No. 98-1189

In The

Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

AMICUS BRIEF BY NATIONAL LEGAL AID DEFENDERS ASSOCIATION, STUDENT LEGAL SERVICES SECTION, IN SUPPORT OF PETITIONERS

NED R. JAECKLE*
University of Colorado
Student Legal Services

PAMARAH GERACE
North Carolina State University
University Student Legal Services

KATHLEEN A. CUSHING
Portland State University
Student Legal Services

National Legal Aid and Defender Association
Student Legal Services Section
219 19th Avenue South
160 West Bank Union
Minneapolis, Minnesota 55455
(612) 624-1001

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

WISCONSIN STATUTES

OTHER AUTHORITIES

INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae is a national organization for legal services programs that serve students in institutions of higher education. We file this brief in support of the University of Wisconsin's position. We contend that the First Amendment allows the University to fund student groups and services through a mandatory fee in order to aid its students, create an educational environment for the expression of diverse viewpoints, and foster vigorous debate.

Amicus has a substantial interest in the issues raised by this case. Student activity fees that are collected and disbursed in the same manner as the method challenged in this case fund the programs that comprise the *Amicus*. In addition, many member organizations provide legal counsel and other assistance to the types of student groups that are recipients of student fees. These client groups would be adversely affected by the relief sought by the Respondents in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Stat. § 36.01(2) provides:

> The mission of the [University of Wisconsin] system is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities, scientific, professional and technological expertise and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training and public service designed to educate people and improve the human condition. Basic to every purpose of the system is the search for truth.

ARGUMENT

I. COMPELLED FUNDING OF SERVICES AND OF A LIMITED PUBLIC FORUM IN A UNIVERSITY SETTING FACILITATES CONNECTIONS BETWEEN LEARNING AND AN EMPOWERED CITIZENRY.

Universities have long fostered exposure to and respect for diverse viewpoints in the students they admit. Traditionally institutions of higher education favored theoretical learning and classroom discourse, leaving practical application to others. Modern Universities, however, have mirrored the views of such consummate learners as Aristotle[2] and Thomas Jefferson[3] in the view that:

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[2] A. Oldfield, Citizenship and Community: Civic Republicanism and the Modern World, *in The Citizenship Debates, A Reader* 75 (G. Shafir, ed. 1998), discussing Aristotle's description of the necessary elements of a political system, "Even empowerment and opportunity together are not sufficient for the practice of citizenship". . . . The solution is education. Citizens are learners all their lives and education . . . for willing engagement in the practice of citizenship never ceases." *Id.* at 87.

[3] "I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom, and happiness." Letter from Thomas Jefferson to George Wythe (Paris, Aug. 13, 1786). Jefferson, while objecting to compelled monetary contribution of an opinion that the contributor believes to be repugnant, also helped establish the University of Virginia. The University of Virginia's mission statement still refers to Jefferson in stating its central purpose of "enriching the mind by stimulating and sustaining a spirit of free inquiry. . . . [In] seeking the ablest and most promising students . . . " and in keeping with the intentions of Thomas Jefferson, "[the University seeks to] attend to [students'] total development and well-being; and to provide adequate intellectual, athletic, and social programs." *http://www.virginia.edu.*

> [Universities] must move beyond abstract notions of citizenship if [they] are to make a strong case about connections between . . . learning and an empowered citizenry. . . . [And the focus should be on] three general areas: intellectual understanding, communication and public problem solving, and the development of civic attitudes of judgment and imagination.[4]

Others have argued persuasively that the disbursement of mandatory fees to certain student groups creates a limited public forum in university settings. We concur with the Petitioner's analysis and application of this concept in the present case. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

The courts have indicated time and time again that it is the universities that have been given the power and authority to determine the educational philosophy in the university community. This determination is reflected in the mandatory student fee cases. *See Veed v. Schwartzkopf*, 353 F. Supp. 149, 153 (D.Neb.) *affd. mem.*, 478 F.2d 1407 (8th Cir. 1973) ("Our states, through their colleges and universities, must retain the freedom and flexibility to put before their students a broad range of ideas in a variety of contexts. The wisdom or political desirability of the specific route chosen is not a question to be determined by the courts.") The court allows that "(w)ithin wide limitations a state (university) is free to adopt such educational philosophy as it chooses."); *Larson v. Board of Regents of University of Neb.*, 189 Neb. 688, 204 N.W.2d

[4] R. Battistoni, Service Learning as Civic Learning *in Education For Citizenship; Ideas and Innovations in Political Learning* 31 (G. Reeher & Joseph Cammarano eds. 1997).

568, 570 (1973) ("The University officials determined, as they had a right to do, that additional services and facilities were essential to the creation of a better educational environment" and that students benefited from "the acquisition, understanding, and interpreting of knowledge [which] could be facilitated by the study of controversial positions."); *Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475, 479, 480 (1973) (The court pointed out that "the county court ordered the trustees of the university to determine what in their judgment, would contribute in the greatest degree to the educational, cultural, social, and recreational activities and functions of the university campus community."); *Arrington v. Taylor*, 380 F. Supp. 1348, 1363 (M.D.N.C. 1974) *aff'd. mem.*, 526 F.2d 587 (4th Cir. 1975) (the court indicates that a school newspaper as well as a speaker's program "provid(e) a forum whereby differing views on controversial subjects are presented. The resulting stimulant to student participation and discussion is at the core of the educational process." *Good v. Associated Students of Univ. of Washington*, 86 Wash.2d 94, 104, 542 P.2d 762 (1975) (The court further held that the student's first amendment rights must be balanced against the "traditional need and desirability of the university to provide an atmosphere of learning, debate, dissent and controversy."); *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) (The court stated that exposure to diverse opinions "was a vital part of the university's educational mission germane to the university's educational institution and that financing it is germane to the University's duties as an educational institution."); *Rosenberger*, 515 U.S. 931 ("The extraction here, by contrast, is a student activity fee designed to

reflect the reality in student life in its many dimensions includes the necessity of wide-ranging speech, inquiry and that student expression is an integral part of the University mission."); Finally, the dissenting opinion from a denial of rehearing *en banc* in *Southworth v. Grebe*, 157 F.3d 1124 (7th Cir. 1998) indicates that "[T]o impede the ability of public universities to fund student groups that represent a wide range of viewpoints," would, in the Justices' minds have a direct impact "on the expression of ideas [that] would undermine the educational mission of those universities."

II. STUDENT PROGRAMS AND SERVICES ARE FUNDED ON CONTENT-NEUTRAL BASES AND ARE NOT CO-OPTED BY ANY ONE POLITICAL OR RELIGIOUS VIEWPOINT DUE TO THE DIVERSITY OF THEIR REPRESENTED STUDENT POPULATION AND DEMOCRATIC SYSTEM OF ALLOCATING FUNDS.

The latest court action in the longsuffering *Smith*[5] case is an appeal from the remand of that earlier 1993 decision. In *Smith v. the Regents of the University of California*, 56 Cal.App.4th 979, 65 Cal.Rptr.2d 813 (1997) the court decided the issue of whether or not mandatory student fees could be used to support political activities of the student government on campus. In contrast to the earlier *Smith* decision, the court held that the state did meet its burden to show a compelling state interest, having demonstrated sufficient educational value in the student's exposure to "government training, conflict

[5] 844 P.2d 500 (Cal. 1993).

resolution, exposure to diverse ideas and in the engagement in matters dealing with controversy." With reasoning similar to the dissent in *Southworth*, the court found that the primary responsibility of student government, as exercised in *Smith*, was to administer student government, not to advocate particular political or ideological views. They further found that the campus forum would allow for "vigorous discussion on matters of campus and public concern." The court also referenced the student fee cases already cited and indicated that the "fostering of energetic debate and the free exchange of views, especially in the university setting" is a long recognized special concern of the First Amendment. The court contrasts with the earlier *Smith* decision by finding that the "campus as a whole becomes the forum, a marketplace of ideas," rather than focusing on individual student activity groups.

In the present case, the parties agree that the funding from student fees creates such a limited public forum, and the objecting students agree that this forum is available for their use and the expression of their own viewpoints. Indeed, many of these same students are members of groups funded by the mandatory fee. But the critical issue here is whether a forum of services and organizations such as the one allowed by the University of Wisconsin's student fees will be extinguished by the political labeling by individual students who already had an opportunity in democratic fashion to elect student leaders who could limit or defund groups and services by using content neutral criteria.

The PIRG student groups in many universities have been particularly scrutinized. Most courts distinguish

between PIRGs that successfully educate the student population without overly politicizing the issues they research, such as in *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1932 (CA9 1999), and those PIRGs that are funded separately and that confer automatic membership in their group to each funding student. This latter type of PIRG has been required to modify their process, often resulting in a favorable change in the outcome of subsequent proceedings. *See, Carroll v. Blinken* 957 F.3d 122 (2d Cir. 1994).

The holdings at both the state and federal level in the mandatory student fee cases have accepted the value of a diversity of choice among student groups, services, and activities on campus because it serves the long standing educational mission of universities. *See Veed*, 353 F. Supp. 149, 152 (mandatory student fees being used for the school newspaper, the operation of the students' association (private attorney fees, attendance at national conferences and student salaries), and the speakers' program were not constitutionally prohibited absent a showing that the university was attempting to support or advance any particular political or personal philosophy. The "educational philosophy" of the university extends beyond the classroom to "extracurricular opportunities for the students to be exposed to speakers outside the classroom who may express widely divergent opinions on a number of topics."); *Larson*, 204 N.W.2d 568, 570 (mandatory student fees being used for the school newspaper, the operation of the student association (a "strike" against foreign policy, a conference on human sexuality, and a birth

control handbook), and the speakers' program were permissible as long as it did not appear that only one political point of view was supported by the fees. The voices heard were not attributable to the school or to the individual students suing. The University determined that "the acquisition, understanding, and interpreting of knowledge could be facilitated by the study of controversial positions . . . " and that it was appropriate that students be exposed to different points of view); *Lace*, 131 Vt. 170, 174 (students contesting the use of their mandatory student fee for the school newspaper, the purchase of certain films, defraying the costs for the student association president attending a national student conference, and the speakers' program failed to show that they were prevented from making their own views known or were denied equal and proportionate access to the same student association funds in order to present views with which they do agree. The "student association funds provide the monetary platform for various and divergent student organizations to inject a spectrum of ideas into the campus community."); *Arrington*, 380 F. Supp. 1348, 1362-3 (mandatory student fees were allowed to support the school newspaper because the newspaper's position on any given subject was attributable only to who controlled its content at any given time and not to the student body, the plaintiffs or the university. The paper should be considered a vehicle to express diverse "views on a variety of issues," open to all, no matter their views.); *Good*, 86 Wash.2d 94, 105 (mandatory student fees that support the operation of the student association, which took various controversial public positions (People's Park and the Vietnam War), and that also supported

a controversial speakers' program, would not be in violation of the students' associational rights if it was not a vehicle for one particular viewpoint, be it political, social, economic or religious. The court very realistically pointed out that upon enrollment in a University, the student "enters an academic community-world which allows the teaching, advocacy and dissemination of an infinite range of ideas, theories and beliefs. They may be controversial or traditional, radical or conformist. But the University is the arena in which accepted, discounted – even repugnant – beliefs, opinions and ideas challenge each other."); *Kania*, 702 F.2d 475, 477 480 (The student newspaper was rightfully receiving mandatory student fees because it increased the overall exchange of information, ideas, and opinions on campus by exposing the "student body to various points of view on significant issues, and [allows] students to express themselves on those issues".); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. den.*, 506 U.S. 1087 (1993) (mandatory student fees used for the school newspaper were allowed in that the university's educational goals were "sufficiently weighty to justify the university subsidy of a student run newspaper" in light of the fact that there was no promotion of one particular viewpoint through the use of that subsidy).

Finally, in the *Southworth* dissent from the denial of the *en banc* hearing, the court held that "[t]he burden on the objecting students' speech is lessened by the availability of the same fund to present opposing speech. The activity funds are available to a wide myriad of student groups." The dues support multiple viewpoints where the same funds are available for others to express their

disagreement; the burden on speech is minimal. Because the membership of the student association changes quickly, so does the composition and voice of the student. The students have every opportunity to participate in the electoral process.

III. LIMITED PUBLIC FORA CREATED AT MANY PUBLIC UNIVERSITIES DO NOT COMPEL OFFENSIVE ASSOCIATIONAL SPEECH, AS THE CONNECTION IS TOO TENUOUS BETWEEN THE ASSOCIATIONAL CHALLENGE AND THE FREE SPEECH AFFORDED BY THE FORUM.

A common theme throughout the various state and federal court holdings is that one group choosing to exercise its right to free speech on campus in no way speaks for everyone on campus nor does the group speaking prevent others from similarly speaking. *See Veed*, 353 F. Supp. 149, 152 (The court held that the students were "free to associate themselves with the political, religious and personal philosophies, which most closely conformed to their own." There were neither "prior restraints" placed on the student in the exercise of his constitutional rights nor were there any "sanctions" imposed for the rights he had chosen to exercise. The student is free to express his own views and positions.); The court in *Lace*, 131 Vt. 170, 174 reiterated the equal access argument and went further to indicate that there was no showing that the "university has taken any action to forbid the making of their views known to others in the campus community through the use of speech, press, films and association." The court in *Good*, 86 Wash.2d 94,

104-105 went one step further by stating that the withholding of "minimal financial contributions required [that] we permit a possible minority view [to] destroy or cripple a valuable learning adjunct of the university life." *Arrington*, 380 F. Supp. 1348, 1362 indicated that the positions in the school newspaper on any given subject were not attributable to the students. The court looked at the newspaper as a vehicle for the students to "complement their classroom education by exposing the student body to various points of view on significant issues while also allowing students to express themselves on those issues." The court in *Kania*, 702 F.2d 475, 477 found that there were various avenues for expressing disagreement with the school newspaper-letters to the editor, joining the newspaper staff or joining or communicating with one of the other school newspapers.

The dissenting opinion from the *Southworth v. Grebe*, 157 F.3d 1124 (7th Cir. 1998) denial of *en banc* hearing made it very clear that there was a great distinction between compelled funding of the *speaker* and compelled funding of the entity that merely creates the *forum*. In the former situation the speech is attributed to the payer of the fees; in the latter it is not. The money is being paid to student government to fund its own operations and to disburse to over 100 student groups with varied viewpoints. Since the speech of the student groups is not attributed to the student government, it cannot be attributed to the students that pay the fee. *Id at* 1125. Further, the student government had not aligned itself with any one political or ideological viewpoint. *Id* at 1126. Finally, the court warns that "in the end, grafting dissenters

rights into a neutral forum for expression of a full panoply of viewpoints will most likely eliminate the forum altogether which is a perverse way indeed to safeguard the kind of free and open political and intellectual debate that lies at the heart of the first amendment" and that is especially important in the University setting. *Id* 1129

PruneYard Shopping Center v. Robins[6] is more analogous to the current case than either *Abood*[7] or *Keller*.[8] First, *Southworth* involves a limited public forum that closely resembles the *PruneYard* forum. Both of these fora have a primary purpose but are open to anyone who enters each forum to take advantage of the resources or services that are offered by each. In contrast, *Keller* concerned an integrated state bar association, which represented its members as a whole with a particular political viewpoint to which some members did not have a way of giving alternative responses. Similarly, in *Abood*, the union acted as the representative and spokesperson of its members, not as a forum for the exchange of varying ideas in which any person was able to participate.

Second, any associational ties between the complaining students in the present case, who claim violation of their rights, and the speaker(s) in the forum funded by student fees are tenuous. The Court in *PruneYard* ruled that the shopping center was open to all members of the public, so any views expressed by members of the public

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[6] 447 U.S. 74 (1980).

[7] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[8] *Keller v. State Bar of California*, 496 U.S. 1 (1990).

in passing out pamphlets or seeking signatures for petitions were not likely to be identified with those of the owner.[9] Likewise, in *Southworth*, it is not reasonable to attribute the ideas and statements of the many student organizations that receive funding to any particular student, when the organizations admittedly represent a variety of activities and attitudes.

Third, the opposing views of students can be expressed. In *PruneYard*, the court felt that forcing the owner of the shopping center to allow public members to pass out pamphlets did not violate his freedom of speech, because he was free to post signs disavowing any connection or belief in the views being expressed. In the present case, students who do not agree with the messages of a particular student group are free to express their opposition – by joining a different student group that advocates another position, writing an article to the school paper, or even posting signs around campus disagreeing with the student organization's acts or views. In *Abood* and *Keller*, the members of each of those organizations had no alternative means to express their opposition. The groups involved in those cases, the state bar association in *Keller* and the teachers' union in *Abood*, represented the view for the entire membership and members who did not agree with that view could not easily disassociate themselves.

Finally, *PruneYard* is more applicable to the current case, than the union or bar association cases because the fact situations are more similar than those in *Abood* and

[9] *PruneYard*, 447 at 87.

Keller. The owner of the shopping center in *PruneYard* was implicitly required to fund the limited public forum, because he could not deny the public members the right to petition for signatures. Similarly, here the students are required to pay mandatory student fees, which are used to fund the various student organizations that make up this limited public forum. In both *Keller* and *Abood*, while the members did pay mandatory fees, those fees did not go toward creating a forum for many differing viewpoints; they went toward certain specific political activities.

In *Rounds*, as well, the Court affirmed that:

> The goals of the university are much broader than the goals of a labor union or a state bar, and they are inextricably connected with the underlying policies of the First Amendment.[10]

In *Rounds* the University of Oregon had developed an elaborate system to ensure proper appropriation of the student fee pool, including required recognition of a student group by the elected student leaders at University of Oregon, a student group constitution that is not discriminatory, a primarily educational purpose, focus on issues of educational benefit to students, and compliance with public meetings and records laws.[11]

Cases like *Rounds* show how universities and all involved in the student fee and student organization and service process, can establish workable procedures to

[10] *Rounds v. Oregon State Bd. Of Higher Educ.*, 166 F.3d 1932 (9th Cir. 1999).

[11] *Id.* at 1039.

carefully safeguard free speech in these limited public fora while minimizing any incidental effect on associational rights of individuals. The University of Wisconsin proposed similar changes to their mandatory student fee process, but had it rejected by the lower court in the present case. With many other jurisdictions determining that the limited educational forum provided by mandatory student fees is essential to the mission of institutions of higher education, and that content neutral selection of student groups and services for funding is constitutional, the student fees challenged here should be upheld.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

DATED this 14th day of June, 1999.

Respectfully Submitted,

NED R. JAECKLE*
University of Colorado
Student Legal Services
Campus Box 206
Boulder, Colorado 80309
(303) 492-6813

PAMARAH GERACE
North Carolina State University
University Student Legal Services
Post Office Box 7306
Raleigh, North Carolina 27695
(919) 515-7091

KATHLEEN A. CUSHING
Portland State University
Post Office Box 751
Portland, Oregon 97207
(503) 725-4570

National Legal Aid and Defender Association
Student Legal Services Section
219 – 19th Avenue South
160 West Bank Union
Minneapolis, Minnesota 55455
(612) 624-1001

**Counsel of Record*