No. ____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Seattle's "democracy voucher" program establishes a dedicated property levy used solely to fund individual contributions from Seattle residents to the political campaigns of participating candidates.

The questions presented are:

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.

PARTIES TO THE PROCEEDINGS AND RULE 29.6

Petitioners, who were Plaintiffs-Appellants in the court below, are Mark Elster and Sarah Pynchon. Respondent, Defendant-Appellee below, is the City of Seattle. All parties to this petition were parties below. No Petitioner is a corporation, so a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RULE 14.1(b)(iii) STATEMENT OF RELATED CASES

The proceedings in the Washington State trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Mark Elster and Sarah Pynchon v. The City of Seattle, Case No. 17-2-16501-8 SEA, Washington State Superior Court for King County. Date of Judgment: November 2, 2017.

Mark Elster and Sarah Pynchon v. The City of Seattle, Case No. 77880-3-I, Court of Appeals of the State of Washington Division One. Date of Judgment: December 17, 2018.

Mark Elster and Sarah Pynchon v. The City of Seattle, Case No. 96660-5, Supreme Court of the State of Washington. Date of Judgment: July 11, 2019.

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INTRODUCTION

In 2015, the City of Seattle implemented a novel method for funding political campaigns. The program implicates a special First Amendment concern because it forces some individuals, here property owners, to pay for the campaign contributions of other private individuals. *See Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 223 (1989) ("Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." (quoting *Monitor Patriot Co. v. Roy*, 410 U.S. 265, 272 (1971))); *Janus v. Am. Fed'n of State, Cty., & Mun. Employees*, 138 S. Ct. 2448, 2464 (2018) ("'[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" (quoting A Bill for Establishing Religious Freedom, *in* 2 *Papers of Thomas Jefferson* 545 (J. Boyd ed. 1950))).

Seattle's public financing program issues four $25 "democracy vouchers" to Seattle residents each election year. *See* Appendix (App.) G at 6–7. The voucher holder can only use the vouchers to support a qualified local candidate that chooses to participate in the program. *See id.* at 8–9. Not surprisingly, most of the vouchers fund the re-election campaigns of the Seattle city council. *Cf.* Danny Westneat, *Democracy vouchers are supposed to be an answer, but big money is swamping Seattle's elections*, Seattle Times, Sept. 25, 2019[1] (pointing out that the voucher program has not shaken up electoral politics as expected).

[1] https://is.gd/THVF4t.

A dedicated property levy is the exclusive method for funding the campaign subsidies. *See* App. H at 24.

The campaign subsidy program raises serious constitutional concerns under this Court's compelled-subsidy precedents, namely *Janus*, 138 S. Ct. 2448, and *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). Specifically, the campaign subsidy program guarantees that Petitioners will be compelled to fund private political speech with which they disagree. Campaign funding will inherently be skewed in favor of currently popular candidates, so property owners who favor less popular candidates, such as Petitioners, are compelled to fund a program that favors candidates and campaign-related speech that they oppose, thus compelling them to "betray[] their convictions." *Janus*, 138 S. Ct. at 2464. The Washington Supreme Court upheld the program under rational basis scrutiny, an excessively deferential test that this Court has rejected in the compelled-subsidy context: "This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here." *Id.* at 2465.

This case implicates compelling, unresolved questions that deserve this Court's attention, such as the compelled-subsidy doctrine's application to taxes levied to fund the private political speech of other individuals, the level of scrutiny that should apply to compelled-subsidy claims, and how the doctrine applies to the compelled funding of political campaigns. This Court should grant the petition to address these significant but lingering questions.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Mark Elster and Sarah Pynchon respectfully petition for a writ of certiorari to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

The opinion of the Washington Supreme Court affirming the Washington State Superior Court's dismissal of Petitioners' complaint is reported at 444 P.3d 590 (Wash. 2019) and reproduced in Appendix A. The order of the Washington State Court of Appeals certifying the case to the Washington Supreme Court is unreported but is reproduced here as Appendix B. The ruling of the commissioner of the Washington Supreme Court accepting certification of the case is unreported but reproduced here as Appendix C. The Washington State Superior Court's order granting Respondent's motion to dismiss is unreported but may be found at 2017 WL 11407502 (Super. Ct. Wash. 2017) and is reproduced here as Appendix D. The superior court's order denying Petitioners' motion for reconsideration can be found at 2017 WL 11441828 (Super. Ct. Wash. 2017) and is reproduced here as Appendix E. The mandate of the Washington Supreme Court, issued August 9, 2019, is reproduced here as Appendix F.

STATEMENT OF JURISDICTION

The Washington Supreme Court entered judgment on July 11, 2019. On September 26, 2019, Justice Kagan extended the time for filing this petition to November 8, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND ORDINANCE AT ISSUE

The First Amendment, as incorporated against the states by the Fourteenth Amendment, provides that the states "shall make no law . . . abridging the freedom of speech."

Seattle Municipal Code (SMC) Chapter 2.04, entitled Honest Elections Seattle, "creates a democracy voucher public finance program." SMC § 2.04.600. The full language of the chapter and the initiative are reproduced in Appendices G and H.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

In 2015, Seattle voters approved Initiative 122, which instituted the campaign subsidy program, the first of its kind in the country. *See generally* App. H. The initiative is incorporated in the Seattle Municipal Code. *See generally* App. G.

Under the program, the City mails four $25 vouchers to each registered voter in Seattle at the beginning of each election year. App. G at 7. Seattle residents who are not registered to vote are also entitled to vouchers upon request. *Id.*

Voucher recipients can only assign the voucher funds to candidates for city-elected offices who have opted in to the campaign subsidy program. *See id.* at 9. Such candidates can only redeem campaign subsidies by satisfying certain qualifications, such as agreeing to lower contribution limits and obtaining a minimum number of contributions. *See id.* at 10–12.

The Initiative gives the City two options for funding the campaign subsidy program—

appropriations from the general revenue or a dedicated property levy. App. H at 23–24. The City opted to raise the voucher funds—up to $3 million per year—through the new levy. *Id.* at 24.[2] The levy funds may only be used to fund the campaign subsidy program. *See id.*

Petitioners Mark Elster and Sarah Pynchon are Seattle property owners subject to the voucher levy, and they object to funding other people's political speech. *See* App. I at 2–3. Mr. Elster is politically active, often meeting with candidates and attending campaign activities. *Id.* at 2. He does not wish to support any of the local candidates who opt to receive campaign subsidies. *Id.* He adamantly objects to being compelled to subsidize political views that conflict with his own values. *Id.*

Ms. Pynchon owns property in Seattle subject to the voucher levy, though she herself lives outside city limits. *Id.* at 3. She is therefore not qualified to receive vouchers. *Id.* Ms. Pynchon objects to being compelled to pay for other people's campaign contributions, particularly when she herself is not entitled to vouchers. *Id.*

II. PROCEDURAL BACKGROUND

Petitioners sued the City of Seattle in the Washington State Superior Court for King County in June 2017, alleging that the campaign subsidy program violates their First Amendment rights by compelling them to subsidize other individuals'

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[2] *See* https://www.seattle.gov/democracyvoucher/about-the-program (explaining the levy funding).

political speech. *See* App. I. They sought declaratory and injunctive relief. *See id.* at 13–14.

The trial court granted the City's motion to dismiss on November 3, 2017. *See generally* App. D. While it held that the program implicated the First Amendment, the trial court applied a relaxed standard of review because the program was akin to a "nonpublic or limited public forum." *Id.* at 6. Therefore, the program passed muster so long as it was "reasonable and viewpoint neutral." *Id.* (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009)). The court held that increasing voter participation in the electoral process through campaign contributions was a "reasonable justification" for the program. *Id.* at 9. It later denied Petitioners' motion for reconsideration. *See* App. E.

This Court issued two key decisions during the pendency of Petitioners' appeal: *Janus*, 138 S. Ct. 2448, and *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). In late 2018, Division I of the Washington Court of Appeals certified the appeal to the Washington Supreme Court because the case "presents a fundamental and urgent issue of broad public import requiring prompt and ultimate determination." App. B. The Washington Supreme Court granted certification and upheld the campaign subsidy program under rational basis scrutiny as a viewpoint-neutral means of facilitating speech. *See generally* App. A, C.

Because this case raises important and unresolved questions concerning the scope of compelled subsidies

that affect core First Amendment rights, Petitioners seek certiorari review.[3]

REASONS FOR GRANTING THE PETITION

This case allows the Court to address important and unresolved issues about the contours and strength of the compelled-subsidy doctrine. These include issues such as when and how the compelled-subsidy doctrine applies to speech subsidies drawn from taxes levied to fund the private political speech of other individuals, the proper level of scrutiny for a compelled subsidy of political speech, and the doctrine's role regarding compelled funding of political campaigns.

The Washington Supreme Court's reasoning conflicts with precedent from this Court and the federal circuit courts. The Washington Supreme Court imposed rational basis review, a standard that the federal courts have universally rejected as inappropriate in the First Amendment and compelled-subsidy contexts. The court also held that a compelled

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[3] Petitioners have standing to raise this challenge. It is "the rule of this Court" that "[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923). *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349 (2006) ("The *Frothingham* Court noted with approval the standing of municipal residents to enjoin the 'illegal use of the moneys of a municipal corporation,' relying on 'the peculiar relation of the corporate taxpayer to the corporation' to distinguish such a case from the general bar on taxpayer suits." (quoting *Frothingham*, 262 U.S. at 487)); *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 210–11 (6th Cir. 2011) (affirming the municipal taxpayer standing rule in *Frothingham*); *United States v. City of New York*, 972 F.2d 464, 471 (2d Cir. 1992) (same).

subsidy is only unconstitutional if the objector is "associated with" the message she's forced to subsidize. App. A at 9. This ruling fundamentally misreads this Court's *Janus* decision in a manner that threatens the vitality of this important First Amendment doctrine. Similarly, the Washington Supreme Court's holding that the campaign subsidy program creates no First Amendment problem because voucher holders are free to decide how to assign the vouchers clashes with the fundamental principles behind the compelled-subsidy doctrine that this Court has developed and defended for four decades.

Finally, the validity of Seattle's campaign subsidy program has become a matter of national significance. At the federal, state, and local levels, legislators are proposing compelled political subsidy programs that emulate Seattle's. These programs burden First Amendment rights and threaten to severely distort electoral discourse. The constitutionality of such programs is a pressing concern that warrants this Court's attention.

I

IMPORTANT QUESTIONS REGARDING THE COMPELLED-SUBSIDY DOCTRINE REMAIN UNRESOLVED

A. This Court should address whether the compelled-subsidy doctrine applies to a property tax levied to fund the private political speech of other individuals

Seattle singles out property owners to sponsor other individuals' partisan campaign contributions. The fact that the City compels this subsidy through

taxes rather than a fee or targeted assessment does not ameliorate the injury done to Petitioners' "individual freedom of mind." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 642 (1943) (holding that students who objected to participating in the pledge of allegiance cannot be forced to betray their own consciences). Yet this Court has never directly addressed whether the compelled-subsidy doctrine can apply to a tax. It should do so now.

Historically, the federal courts have applied the compelled-subsidy doctrine to a range of fees and targeted assessments. These include union agency-shop fees, bar dues, targeted assessments on industry participants, and university student fees.[4] Nonetheless, neither this Court's precedents nor the rationale for the compelled-subsidy doctrine prevents the doctrine's application to subsidies drawn from tax revenue.

This Court has implied that the compelled-subsidy doctrine can extend to such circumstances but has yet to issue an express holding to that effect. In *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), this Court addressed whether the government-speech doctrine barred a compelled-subsidy claim where the subsidy targeted a particular industry. The Court said: "The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. . . . [T]he injury of compelled funding (as opposed to the injury of compelled speech)

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[4] *See Janus*, 138 S. Ct. 2448 (agency-shop fees); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (bar dues); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (industry assessments); *Southworth*, 529 U.S. 217 (2000) (student activity fees).

does not stem from the government's mode of accounting." *Id.* at 562–63. While this holding only addressed an attempt to limit the government-speech doctrine, there is no reason that the method of appropriating funds should affect the compelled-subsidy analysis more generally. *See* William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. 171, 183 (2018) ("Another possible distinction is that most taxes go to a wide range of uses, and come from a wide range of taxpayers; agency fees are narrower in both respects. But we think the Court was quite right in *Johanns* to conclude that this distinction can't make a First Amendment difference.").

The issue remains unresolved in the lower courts. For example, in *O'Brien v. Village of Lincolnshire*, 354 F. Supp. 3d 911 (N.D. Ill. 2018), a federal district court addressed whether funding a non-government municipal league with funds from income, sales, and utility taxes resulted in an unconstitutional compelled subsidy. *See id.* at 914. The Court did not, however, decide whether expenditures from general tax revenue implicated the First Amendment, instead holding that the municipal league's expression constituted government speech. *Id.* at 918–19.[5]

The question of the compelled-subsidy doctrine's scope is a significant one. When government compels a speech subsidy, a First Amendment injury occurs because no one should be "coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. So long as the funding is compelled, this injury is the same whether

[5] The assignment of vouchers to political candidates does not constitute government speech because the voucher holder decides which campaign to support. *See* App. A at 9 n.4.

the money comes from dues, fees, or taxation. *See* Baude & Volokh, *supra* at 184 ("[T]here is no practical ground for a distinction between agency fees and taxes, nor is there anything in the text of the First Amendment that suggests one."). Petitioners must betray their own convictions to the same extent as Mark Janus. Yet legislation subsidizing speech through general appropriations is not uncommon. *See 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, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers." (internal citations omitted)); Baude & Volokh, *supra* at 187 (describing commonplace examples of speech subsidies). Many such speech subsidies likely qualify as government speech, but some may not, and the open question of whether the compelled-subsidy doctrine may apply in such settings is an important one that will likely recur. *See, e.g.*, *O'Brien*, 354 F. Supp. 3d at 920 (holding that funding of municipal league speech through general revenue was a valid subsidy of government speech). In fact, some lawmakers have suggested resorting to tax revenue as a means of continuing to fund union speech through compulsion following *Janus*. *See*, *e.g.*, Nolan Hicks, *Dem Lawmaker has 'workaround' to SCOTUS unions decision*, New York Post, July 4, 2018.[6] Thus, this question has direct bearing on this Court's precedent.

This petition presents an ideal vehicle for establishing the scope of the compelled-subsidy

[6] https://nypost.com/2018/07/04/dem-lawmaker-has-workaround-to-scotus-unions-decision/.

doctrine in the context of taxation. The campaign subsidy program sits at a middle ground between an appropriation from a general fund on the one hand, and a targeted assessment or fee on the other. The vouchers are funded by a dedicated property levy. *See* App. H at 23–25. The levy will raise a maximum of $30,000,000 over a 10-year duration at a rate of $3,000,000 per year. *Id.* The voucher levy applies to commercial, business, and residential properties. Seattle.gov, About the Democracy Voucher Program.[7] Washington state law limits municipalities' ability to increase or impose new property taxes such as the voucher levy, *see* Wash. Rev. Code § 84.55.010, but a taxing district may exceed such limits if the levy is authorized by a majority vote of the voters in the district. *See id.* § 84.55.050(1).

The campaign subsidy program used this exception to the state levy cap. *See* App. H at 23–25. The levy only goes to funding the campaign subsidy program. *See id.* Hence, the campaign subsidy program creates a new tax dedicated solely to funding campaign subsidies, without which the increased property tax burden would not exist. Thus, while the campaign subsidy program is funded by a generally applicable tax, it differs from an allocation from the general revenue because the money comes from a new, dedicated tax against a subset of the electorate—property owners. The voucher funding is therefore more akin to "a special subsid[y] exacted from a designated class of persons." *United States v. United Foods*, 533 U.S. 405, 410 (2001).

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[7] https://www.seattle.gov/democracyvoucher/about-the-program (last visited Nov. 4, 2019).

This funding mechanism makes the campaign subsidy program an excellent vehicle for addressing how the compelled-subsidy doctrine applies to taxation. The Court need not address the larger question of whether all allocations from general revenue that go to fund private speech can be subject to a compelled-subsidy challenge, but the Court could still reach an important and unresolved question about how far the compelled-subsidy doctrine may extend.

The case is an excellent opportunity in another important sense. Unlike in *Janus* or other landmark compelled-subsidy cases, the levy funds go exclusively to funding private speech on a specific topic: campaign contributions for local candidates for elected office. Hence, the Court need not address whether appropriations from general revenue for use by private parties will always implicate the compelled-subsidy doctrine if just a portion of that money is used for speech. Moreover, this Court has long recognized that the First Amendment plays a special role in the context of campaign speech. *See Eu*, 489 U.S. at 223. Given both the dedicated tax that funds the vouchers, and the specific use to which the vouchers are put, this case presents an excellent vehicle for addressing an important question about the scope of the compelled-subsidy doctrine in a limited fashion.

B. This case presents the lingering question of which level of scrutiny applies to compelled subsidies

This Court has acknowledged that the level of scrutiny applicable to a compelled speech subsidy is an open question. *See Janus*, 138 S. Ct. at 2465 ("[W]e again find it unnecessary to decide the issue of strict

scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*."); *Harris v. Quinn*, 573 U.S. 616, 648 (2014) ("For present purposes, however, no fine parsing of levels of First Amendment scrutiny is needed because the agency-fee provision here cannot satisfy even the test used in *Knox*."); *Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S. 298, 310 (2012) ("[C]ompulsory subsidies for private speech are subject to exacting First Amendment scrutiny. . . ."). This case presents a clear factual context for answering that question.

If there is a compelled-subsidy case in which strict scrutiny ought to be applied, it is this one. The campaign subsidy program is unlike the subsidies considered by this Court in the past because the money drawn from the dedicated property levy is specifically and exclusively earmarked for a narrow category of political speech: campaign contributions to select Seattle electoral candidates. To date, this Court has only had occasion to apply the intermediate scrutiny standard utilized in *United States v. United Foods*, 533 U.S. 405, where "the mundane commercial nature" of mushroom ads did not create as serious a crisis of conscience as do compelled political subsidies. *Harris*, 573 U.S. at 648 (applying the *United Foods* standard to union fees required of in-home care providers even though "it is arguable that the *United Foods* standard is too permissive"). *See also Knox*, 567 U.S. at 309–10 (applying the *United Foods* standard to an unconsented increase in compelled agency-shop fees). As the *United Foods* dissent argued, "[n]o one here claims that the mushroom producers are restrained from . . . doing anything else more central to the First Amendment's concern with democratic

self-government" and therefore there existed "no risk of significant harm to an individual's conscience." *United Foods*, 533 U.S. at 426–27 (Breyer, J., dissenting).

Hence, this Court has been applying a relaxed test designed for a non-political commercial context where the betrayal of conscience so central to the compelled-subsidy doctrine is not as poignant as the political context in which the test is frequently applied. The time has come for the Court to put new wine into a new bottle.

This case is a prime opportunity for addressing whether that level of scrutiny should be tightened because the speech being subsidized here—campaign contributions—touches on political speech in the course of an election, where First Amendment protection "has its fullest and most urgent application" and where considerations of conscience are especially poignant. *Eu*, 489 U.S. at 223. *See also Citizens United v. FEC*, 558 U.S. 310, 334 (2010) (noting the "primary importance of speech itself to the integrity of the election process"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("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."). The rationale for heightened scrutiny grows where, as here, government compels some people to pay for other people's speech on matters of the highest significance.

The narrow use of the voucher funds may also be relevant to the level of scrutiny because, in this

Court's other compelled-subsidy cases, the subsidy went to pay for a whole range of activities, only some of which included speech. *See, e.g.*, *Janus*, 138 S. Ct. at 2461 (nonmembers' fees went to social and recreational activities, membership meetings and conventions, and other services in addition to the lobbying and other speech to which nonmembers objected); *Southworth*, 529 U.S. at 222–23 (student activity fees went to "various campus services and extracurricular student activities," only a portion of which included private speech by registered student organizations); *United Foods*, 533 U.S. at 408 ("The assessments can be used for projects of mushroom promotion, research, consumer information, and industry information. It is undisputed, though, that most moneys raised by the assessments are spent for generic advertising to promote mushroom sales.").

Seattle's compelled speech subsidy is different. The property levy goes wholly to funding private political speech, thus heightening the injury to objecting property owners. Objectors end up funding two forms of purely private speech: the campaign contribution itself, and the use of that money by the candidate as a "means of disseminating ideas as well as attaining political office." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979).

Both the dedication of the levy solely to speech and the political nature of that speech raise significant questions as to whether the campaign subsidy program should be reviewed under a higher level of scrutiny than assessments that go partially to mushroom advertisements, an issue not "likely to stir the passions of many." *Knox*, 567 U.S. at 309. After all,

where the injury to conscience grows more acute, the concerns that animate strict scrutiny in the compelled speech context rise. Freedom of conscience is the key driver in that context, acting as a safeguard against speech compulsion that "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette*, 319 U.S. at 642. Hence, where a speech subsidy goes directly and exclusively to private speech "that touch[es] on the heart of the existing order," such as political campaigns, then a serious question arises regarding whether strict scrutiny should apply. *Id.*

This Court should also resolve the proper level of scrutiny in order to bring the compelled speech and compelled-subsidy doctrines into greater harmony. This Court has said that the injuries from compelled speech and compelled subsidies are parallel. *See Janus*, 138 S. Ct. at 2464 ("When speech is compelled, however, additional damage is done . . . . Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns."); *Knox*, 567 U.S. at 309 ("Closely related to compelled speech and compelled association is compelled funding of other private speakers or groups."); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 788 (1961) ("Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against." (Black, J., dissenting)). Yet it is well-established that compelled speech outside the context of uncontroversial factual consumer disclosures must face strict scrutiny, *NIFLA v. Becerra*, 138 S. Ct. at 2371–72, while compelled subsidies still face an

intermediate scrutiny designed for the commercial context. It is unclear why the additional link of money that fuels the objectionable speech should make a constitutional difference. After all, "[t]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley*, 424 U.S. at 16. This Court should grant the petition to address this discrepancy and determine whether strict scrutiny should apply to at least some compelled subsidies.

Several Justices have expressed an interest in grappling with this issue. This Court in *Harris v. Quinn* noted that "it is arguable that the *United Foods* standard is too permissive." 573 U.S. at 648. Justice Stevens's *United Foods* concurrence noted that he considered regulation of campaign contributions to be a lesser restraint on liberty than forcing someone to subsidize speech. *United Foods*, 533 U.S. at 418 n.* (Stevens, J., concurring). Since a form of intermediate scrutiny applies to limits on campaign contributions, *see McCutcheon v. FEC*, 572 U.S. 185, 197 (2014), this indicates that Justice Stevens believed something greater than intermediate scrutiny should apply to compelled subsidies of speech, even in the rather mundane context of mushroom advertisements. Justice Thomas's concurrence in *United Foods* agreed: "Any regulation that compels the funding of advertising must be subjected to the most stringent First Amendment scrutiny." 533 U.S. at 419 (Thomas, J., concurring). The Court should grant this petition and decide this important constitutional question.

C. This case offers the Court an opportunity to address tension between campaign finance caselaw and compelled-subsidy caselaw

This Court has never directly addressed the uneasy relationship between the compelled-subsidy doctrine and public financing of political campaigns. The Court should grant this petition to explain how the compelled-subsidy doctrine interacts with the world of public campaign financing.

Campaign funding translates directly to political speech: "When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself." *Colo. Republican Fed. Campaign Commission v. FEC*, 518 U.S. 604, 636 (1996) (Thomas, J., concurring in part and dissenting in part). *See also Buckley*, 424 U.S. at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."). Hence, when someone is forced to subsidize a political campaign, as here, that taxpayer is involuntarily funding the political messages of private individuals. This clashes with principles animating the compelled-subsidy doctrine. The doctrine should therefore apply to the public funding of campaigns, at least where the distribution of the funds is not viewpoint-neutral. *See Southworth*, 529 U.S. at 235 (requiring that student activity fees

be distributed to student groups in a viewpoint-neutral manner).

Yet some courts have read this Court's decision in *Buckley v. Valeo*, 424 U.S. 1, as either foreclosing or severely limiting compelled-subsidy claims in the campaign-finance context. *See, e.g.*, *Little v. Florida Dep't of State*, 19 F.3d 4, 5 (11th Cir. 1994) (reasoning that striking down Florida's allocations to a campaign trust fund as a compelled subsidy would be "contrary to *Buckley*"); *Libertarian Party of Indiana v. Packard*, 741 F.2d 981 (7th Cir. 1984) ("As we interpret *Buckley*, the reason that government constitutionally may be allowed to use public funds to finance political parties is that the funds are not considered to be contributing to the spreading of a political message, but rather are advancing an important public interest, the facilitation of 'public and discussion and participation in the electoral process, goals vital to a self-governing people.'" (quoting *Buckley*, 424 U.S. at 92–93 (footnote omitted))); *May v. McNally*, 55 P.3d 768, 770 (Ariz. 2002) (relying on *Buckley* to reject a compelled-subsidy claim challenging Arizona's public campaign finance program). *Contra Butterworth v. Republican Party of Florida*, 604 So. 2d 477 (Fla. 1992) (holding that an assessment on political contributions that went to funding public campaign financing violated the compelled-subsidy doctrine). The Washington Supreme Court likewise relied on *Buckley* to uphold Seattle's speech subsidy. *See* App. A at 5.

Yet *Buckley* should not be viewed as a compelled-subsidy precedent because the *Buckley* Court did not face a compelled-subsidy claim. Among other things, the *Buckley* plaintiffs challenged the constitutionality of the Presidential Election Campaign Fund (PECF),

which allows federal taxpayers to voluntarily devote a dollar of their tax liability to a fund for presidential campaigns. *See Buckley*, 424 U.S. at 86. For the general election, eligible major-party candidates are entitled to a flat lump sum of $20 million. *Id.* at 87. Eligible primary candidates, on the other hand, receive public funds via a one-for-one matching formula that offers a dollar of public funds for every contribution dollar, up to $250 per contribution. *Id.* at 90.

The *Buckley* plaintiffs primarily argued that the PECF violated the First Amendment by discriminating against non-eligible candidates and minor-party candidates, who were entitled to less money in the general election than their major-party counterparts. *See Buckley*, Brief of the Appellants, 1975 WL 441595, at *152–169. They did not raise a compelled-subsidy claim. Nor could they have done so, since the tax checkoff was not compelled. *Buckley* simply has nothing to say about whether a compelled-subsidy claim is viable in the campaign-finance context.

Buckley's relevance to the compelled-subsidy realm is even more dubious given developments in the law since *Buckley* was decided. This Court's first case recognizing the compelled-subsidy doctrine, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), was not even decided until a year after *Buckley*, and the doctrine has developed substantially since that time. *Compare Abood*, 431 U.S. 209, *with Janus*, 138 S. Ct. 2448.

Hence, while lower courts have mistakenly concluded that *Buckley* settled the question of compelled subsidies in the campaign-finance context,

this Court has not yet addressed the uneasy tension between public campaign financing programs and the compelled-subsidy doctrine. Yet the conflict is a significant one. This Court has said that "the compelled subsidization of private speech seriously impinges on First Amendment rights" and therefore "cannot be casually allowed." *Janus*, 138 S. Ct. at 2464. But many campaign finance programs across the country compel people to subsidize "speech uttered during a campaign for political office," where the First Amendment "has its fullest and most urgent application." *Eu*, 489 U.S. at 223.

This issue has grown in significance as public funding of campaigns has proliferated. Fourteen states currently offer public financing for candidates. *See* National Conference of State Legislatures (NCSL), *Public Financing of Campaigns: Overview* (Feb. 8, 2019).[8] A number of major cities offer public financing as well.[9] These programs differ in important and constitutionally relevant ways. For example, some states allot funds to all eligible candidates as a lump sum, often in an amount equal to the state's expenditure limit. *See id.* Others match private donations up to a certain amount at a dollar-for-dollar ratio, essentially allowing private donors to determine which candidates receive public dollars. *See id.* Whether any such programs fall within the scope of the compelled-subsidy doctrine is an important question given the primacy of individuals' right to

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[8] http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx.

[9] *See, e.g.*, New York City's Matching Funds Program (https://www.nyccfb.info/program); Denver's Fair Elections Fund (Denver Municipal Code, Section 15-51).

refrain from "betraying their convictions." *Janus*, 138 S. Ct. at 2464.

This case is an excellent vehicle for addressing this gap in compelled-subsidy caselaw. The campaign subsidy program has special features that make it especially vulnerable to a compelled-subsidy claim—namely, the program's use of voucher recipients to designate which candidates receive public dollars. *See* App. G at 8–9. That funding mechanism makes the program particularly vulnerable to constitutional challenge. *See infra* II.B. This case would therefore allow this Court to address the compelled-subsidy doctrine's applicability in this important context without having to decide now whether all other forms of public financing violate the First Amendment.

II

THE SUPREME COURT OF WASHINGTON DEVIATED FROM THIS COURT'S COMPELLED-SUBSIDY CASELAW

The Washington Supreme Court's decision created three important conflicts with federal caselaw. First, the Court applied a permissive standard of review that federal courts have widely rejected. Second, the Court misconstrued *Janus* as requiring that a subsidy individually associate the payer with the objectionable speech. App. A at 9. And third, in holding that the program is viewpoint-neutral, the Washington Supreme Court misconstrued this Court's reasoning in *Southworth*, 529 U.S. 217, and employed faulty reasoning that clashes with this Court's compelled-subsidy doctrine.

A. The lower court departed from the uniform consensus among federal courts that rational basis review is not an appropriate standard for free speech claims, including compelled subsidies

The Washington Supreme Court created a conflict with the federal courts in determining that rational basis review was the proper analysis rather than reasonableness review, which is the correct test for viewpoint-neutral speech subsidies. In *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995), this Court held that such subsidies must be "reasonable in light of the purpose served by the forum." Federal circuits have made clear that reasonableness review must not be conflated with rational basis. *See Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966–67 (9th Cir. 2002) ("The 'reasonableness' requirement for restrictions on speech in a nonpublic forum requires more of a showing than does the traditional rational basis test."); *Multimedia Pub. Co of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir. 1993) ("[I]t isn't enough simply to establish that the regulation is rationally related to a legitimate governmental objective, as might be the case for a typical exercise of the government's police power, for this regulation affects protected First Amendment activity that is entitled to special solicitude even in this nonpublic forum.").

This Court has directly rejected rational basis in the compelled-subsidy context. Responding to the dissent in *Janus*, this Court said rational basis applied to a compelled subsidy is "foreign to our free-speech jurisprudence, and we reject it here." *Janus*,

138 S. Ct. at 2465. Even if this Court does not believe the time is ripe to determine whether strict scrutiny applies to compelled subsidies, the Court should still grant the petition to address the Washington Supreme Court's conflict with federal caselaw.

B. The lower court misconstrued this Court's reasoning in *Janus*

This Court should grant the petition to correct the Washington Supreme Court's misreading of *Janus*. The Washington Supreme Court imposed an unsupported and ambiguous limit on the reach of that precedent. The lower court distinguished *Janus* from the campaign subsidy program by emphasizing association, without citing to *Janus* itself: "Unlike the employees in *Janus*, Elster and Pynchon cannot show the tax individually associated them with any message conveyed by the Democracy Voucher Program." App. A at 9. In light of the Washington Court's additional citation to *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), it appears that the Court meant that a compelled-subsidy plaintiff must show that he is likely to be identified as holding the views funded by the subsidy. *See* App. A at 9. *See also Pruneyard*, 447 U.S. at 87 ("[V]iews expressed by members of the public . . . will not likely be identified with those of the owner."). Neither *Janus* nor any other compelled-subsidy case from this Court requires such a showing. Moreover, such a requirement at best injects deep ambiguity into the compelled-subsidy doctrine and at worst threatens to neuter it.

Mark Janus likely would have lost his compelled-subsidy challenge had this Court required him to show that others were likely to confuse his views with the union's. After all, *Janus* is about the rights of

nonmembers to refrain from funding the union, and nonmembers are not likely to be associated with the union, given their lack of membership. Mark Janus was one of 35,000 public employees in his state represented by the American Federation of State, County, and Municipal employees, a massive national organization. *Janus*, 138 S. Ct. at 2461. The risk that he would be directly identified with the views of a large national labor organization that he had not joined was non-existent and irrelevant to this Court's decision. *Cf. D'Agostini v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016) ("And the freedom of the dissenting appellants to speak out publicly on any union position further counters the claim that there is an unacceptable risk the union speech will be attributed to them contrary to their own views.").

The idea that a compelled subsidy must personally identify the payer with the message he objects to in order to sustain a First Amendment injury misapprehends the nature of the First Amendment harm. That injury is to the "individual freedom of mind," which arises whether or not others may mistake the objector's opinions. *Barnette*, 319 U.S. at 633–34. As the *Janus* Court said, coercing people into "betraying their convictions" is a First Amendment harm whether the individual must utter the objectionable speech or pay for the objectionable speech. *Janus,* 138 S. Ct. at 2464. Whether a subsidy "invades the sphere of intellect and spirit" protected by the First Amendment simply has nothing to do with whether the plaintiff is forced to be identified by the public with the message he opposes. *Barnette*, 319 U.S. at 642. *See also Wooley v. Maynard*, 430 U.S. 705 (1977) (plaintiffs could not be forced to install license plate with motto "Live Free or Die" even though there

was no risk that others would identify them as affirming belief in that message).

This fundamental error, if followed by other courts, would threaten the viability of this Court's compelled-subsidy doctrine as a whole. In the union context, nonmembers are not "associated with" the union's political speech just because their wages are garnished, nor are university students associated with the speech of independent student publications funded with student activity fees. Indeed, it is difficult to see how anyone could bring a compelled-subsidy claim under this requirement unless they are forced to pay for a private organization's speech *and* forced to be members of that organization, or where they are unable to engage in speech distancing themselves from the objectionable message. *Cf. Wooley*, 430 U.S. at 722 ("Thus appellees could place on the bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live Free or Die' and that they violently disagree with the connotations of that motto.") (Rehnquist, J., dissenting). This Court has never endorsed such a cramped view of the First Amendment, and doing so would largely undo this Court's holding in *Janus*.

C. The lower court declined to apply this Court's reasoning in *Southworth*

In holding that the campaign subsidy program is viewpoint-neutral, the Washington Supreme Court once again created a conflict with this Court's compelled-subsidy doctrine, specifically *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217. Contrary to this Court's reasoning in *Southworth*, the Washington Supreme Court held that a program that distributes public

funds to speakers in a manner that favors majoritarian views is viewpoint-neutral. That conflict deserves this Court's attention.

Petitioners argued below that the campaign subsidy program was not viewpoint-neutral because the design and purpose of the program are to allow private citizens to allot public money based on their partisan political viewpoints. As a result, speech subsidies inevitably skew in favor of candidates with majoritarian support. Thus, in design and effect, the program is not viewpoint-neutral.

In reaching the contrary conclusion, the Washington Supreme Court misread this Court's reasoning in *Southworth*, 529 U.S. 217. In that case, this Court examined the constitutionality of student activity fees paid by university students that funded a variety of extracurricular activities, including speech by registered student organizations. *Id.* at 222–23. The Court held that the subsidy implicated the First Amendment and could only withstand scrutiny if it was viewpoint-neutral. *Id.* at 229–30. The university had various means of allocating activity-fee funds, one of which was a referendum process that allowed a majority vote of the student body to fund or defund a registered student organization. *Id.* at 230. The Court reasoned that such a process violated viewpoint neutrality: "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the

same respect as are majority views." *Id.* at 235.[10] *See also Amidon v. Student Ass'n of SUNY at Albany*, 508 F.3d 94, 102 (2d Cir. 2007) (Holding that a similar "referendum policy creates a substantial risk that funding will be discriminatorily skewed in favor of [registered student organizations] with majoritarian views. Favoritism of majority views is not an acceptable principle for allocating resources in a limited public forum.").

The Washington Supreme Court agreed with Petitioners that the campaign subsidy program necessarily means that popular candidates will receive more public money for their campaign than unpopular candidates. *See* App. A at 6. According to the lower court, however, this majoritarian skew did not implicate *Southworth* because that distortionary effect "reflects the inherently majoritarian nature of democracy and elections." *See id.* But this "majoritarian" skew was present in *Southworth* as well. In fact, that was the crux of the problem in *Southworth*. While the government may rightfully subject some aspects of governance to the democratic process, it is axiomatic that the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy" and "place them beyond the reach of majorities." *Barnette*, 319 U.S. at 638. The "individual freedom of mind" protected by the compelled subsidy and compelled speech doctrines is one of these subjects. *Id.* at 637.

The Washington Supreme Court also sought to absolve the City of any responsibility for a partisan

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[10] This Court remanded the case for the lower courts to address the constitutionality of the referendum because of lingering factual questions. *Id.* at 221.

distortion in funding by pointing out that "the decision who receives vouchers is left to the individual municipal resident and is not dictated by the city or subject to referendum." App. A at 6. But the university in *Southworth* was not responsible for the vote of its student body either. Rather, it was the governmental decision to allow private individuals to decide where public money goes that created the constitutional problem. And while *Southworth* involved an up-or-down vote regarding whether a group would receive funding, this is only a difference in degree. It was the idea that more popular organizations would be favored in the funding process that troubled the *Southworth* Court, and that problem persists here.

The fact that private individuals decide where the money goes cannot absolve the City of an unconstitutional compelled subsidy. After all, in any viable compelled-subsidy case, the private speaker decides what to say with the compelled funds. Indeed, that's the nature of the constitutional problem. If the government, rather than the private speaker, decided on the message funded by the subsidy, then a compelled-subsidy claim could not be brought because of the government speech doctrine. *See Johanns*, 544 U.S. at 562 (government speech doctrine bars a compelled-subsidy claim where "the government sets the overall message to be communicated and approves every word that is disseminated").

This Court should grant the petition to correct the Washington Supreme Court's mistaken interpretations of *Janus*, *Southworth,* and the compelled-subsidy doctrine.

III

PROGRAMS SIMILAR TO THE CAMPAIGN SUBSIDY PROGRAM ARE GROWING IN POPULARITY, AND THEY POSE A SERIOUS THREAT TO FIRST AMENDMENT INTERESTS AND POLITICAL DEBATE

Seattle's campaign subsidy idea has quickly become an issue of national interest. Federal, state, and local governments across the country are proposing programs like Seattle's, while presidential candidates and scholars are advocating for their proliferation. Since Seattle's program is the first of its kind, "[a]dvocates for campaign finance reform are eagerly watching Seattle's experiment to see if they want to seek its adoption in other cities." Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 Geo. Wash. L. Rev. 1039, 1076 (2017). Although state and local governments are often thought to be "laboratories of democracy," any experimentation must be consistent with the First Amendment. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Given the rising interest in Seattle's program, it is important for this Court to address the constitutional questions it raises.

Campaign subsidy programs like Seattle's have gained traction at all levels of government across the nation. In March, the House of Representatives passed a bill that would establish a pilot voucher program. H.R. 1, 116th Cong. § 5101 (1st Sess. 2019). Were this pilot program to become law, voters in three states designated by the Federal Election Commission could request $25 vouchers to give to a congressional candidate. *Id.* § 5101(a); § 5102(a)(1)(A). And last year, Congressman Ro Khanna introduced a similar

concept called "The Democracy Dollars Act." H.R. 7306, 115th Congress (2d Sess. 2018); *see also* Press Release, Rep. Khanna Welcomes Sen. Gillibrand's "Democracy Dollars" Plan, Praises Others to Join the Field, (May 1, 2019).[11] Two states—Washington (Initiative 1464) and South Dakota (Initiated Measure 22)—have also considered "Democracy Dollars" programs. South Dakota passed voucher legislation but ultimately repealed its program after a court granted a preliminary injunction against the program in a lawsuit brought by republican lawmakers, and voters rejected Washington's program at the ballot box. *See* Ballotpedia, *South Dakota Revision of State Campaign Finance and Lobbying Laws, Initiated Measure 22 (2016)*;[12] Lewis Kamb, *Washington voters rejecting overhaul of campaign finance system*, Seattle Times, Nov. 8, 2016.[13]

Following in Seattle's footsteps, cities like Albuquerque, Austin, New York, San Diego, and San Francisco have expressed interest in campaign subsidy programs. Gregory Scruggs, *Can Small-Money Democracy Vouchers Balance Out Big-Money PACs in Seattle's Municipal Elections?*, Next City, Aug. 6, 2019.[14] In this month's elections, Albuquerque voters defeated a program patterned after Seattle's by a narrow margin. *See* Ballotpedia, *Albuquerque, New Mexico, Proposition 2, Democracy Dollars Program Initiative (November 2019).*[15]

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[11] https://is.gd/3wUIez.
[12] https://is.gd/dVGfR8.
[13] https://is.gd/jfooHO.
[14] https://is.gd/b0PzFl.
[15] https://is.gd/v7n4gr (last visited Nov. 6, 2019).

Even presidential candidates are calling for "Democracy Dollars" programs. Inspired by Seattle, Senator Kristen Gillibrand advocated for "Democracy Dollars" as a part of her "Clean Elections Plan." David Gutman, *Presidential hopeful Kirsten Gillibrand wants to take Seattle's public campaign finance system nationwide*, Seattle Times, May 17, 2019.[16] Following Gillibrand's lead, presidential candidate Andrew Yang has also proposed a "Democracy Dollars" initiative. Policy Democracy Dollars, Yang 2020,[17] (stating that a program like Democracy Dollars "has been used in Seattle to great effect, and we can take their program national to move towards publicly funded elections").

Legal scholarship is also promoting the proliferation of campaign subsidy programs. Nearly 10 years ago, Professor Lawrence Lessig of Harvard Law School advocated for a program strikingly similar to the one challenged here. Lawrence Lessig, *More Money Can Beat Big Money*, NY Times, Nov. 16, 2011.[18] Scholars have subsequently praised Seattle and sought to expand the blueprint nationwide: Yale Law Professors Bruce Ackerman and Ian Ayres wrote that "[t]he challenge is to transform Seattle's approach into a plausible national program." Bruce Ackerman & Ian Ayres, *'Democracy dollars' can give every voter a real voice in American politics*, The Washington Post, Nov. 5, 2015;[19] s*ee also* Joshua A. Douglas, *Local Democracy on the Ballot*, 111 Nw. U. L. Rev. Online 173, 178 (2017) ("[C]ities should now

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[16] https://is.gd/4yuJgh.
[17] https://is.gd/TieIN7 (last visited Nov. 5, 2019).
[18] https://is.gd/yb5kD1.
[19] https://is.gd/B6pSNT.

watch Seattle and evaluate the success of its experiment with using campaign subsidies for public financing. Seattle is the courageous city that has gone first, and if the overall experience is positive, then other cities can use that evidence in support of their own similar initiatives. Academics should study these reforms to discern which ones work best and deserve widespread adoption.").

The majoritarian nature of Seattle's vouchers and the program's funding mechanism make it even more problematic than ordinary campaign-finance laws. Under the campaign subsidy program, popular candidates necessarily receive more money than unpopular candidates. By favoring speakers with majoritarian support at the expense of candidates supported by a minority of voters, the program distorts public debate and further entrenches popular platforms and candidates. Seattle's program, and others like it, will entrench incumbents and place lesser-known candidates at a heavy disadvantage. The spread of the voucher idea poses a threat to democratic politics that warrants this Court's consideration.

CONCLUSION

This Court should grant the petition.

DATED: November 2019.

Respectfully submitted,

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