Hon. Beth M. Andrus

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

MARK ELSTER and SARAH PYNCHON, Plaintiffs, vs. THE CITY OF SEATTLE, Defendant.	No. 17-2-16501-8 SEA ORDER GRANTING CITY OF SEATTLE'S MOTION TO DISMISS

Defendant City of Seattle has moved to dismiss the complaint filed by Plaintiffs Mark Elster and Sarah Pynchon. After briefing and argument of counsel,[1] the Court GRANTS the City's motion to dismiss based on the analysis set out below.

City of Seattle's Democracy Voucher Program

On November 3, 2015, the voters in the City of Seattle passed Initiative I-122, codified as "Honest Election Seattle," in Seattle Municipal Code (SMC) 2.04.600 to 2.04.690. The initiative authorized the funding of a "Democracy Voucher Program" through the imposition of an additional property tax imposed in years 2016 through 2025. The proceeds of this tax may be used only to fund the Democracy Voucher Program.

[1] *See* Appendix A for the materials considered by the Court.

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Under this program, every Seattle registered voter received four vouchers totaling $100 which the voter can assign to qualified candidates running for election to the position of city mayor, city attorney, and city councilmember. SMC 2.04.620(b) and (e).

Candidates qualify to receive these vouchers from voters if they agree to participate in at least three public debates for both the primary and general elections, and they agree to comply with special campaign contribution and spending limits. SMC 2.04.630(b). To qualify for the program, candidates must receive a minimum number of campaign contributions, ranging from 600 for a mayoral candidate to 150 for a city attorney candidate, of at least $10 or more. SMC 2.04.630(c). The campaign spending limits run from a high of $800,000 total for a mayoral candidate, to $150,000 total for district city council candidates and city attorney candidates. SMC 2.04.630(d). If a qualifying candidate demonstrates that his or her opponent has exceeded these spending limits, the candidate may ask the Seattle Ethics and Elections Commission (SEEC) to be released from the program's contribution and spending limits. SMC 2.04.630(f).

All Seattle residents are entitled to receive Democracy Vouchers, whether the residents own property or not. No residents living outside of Seattle may receive these vouchers even if they own real estate within the city and are paying property taxes for the Democracy Voucher Program fund.

Plaintiffs' Complaint

On June 28, 2017, Mark Elster and Sarah Pynchon filed this lawsuit challenging the constitutionality of the Democracy Voucher Program. Mr. Elster who owns a family home in Magnolia, has been taxed under the program and received but not used Democracy Vouchers. Complaint, ¶4. Ms. Pynchon owns property in Seattle and has been taxed under the program but, because she lives outside the city limits, is not entitled to receive any Democracy Vouchers. Complaint, ¶5. Mr. Elster and Ms. Pynchon contend that the Democracy Voucher Program is a compelled subsidy of political speech which violates their First Amendment rights. The City counters that the program is a constitutionally valid method of public campaign finance approved by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

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ANALYSIS

The parties agree that this case presents the Court with an issue of first impression. Although there are reported cases affirming and invalidating various means of publicly funding political campaigns, none involve the imposition of a tax used to finance a voucher program in which registered voters make campaign contributions of their choice to candidates in certain qualified electoral races. After reviewing the case law cited by both parties and considering the arguments of the parties, the Court finds the City's position to be the more persuasive one.

***Buckley v. Valeo*: The Use of Public Money to Finance Political Campaigns**

In 1976, the Supreme Court considered the constitutionality of the Federal Election Campaign Act, which placed limits on campaign contributions and expenditures and created a system of public financing of presidential election campaigns and nominating conventions. The Court invalidated the campaign spending provisions but affirmed the public financing provision of the act, known as Subtitle H.

Subtitle H created a Presidential Election Campaign Fund financed from general tax revenues. Taxpayers may check a box on their tax returns authorizing the diversion of taxes to a fund for distribution to presidential candidates for nominating conventions and primary and general election campaigns. 424 U.S. at 86-87. The amount of money each campaign was entitled to receive depended on whether the candidate belonged to a major or minor political party. *Id.*

The challengers contended that Subtitle H constituted government support of political speech in violation of the First Amendment. The Supreme Court rejected this argument and concluded that the program was intended "not to abridge, restrict, or censor speech, but rather *to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.*" *Id.* at 92-93 (emphasis added). *Buckley v. Valeo* affirmed the proposition "that the public financing of political candidates, in and of itself, does not violate the First Amendment, even though the funding may be used to further speech to which the contributor objects." *May v. McNally*, 203 Ariz. 425, 428, 55 P.3d 768 (2002).

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Public Funding of Political Campaigns Post-*Buckley*

Since *Buckley v. Valeo*, several states have passed laws publicly funding political campaigns. Some have survived constitutional challenge. *See Libertarian Party of Ind. v. Packard*, 741 F.2d 981 (7th Cir. 1984) (imposing sales tax on personalized license plates to publicly fund campaigns); *Bang v. Chase*, 442 F. Supp. 758 (D. Minn. 1977) (allowing income tax filer to allocate taxes to state election campaign fund for use by specific party); *May*, 203 Ariz. 425 (imposing 10% surcharge on criminal and civil traffic fines to publicly fund campaigns).

Some have not. *See Vt. Soc'y of Ass'n Execs. v. Milne*, 172 Vt. 375, 779 A.2d 20 (2001) (imposing tax on lobbyist expenditures to fund public grants to gubernatorial candidates violated lobbyists' First Amendment rights); *Butterworth v. Republican Party of Fla.*, 604 So. 2d 477 (Fla. 1992) (imposing 1.5% assessment on donations to state political parties to finance public campaign funding of qualifying candidates violated First Amendment).

Plaintiffs contend that the Democracy Voucher program cannot survive their First Amendment challenge because the City is compelling them to subsidize the voucher recipients' private political speech. They argue that this program, unlike any other public campaign finance case, involves a government entity allowing voters to choose to whom to donate public funds. They contend that the voucher feature interferes with the Plaintiffs' First Amendment right to support candidates other than those selected by the voucher holder, or the right to not support any candidate at all.

The Court agrees with Plaintiffs that the City's Democracy Voucher program does implicate their First Amendment rights. In *Board of Regents v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000), the Supreme Court considered a First Amendment challenge to a mandatory student fee used to support student organizations engaged in expressive activities. The plaintiffs claimed that they should not be compelled to subsidize student organizations with which they disagreed. *Id.* at 222-24. The Court held that once the university conditioned the opportunity to obtain an education on an agreement to support objectionable speech (through the imposition of a mandatory fee), the First Amendment was implicated. *Id.* at 231. By analogy here, the City is conditioning

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property owners' rights to their land on the payment of a tax used to support speech property owners may find objectionable. The First Amendment is implicated.

Viewpoint Neutrality

But the fact that the First Amendment is implicated does not mean that the program is unconstitutional. The City asks this Court to adopt the public forum standard of viewpoint neutrality when evaluating the Democracy Voucher Program. Under public forum law, when a government creates a nonpublic or limited public forum, namely a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects, speech restrictions need only be "reasonable and viewpoint neutral." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009). In *Southworth*, the Supreme Court applied this standard when assessing the constitutionality of mandatory student funding of organizations. 529 U.S. at 230.

Plaintiffs, however, ask the Court to apply the "compelled funding of speech" cases. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309-10, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977). In *Knox*, the Supreme Court held that the "compelled funding of the speech of other private speakers or groups" is unconstitutional unless (1) there is a comprehensive regulatory scheme involving a mandated association among those who are required to pay the subsidy; and (2) the mandatory fee or tax is a necessary incident of the larger regulatory purpose which justified the required association. 567 U.S. at 310 (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 414, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001)). The *Southworth* Court acknowledged this line of cases but concluded that those cases did not apply in the context of extracurricular student speech at a university. 529 U.S. at 230.

The Court does not find the test used in *Knox* or more recently *Harris v. Quinn*, __ U.S. __, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014) to be any more applicable to the City's Democracy Voucher Plan than it was to the University of Wisconsin's student fee. 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.

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Plaintiffs next argue that the City's funding plan is not viewpoint neutral because it "distribut[es] voucher funds through the majoritarian preferences of Seattle residents." Response, p. 21. At oral argument, counsel clarified this argument: the voucher recipient is choosing to whom to donate public money, rather than the City, based on the voter's viewpoint preference, making the decision as to which candidate receives financial support viewpoint-based. They rely on *Amidon v. Student Ass'n of the State University of New York*, 508 F.3d 94 (2d Cir. 2007) in which a federal court of appeals held that the use of a student referendum to determine how to allocate student fees among student organizations was not viewpoint neutral because the vote reflected the student body's majority opinion of the value or popularity of an organization's speech. *Id.* at 101.

This Court does not find *Amidon* to be analytically helpful. The City sets eligibility requirements for Democracy Voucher candidates. Candidates must demonstrate adequate grassroots support to qualify for the program by showing they have received a certain number of donations of $10 or more. In *Buckley*, the Supreme Court held that it was permissible for a government to set eligibility requirements because "Congress' interest in not funding hopeless candidacies with large sums of public money necessarily justifies the withholding of public assistance from candidates without sufficient public support." 424 U.S. at 96 (citation omitted). The City does not, however, put eligibility to a popular vote, as in *Amidon*. Any voter can assign a $25 voucher to any eligible candidate, even if that candidate's viewpoint is unpopular with the majority of Seattle voters. The City is not distributing voucher funds "through majoritarian preferences of Seattle residents."

The City argues that its voucher program should be deemed viewpoint neutral because the City is not choosing to whom to allocate campaign funds and is allowing voters to make a completely private choice, similar to school voucher programs. In *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002), the Supreme Court held that a government school voucher program was constitutional under the Establishment Clause because it was "neutral with respect to religion," and provided assistance to a broad class of citizens who directed the aid to a religious school "wholly as a result of their own genuine and independent private choice." *Id.* at 652. The Court is reluctant to

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invoke Establishment Clause precedent here given the Supreme Court's admonition in *Buckley* that any analogy to Establishment Clause case law is "patently inapplicable" to the issue presented in that case. 424 U.S. at 92. But the Court can find no other analogous precedent. This Court concludes that the Democracy Voucher program is viewpoint neutral because candidates qualify for voucher support regardless of the views they espouse, and the City imposes no restrictions on voters' choice as to whom they may assign their vouchers.

The City has articulated a reasonable justification for the Democracy Voucher Program. It seeks an increase in voter participation in the electoral process. This goal was recognized by the *Buckley* Court to be "goals vital to a self-governing people." *Id.* at 92-93. The Democracy Voucher Program is a viewpoint neutral method for achieving this goal.

For the foregoing reasons, the Court GRANTS the City's motion to dismiss Plaintiffs' complaint.

IT IS SO ORDERED this 3rd day of November, 2017.

Electronic signature attached

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Honorable Beth M. Andrus

APPENDIX A

Plaintiffs' Complaint, Sub. #1
City of Seattle's Rule 12(b)(6) Motion to Dismiss, Sub. #17
Amicus Curiae Brief of Washington CAN!, et al., Sub. #20
Plaintiffs' Response to Defendant's Motion to Dismiss, Sub. #34
Plaintiffs' Consolidated Response to Amicus Briefs Filed in Support of City, Sub. #35
City of Seattle's Reply in Support of Its Rule 12(b)(6) Motion to Dismiss, Sub. #36

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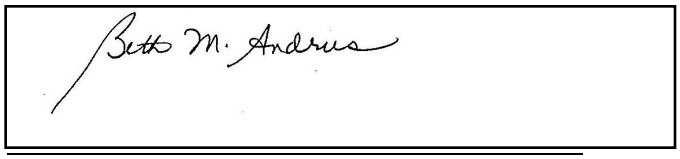

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