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 Writ of Certiorari to the Washington Supreme Court

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a levy 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right of Freedom of Speech. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Janus v. American Federation of State, County, and Mun. Employees*, 138 S.Ct. 2448 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); and *Arlene's Flowers v. Washington*, 138 S.Ct. 2671 (2018).

SUMMARY OF ARGUMENT

The City of Seattle exacts funds from property owners in order to enhance the political voice of others with whom the property owners may disagree. Because the property owners are not "associated" with the political speech of those to whom the city transfers these funds, however, the Washington Supreme Court decided that this case was more like the challenge to student activity fees at a public university than the compelled agency fees charged by a public employee union. The city in this case is not at all similar to a public university. It is a municipal government charged with protecting the public health and safety of its residents. The police power has never been

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[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

thought to include the authority to increase the political voice of one group by reducing the voice of others.

The decision of the Washington Supreme Court opens a dangerous and gaping hole in the protection of the First Amendment right to be free from compelled support of speech. Where this Court has recognized broad protections against compelled speech, the Washington Supreme Court's decision extends only "rational basis scrutiny" to a program that exacts funds from one group in order to finance the political speech of others. This Court should grant review to check this radical departure from the First Amendment jurisprudence of this Court.

REASONS FOR GRANTING THE WRIT

I. The First Amendment Protects Against Compelled Subsidization of Political Speech.

The text of the First Amendment protects the "freedom of speech." The "practices and beliefs of the Founders" reveal that the founding generation intended the First Amendment to protect against compelled speech. *See McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring).

While there was little discussion of compelled support for political activity during the founding era, there was significant debate over compelled financial support of churches in Massachusetts and Virginia, the Virginia debate being the most famous. This Court has often quoted Jefferson's argument "That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), in 5

THE FOUNDERS' CONSTITUTION, University of Chicago Press (1987) at 77; quoted in *Janus*, 138 S.Ct. at 2464; *Keller v. State Bar*, 496 U.S. 1,10 (1990); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n.15 (1986).

James Madison was another prominent voice in the Virginia debate, and again this Court has relied on his arguments for the scope of the First Amendment protection against compelled political support: "Who does not see…[t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, Memorial and Remonstrance Against Religious Assessments, in 5 THE FOUNDERS' CONSTITUTION at 82; quoted in *Chicago Teachers Union*, 475 U.S. at 305, n.15; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-25 n.31 (1977).

Although these statements were made in the context of compelled religious assessments, the Court easily applied them to compelled political assessments in *Chicago Teachers Union* and *Abood*. This makes sense because Jefferson himself applied the same logic to political debate. In his first Inaugural Address, Jefferson equated "political intolerance" with the "religious intolerance" he thought was at the core of the Virginia debate. Thomas Jefferson, First Inaugural Address (1801), in 5 THE FOUNDERS' CONSTITUTION at 152. The theme of his address was unity after a bitterly partisan election, and the goal he expressed was "representative government" – a government response to the force of public opinion. *Id.*; Thomas Jefferson, Letter to Edward Carrington

(1787), in 5 THE FOUNDERS' CONSTITUTION at 122 (noting, in support of the freedom of the press, "[t]he basis of our government [is] the opinion of the people"). Government cannot be responsive to public opinion unless individuals retain the freedom to reject politically favored groups.

Madison, too, noted the importance of public opinion for the individual liberty the Founders sought to enshrine in the Constitution. "[P]ublic opinion must be obeyed by the government," according to Madison, and the process for the formation of that opinion is important. James Madison, Public Opinion (1791), in 2 THE FOUNDERS' CONSTITUTION at 73-74. Madison argued that free exchange of individual opinion is important to liberty and worried that "real opinion" would be "counterfeited." *Id*. But "counterfeited" opinion is all that Seattle receives from a program where some are forced to pay for the political sentiments of others.

The voice of the individual is lost when state law compels him to pay for political speech he opposes. This compulsion is an effective censor of individual opinion. Instead of being drowned out by many genuine voices, the individual is forced to boost the voice of those he opposes or even despises. He is forced to pay for the counterfeiting of public opinion, distorting democracy, and losing his freedom in one fell swoop.

The freedom against compelled speech also preserves the natural right to liberty of conscience – that right to one's own opinions. James Madison, On Property, Mar. 29, 1792 (Papers 14:266-68) ("A man has a property in his opinions and the free communication of them"). Without this right, the people lose their

status as sovereign and officials in power "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The founding generation rejected the idea that government officials should have such power. They clearly recognized that freedom to communicate opinions is a fundamental pillar of a free government that, when "taken away, the constitution of a free society is dissolved." Benjamin Franklin, On Freedom of Speech and the Press, Pennsylvania Gazette, November 17, 1737 reprinted in 2 THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN (McCarty & Davis 1840) at 431.

Thomas Paine argued that "thinking, speaking, forming and giving opinions" are among the natural rights held by people. Edmond Cahn, *The Firstness of the First Amendment*, 65 Yale L.J. 464, 472 (1956). Congress and the states agreed. The First Amendment does not "grant" freedom of speech. The text speaks about a right that already exists and prohibits Congress from enacting laws that might abridge that freedom. U.S. Const. Amend. I. As Thomas Cooley noted, the First Amendment's guaranty of free speech "undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing." Thomas Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW (Little, Brown, & Co. 1880) at 272.

The impulse to protect the right of the people to hold their own opinion rather than be forced to adopt state-sanctioned orthodoxy was widespread at the founding. This was especially true for publishers. In

1776, North Carolina and Virginia both adopted Declarations of Rights protecting freedom of the press. Francis N. Thorpe, 5 THE FEDERAL AND STATE CONSTITUTIONS (William S. Hein 1993) at 2788 (North Carolina) (here-after Thorpe); 7 Thorpe at 3814 (Virginia). Both documents identified this freedom as one of the "great bulwarks of liberty." Maryland's Constitution of 1776, Georgia's constitution of 1777, and South Carolina's constitution of 1778 all protected liberty of the press. 3 Thorpe at 1690 (Maryland); 2 Thorpe at 785 (Georgia); 6 Thorpe at 3257 (South Carolina). Vermont's constitution of 1777 protected the people's right to freedom of speech, writing, and publishing. 6 Thorpe at 3741. As other states wrote their constitutions, they too included protections for what Madison called "property in [our] opinions and the free communication of them." James Madison, On Property, *supra*.

An example of the importance of these rights to the founding generation is in the letter that the Continental Congress sent to the "Inhabitants of Quebec" in 1774. That letter listed freedom of the press as one of the five great freedoms because it facilitated "ready communication of thoughts between subjects." Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108 quoted in *Thornhill v. Alabama*, 310 U.S. 88, 102, (1940). There would be no such freedom, however, if the government had the power to command speakers to finance opinions with which they disagree.

The failure to include a free speech guaranty in the new Constitution was one of the omissions that led many to argue against ratification. *E.g.*, George Mason's Objections, Massachusetts Centinel, reprinted

in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Commentaries on the Constitution No. 2 at 149-50 (John P. Kaminski, et al. eds. 2009); Letter of George Lee Turberville to Arthur Lee, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 at 128; Letter of Thomas Jefferson to James Madison, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 at 250-51; Candidus II, Independent Chronicle, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 at 498; Agrippa XII, Massachusetts Gazette, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 at 722.

Several state ratifying conventions proposed amendments to the new Constitution to cure this omission. Virginia proposed a declaration of rights that included a right of the people "to freedom of speech, and of writing and publishing their sentiments." Virginia Ratification Debates reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 3 at 1553. North Carolina proposed a similar amendment. Declaration of Rights and Other Amendments, North Carolina Ratifying Convention (Aug. 1, 1788), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* at 18. New York's convention proposed an amendment to preserve the rights of assembly, petition, and freedom of the press. New York Ratification of Constitution, 26 July 1788, Elliot 1:327-31, reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* at 12. The Pennsylvania convention produced a minority report putting forth proposed amendments, including a declaration that the people

had "a right to freedom of speech." The Dissent of the Minority of the Convention, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Pennsylvania.

Madison ultimately promised to propose a Bill of Rights in the first Congress. CREATING THE BILL OF RIGHTS (Helen Veit, et al. eds. 1991) at xii. Although Madison argued that a Bill of Rights provision protecting speech rights would not itself stop Congress from violating those rights, Jefferson reminded him that such a guaranty in the Constitution provided the judiciary with the power it needed to enforce the freedom. Madison repeated this rationale as he rose to present the proposed amendments to the House of Representatives. *The Firstness of the First Amendment*, *supra*, at 467-68. The First Amendment was designed to allow the judiciary to act in cases such as this where the government claims the power to force one group of citizens to finance the political speech of others.

In line with this original understanding this Court has consistently held that an individual cannot be compelled to speak or publish a message with which he disagrees. *E.g.*, *Janus*, 138 S.Ct. at 2464; *Harris v. Quinn*, 573 U.S. 616, 648-49 (2014); *Knox v. Serv. Employees Int'l Union*, 567 U.S. 298, 309 (2012); *Keller*, 496 U.S. at 9-10; *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988); *Pacific Gas & Elect. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 8 (1984) (plurality opinion); *Abood*, 431 U.S. at 234-35; and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254 (1974).

The Court's decision in *Barnette* established this principle more than 70 years ago: "If there is any fixed star in our constitutional constellation, it is that no

official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642; *see also Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (State may not "require an individual to participate in the dissemination of an ideological message"). Nonetheless, Seattle has decided to force property owners to underwrite the political speech of those with whom they disagree.

The Seattle ordinance at issue clearly transgresses the freedom from compelled subsidization of the speech others recognized by this Court's First Amendment jurisprudence. Yet the Washington Supreme Court ruled that the compelled speech rights were not important in this instance because the taxpayers were not "associated" with the speech with which they disagreed. This Court should grant review to decide whether the right to be free from compelled speech is lost if it is not coupled with an associational right.

II. This Court Should Grant Review to Resolve the Question of the Standard of Review in Compelled Financial Support of Speech Cases.

In *Janus*, this Court discussed the level of scrutiny that should apply in cases of "compelled subsidization" of speech. *Janus*, 138 S.Ct. at 2464-65. Although the Court had applied an "exacting scrutiny" in past cases, that test came out of commercial speech cases. *Id*. at 2465. The *Janus* Court questioned, however, whether using a commercial speech test for what the Court recognized as a "significant impingement on First Amendment rights" was appropriate. *Id*. at 24-

64-65. Indeed, in *Harris*, this Court expressly questioned whether that test provided sufficient protection for the speech rights at issue. *Harris*, 573 U.S. at 648. Nonetheless, this Court in *Janus* did not resolve the question of the appropriate level of scrutiny after finding that the challenged law could not even survive the lower level of scrutiny afforded to commercial speech. *Janus*, 138 S.Ct. at 2465.

This case presents the Court with the opportunity to resolve the question left open in *Janus*. The Washington Supreme Court expressly rejected application of either strict or exacting scrutiny. Pet. App. A-4-5. Instead, purportedly relying on *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the court below ruled that the correct standard to apply was "rational basis." The Washington court, however, misunderstood the factual context of the *Southworth* decision, missed this Court's explanation of the holding in *Southworth* in later cases, and ignored this Court's ruling in *Janus*. Each of these errors on important issues of First Amendment jurisprudence demonstrates the need for review by this Court.

First, the Washington court failed to consider the factual context of *Southworth*. That case concerned the collection of student fees used to promote student groups on campus "to further the educational mission" of the university. *Southworth*, 529 U.S. at 220-21. The purpose of the university is to promote learning and this Court was loathe to interfere in the educational judgment of the university. *Id*. at 232 ("To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pur-

sue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.").

The City of Seattle, by contrast, is not an institutional of higher education, or any type of education. It is a municipal government in the state of Washington vested with the power to "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Wash. Const., art. XI, §11. While the police power is broad, it has never been thought to include the power to reduce the political speech of one group in order to increase the political speech of another. *See Harris*, 573 U.S. at 647-48; 650-51.

Further, this Court in *Southworth* never applied a rational basis level of scrutiny. Indeed, the portion of the *Southworth* opinion cited by the Washington court dealt only with review of government speech which was not at issue in *Southworth* and is not at issue here. Pet. App. A-3-4. Further, this Court in *Harris* described the level of scrutiny at play in *Southworth* as requiring a showing of a "compelling interest." *Harris*, 573 U.S. at 656. That is most assuredly not evidence of "rational basis" review.

Finally, this Court in *Janus* flatly rejected the idea that only rational basis scrutiny should apply in compelled subsidization of speech cases.

> The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. … *This form of minimal scrutiny is*

> *foreign to our free-speech jurisprudence*, and we reject it here.

Janus, 138 S.Ct. at 2465 (emphasis added).

The Washington court misunderstood the level of scrutiny to apply when a government program is challenged on the basis that it compels subsidization of the political viewpoints of others. This Court should grant review to clarify the appropriate standard of review, answering the question left open in *Janus*.

CONCLUSION

The decision of the lower court conflicts with the decisions of this Court. The decision upholds a program that reduces the political speech of some individuals in order to enhance the political speech of others, and it does so by applying a "form of minimal scrutiny" that is foreign to this Courts "free speech jurisprudence. Review should be granted to answer the question left open in *Janus* regarding the proper level of scrutiny of regulations that compel individuals to subsidize the speech of those with whom they disagree.

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Respectfully submitted,

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