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 Supreme Court of Washington

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ETHAN W. BLEVINS
Counsel of Record
WENCONG FA
MOLLIE R. WILLIAMS
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: EBlevins@pacificlegal.org

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 2
I. PETITIONERS HAVE STANDING AS MUNICIPAL TAXPAYERS AND BECAUSE OF THE FIRST AMENDMENT INJURY ARISING FROM THE COMPELLED SUBSIDY OF SPEECH 2
II. THE PETITION RAISES PRESSING AND UNADDRESSED QUESTIONS ABOUT THE FIRST AMENDMENT'S COMPELLED-SUBSIDY DOCTRINE 4
III. THE PETITION IS A GOOD VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED 7
CONCLUSION.. 11

TABLE OF AUTHORITIES

Page(s)

Cases

Amidon v. Students Ass'n of State University of New York at Albany, 508 F.3d 94 (1st Cir. 2007)................................10

Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986) 7

ASARCO v. Kadish, 490 U.S. 605 (1989).................3

Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217 (2000) 9, 10

Buckley v. Valeo, 424 U.S. 1 (1976)..........................5

Clinton v. City of New York, 524 U.S. 417 (1998) 3

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 2, 3

Frothingham v. Mellon, 262 U.S. 447 (1923)...........2

Harris v. Quinn, 573 U.S. 616 (2014) 7

Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) 1, 7

Kinney v. Cook, 159 Wn.2d 837 (2007)...................10

Knox v. Service Employees International Union, 567 U.S. 298 (2012) 7

O'Brien v. Village of Lincolnshire, 354 F. Supp. 3d 911 (N.D. Ill. 2018) 5

Smith v. Jefferson County Bd. of School Comm'rs, 641 F.3d 197 (6th Cir. 2011)..............2

Taub v. Kentucky,
842 F.2d 912 (6th Cir. 1988) 2

United States v. United Foods, Inc.,
533 U.S. 405 (2001) 4

Rule

Sup. Ct. R. 10(b) 5, 6

Other Authorities

Baude, William & Volokh, Eugene,
Compelled Subsidies and the First Amendment, 132 Harv. L. Rev. 171 (2018) 5

Ferguson, Dana, *After promising to replace, did lawmakers deliver on IM22?,* Argus Leader, Mar. 11, 2017,
https://www.argusleader.com/story/news/politics/2017/03/11/after-promising-replace-did-lawmakers-deliver-im22/99014304...4

Krishan, Nihal, *Sanders targets DNC with new campaign finance reform plan,* Washington Examiner, Oct. 07, 2019,
https://www.washingtonexaminer.com/news/campaigns/sanders-targets-dnc-with-major-new-campaign-finance-reform-plan 5

Winkler, Adam, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793 (2006)...6

INTRODUCTION

The City's opposition does not dispute that the issues presented in this case are of nationwide importance. Seattle forces Petitioners to fund campaign contributions—a classic form of political speech. This Court's recent decision in *Janus* underscored the First Amendment issues involved in forcing citizens to pay for speech with which they disagree. This case thus implicates two important constitutional issues: (1) does the compelled-subsidy doctrine apply to private speech subsidies funded by a property tax?; and (2) what level of scrutiny applies to compelled subsidies of private speech?

Unable to disregard the importance of the questions presented, the City argues instead that the Court should deny the Petition because this particular ordinance has not yet been replicated elsewhere. The Court should reject this myopic view of cert-worthiness.

This case presents a good vehicle for addressing the questions presented. The City wrongly claims that further factual development is needed, despite the straightforward legal issues presented and the fact that the case comes to this Court on an order granting a motion to dismiss. Even if factual development is necessary, the case should be remanded for such development to occur after this Court has addressed the questions presented.

ARGUMENT

I

PETITIONERS HAVE STANDING AS MUNICIPAL TAXPAYERS AND BECAUSE OF THE FIRST AMENDMENT INJURY ARISING FROM THE COMPELLED SUBSIDY OF SPEECH

This Court has jurisdiction to hear this case. Unlike federal or state taxpayers, municipal taxpayers like Petitioners satisfy the standing requirement by pleading an alleged misuse of municipal funds. *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923). In contrast to the over one hundred million Americans who pay federal taxes, the "close relationship between residents of a municipality and their local government results in a direct and palpable injury whenever tax revenues are misused." *Taub v. Kentucky*, 842 F.2d 912, 918 (6th Cir. 1988). For that reason, the Supreme Court has, for nearly a century, consistently recognized that a municipal taxpayer's interest in municipal funds is "direct and immediate," and properly remedied by injunctive relief. *Frothingham*, 262 U.S. at 486. *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349 (2006) (acknowledging the "standing of municipal residents to enjoin the 'illegal use of the moneys of a municipal corporation.'" (quoting *Frothingham*, 262 U.S. at 486)); *Smith v. Jefferson County Bd. of School Comm'rs*, 641 F.3d 197, 210 (6th Cir. 2011) ("Unlike federal or state taxpayers, municipal taxpayers may

fulfill the injury requirement by pleading an alleged misuse of municipal funds.”).[1]

None of the cases cited by the City says otherwise. *See* Opp. at 10. When read in context, Justice Kennedy’s opinion in *ASARCO v. Kadish* did not impose a new requirement that municipal taxpayers show a particular relationship between the taxpayer and the municipality. 490 U.S. 605, 613 (1989) (plurality op.). Instead, the opinion indicated that the relationship between a taxpayer and the municipality was sufficiently close so that a municipal taxpayer need not meet the same pleading requirements as a state or federal taxpayer. *Id.* Similarly, the Court in *DaimlerChrysler Corp. v. Cuno* rejected a claim that taxpayers had standing to challenge a *state* tax credit. 547 U.S. at 349. Yet, as relevant here, the Court noted that the lower court found no issue with plaintiffs’ ability to challenge the *municipal* tax credit as *municipal* taxpayers, and indeed “no issue regarding plaintiffs’ standing to bring [that claim] has been raised.” *Id.*

Plaintiffs’ injury is even more apparent in a free speech case like this one. Just as the First Amendment prevents Seattle from compelling individuals to express certain views, it prevents Seattle from compelling individuals to pay subsidies

---

[1] The City’s observation that Mr. Elster and his wife transferred their Seattle property to a limited liability company last year is irrelevant. Opp. at 11. Mr. Elster owns the limited liability company and assumes the company’s tax liability. In any event, Ms. Pynchon, who owns property in the city of Seattle, pays property taxes that fund the voucher program. *See* Pet. App. I at 3. The Court need not address the standing of all petitioners if it is satisfied that one of them has standing. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998).

for speech to which they object. *See United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Petitioners' injury stems not just from the government's compulsion of payment, but also its use of the funds for private speech to which Petitioners object.

II

THE PETITION RAISES PRESSING AND UNADDRESSED QUESTIONS ABOUT THE FIRST AMENDMENT'S COMPELLED-SUBSIDY DOCTRINE

In its response, the City does not once challenge the significance of the questions presented in the Petition. *See* Opp. at 6–9. Instead, the City argues that the voucher program itself is not an issue of national importance because other governments have yet to adopt a similar program. *See id.* at 6–7. The City also argues that the issues raised by the questions presented should be allowed to percolate in the lower courts. *See id.* at 8–9. Neither argument offers a rationale for denying the Petition.

The City's argument that other jurisdictions have yet to enact similar voucher programs misses the point.[2] The primary focus of cert-worthiness is whether the *questions presented* are of national importance, not necessarily the exact ordinance at

---

[2] The City's claim that no similar voucher programs have passed into law is not wholly accurate either. South Dakotans passed an initiative that included a voucher program, but the state legislature promptly repealed it. *See* Dana Ferguson, *After promising to replace, did lawmakers deliver on IM22?*, Argus Leader, Mar. 11, 2017, https://www.argusleader.com/story/news/politics/2017/03/11/after-promising-replace-did-lawmakers-deliver-im22/99014304/.

issue.[3] *See* Supreme Court Rule 10(b). The City has nothing to say on the importance of the questions presented, and effectively concedes the point. This concession echoes the views of the Washington Court of Appeals: "[T]his matter . . . presents a fundamental and urgent issue of broad public import requiring prompt and ultimate determination, including whether the City of Seattle campaign voucher program implicates constitutional guarantees of free speech." Pet. App. B at 1.

As noted in the Petition, the question of whether the compelled-subsidy doctrine applies to speech subsidies funded via taxation is a matter of national significance because of the wide range of programs that raise that issue. *See, e.g.*, *O'Brien v. Village of Lincolnshire*, 354 F. Supp. 3d 911 (N.D. Ill. 2018) (addressing a compelled-subsidy challenge to the use of general tax funds to pay for expression by municipal league). *See also Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) ("Our statute books are replete with laws providing financial assistance to the exercise of free speech."); William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. 171, 183 (2018) ("Compulsory tax revenue also routinely ends up subsidizing private speech.").

---

[3] To the extent that the spread of similar voucher programs does matter in considering the Petition, it is worth noting that Bernie Sanders' campaign proposes to emulate the Seattle program at the federal level. Nihal Krishan, *Sanders targets DNC with new campaign finance reform plan*, Washington Examiner, Oct. 07, 2019, https://www.washingtonexaminer.com/news/campaigns/sanders-targets-dnc-with-major-new-campaign-finance-reform-plan.

The City does not dispute that the second question presented, regarding the applicable level of scrutiny, raises an issue of national importance. This Court has frequently noted that the level of scrutiny applicable to compelled subsidies remains an open question. And many First Amendment claims hinge on its answer. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 844 (2006) ("[S]trict scrutiny is actually most fatal in the area of free speech, where the survival rate is 22 percent, lower than in any other right.").

The City urges this Court to wait for the issues to "percolate" among the lower courts. *See* Opp. at 8–9. The City's argument that lower courts should have time to address these issues implies that the federal questions raised are important ones worth addressing at some point. Yet a finding that a federal question is important is adequate justification for granting a petition under this Court's rules. *See* Sup. Ct. R. 10(b). Moreover, the question of the compelled subsidy doctrine's scope is a purely legal one that does not require a wide range of circumstances in order to better grasp its contours.[4]

---

[4] The City implies that Petitioners' theory could endanger school voucher programs because such programs spend public money on the speech of teachers and schools. This misapprehends both school voucher programs and the First Amendment. School vouchers directly fund student tuition, not school expression. The fact that a law subsidizing conduct, i.e. school attendance, has an incidental effect on speech does not mean that such a law would be subject to invalidation under the compelled-subsidy doctrine. "Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic

The City offers no real argument that the second question presented needs to percolate. The question of the proper standard of review in this context has arisen multiple times before this Court—it hardly presents a fresh issue in need of further development among lower courts. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2465 (2018) ("[W]e again find it unnecessary to decide the issue of strict scrutiny . . . ."); *Harris v. Quinn*, 573 U.S. 616, 648 (2014) ("For present purposes, however, no fine parsing of levels of First Amendment scrutiny is needed . . . ."). Indeed, this Court has already noted that the exacting scrutiny currently applied may be "too permissive." *Harris*, 573 U.S. at 648. This issue is therefore ripe for this Court's review without further development in the lower courts, which are currently bound by the exacting scrutiny applied in *Knox v. Service Employees International Union*, 567 U.S. 298, 310 (2012).

III

THE PETITION IS A GOOD VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED

Though the City acknowledges the importance of the questions raised by the Petition, it urges the Court to nonetheless decline the Petition because the case is

---

violation, would require analysis under the First Amendment." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring). Moreover, amici curiae debunk the school voucher analogy at some length. *See generally* Brief of Am. Ass'n of Christian Schools and Ass'n of Christian Schools Int'l in Support of Pets.

not a good vehicle for addressing the questions presented. The City is wrong.

The City claims that this case is a poor vehicle because the City *might* at some future date fund the voucher program through some other funding mechanism besides the property tax. *See* Opp. at 10. But it is undisputed by the parties that the City *now* funds the voucher program by taxing property owners like Petitioners here. Future contingencies simply have no bearing on whether this Petition is a good vehicle for addressing questions presented now.

The City also claims that Petitioners' claims somehow hinge on the property tax serving as the exclusive method of paying for the vouchers. *Id.* at 9–10. This is not accurate—what matters for this Petition is that the levy funds authorized by Initiative 122 are dedicated only to funding the voucher program. Pet. App. H at 23–24. There is no dispute that Petitioners' tax payments go directly to others who wish to contribute to campaigns. The City does not and cannot dispute that this is the case.

The City also urges the Court to decline the Petition because the case comes before this Court in a "factual vacuum." Opp. at 10. But neither the questions presented nor the disposition of this case depend on the truth of uncertain factual allegations raised by Petitioners. The City claims that Petitioners' argument that the voucher money will favor majoritarian candidates depends on factual development. *Id.* This is not true. Petitioners' argument is that the inevitable outcome of the voucher program is that it will favor more popular

candidates.[5] The voucher allows Seattle residents to decide which candidates receive public funding. It is hardly an uncertain proposition that more public money will end up in the hands of the candidates who receive the most support from Seattle residents.[6]

Courts addressing similar circumstances have not waited to see how the distribution of funds plays out. In *Board of Regents of University of Wisconsin System v. Southworth*, this Court held that a program allowing a student referendum to defund a student organization would violate the First Amendment because it would fail to offer adequate protection for viewpoint neutrality—the Court did not require that the plaintiffs first wait and see if this contingency

---

[5] The City argues that this is not inevitable because a recent candidate who received substantial voucher support did not receive a correspondingly high number of votes. *See* Opp. at 13–14. First, vote count is irrelevant because Seattle residents do not need to be registered to vote in order to receive and assign vouchers. *See* Pet. App. G at 7. Moreover, voter turnout and many other unrelated factors affect electoral outcomes, such that votes do not speak to the relative popularity of a candidate at the time the vouchers were assigned. An election year is fraught with surprises and upsets as candidates compete, and much can happen between the date a voucher is assigned early in the year and election day many months later.

[6] The City wrongly asserts that the Petition is the first time Petitioners have argued that the voucher program will be skewed in favor of more popular candidates. *See* Opp. at 10. This has been a central point of Petitioners' claim since the outset of this litigation. *See, e.g.*, Complaint, Pet. App. I at 12 ("By distributing such funds at the whim of majoritarian interests, the program disfavors minority viewpoints."); Order of the Washington State Superior Court of King County, Pet. App. D at 7–8 ("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.'").

came to pass. 529 U.S. 217, 235 (2000). Rather, the Court held that such a program would be invalid simply because it endangered viewpoint neutrality. *Id.* Likewise, the First Circuit addressed a mechanism allowing for a non-binding student referendum to determine the amount of funding for each student organization. *See generally Amidon v. Students Ass'n of State Univ. of New York at Albany*, 508 F.3d 94 (1st Cir. 2007). The court held that such a program violated the First Amendment without a need to see whether the student government adopted the referendum results because "the referendum policy creates a *substantial risk* that funding will be discriminatorily skewed in favor of [student groups] with majoritarian views." *Id.* at 102 (emphasis added); *see also id.* at 103 ("While a decision maker is free to disregard a viewpoint-discriminatory, advisory referendum, this practice nevertheless injects a substantial risk of undetectable viewpoint discrimination into the allocation process."). Similarly, allotting money to candidates based on Seattle residents' partisan viewpoints "injects a substantial risk" that the funding mechanism will favor majoritarian views, so awaiting the actual results is unnecessary. *Id.* at 103.

Even if further factual development is necessary, that should not dissuade the Court from granting the Petition. This case arises from the state trial court's order granting the City's motion to dismiss for failure to state a claim. *See* Pet. App. D. In such a posture, the allegations in the Complaint that the voucher program favors majoritarian candidates are presumed true. *See Kinney v. Cook*, 154 P.3d 206 (Wash. 2007) (in adjudicating a motion to dismiss for failure to state a claim, a court "presumes all facts alleged in the

plaintiff's complaint are true"). If anything, the City's concerns regarding factual development should be addressed on remand.

Finally, the City concludes with the odd assertion that the Washington Supreme Court did not apply rational basis scrutiny. Opp. at 14. Yet at the end of the section entitled "STANDARD OF SCRUTINY," the lower court stated: "Accordingly, we apply rational basis review." Pet. App. A at 4. Then again, at the conclusion of the Court's analysis, it states: "The program, therefore, survives rational basis scrutiny." *Id.* at 9. Thus, this case is an appropriate vehicle for addressing the proper level of scrutiny.

CONCLUSION

Petitioners respectfully ask this Court to grant the Petition.

DATED: February 2020.

Respectfully submitted,

ETHAN W. BLEVINS
Counsel of Record
WENCONG FA
MOLLIE R. WILLIAMS
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: EBlevins@pacificlegal.org

Counsel for Petitioners