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In The

Supreme Court of the United States

October Term, 1999

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 CURIAE BRIEF IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

Amicus curiae UNIVERSITY OF CALIFORNIA STUDENT ASSOCIATION (USCA) [1] [2] is a non-profit, unincorporated association governed by representatives of the graduate and undergraduate student government associations at each of the nine University of California campuses and Hastings College of the Law. It is financed almost exclusively by activity fees collected from students enrolled at the University of California campuses.[3] UCSA's

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[1] This brief was authored by counsel for UCSA and not authored in whole or in part by counsel for the parties. No person or entity, other than UCSA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] All parties have consented to the filing of this brief. The letters from counsel indicating such consent are filed concurrently herewith. UCSA also joins in, and concurs with, the amicus curiae brief submitted by the United States Student Association.

[3] Each UCSA member organization is a university-recognized student association of all undergraduate, post-graduate, or professional school students enrolled at a campus of the University of California. Each was created, and each can be dissolved, by student majority vote. The general fee and any special fees of each association are established through fee referenda by student majority vote with approval by the Regents. Decisions to allocate those

mandate is to promote access to and further the cause of higher education and to promote the general welfare of the student body and the University. It does so by appointing students to numerous higher education decision-making bodies, by providing resources and support to student leaders on campus, and by advising and lobbying state government on issues of concern to students as students. In carrying out these tasks, UCSA provides educational opportunities to its student directors, interns, and volunteers, and to students on the University of California campuses, while ensuring that the student voice is heard.

UCSA submits this brief to urge the Court to reverse the United States Court of Appeals for the Seventh Circuit's decision in *Southworth v. Grebe*, 151 F.3d 717 (7th Cir., 1998) and find that respondents have no First Amendment right to opt out of paying a mandatory fee that funds private campus organizations engaged in political and ideological advocacy which are distributed in a viewpoint-neutral forum. However, if the Court finds that respondents do have such a right, UCSA urges the Court to reverse the Seventh Circuit's finding that petitioners, the University of Wisconsin (University), may not institute a refund procedure to accommodate students who object to the political and ideological uses of their funds. As explained below, a pro rata refund-escrow system is sufficient to meet all constitutional objections.

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fees are made by elected student representatives. UCSA is financed with a portion of those fees from each University of California campus student association that chooses to join UCSA.

UCSA has vital interests in the outcome of this case. UCSA engages in non-partisan political speech on behalf of University of California students with student activity fees. The fees are voluntarily contributed by UCSA's 19 member associations. Since the California Supreme Court imposed a refund requirement on those fees in 1993, they are now subject to a pro rata refund if requested by any University of California student who objects to their use, consistent with University policy. Thus, UCSA's ability to advocate on behalf of University of California students with essential fee support will be determined by this Court's decision.

SUMMARY OF ARGUMENT

Compelled speech cases do not apply to political or ideological activity funded by student activity fees, and therefore, no First Amendment right exists to withhold student activity fees used to support a student activity fund. Student activity fees create a forum from which student groups are allowed access to funds to support their speech and activities. The limited public forum created by such student activity funds support a diversity of viewpoints and serve as a vital part of the educational experience at public Universities.

In a university context, both political speech and activity are educational and should be funded in the same manner as other educational speech and activity. The dichotomy articulated by the Seventh Circuit in the case at bar between political speech and activity and educational speech and activity does not exist. Furthermore, to require public universities to categorize and scrutinize each group to see whether its speech and activities are more political than educational to determine which will receive funding, would result in unconstitutional content based discrimination.

However, assuming arguendo that compelled speech cases are applicable, an escrow-refund system addresses dissenting students' objections while ensuring that the student majority may continue to exercise its First Amendment right to use the funds for political and ideological speech. This Court's compelled speech cases make clear that it is constitutionally acceptable to collect fees from dissenters, place them into an interest bearing escrow account, and to subsequently refund the portion of the fees that were used for nonchargeable political or ideological activity.

Additionally, a majority of courts have upheld the use of escrow refund systems. The First, Second, Fourth, Sixth, Ninth, and Eleventh Circuits have all upheld the procedure of placing fees into an interest bearing escrow account. This Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995), suggests that these principles apply in student fee cases, and the California Supreme Court in *Smith v. Regents of the University of California,* 4 Cal. 4th 843, 16 Cal. Rptr. 2d 181, 844 P.2d 500, *cert. denied*, 510 U.S. 863 (1993), has so held. Therefore, the Seventh Circuit erred in summarily rejecting the University of Wisconsin's proposal for a refund system to address objecting students concerns.

ARGUMENT

I. UCSA'S Experience with Student Fee Funding after *Smith v. Regents*: The Argument for Permitting Refunds of Student Activity Fees

A. California's Experience with Student Fee Rebate Systems

The availability of a refund mechanism as a constitutionally defensible alternative is of vital importance to

University of California students. In 1993, to the chagrin of student leaders throughout the University of California system, the California Supreme Court held that objecting students were entitled to procedural protections ensuring that their mandatory student fees not be used to finance political and ideological activities with which they disagreed. *Smith v. Regents of the University of California,* 4 Cal. 4th 843, 16 Cal. Rptr. 2d 181, 844 P.2d 500 (1993), *cert. denied*, 510 U.S. 863 (*Smith I*). The court decided that the only practical way to protect the dissenters' rights was to require the university to implement the procedural protections described in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) and *Keller v. State Bar of California*, 496 U.S. 1 (1990). The court interpreted those cases as requiring a system which would provide for a refund of the portion of a dissenting student's fees that supported a group whose primary purpose was political or ideological as opposed to educational. *Smith I* at 862-63, 866. Courts handling the litigation in the wake of *Smith I* have interpreted that decision as imposing a refund procedure for political and ideological activity by student activity groups and for student government lobbying. See, *Smith v. Regents of the University of California* 56 Cal. App. 4th 979, 981, fn. 1, 65 Cal. Rptr. 2d 813 (1997) (*Smith II*); *Associated Students of the University of California at Riverside v. Regents of the University of California*, No. C 98-0021 CRB, WL 13711 (N.D. Cal. Jan.8, 1999).

Unfortunately, although the California Supreme Court made it clear that the Regents were to adopt a refund mechanism, the Regents did not find implementation of the decision simple. An immediate difficulty the University of California confronted was determining which student activity was subject to a refund. This required the University to

distinguish political activity from educational activity, despite its long-standing belief that student political activity was educational.

Various options were proposed to protect the rights of dissenting students, including positive checkoffs, negative checkoffs, abolishing all mandatory student fees, and student referenda to establish completely voluntary funding of student political activity. These options were carefully considered, but ultimately opposed by student government as not being constitutionally required and for failing to ensure adequate funding for student activities that the majority of students had no objection to, and in fact, found vitally important to their educational experiences.[4]

Ultimately, the Regents did adopt a refund mechanism applicable to the lobbying and other political activities of some student groups, but not to student government which was required to fund its lobbying activities through voluntary fees. This lead to further litigation by a student government organization, claiming that the rights of the majority of students who had no objection to funding student government's political activities were being trammeled to protect dissenters' interests. *Associated Students v. Regents, supra.*

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Prior to the *Smith I* decision, UCSA opposed any limitation on the use of student fees for political and ideological activity. The *Smith I* decision forced UCSA to reluctantly recognize a refund system as the best alternative to a bad situation.

B. The Student Majority Has a Right to Engage in Political Speech with Student Activity Fees Without Being Silenced by Dissenters

Public universities have a legitimate interest in compelling students to contribute to a student activity fee. See, e.g., *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032 (9th Cir. 1999); *Carroll v. Blinken*, 957 F.2d 991, 999-1003 (2nd Cir. 1992); *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D.Neb. 1973), *aff'd mem.*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Kania v. Forham*, 702 F.2d 475 (4th Cir. 1983); *Hays County Guardian v. Supple*, 969 F.2d 111, 123-24 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993). When support is not compelled, apathy and the incentive to become a "free rider" create a funding problem for student activities.

Further, the majority of students who have no objection to the use of their fees for political activities have a right to engage in and financially support such speech without being silenced by the minority. Even in this Court's cases finding a right for dissenters to withhold financial support for some union political activity, this principle has been made clear. Thus, in striking down the lower court's injunction in *International Ass'n. of Machinists v. Street*, 367 U.S. 740 (1961), the Court reasoned that:

> ... the fact that these expenditures are made for political activities is an additional reason for reluctance to impose such an injunctive remedy. ... As to such expenditures **an injunction would work a restraint on the expression of**

> **political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters.** To attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts in administering the [Railway Labor] Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other.

Id. at 773 (emphasis added). Likewise, in *Brotherhood of Ry. and Steamship Clerks v. Allen*, 373 U.S. 113 (1963), the Court invalidated an overbroad injunction, cautioning that:

> [N]o decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, **to expend nondissenters' such exactions in support of political activities.**

Id. at 122 (emphasis added). And similarly, in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), the Court specifically limited its holding so as not to infringe on the rights of the non-dissenting majority of union members:

> We do **not** hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires **only** that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Id. at 235-36 (emphasis added). Therefore, if student speech and debate are to flourish and the majority is not to be silenced by the dissenters, a refund-escrow mechanism must remain a viable funding alternative.

C. A Refund-Escrow System is the Only Practical Way to Implement *Hudson* at Public Universities

Moreover, a refund-escrow system is the only practical way to institute a student fee reduction at a university. In the case at bar, the University of Wisconsin collects from full-time students enrolled at the University's Madison campus a mandatory student activity fee each semester. The Associated Students of Madison (ASM), the student government, has complete authority over most of the allocable portion of the fee. *Southworth* at 719. The fee is used for the ASM budget, and to fund the General Student Service Fund (GSSF). Both the ASM and the GSSF monies are distributed to other private organizations. The GSSF is distributed to registered student organizations, University departments, and community based service organizations. *Id.*. The ASM funds registered student organizations, which are non-profit entities, controlled and directed by students, and composed mainly of students. Such registered student organizations receive funds in the form of operating grants,

travel funds, or funds to sponsor an activity or event. *Id.* at 719-20. The University reviews and has final authority over these funding decisions. *Id.* at 720.

The fee collection and distribution system at the University of Wisconsin is typical of public universities throughout the country. Student fees are typically administered and distributed by student government. Student government is, of course, run by students who are elected each year at the beginning of the school year. The student body, along with its elected representatives, change from year to year, as a new freshman class comes in, a senior class graduates, and students transfer in or out, take or return from leaves of absence, or fail or drop out. Generally, during summer break and other intercessions, student government ceases to function.

Student activity fees, as at the University of Wisconsin, are typically collected in a lump sum at the beginning of the quarter or semester from matriculating students, often just days before classes start. Unlike unions and state bar organizations, the fees are not distributed to a single organization with one budget. Instead, at large universities like the University of Wisconsin, they are distributed to well over a hundred separate groups, each with its own budget.

Thus, at the time fees are collected, student government has no way of knowing: 1) which student groups will exist in the upcoming year, 2) what the goals and planned activities of the student groups will be, 3) the amount of money each group will request and will receive from the activity fund, 4) whether any of the independently run student groups will engage in political or ideological activity during

the year which they could not or had not anticipated (e.g. an impromptu rally to oppose a sudden military action), 5) how much money last year's student groups actually spent on chargeable or non-chargeable activities, and 6) the identity and location of the students who will object to certain political and ideological uses of their funds, as this information changes from semester to semester.

Therefore, neither student government nor the university has sufficient information at the time fees are collected to calculate what fees, if any, will be used in the upcoming school year for political and ideological activity. If they were to guess, and to reduce certain students' fees in advance, this would have the "serious defect of depriving [students] to access to some funds that [they] are unquestionably entitled to retain." *Hudson*, 475 U.S. at 310. Further, without such information, they cannot provide potential objectors with "an adequate explanation of the basis for the fee" upon which to base an objection, as required by *Hudson*. Id. at 306, 310 (noting that the nonunion employee has the burden of raising an objection). See also, *Street*, 367 U.S. at 774 (only those objecting are entitled to relief; "dissent is not to be presumed").

A refund-escrow system avoids these problems. Such a system would allow all fees to be uniformly collected from all students. Before distribution to any group, an adequate proportion of the fees based on previous years' experiences with refund requests could be placed into escrow for a sufficient time to allow budgets and expense audits to be prepared, and funding decisions to be made. This information could be distributed to all registered students, who would then have an opportunity to object. After the period for objection ended, funds in escrow could be

distributed to student groups or rebated to the objectors. This system has the substantial advantage of ensuring adequate funding for student activities and speech, in that it does not allow students the choice to avoid paying all student activity fees for purely economic reasons, and provides relief to only those with genuine First Amendment concerns.

II. The *Southworth* Case

A. The District Court's Decision

The student fees allocated at the University of Wisconsin go to a variety of organizations, some of which engage in political and ideological speech. *Southworth*, at 720-21. Respondents, students at the University, object to the use of their fees to support political and ideological speech with which they disagree. They claim that the University's use of their fees in this manner violates their First Amendment rights.

The District Court found that respondents had a First Amendment interest in not having their mandatory student fees used to fund the political and ideological activities of campus groups whose views they found offensive. In determining their remedy, it rejected the University's proposed method for protecting objectors' First Amendment interests - a refund mechanism. It instead enjoined the University from funding private groups that engage in ideological or political advocacy, and ordered it to publish written notice of which organizations engaged in political or ideological speech, and the pro rata share of mandatory fees devoted to those organizations. It further ordered that the University establish an arbitration proceeding for disputes over the amount of fees paid and the nature of the

organizations involved. *Southworth* at 733.

B. The Seventh Circuit's Decision

On the University's appeal, the Seventh Circuit applied compelled speech cases from the union and integrated state bar context to the students' challenge. *Abood v. Detroit Bd. of Educ.*, *supra*, 431 U.S. 209 (1977); *Keller, supra*, 496 U.S. 1 (1990); *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991). Using *Lehnert's* three part test, it found that even if funding private political and ideological organizations is germane to the University's mission, the forced funding of such organizations significantly adds to the burdening of the students' free speech rights. It therefore agreed with the District Court that the University could not use the allocable portion of objecting students' mandatory activity fees to fund organizations which engage in political or ideological activities, advocacy, or speech with which they disagreed. *Southworth* at 732-33.

The Seventh Circuit also agreed that, "[i]n issuing the injunction, the district court properly rejected the Regents' proposed procedure for compliance - a refund mechanism." *Southworth* at 733. In so finding, it relied on this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1985) for the proposition that (in the union context) a pure rebate approach inadequately protects the constitutional rights of objecting employees. It quoted *Ellis*, 466 U.S. at 443-45:

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization.

> The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.

The court rejected the University's claim that it could not establish a pro rata reduction in advance since it had no way of knowing at the time fees were collected how they would be spent. Again, it relied on *Ellis*: "The only justification for this union borrowing would be administrative convenience. ... Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Southworth* at 733, quoting *Ellis* at 443-45.

The Seventh Circuit then went on to hold the District Court's injunction overbroad for preventing the University from funding political and ideological activity with non-objecting students' fees. *Southworth* at 733-34. In light of principles of federalism and comity, it enjoined the University from using the allocable portion of objecting students' mandatory activity fees to fund organizations which engage in political or ideological activities, advocacy, or speech, but left it up to the University to devise a fee system consistent with its decision and Supreme Court precedent. *Id.* at 734-35. In guiding the University in how to comply with its decision, the court cautioned:

> ... we reiterate that under our holding above, the University cannot even temporarily collect

> from objecting students the portion of the fees which would fund organizations which engage in political and ideological activities, speech, or advocacy, whether or not the organization also provides some service in doing so.

Id. at 735.

III. The Court Erred in Applying this Court's Compelled Speech Cases, Since Student Activity Fees Create a Public Forum Accessible Equally to All Students

It is undisputed that some of the student fees distributed by the University are used by student groups for political and ideological speech. Undoubtedly, those same groups and other groups receiving fees engage in speech which is purely academic, social, or recreational. As petitioners have argued in their Petition for Writ of Certiorari, and as this Court found in its *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) decision, the student activity fee creates a limited public forum through which the university spends funds to encourage a diversity of private speech. *Rosenberger*, 515 U.S. at 830. The expression of a diversity of viewpoints on campus is a vital part of the educational experience of this and every public university. See, e.g., *Rosenberger*, 515 U.S. at 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"); *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("The college classroom with its surrounding environs is peculiarly the "market of ideas ...").

Because student political speech and activity in a university context is educational, the dichotomy articulated by the Seventh Circuit between educational activity and political activity is a false one. Universities cannot make this distinction because, as a matter of fact and of law, it does not exist. *Healy*, 408 U.S. at 180-81. Further, to require universities to evaluate the activities of each student group that receives funding misconceives the universities' purpose for creating a student activity fee. Universities do not fund student groups to support any particular student group or its viewpoint. They fund a forum which allows student groups to access funds because student speech creates a vibrant, stimulating intellectual environment for students that enhances their educational experience.

Moreover, by requiring public universities to scrutinize and categorize each student group based on the university's judgment that its activity is somewhat more political than educational (or vice versa), the court is requiring universities to engage in unconstitutional content based discrimination. This contravenes a long line of Supreme Court authority. See, *Rosenberger*, 515 U.S. at 832-36 (holding that the university could not pay for printing costs of all eligible student organizations from student activity fee except a Christian student newspaper on the basis of its religious viewpoint, and stating that the first danger to liberty lies in granting the State the power to examine publications and classify them based on viewpoint, the second is the chilling of individual thought and expression); *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) (holding that policy of opening university facilities to some student groups required university to open them to all groups without regard to religious content of their activities); *Healy*, 408 U.S. at 181, 184 (holding that college must meet "heavy burden"

before denying official recognition to SDS chapter on basis of group's political activities). For these reasons, *amicus curiae* UCSA urges the Court to find that respondents' First Amendment interests are not even implicated by the student fee system.

IV. The Seventh Circuit Was Wrong in Summarily Rejecting The University's Proposal Because a Refund-Escrow Procedure Adequately Addresses the Dissenters' Objections Without Silencing the Majority

Assuming, *arguendo*, that *Abood* and *Keller* do apply to student activity fees collected to support a limited public forum where all student organizations are eligible to be funded without regard to the political, ideological, or religious viewpoint of their speech, neither the District Court nor the Seventh Circuit should have summarily rejected the University's proposal for a refund mechanism. Cases in both the compelled speech and the student speech areas make that holding error. Moreover, as demonstrated above, a refund-escrow system is the only practical way to address dissenters' objections without trammeling the rights of the majority to be heard.

A. The Supreme Court's Compelled Speech Cases Allow for an Escrowing of Fees Subject to a Refund

The Supreme Court's compelled speech cases make clear that it is constitutionally acceptable to collect fees from dissenters, place them into an interest bearing escrow account, and to subsequently refund the portion of the fees that were used for nonchargeable political or ideological

activity.

In *Ellis*, agency fee paying employees challenged the union's rebate system which allowed the union to collect the full amount of dues from them, use part of their dues for political activities they found objectionable, and rebate the equivalent amount spent on objectionable activities a year later. *Ellis*, 466 U.S. at 440-41. The Court held that the harm from this pure rebate scheme would be reduced if the union had paid interest on the amount refunded, but it did not do so. *Id.* at 444. It stated that:

> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, **such as advance reduction of dues and/or interest-bearing escrow accounts,** that place only the slightest additional burden, if any, on the union.

Id. (emphasis added).

In so holding, the Court clearly endorsed the option of using an interest-bearing escrow account in conjunction with a rebate. In reaching its decision, it reviewed with apparent approval its prior decisions which suggested the appropriateness of a refund procedure. Specifically, it noted *Street*'s suggested remedy of "'restitution to each individual employee of that portion of his money which the union

expended, despite his notification, for the political causes to which he had advised the union he was opposed,'" *Ellis* at 443 (quoting *Street*, 367 U.S. at 775), and *Allen*'s proposal of a refund, to any employee who indicated his opposition to the use of his funds, of a portion of the exacted funds in the same proportion that political expenditures bore to the total union expenditures, and a reduction of future exactions in the same proportion, *Ellis*, at 443 (citing *Allen*, 373 U.S. at 122).

In *Hudson*, non-union members were charged 5% less at the outset than union members and provided the subsequent opportunity to object to uses paid for with the dues that were actually collected from them. Non-union members who lodged objections with the union sued to challenge the union's procedure as to the funds actually extracted from them. The advance reduction used by the union was not challenged, and was never passed on by the Court.

The Court found "three fundamental flaws" with the union's scheme. First, "a remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Id.* at 303. Second, noting that the nonunion employee has the burden of raising an objection, the Court found that "the 'advance reduction of dues' was inadequate because it provided nonmembers with inadequate information [upon which to base any possible objection] about the basis for the proportionate share." *Id.* at 306.

Third, the procedure was "defective because it did not provide for a reasonably prompt decision by an impartial decisionmaker." *Id.* at 307.

During the course of the litigation, the union had voluntarily put 100% of the plaintiffs' dues into escrow and agreed to do so for other employees while disputes about their dues were pending. *Id.* at 309. The Court noted that although that remedy cured the first defect with the union's scheme, it was not constitutionally required. "Such a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain." *Id.* at 310. But, the Court did ultimately hold that:

> ... the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Id..

Thus, *Hudson* ruled that the escrowing of amounts that could reasonably be challenged by objectors cured the first defect - i.e., the risk that funds may be used temporarily for an improper purpose. Significantly, it did not rule that

rebating in and of itself was a "fundamental flaw" in the union's scheme. Thus, it appears that *Ellis'* endorsement of "interest-bearing escrow accounts" as an adequate remedy remains sound. See also, *Keller v. State Bar of Cal.*, 496 U.S. 1, 16-17 (1990) (applying *Hudson's* ruling to integrated state bars).

B. The Majority of the Courts of Appeals Have Upheld the Use of Escrow-Refund Systems

In *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370 (9th Cir. 1993), the Ninth Circuit held that an escrow-refund mechanism used to collect fees from public school teachers passed constitutional muster. In *Grunwald*, the court evaluated the following system: The teachers' union deducted the same amount of money each month from the paychecks of union and non-union members. However, the fees charged to non-union members were put into an interest-bearing escrow account. Following the first monthly deduction in September, the union sent a notice to all non-union members telling them how to obtain a rebate of non-chargeable dues, along with an explanation of how the union calculated that amount. To obtain a refund, non-members had to submit a letter objecting to the union's use of the funds by a specified date. If the non-member agreed with the union's calculation, the refund was immediately processed. If not, the non-member could request that the

calculation be determined by a prompt arbitration, at the union's expense.

The court approved of this procedure, noting that *Ellis* allows unions to adopt procedures "such as advance reduction of dues and/or interest-bearing escrow accounts" in fulfilling their obligation to not use objectors money, even temporarily, for ideological purposes. *Grunwald*, 994 F.2d at 1374. The court found this procedure justified for public school teachers because every year different teachers are employed, and every year, different teachers choose to be or not to be union members. This fluctuation made an advance reduction system exceedingly difficult to implement. *Id.* at 1376-77. The same situation is present among university students, where there is even more fluctuation from year to year.

The Eleventh Circuit came to a similar conclusion in *Gibson v. Florida Bar*, 906 F.2d 624 (11th Cir. 1990), *cert. dismissed*, 502 U.S. 104 (1991). After this Court's decision in *Hudson*, the Florida Bar adopted a procedure to address the concerns of objecting Bar members. Bar dues were uniformly collected from all Bar members. If the Bar adopted a legislative position on an issue, it published its position in its journal and circulated it to all Bar members. Within 45 days of receipt of the notice, a member could object to a legislative position. If a member objected, the Bar then determined the pro rata amount used to fund that activity and put it into an escrow account. The Bar had 45

days to either refund the pro rata share or refer the matter to arbitration. *Gibson*, 906 F.2d at 628-29.

The plaintiff contended that providing a refund instead of an advance reduction of dues for the portion the Bar knew would be used for political activity was unconstitutional. *Id.* at 631. The Bar argued that interest bearing escrow accounts were permissible, and that an advance deduction was not feasible because it could not predict, at the time dues are assessed, what political activity it will undertake in the upcoming year. *Id.* Under *Keller*, objectors were not entitled to deduct dues for all political activity, just that activity not germane to, and necessarily or reasonably incurred in furtherance of, the government's purposes for compelling the association - *i.e.*, regulating the legal profession and improving the quality of legal services. *Keller*, 496 U.S. at 13-14.

The Eleventh Circuit held that:

> In *Ellis* [citation omitted], the Supreme Court invalidated a "pure rebate approach" but noted the existence of "readily available alternatives, such as advance reduction of dues *and/or interest-bearing escrow accounts*." (Emphasis added). The Court restated this proposition in *Chicago Teachers*, 475 U.S. at 303-04, 106 S.Ct. At 1074 (quoting *Ellis*), and stated that "an escrow for the amounts reasonably in

> dispute," along with an adequate explanation of the fee and an opportunity to challenge the amount, would satisfy the constitutional requirements for an objection procedure. [Citation omitted]. These statements provide indisputable authority that an interest-bearing escrow account (along with an otherwise satisfactory procedure) is sufficient."

Gibson at 631.

A majority of the circuits have similarly upheld the use of escrow-refund mechanisms. See, *Andrews v. Education Ass'n. of Cheshire*, 829 F.2d 335, 339 (2nd Cir. 1987) (teachers' agency fees collected through payroll deductions until objection made; after objection, 100% of fees put into interest-bearing escrow account until arbitrator resolves dispute and union calculates rebate); *Crawford v. Air Line Pilots Ass'n. Intern.*, 870 F.2d 155, 160-61 (4th Cir. 1989), *aff'd en banc*, 992 F.2d 1295, 1301-02 (4th Cir. 1993) (union deposits 150% of estimated amount of rebate obligation based on previous years' experience, budget projections and any other available information into an interest bearing escrow account; independently audited report of germane and non-germane expenses from previous year distributed by May 31st, along with lump sum rebate with interest); *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 626, 634-37 (1st Cir. 1990) (Bar's rebate and escrow system can pass constitutional muster; at time dues

paid, attorneys can file general objection to use of dues for ideological activities unrelated to core purposes; objection triggers escrowing of dues until dispute resolved; escrow amount must be determined and disclosed to members before dues assessed, and must be based on verified accounting of projected expenditures derived from previous years' experiences, plus a buffer). See also, *Hohe v. Casey*, 868 F.2d 69, 71-72 (3rd Cir. 1989), *cert. denied*, 493 U.S. 848 (1989) (affirming denial of motion for preliminary injunction on collecting agency fees where union escrowed 100% of agency fees until disposition by impartial arbitrator).

Prior to the *Southworth* decision, the Sixth Circuit stood alone in requiring an advance reduction of fees. Notably, neither of the Sixth Circuit cases involve either teachers or students. *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987).

Thus, the Courts of Appeal have generally agreed with the Second Circuit's assessment in *Andrews*, *supra*,

> ... we do not believe that *Hudson* stands for the proposition that a union's procedures are constitutionally infirm unless they constitute the least restrictive process imaginable. When the union's plan satisfies the standards established by *Hudson*, the plan should be upheld even if its opponents can put forth some plausible

> alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support.

Andrews, 829 F.2d at 340.

C. The Same Principles Allow for a Refund In Student Fee Cases

In their Brief in Opposition to the Petition for Writ of Certiorari, the respondents argue that *Rosenberger* directed the courts to *Abood* and *Keller* to decide the rights of dissenting students to withhold financial support from the student fee public forum. Assuming that *Abood* and *Keller* apply, *Rosenberger* also suggests the appropriate remedy. The *Rosenberger* Court stated:

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

Rosenberger, 515 U.S. at 840. See also, *Rosenberger*, 515 U.S. at 851 (O'Connor concurring). The use of the words

"pro rata return" strongly suggest that the Court has not overruled *Ellis'* holding that a refund from fees held in an interest-bearing escrow account is a constitutionally acceptable way to protect the rights of dissenters.

Because the majority of courts confronting First Amendment challenges to uses of the student activity fund have found no Constitutional problem with compelling contributions to the fund, only three courts have confronted the situation the *Southworth* court did where students were found entitled to a remedy to prevent their funds from supporting campus groups they found objectionable. All of those cases were decided before *Rosenberger*, and are of dubious precedential value. *Smith I*, *supra*, *Carroll*, *supra*, and *Galda v. Rutgers*, 772 F.2d 1060 (3rd Cir. 1985). And, only one of those cases, *Smith I*, presented a truly analogous situation where the funding of a variety of groups from a viewpoint neutral activity fee forum was challenged.[5]

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[5] Neither *Galda* nor *Carroll* are truly applicable here. In *Galda*, the fee challenged, although refundable, was not for a general student activity fund, but was specifically earmarked for an independent outside organization, the New Jersey Public Interest Research Group, a self proclaimed political advocacy group. *Galda*, 772 F.2d at 1064, 1067-68 (enjoining earmarked assessment of refundable fee payable to NJPIRG). The *Galda* court took care to distinguish this situation from one where a student group is

As discussed above, in *Smith I* the California Supreme Court ordered the University of California to adopt a procedure to refund student activity fees to students who objected to the political and ideological activities of student groups and to lobbying by student government. *Smith I*, 4 Cal. 4th at 863, 866. Thus, there is no support in the student fee cases for the Seventh Circuit's *Southworth* holding that a refund mechanism does not meet constitutional standards.

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funded out of a mandatory student activity fee creating a forum for a diverse range of opinion. *Id.* at 1064, 1067. Likewise, in *Carroll*, dissenting students challenged the automatic distribution of a portion of their fee to the New York Public Interest Research Group (NYPIRG), pursuant to a contract between NYPIRG and the student government. *Carroll*, 957 F.2d at 993. Because of the substantial interest the university had in promoting extracurricular life, fostering concrete skills and a sense of civil duty, and stimulating energetic campus debate, the Second Circuit held that dissenters could be compelled to pay for some of NYPIRG's activities, but not for those conducted off the State University of New York, Albany campus. *Id.* at 1001. Therefore, it held that the University could constitutionally allocate students' activity fees to NYPIRG as long as NYPIRG spent the same amount of money on the Albany campus as was contributed by Albany students. *Id.* at 1002.

CONCLUSION

For the foregoing reasons, UCSA urges the Court to reverse the Seventh Circuit and find no First Amendment right to withhold fees used to support a student activity fund which creates a public forum for the expression of diverse student views. If the Court does find such a right, UCSA urges the Court to reverse the Seventh Circuit's summary conclusion that a refund system would not meet minimal constitutional requirements, and to remand for further proceedings.

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Respectfully submitted,

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