No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

Board of Regents, University of Wisconsin,
Petitioners

v.

Scott Southworth, et al.,
Respondents

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION; RAYMOND L. BROSTERHOUS III; WILLIAM G. HOLLINGSWORTH; LISA R. HOLLINGSWORTH; AND JEFFREY D. FERNANDES IN SUPPORT OF RESPONDENTS

Filed June 9, 1999

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QUESTION PRESENTED

Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech.

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IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation, Raymond L. Brosterhous III, William Hollingsworth, Lisa Hollingsworth, and Jeffrey Fernandes respectfully submit this brief amicus curiae in support of Respondents Scott Southworth, *et al.*[1] All parties consented to the filing of the brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has adopted a legal policy objective that the government may not force people to make involuntary payments of funds that will be used for political or expressive purposes. To that end, PLF is submitting this brief to provide an additional viewpoint with respect to the issues presented. PLF attorneys were counsel of record in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and have participated as amici in numerous other compelled fee cases, including *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). PLF attorneys also represented the student objectors in *Smith v. Regents of the University of California*, 4 Cal. 4th 843, *cert. denied*, 510 U.S. 863 (1993). Except as otherwise noted, PLF attorneys represent the other amici described below in their own challenges to unconstitutional governmental uses of mandatory fees.

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[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Raymond L. Brosterhous III, was one of the plaintiffs in *Keller v. State Bar of California*, 496 U.S. 1. In 1992, after the State Bar failed to comply with the requirements of *Keller*, and continued to compel individual attorneys to pay for lobbying and other ideological activities unrelated to regulation of the legal profession or improving the quality of legal services available to Californians, Mr. Brosterhous sued again. That case, *Brosterhous v. State Bar of California*, is pending in California Superior Court for the County of Sacramento (Case No. 527974). One of the issues in *Brosterhous* is the level of scrutiny to be applied to the State Bar's actions. On a pretrial motion, the trial court ruled that this Court's precedents demanded strict scrutiny, but the State Bar continues to argue that a far more deferential standard should be applied.

William Hollingsworth, Lisa Hollingsworth, and Jeffrey Fernandes were students at Lane Community College in Oregon. They objected to paying a mandatory fee to subsidize the Oregon Student Public Interest Research Group (OSPIRG). In an unpublished decision issued March 24, 1999 (Case No. CV-95-6321-CO), the Ninth Circuit Court of Appeals rejected their First Amendment claims against the college. In its decision, the Ninth Circuit found that First Amendment claims in the student activity fee context warranted only intermediate scrutiny. The *Hollingsworth* students filed a petition for rehearing in the Ninth Circuit pending this Court's resolution of this case.

Amici believe the significance of this case extends beyond the context of mandatory student activity fees because it goes to the heart of First Amendment jurisprudence applicable to all types of compulsory funding. Amici seek to augment the arguments in the parties' briefs by concentrating on the legal standard of strict scrutiny that must be applied in all First

Amendment cases, including those related to mandatory fees. Moreover, amici believe that their litigation experiences applying this Court's precedents in both the integrated bar and student activity fee contexts will provide this Court with a broader policy viewpoint than that presented by the parties and believe that their broader viewpoint will aid this Court in the resolution of this case.

OPINION BELOW

The opinion below is reported at *Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998).

STATEMENT OF THE CASE

Students at the University of Wisconsin-Madison were required to pay a student activity fee of $165.75 for the 1995-96 school year. A portion of this fee was allocated by the student government to various politically active groups, including the Wisconsin Public Interest Research Group (WISPIRG); the Lesbian, Gay, Bisexual Campus Center; the UW Greens; the International Socialist Organization; the Militant Student Union of the University of Wisconsin; the Student Labor Action Coalition; Student Solidarity; and Students of National Organization for Women. Scott Southworth and other students who disagreed with the political and ideological agendas of these organizations sued the university under various theories, including the First Amendment right to refrain from subsidizing these groups' expressive activity.

The district court agreed with the objecting students and found the collection and allocation of mandatory student activity fees violate the First Amendment. On appeal, the Seventh Circuit Court of Appeals affirmed the lower court opinion, emphasizing that politically active groups can continue to speak and act however they wish; *however*, the university cannot force

objecting students to subsidize those activities. *Southworth*, 151 F.3d at 721. The Seventh Circuit's analysis began with the general principles enunciated in *Abood* and *Keller*, and were refined in *Lehnert*. The court below used the three-part *Lehnert* analysis: To be constitutional, the expenditures must be

> (1) "germane" to collective-bargaining activity; (2) justified by the government's vital policy interest in labor peace and avoiding "free-riders;" and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Lehnert, 500 U.S. at 519. The court found the university's practice of compulsory subsidization of political and ideological groups violated all three prongs of this test.

First, the court held that the university could not prevail by claiming that the political and ideological groups funded by the student activity fee are germane to the university's "educational" purpose. *Southworth*, 151 F.3d at 725. The court recognized that "everything is in a sense education[] . . . even if it merely teaches you that you do not want to do it again." *Id.* The court concluded that the political and ideological groups, which are private and open to students and nonstudents alike; which mirror organizations existing outside the university setting; and which have goals primarily concerned with the promotion of their ideological beliefs, are not germane to legitimate university goals. *Id.*

> The mere incantation of the rubric "education" cannot overcome a tactic, repugnant to the Constitution, of requiring objecting students to fund private political and ideological organizations.

Id.

Second, the court held that, even if the university could surmount the "germaneness" hurdle, there is no vital interest in

compelling students to fund private organizations which engage in political and ideological speech. *Id.* at 727. Moreover, the court noted that

> far from *serving* the school's interest in education, forcing objecting students to fund objectionable organizations undermines that interest. In some courses students are likely taught the values of individualism and dissent. Yet despite the objecting students' dissent they must fund organizations promoting opposing views or they don't graduate.

Id. at 728.

Third, the court found that the specific expenditures of the mandatory fee to fund the 18 challenged political and ideological programs significantly added to the burdening of free speech inherent in any compulsory payment of money. It relied on *Lehnert's* holding that using objecting employees' funds to lobby or otherwise garner public support for a position "present[s] additional 'interference with the First Amendment interests of objecting employees.'" *Lehnert*, 500 U.S. at 521-22 (citation omitted). Relying heavily on the political and ideological nature of the challenged programs, the Seventh Circuit held that compulsory funding violated the students' First Amendment rights. *Southworth*, 151 F.3d at 730-31.

The university asked this Court to review the case, and the petition for a writ of certiorari was granted March 29, 1999.

SUMMARY OF ARGUMENT

While the court below correctly decided this case, several aspects of its analysis should be reviewed by this Court. First, the court should have recognized that *Lehnert*, like the agency shop fee and integrated bar cases before it, requires strict scrutiny. Just like any other First Amendment case, courts should apply strict scrutiny to mandatory student activity fees used to subsidize groups engaging in expressive activity.

Students exercising their right to refrain from subsidizing others' expressive activity are entitled to full First Amendment protection. This is so despite the disturbing language in *Buckley v. Valeo* that contributions are entitled to less First Amendment protection than expenditures because someone else is doing the actual talking. Whatever validity that distinction may have had in the context of campaign contributions, certainly the policy rationale for giving contributions less protection (to prevent corruption) is wholly inapplicable when individuals wish to *refrain* from contributing.

Second, the Seventh Circuit opinion unnecessarily emphasized the political and ideological cast of the challenged activities. This Court's decisions in *Abood* and *Glickman v. Wileman Brothers & Elliott*, 117 S. Ct. 2130 (1997), create some confusion on this point, as *Abood* expressly declares that no such political or ideological label is required, but *Glickman* found the lack of such content important. To remedy this inconsistency, this Court should acknowledge that *Glickman* was inconsistent with *Abood* on this point; hold that, to the extent the *Glickman* holding survives, that its emphasis on the lack of political or ideological content to generic fruit advertisements is limited to commercial speech. Alternatively, if the political or ideological content of speech is held to be a necessary precondition to First Amendment protection, then the Court must define those terms so as to provide guidance to both the universities and the lower courts as to the broad scope of activity included within those genres.

Finally, applying strict scrutiny to the University of Wisconsin fee, amici argue that the university does not have a compelling interest to justify the fee in the first place. Moreover, even if the university has a compelling justification for forcing students to subsidize voluntary activity groups, this justification cannot extend to those groups which engage in the activities challenged by the plaintiffs in this case.

ARGUMENT

I

A STATE UNIVERSITY'S INTRUSION ON STUDENTS' FIRST AMENDMENT RIGHTS MUST BE SUBJECTED TO STRICT SCRUTINY

A. Standard First Amendment Analysis Requires Strict Scrutiny

Standard First Amendment analysis follows strict scrutiny, regardless of whether the First Amendment right is positive (one may speak freely) or negative (one may refrain from speaking or refrain from subsidizing others' speech). These two aspects of the free speech guarantee are usually considered to be two sides of the same coin, as this Court taught in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), holding that school children could not be required to salute the American flag. *See also Riley v. National Federation of the Blind*, 487 U.S. 781, 796-97 (1988) ("the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say") (applying strict scrutiny to statute requiring professional fund-raisers to disclose financial and donor information). Moreover, just as compelled silence is constitutionally indistinguishable from compelled speech, so too are compelled statements of fact constitutionally indistinguishable from compelled statements of opinion. *Riley*, 487 U.S. at 797.

Thus, under the usual First Amendment analysis, the presumption of constitutionality gives way to a presumptive prohibition on infringement. *Elrod v. Burns*, 427 U.S. 347, 360 (1976). This is especially true in cases involving political belief and association, which constitute the core of those activities protected by the First Amendment. *Id.* at 356. Encroachment on First Amendment rights may be justified only if they survive strict scrutiny. *Riley*, 487 U.S. at 788 (strict scrutiny is "standard First Amendment analysis"). Such restrictions are

valid only if "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Perry Education Association v. Perry Local Educators Association, Inc.*, 460 U.S. 37, 45 (1983).

The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of the interest (not on the individual attacking the restriction to show that such an interest does not exist). *Elrod*, 427 U.S. at 362. Even the usual deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). In addition, the means chosen to further the governmental interest must be closely drawn to avoid unnecessary abridgment of First Amendment freedoms. The government has the burden to show that its interest is furthered by a means that is least restrictive of First Amendment rights. *Elrod*, 427 U.S. at 363. *See also Procunier v. Martinez*, 416 U.S. 396, 413 (1974) (limitation on First Amendment rights may be "no greater than is necessary or essential to the protection of the particular governmental interest involved"). In the compelled fee context, then, the government must show its actions are least restrictive of dissenting students' right to withhold financial support from groups' expressive activities.

Although this Court has never ruled specifically on the issue of activities funded by mandatory student fees, cases in the agency shop fee and integrated bar context provide a framework for analyzing the appropriate use of mandatory student fees. In the compelled fees context, there has been some confusion as to whether and how to apply this analysis. The court below noted that the Plaintiffs in this case urged the application of strict scrutiny, but having already found the university violated First Amendment rights using the *Lehnert* analysis, the Seventh Circuit found it unnecessary to apply the more exacting scrutiny. *Southworth*, 151 F.3d at 731 n.13. Actually, the *Lehnert* test appears to be a form of strict scrutiny specifically designed for

agency shop fee cases. This Court's omission in explicitly stating this, however, has led some courts to conclude that lesser scrutiny is sufficient. *See, e.g., Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032 (9th Cir. 1999) (petition for rehearing pending decision in *Southworth* granted May 3, 1999); Siemer, *Lehnert v. Ferris Faculty Association: Accounting to Financial Core Members: Much A-Dues About Nothing?* 60 Fordham L. Rev. 1057, 1078-79 (1992) (identifying cases where federal courts had trouble applying *Lehnert*). This case presents the opportunity to this Court to state explicitly what its agency shop fee and integrated bar cases have held implicitly: that objectors' First Amendment challenges must be analyzed under strict scrutiny.

B. This Court's Agency Shop Fee Cases Implicitly Require Strict Scrutiny

In *Abood v. Detroit Board of Education*, 431 U.S. at 231, this Court held that

> the fact that [individuals] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.

Abood involved nonunion public school teachers who were compelled to pay an agency shop fee to the teachers' union. The court upheld the requirement for all teachers in a bargaining unit to support the collective bargaining representative, but ruled that the Constitution was violated if nonmembers were compelled to pay for political or ideological activities that were unrelated to collective bargaining, contract administration, and grievance adjustment. *Id.* at 235-36.

These same principles apply to attorneys who are forced, by state law, to belong to and pay dues to a bar association. In *Keller v. State Bar of California*, this Court dismissed arguments that the Bar was not bound by prior case law concerning compelled union dues. The Bar had argued that

the union fee cases should be distinguished from compelled bar dues on the grounds that the Bar assertedly served a more substantial public interest than the union's private economic interest. *Keller*, 496 U.S. at 13. This Court replied that

> legislative recognition that the agency-shop arrangements serve vital national interests in preserving industrial peace, indicates that such arrangements serve substantial public interests as well. We are not possessed of any scales which would enable us to determine that the one outweighs the other sufficiently to produce a different result here.

Id. (citations omitted). This Court then announced the guiding standard for determining challenges to the Bar's expenditures:

> [W]hether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State."

Id. at 14.

Keller was followed by *Lehnert v. Ferris Faculty Association*, 500 U.S. 507. In that case, a plurality of this Court formulated a three-part test to be used in compulsory fee challenges. This Court ruled that an expenditure is chargeable to dissenters if (1) it is germane to the activity for which compelled fees are permissible; (2) it is justified by the government's vital policy interest that justified the compelled fees; and (3) it does not significantly add to the burdening of free speech already occasioned by the compelled fee. *Id.* at 518.

All of these cases were extremely important vindications of the rights of Americans to refrain from subsidizing speakers who advocate ideas with which they disagree. The facts of the *Lehnert* case in particular demonstrate why these principles must be applied with equal vigor in the mandatory student fee context.

The plaintiffs in *Lehnert* were state college professors who paid agency shop fees to the faculty union. Upon their challenge to the union's practice of using compelled fees for all union activities, including lobbying, this Court held that the professors could not be compelled to subsidize any activities outside the limited scope of contract ratification or implementation, even matters as closely related to the union's interests as taxes for the support of public education. *Lehnert*, 500 U.S. at 520, 526. The symmetry of public university professors and the students they instruct in relation to the same First Amendment rights requires the same vigilance in protecting those rights for both groups.

In 1995, Justice O'Connor noted that lower court decisions applying the *Abood-Keller-Lehnert* line of cases resulted in a split of authority among the lower courts as to whether an objecting student may be forced to pay for political and ideological speech with which they disagree.

> Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. There currently exists a split in the lower courts as to whether such a challenge would be successful.

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. at 851 (citations omitted) (O'Connor, J., concurring). One of the lower court cases identified by Justice O'Connor is *Smith v. Regents of University of California*, 4 Cal. 4th 843.

Smith involved a challenge by students to the University of California's practice of funding political and ideological groups with mandatory student fees.[2] The California Supreme Court

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[2] At issue in *Smith* were 14 groups, including Amnesty International, Campus Abortion Rights Action League, Spartacus Youth League,

(continued...)

determined that the university's use of compelled student fees to fund political and ideological speech and activities was subject to strict judicial scrutiny. "Because the use of a mandatory fee implicates freedom of association, *strict scrutiny applies.*" *Smith*, 4 Cal. 4th at 853 (emphasis added).

On the contrary, in both *Hollingsworth* and *Rounds*, the Ninth Circuit expressly rejected the claim that the use of mandatory fees to fund political and ideological activities is subject to strict scrutiny.

> The district court did not err in declining to apply strict scrutiny to the funding of OSPIRG EF through mandatory fees imposed upon the students at Lane by the Board of Education. As we held in *Rounds*, even if *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny are applicable, they do not endorse the application of strict scrutiny.

Hollingsworth, Memorandum Opinion at 3. *See also Rounds*, 166 F.3d at 1037.

> Because competing constitutional interests are implicated and significant governmental interests impacted, an intermediate level of scrutiny is appropriate, assessing first the interference with First Amendment rights imposed on those objecting to the expenditures and then determining "whether they are nonetheless adequately supported by a governmental interest."

This analysis is incorrect. There are no "competing constitutional interests." Rather, the students have a well-settled constitutional right to refrain from subsidizing political and ideological activities with which they disagree. Whatever

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[2](...continued)
and Students Against Intervention in El Salvador. *Smith*, 4 Cal. 4th at 850.

interest the university asserts is not a *constitutional* interest; it is simply a governmental interest that must rise to the level of "compelling" if it is to survive the first prong of standard First Amendment analysis. This Court should determine that mandatory funding schemes are to be strictly scrutinized (as in *Smith*) instead of subjected to intermediate scrutiny (as in *Rounds* and *Hollingsworth*) or analyzed through the three-pronged test articulated by this Court in *Lehnert* (as in *Southworth)* in favor of strict scrutiny.

C. Strict Scrutiny Should Apply Regardless of Whether the Challenged Programs or Activities Are Labeled "Political" or "Ideological"

The decision of the court below rested heavily on the fact that the 18 challenged programs are easily identified as political or ideological in nature. *Southworth*, 151 F.3d at 730-31. This premise was wholly unnecessary, however, in light of this Court's holding in *Abood* that

> our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters to take a nonexhaustive list of labels is not entitled to full First Amendment protection. . . . Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs the critical constitutional inquiry.

Id. at 231-32. *See Lehnert*, 504 U.S. at 516, 521-22.

> Unions have traditionally aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individual employees. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns. . . . First Amendment protec-

> tion is in no way limited to controversial topics or emotionally charged issues.

See also Buckley v. Valeo, 424 U.S. 1, 14 (1976) (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)) (First Amendment protections are not confined to the "exposition of ideas").

This Court's decision in *Glickman v. Wileman Brothers & Elliott*, 117 S. Ct. 2130, however, cast some confusion on this matter. *Glickman* involved a challenge by independent fruit growers who objected to regulations requiring they pay for generic fruit advertising. While the four dissenting justices in that case made it perfectly plain that the First Amendment protects against the government compelling individuals to fund private speech whether or not the speech at issue is political or ideological (117 S. Ct. at 2147 (Souter, J., dissenting)), the rule to be taken from the majority is less clear and to the extent it conflicts with *Abood*, this Court should reaffirm *Abood*. In *Glickman*, the Court upheld the assessment in part because it did not compel the fruit growers to endorse or finance any political or ideological views. *Id.* at 2138. While the court below found this aspect of the regulation to be of the "utmost significance to the Court's ruling" (*Southworth*, 151 F.3d at 730), what actually seems to be of the greatest importance in that case was that the federal government had a longstanding practice of thoroughly regulating this particular field of commerce. *Glickman*, 117 S. Ct. at 2138-39.

> Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement because of the "information of potential interest and value" conveyed, rather than because of any direct contribution to the interchange of ideas.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 779-80 (1976) (Stewart, J., concurring) (internal citation omitted, footnote omitted).

This purported line between commercial and ideological speech, however, is indistinct at best, and more frequently wholly indeterminate. As Justice Brennan noted in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 319-20 (1974) (Brennan, J., dissenting) (a case involving a city's ordinance forbidding political advertisements on buses while permitting other types of advertisements):

> The line between ideological and nonideological speech is impossible to draw with accuracy. By accepting commercial and public service advertisements, the city opened the door to "sometimes controversial or unsettling speech" and determined that such speech does not unduly interfere with the rapid transit system's primary purpose of transporting passengers. In the eyes of many passengers, certain commercial or public service messages are as profoundly disturbing as some political advertisements might be to other passengers.

If, however, this Court maintains that, in the commercial context, a challenged activity must have political or ideological content to be subject to strict scrutiny under the First Amendment, the Court should clarify that this holding is applicable in the commercial realm *only*. In the agency shop fee, integrated bar, and student activity fee cases, core First Amendment rights may not be infringed regardless of whether a court labels challenged activities as "political" or "ideological."

Nonetheless, even in agency shop fee and similar cases, and despite *Abood*'s caution to the contrary, courts frequently employ the phrase "political and ideological" to describe the challenged activities in compelled dues cases. This is probably due in large part to the fact that the plaintiffs in these cases often

challenge only those activities which are blatantly political or ideological. *See, e.g., Southworth*, 151 F.3d at 720 (challenging only 18 programs); *Smith*, 4 Cal. 4th at 850 (challenging 14 out of 150 programs)). At least two federal appeals courts flatly contradict *Abood* by requiring proof of political or ideological content before permitting members of an integrated bar to challenge the bar's use of their dues for expressive purposes with which they disagree. *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 404-05 (7th Cir. 1996); *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 633 (1st Cir. 1990) (approving lobbying on "technical" legislation); *see also Popejoy v. New Mexico Board of Bar Governors*, 887 F. Supp. 1422, 1429-31 (D.N.M. 1995).

If the First Amendment is going to be held to apply only to "political or ideological" activities,[3] however, this Court should provide guidance as to the types of activities these adjectives encompass. As shown below, however, attempting to define "political" and "ideological" demonstrates just how broad those words are; and why *Abood*'s holding that such adjectives are unnecessary makes so much sense. For example, the word "political" covers a wide range of expressive activity; it is not limited to lobbying or campaign contributions.

"One rarely abandons the path of logic and commonsense when Webster is consulted for the precise meaning of a term." *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131 (5th Cir. 1980). The Second Circuit did just that in *Schwartz v. Romnes*, 495 F.2d 844, 860 n.6 (2d Cir. 1974), quoting from Webster's Third New International Dictionary (1961), the following definitions of "political" and "politics":

[3] Such a requirement, however, would prove devastating to the values the First Amendment was designed to protect. Political dissent would be easy to suppress if speakers were first required to prove in court that this message met the current definition of "political" or "ideological."

> [P]olitical . . . 1a: of or relating to government, a government, or the conduct of governmental affairs; b: of or relating to matters of government as distinguished from matters of law . . . c: engaged in civil as distinguished from military functions . . . d: of, relating to, or concerned with the making as distinguished from the administration of governmental policy . . . 3a; of, relating to, or concerned with politics; b: of, relating to, or involved in party politics . . .." "politics . . . 1a: the art or science of government: a science dealing with the regulation and control of men living in society: a science concerned with the organization, direction, and administration of political units (as nations or states) in both internal and external affairs: the art of adjusting and ordering relationships between individuals and groups in a political community; b(1): the art or science concerned with guiding or influencing governmental policy . . . 4a(1): political affairs or business; specif: competition between competing interest groups or individuals for power and leadership (2): activities concerned with governing or with influencing or winning and holding control of a government . . . (3): activities concerned with achieving control, advancement, or some other goal in a nongovernmental group (as a club or office) . . ..

Similarly, to determine whether a Chinese national could properly seek asylum because he feared persecution in China for his "political" opinions, the Third Circuit relied on the definition of "political" in Black's Law Dictionary (5th ed. 1979):

> Pertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as

> political theories; of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its public policy . . . .

Chang v. Immigration and Naturalization Service, 119 F.3d 1055, 1069 n.5 (3d Cir. 1997).

In *Wilson v. Chancellor*, 418 F. Supp. 1358, 1368 n.11 (D. Or. 1976) (reviewing a school district policy banning "political" speakers at school), the court noted that

> the word "political" itself connotes different things to different people, not excluding judges and editors of dictionaries. . . .
>
> . . . .
>
> Without more, the word political is too vague and its meaning too elusive to tolerate in regulations aimed at protected conduct.

The California Supreme Court (also relying on Webster's) struck down as unconstitutionally vague a statute criminalizing threats made to further social or political purposes in *People v. Mirmirani*, 30 Cal. 3d 375, 384 (1981) (citations omitted):

> "Political" is defined as of or relating to "government," "the conduct of governmental affairs," or "politics." Politics is "the art or science of government," "the regulation and control of men living in society," and the "total complex of interacting and (usually) conflicting relations between men living in society."

Applying this definition, the court went on to say:

> The main problem with the statute is that it is all-inclusive. It is virtually impossible to determine what conduct by an individual in a democratic society could not in some way be construed as an attempt to achieve a "social" or "political" goal. At first glance, it might be argued that one who threatened another after a barroom brawl would not be included within the scope of the statute. However, if the brawl started because of a racial epithet and one of the participants hoped to deter members of a certain racial group from coming to that bar, would such threats be made to achieve a goal related to "human society" or to the "conflicting relationships" among men and women in society? Clearly the statute provides no guidance to the police, prosecutor, judge or jury who must decide whether the conduct was motivated by the desire to achieve a social or political goal.
>
> Despite the apparent intent to limit the scope of the statute to threats aimed at achieving "social or political goals," *those words in fact provide no limitation at all. They are all-encompassing.*

Id. (emphasis added).

Specifically in the context of agency shop fees, the District of Columbia Circuit also recognized the broad definition of "political" for purposes of determining whether union expenditures are germane. In *Miller v. Air Line Pilots Association*, 108 F.3d 1415, 1422 (D.C. Cir. 1997), *aff'd*, 118 S. Ct. 1761 (1998), the appellate court held:

> The union would have us see its lobbying on safety-related issues as somehow nonpolitical because all pilots share a common concern with these activities. But we cannot possibly assume that to be true. All pilots are surely interested in airline safety, but it would certainly not be unexpected that pilots would have varying views as to the desirability of government regulation--including those regulations of airlines that pertain to safety. The benefits of any regulation include trade-offs, and certain pilots might

> be reluctant to pay the costs either directly or indirectly of increased regulations, just as others might oppose relaxed regulations that could expand work opportunities. Some, of course, might even object to such regulations on principle.

Further confusion and potentially unwarranted limitation on First Amendment rights result when lower courts treat "political" and "ideological" as synonyms. At the very least, lower courts should be aware that the definition of ideological includes all social programs, even those which may lack discernible political content. The common dictionary definition of "ideology" is "the body of ideas reflecting the social needs and aspirations of an individual, group, class, or culture." The American Heritage Dictionary of the English Language at 654 (Morris ed. 1981). Justice Stewart defined "ideological expression" as follows:

> Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought that may shape our concepts of the whole universe of man.

Virginia State Board of Pharmacy, 425 U.S. at 779 (Stewart, J., concurring). Scholars define "ideology" in varying ways, but all stress the social aspect of ideological thought:

- "[A] distinct and broadly coherent structure of values, beliefs, and attitudes with implications for social policy."

A. J. Reichley, *Conservatives in an Age of Change: The Nixon and Ford Administrations* at 3 (1981), *cited in* R. Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* at 36 (1987) (Higgs).

- "[A] collection of ideas that makes explicit that nature of the good community. . . . [T]he framework by which a community defines and applies values."

G. C. Lodge, *The New American Ideology* at 7 (1976), *cited in* Higgs at 36.

- "[A]n economizing device by which individuals come to terms with their environment and are provided with a 'world view' so that the decision-making process is simplified. [It is] . . . inextricably interwoven with moral and ethical judgments about the fairness of the world the individual perceives."

D. C. North, *Structure and Change in Economic History* at 49 (1981), *cited in* Higgs at 36-37.

At a minimum, therefore, "ideological" activities that cannot be funded with compelled fees would include those seeking social change, "good" government, or "fairness" in the way the world operates.

D. *Buckley v. Valeo's* Holding That Monetary Contributions Are Entitled to Less Scrutiny Is Inapplicable When an Individual Asserts His First Amendment Right to Refrain from Subsidizing Another's Speech

The Ninth Circuit decisions in *Rounds* and *Hollingsworth* relied in part on the notion that monetary contributions are entitled to less First Amendment protection because someone else is making the actual speech:

> The challenge in this case does not present an instance of compelled personal speech, for no personal speech is compelled from anyone. . . . For this reason, contrary to the Students' argument, strict scrutiny is not required. When personal speech is compelled, as in *Wooley v. Maynard* and *West Virginia State Board of Education v. Barnette*, state action is valid only if it is "a narrowly tailored means of serving a compelling state interest." *PG&E Company v. Public Utilities Corporation*, 475 U.S. 1,

> 19 (1986). Because mandatory exactions do not involve personal endorsements, such exacting scrutiny is not required.

Rounds, 166 F.3d at 1037-38 and 1038 n.4. To arrive at this holding, the Ninth Circuit misapplied this Court's holding in *Buckley v. Valeo*, 424 U.S. 1.

In *Buckley*, this Court upheld federal statutory limits on campaign contributions. The Court found that the government had a compelling interest in preventing corruption or the appearance of corruption and that the limits were related to this interest. *Buckley*, 424 U.S. at 26. The Court expressly declined to subject these limits to strict scrutiny because "a contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. Campaign expenditures, on the other hand, were held to be core political expression fully protected by the First Amendment.

In the first place, this Court should revisit this oft-criticized distinction between the constitutional scrutiny applied to contributions and expenditures.

> We do little but engage in word games unless we recognize that people . . . spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words.

Id. at 244 (Burger, J., concurring in part and dissenting in part). *See also Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring) (the distinction "should have little, if any, weight in reviewing corporate participation in candidate elections"); *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S. Ct. 2309, 2326 (1996) (Thomas, J., concurring and dissenting) ("Contributions and expenditures both involve core First Amendment expression . . . . 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. Indeed, the individual may add more to political discourse by giving rather than spending, if the donee is able to put the funds to more productive use than can the individual."). *See also Federal Election Commission* v. *National Conservative Political Action Committee*, 470 U.S. 480, 495 (1985) (where the "proxy" speech is endorsed by those who give, that speech is a fully protected exercise of the donors' associational rights). ("To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.")

In the second place, the *Buckley* Court held that contributions are entitled to less constitutional protection because of the state's interest in preventing the possibility of corruption or the appearance of corruption. *Buckley*, 424 U.S. at 26. But this justification makes no sense in the reverse case--where a person wishes to exercise his or her right to *refrain* from making a contribution. In this case, and lacking any countervailing compelling state interest, the freedom of speech right is entitled to full First Amendment protection.

II

IN THIS CASE THE UNIVERSITY HAS NO CONSTITUTIONAL JUSTIFICATION TO COMPEL PAYMENT OF FEES TO PROMOTE STUDENT EXPRESSIVE ACTIVITIES

A. The University Has No Compelling Interest in Coercing Students to Subsidize Voluntary Organizations' Political and Ideological Activities

While a university may well have a compelling interest in *exposing* students to various conflicting viewpoints, it does not have a compelling interest in coercing *support* for those viewpoints.

> [T]he freedom to keep silent as well as to speak is grounded in something broader than a national fear of the state. It is equally the product of our view of personhood, which encompasses what the Supreme Court later referred to as "freedom of thought," "freedom of mind" and a "sphere of intellect and spirit." Were there no state at all, or were it inalterably benign, our conception of what it means to be human would still lead us to respect the individual autonomy of intellect and will enshrined in the First Amendment.

Carroll v. Blinken, 957 F.2d 991, 996 (2d Cir.), *cert. denied*, 506 U.S. 906 (1992) (citations omitted). By coercing support for political groups, the university sends a troubling message to students: If students want to advance a political position for which they cannot find support, the government will give them money to propagate their unpopular views. This is an illegitimate lesson for a public university to teach its students.

The defendants in *Abood* and *Keller* understood that mandating support for an organization smothers, rather than stokes, contrary speech. Moreover, the university, let alone the political groups themselves, does not create a free marketplace or forum for the expression of ideas. Rather it requires students to be the financial sponsors of someone else's speech. Indeed, the notion that a free marketplace of ideas can be created and encouraged by involuntary contributions is an oxymoron. The strength of an idea (*i.e.*, its acceptance in the marketplace) is best measured by how many people will volunteer to spread the idea or to help finance its propagation.

The university's position also implies that the First Amendment has only limited application within the confines of a public university campus. As the court below noted,

> far from *serving* the school's interest in education, forcing objecting students to fund objectionable organizations undermines that interest. In some courses students are likely taught the values of individualism and dissent. Yet despite the objecting students' dissent they must fund organizations promoting opposing views or they don't graduate.

Southworth, 151 F.3d at 728. If the university really wants students to learn practical civics lessons, it should encourage politically active groups to learn the art of fund-raising. In real political campaigns, opponents of the message do not give money to the cause.

B. A State University May Permit Voluntary Funding of Student Groups as a Less Intrusive Method of Promoting Such Groups on Campus

Universities are free to adopt any system of funding student activities that avoids constitutional defects. The best system, however, is the "positive check-off" voluntary system. Such a check-off could be designed in a number of ways. For example, it could list each recognized student group eligible for funding and permit students to choose which particular groups they wish to subsidize. Alternatively, it could simply provide a single box which, if checked, would mean that the student assents to funding all eligible student groups. By requiring students to designate affirmatively that they wish to fund particular groups, either individually or as a whole, the university advances several compelling goals. First, it requires thought on the part of the student, rather than mindless contributions to groups the student may not even be able to identify. Second, it encourages student groups to organize and articulate their messages clearly so as to attract as much financial support as possible.[4] Third, and most importantly, it sends a strong message to the entire student body that the university respects the constitutional rights of *all* students and has taken the strongest measures possible to protect those rights. La Fetra, *Recent Developments in Mandatory Student Fee Cases*, 10 J.L. & Pol. 579, 612-13 (1994).

Supporters of compelled funding have derided such a method, complaining that

[4] The groups benefit in another way: if they suffer a funding shortfall when their opponents are no longer forced to subsidize their activities, the groups will likely turn to their own members to make up the difference. A person who pays a membership fee to belong to one of these groups will have a more personal stake in the group's successful attainment of its objectives. Bevilacqua, *Public Universities, Mandatory Student Activity Fees, and the First Amendment*, 24 J.L. & Educ. 1, 29-30 (1995).

> funding will soon devolve into a political *popularity* contest. Thus, in a setting where provocative ideas should receive the most support and encouragement, precisely the opposite will occur; student groups will be subject to an ideological referendum, and the most marginal groups will receive the least financial assistance. This is truly Orwellian.

Smith, 4 Cal. 4th at 881 (Arabian, J., dissenting). Justice Arabian's reasoning is backwards. What is Orwellian is a situation in which marginal groups are presented to the community as having support where there is none and presented as mainstream rather than extreme. Giving these ideas the cover of legitimacy and acceptability because of coerced subsidization from students who oppose the message perpetrates a great disservice. Students who wish to attract adherents to unconventional ideas must do so by convincing others of the soundness of their theories. Giving these unconventional thinkers the unwilling financial support of their dissenters grants them the means to speak more loudly than their actual support would permit.

CONCLUSION

The students in *West Virginia State Board of Education v. Barnette*, by being forced to salute the flag, were more than exposed to patriotism; they were forced to support it with a raised hand. Like them, the students at UW-Madison were not simply exposed to divergent views, they were forced to reach into their pockets to finance their opponents views. Ideas that could not win adherence through persuasion and reason were thus kept alive by the state by imposing fees on those who do not support the idea in question. The First Amendment was designed to prevent just such an exercise of state power.

Attempts by the government, whether through a public agency, a legislature, or a court, to force individuals to financially support political and ideological activities with which they

disagree have been rejected from the time of Thomas Jefferson to the present. This Court has on numerous occasions protected the rights of teachers, attorneys, and nonunion agency shop fee payers to refrain from supporting speech which they oppose. Students are entitled to no less protection.

For the reasons expressed above, the decision of the Seventh Circuit Court of Appeals should be affirmed.

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Respectfully submitted,

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