

Case No: 77880-3

**IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

MARK ELSTER and SARAH PYNCHON,

Plaintiffs/Appellants,

v.

THE CITY OF SEATTLE, a Washington municipal corporation,

Defendant/Respondent.

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Seattle’s unconventional campaign-finance scheme forces property owners to pay for other people’s campaign contributions. This compelled subsidy of partisan political speech clashes with a “bedrock principle” of the First Amendment: “[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party he or she does not wish to support.” *Harris v. Quinn*, _ U.S. _, 134 S. Ct. 2618, 2644, 189 L. Ed. 2d 620 (2014).

In every campaign-finance case before the Supreme Court, the Court has employed strict scrutiny or—at minimum—“closely drawn” scrutiny for “marginal” burdens on speech rights. *Buckley v. Valeo*, 424 U.S. 1, 20, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). Never has the Supreme Court—or any other federal court—employed a “reasonableness” standard to speech restrictions imposed by campaign-finance laws.

Nonetheless, the lower court applied that anomalous standard to Seattle’s campaign-finance program. The lower court recognized that this program implicated property owners’ First Amendment rights. But—without any opportunity for discovery—the court held that the burden on First Amendment rights was permissible because Seattle’s voucher program was reasonable and viewpoint-neutral.

When government burdens core political speech, it should not skate by on a motion to dismiss without presenting any evidence that the burden placed on a fundamental right is justified. Outright dismissal is only proper when “it appears beyond a reasonable doubt that no facts exist that would justify recovery.” *In re Parentage of C.M.F.*, 179 Wn.2d 411, 418, 314 P.3d 1109 (2013) (citation and quotation marks omitted). A recognized First Amendment injury demands factual development and thorough vetting beyond a motion to dismiss.

This Court should reverse and remand, instructing the trial court to employ strict scrutiny, or at least the “closely drawn” scrutiny applied to marginal speech restrictions in the campaign-finance setting. Even if a reasonableness standard is proper here, a remand is justified to allow plaintiffs to develop record evidence regarding reasonableness.

ASSIGNMENTS OF ERROR

The trial court erred in granting the City’s motion to dismiss Elster’s First Amendment challenge to the democracy-voucher program. Specifically, the court misconstrued Supreme Court caselaw by applying a “reasonableness” standard to the voucher program instead of the heightened scrutiny due any other viewpoint- or content-based regulation of political speech. The court also erroneously held that the voucher program satisfies the reasonableness standard because it is “viewpoint neutral.” This Court—

applying *de novo* review—should vacate the motion to dismiss and remand the case for review under the appropriate test.

This appeal raises the following issues for review:

1. **Strict scrutiny:** Should strict scrutiny apply to a compelled subsidy of political speech that is both content-based and viewpoint-based?
2. **Intermediate scrutiny:** If strict scrutiny does not apply, should the voucher program be reviewed under “closely drawn” scrutiny, a standard employed for marginal speech restrictions in the campaign-finance context?
3. **Reasonableness review:** If reasonableness review is the proper standard, should Elster have an opportunity to develop record evidence on the issue of reasonableness?

STATEMENT OF THE CASE

In 2015, Seattle adopted the democracy-voucher program, the first of its kind in the country, through Initiative 122. Clerk’s Papers (CP) at 3-4; *see* SMC § 2.04. Every election year, Seattleites get four \$25 vouchers. SMC § 2.04.620(d), (e). Voucher recipients may donate their vouchers to any eligible candidate. *Id.*

The Initiative offers two options for funding the voucher program—appropriations from the general revenue or a dedicated property levy. I-122 § 2. The City opted to raise the voucher funds—up to \$3 million per year—through the property levy. The levy funds may only be used for democracy vouchers and program administration. *See id.*

In 2017, five candidates qualified for vouchers. *See* Seattle Ethics and Elections Commission, Program Data.¹ Six hundred thousand dollars in campaign contributions funded by the property levy went to two candidates: Jon Grant and Teresa Mosqueda, both running for City Council Position 8. *Id.* The three other eligible candidates received in total about \$250,000 in voucher contributions. *Id.*

The appellants—Mark Elster and Sarah Pynchon (Elster)—are Seattle property owners who object to sponsoring other people’s political speech. CP at 2-3. Elster opposed all the candidates receiving the voucher funds that he subsidized, and he does not wish to support candidates who rely on vouchers in future elections. CP at 2. Pynchon owns Seattle property but is ineligible to receive the vouchers herself because she is not a Seattle resident. CP at 3. She does not want to subsidize other people’s political speech when she cannot obtain her own vouchers. *Id.*

In June, 2017, Elster filed a complaint against the City of Seattle, raising a Section 1983 claim against Initiative 122’s voucher program, codified in Subchapter VIII of Section 2.04 of the Seattle Municipal Code. *See generally* CP 1-28. Elster’s complaint alleged that the democracy-

¹ Available at <http://www.seattle.gov/democracymvouchers/program-data>. Timely voucher data kept by the SEEC is judicially noticeable. *See* ER 201(b).

voucher program violated his First Amendment rights by compelling him to pay for other people's private campaign contributions. *See generally id.*

The City moved to dismiss in lieu of an answer. *See generally* CP 31-65. The trial court heard oral argument regarding the motion to dismiss on October 27, 2017. One week later, the court issued an order granting the motion. *See generally* CP 109-16.

The trial court held that the voucher program implicated Plaintiffs' First Amendment rights. CP at 112. Nonetheless, the court concluded that a relaxed standard of review applied because the program was akin to a "nonpublic or limited public forum." CP at 113-15. Therefore, the program needed only to be "reasonable and viewpoint neutral." CP at 113 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009)). The court held that the program satisfied this standard because increasing voter participation in the electoral process was a "reasonable justification for the Democracy Voucher Program." CP at 115.

In so holding, the court relied on the City's analogy to Establishment Clause challenges to school vouchers. CP at 114-15. Although acknowledging the Supreme Court's warning that the Establishment Clause and the Free Speech Clause should not be equated, *see Buckley v. Valeo*,

424 U.S. at 93 n.127 (1977), the court nonetheless relied on those cases in its ruling. CP at 114-15.

Elster moved for reconsideration. *See generally* CP 117-26. He urged the court to allow further briefing regarding the City’s reliance on school-voucher precedent. CP at 121. Elster did not get the opportunity to address that argument in the written briefing because the City raised the point in their reply. CP at 121. Moreover, the court itself recognized the questionable relevance of Establishment Clause caselaw.

Elster also requested that the court allow further briefing about the proper standard of review. Elster argued that—at minimum—the voucher program was a content-based speech regulation that should trigger some form of heightened scrutiny. CP at 120.

The court denied the motion for reconsideration without a written opinion.

ARGUMENT

This Court has held that motions to dismiss should be granted only when a claim is certain to fail regardless of the outcome of discovery and fact-finding: “A motion to dismiss should only be granted if it appears beyond a reasonable doubt that no facts exists that would justify recovery. This is the case when there is some insuperable bar to relief.” *Rowe v. Klein*, No. 74724-0-I, _ Wn. App. _, 2018 WL 580623, at *2 (Jan. 29, 2018).

Courts should exercise even greater caution where government action implicates the First Amendment. *Cf. Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

As the trial court recognized, the democracy-voucher program implicates Elster’s First Amendment right to refrain from subsidizing speech he opposes. Yet the court did not demand any evidence from the City that a burden on this fundamental right was justified or allow Elster to build a record that might rebut the City’s proffered justification. It instead granted a motion to dismiss based on a “reasonableness” inquiry—a rarity in First Amendment jurisprudence and a total stranger to campaign-finance cases in particular.

The voucher program should instead face strict scrutiny for three independent reasons: (1) it is viewpoint-based because voucher holders decide who receives public funds based on their own political viewpoints; (2) it is content-based because it only subsidizes political contributions to locally elected candidates; and (3) it regulates political speech.

Alternatively, even if the burden on Elster’s First Amendment interests here are minimal, “closely drawn” scrutiny should have applied rather than a reasonableness standard. Courts consistently have applied

“closely drawn” scrutiny—a species of intermediate scrutiny—to marginal speech restrictions imposed in the campaign-finance context. *See, e.g., McCutcheon v. FEC*, _ U.S. _, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014) (employing the “closely drawn” standard to aggregate contribution limits). That standard would require the City to demonstrate—with evidence—that the voucher program serves “a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.” *Id.* at 1444 (quoting *Buckley*, 424 U.S. at 25).

But, even assuming a reasonableness standard applies, Elster should have the opportunity to develop a record with respect to the program’s reasonableness.

I

STRICT SCRUTINY APPLIES TO THE DEMOCRACY-VOUCHER PROGRAM BECAUSE IT IS BOTH A VIEWPOINT-BASED AND A CONTENT-BASED REGULATION OF POLITICAL SPEECH

Strict scrutiny applies to compelled subsidies of speech when the subsidized speech relates to a specific subject matter or viewpoint. The voucher program is just such a subsidy.

A. THE FIRST AMENDMENT PROVIDES ROBUST PROTECTIONS AGAINST COMPELLED SUBSIDIES OF SPEECH

The Supreme Court has applied First Amendment protections to individuals forced to subsidize speech in a number of contexts, such as

union fees, bar dues, and commercial advertisements. These cases provide valuable context in understanding the constitutional landscape at issue in this case.

Compelled dues to a union or similar compulsory association raise First Amendment concerns for both free speech and free association. In most of these cases, non-union members forced to pay union fees object to the advocacy sponsored on their dime. In *Abood v. Detroit Board of Education*, the Supreme Court forged the key principle behind many compelled-subsidy cases that have followed: “For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.” 431 U.S. 209, 234-35, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).

Abood, however, upheld the union fees—a holding severely criticized by subsequent caselaw. *Id.*; see *Harris*, 134 S. Ct. at 2632-34 (“The *Abood* Court’s analysis is questionable on several grounds. Some of these were noted or apparent at or before the time of the decision, but several have become more evident and troubling in the years since then.”).² *Abood*

² Indeed, many commentators predict that *Abood* will be overruled by the Supreme Court in its forthcoming decision in *Janus v. AFSCME*. See, e.g., SCOTUSblog Symposium, Andree Blumstein, *Hijacked riders, not free riders* (Dec. 20, 2017) (available at <http://www.scotusblog.com/2017/12/symposium-hijacked-riders-not-free-riders/>)

drew a line between permissible subsidies for collective bargaining and impermissible subsidies for ideological speech. 431 U.S. at 236. Subsequent cases molded this into a specialized test for compelled subsidies in the context of associations. Compulsory associations can fund activities germane to their central functions through mandatory fees. *Keller v. State Bar of California*, 496 U.S. 1, 14, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990). Associations cannot, however, use dissenters' money to fund expressive activities that stray from the non-political goals of the association. *Id.*

Cases striking down taxes on food producers also demonstrate that the compelled-subsidy doctrine applies to taxes used to fund private speech with even greater force than in the association context. For example, in *United States v. United Foods*, a government agency imposed a per-pound assessment on mushroom producers and importers. 533 U.S. 405, 408, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001). That tax funded mushroom ads that several businesses subject to the tax opposed. *Id.*

The Supreme Court struck down the tax. *Id.* at 417. The First Amendment, the Court said, “may prevent the government from compelling individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object.” *Id.* at 410. Unlike in the

(“Crystal balls foretell that Neil Gorsuch will now supply the fifth vote to overrule *Abod*.”).

union or bar cases, the mushroom tax did not relate to any compulsory association, so the Court employed a stricter First Amendment scrutiny instead of the more permissive germaneness test. *Id.* at 413-16. In fact, the Supreme Court recently opined that even *United Foods*' less forgiving test might be "too permissive." *Harris*, 134 S. Ct. at 2639.

The lower court erred in eliding the union and advertisement cases. The lower court decided that these core compelled-subsidy cases did not apply to the voucher program because the voucher program does not mandate association: "The program is not mandating that property owners associate with each other. Without this mandated association, it is difficult to see how the test laid out in the 'compelled funding of speech' cases fits a campaign funding tax." CP at 113. The lower court, however, misread the compelled-subsidy precedents.

Contrary to the lower court's ruling, the lack of any associative component to the voucher program makes it *more* vulnerable to heightened judicial scrutiny, not less. The perverse result, under the lower court's decision, is that compelled subsidies of political speech are more permissible than compelled subsidies of ads about mushrooms. This is not the proper state of the law. *See Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 103 L. Ed. 2d 271

(1989) (holding that the First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office”).

B. STRICT SCRUTINY APPLIES WITH EQUAL VIGOR TO COMPELLED SILENCE, COMPELLED SPEECH, AND COMPELLED SUBSIDIES OF SPEECH

The Supreme Court applies the same First Amendment scrutiny to compelled silence, compelled speech, and compelled subsidies of speech. As the Court explained in *Harris v. Quinn*, compelled speech and compelled subsidies present equal hazards to First Amendment rights: “[C]ompelled funding of the speech of other private speakers or groups’ presents the same dangers as compelled speech.” *Harris*, 134 S. Ct. at 2639 (quoting *Knox v. SEIU*, 567 U.S. 298, 309, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012)). Compelled speech and compelled subsidies therefore face the same degree of scrutiny.

Compelled speech and compelled subsidies, in turn, receive the same scrutiny as outright censorship. The Supreme Court has long recognized “[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression.” *Riley v. Nat’l Fed’n of the Blind of N.C. Inc.*, 487 U.S. 781, 797, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988). Thus, compelled speech, compelled subsidies, and censorship all face the same degree of First Amendment scrutiny. The

democracy-voucher program, therefore, must answer to the same constitutional standards as other burdens on speech rights.

C. THE DEMOCRACY-VOUCHER PROGRAM IS CONTENT-BASED BECAUSE THE COMPELLED SUBSIDY ONLY FUNDS POLITICAL DONATIONS TO LOCAL ELECTORAL CANDIDATES

The democracy-voucher program must satisfy strict scrutiny as a content-based speech regulation. *See Reed v. Town of Gilbert, Ariz.*, ___ U.S. ___, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

A content-based speech regulation is one that regulates speech on a particular subject matter. *See Burson v. Freeman*, 504 U.S. 191, 197, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992); *Collier v. City of Tacoma*, 121 Wn.2d 737, 749, 854 P.2d 1046 (1993). Regulations of speech relating to an election are content-based. *See Burson*, 504 U.S. at 197.

A law need not evince an intent to disadvantage speech on certain topics in order to be considered content-based. Rather, it need only target a particular subject matter on its face. *Reed*, 135 S. Ct. at 2228. The rationale for regulating content does not affect the question of whether strict scrutiny should apply: “In other words, an innocuous justification cannot transform

a facially content-based law into one that is content-neutral.” *Reed*, 135 S. Ct. at 2228.

The bulk of precedent regarding campaign-finance reform laws show that regulations of campaign speech are content-based and therefore subject to strict scrutiny. Indeed, aside from limits on campaign contributions, every Supreme Court case to address First Amendment burdens in the campaign-finance context has applied strict scrutiny. *See, e.g., Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011) (applying strict scrutiny to Arizona’s public financing scheme); *Citizens United v. FEC*, 558 U.S. 310, 340, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (applying strict scrutiny to limits on corporate independent expenditures); *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 743, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) (applying strict scrutiny to a federal law regulating self-funded candidates).

Regulations that compel speech in a content-based manner are constitutionally suspect because individuals have a right to refrain from speaking or supporting speech on a particular topic in general, not just with regard to viewpoints they oppose. For example, in *Riley v. National Federation for the Blind of North Carolina*, the Supreme Court struck down a law that compelled speech even though the speech did not elicit any

particular viewpoint. The North Carolina law in *Riley* required professional fundraisers to tell potential donors the percentage of fundraising revenue that the fundraiser retained as fees and costs. 487 U.S. at 784. The Court rejected the view that compelled speech is only problematic if the speaker is forced to state an opinion he objects to. *Id.* at 797-98. Whether the case involves “compelled statements of opinion” or “compelled statements of ‘fact’”: either form of compulsion burdens protected speech.” *Id.*

Circuit courts have consistently applied this rule, striking down myriad laws compelling content-based speech that did not force the speaker to support a specific viewpoint they opposed, such as a law requiring physicians to display a sonogram and describe the fetus to patients considering an abortion, or a law requiring dairy manufacturers to label products from cows treated with growth hormones. *See Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996). This precedent establishes a settled rule that a law cannot require someone “to speak when they would rather not,” whether they disagree with the compelled speech or simply want to refrain from speaking on the subject matter. *Amestoy*, 92 F.3d at 72; *Riley*, 487 U.S. at 797 (“[T]he First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”).

This pattern applies to the coercion of campaign-related speech. For example, in *Clifton v. Federal Election Commission*, the First Circuit addressed a First Amendment challenge to an FEC regulation that required advocacy groups to give equal space and prominence to all candidates in their voting guides. 114 F.3d 1309, 1311 (1st Cir. 1997). The FEC regulation, by forcing advocacy groups to offer equal promotion to candidates they opposed, had to face strict scrutiny because the regulation—though viewpoint-neutral—compelled speech on a particular topic: political candidates. *Id.* The advocacy groups could still say whatever they wished about those candidates in the allotted space, but the First Circuit nonetheless held that those groups had the right to refrain from speaking about a candidate, even where they did not have to pantomime an objectionable viewpoint.

The voucher program is a content-based speech regulation. Voucher holders can only use the vouchers to contribute to a local candidate. The compelled subsidy therefore targets particular content. Just like *Clifton*, compelling speech on the subject of political campaigns constitutes a content-based speech regulation. The fact that the voucher money may or may not go to a viewpoint that Elster objects to does not diminish the required level of scrutiny, just as in *Clifton*; he has a right not to support

speech on a subject upon which he would rather not speak. The lower court's failure to apply strict scrutiny constitutes reversible error.

D. THE DEMOCRACY-VOUCHER PROGRAM IS VIEWPOINT-BASED BECAUSE IT AUTHORIZES PRIVATE INDIVIDUALS TO DIVERT PUBLIC FUNDS TO CAMPAIGNS BASED ON THEIR PERSONAL POLITICAL VIEWPOINTS

The voucher program also must face strict scrutiny as a viewpoint-based speech regulation. A regulation is viewpoint-based if it either (1) expressly targets or favors particular viewpoints; or (2) has the practical effect—regardless of intent—of disfavoring or favoring certain views. The democracy-voucher program falls into the second category. By distributing voucher funds through the majoritarian preferences of Seattle residents, the program favors majoritarian views. The voucher program must therefore satisfy strict scrutiny.

To be considered viewpoint-based, a speech regulation does not need to have an intent to disfavor particular viewpoints. If the unintended outcome undermines particular speakers, then the regulation is viewpoint-based. A law's direct effect on speech matters as much as its purpose: "Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983); see also *Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221, 228, 107 S.

Ct. 1722, 95 L. Ed. 2d 209 (1987) (A First Amendment claimant need not prove an “improper censorial motive.”).

This holds true in the campaign-finance context. The Supreme Court has held that burdens on core political speech must face strict scrutiny, whether the law burdens speech “by design or inadvertence.” *Citizens United*, 558 U.S. at 340. As the Supreme Court said in *Buckley v. Valeo*: “This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government’s conduct.” *Buckley*, 424 U.S. at 65.

A stilted allocation of funds that favors majoritarian views is viewpoint-based. The Supreme Court made this point in *Board of Regents of University of Wisconsin v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000), a case in which the Court addressed a compelled-subsidy challenge to a student fee that funded student organizations that engaged in political speech. The Court upheld the fee in part, but it remanded a funding mechanism that allowed funding by student referendum. *Id.* at 235. The Court expressed skepticism over whether the referendum method could satisfy strict scrutiny because it would subject speech subsidies to a majoritarian distribution:

To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here.

Id.

On remand, the Seventh Circuit struck down aspects of the referendum policy. *Southworth v. Bd. of Regents of University of Wisconsin Sys.*, 307 F.3d 566, 595 (7th Cir. 2002). The Second Circuit likewise invalidated another university fee distributed by advisory referendum: “Viewpoint discrimination arises because the vote reflects an aggregation of the student body’s agreement with or valuation of the message [a student organization] wishes to convey.” *Amidon v. Student Ass’n of State University of New York*, 508 F.3d 94, 101-02 (2d Cir. 2007). Thus, a subsidy is viewpoint-based if the government leaves the distribution of a compelled subsidy up to voter preferences.

The democracy-voucher program is viewpoint-based. The “inevitable result” of the program favors majoritarian viewpoints over minority viewpoints. *Buckley*, 424 U.S. at 65. Because the actual campaign contributions are determined through voter choice, the allocation of funds will inevitably reflect majoritarian interests. The voucher program effectively determines which candidates receive taxpayer funds through a

public referendum—like the funding by referendum disapproved in *Southworth* and invalidated by multiple circuits. Such funding “substitutes majority determinations for viewpoint neutrality.” *Southworth*, 529 U.S. at 235.

The lower court rejected Elster’s analogy to the referendum policies in *Southworth* and *Amidon* because, with the voucher program, “[a]ny voter can assign a \$25 voucher to any eligible candidate, even if that candidate’s viewpoint is unpopular with the majority of Seattle voters.” CP at 114. But the Court’s reasoning misapprehends the nature of Elster’s claim. The Court’s point that voucher holders remain free to give their own voucher money to unpopular candidates might be relevant to a claim that the voucher program *stifles* speech. But Elster’s viewpoint argument is that he should not have to subsidize a voucher program that inevitably favors certain candidates more than others, regardless of whether he himself can give his vouchers to minority candidates. Certainly, the fact that unpopular candidates are not wholly barred from receiving voucher funds makes it plausible that at least a small portion of Elster’s subsidy goes to less popular candidates. But this is only a difference in degree. The voucher program still allots funds based on private individuals’ viewpoints, raising the same concerns present in *Southworth* and *Amidon*.

The City, in its briefing below, argued that the voucher program is not viewpoint-based because there is no “disparate impact theory” of the First Amendment. CP at 102. The City argued that any partisan skew in the allocation of voucher funds was simply a “disparate impact” that could not be attributed to the government. CP at 102. The City, however, drew this catchphrase from markedly different cases. In the cases cited by the City, laws that did not directly regulate speech at all were challenged as having an incidental impact on a particular category of speech or type of speaker. *See, e.g., Pahls v. Thomas*, 718 F.3d 1210 (10th Cir. 2013) (rejecting an argument that two viewpoint-neutral security policies can be considered viewpoint-based because they incidentally worked in tandem to burden one group of speakers over another); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (rejecting an argument that federal law protecting access to abortion facilities was content-based because most people whose conduct the law proscribes happen to oppose abortion); *iMatter Utah v. Njord*, 980 F. Supp. 2d 1356 (D. Utah 2013) (holding that the government did not violate marchers’ First Amendment rights by requiring indemnification and insurance, even though certain speakers with controversial messages might have trouble finding willing insurers). In those cases, any incidental burden on speakers occurred by happenstance rather than as a direct and inevitable

result of the law at issue. That is what those cases meant by “disparate impact theory” of the First Amendment.

By contrast, the voucher program—by its direct operation—skews speech subsidies toward majoritarian preferences. That consequence does not depend upon happenstance, such as where a content-neutral policy results in an unintended and accidental burden on particular speakers. If Elster argued that the voucher program resulted in viewpoint discrimination because no conservative candidates are eligible to receive vouchers, then the “disparate-impact” theory raised by the City would apply. The program, after all, might not inevitably or directly favor candidates of a particular political persuasion. Elster’s argument, however, is that the law’s “inevitable result”—by virtue of how it operates—favors candidates who appeal to the majority of Seattle voucher holders. *See Buckley*, 424 U.S. at 65.

The lower court—in holding that the voucher program is viewpoint-neutral—relied on a flawed analogy to Establishment Clause caselaw regarding school-voucher programs. *See CP* at 114-15. As the lower court noted, the Supreme Court in *Zelman v. Simmons-Harris* held that school vouchers do not violate the Establishment Clause because they are “neutral with respect to religion,” and any money flowing to religious schools did so through “genuine and independent private choice.” *See id.*; *Zelman v.*

Simmons-Harris, 536 U.S. 639, 652, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002). But the lower court itself admitted its reticence to rely on *Zelman* because it involved a wholly different constitutional landscape: “The Court is reluctant to invoke Establishment Clause precedent here given the Supreme Court’s admonition in *Buckley* that an analogy to Establishment Clause case law is ‘patently inapplicable’ to the issue presented in that case.” CP at 115; *Buckley*, 424 U.S. at 92. The court, however, still held to the school-voucher analogy because it could “find no other analogous precedent.” CP at 115.

The court was wrong to claim that no other analogous precedent existed. Indeed, free-speech precedent is far more relevant to a free-speech claim than caselaw imported from an entirely different area of constitutional law. The Supreme Court’s campaign-finance and compelled-subsidy caselaw—all free-speech cases—provided ample precedent for the lower court to have made an informed decision based on binding caselaw.

School-voucher precedent has no bearing on this case. *Zelman* involved a different constitutional requirement. In Establishment Clause cases, the key question is whether a reasonable observer would believe that religious activity or funding “carries with it the imprimatur of government endorsement.” *Zelman*, 536 U.S. at 655. Where a private individual decides

whether the money goes to a religious or non-religious school, the state could not be reasonably seen as endorsing religion. *Id.*

The question in a compelled-subsidy case, however, is quite different. The question in that context is whether government is compelling someone to pay for another private individual's expressive activity. *See Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 562, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005) ("Citizens may challenge compelled support of private speech."). A compelled subsidy impacts free-speech interests regardless of the viewpoint expressed by the subsidized speech. In fact, all compelled-subsidy cases by necessity involve forced support of private expression, because compelled funding of government speech does not give rise to a free-speech claim. *See id.* The disparate tests applied under these separate constitutional doctrines only confirms the Supreme Court's admonition that Establishment Clause jurisprudence is "patently inapplicable" to free-speech claims. *Buckley*, 424 U.S. at 92.

School vouchers, moreover, do not require the taxpayer to fund private *expression*—a required element of a compelled-subsidy claim. No Court has held that paying school tuition is an expressive activity. Contributing money to a political campaign, on the other hand, is a form of protected political speech. *See McCutcheon*, 134 S. Ct. at 1441 ("The right to participate in democracy through political contributions is protected by

the First Amendment.”). Such subsidies therefore raise unique free-speech concerns that do not mimic Establishment Clause claims.

E. STRICT SCRUTINY APPLIES TO THE DEMOCRACY-VOUCHER PROGRAM BECAUSE THE PROGRAM IMPACTS POLITICAL SPEECH

First Amendment protections rise to their “zenith” when government regulates political speech. *Meyer v. Grant*, 486 U.S. 414, 425, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988). Indeed, the First Amendment’s promise “has its fullest and most urgent application to speech uttered during a campaign for political office.” *Eu*, 489 U.S. at 223. For that reason, “[l]aws that burden political speech are ‘subject to strict scrutiny.’” *Citizens United*, 558 U.S. at 340 (quoting *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007)). Our state Supreme Court, too, has insisted on applying strict scrutiny when core political speech is at stake: “This standard applies to political speech concerning election issues as well as to political speech concerning candidates for office, as both are core political speech.” *Washington State Republican Party v. Washington State Public Disclosure Comm’n*, 141 Wn.2d 245, 258, 4 P.3d 808 (2000); *see also Collier*, 121 Wn.2d at 746 (“Wherever the extreme perimeters of protected speech may lie, it is clear the First Amendment protects political speech, giving it greater protection over other forms of speech.”) (internal citation omitted).

The United States Supreme Court has an unrelenting pattern of employing strict scrutiny to regulations that directly or indirectly impact core political speech. See *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 208, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999) (Thomas, J., concurring); see, e.g., *Bennett*, 564 U.S. at 728 (strict scrutiny applied to a law that triggered matching funds for publicly funded candidates if privately funded candidates outspent them); *Burson*, 504 U.S. 191 (strict scrutiny applied to a Tennessee law prohibiting solicitation of voters and distribution of pamphlets near a polling place); *Brown v. Hartlage*, 456 U.S. 45, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982) (strict scrutiny applied to a Kentucky law regulating candidates' campaign promises).

The democracy-voucher program unquestionably regulates political speech. It requires property owners to subsidize private political donations—donations that have long been considered an act of political expression. *Buckley*, 424 U.S. at 21.

The First Amendment's solicitude toward core political speech requires that the voucher program face strict scrutiny. As discussed above, First Amendment tiers of scrutiny operate in the same manner toward compelled silence, compelled speech, and compelled subsidies of speech.

Thus, the long history of applying strict scrutiny against restrictions on political speech controls compelled subsidies of political speech as well.

II

EVEN IF STRICT SCRUTINY DOES NOT APPLY, “CLOSELY DRAWN” SCRUTINY REMAINS THE TRADITIONAL STANDARD FOR MINOR RESTRICTIONS ON SPEECH RIGHTS IN CAMPAIGN-FINANCE CASES

Even if strict scrutiny were improper here, the lower court should have relied upon the traditional lesser standard in campaign-finance cases: “closely drawn” scrutiny.

“Closely drawn” scrutiny—while not as demanding as strict scrutiny—is still a “rigorous standard of review.” *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 302, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981) (Blackmun, J., concurring in the judgment). The test in many respects resembles strict scrutiny, asking whether the government “demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.” *McCutcheon*, 134 S. Ct. at 1444.

Courts employ this test in assessing the constitutionality of limits on campaign contributions and measures designed to prevent circumvention of such limits. *See, e.g., id.; McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), *abrogated by Citizens United*, 558 U.S. 310 (applying “closely drawn” scrutiny to prohibitions on soft-money

contributions designed to prevent circumvention of candidate contribution limits). This lesser standard applies to these contexts because a limitation on contributions “entails only a marginal restriction upon the contributor’s ability to engage in free communication.” *Buckley*, 424 U.S. at 20; *see also McConnell*, 540 U.S. at 657 (applying “closely drawn” scrutiny to soft-money contribution limits because they “have only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech”).

Only one government interest has satisfied the “sufficiently important interest” step: preventing corruption or the appearance of corruption. *McCutcheon*, 134 S. Ct. at 1441. Corruption, in this instance, only refers to quid pro quo exchanges of favors for money. *Id.* The Supreme Court has “consistently rejected attempts to suppress campaign speech based on other legislative objectives,” such as leveling the playing field, equalizing candidates’ financial resources, or creating more electoral opportunities. *Id.* at 1450. Any campaign-finance program that even imposes a “marginal” burden on speech rights must therefore demonstrate that it exists to pursue an anticorruption interest rather than an interest rejected as insufficiently important.

Although strict scrutiny is the proper standard to analyze the voucher program, at minimum “closely drawn” scrutiny should apply. Even

if the voucher program’s burden on First Amendment rights—a burden recognized by the lower court—is “marginal,” the proper standard would be this specialized form of intermediate scrutiny rather than “reasonableness” review. Indeed, no federal court in this country has applied such a highly deferential test to regulations of core political speech in the campaign-finance context.

III

THE TRIAL COURT MISAPPLIED *BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN V. SOUTHWORTH*

The trial court relied on the reasonableness standard because of a misreading of *Southworth*. The trial court’s interpretation of that case founders on two distinctions: (1) *Southworth* itself and subsequent caselaw demonstrate that its holding is limited to the university context, and (2) *Southworth* did not address content-based speech regulations such as the democracy-voucher program.

In *Southworth*, students challenged an activity fee that funded student groups engaged in political speech. 529 U.S. at 220-21. The Supreme Court held that such a fee would not violate the First Amendment so long as funds were disbursed in a viewpoint-neutral manner. *Id.* at 221.

The Court’s holding relied on unique features of the university context. Specifically, the Court applied a more permissive First Amendment

standard because of a university's unique interest in facilitating student speech. *See Southworth*, 529 U.S. at 232-33. Indeed, the Court has since declined to extend *Southworth* outside the university context because “[p]ublic universities have a compelling interest in promoting student expression in a manner that is viewpoint neutral.” *Harris v. Quinn*, 134 S. Ct. at 2644. Thus, the Supreme Court has limited *Southworth*'s holding to its factual context, and the lower court's interpretation of that case is grounds for reversal.

Even if the Supreme Court had not cabined *Southworth*, it still would not control the outcome of this case. *Southworth*, after all, did not involve a content-based speech regulation because the subsidy funded student groups engaging in a wide array of speech content and views. *See Southworth*, 529 U.S. at 223. The voucher program, however, is content-based, and therefore raises an issue not present in *Southworth*.

The First Amendment is vital enough that exceptions to strict scrutiny should be carefully limited. Excessive deference in the area of the First Amendment does not comport with democratic values, since “democracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgments in this area.” *Collier*, 121 Wn.2d at 752 (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 519, 101

S. Ct. 2882, 69 L. Ed. 2d 800 (1981)). This Court should read *Southworth* narrowly to prevent dilution of First Amendment rights.

IV

WHETHER STRICT OR “CLOSELY DRAWN” SCRUTINY APPLIES, FACTUAL DEVELOPMENT WILL BE NECESSARY TO DETERMINE WHETHER THE CITY SATISFIES THE PROPER LEVEL OF SCRUTINY

Either species of scrutiny would require an evidentiary record to properly test the voucher program’s constitutionality. Dismissal without discovery or consideration of evidence, therefore, is improper. This Court should remand the case to the lower court to allow the parties to build a record.

A great deal of probative evidence that the lower court did not consider could bear on the program’s constitutionality. For instance, a careful review of evidence is called for to determine whether the voucher program is directed at preventing corruption or whether it is in fact animated by an insufficiently important purpose like leveling the playing field.

Courts require that any anticorruption effort that burdens speech must be justified by actual evidence of corruption in the relevant location. *See Zimmerman v. City of Austin*, No. 16-51366, __ F.3d __, 2018 WL 652854, *4 (5th Cir. Feb. 1, 2018) (“While the importance of [anticorruption] interests is beyond dispute, their invocation still must be justified by some evidentiary showing that the state or locality enacting a

contribution limit faces a problem of either corruption or its appearance.”). The government must point to a “cognizable risk of corruption” beyond just general impressions. *McCutcheon*, 134 S. Ct. at 1452; *see also Randall v. Sorrell*, 548 U.S. 230, 244, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006) (striking down Vermont’s low contribution limits in part because Vermont had not “shown, for example, any dramatic increase in corruption or its appearance in Vermont”). “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 also 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”); *Lair v. Motl*, 873 F.3d 1170, 1178 (9th Cir. 2017) (“To satisfy its burden, Montana must show the risk of actual or perceived quid pro quo corruption is more than mere conjecture.”) (internal quotation marks omitted).

The City—under either form of scrutiny—would also have to demonstrate that the low contribution limits already imposed on candidates is not adequate to combat corruption. In *Arizona Free Enterprise Club’s Freedom 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 corruption. *Bennett*, 564 U.S. at 751-52. 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; *see also Zimmerman*, 2018 WL 652854, at *8 (“[A]n additional limit on contributions beyond a base contribution limit that is already in place must be justified by evidence that the additional limit serves a distinct interest in preventing corruption that is not already served by the base limit.”).

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 program agree to a lower \$250 contribution limit. *Id.* § 2.04.639(b), (f). The general \$500 limit is quite low, lingering near the bottom of comparable cities with contribution limits.³

As with *Bennett*, the City carries the burden to show that the strict contribution limit applied to all candidates—a much more direct route to

³ 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/DCCOF_CampaignFinanceGuide.pdf; New York City Campaign Finance Board, Limits & Thresholds, <https://www.nycffb.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>.

squashing corruption than vouchers—does not adequately serve the City’s interest in anticorruption. *Bennett*, 564 U.S. at 752; *see also Toledo Area AFL-CIO v. Pizza*, 154 F.3d 307, 318 (6th Cir. 1998) (striking down a campaign-finance program that took an “indirect route” where the state’s interest was already “adequately protected by contribution limits”).

The question of means/end fit—an element in both strict and “closely drawn” scrutiny—also requires factual development. Indeed, the burden rests on the government to demonstrate that the law at issue is either narrowly tailored (strict scrutiny) or closely drawn to avoid unnecessary abridgment (“closely drawn” scrutiny). When engaged in this tailoring analysis, courts look to the “fit between the stated governmental objectives and the means selected to achieve that objective.” *McCutcheon*, 134 S.Ct. at 1445. The government’s chosen means of addressing corruption must “focus narrowly on the state’s interest.” *Lair*, 873 F.3d at 1180 (quoting *Montana Right to Life Ass’n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003)).

The City also must demonstrate that the voucher program is narrowly tailored in light of other oppressive means of achieving an anticorruption interest. If less intrusive means exist that would also further the City’s interests, then the choice of the more oppressive option will fail First Amendment scrutiny: “If the State has open to it a less drastic way of

satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.” *Kusper v. Pontikes*, 414 U.S. 51, 59, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973).

The City must demonstrate how vouchers reduce corruption. The program seems to have little bearing on preventing corruption, and instead seems designed to further less important interests like leveling the playing field. Candidates who opt in to the program can still solicit and receive private donations. Indeed, the program results in more individuals contributing money to campaigns, which appears to only increase candidate dependency on donors, thereby expanding chances for improper influence. Voucher holders are just as likely to engage in quid pro quo corruption as any other contributor. While each voucher holder only has \$100 in voucher funding, groups can still coordinate to promise vouchers to candidates in exchange for voucher funds. The City carries the burden of showing that this program does in fact somehow reduce corruption rather than increase it. The City must demonstrate with evidence how the voucher program focuses narrowly on a purported anticorruption interest.

Additionally, the City would carry the burden to explain why less oppressive alternatives are not viable. The City must explain, for instance, why property owners alone carry the burden of funding the speech of all other residents’ political speech, when a less burdensome means—allowed

by the Initiative itself—would be to draw from general revenue. *See Butterworth v. Republican Party of Florida*, 604 So. 2d 477, 480 (1992) (holding that “singling out” certain groups “to support the [campaign] fund bears no relationship” to a compelling interest); I-122 § 2 (allowing the City to choose between appropriating voucher funds from general revenue or through a property levy).

Additionally, other public-financing programs have existed for decades that could satisfy the City’s anticorruption interest without raising the issue of compelled subsidies. A neutral, lump-sum payment provided to all candidates who opt in and meet qualifications, for instance, would not implicate the First Amendment interests endangered by the voucher program. The City has not carried its burden to show why this less-oppressive option will not adequately address corruption in Seattle politics.

The City cannot brush off First Amendment claims on a motion to dismiss without showing localized corruption, demonstrating the inadequacy of current measures in place, and proving that the voucher program is narrowly tailored or closely drawn to prevent corruption. The Court should remand to allow the parties to build a record for the rigorous factual review vital to First Amendment protections.

V

EVEN UNDER REASONABLENESS REVIEW, ELSTER DESERVES AN OPPORTUNITY TO PRESENT EVIDENCE OF UNREASONABLENESS

Even assuming reasonableness review is the proper standard here, Elster should have the opportunity to demonstrate unreasonableness. After all, “reasonableness” in the First Amendment “requires more of a showing than does the traditional rational basis test.” *Sammartano v. First Judicial District Court*, 303 F.3d 959 (9th Cir. 2002) *overruled on other grounds by Winter v. NRDC*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008); *see also Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1271 (11th Cir. 2004) (“This ‘reasonableness’ test is not the anemic simulacrum of a constraint on governmental power found in the Due Process Clause’s ‘rational basis’ test, but rather a more robust notion of ‘reasonableness’ such as that applied in the Fourth Amendment context.”) (internal citation omitted).

Yet even in the weak rational basis context, plaintiffs have a right to present evidence that a law is not grounded in a legitimate public purpose or is not rationally related to achieving that purpose. As the Supreme Court said in one of its seminal rational-basis cases, that deferential standard creates an evidentiary presumption that can be rebutted through contrary evidence:

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

United States v. Carolene Prod. Co., 304 U.S. 144, 152, 58 S. Ct. 778, 82 L. Ed. 1234 (1938); *see also Heller v. Doe by Doe*, 509 U.S. 312, 321, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (“True, even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation.”).

If a well-pleaded complaint can survive a motion to dismiss under the famously weak rational-basis standard, then a complaint that is not fundamentally flawed should likewise survive a motion to dismiss based on the more robust reasonableness standard. Elster therefore deserves the opportunity to present evidence so that the court can determine “whether the facts broadly support the government’s decision as a basically reasonable approach to the problem at issue, or whether such facts are lacking, or merely pretextual.” Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary “Perplexity”*, 25 Geo. Mason U. Civ. Rts. L.J. 43, 52 (2014). The lower court therefore, even under the improper reasonableness test, should not have dismissed Elster’s claim at the 12(b)(6) stage.

CONCLUSION

The City’s unconventional method of financing political campaigns is the first of its kind in the nation. It presents a unique merger of two lines of caselaw—compelled subsidies and campaign finance. Both these lines of caselaw demonstrate that compelling taxpayers to pay for other peoples’ campaign contributions deserves strict or “closely drawn” scrutiny. Under either standard, factual development is essential to the prosecution of Elster’s claim. This Court should reverse the order dismissing the case without discovery and remand for further fact-finding in light of the proper level of scrutiny.

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Respectfully submitted,

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