No. 98-1189

IN THE

Supreme Court of the United States

October Term, 1998

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

Petitioners,

against

SCOTT HAROLD SOUTHWORTH, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, *et al.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37, the States of New York, Arkansas, Colorado, Georgia, Hawaii, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Montana, North Carolina,

Ohio and Tennessee and the Regents of the University of Minnesota, respectfully submit this brief as *amici curiae* in support of petitioner. Consent to the participation of the Regents of the University of Minnesota as *amicus curiae* was given by all parties. Copies of the consent letters have been filed with the Court.

STATEMENT OF *AMICI CURIAE* INTEREST

The States have a strong interest in permitting public universities to maintain programs which fund -- through the use of a mandatory student fee -- various student and community organizations, some of which engage in ideological and political speech. These programs further educational goals by fostering "a marketplace of ideas" on the university campus that encourages students to express themselves on academic, social and political issues, and creates opportunities for debate and open discussion by exposing students to a variety of viewpoints. "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (citation omitted). Indeed, as this Court has stated, "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citation omitted).

To promote their educational goals, most public universities have a well-developed student organization and activity program funded by a mandatory student fee. Extra-curricular student organizations and activities became an important element of the American university student's experience in the 1800's. *See* David Meabon *et al.*, *Financing Campus Activities* 59 (1996).

The proliferation and importance of student activities continues to grow. The popularity of the mandatory activity fee to fund student organizations and activities, and the breadth of the activities and organizations which are funded by it, have been documented by educational studies. *See id.* at 41-42, 44; *see also* 1 James A. Rapp, *Education Law* § 5.04(4)(a) (1999). The results of a national student activity fee survey conducted four times during a fifteen-year period demonstrates that the use of a mandatory fee has been, and remains, the funding method used to finance student activities by a large majority of universities and colleges. *See* Meabon *et al.*, *supra*, at 44 (the mandatory fee funding method was used by approximately 70% of the universities surveyed during each survey period).

Organizations and activities funded by the activity fee include student government, entertainment programs, cultural clubs, academic clubs, intramural and intercollegiate athletics, professional groups, honor societies, fraternities and sororities, student newspapers, student counseling centers, and civic/political groups. *Id.* at 41. New York, for example, permits, but does not require, a mandatory student fee program at the campuses in its State university system. The students at each State campus decide by referendum at least every four years whether student activity programs will be supported by a voluntary or mandatory fee. *See* N.Y. Comp. Codes R. & Regs., tit. 8, § 302.14(a) (1995). If elected, the mandatory fee is used to support a broad range of student organizations, as well as a variety of student activities, including recreational and social activities, tutorial programs, athletic programs, student publications, supplemental student services, and remuneration to student government officers. *See id.* § 302.14(c)(3).

However, the range of permissible activities funded by student activity fees is not unlimited. Parameters for the appropriate use of these fees are commonly established by state legislatures or

governing bodies of public university systems. In New York, for example, the fees at campuses in the State university system may only be used to support recognized student organizations whose purposes and activities are "of educational, cultural, recreational or social nature." N.Y. Comp. Codes R. & Regs, tit. 8, § 302.14(c)(3)(vi) (1995). Likewise, as set forth in the parties' stipulated facts in this case, the registered student groups that receive funding from the University of Wisconsin's mandatory activity fee must engage in activities that are related to student life on campus. *See also Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 824 (1995) (University of Virginia mandatory student activity fee was intended "to support a broad range of extracurricular student activities that are related to the educational purpose of the University" (internal quotation and citation omitted)); Or. Rev. Stat. § 351.070(3)(d) (1997) (programs financed by student fees must be "advantageous to the cultural or physical development of students"). Other university systems choose to prescribe more specific limitations on the use of student activity fees. *See* Meabon *et al.*, *supra*, at 56 (indicating that some universities prohibit the use of student activity fees for political contributions and partisan political activities).

Reliance on a mandatory student fee to fund extra-curricular activities serves a number of purposes. It provides stability for student organizations which can rely upon the fee to maintain their core activities from year to year. It further creates an opportunity for the members of the student government to administer the disbursement of these funds, a useful civic and real-world experience.

There is a direct educational benefit to State universities' choice to maintain the activity fee as a distinct charge separate from tuition and other mandatory university fees. This funding method emphasizes to the students that they are responsible for

the activity fund -- both for its funding and, through their student representative body, for its allocation and distribution. The fee thus becomes more directly accessible to students, encouraging diverse student participation. Because all students are assessed the fee, they are encouraged to maximize its personal value to themselves by joining, or forming, a group which matches their academic or extra-curricular interests. In this way the mandatory separate activity fee helps ensure that extra-curricular activities form an important part of students' educational experiences.

SUMMARY OF ARGUMENT

When a public university uses mandatory student activity fees to create a fund for financing channels of communication for student organizations, the university creates a limited public forum. As this Court stated in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995), traditional public forum analysis governs use of these funds. The university may limit use of the funds to particular topics or content of speech based on its educational objectives, but it may not discriminate among speakers on the basis of their viewpoint with respect to permitted topics.

Consistent with these principles, a university may choose to limit availability of designated extra-curricular funds to student groups that are not engaged in ideological or political speech or based on other criteria, but there is no constitutional imperative that it so limit use of its forum. As a matter of educational policy, university officials may choose to make the university's extra-curricular fund available to a broad range of organizations, some of which engage in political or ideological speech.

The forum created by a mandatory student activity fee is indistinguishable, for First Amendment purposes, from other

types of mandatory fees which support traditional physical public fora like public parks and places used for public speaking. It is undeniable that a fee-paying member of the public cannot object to payment of the fee on the ground that the fee is used in part to provide a forum for political speakers with whose message the fee-payor disagrees. As long as access to the extra-curricular fund, like a public park, is available to speakers on a viewpoint-neutral basis, no First Amendment burden is imposed by the university's use of a mandatory student activity fee to create a forum for diverse speech.

The Court of Appeals in this case erred by focusing exclusively on the *Abood/Keller* line of cases. Those cases are distinguishable because they involved compelled association with a particular group. The mandatory fees were used to underwrite a single, collective speaker with which employees in *Abood* and bar members in *Keller* were forced to associate. The Court was concerned with limiting the burden already imposed on the First Amendment associational rights of those dissenting members and so required that funded ideological speech of the association be limited to speech germane to the State interest which justified the forced association.

In sharp contrast, the challenged mandatory student activity fee funds a public forum for a wide spectrum of speakers and viewpoints. The student activity fee does not fund a single speaker or single ideological viewpoint. The analysis applied by this Court in the union fee and integrated bar association cases accordingly has only limited application to the mandatory fee at issue here. Even if applicable, the "germaneness" principles of *Abood* and *Keller* were incorrectly applied by the Court of Appeals.

Finally, the decision below undermines fundamental First Amendment principles. While student activity fees are not part

of a general tax designed to raise revenue for the university, the fees nonetheless constitute "public funds" in the same manner as do tuition payments. The ability of students to withhold or seek refund of tuition payments because they are used to finance certain teachers who disseminate political or ideological messages, however, would be wholly antithetical to the important First Amendment interests served by the strong tradition of academic freedom. It is of no constitutional significance that most public universities choose, as a matter of educational and administrative policy, to charge a mandatory student activity fee that is separate and apart from other required payments such as tuition.

The decision below should be reversed.

ARGUMENT

I.

BECAUSE THE MANDATORY STUDENT ACTIVITY FEE IS USED TO CREATE A VIEWPOINT-NEUTRAL FORUM, IT DOES NOT BURDEN THE FIRST AMENDMENT RIGHTS OF STUDENTS WHO DISAGREE WITH SOME OF THE VIEWPOINTS WITHIN THE FORUM.

The use of a mandatory student activity fee at public universities furthers important state educational interests by creating a public forum for student speech and activities on a variety of topics and from a multitude of viewpoints. *See Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. at 830, 840 (the "student activity fee [is] designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student

expression is an integral part of the University's educational mission"); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

When a university uses the student activity fee to create channels of communication for student organizations, it creates a limited public forum open for the expressive activities of student organizations. *See Widmar*, 454 U.S. at 267-68 (university's policy of generally opening its facilities to student groups created a limited public forum); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985) ("a public forum may be created by government designation of a * * * channel of communication for use by * * * certain speakers"). The fact that the student activity fund is not a physical facility does not prevent its designation and use as a forum. *See Rosenberger*, 515 U.S. at 830 (recognizing that forum analysis applies to student activity fund even though it is not a forum in a "spatial or geographic sense"); *Cornelius*, 473 U.S. at 801-06 (applying forum analysis to a federal employee charitable contribution system); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-49 (1983) (applying forum analysis to school's internal mail system).

The government may legitimately confine a limited public forum to the use to which it is dedicated. *See Rosenberger*, 515 U.S. at 829; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993); *Cornelius*, 473 U.S. at 806. Content-based discrimination of speech is thus permissible if it preserves the purposes of the limited public forum. "Once it has opened a limited public forum, however, the State must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829. That is, the government may reserve the property for certain groups or for the discussion of certain topics, but these limitations must be "reasonable in light of the purpose served by the forum and * * * viewpoint neutral.'" *Lamb's Chapel*, 508 U.S. at 392-93 (quoting *Cornelius*, 473 U.S. at 806).

Viewpoint-based discrimination against speech on a topic that is permitted within the forum is presumptively unconstitutional. *See Rosenberger*, 515 U.S. at 829-30.

Consistent with these principles, a public university may dedicate the student activity fee for student speech and may require that groups meet other objective criteria in order to receive funding (i.e., that the organization be composed primarily of students, have a faculty advisor, etc.). A public university may also choose, as a matter of educational policy, to limit the forum to student groups that are not engaged in political or ideological speech or activities. There is, however, no constitutional imperative that a public university make such an educational policy determination regarding the use of its limited public forum.

The decision below, by limiting the permissible content of funded speech in a limited public forum, intrudes unnecessarily upon the educational judgments of public university officials. Here, Wisconsin has chosen to limit the activities funded with the mandatory fee to those that benefit students on campus, a workable limitation which serves to preserve the nature and purpose of the forum. The university's determination as to the types of student activities that best serve its educational goals should not be subject to judicial second-guessing. So long as the student activity fee is not allocated on the basis of viewpoint of the organizations' speech, state university officials' determinations as to the appropriate content cannot be disturbed.

Like the traditional public forum, the student activity fee provides an opportunity for diverse private speakers "who convey their own messages." *Rosenberger*, 515 U.S. at 835. Indeed, the mandatory student activity fee is indistinguishable, for First Amendment purposes, from other types of mandatory fees which support traditional public fora like our public parks

and other places used for public speaking. Park fees, for example, like the activity fee here, finance a public forum. (While the park fees create a physical forum for speech, the activity fees create a monetary forum for speech.) In the context of a public fee-supported physical forum it could not seriously be argued that a fee-paying member of the public could object to payment of the fee on the ground that the fee is used in part to provide a forum for political speakers with whose message the fee-payor disagrees.

As members of the public we support the erection and maintenance of countless public fora. Because access to a public forum is available on a viewpoint-neutral basis, the forum may at times be used by speakers with whom we disagree. But, whether the forum is supported by general appropriations or a specific user fee, this is the price we pay for living in a society which makes available such public fora for speech. And it is also understood that no Free Speech burden is imposed upon those who financially support the forum when the forum is used for speech to which they are opposed. But this is essentially the position taken by the objecting students in this lawsuit and accepted by the courts below. Viewed as an objection to the use of a viewpoint-neutral public forum, their position is flawed.

II.

THE COURT OF APPEALS ERRED IN ITS RELIANCE ON THE *ABOOD/KELLER* LINE OF CASES

A. *Abood/Keller* Provide A Flawed Legal Framework For This Case

The Court of Appeals for the Seventh Circuit erred by focusing exclusively on the *Abood/Keller* line of cases. *See Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit*

Bd. of Educ., 431 U.S. 209 (1977).[1] The *Abood/Keller* cases all involved an underlying compelled association with a single group. In *Abood*, 431 U.S. at 235, the Court was concerned with the constitutionality of the agency shop in which one union is the exclusive bargaining agent for union and nonunion employees alike and the nonunion employees are required to pay a service fee equivalent to the union dues. Only secondarily was the Court concerned with the union's uses of the mandatory service fees once collected from nonmembers. Id., at 232. In *Keller*, 496 U.S. 1, lawyers in an integrated state bar were compelled to pay membership dues to the state bar association as a condition of practicing law in that state. *See also Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457 (1997) (involving objection to collective advertising in regulated agricultural market).

In each of these cases, the Court recognized that the situations involved a compelled affiliation with the private organization which imposed a burden on individuals' First Amendment associational rights, without regard to the specific activities that

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[1] While many courts have looked to this line of cases for guidance in determining the constitutional validity of a mandatory student activity fee program, the courts have differed in their application of these cases and in the results reached thereunder. *See, e.g., Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1038-40 (9th Cir. 1999) (upholding funding of educational arm of Public Interest Research Group as germane to purpose for which mandatory fee is required); *Carroll v. Blinken*, 957 F.2d 991, 996-1003 (2d Cir.) (relying on *Abood/Keller/Lehnert* to hold that mandatory student funding of political activities constitutes compelled speech, but applying and sustaining funding program under intermediate scrutiny test rather than germaneness test), *cert. denied*, 506 U.S. 906 (1992); *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983) (distinguishing *Abood* and finding that funding of student newspaper by mandatory student fee is germane to university's educational duties); *Smith v Regents of Univ. of Cal.*, 844 P.2d 500, 511-12 (Cal. 1993) (in bank) (invalidating mandatory student fee program under germaneness test by focusing on educational mission of the funded organizations).

were funded with the mandatory fees. As the Court noted in *Abood*:

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. * * * To be required to help finance the union as a collective-bargaining agent might well be thought * * * to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.

431 U.S. at 222, 225; *accord Glickman*, 521 U.S. at 469 (recognizing that collective action in regulated market limits business entities "freedom to act independently"); *Lehnert v Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991); *Ellis v. Brotherhood of Ry., Airline, and Steamship Clerks*, 466 U.S. 435, 455 (1984) (the agency shop involves "a significant impingement on First Amendment rights"); *Keller*, 496 U.S. at 13-14 (describing context as involving "compelled association").

Because the mandatory fees in the *Abood/Keller* line of cases were part of a compelled association with a single group, the Court used a germaneness inquiry to determine the constitutionality of the use of the fee to fund political speech. The compelled association with the union or bar association already burdened the First Amendment rights of employees and bar members who objected to the organization's viewpoint or activities, but this impingement was permitted by the Court because it was supported by sufficiently significant government interests -- in *Abood*, promoting labor peace and avoiding a free rider problem in the union context, and in *Keller*, regulating the professional bar. Given that a significant First Amendment burden was already imposed on dissenting members, the Court required that activities funded with the fees of dissenting

members be germane to the State interests that justified the compelled association.[2]

In the mandatory student activity fee context, however, there is no underlying compelled affiliation between the public university students and the myriad organizations which receive funding. The students choose to attend the public university and thereby agree to abide by all of the university's financial requirements, including the mandatory activity fee. As a condition of their attendance at the public university the students are compelled to pay the activity fee, but the fee is not a corollary to an existing compelled affiliation as in the agency shop and integrated state bar.

The union fee and integrated bar association cases are inapplicable to the student activity fee challenged here for another compelling reason. Employees in an agency shop and the members of an integrated bar are forced to fund a single speaker with specific ideological interests, which the organization's funding choices presumably reflected. Thus, the mandatory fees in *Abood* and *Keller* were not viewpoint neutral.

In sharp contrast, the mandatory student activity fee is specifically earmarked for a *viewpoint-neutral* purpose, to fund a diverse forum of student speech. It does not aid only a single organization with which the students are identified. The burden

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[2] In *Lehnert*, the Court further refined the germaneness test, explaining that it consists of a three-step inquiry, which, in addition to the germaneness inquiry, focuses on the relationship between the government interests that justify the compelled affiliation and the additional burden that the challenged activities add to that compulsion. The tripartite germaneness test asks whether the objectionable activities (1) are germane to the activities upon which the compelled association is premised, (2) are justified by the government's vital policy interests which underlie the compelled affiliation and dues and (3) do not significantly add to the burdening of free speech already inherent in the compelled association. 500 U.S. at 519.

placed upon the objectors in the agency shop and integrated bar settings -- a compulsion to fund a specific ideology with which they disagreed -- is absent from the university activity fee setting.

Indeed, because a student activity fee creates a forum for speech which includes many speakers who express a variety of, and even conflicting, viewpoints, there is little danger that any one of these various voices will be attributed to the student body as a whole, or any individual member of it. *See Rosenberger*, 515 U.S. at 835 (mandatory student fee creates a forum for private speakers "who convey their own messages"). For the same reasons that the speech of the funded groups is not attributable to the university, *see id.*, at 834, 841, it is not attributable to the students at large: "The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis * * *, significantly diminishes the danger that the message of any one [group] is perceived as endorsed" by the student body as a whole. *Id.* at 850 (O'Connor, J., concurring); *Widmar*, 454 U.S. at 271 n.10 ("But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there."). Just as the government does not endorse any of the religious entities which receive funds from a general funding scheme, so the students who fund a forum for diverse speech do not endorse any of the particular views expressed in the forum.[3]

[3] The mandatory student fee is thus similar to the general funding measures which survive scrutiny under the Establishment Clause. Because the funding in those cases reaches not only religious activities, but many other activities as well, the speech of the funding recipient is not attributable to the funding source. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding as part of a general program of state aid to disabled students the funding of a sign language interpreter used by a student at a private religious school); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding as part of a general program of vocational aid to disabled persons the provision of funding to a blind person engaged in religious study at a private religious college); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding state income tax deduction for educational expenses which applied to expenses incurred at both public and private schools); *see also Rosenberger*, 515 U.S. 819 (holding that Establishment Clause was not offended by use of public university's generally applicable mandatory student activity fee to provide financial assistance to a religious newspaper); *Widmar*, 454 U.S. at 274 & n.14 (because university makes its property available to wide range of student groups, it "does not confer any imprimatur of state approval on religious sects or practices" if the property is used by a student group for religious purposes).

In sum, the mandatory student fee is in a different category from the mandatory union fees and bar association dues which are used to fund a single speaker with whom the objectors must associate. Because the student fee is used to finance the activities of a multitude of groups with diverse and divergent ideologies and viewpoints, its constitutionality should not be measured by the germaneness test which was developed for application to speech not within the context of a public forum.[4]

[4] In *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), the Court was presented with the question whether a public university could refuse to fund an otherwise eligible student activity because it promoted a religious viewpoint. In discussing whether the Establishment Clause justified this university regulation, the majority, citing to *Abood* and *Keller*, recognized that the issue presented here -- whether students may object on First Amendment grounds to the use of the activity fee to fund speech with which they disagree -- was not before the Court and was not decided by it. *Rosenberger*, 515 U.S. at 840. Additionally, Justice O'Connor, also citing to *Abood* and *Keller* in her concurring opinion, recognized that the ability of objecting students to opt out of funding certain groups might distinguish the mandatory activity fee, for Establishment Clause purposes, from other government programs that fund religious activities. *Rosenberger*, 515 U.S. at 851-52 (O'Connor, J., concurring). However, because the First Amendment claim of objecting students was not before the Court in *Rosenberger*, the applicability of the *Abood/Keller* line of cases to the activity fee remains an open question.

B. The Court of Appeals Erred In Its Application of the Germaneness Test

Even if applicable, the Seventh Circuit's application of *Abood* and *Keller* to the activity fee was flawed. First, the Court of Appeals erred in rejecting the University's claim that a broad governmental purpose -- educating students by providing opportunities for and exposure to diverse expression -- encompassed the challenged political and ideological speech of the funded organizations. *See Southworth*, 151 F.3d 717, 724-25 (7th Cir. 1998). Although a similarly broad purpose -- improvement of the administration of justice -- was rejected by the Court in *Keller* as a justification for the challenged bar lobbying expenditures, it was not rejected in that context because a broad justification is inevitably invalid. Rather, the Court in *Keller* stated that the government had a more limited purpose in countenancing the forced association attendant with an integrated bar association -- regulation of the legal profession and the improvement of legal services within the state. In *Abood* and *Keller*, the Court necessarily focused on the limited purposes which justify an agency shop or integrated bar because the objectors were being forced to associate with and finance the political activities of one viewpoint-specific organization.

In contrast here, the student activity fee is justified by a broad purpose because it creates an open forum and does not compel association with a specific speaker. The purpose of the mandatory student fee is to encourage "wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues." *Keyishian*, 385 U.S. at 603 (internal quotations and citation omitted). Under the *Abood* analysis, that purpose is served by funding a diversity of organizations and by permitting organizations to speak out on a wide variety of political, controversial and socially significant topics. The activities of the funded organizations are germane to the purpose

of the fee because they increase the number and variety of voices engaged in the university's marketplace of ideas.

The court below also erred in focusing on whether the challenged organizations themselves had a sufficiently educational purpose. *See Southworth*, 151 F.3d at 725. Because the university uses the activity fee to promote a forum, not to promote the particular positions of any of the funded groups, the proper question is whether the creation of a forum serves the university's educational goals. The question is not whether the individual speakers independently supported by the forum serve that educational purpose. The collective purpose of the mandatory student activity fee is to create an opportunity for the sharing of diverse viewpoints. The viewpoints expressed there, whether they involve religious, political or social topics, are germane to that purpose.

III.

THE DECISION BELOW UNDERMINES FUNDAMENTAL FIRST AMENDMENT PRINCIPLES

While student activity fees are not part of a general tax designed to raise revenue for the university, *see Rosenberger*, 515 U.S. at 840, the fees nonetheless constitute "public funds" because they are exacted by the public university, attendance at the school is conditioned upon their payment, and the disbursement of the fees is overseen by university officials. *See In re Smith v. City Univ. of N.Y.*, 92 N.Y.2d 707, 716 (1999) (holding that mandatory activity fees at public community college are public funds); 35 Op. Att'y Gen. 183 (Mont. 1974) (concluding that mandatory student fees are public funds because the authority to impose them is vested in the university system's governing board and the fees are subject to its ultimate control and supervision); *Southworth v. Grebe*, 151 F.3d at 719 (Board

of Regents assesses the fee, which is required to obtain grades and graduate, and has ultimate authority to approve or disapprove the student government's allocation decisions (construing Wis. Stats. § 36.09)); *see also* N.Y. Comp. Codes R & Regs, tit. 8, § 302.14(c) (payment of fee is required at registration and allocation determinations of student government are subject to ultimate review by university's chief administrative officer).

When viewed as public funds, two important consequences follow. First, the fee becomes like a governmental appropriation which unquestionably may be used to further private political speech, notwithstanding the objections of individual taxpayers. *See Buckley v. Valeo*, 424 U.S. 1, 92 n.124 (1976) (rejecting taxpayers' claim that check-off system for funding presidential campaigns compelled individuals to finance the dissemination of ideas with which they disagreed because this was simply a means to determine the amount of government appropriation). In *Buckley*, the Court, in rejecting a First Amendment challenge to an appropriation scheme for the financing of presidential election campaigns, noted that "every appropriation made by Congress uses public money in a manner to which some taxpayers object." 424 U.S. at 92; *see also Keller*, 496 U.S. at 12-13 ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."); *cf. United States v. Lee*, 455 U.S. 252, 260 (1982) (holding that individuals may not resist payment of taxes on ground tax system conflicts with religious beliefs).

Second, the fee becomes more akin to other university exactions like tuition which may also fund controversial political speech. If students can successfully object to the use of a mandatory student activity fee, could they likewise object to that

portion of their tuition payment which supports academicians who voice controversial political viewpoints through their university research and professional writings? It is of no constitutional significance that most state universities choose, as a matter of educational and administrative policy, to charge a mandatory student activity fee that is separate and apart from other required payments such as tuition. Once it is recognized that the viewpoints expressed in the forum, like the viewpoints of the university professors, are not attributed to other students merely on the basis of their payment of the fee, then an objection to the activity fee becomes indistinguishable from an objection to uses of tuition funds.

The ability of students to withhold tuition from financing certain teachers based upon their political and ideological viewpoints would be wholly antithetical to the important First Amendment interests protected by the strong tradition of academic freedom. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.); *Keyishian*, 385 U.S. at 603; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Indeed, this Court has recognized that academic officials must be given broad lee-way in determining how the university's scarce resources are spent. *See Widmar*, 454 U.S. at 276. Objections to the mandatory student activity fee on the ground that it makes available certain controversial viewpoints must therefore be rejected as contrary to the First Amendment and the university's role as a "marketplace of ideas." *See Healy v. James*, 408 U.S. 169, 180 (1972).

Finally, the scope of the ruling of the Court of Appeals is problematic. The court held that the objecting students' fees could not be used to fund *organizations* which engage in political speech or activity. It is not only the specific political activities which risk funding loss, but the organizations themselves. Allowing objecting students to withhold their fees from certain groups will reduce the funding available to those

groups and jeopardize their existence. *See Carroll v. Blinken*, 957 F.2d 991, 1001-02 (2d Cir. 1992) ("Clearly, the ability of NYPIRG and other campus groups to function effectively is tied to the level of resources they can muster in support of their activities."). Consequently, the very existence of the forum as an opportunity for "uninhibited, robust, and wide-open" public debate, a core value of the First Amendment, will be jeopardized. *See Southworth v. Grebe*, 157 F.3d 1124, 1129 (7th Cir. 1998) (Wood, J., dissenting from denial of rehearing en banc).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Dated: Albany, New York
June 14, 1999

Respectfully submitted,

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