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 IN OPPOSITION

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QUESTIONS PRESENTED

The City of Seattle recently enacted a Democracy Voucher program—the first and only of its kind in the nation. It enables each qualified resident to direct up to $100 to candidates in City elections. The program may be funded in a variety of ways, including a marginal property tax increase.

In rejecting Petitioners' First Amendment challenge to Seattle's voucher program, the Washington Supreme Court followed *Buckley v. Valeo,* 424 U.S. 1 (1976), and this Court's public-campaign-finance jurisprudence and distinguished this Court's recent compelled-subsidy decision, *Janus v. American Fed'n of State, Cty., & Mun. Employees,* 138 S. Ct. 2448 (2018). No other court has addressed a claim that *Janus* overrides longstanding public-campaign-finance principles.

Petitioners pose two questions:

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.

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STATEMENT OF THE CASE

1. In November 2015, Seattle voters overwhelmingly approved Initiative 122. *See* Pet. App. H. The Initiative added an "Honest Elections Seattle" subchapter to City law that introduced several reforms. *Id*. The City codified much of the Initiative in Seattle Municipal Code §§ 2.44.600 *et seq. See* Pet. App. G.[1]

2. Consistent with its goal of "giving more people an opportunity to have their voices heard in our democracy," *id*. H-1, the Initiative also created a "Democracy Voucher" program, which the Initiative cast as "vital to ensure the people of Seattle have equal opportunity to participate in political campaigns and be heard by candidates, [and] to strengthen democracy . . . ." *Id*. H-6.

The program applies in odd-numbered years, when voters choose City Councilmembers, the Mayor, or the City Attorney. The City provides each registered voter and any other person who qualifies with four $25 vouchers. Voucher recipients may assign vouchers to qualifying candidates—those who collect minimum qualifying signatures and contributions from Seattle residents and remain within campaign spending limits.

To fund the program, the Initiative provides the City Council three options: (1) a property tax levy; (2) the general fund; or (3) "any other lawful source of funds of its choosing." Pet. App. H-24. The tax "shall not be collected to the extent the City allocates funds sufficient to establish and pay for the Program from other sources." *Id*. The

[1] In 2018 the Seattle City Council amended those provisions to better align them with state law and state and City practices, reorganize and clarify them, and create a crime of falsifying certain information. Seattle Ord. 125611. Petition Appendix G reproduced the older, unmodified version of the Code provisions. The differences between the older and current versions are irrelevant to the Petition.

Initiative authorized the levy only through 2025—in five years the Council will need a new vote of the people if it wants to maintain the property tax option. *See id*.

3. The voucher program is the first and only of its kind. No other voucher program exists in the nation. Other jurisdictions have considered such programs, but none has enacted one.

4. The City implemented the program in 2016. The 2017 elections saw the first campaigns tapping voucher funding.

The only other elections using Democracy Vouchers concluded in 2019. In those elections: less than nine percent of voucher funding supported incumbent City Council candidates;[2] in some districts losing candidates garnered the most voucher support; and the candidate who received the greatest voucher funding received the fewest votes of all candidates in the general election.[3]

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[2] Voucher funding statistics are available at City of Seattle, Democracy Voucher Program, https://www.seattle.gov/democracyvoucher/program-data (last visited Feb. 5, 2020). The incumbents participating in the Voucher Program were Councilmembers Lisa Herbold and Debora Juarez. *See* Seattle Municipal Archives, Seattle City Council Members 2016–Present, https://www.seattle.gov/cityarchives/seattle-facts/city-officials/city-council-members/city-council-2016-present (last visited Feb. 5, 2020).

[3] Election results for the August 2019 and November 2019 elections are available at King County Elections Department, Elections Home, 2019 Results, https://www.kingcounty.gov/depts/elections/results/2019.aspx (last visited Feb. 5, 2020). Comparing that to the City voucher funding statistics reveals the candidates with the most voucher support in Districts 2 (Mark Solomon), 3 (Egan Orion), and 4 (Shaun Scott) failed to win election and that Mr. Solomon received the most 2019 voucher funding and the fewest votes of all non-write-in candidates for Seattle City Council in the general election.

5. Property taxes are a significant source of Seattle's revenue—forecast to account for 23.1% of 2019 revenue. *See* CITY OF SEATTLE BUDGET OFFICE, 2019 ADOPTED AND 2020 ENDORSED BUDGET at 46, *available at* https://www.seattle.gov/city-budget-office/budget-archives/2019-adopted-and-2020-endorsed-budget (last visited Feb. 5, 2020).

But the portion of property tax collected for the Democracy Voucher program has been minuscule. It is by far the smallest component of City property tax revenue—just 0.43% in 2018. *Id*. at 65.[4] Because the City receives only 25% of the property tax revenue paid by Seattle property owners, *id*. at 51, that means just 0.11%—a penny from each $9.50—of total property taxes paid by Seattle property owners went to the program. For the median, $5,709 property tax bill, *see id.* at 48, that amounts to about six dollars going to the program.

The program's relatively modest revenue is sufficient even though, for each two-year election cycle, the median property owner chips in about $12, and each qualified resident (property owner or not) receives $100 worth of vouchers. To qualify for voucher funding, a candidate must remain within constraints on total campaign spending, including spending covered by vouchers. Pet. App. G-12 to G-13. Because those limits are low enough and the number of candidates remains reasonable, a practical ceiling

[4] The denominator in this calculation excludes "Other Property Taxes related to the City." The voucher program's component would have been an even smaller percentage of overall tax revenue had those taxes been included.

constrains the voucher funding candidates may redeem—under $2.5 million in the 2019 election cycle.[5]

6. Petitioners claim they own property in Seattle and are subject to the current property tax levy. *See* Pet. App. I-2 to I-3. But last year the lead Petitioner, Mark Elster, and his wife transferred their Seattle property to a limited liability company.[6] The county tax assessor now lists the company as the taxpayer for that property.[7] The other Petitioner, Sarah Pynchon, claims she owns property in Seattle but neither resides nor is registered to vote in it. Pet. App. I-3.

7. In June 2017—before any election using Democracy Vouchers occurred[8]—Petitioners sued the City in state court seeking a declaration that the Democracy Voucher program, facially and as applied, violates the First Amendment to the U.S. Constitution. Pet. App. I-14 to I-15. They challenged only the optional property tax, claiming injury from allegedly being compelled to subsidize others' views or speech, no matter its content. *Id*. I-2 to I-3.

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[5] Voucher funding statistics are available at City of Seattle, Democracy Voucher Program, https://www.seattle.gov/democracyvoucher/program-data (last visited Feb. 5, 2020).

[6] See the deed filed as Instrument No. 20190321000499 by searching in King County Recorder's Office, Online Records Search, https://www.kingcounty.gov/depts/records-licensing/recorders-office/records-search.aspx (last visited Feb. 5, 2020).

[7] See the record for Tax Account No. 277060675000 by searching in King County, Finance & Business Operations, Treasury Operations, Property Tax Storefront, https://payment.kingcounty.gov/Home/Index?app=PropertyTaxes (last visited Feb. 5, 2020).

[8] The 2017 primary election occurred in August. *See* King County Elections Department, Elections Home, 2017 Results, https://www.kingcounty.gov/depts/elections/results/2017.aspx (last visited Feb. 5, 2020).

The trial court granted the City's motion to dismiss. *See* Pet. App. D. Petitioners appealed to the Washington State Court of Appeals, which certified the case to the Washington Supreme Court. *See* Pet. App. B.

The Washington Supreme Court unanimously affirmed the trial court. *See* Pet. App. A. Applying *Buckley v. Valeo,* 424 U.S. 1 (1976), and this Court's public-campaign-finance jurisprudence, the court explained how this Court has long held that "public financing systems are constitutional." Pet. App. A-5. This is true even though such systems involve "the disbursement of tax revenue to political parties," because virtually every governmental appropriation distributes money "'in a manner in which some taxpayers object.'" *Id*. (quoting *Buckley*, 424 U.S. at 92). The Washington Supreme Court also noted the Democracy Voucher program "resembles other content neutral ways the government facilitates political speech, for example, when the government distributes voters' pamphlets." *Id.* A-7.

The Washington Supreme Court rejected Petitioners' argument that this Court's recent compelled-subsidy decision, *Janus v. American Fed'n of State, Cty., & Mun. Employees,* 138 S. Ct. 2448 (2018), sweeps aside this longstanding public-campaign-finance case law. Pet. App. A-8 to A-9. "Unlike the employees in *Janus*" who were forced to subsidize the speech of a particular union, taxpayers who fund the Democracy Voucher program "cannot show the tax individually associated them with any [particular] message." *Id.* A-9.

Petitioners seek review of the Washington Supreme Court's decision.

REASONS FOR DENYING THE WRIT

This Court should deny the Petition. Seattle's Democracy Voucher program does not merit this Court's attention because it is a new, one-of-a-kind program that rests on a minimal tax. Nor have appellate courts besides the Washington Supreme Court grappled more generally with whether, as Petitioners claim, compelled-subsidy case law overrides longstanding public-campaign-finance principles. In any event, this case would be a poor vehicle for exploring the questions presented primarily because the program need not (and may not in the relatively near future) be funded through a property tax. Petitioners also brought this action in a factual vacuum, and their standing to bring the case to this Court is clouded by significant Article III concerns. Finally, the Washington Supreme Court correctly upheld Seattle's program under *Buckley v. Valeo,* 424 U.S. 1 (1976), and this Court's public-campaign-finance jurisprudence and properly distinguished this Court's recent compelled-subsidy decision, *Janus v. American Fed'n of State, Cty., & Mun. Employees,* 138 S. Ct. 2448 (2018).

I. Petitioners present no issue warranting this Court's intervention.

1. Petitioners concede Seattle's Democracy Voucher program is "novel" and "the first of its kind in the country." Pet. at 1, 4. But they warn of the "rising interest" in "similar" programs "growing in popularity." *Id.* at 31–34. That warning is hollow; no pressing need exists to examine the constitutionality of democracy voucher programs.

Seattle's one-of-a-kind program has set no trend. No other voucher law exists. As Petitioners acknowledge, all five of the voucher proposals they cite failed to become law. *Id*. at 31–33 (citing two House Bills and ballot measures in South Dakota, Washington, and Albuquerque). Neither of

the House Bills earned a committee hearing. One attracted a single cosponsor; the other none. *See* 116th Cong. H.R. 1613; 115th Cong. H.R. 7306. Petitioners claim four other cities are "following in Seattle's footsteps," Pet. at 32, but internet searching reveals no evidence suggesting voucher proposals are before (or even coming to) legislative bodies or voters in those cities. Endorsements of the voucher concept from academics and one current and one former Democratic presidential candidate do nothing to enact a voucher program. *See id*. at 33–34.

If other jurisdictions enact programs like Seattle's, and other courts review any challenges to them, this Court can then consider whether to address the constitutional issues Petitioners raise.

2. The same is true with Petitioners' more general constitutional arguments. Petitioners ask this Court to recognize a "gap" in compelled-subsidy law and lurch to fill it by bringing public-campaign-finance programs "within the scope of the compelled-subsidy doctrine." *Id*. at 22–23. At the very least, this Court should allow lower courts to first grapple with whether compelled-subsidy case law overrides longstanding public-campaign-finance principles.

Lower courts have scarcely considered the novel argument Petitioners press here. Petitioners cite only two decisions in the 44 years since *Buckley* that followed it and distinguished compelled-subsidy case law. *Id*. at 20 (citing *Libertarian Party of Indiana v. Packard*, 741 F.2d 981 (7th Cir. 1984), and *May v. McNally*, 203 Ariz. 425, 55 P.3d 768 (2002)). *See Libertarian Party*, 741 F.2d at 986–90; *May*, 55 P.3d at 770–73. The other two decisions Petitioners cite involved no compelled-subsidy claim (*Little v. Florida Dept.*

of State, 19 F.3d 4, 5 (11th Cir. 1994))[9] or followed *Buckley* for a proposition unrelated to compelled speech (*Butterworth v. Republican Party of Florida*, 604 So. 2d 477 (Fla. 1992)).[10] If an "uneasy tension" exists between *Buckley*-grounded public-campaign-finance law and compelled-subsidy law, Pet. at 22, Petitioners provide scant evidence.

Petitioners rely primarily on *Janus*, which this Court issued less than two years ago while this action was pending. *See id*. at 1–2, 9–13, 19–27 (citing *Janus v. American Fed'n of State, Cty., & Mun. Employees,* 138 S. Ct. 2448 (2018)). Lower courts have had no real opportunity to assess whether *Janus*—addressing a fee imposed as a condition on public employment and used to fund one entity's messages—holds any lesson for disputes over tax-funded public-campaign-finance programs. That is why Petitioners cite no decision besides the one below discussing *Janus* in a public-campaign-finance dispute.

Allowing this issue to percolate would better reveal the implications of Petitioners' compelled-subsidy argument. For example, it could threaten to expose school voucher programs to challenge from taxpayers who object to funding the speech of schools and teachers with whom

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[9] At issue was the mandatory nature of the challenged fee. *Little*, 19 F.3d at 5 ("Plaintiffs attempt to distinguish this situation from *Buckley* on the grounds that this filing fee is involuntary, whereas the check-off is voluntary.").

[10] *Butterworth* found a tax on political contributions directly infringed the First Amendment by penalizing contributors for exercising their rights to contribute to and associate with a political party. *Butterworth*, 604 So. 2d at 481 (citing *Buckley*). *Accord May*, 55 P.3d at 773 n.5 (characterizing *Butterworth*'s use of *Buckley*).

they disagree.[11] Likely aware of this overreach, Petitioners invite the Court to ignore "the larger question of whether all allocations from general revenue that go to fund private speech can be subject to a compelled-subsidy challenge . . . ." Pet. at 13. Time would allow lower courts to probe the potential scope of this larger question and its consequences.

Time could also yield a case directly implicating compelled-subsidy law, allowing this Court to address the appropriate level of scrutiny to apply—a better vehicle for resolving that issue than Petitioners' second question, which depends on this Court first determining that compelled-subsidy law overrides public-campaign-finance law.

II. This case is a poor vehicle for exploring the questions presented.

Even if the questions presented were ripe for review, this case would be a poor vehicle for exploring them.

1. The Petition is structured around a claim that a "dedicated property levy is the exclusive method for funding" the City's voucher program. Pet. at 2. That claim is at the heart of the first question, which is directed to "a levy that forces property owners to fund other individuals'

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[11] *Amici* attempt to distinguish school voucher programs on the ground that they fund conduct, not speech. Brief of *Amici Curiae* Am. Ass'n of Christian Schools and Ass'n of Christian Schools Int'l in Support of Pets. at 6–7. Even if they raised a distinction with a constitutional difference, *amici* are mistaken. This Court extends free speech protection to schools and teachers. *See, e.g.*, *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 295 (2007); *Healy v. James*, 408 U.S. 169, 180–81 (1972). For their conduct/speech distinction, *amici* cite only a decision from Maine that never used "conduct" and merely noted the difference between the Establishment Clause claim at issue there and free speech claims. *Bagley* v. *Raymond Sch. Dep't*, 728 A.2d 127, 146–47 (Me. 1999).

campaign donations." *Id*. at i. And the second question depends on an affirmative answer to the first. *Id*.

The claim is false. The Democracy Voucher initiative allows the City Council three funding sources: (1) the property tax levy; (2) the general fund; or (3) "any other lawful source of funds of its choosing." Pet. App. H-24. The tax "shall not be collected to the extent the City allocates funds sufficient to establish and pay for the Program from other sources." *Id*. And the levy is authorized only through 2025—in five years the Council will need a new vote of the people if it wants to maintain the property tax option. *See id*. Because Petitioners challenge only the property tax funding mechanism and any invalidation of the tax would cause the City Council to fund the vouchers from another source—presumably some other tax Petitioners also pay—the Court should wait for a case challenging a future voucher program regardless of its funding source.

2. Another vehicle problem results from Petitioners having sued in a factual vacuum before the City had implemented the voucher program. For the first time in this dispute—and citing no factual support—Petitioners assert "most of the vouchers fund the re-election campaigns of the Seattle city council" and voucher funding "will inherently be skewed in favor of currently popular candidates . . . ." Pet. at 1, 2. Disproving such assertions requires evidence outside the record. Published data demonstrate, for example, that in Seattle's 2019 elections: less than nine percent of voucher funding supported incumbent City Council candidates; in some districts losing candidates garnered the most voucher support; and the candidate who received the greatest voucher funding received the fewest votes of all candidates in the general election. This Court is not designed to referee fact-based disputes involving events after the record was closed. Absent resolution of such disputes, Petitioners lack

support for their core assertion that the program "favor[s] speakers with majoritarian support at the expense of candidates supported by a minority of voters." *Id*. at 34. Petitioners chose a fact-free, pre-implementation challenge. That choice undercuts this case's value as a vehicle to explore the issues Petitioners raise.

3. The question of Petitioners' standing further compromises this case. The lead Petitioner, Mark Elster, and his wife transferred their Seattle property to a limited liability company last year, prompting the county tax assessor to list the company—not the Elsters—as the taxpayer.

And it is unclear whether Petitioners' status as municipal taxpayers—including the claim of Ms. Pynchon, who resides outside Seattle—is enough to establish standing. Petitioners rely on *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923). Pet. at 7 n.3. But the Court has an obligation under Article III in every new case to assure itself of standing, and a broad reading of that 1923 decision appears inconsistent with the Court's modern approach to Article III. *See ASARCO Inc. v. Kadish,* 490 U.S. 605, 613 (1989) (opinion of Kennedy, J.) (casting *Frothingham* as requiring the plaintiff to show a particular relationship between the taxpayer and the municipality); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349 (2006) (citing *ASARCO* favorably). *See also id*. at 345 (the "rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers"); Tr. of Oral Arg. at 16, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006) (Nos. 04-1704, 04-1724) (Chief Justice Roberts: "so, a taxpayer in Wyoming can't challenge the State tax, because his claim is too diffuse, but a resident in New York City can challenge the city tax, because it's not"?). Before reaching the merits, the Court would need to grapple with these issues.

III. The Washington Supreme Court correctly followed established public-campaign-finance law.

Petitioners offer two questions presented. Pet. at i. Yet in the body of their brief they argue the Washington Supreme Court erred on three grounds that do not clearly track the two questions. *Id*. at 23–30. Petitioners' arguments find no purchase in the decision below.

1. The Washington Supreme Court correctly determined the Democracy Voucher program does not implicate compelled-subsidy case law. The court followed *Buckley v. Valeo,* 424 U.S. 1 (1976), which started from the premise that "every appropriation made by Congress uses public money in a manner to which some taxpayers object." Pet. App. A-5 to A-9 (quoting *Buckley*, 424 U.S. at 92). *Buckley* rejected a First Amendment challenge to a public-campaign-finance program, noting such programs constitute an "effort, 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." *Buckley*, 424 U.S. at 92–93. Such a program "furthers, not abridges, pertinent First Amendment values." *Id*. at 93.

The Washington Supreme Court applied *Buckley* to uphold the City's voucher program under the First Amendment. *Buckley*'s reasoning embraces a voucher program funded by marginally increasing property taxes. Just like taxpayer funding in Washington for voters' pamphlets (allowing candidates disfavored by some taxpayers to communicate directly with voters) and postage-prepaid envelopes for Washington's vote-by-mail system (fostering votes other taxpayers do not support), the court correctly reasoned "the Democracy Voucher Program 'facilitate[s] and enlarge[s] public discussion and

participation in the electoral process.'" Pet. App. A-7 to A-8 (quoting *Buckley*, 424 U.S. at 92–93).

The Washington Supreme Court correctly distinguished this Court's most recent compelled-subsidy decision, *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018). *Compare* Pet. App. A-6 to A-7 *with* Pet. at 25–27. *Janus* invalidated an agency fee public employees—as a condition of employment—were compelled to pay one union even though the plaintiff employees objected to the union's messages on matters of substantial public concern. *Janus*, 138 S. Ct. at 2459–61. *Janus* did not cite *Buckley* for good reason—*Janus* holds no lesson for a situation where, as here and in *Buckley*, the government requires no one to fund any particular person's or entity's messages and merely uses tax revenue to further First Amendment values by expanding the participation of a range of players in political discourse.

The Washington Supreme Court also properly rejected Petitioners' claim that the City's voucher program failed the viewpoint neutrality test advanced by *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217 (2000). *Compare* Pet. App. A-6 to A-7 *with* Pet. at 27–30. Invoking the principle that "[a]ccess to a public forum . . . does not depend upon majoritarian consent," *Southworth* remanded for further review a scheme that appeared to allow a majority vote of the student body to determine whether a student organization would receive public funding. *Southworth*, 529 U.S. at 235–36. Not so with the City's voucher program, where the majority can silence no one—the action of each voucher holder results in support for the candidate they favor. Even if majoritarian preferences were relevant here, data not available to the Washington Supreme Court—data showing candidates garnering the fewest votes but greatest voucher

support[12]—belie Petitioners' assertion "that speech subsidies inevitably skew in favor of candidates with majoritarian support." Pet. at 28.

2. The Washington Supreme Court did not, as Petitioners' second question asserts, conclude that a compelled subsidy of speech should be examined under "rational basis" or any standard of review. *Cf*. Pet. at i. The court did not reach that question because it correctly distinguished compelled-subsidy case law. This case provides no basis for considering what standard of review applies to a compelled subsidy of speech, as opposed to a legitimate public-campaign-finance program. *See* Pet. at 24–25.

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[12] Voucher funding statistics are available at City of Seattle, Democracy Voucher Program, https://www.seattle.gov/democracyvoucher/program-data (last visited Feb. 5, 2020). Election results for the August 2019 and November 2019 elections are available at King County Elections Department, Elections Home, 2019 Results, https://www.kingcounty.gov/depts/elections/results/2019.aspx (last visited Feb. 5, 2020). Comparing those data reveals the candidates with the most voucher support in Districts 2 (Mark Solomon), 3 (Egan Orion), and 4 (Shaun Scott) failed to win election and that Mr. Solomon received the most 2019 voucher funding and the fewest votes of all non-write-in candidates for Seattle City Council in the general election.

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

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