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Honorable Beth Andrus
KING COUNTY Dept. 35

Noted for Hearing without Argument
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Nov 15 2017
CASE NUMBER 17-2-16501-8 SEA

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

<p>MARK ELSTER and SARAH PYNCHON,</p> <p>Plaintiffs,</p> <p>v.</p> <p>THE CITY OF SEATTLE, a Washington Municipal corporation,</p> <p>Defendant.</p>	<p>Case No. 17-2-16501-8 SEA</p> <p>PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER TO DISMISS</p>
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REQUEST FOR RELIEF

On November 3, 2017, this Court granted the City of Seattle’s motion to dismiss Plaintiffs’ challenge to the democracy-voucher program. The Court agreed that the voucher program implicates Plaintiffs’ First Amendment rights. Yet the Court dismissed the case, relying on a public forum analysis not briefed by either party and without addressing Plaintiffs’ argument that the voucher program’s content-based nature suffices to trigger strict scrutiny.

Reconsideration of the Court’s Order is proper for three reasons:

1. Further briefing is appropriate because a key portion of the Court’s ruling relied on a First Amendment doctrine that neither party had raised directly in the briefing.

1 **STATEMENT OF THE ISSUE**

2 Whether this Court should allow the parties to engage in further briefing beyond the
3 motion-to-dismiss stage on a First Amendment issue regarding political speech where the Court
4 has held that the First Amendment applies.

5 **EVIDENCE RELIED UPON**

6 Plaintiffs rely on the Court’s November 3 Order as well as the motions and pleadings to
7 date.

8 **AUTHORITY**

9 Reconsideration is proper here. Civil Rule 59 allows parties to seek reconsideration of
10 rulings on dispositive motions for a variety of reasons, including:

- 11 • An irregularity in a court ruling preventing a party from having a fair trial;
- 12 • A ruling that is contrary to law;
- 13 • The failure to achieve substantial justice.

14 Superior Court Civil Rule 59(a).

15 This case merits reconsideration so that the parties can brief the public-forum issue. In its
16 Order, the Court applied the First Amendment standard applicable for a limited public forum.
17 Order at 5. That issue, however, was not raised by either party. The Court’s Order indicates that
18 *Board of Regents of the University of Wisconsin v. Southworth*—a case briefed by both parties—
19 is the basis for applying a public-forum analysis.

20 The *Southworth* opinion, however, expressly stated that the student activity fee program
21 was not a limited public forum: “[T]he student activities fund is not a public forum in the traditional
22 sense” and public-forum cases “most often involve a demand for access, not a claim to be exempt
23 from supporting speech.” *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 229-30, 120

1 S. Ct. 1346, 146 L. Ed. 2d 193 (2000). The Court relied on the public-forum doctrine only by
2 analogy. *Id.* Indeed, instead of holding that the program was a public forum, the *Southworth* Court
3 held that the viewpoint-neutrality standard was appropriate because of a university’s unique
4 interest in facilitating student speech. *See Southworth*, 529 U.S. at 232-33; *Harris v. Quinn*, ___
5 U.S. ___, 134 S. Ct. 2618, 2644, 189 L. Ed. 2d 620 (2014) (declining to extend *Southworth* outside
6 the university context because “[p]ublic universities have a compelling interest in promoting
7 student expression in a manner that is viewpoint neutral”).

8 Additionally, neither the City nor the Plaintiffs argued that *Southworth* was a public-forum
9 case, or that public-forum analysis is applicable here. Rather, *Southworth* imported only one aspect
10 of the public-forum analysis into the unique university setting: viewpoint neutrality. *Southworth*,
11 529 U.S. at 229-30. *Southworth* thus left three key questions unresolved:

- 12 1. Does public-forum analysis apply to the compelled-subsidy doctrine generally?
- 13 2. Do the public-forum rules regarding content-based speech regulations extend to the
14 compelled-subsidy setting?
- 15 3. Does *Southworth*’s analogy to public-forum cases extend outside the university
16 context?

17 These questions have major implications for the compelled-subsidy doctrine and deserve detailed
18 briefing by both parties.

19 Reconsideration is also appropriate because the Court did not address the content-based
20 nature of the voucher program. In both the briefing and oral argument, Plaintiffs contended that
21 the voucher program is a content-based speech regulation subject to strict scrutiny even if it is
22 viewpoint-neutral. The Court’s Order holds that the program is viewpoint-neutral but does not
23 address Plaintiffs’ alternative rationale for applying heightened scrutiny. This issue would benefit

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1 from further briefing, and an express holding on the issue would provide guidance to the parties
2 on appeal.

3 Finally, reconsideration is proper here because the standard of review—including
4 application of that standard—deserves separate written and oral argument. The City’s motion to
5 dismiss argued at length that the First Amendment does not apply to this case in the first instance.
6 The Court rightly rejected that argument. Given that holding, it would be appropriate to resolve
7 only the question of the First Amendment’s applicability at the motion-to-dismiss stage and save
8 the remaining issues for summary judgment briefing or at least supplemental briefing.

9 This would allow further vetting of the City’s arguments—such as its comparison to school
10 vouchers. As the Court recognized, the school-voucher comparison is questionable given
11 Buckley’s warning that Establishment Clause doctrine should not be extended to Free Speech
12 issues. Order at 6 (“The Court is reluctant to invoke Establishment Clause precedent here given
13 the Supreme Court’s admonition in *Buckley* that any analogy to Establishment Clause law is
14 ‘patently inapplicable’ to the issue presented in that case.”); *Buckley v. Valeo*, 424 U.S. 1, 92, 96
15 S. Ct. 612, 46 L. Ed. 2d 659 (1976). The Court nonetheless relied on the analogy, citing a lack of
16 other viable comparisons. Order at 6. Since the City raised the school-voucher analogy only in its
17 reply brief, Plaintiffs never had a chance to issue a written response to that analogy, which played
18 an important—if hesitant—role in this Court’s Order. Either requesting supplemental briefing or
19 awaiting further briefing on summary judgment would allow for deeper treatment of this and other
20 issues that may have received limited development at the preliminary stage of a motion to dismiss.

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1 **CONCLUSION**

2 First Amendment issues regarding political speech are of vital importance. Further briefing
3 would allow full vetting of issues relevant to the resolution of this case that have not had sufficient
4 opportunity for briefing by both parties. The motion for reconsideration should be granted.

5 PACIFIC LEGAL FOUNDATION
6 BRIAN T. HODGES, WSBA No. 31976
7 ETHAN W. BLEVINS, WSBA No. 48219

8 Date: November 8, 2017

9 By: s/ Ethan W. Blevins
10 Ethan W. Blevins
11 WSBA No. 48219
12 10940 NE 33rd Place, Suite 210
13 Bellevue Washington 98004
14 Telephone: (425) 576-0484
15 Facsimile: (425) 576-9565
16 Email: EBlevins@pacificlegal.org

17 *Attorneys for Plaintiffs*

18 **Certification of Compliance**

19 I certify that this document contains 1,235 words and complies with Local Civil Rules.

20 s/ Ethan W. Blevins
21 Ethan W. Blevins
22 WSBA No. 48219

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that a true copy of the above document was served upon counsel for Defendant
3 City of Seattle via this Court’s e-Service application on Nov. 8, 2017.

4 Micheal Ryan, WSBA # 32091, Michael.Ryan@seattle.gov
5 Jeff Slayton, WSBA # 14215, Jeff.Slayton@seattle.gov
6 Kent Meyer, WSBA # 17245, Kent.Meyer@seattle.gov
7 Lester Lawrence Lessig, Ill. Bar # 6207359, lessig@law.harvard.edu

8 True copies of the above document were served upon counsel for the amici in this case via email
9 on Nov. 8, 2017.

10 Walter M. Smith, WSBA # 46695, walter@smithdietrich.com
11 Knoll D. Lowney, WSBA # 23457, knoll@smithandlowney.com

12 s/ Ethan W. Blevins
13 Ethan W. Blevins, WSBA No. 48219

Honorable Beth M. Andrus
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Noted for Hearing without Argument
Nov. 15, 2017

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

<p>MARK ELSTER and SARAH PYNCHON, Plaintiffs, v. THE CITY OF SEATTLE, a Washington Municipal corporation, Defendant.</p>	<p>Case No. 17-2-16501-8 SEA [Proposed] ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER OF DISMISSAL</p>
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Pending before the Court is Plaintiffs' motion for reconsideration of the Court's order granting the City of Seattle's motion to dismiss.

For good cause shown, Plaintiffs' motion for reconsideration is GRANTED. The Court's November 3 Order is hereby rescinded, and the City's motion to dismiss is DENIED.

IT IS SO ORDERED.

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Dated: _____

Honorable Beth M. Andrus
Chief Civil Judge for the
King County Superior Court

Presented by:

PACIFIC LEGAL FOUNDATION
BRIAN T. HODGES, WSBA No. 31976
ETHAN W. BLEVINS, WSBA No. 48219

By: s/ Ethan W. Blevins
Ethan W. Blevins, WSBA No. 48219
10940 NE 33rd Place, Suite 210
Bellevue Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
Email: EBlevins@pacificallegal.org

Attorneys for Plaintiffs

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4 Micheal Ryan, WSBA # 32091, Michael.Ryan@seattle.gov
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6 Kent Meyer, WSBA # 17245, Kent.Meyer@seattle.gov
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