

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 97-3510 and 97-3548

SCOTT H. SOUTHWORTH, AMY SCHOEPKE
and KEITH BANNACH, et al.,

Plaintiffs-Appellees, Cross-Appellants,

v.

BOARD OF REGENTS OF UNIVERSITY OF
WISCONSIN SYSTEM, et al.,

Defendants-Appellants, Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN,
THE HONORABLE JOHN C. SHABAZ, CHIEF JUDGE, PRESIDING,
CASE NO. 96-C-292

DEFENDANTS-APPELLANTS-CROSS-APPELLEES' PETITION FOR PANEL
REHEARING AND FOR REHEARING EN BANC

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Defendants-appellants-cross-appellees Board of Regents of the University of Wisconsin System (herein, the Regents or Board of Regents), by their attorneys, James E. Doyle, Attorney General, and Peter C. Anderson, Assistant Attorney General, petition for panel rehearing and rehearing en banc pursuant to Fed. R. App. P. Rules 35 and 40.

FED. R. APP. P. RULE 35(b)(1) STATEMENT

This case returns to the Court on remand from the Supreme Court following decision in *Bd. of Regents of Univ. of Wisconsin v. Southworth*, 120 S. Ct. 1346 (2000), which resulted in the unanimous reversal of this Court's earlier decision in *Southworth v. Grebe*, 151 F.2d 717 (7th Cir. 1998). With one exception (concerning the use of referenda to allocate student fees), the Supreme Court upheld the imposition of a mandatory student fee at the Madison campus of the University of Wisconsin, used to support student expressive activities. In upholding the challenged fee system, the Court relied on the parties' stipulation that "[t]he process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion," quoted at *Southworth*, 120 S. Ct. at 1351, which the Court noted had been "entered . . . at the outset of this litigation [and] which was again reiterated during argument in this Court." *Southworth*, 120 S. Ct. at 1352. The sustaining of the non-referendum aspects of the fee system was not contingent or equivocal, the Court stating that "[w]e decide that the viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students." *Id.* at 1354. *See also id.* at 1357 (Souter, J., concurring in the judgment) ("The majority today validates the University's student activity fee I agree that the University's scheme is permissible . . .").

Following the parties' simultaneous filing of Circuit Rule 54 statements concerning remand, on June 23, 2000, the Panel that had originally decided the case issued an order remanding the case to the district court, in part "for consideration of the plaintiffs' request to amend their complaint and void the stipulation concerning the viewpoint neutrality of the SGAF [Student Government Activity Fund] and GSSF [Government Student Services Fund] allocation methods." Order at 5. This part of the panel decision conflicts with the decision of the Supreme Court concerning the scope of the issues to be decided on remand. Rather than attempting to determine the intended scope of the Court's remand by direct reference to the Court's decision, the panel decision attempts to evaluate the reasonableness of the plaintiffs' request to reopen their stipulation of viewpoint neutrality. See Order at 5 ("Under these circumstances, the plaintiffs' request seems reasonable"). The circumstances identified are the plaintiffs' claim that they litigated the case under what they "perceived to be the governing law at the time," with the Supreme Court unexpectedly "chang[ing] the landscape of the law," *id.* at 4, and the Panel's perception that the Supreme Court "did not consider the constitutionality of the SGAF and GSSF methods of funding student activities because of the plaintiffs' stipulation." *Id.* at 5. However, neither is the case. It has been recognized throughout this litigation, by both parties as well as each court to decide this case, that the principal issue of the case had been "acknowledged but unresolved in *Rosenberger* [*v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995)]." *Southworth*, 120 S. Ct. at 1356; see also *Southworth*, 151 F.3d at 722. With respect to the Panel's belief that the

Supreme Court did not consider the constitutionality of the non-referendum aspects of the fee system by reason of the plaintiffs' stipulation, an in-context examination of the Court's statements reveals precisely the opposite to be the case. *Because* of the plaintiffs' stipulation of viewpoint neutrality, which their counsel reiterated at oral argument, the Court considered and upheld the constitutionality of the SGAF and GSSF funding.

By not first examining the Supreme Court's decision, and by instead focusing on the apparent reasonableness of the plaintiffs' request to reopen their stipulation, but without affording the University an opportunity to be heard on the issue, the panel decision employs an incorrect methodology which results in the Court's failure to give effect to the Supreme Court's judgment. Accordingly, en banc rehearing is appropriate under Fed. R. App. P. Rule 35(b)(1)(A).

Circuit Rule 54 does not provide for a party to file a response to another party's statement on remand. The Panel did not direct the University to respond to the claimed reasonableness of the plaintiffs' request to reopen their stipulation. For instructing the district court on its discretion to decide whether to relieve the plaintiffs of their stipulation, the panel decision then prejudices the issue by stating that the plaintiffs' request seems reasonable, identifying specific circumstances that purportedly make it so.

At the same time, the panel decision discusses the substantive issue of viewpoint neutrality in the context of a student fee non-spatial forum, Order at 3-4, but again without affording the University an opportunity to brief the issue. The result is that the

panel decision strongly suggests that a first-come-first served forum allocation rule would violate the requirement of viewpoint neutrality in the context of a student fee system. This conclusion is wrong, since such a system would not discriminate on the basis of a fee applicant's viewpoint. The panel decision also contains a general discussion of the law surrounding the voiding of a party's stipulation, Order at 5, but without directing the University to file a response to the plaintiffs' remand statement, where the issue was first raised.

Perhaps the most fundamental quality of a court is its fairness. The issue of whether this Court should make substantive rulings on issues to be decided or potentially to be decided in a given case, but without affording the parties an opportunity to be heard, raises an issue of exceptional importance given that the case is on remand from the Supreme Court, given the amount of litigation that has led up to the Supreme Court's decision in the case and given that the party which has not been heard on these substantive issues is a public university serving one of only three states comprising this circuit. Accordingly, rehearing en banc is appropriate under Fed. R. App. P. Rule 35(b)(1)(B).

ARGUMENT

- I. The Panel Decision Does Not Attempt To Discern The Scope Of The Supreme Court's Remand By Reference To The Court's Decision But By Consideration Of The Apparent Reasonableness Of The Plaintiffs' Request To Reopen The Issue Of Viewpoint Neutrality And Without Inviting Or Directing The University To Respond To The Claimed Reasonableness Of The Plaintiffs' Request. This Is An Incorrect Methodology For Determining The

Scope Of Remand Which Results In A Failure To Give Effect To
The Supreme Court's Judgment.

The Supreme Court has made clear that

“[w]hen a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. . . .”

Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 427-28 (1978) (per curiam), quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). More generally,

[O]nce a case has been decided, then, unless the decision was avowedly tentative (for example, a decision granting or denying a preliminary injunction or--our earlier example--a decision by a motions panel), there is a natural and healthy reluctance not to reconsider the decision unless powerful reasons are given for doing so.

Johnson v. Burken, 930 F.2d 1202, 1207 (7th Cir. 1991).

The panel decision's methodology is not to attempt to determine what the Supreme Court intended to dispose of by its decree. Rather, the decision's methodology attempts to assess the reasonableness of the plaintiffs' request that they be allowed to void their stipulation of viewpoint neutrality, with two out-of-context quotations from the Court's decision cited in support of the request. This methodology is wrong, and the result it produces is wrong.

In order to determine what issues the Supreme Court intended to dispose of by its decree, the starting place must be the Court's decision itself. Justice Kennedy summarizes the Court's holding in this case at the beginning of his opinion:

Relying upon our precedents which protect members of unions and bar associations from being required to pay fees used for speech the members find objectionable, both the District Court and the Court of Appeals invalidated the University's student fee program. . . .

We reverse. The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral. *We do not sustain, however,* the student referendum mechanism of the University's program, which appears to permit the exaction of fees in violation of the viewpoint neutrality principle. *As to that aspect of the program,* we remand for further proceedings.

Southworth, 120 S. Ct. at 1349-50 (emphasis added).

The statement is not avowedly tentative. The Court does not vacate this Court's judgment for an evaluation of the viewpoint neutrality of the full funding mechanism, but reverses. The phrase "[w]e do not sustain, however, the student referendum mechanism . . ." plainly implies that the other aspects of the system are sustained. In the final sentence of the quoted passage, the remand is expressly limited to the aspect of the program authorizing student referendum funding of certain expressive activities.

This is consistent with the remainder of the opinion, as well as with the concurrence's understanding of the majority opinion. The Court contrasts the student referendum process with funding provided through the SGAF and GSSF mechanisms, emphasizing the viewpoint neutrality of both SGAF and GSSF funding. *Id.* at 1351. The Court again contrasts the general funding system with the referendum process, expressly stating--not in the conditional tense as suggested in plaintiffs' Circuit Rule 54 Statement (at 1), but in the present indicative tense--that the non-referendum aspect is constitutionally adequate:

We decide that the viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students. The student referendum aspect of the program for funding speech and expressive activities, however, appears to be inconsistent with the viewpoint neutrality requirement.

Id. at 1354.

Following its discussion of the SGAF and GSSF funding systems, the Court states that it “*remains* to discuss the referendum aspect of the University’s program.” *Id.* at 1357 (emphasis added). It is in the discussion of this remaining issue that the Court states that a remand is necessary. *Id.*

It is clear that the concurrence also perceives the majority to be upholding the challenged fee system, with the exception of the referendum funding component. Concurring in the judgment, Justice Souter characterizes the majority as “today validat[ing] the University’s student activity fee,” stating his agreement “that the University’s scheme is permissible.” *id.* at 1357 (Souter, J., concurring in the judgment).

The only part of the decision identified by the plaintiffs as demonstrating an intent to allow reconsideration of the plaintiffs’ viewpoint neutrality stipulation is the Court’s statement, in discussing the referendum issue, that “the case in all events must be reexamined in light of the principles we have discussed.” *Id.*, 120 S. Ct. at 1357. If the Court meant that the viewpoint neutrality of the GSSF and SGAF funding needed to be reexamined on remand, its expression of purpose was very indirect. In that event, the Court chose to make a statement regarding an aspect of the case it had already decided by placing it with the discussion of the single issue it had expressly reserved for

remand. Logically, however, there is no inconsistency between the Court's stating that remand on the issue of the viewpoint neutrality of the referendum funding mechanism is required and its stating that when this occurs, the case must be reexamined in light of the other principles discussed in the decision. In addition to the principle of viewpoint neutrality, the decision discusses the legitimacy of a public university's seeking to facilitate the free and open exchange of ideas by, and among its students, *id.* at 1354, *see also id.* at 1355, (“[R]ecognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech”; “The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds”); declines to recognize a general opt out right, noting that the costs and disruption of such a system could render ineffective a program to support extracurricular speech, *id.* at 1356; notes the lack of principled basis upon which to differentiate on-campus from off-campus expression for purposes of constitutional analysis, *id.* at 1356-57 (“Universities possess significant interests in encouraging students to take advantage of the social, civic, cultural, and religious opportunities available in surrounding communities and throughout the country”), and emphasizes that the University's own speech is likely to be treated as a form of governmental speech, *id.* at 1357 (“Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different”).

The panel decision relies on two excerpts from the Court’s decision as supporting the reasonableness of the plaintiffs’ request to reopen their stipulation. The decision first characterizes the Supreme Court as having “not consider[ed] the constitutionality of the SGAF and GSSF methods of funding student activities because of the plaintiffs’ stipulation.” Order at 5, citing *Southworth*, 120 S. Ct. at 1352. It then states that the Court “hinted” that the plaintiffs’ request seemed reasonable. Order at 5, citing *Southworth*, 120 S. Ct. at 1357.

Exactly opposite is the case. In this Court, the plaintiffs explain their having stipulated to the fee system’s viewpoint neutrality by arguing that their understanding of the law at the time made the issue “irrelevant to the ultimate resolution of the case.” Appellee’s Circuit Rule 54 Statement at 5. The explanation provided to the Supreme Court was materially different. There, the plaintiffs stated that:

The students agreed to a stipulation that “[t]he process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion,” (J.A. 14-15), because the University does not enforce any of its formal policies that operate as viewpoint-based exclusions like the one struck down in *Rosenberger*.

Board of Regents of the University of Wisconsin System, et al. v. Scott Harold Southworth, et al., No. 98-1189, Respondents’ Br. at 34 n.2 (published at 1999 WL 618376).

Plaintiffs identified the formal policy they were referring to as a pre-*Rosenberger* policy statement limiting funding of partisan political and religious activities, *see id.*, although the University also conceded that the policy against funding religious speech could not be enforced under *Rosenberger*.

Despite their stipulation of viewpoint neutrality, the plaintiffs sought to suggest that the challenged fee system resulted in viewpoint-based allocation decisions, asserting that “[w]hich groups receive money depends on . . . the value-based priorities of those controlling the student government.” *Id.* at 30-31. However, the plaintiffs did not ask to be relieved of their stipulation or suggest that if the Court accepted the University’s legal argument, the case be remanded to allow them to ask to have their stipulation voided. To clarify the plaintiffs’ position, the Court asked plaintiffs’ counsel at the very outset of his oral argument whether there was not a stipulation of viewpoint neutrality. Rather than advise the Court that the stipulation was entered in error or that a remand might be necessary to determine whether the stipulation should be voided, counsel confined his response to reaffirming plaintiffs’ stipulation. *See Board of Regents of the University of Wisconsin System, et al. v. Scott Harold Southworth, et al.*, No. 98-1189, 1999 WL 1050283 (Nov. 9, 1999) (Transcript of Oral Argument) at 11.

It was in this context that the Court rejected the plaintiffs’ efforts to sidestep their stipulation of viewpoint neutrality, referring in its decision to both page 31 of the plaintiffs’ merits brief and to their subsequent contention that the restriction on funding of partisan political activities rendered the system discriminatory. *Southworth*, 120 S. Ct. at 1352. Expressly noting the plaintiffs’ reiteration of their stipulation during oral argument, *id.*, the Court did not hint that it was reasonable for plaintiffs to seek to reopen their stipulation on remand. The Court also did not state that it was avoiding consideration of the constitutionality of the SGAF and GSSF methods of funding student

activities because of the plaintiffs' stipulation, as the Panel's interpretation suggests. Rather, as the language quoted in the panel decision reveals, the Court declined to consider *the plaintiffs' challenge* to this aspect of the system. Instead of declining to reach the issue, by reason of the plaintiffs' stipulation of viewpoint neutrality, the Court considered and upheld the constitutionality of the SGAF and GSSF funding.

Accordingly, the Panel's perception that the Supreme Court did not decide the constitutionality of the non-referendum aspects of the system is incorrect. Aside from this perception, the only other circumstance identified as supporting the reasonableness of the plaintiffs' request to have their stipulation revisited consists of the plaintiffs' claim that they "made this stipulation based on what they perceived to be the governing law at the time, *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) and *Keller v. State Bar of California*, 496 U.S. 1 (1990) and that . . . the Supreme Court's decision in *Southworth* changed the landscape of the law." Order at 4.

The reality is that the issue of *Abood's* and *Keller's* application to a student fee limited forum was anything but settled, having been expressly left open in *Rosenberger*. There, the Court had stated:

The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. *See Keller* [citation omitted]; *Abood* [citation omitted].

Rosenberger, 515 U.S. at 840. *See also id.* at 851 (O'Connor, J., concurring); *see also Southworth*, 120 S. Ct. at 1356 (noting the Court's having acknowledged but not resolved the issue in *Rosenberger*).

Moreover, much of the focus of the Regents' argument in the district court, in this Court and in the Supreme Court was that because *Rosenberger* funding resulted in the creation of a non-spatial, limited public forum, requiring students to support its creation by paying a nominal student fee did not violate First Amendment principles any more than would requiring students to partly pay the costs of constructing or maintaining a traditional spatial forum, such as an auditorium, classroom, park or outside mall. This argument rested to a large extent on the parties' stipulation of viewpoint neutrality, with the University, like the members of this Court who dissented from the denial of our earlier petition for rehearing, pointing to the "difference between a requirement to pay money to an organization that explicitly aims to subsidize one viewpoint to the exclusion of other viewpoints, as in *Abood* and *Keller*, and a requirement to pay a fee to a group that creates a viewpoint-neutral forum, as is true of the student activity fee here." *Southworth v. Grebe*, 157 F.3d 1124, 1129 (7th Cir. 1998) (D. Wood, J., dissenting), quoted in *Southworth*, 120 S. Ct. at 1353.

Plaintiffs' suggestion that they believed the law to be settled borders, therefore, on an after-the-fact fabrication. Their Circuit Rule 54 statement, while given a patently self-serving gloss, nevertheless reveals that the decision to stipulate to viewpoint neutrality constituted a strategic litigation decision, designed to focus the case on a question the plaintiffs viewed as important. The plaintiffs explain that they:

did not want this case to devolve into a *Rosenberger* case, as if the students here were objecting because they applied for funds and were denied. In the minds of the students, entering into the stipulation on viewpoint neutrality dispensed of a separate issue involving distribution of

funds and focused the case on whether the mandatory contribution requirement was constitutional. If the students had not stipulated to viewpoint neutrality, the University would have opposed our motion for summary judgment and demanded a trial on an issue the students (and later this Court) thought was irrelevant to the ultimate resolution of the case.

Appellees' Circuit Rule 54 Statement at 5.

In other words, plaintiffs were so convinced that their view of the law was correct, they did not need to consider the possibility of the district court, this Court or the Supreme Court accepting the Regents' reasoning. The Regents submit that under these circumstances, plaintiffs' request to reopen their stipulation is not reasonable.

II. The Panel Decision Unfairly Makes Substantive Pronouncements Without Affording The University And Opportunity To Be Heard.

Circuit Rule 54 provides a procedure for the Court to decide which issues are to be decided on remand, the procedure by which they should be decided and the appropriate court for deciding them. It is not a procedure for the actual decision of those issues. The rule requires the parties to file simultaneous "statements" regarding the proper course of remand. It contains no provision for briefing of substantive issues or for responding to other parties' statements. Neither side sought to file a response to the other's statement, and the Court did not direct the filing of responses. The panel decision indicates that the matter was submitted on the same day that the parties' simultaneous statements were filed.

Federal R. App. P. Rule 47(b) cautions that "[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules,

or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.” Here, the Regents did not have notice that they were required, or even permitted, to file a response to the plaintiffs’ remand statement. Their expectation was that this Court would determine what the Supreme Court intended to dispose of by its ruling and what issues the Court intended to remand for further proceedings. They did not expect this Court to make substantive rulings without first hearing from the parties.

The Panel’s decision goes well beyond the question of what issues remain to be decided and by what procedure, to address the actual decision of these issues, *but without affording the University an opportunity to be heard on these issues*. This occurs four times: in the Panel’s general discussion of the requirement of viewpoint neutrality, Order at 3, in its suggestion that a first-come-first-served allocation rule would not be constitutional in the context of a student fee limited public forum, *id.* at 3-4, in its general discussion of the standards by which a stipulation may be voided, *id.* at 5 and in its characterization of the plaintiffs’ request to have their stipulation reopened as reasonable. *Id.* Several of the statements have the quality of an advisory opinion. For example, not only was the University not directed to brief the issue of viewpoint neutrality, there was no current dispute concerning the requirement, since it would not come into play unless the district court decided to allow the plaintiffs to reopen the case and even then, only as framed by the factual record that might be developed. In contrast to these pronouncements is the Panel’s carefully neutral treatment of the Regents request

to have the case remanded to allow the district court “to accept supplemental evidence relevant to the referendum, including any evidence and arguments concerning mootness.” Order at 4.

Although the fact that some of the Panel’s comments appear made in passing may keep them from serving as the law of the case, *see Local Union 103 v. Indiana Const. Corp.*, 13 F.3d 253, 256 (7th Cir. 1994) (law of the case doctrine misplaced when court did not fully decide issues), plaintiffs are likely to argue otherwise, and it remains prejudicial to the University to have these substantive pronouncements introduced into the case through a procedural mechanism for determining what issues are to be decided on remand and in what manner. It is natural for many lower courts to heed the off-hand comments of a reviewing court, even if not legally constrained to follow them.

For instructing the district court as to its discretion to decide whether to relieve the plaintiffs of their stipulation, the panel decision seems to pre-judge the issue by finding the plaintiffs’ request reasonable. As discussed above, the circumstances identified by the Panel as supporting this conclusion do not hold; under the actual circumstances of the case, the plaintiffs’ request is *not* reasonable. It is true that *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1206 (7th Cir. 1989), states that “a stipulation is binding unless relief from the stipulation is necessary to prevent a ‘manifest injustice’ or the stipulation was entered into through inadvertence or based on an erroneous view of the facts or law.” (Quoted in Order at 5). But in *Graefenhain*, this Court was affirming a district court’s refusal to void a stipulation.

While the Panel's general discussion of viewpoint neutrality appears largely correct, the University would ask that it be given the opportunity to have the issue framed, in the event it becomes relevant, not in the abstract, but within the context of whatever factual record might subsequently be produced. We do, however, strongly object to the Panel's suggestion that a first-come-first-served allocation rule would be neutral with respect to a spatial forum but discriminatory with respect to a non-spatial one. Access to a traditional public forum can also be denied under this type of allocation rule, where another speaker or group has previously reserved the desired space. Regardless of whether the forum is spatial or non-spatial, the question of whether a particular speaker applied sufficiently early to obtain access is independent of the viewpoint expressed.

Accordingly, if the panel decision is correct regarding the scope of the Supreme Court's remand, then the remaining issues should either be remanded to the district court without substantive discussion or else this Court should schedule substantive briefing by the parties.

Respectfully submitted this 6th day of July, 2000.

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