred candidates, unlike  
11 in *Bennett*.<sup>13</sup> They may aggregate expenditures with like-minded individuals to amplify their  
12 voices. They may also continue to make private contributions to their preferred candidates. *See*  
13 SMC 2.04.370, 2.04.630, subd. b. Plaintiffs also remain free to give voice to their objections  
14 about the Democracy Voucher program in real time, on the air, or online.

15           Nor does the Democracy Voucher program threaten to drive any candidate’s voice below  
16 the level of notice. Like other public financing programs, the Democracy Voucher program only  
17 increases candidate choice. *See Republican Nat’l C’ee v. Fed’l Election Comm’n*, 487 F. Supp.  
18 280, 284 (S.D.N.Y. 1985), *aff’d without opinion*, 470 U.S. 480 (1985). Candidates can choose  
19 the manner of campaigning that is most suitable for their own particular needs: be it by

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<sup>12</sup> The total revenue that may be collected from the challenged tax is capped at roughly 2.5 cents per \$1,000 of assessed value. *See* I-122 Section 2, MTD App. C. For an owner of a piece of real property worth \$1,000,000, this suggests that only \$25 could be levied toward the at-issue tax. This amount of 2.5 cents per \$1,000 of assessed value constitutes less than 1% of the maximum amount of regular property taxes that could be levied by the City in 2016 (\$3.60 per \$1,000 of assessed value). *See id.*

<sup>13</sup> *See supra* n. 1 & accompanying text.

1 complying with voluntary limits and receiving voucher funds, or by opting out of the program.  
2 *See id.* The program hence survives intermediate scrutiny as a matter of law.

3 **CONCLUSION**

4 For the foregoing reasons, the City’s motion to dismiss must be granted.

5 Respectfully submitted September 19, 2017.

6  
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