No. 19-608

In The
Supreme Court of the United States

MARK ELSTER and SARAH PYNCHON,

Petitioners,

v.

THE CITY OF SEATTLE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Seattle's "democracy voucher" program imposes a tax on property owners that is used exclusively to fund vouchers that are distributed to Seattle residents, who may use the vouchers to contribute to the political campaigns of participating candidates.

The questions presented are:

1. Whether a tax that forces property owners to fund other individuals' campaign donations implicates the First Amendment's compelled-subsidy doctrine.

2. Whether a compelled subsidy of speech should be examined under rational basis review, as the decision below concluded, or whether a higher standard of review is appropriate.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files *Amicus* briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the vital constitutional principle of freedom of speech. The Institute has litigated and won cases challenging unconstitutional campaign-finance laws, including *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011) (matching-funds provision violated First Amendment), and *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (scheme imposing different limits on different classes of donors violated Equal Protection Clause). The Institute also litigates cases challenging laws that compel individuals to financially support the political speech of others.

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[1] Pursuant to Supreme Court Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *Amicus*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

See, *e.g.*, *Bennett*, 564 U.S. 721; *Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019), *petition for cert. filed* (Nov. 26, 2019) (No. 19-670) (challenge to mandatory bar association membership and fees remanded for consideration in light of *Janus v. AFSCME*, 138 S. Ct. 2448 (2018)).

SUMMARY OF ARGUMENT

Over the past century, there have been two competing, conflicting conceptions of free speech in this country: a "civic" conception, which sees freedom of speech as a social construct designed to foster democratic deliberation and decision-making for the benefit of the general public; and an individualistic conception, which sees the freedom of speech as an essential facet of personal autonomy that should be protected for the individual's sake.

The individualistic conception is the correct one. Although better democratic deliberation and political competition are *benefits* of free speech, they are *not* its primary purpose. The First Amendment was designed to protect individual rights—and to *prevent*, not to aid, government meddling in the political process to achieve the discourse or results that government officials think best. This Court's recent First Amendment jurisprudence duly reflects that individualist understanding.

Unfortunately, governments continue to invoke the civic conception of free speech to justify infringements

of the individual rights the First Amendment is supposed to protect, especially in the area of campaign finance. As a result, courts sometimes uphold schemes that purport to increase democratic deliberation, but do so by violating the right of individuals *not* to speak. *Cf. Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 16, 19–20 (1986) (plurality op.) ("the choice to speak includes within it the choice of what not to say"). The Washington Supreme Court did just that in this case. In holding that Seattle may constitutionally force property owners to pay for other people's political contributions in order to " 'giv[e] more people an opportunity to have their voices heard in democracy,' " App. A–9—even though this comes at the expense of the First Amendment rights of those who would prefer *not* to speak or to subsidize others' speech—rests upon a faulty view of the nature of free speech in the Constitution. The Court should take this opportunity to expressly reject that civic conception of the First Amendment and make clear that individual rights take precedence over the government's professed interest in fostering democratic debate.

ARGUMENT

This case highlights the contrast—and inevitable conflict—between the "civic conception" of free speech, under which freedom of speech is a social construct designed to foster democratic deliberation and decision-making, and the individual rights the First Amendment protects.

Seattle's "democracy voucher" program is designed to serve the civic conception of free speech by increasing the number of people participating in the political process. But it does this at the expense of fundamental First Amendment rights by forcing property owners to pay for *other people's* political contributions. And it does this for purposes this Court has deemed illegitimate grounds for infringing on First Amendment rights: to "level the playing field"—i.e., to enhance some voices relative to others, and thus influence the outcomes of elections to attain results that certain activists and officials prefer. And it does so contrary to the rights of those who would prefer *not* to fund speech at all. *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (First Amendment forbids government "from compelling certain individuals to pay subsidies for speech to which they object.").

The Court should grant certiorari for the reasons Petitioners have presented, and also to explicitly reject the civic conception of free speech. It should make clear that individual rights take precedence over the government's interest in fostering democratic deliberation—and especially over the illegitimate aim of influencing which candidates and ideas succeed or fail in the political arena.

I. The Court should explicitly reject the "civic conception" of free speech and make clear that individual rights take precedence.

A. The First Amendment is based on an individualistic conception of free speech, not the civic conception.

In the past century, it has become popular—among certain activists, academics, and jurists—to describe the freedom of speech as a social construct designed to foster democratic deliberation and decision-making. This began with Justice Holmes's dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (1919), which expressed the belief that free speech is intended primarily to serve social goals, as opposed to the goals of individuals. Although Holmes found persecution for dissent to be "perfectly logical," he believed the Constitution banned such persecution to enable the public to find a "ground upon which their wishes safely can be carried out"—a goal that would be "better reached by free trade in ideas" than by censorship. *Id.* at 630 (Holmes, J., dissenting). In this view, free speech is a privilege the state gives to citizens to achieve social goals—not a human right the state must respect.

This approach to the First Amendment—under which "the central constitutional goal" of free speech is "creating a deliberative democracy" instead of "protect[ing] preexisting private rights"—has been called the "civic conception" of free speech. Cass R. Sunstein, Democracy and the Problem of Free Speech 18, 28 (1993). It has proven extraordinarily influential. *See*, *e.g.*, Thomas Healy, The Great Dissent 249 (2013)

(noting pervasiveness of the marketplace theory). It is, however, profoundly flawed.

The First Amendment's authors did not embrace the civic conception but instead held what might be called an *individualistic* conception of free speech. They viewed free speech, not primarily as a tool for accomplishing public goals, but as a protection for a critical facet of personal autonomy that must be secured against intrusion *for the individual's sake*. James Madison made this clear when he described freedom of opinion in terms of property rights: the word "property," he wrote, "embraces every thing to which a man may attach a value and have a right," and therefore "a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them." James Madison, *Property* (1792), *reprinted in* James Madison: Writings 515 (Jack Rakove, ed. 1999).

The individualistic conception does not contradict the ideas that free speech aids democratic deliberation and competition is the best way to test ideas. Thomas Jefferson, for example, embraced the individualistic conception—arguing that opinions are private matters over which government can have no legitimate power—but also acknowledged that free speech is "the only effectual agent[] against error" and "the test of . . . investigation" for ideas. Thomas Jefferson, *Notes on the State of Virginia* (1787), *reprinted in* Thomas Jefferson: Writings 285 (Merrill Peterson, ed. 1984).

But to the framers, protection of the individual was more important than these social benefits of free speech. Indeed, the framers embraced the individualistic conception in conscious reaction *against* the British legal doctrine of "toleration," which was essentially identical to today's civic conception of free speech. That doctrine saw freedom of opinion (particularly religious opinion) as a privilege the king gave to the subject for public reasons rather than an individual right. The Constitution's authors rejected the principle of toleration for precisely this reason: because it subordinated the individual's freedom of opinion to social needs.

Thomas Paine, for one, described toleration "not [as] the *opposite* of Intoleration, but . . . the *counterfeit* of it. . . . The one assumes to itself the right of withholding Liberty of Conscience, and the other of granting it." Thomas Paine, *Rights of Man: Part I* (1791), *reprinted in* Thomas Paine: Collected Writings 482 (Eric Foner, ed. 1995). George Washington, too, rejected toleration on the grounds that it assumed that "it [is] by the indulgence of one class of people, that another enjoy[s] the exercise of their inherent natural rights." George Washington, Letter to the Hebrew Congregation in Newport, R.I., Aug. 18, 1790, *in* George Washington: Writings 767 (John Rhodehamel, ed. 1997).

Instead of the civic conception, the founders adopted the principle of *liberty of conscience*, which holds that individuals are presumptively free to abide by and express their opinions. The word "conscience" applies to individuals or to groups of individuals expressing their shared individual opinions. *See*, *e.g.*,

Samuel Johnson, A Dictionary of the English Language (11th ed. 1797) (defining conscience as "[t]he knowledge or faculty by which we judge of the goodness or wickedness of our own actions" and "knowledge of our own thoughts"). Thus, for example, James Wilson defined the "rights of conscience" as "[t]he right of private judgment. . . . To be deprived of it is insufferable. To enjoy it lays a foundation for that peace of mind, which the laws cannot give, and for the loss of which the laws can offer no compensation." 1 Collected Works of James Wilson 539 (Kermit L. Hall, et al., eds. 2007).

Thomas Jefferson wrote, in defense of his proposed Virginia Statute of Religious Freedom, that "our rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit." *Notes on the State of Virginia, supra*, at 285. These words demonstrate that the purpose of constitutional protections for freedom of conscience was not to facilitate collective decision-making, but to protect individual rights, full stop.

The same is true of the First Amendment's speech and press clauses. While free speech plays an essential role in democratic government, its primary purpose is to secure individual freedom. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 264–87 (2017) (expanding founders' conception of free speech as an individual right). The expression clauses were designed to protect "freedom of opinion" or, as Jefferson called it, "the rights of thinking, and publishing our thoughts by speaking or writing." Letter to David

Humphreys (Mar. 18, 1789), *in* 7 The Writings of Thomas Jefferson 323 (Albert Ellery Bergh, ed. 1907). This Court later called this "freedom of mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). It is why even an expression without public political significance—such as a private poem, or a Jackson Pollock painting, or an aesthetic judgment—falls within the freedom of speech guarantee. *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) ("[the] painting of Jackson Pollock, music of Arnold Shöenberg, or Jabberwocky verse of Lewis Carroll" are "unquestionably shielded" by the First Amendment).

Thus, what Justice Blackmun said of privacy rights is certainly true of free speech: the Constitution protects it "not because [it] contribute[s], in some direct and material way, to the general public welfare, but because [it] form[s] so central a part of an individual's life" and "embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting) (citation omitted).

B. The individualistic conception of free speech conflicts with, and should take precedence over, the civic conception.

Although the individualistic conception of free speech often serves the civic conception's putative goal—fostering democratic deliberation and competition between ideas—the government's pursuit of the

civic conception inevitably conflicts with the individualistic conception. The civic conception implicitly assumes that free speech may be curtailed (or compelled) to serve political leaders' notions of the greater good. Indeed, proponents of the civic conception openly admit that they believe it is "necessary to restrict the speech of some elements of our society in order to enhance the relative voice of others." Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1425 (1986) (internal quotations omitted). The Court should hear this case to make clear that, where the two conceptions of free speech conflict, individual rights must take precedence.

The conflict between the two conceptions of free speech is especially apparent when one considers the First Amendment right at issue in this case: the right *not* to participate in public deliberation, or to speak at all. The civic conception of speech "might well place no protection whatsoever on the right not to speak," writes one scholar, because if "forced expression might benefit the listener's self-governing decision making," compelling a person to speak "would actually seem to further [democratic] values." Martin H. Redish, *Freedom of Expression, Political Fraud, and the Dilemma of Anonymity*, *in* Speech and Silence in American Law 151 (Austin Sarat, ed. 2010). But of course this Court—applying the individualist conception—*has* recognized a right not to speak. *See*, *e.g.*, *Hurley*, 515 U.S. at 573–74 (recognizing the "fundamental rule of protection under the First Amendment, that a speaker has the

autonomy to choose the content of his own message," including "what not to say." (citation omitted)).

At times, this Court has invoked the civic conception of free speech to uphold restrictions on free speech—only to correct itself upon recognizing that its application of the civic conception was incompatible with individual rights the First Amendment is supposed to protect. For example, in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), Justice Frankfurter wrote for the Court in holding that the broader public good justified compelling school children to pledge allegiance to the flag. "[T]he freedom to follow conscience," wrote Frankfurter, "has . . . limits in the life of a society," as a consequence of the "principles which, as a matter of history, underlie[ ] protection of religious toleration." *Id.* at 594. The Court repudiated that opinion only three years later in *Barnette*, in which it embraced the individualistic conception of speech and declared that "[t]he very purpose of [the] Bill of Rights was to withdraw certain subjects"—including free speech—"from the vicissitudes of political controversy" and "place them beyond the reach of majorities."[2] 319 U.S. at 638; *see also Cohen v. California*, 403 U.S. 15, 24 (1971) (First Amendment was written "to remove governmental restraints from the arena of

[2] It is unsurprising that Professor Sunstein, among the most prominent advocates of the civic conception, has criticized *Barnette* as "too cavalier" because it was based on a "belief[ ] in individual immunity from communal ties." Cass R. Sunstein, *Unity and Plurality: The Case of Compulsory Oaths*, 2 Yale J.L. & Human. 101, 111 (1990).

public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us.").

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that the First Amendment allowed governments to compel their employees to pay for unions' political speech to serve allegedly democratic goals: "As long as [a union] act[s] to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees." *Id.* at 223. But in *Janus*, 138 S. Ct. 2448, the Court overruled *Abood* for giving insufficient scrutiny to a "serious[] impinge[ment] on First Amendment rights," citing Jefferson's statement that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Id.* at 2464 (quoting A Bill for Establishing Religious Freedom, *in* 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659–60 (1990), the Court upheld a ban on corporate independent expenditures supporting or opposing candidates for office because the resulting speech might "have little or no correlation to the public's support for the corporation's political ideas" and could "unfairly influence" and have "distorting effects" on democracy. But in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court rejected *Austin*'s "antidistortion rationale," *id.* at 349–56, recognizing that the First Amendment is "[p]remised on mistrust of governmental power," *id.* at 340, and forbids efforts to "'equaliz[e]

the relative ability of individuals and groups to influence the outcome of elections,'" *id.* at 350 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)).

Other decisions of the Court in this century have repeatedly recognized that the First Amendment exists to *protect individuals against* government efforts, "no matter how well intentioned," "to fine-tune the electoral process" for the purpose of "level[ing] the playing field, . . . level[ing] electoral opportunities, or . . . equaliz[ing] the financial resources of candidates." *McCutcheon v. FEC*, 572 U.S. 185, 206–07 (2014) (plurality opinion) (internal quotes and citations omitted); *see also Knox v. SEIU Local 1000*, 567 U.S. 298, 322 (2012) ("The First Amendment creates a forum in which all may seek, without hindrance *or aid* from the State, to move public opinion and achieve their political goals.") (emphasis added); *Bennett*, 564 U.S. at 750 ("The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair."); *Davis v. FEC*, 554 U.S. 724, 741–42 (2008) (holding that attempting to "level electoral opportunities for candidates of different personal wealth" was not a "legitimate government objective" and wrongly "ma[de] and implement[ed] judgments about which strengths should be permitted to contribute to the outcome of an election").

Still, political leaders and "reform" advocates continue to cite the civic conception as a justification for violating individuals' freedom of speech, especially in

the context of campaign-finance restrictions. Advocates of such restrictions still argue that wealthy donors to political candidates or campaigns have a "disproportionate" effect on political debates that "distorts" the political process, *see* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 671–87 (1997), and assert this as a reason to infringe individual rights for the supposed greater good.

Political and legal debates over "dark money" provide examples of this. In recent years, governments have even begun to force think tanks and other non-profit organizations that do *not* endorse candidates for office to disclose the identities of their donors on the theory that these organizations distort the political process by promoting their views and seeking to persuade voters and politicians to act. *See*, *e.g.*, *Americans for Prosperity Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018); *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015). In a case that the Goldwater Institute is currently litigating, the City of Santa Fe, New Mexico, adopted an ordinance forcing donors to non-profit organizations to publicly disclose their names, addresses, and other information, if the organizations to which they contribute spend $250 to support or oppose a ballot measure. When a non-profit posted a Facebook video opposing a citywide ballot measure to impose a two-cent tax on large sodas, the city sent the organization a threatening letter complaining that it had "reached more than 100 eligible voters" and insisting that it give the city confidential

information about its supporters. Complaint, *Rio Grande Found. v. City of Santa Fe*, No. 1:17-cv-00768 at ¶¶ 19–22 (D.N.M., filed July 26, 2017).

As discussed below, the instant case provides another example of "civic" considerations overriding individuals' fundamental First Amendment rights—and therefore presents an opportunity for the Court to explicitly reject the civic conception of the First Amendment.

II. Seattle's "democracy voucher" program unjustifiably infringes on individuals' First Amendment rights.

Seattle's "democracy voucher" program illustrates the conflict between the civic conception of free speech and the individual rights that the First Amendment protects. As Petitioners have argued, the democracy voucher program infringes on individuals' First Amendment right to choose which political candidates, if any, to support with their money. It levies a tax on property owners that is used specifically and exclusively to fund political contributions by other individuals, regardless of whether the property owner wishes to fund the campaigns in question or any campaign at all. *See* Petition 4–5, 8–9.

Seattle enacted its democracy voucher program in pursuit of interests the Court has identified as illegitimate grounds for infringing First Amendment rights. The program's stated purpose is to "expand the pool of candidates for city offices," Seattle Muni. Code

§ 2.04.600(a) (App. G–1)—i.e., to create more competition than would exist in the absence of government intervention and thus "level electoral opportunities." *McCutcheon*, 572 U.S. at 207. In its official promotional material, the organization that sponsored the ballot measure through which the program was enacted stated that the program "aims to level the playing field and amplify the voices of ordinary voters"[3]—i.e., purposes the Court has specifically identified as illegitimate. *See id.* (stating that "it is not an acceptable governmental objective to 'level the playing field'"); *Davis*, 554 U.S. at 741–42 (disapproving infringements on First Amendment rights to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections").

The sponsor also advertised that the program would "restore the power of small donors in elections" so that "regular people [would] call the shots . . . instead of having our voices drowned out by the influence of wealthy donor class and corporate special interests"[4]—again, explicitly identifying goals this Court has disapproved. Indeed, the sponsor even said that the program was a "stand against Citizens United"[5]—i.e., enacted in deliberate defiance of the First Amendment principles this Court has upheld.

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[3] Honest Elections Seattle, *What Is Initiative 122?*, available at https://web.archive.org/web/20150531114557/http://honestelectionsseattle.org/what-is-initiative-122.

[4] Honest Elections Seattle, *What Is Initiative 122?*, supra.

[5] Honest Elections Seattle, *What Is Initiative 122?*, supra.

All of this is rooted in an understanding of the First Amendment opposed to that of the framers and of this Court. In an *Amicus* brief filed in the lower court in this case, groups that developed and helped enact the democracy voucher program defended it by arguing that the civic conception of First Amendment rights is more important than individual rights. They argued that "the public marketplace of ideas protected by the First Amendment does not exist in a vacuum, but rather is in service of our system of democratic self-government" and that "[t]he compelling interest of democratic self-government can only be realized . . . when ideas with the greatest public support are translated into government action." *Amicus Curiae* Brief of Washington CAN!, et al. at 14, 18, *Elster v. City of Seattle*, 444 P.3d 590 (Wash. 2019).[6] They continued: "While it is true that the First Amendment is countermajoritarian to the extent it protects individual rights to express unpopular opinions, . . . the Amendment cannot be read to uproot our entire system of majoritarian republicanism so integral to its very purpose." *Id.* at 19. In other words: individual rights are important only to the extent that they serve to implement ideas supported by the majority.

That is not how the First Amendment or our system of government works. On the contrary, when "majoritarian republicanism" is viewed as intruding on the free speech rights of minorities—including the smallest of all minorities, the individual—the Constitution's

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[6] https://www.courts.wa.gov/content/Briefs/A08/966605%20Amicus%20-%20WA%20CAN!,%20et%20al.pdf.

message is clear: the rights of the individual take precedence. As this Court said in *Barnette*, "One's right . . . to free speech [or] a free press . . . may not be submitted to vote; they depend on the outcome of no elections." 319 U.S. at 638. The Court should grant certiorari to make that clear to Seattle and to other jurisdictions that would follow its example.

CONCLUSION

The petition for certiorari should be *granted*.

Respectfully submitted,

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