No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

BOARD OF REGENTS OF THE UNIVERSITY
OF WISCONSIN SYSTEM, *et al.*,
Petitioners

v.

HAROLD SOUTHWORTH, *et al.*,
Respondents

BRIEF OF THE NATIONAL SMOKERS ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Filed July 14, 1999

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

BRIEF OF THE NATIONAL SMOKERS ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The National Smokers Alliance is a non-profit membership organization composed of adults who support the accommodation of smokers and non-smokers in public places and in the workplace, and who oppose government-imposed smoking bans and the excessive taxation and regulation of tobacco products. The National Smokers Alliance, which has a total membership of approximately 3,000,000, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

The First Amendment's protections for the freedom of speech include the right of each citizen not to speak. As part of this right, individuals cannot be forced to support, either through their actions, speech, or financial means, the dissemination of ideas with which they disagree. A particular threat to the right against compelled speech arises when the government imposes a discrete fee to be used to fund speech with which the fee-payers disagree. Where, as here, the state requires such a mandatory payment, this Court has recognized only limited exceptions to the First Amendment's broad protections. None of the circumstances of this case justify expanding a narrow exception to the Free Speech Clause to include the millions of students, faculty, and staff on the nation's college and university campuses.

Because the university setting is sharply different from the contexts within which this Court has permitted mandatory fees to fund speech, this Court should refuse to

---

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

apply the analysis of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Instead, petitioners' compulsory fees should be subject to the standards of review that apply to government attempts to burden speech in the public sphere. Cases such as *Abood* and *Keller v. State Bar of California*, 496 U.S. 1 (1990), have allowed mandatory fees because the state was advancing a government objective in which success was utterly dependent on the collective participation of all in the affected class. In such cases, compelled association and dues overcame free-rider problems that threatened to doom the very existence of a state-promoted institution. Here, by contrast, no state interest justifies the forced collectivization of student efforts and resources.

This case's setting in the college and university context demands that any state burdens on free speech rights receive the strictest of scrutiny. Simply because respondents are in college, and not the public sphere, the state does not have greater freedom to trample their constitutional rights. Cases that have recognized reduced constitutional rights in schools usually have occurred in the primary and secondary school context, where the needs of educators to maintain order and safety are paramount. In the university setting, by contrast, students are adults who enjoy full political rights and are part of a community that should receive the same constitutional treatment as the public sphere.

Application of the First Amendment's bar on compelled speech threatens neither the State's right to make academic choices nor the academic freedom of professors and students. Petitioners' fee funds student-run activities that take place outside of the classroom; these student groups are not under direct faculty supervision, there are no classroom discussions or lectures, and there are no formal

evaluations of student performance. Prohibition of the fee does not prevent the university from deciding what courses to offer, nor does it interfere with classroom education.

Petitioners' mandatory fee should receive strict scrutiny. In its other compelled speech cases, this Court implicitly has used this standard when plaintiffs have challenged government efforts to force them to support speech with which they disagree. In such cases, the funding of other speech with which the objecting fee-payers might agree does not provide a cure for the violation of free speech rights. Instead, this Court has invalidated the fee automatically. The mandatory fee forces objecting students to replace the speech that they would support with their funds with speech chosen by the university and its student groups. Even if this Court were to conclude that petitioners' funding scheme were content-neutral, recent cases support affirming the decision below. This Court has never held that the state can achieve the goal of creating a virtual public forum—solely for the purpose of promoting the expression of diverse viewpoints—by compelling dissenting citizens to contribute financially through a special fee. It should not do so now.

The limited evidence that we have concerning the original understanding of the First Amendment supports the principle that the government cannot use mandatory fees to support speech with which the payers disagree. In examining these issues, Justices and legal scholars have long looked to the Virginia "Assessment Controversy" for guidance as to the intentions and beliefs of those who wrote the First Amendment. While the Assessment Controversy occurred five years before the ratification of the Bill of Rights, its involvement of many of the leading founders, in the most important state of the early repub-

lic, and its airing of many of the key arguments and issues, justifies its relevance for interpretation of the First Amendment. Close examination of the Assessment Controversy indicates that some of the leading framers would have understood the emerging First Amendment to bar the imposition of discrete taxes to fund political or ideological speech. Efforts by key founders, such as Thomas Jefferson and James Madison, to disestablish the Anglican church represented a broader belief that the state should not be in the business of shaping citizen's minds and views. Central to their efforts was the idea that the government could not force individuals to pay for the dissemination of ideas with which they disagree. This singular historical event lends important support for the same principle embodied in this Court's case law and its application to the case at hand.

ARGUMENT

The First Amendment guarantees a citizen's right to remain silent, just as it protects the right to speak. *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), read the Free Speech Clause to prohibit states from compelling public school students to salute and pledge allegiance to the American flag. As Justice Murphy observed in *Barnette,* the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 645 (Murphy, J., concurring). *Wooley v. Maynard,* 430 U.S. 705 (1977), extended this principle to prohibit states from forcing drivers to display the state motto on their license plates, and *Pacific Gas & Electric Co. v. Public Utilities Commission,* 475 U.S. 1 (1986), invalidated a state rule that required a utility to distribute an unwanted consumer organization's communication. *See also Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). As this Court declared

in *PG&E*: "the essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the ultimate end as freedom of speech in its affirmative aspect." 475 U.S. at 11 (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 524, 559 (1985) (quoting *Estate of Hemingway v. Random House,* 23 N.Y. 2d 341, 348 (1968) (emphasis in original)).

As these cases demonstrate, the Free Speech Clause bars the government from compelling individuals to support, either through their actions, speech, or financial means, the dissemination of ideas with which they disagree. This principle applies regardless of whether the government actually forces individuals to speak, as in saluting the flag, or compels them to pay funds that support speech with which they disagree. See *Keller,* 496 U.S. 1; *Abood,* 431 U.S. 209. As this Court recognized in *Buckey v. Valeo,* 424 U.S. 1 (1976), the First Amendment protects, as speech, financial contributions to an organization for the purpose of political speech. *Id.* at 22-23. Both forced speech and forced contributions, therefore, strike at the very heart of the First Amendment "notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state." *Abood,* 431 U.S. at 235 (citations omitted). That core First Amendment principle is violated by the petitioners' effort to force respondents to contribute financially to support political speech with which they disagree.

I. THE UNIVERSITY CONTEXT DOES NOT JUSTIFY THE VIOLATION OF A CITIZEN'S FIRST AMENDMENT RIGHT AGAINST COMPELLED POLITICAL SPEECH

A particular threat to the right against compelled speech arises when the government imposes a discrete fee to be used to fund political and ideological speech. Where, as here, the state requires such a mandatory payment, this Court has recognized only limited exceptions to the First Amendment's broad protections against compelled speech. In such cases, the Court has allowed mandatory fees *only* when the state was advancing a government objective that required the collective participation of all in the limited, affected class in order to succeed. This case—which involves universities, rather than union shops or bar associations—bears no similarities to situations in which the Court has allowed mandatory fees. Because the university setting is vastly different from these other contexts, this Court should subject petitioners' activities fees to the normal standards of scrutiny that apply when government burdens political speech.

In the context of agency shop rules, for example, this Court has held that the government may compel non-union teachers to contribute financial dues to the union that negotiated their collective bargaining agreement. *Abood*, 431 U.S. 209. Although the non-union teachers held a right against compelled speech, this Court found that the government had a legitimate interest in promoting the union shop to prevent free-riding by non-union workers on a union's collective bargaining efforts. *Id.* at 222; *see also Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961). In order to accommodate both interests, *Abood* held that the union could use the funds of objecting non-union teachers for collective bargaining activities, but not

for the espousal of political or ideological causes, unrelated to collective bargaining, with which the teachers disagreed. *Id.* at 235-36. The mandatory fee prevents those who benefit from union representation from avoiding their fair share of the cost.

Similarly, in the context of state bar associations, this Court has recognized that the *Abood* exception to the First Amendment's ban on compelled speech applies only because of the role of the bar in regulating the legal profession. In *Keller v. State Bar of California*, this Court found that lawyers benefited from the unique status of an integrated bar in a manner analogous to the way employees gained from union representation. 496 U.S. at 12. State law required bar membership and dues as a condition of practicing law in the state. In return, the bar engaged in a number of functions to regulate the practice of law, such as examining applicants for admission, formulating rules of professional conduct, and disciplining lawyers for misconduct. *Id.* at 4-5. For an integrated bar to succeed in the self-regulation of the legal profession, all practicing lawyers must be members; lawyers benefit by avoiding more direct state supervision and by being admitted to the practice of law. *Id.* at 12-14. Thus, in cases where the bar is acting in its role as a professional adviser to those ultimately charged with the regulation of the legal profession, the First Amendment does not prohibit the use of dissenting members' funds. *Id.* at 15. But when those funds are used for political or ideological speech unrelated to those goals, the Free Speech Clause is offended. As this Court noted, compulsory bar dues could not be used to endorse or advance "a gun control or nuclear weapons freeze initiative," but they could be used for activities connected with disciplining members of the bar. *Id.* at 16.

This Court has allowed mandatory fees for compelled speech in only these two narrow circumstances. If the state interest in assuring successful regulation requires "compelled association," *id.* at 13, then it can compel financial contributions for the support of speech, but only if that speech is related to the purpose of a valid regulatory framework. In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984) and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), this Court refined the *Abood* analysis to bar the expenditure of dissenting employees' dues on speech that was not "germane" to collective bargaining activities. *See also Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). As recent cases have explained, the state may use mandatory fees to fund speech only if the speech is "germane" to the regulation's objectives, it is justified by the government's vital policy interests, and it does not significantly burden free speech interests. *See Lehnert*, 500 U.S. at 519; *Ellis*, 466 U.S. 435; *see also Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S. Ct. 2130, 2146 (1997) (Souter, J., dissenting).

Aside from the unique situations created by union shops and state bars, this Court has refused to broaden the narrow exception for compelled political speech. While the Court recently upheld a federal agricultural marketing program that compelled contributions in order to pay for generic advertising, *Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S. Ct. 2130 (1997), it found that the First Amendment's bar on compelled speech was not implicated because the advertising constituted commercial speech. *Id.* at 2138, 2140. *Glickman* does not apply where, as here, the compelled speech is of a political and ideological nature. The Court has never extended the *Abood* analysis to the different, if not unique, context of the university—nor should it.

Although the lower courts that have addressed this issue have adopted the *Abood* approach, *see, e.g., Southworth v. Grebe*, 151 F.3d 717, 722-23 (7th Cir. 1998); *Galda v. Rutgers*, 772 F.2d 1060, 1063-64 (3d Cir. 1985); *Carroll v. Blinken*, 957 F.2d 991, 997 (2d Cir. 1992); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992); *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983); *Smith v. Regents of the University of California*, 4 Cal.4th 843, 844 P.2d 500, 511 (Cal.1993), they have done so without analyzing whether the standard of scrutiny that applies in the public sphere, rather than in the workplace, is more appropriate. To be sure, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), Justice O'Connor's concurring opinion appeared to suggest that the *Abood/Keller* approach might apply to mandatory student fees. *Id.* at 851 (O'Connor, J., concurring). But Justice O'Connor's concurrence only cited *Keller* and *Abood* to make clear that *Rosenberger*'s requirement—that a state university distribute student activity funds in a content-neutral manner—did not address the constitutionality of the collection of the fees themselves. *Id.* ("Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees."). In this regard, the dissenting judges of the Court of Appeals for the Seventh Circuit, sitting *en banc*, incorrectly concluded that *Rosenberger* dictated an opposite outcome in this case. *Southworth v. Grebe*, 157 F.3d 1124, 1127-28 (1998) (denial of petition for rehearing en banc) (Wood, J., dissenting). *Rosenberger* only required the University of Virginia to disburse funds to groups in a content-neutral manner; as Justice O'Connor's concurrence notes, *Rosenberger* ex-

pressly did not reach the constitutionality of the collection of the funds in the first place.

In the absence of any commonalities among union shops, integrated bars, and universities, this Court should refuse to expand a narrow exception to the free speech rights of the nation's citizens. Union shops and integrated bars share few, if any, similarities with the university setting. In the former case, compelled association and dues are necessary order to overcome free-rider problems that may doom the very purpose of state regulation. Here, by contrast, there is no vital state interest that requires the forced collectivization of student efforts and resources. Petitioners do not claim that respondents benefit from, without paying for, the efforts of other students in organizing groups and engaging in campus debate in such a manner that defeats the objectives of the university. Respondent students do not want to free-ride; they want to exit.

Further, the state does not have a vital interest in regulating the speech of college and university students by levying a mandatory speech tax. Achieving the state's interest does not require the financial contribution of all university students. There is no showing that campus organizing and speech would seriously decline in the absence of a compulsory fee. Mere speculation that a drop in such activity would occur cannot form the basis for the infringement of students' free speech rights. Cf. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986). In fact, unlike other compelled speech cases, here the state has conditioned the receipt of a public benefit—college and university education—on the payment of a fee that burdens students' free speech rights. This Court should demand that compelling government interests are

at stake before it expands an exception to the First Amendment's guarantee for freedom of speech to the many public college and university students in the country.

Close examination of the university context shows that the First Amendment does not permit the state to violate the free speech rights of university students. Respondents' status as college students does not provide the state with greater freedom to trampel their constitutional rights. As this Court has made clear before, "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972). "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). To be sure, this Court has recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Ibid.* In certain circumstances, the constitutional rights of students have less force in the face of reasonable regulations designed to maintain educational goals, discipline and safety. *Id.* at 507; *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 250 (1988).

For the most part, however, these cases have found lesser protections for students' constitutional rights in the context of primary and secondary schools, not colleges and universities. *Cf. Rosenberger*, 515 U.S. at 835-36; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973); *Healy*, 408 U.S. at 180. In contrast to primary and secondary education, college and university students are adults who make many of the education and

lifestyle choices that schools and parents make for younger children. Most college and university students can vote, and hence they need the full panoply of political rights guaranteed by the Constitution to allow them to be active citizens. They participate in an educational community based on the free exchange of ideas and criticism. "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Healy*, 408 U.S. at 180-81. Allowing students to enjoy the full exercise of First Amendment rights constitutes an important part of their education and of the pursuit of truth. "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, rather than through any kind of authoritative selection." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

While this Court has recognized that the free expression of ideas is central to the mission of the university, it has not found that the university can force students to take part in the vigorous give-and-take of extracurricular life. To do so would violate the First Amendment rights of students against compelled speech. In fact, compelled speech may cause more damage in the university setting, which is particularly devoted to the development of the intellect through speech, than in the ordinary public sphere. As this Court observed in *Rosenberger*, the "danger" of the violation of First Amendment rights "is especially real in the University setting, where the State acts against a background and tradition that is at the center of our intellectual and philosophic tradition." 515 U.S. at 835. By collecting mandatory fees, and then re-distributing them according to its own formula, the university has intervened in the marketplace of ideas. Such intervention distorts the natural workings of the market for speech and ideas, just as surely as it would if the government taxed individuals and used the revenues to make production decisions for a consumer good. Without a showing of any "market failure" in the unfettered operation of the campus speech market, such heavy-handed government intervention invariably produces results that will vary from that which would obtain if students were free to make their own decisions. It would be ironic, to say the least, if this Court allowed a student's first introduction to the First Amendment to take the form of compelled speech, in the form of mandatory fees to pay for the speech of others.

Further, while colleges and universities surely must maintain a certain level of order, it does not approach the level necessary in the primary and secondary school systems. It is in regard to the education of the young and immature where the need of states and school officials to maintain order and safety is greatest. Even if this also were true at the college level, this Court has rejected the notion that the need for order justifies restrictions on free speech rights in the university. As this Court said in *Healy*, "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Healy*, 408 U.S. at 180.

To be sure, this Court also has expressed concern for the "right of the University to make academic judgments as to how best to allocate scarce resources," *see Rosenberger*, 515 U.S. at 833-34; *Widmar*, 454 U.S. at 276, which it has recognized as a variant of the right of the state, when it is the speaker, to make content-based choices. Thus, the university may determine what courses to offer. Cf. *Rust v. Sullivan*, 500 U.S. 173 (1991). To

husband its resources, it can impose reasonable time, place, and manner restrictions on speech, and it can decide to bar the use of university facilities to non-university personnel. *Widmar*, 454 U.S. at 268 n. 5. Somewhat related to this doctrine is the First Amendment's protection for academic freedom, which "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603.

These doctrines, however, do not alter the First Amendment rights of adult students against compelled speech. Under the guise of making academic choices about teaching and research, petitioners could not force students to advocate required beliefs. Cf. *Barnette*, 319 U.S. at 634. Even in the name of academic freedom, professors and state officials could not use classroom instruction to force students to adopt specific tenets of belief, nor could they convert educational resources to advance their preferred causes. Similarly, vague claims of academic freedom or educational goals cannot allow petitioners to force objecting students to fund political or ideological speech, when the First Amendment would bar such compelled speech in the public sphere. This Court owes petitioners no deference in the definition and advancement of their compelled speech program.

Furthermore, here neither the State's right to make academic choices nor the academic freedom of professors and students are jeopardized by a bar on mandatory speech fees. Petitioners' compelled fee funds student-run activities that take place outside of the classroom; these student groups are not under direct faculty supervision, there are no classroom discussions or lectures, and there are no formal evaluations of student performance. Prohibition of the fee does not prevent the university from deciding what courses to offer, nor does it interfere with classroom education. At worst, application of the First Amendment's

compelled speech doctrine only limits the means by which the university may establish a certain type of campus atmosphere. Petitioners cannot show that, in the absence of the mandatory fee, vigorous debate and activity by student groups would cease. These groups are still free to continue as before; they just cannot force unwilling students to pay for their activities. Both the university and student groups are free to use other sources of revenue, so long as they do not originate from a discrete, mandatory fee to be used for speech purposes.

II. PETITIONERS' FEE CANNOT SURVIVE FIRST AMENDMENT STANDARDS OF REVIEW

In order to prevail, therefore, the petitioners have the burden of showing why the university context is sufficiently analogous to *Abood* or *Keller* to justify employing *Abood's* lower standard of review at all. Because the university context does not justify the reduction of individual rights, this Court should apply the usual level of First Amendment scrutiny to petitioners' mandatory fee. Here, petitioners impose a fee that funds political and ideological speech with which respondent students disagree. First Amendment principles as well as established case law make clear that such a fee, imposed outside of a union shop or a bar association, violates the First Amendment. Wisconsin, for example, could not impose a discrete speech tax on its citizens to fund speech which promotes the political or ideological views of the governor or the legislature. Otherwise, a Democrat- or Republican-dominated government could fund speech that seeks to convince voters to join its party. Similarly, Wisconsin cannot impose a tax to support different interest groups because of their political or ideological positions, or to fund a number of interest groups to ensure a diversity of views in the marketplace of ideas. Such efforts would

run counter to the First Amendment ideal that an individual's views should be shaped by his mind, rather than coerced by the state, *Abood*, 431 U.S. at 235, and the principle of popular sovereignty that the government should represent the views of the people, rather than impose its views on the people.

This Court should apply strict scrutiny to petitioners' mandatory fee. Even though petitioners' speech programs do not appear to facially discriminate on the basis of content in distributing student activity funds—in fact, under *Rosenberger*, the First Amendment prohibits petitioners from doing so—nonetheless, strict scrutiny still applies. In cases where the government has imposed a mandatory fee to fund speech, this Court has not found a compelled speech violation to be cured by the funding of other speech with which the payers might agree. In *Abood*, for example, this Court found the First Amendment violated because *some* of the dues were used to fund political or ideological speech with which the plaintiffs disagreed. Plaintiffs in *Abood* did not need to show that *all* of the funds were used for objectionable speech, *Abood*, 431 U.S. at 213, nor did the Court ask whether the plaintiffs agreed with some of the dues-funded causes and candidates. Similarly, in *Keller*, plaintiffs did not need to show that all of the state bar's lobbying and litigation positions were objectionable, only that some of them were. As in *Abood*, the Court did not inquire into whether the bar's other litigation and lobbying activities met with the plaintiffs' approval.

Neither *Abood* nor *Keller* deemed it relevant whether the collected funds were used for speech with which the plaintiffs agreed, as well as for speech with which they disagreed. This Court found that the rights of the objecting employees were violated if some—not necessarily all

—of the speech, funded by the mandatory dues, was of a political or ideological nature with which they disagreed. *Abood* recognized an exception from this bar on the use of mandatory fees only for speech that is germane to the purpose of the institution collecting the fee. For speech that is non-germane—in other words, political and ideological speech—this Court implicitly subjected the mandatory dues to strict scrutiny and invalidated them. Petitioners cannot cure the violation of respondents' right against compelled speech by arguing that the funds go to non-objectionable as well as objectionable speech.

Intermediate scrutiny, normally reserved for content-neutral regulations that impact upon speech, is not appropriate here. The state's mandatory fee scheme orders students to support certain kinds of speech, and it prevents students from choosing for themselves the speech that they would prefer to fund. Students may not wish to support speech by the formula chosen by petitioners—forcing students to obey that formula distorts the message that the students themselves might choose were they making their own funding decisions. The mandatory fee forces objecting students to replace the speech that they would support with their funds with speech chosen by the university and its student groups, which amounts to a content-based restriction. Cf. *Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781, 795 (1988).

Furthermore, the state pursues a goal that itself represents a regulation of speech in regard to its content. To be sure, respondents established the speech scheme here to encourage the expression of a diversity of viewpoints, rather than to suppress speech. Even if the state, however, were to possess a benign, rather than malign, motivation in choosing to fund certain classes of speech, that does not entitle it to intermediate scrutiny. Cf. *R.A.V.*

v. St. Paul, 505 U.S. 377, 386 (1992). Although the state may not have an interest in suppressing speech, it still has engaged in the regulation of speech in relation to the content of the speech. Here, petitioners have sought to promote speech that it believes adds to the diversity of viewpoints expressed on campus. Promoting speech for the sake of diversity represents regulation based on the communicative impact of the speech as much as a law that barred certain speech for the purpose of suppressing diversity in the marketplace of ideas.

Petitioners have not even shown that the fees are distributed in a neutral manner. Every registered student organization that seeks funding is not guaranteed funding; rather, the university is distributing funds in order to ensure that certain viewpoints are represented on campus. In fact, the great majority of funds regularly goes to a relatively small number of groups. If the government collects a fee to fund speech, it cannot distribute the funds on the basis of content. Therefore, even if this Court were to allow mandatory fees that force payers to support speech with which they disagree, it should not do so in this case. While increasing the amount of campus speech arguably might rise to the level of an important government interest, it is by no means a compelling one. The lack of a compelling, or even a substantial, interest is demonstrated by the lack of evidence that any problems exist involving the level or diversity of campus speech in the absence of petitioners' mandatory activities fee.

Even if this Court were to conclude that the state had a compelling interest in promoting speech, petitioners have failed to demonstrate that their program is narrowly tailored to achieve this goal. Student groups, which have their own incentives and resources to engage in speech, are not going to disappear in the absence of petitioners' compelled speech program. The state also has failed to

demonstrate that the university lacks alternatives to fund student activities that would better avoid violating respondents' right against compelled speech. For example, the university could seek voluntary contributions from students or donations from alumni or outside organizations. If this Court is to allow the state to engage in programs that promote certain types of speech, its cases require that the state do so in a manner that is least intrusive upon the free speech rights of dissenting students. The First Amendment rights of respondents require petitioners to resort to alternative means to fund their speech program that do not compel contributions from unwilling students.

Even if this Court were to conclude that petitioners' funding scheme was content-neutral, recent cases support affirmance of the decision below. Petitioners, and the dissenting en banc judges below, claim that the mandatory fee is entitled to intermediate scrutiny because the funds are used to create a virtual public forum that does not discriminate on the basis of the content of speech. This Court has never held, however, that the state can achieve the goal of creating a virtual public forum by compelling dissenting citizens to contribute to it financially. In the most analogous case to address government-subsidized third-party speech, this Court suggested that a voluntary contribution system saved the legislative scheme from First Amendment problems. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld the 1974 Federal Election Campaign Act's provision for the public financing of presidential election campaigns. Under the statute, the federal government agreed to fund a presidential campaign if the candidate accepted spending and contribution limitations. *Id.* at 88. The Court found that the law did not involve any "compulsion upon individuals to finance the dissemination of ideas with which they dis-

agree," *id.* at 91 n.124, because the federal campaign contribution was funded by a voluntary check-off box on individual income tax returns. The *Buckley* Court also noted that taxpayers had no broad right to object to the expenditure of general revenue taxes for the general welfare. *Id.* at 90-92. A challenge to a spending program, however, could prove quite different if only a certain class of taxpayers were forced to pay by means of a specific, mandatory fee.

Turner Broadcasting System v. F.C.C., 512 U.S. 622 (1994), also should not be read to allow government to engage in speech-promoting activities paid for by dissenting individuals. In *Turner Broadcasting*, this Court upheld the "must-carry" provisions of the 1992 Cable Act, even though they amounted to compelled speech on the part of cable operators. *Id.* at 643-44. The Court concluded that the legislative scheme burdened speech without reference to content. *Turner Broadcasting*, however, did not address whether the government could impose a discrete fee, rather than dip into general revenues, for the specific creation of a speech-promoting program. In this respect, *Turner Broadcasting* was consistent with *Buckley's* effort to protect the federal government's control over its general revenues, without reaching the question of the constitutional rights of dissenting taxpayers when a specific fee is levied to pay for speech.

The government programs in *Buckley* and *Turner*, and public forum cases generally, are different from petitioners' compelled speech scheme in another important respect. In *Buckley* and *Turner*, the central object of the legislative program was not simply to enhance speech. In *Buckley*, Congress regulated the federal campaign contributions and expenditures in order to prevent corruption and safeguard the integrity of the electoral process. *Buckley*, 424

U.S. at 23-28. In *Turner*, Congress enacted the Cable Act's must-carry provisions to sustain the local television broadcast industry, which plays an important role in the dissemination of information and in the competition over television programming. *Turner*, 512 U.S. at 662-64. Taxes that pay for physical public forums, such as stadiums, parks, government buildings, and sidewalks, certainly create public spaces that can be used for speech, but the purpose for their construction is not solely, or even primarily, devoted to the promotion of speech. Rather, in all of these circumstances, the government has created a system, mechanism or place that benefits the public in ways that are unrelated to speech, but which also has speech-enhancing side effects. Thus, a sidewalk can be used for a public demonstration, but the government built the sidewalk in the first place for foot traffic and safety reasons.

Behind these examples is a distinction between a conduit for speech and the content of the speech itself. In a normal public forum case involving a physical forum, such as a park or a government building, or even a case involving an intangible forum, such as the realm of television programming, the government has created a facility that serves as the conduit for the expression of different ideas, without regard to the speech itself or its content. In this case, however, the petitioners' compelled speech program funds the favored speech itself, not the method for its communication. Without the petitioners' scheme, different student groups would simply engage in less speech overall, vis-à-vis other student groups on campus. A true public forum—one that served as a communications conduit that operated without regard to the content of speech—would raise the amount of speech for all groups in an equal proportion. Petitioners' speech scheme thus stands in sharp contrast to a system, akin to the one

in *Rosenberger*, in which the university funds a facility for the printing of leaflets or the creation of web pages that are equally available to all student groups.

Also unlike a normal public forum, here the petitioners have imposed a discrete, mandatory fee solely to promote a diversity of speech on campus. Creating speech is the only purpose of the state's program. In such circumstances, the use of the mandatory fee is all the more invasive of dissenting students' rights against compelled speech, because none of the fee goes toward other uses that might benefit them, as with the construction of a public facility or a communications network. Petitioners have not shown that the achievement of this goal is important enough to justify a fee that forces students to support speech with which they disagree. If the government intends to promote political and ideological speech, even if it does so in a content-neutral manner, it either should pay for it out of general revenues or, if it chooses to use a discrete fee, it should impose the fee only on those who agree with the speech. In the absence of any showing of a vital problem or need to create political speech, the First Amendment requires that the government promote speech in a manner that avoids the forced contributions of those who disagree. At the very least, this Court should make clear that if the government is going to fund speech for the sake of speech, it must do so in a content-neutral manner.

III. THE FIRST AMENDMENT'S ORIGINAL UNDERSTANDING SUPPORTS THE PROHIBITION ON THE USE OF MANDATORY FEES TO FUND POLITICAL SPEECH

The limited evidence that we have concerning the original understanding of the First Amendment supports the principle that the government cannot use mandatory fees

to support speech with which the payers disagree. Not only are the records of the drafting and ratification of the First Amendment sparse, but they also do not directly address the issue of compelled speech. Nonetheless, in examining these issues, this Court has long looked to the Virginia "Assessment Controversy" for guidance as to the intentions and beliefs of those who wrote the First Amendment. See, e.g., *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 74 (1947) (appendix to dissent of Rutledge, J.); *Abood*, 431 U.S. at 234 n.31; *Rosenberger*, 515 U.S. at 853 (Thomas, J., concurring); *id.* at 868 (Souter, J., dissenting). While the Assessment Controversy occurred five years before the ratification of the Bill of Rights, its involvement of many of the leading founders, in the most important state of the early republic, and its airing of many of the key arguments and issues, justifies its relevance for interpretation of the First Amendment. Close examination of the Assessment Controversy indicates that some of the leading framers would have understood the First Amendment to bar the imposition of discrete taxes to fund political or ideological speech.

In the 1786 Assessment Controversy, Thomas Jefferson, the author of the Declaration of Independence, and James Madison, the future father of the Constitution and the drafter of the Bill of Rights, successfully convinced the Virginia legislature to enact a statute guaranteeing religious freedom and to reject a tax assessment bill for the support of an established church. In light of Jefferson and Madison's involvement and the political importance of Virginia in the early years of the Republic, judges and scholars properly have considered the events of the Assessment Controversy to be an important piece of evidence in construing the First Amendment. See, e.g., Thomas Curry, The First Freedoms 134 (1986); Robert L. Cord, Separation of Church and State: Historical Fact and

Current Fiction 20-23 (1982); The Virginia Statute for Religious Freedoms: Its Evolution and Consequences in American History (Merrill D. Peterson & Robert C. Vaughn eds., 1988); Leonard Levy, The Establishment Clause 51-60 (1986); Leo Pfeffer, Church State and Freedom 104-14 (revised ed. 1967); Dumas Malone, Jefferson: The Virginian 274-85 (1948).

In brief, the Assessment Controversy had its roots in revolutionary Virginia's struggle over the proper relationship between church and state. Following the break with Great Britain, Thomas Jefferson led efforts to break the state's ties with the Anglican church, which was the established church of the colony. In 1779, Jefferson's Bill for Establishing Religious Freedom, which prohibited the state from compelling any citizen from attending or supporting religion and which guaranteed each individual's freedom to profess his own religious beliefs, was introduced in the state legislature but did not pass. 2 Papers of Thomas Jefferson 545 (Julian P. Boyd ed. 1950). That same year, other legislators proposed a bill providing for a general assessment to fund the operations of Christian churches throughout Virginia. After British operations in the state had ceased, the state legislature in 1784 turned to consideration of the proposed assessment. Assuming Jefferson's mantle, James Madison led the fight in the legislature against the assessment. In June, 1785, he issued his famous Memorial and Remonstrance Against Religious Assessments as part of a successful strategy that defeated the tax. 8 Papers of James Madison 298-306 Robert A. Rutland ed. Once Madison had organized a groundswell of popular opposition to the assessment, the legislature tabled it and instead enacted Jefferson's Statute for Religious Freedom, which ended efforts in Virginia to impose a mandatory fee for the support of an established church.

In *Abood*, this Court correctly recognized that the roots of the Assessment Controversy concerned not just religion, but the larger issues of freedom of speech and of thought. At the time of the framing, organized religion was one of the primary means whereby the state engaged in speech, and, in the absence of modern ideologies and permanent political parties, religion was one of the few organized systems of thought. To Jefferson and Madison, however, religious belief—like political and ideological belief—ought to be the product of the workings of the rational mind, not the command of the state. The same intellectual freedom from state-imposed orthodoxy allowed the individual citizen to develop and maintain both religious and political beliefs. Religious freedom thus became intertwined with freedom of thought, of conscience, and of speech, a development that recent cases have recognized in prohibiting the state from discriminating against religious speech. *See, e.g., Rosenberger*, 515 U.S. at 830-37; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393 (1993).

Jefferson's Statute for Religious Freedom provided the philosophical and political justification not just for the idea of religious toleration, but for the broader right of the individual to intellectual liberty. Protecting religious liberty was simply one component of the protections for political and ideological liberty and speech. "Our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry." 2 Papers of Jefferson at 545-46. Jefferson wrote that religion had to be independent of the state because "the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds," and that "all attempts to influence [the mind] by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hyprocrisy and meanness." 2 *id.* at 545. As

Madison wrote in his Remonstrance, "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." 8 Madison Papers at 298. Madison believed this right to be "inalienable" because "the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men." *Id.* The human mind, Jefferson and Madison believed, must remain free from the power of the state. Declared Jefferson's bill: "the opinions of men are not the object of civil government, nor under its jurisdiction." 2 Papers of Jefferson at 546.

If the state is barred from influencing the opinions of its citizens, Jefferson and Madison concluded, it should also be prohibited from imposing a specific tax for the support of speech designed to propagate certain beliefs. In the course of defending the freedom of the human mind, Jefferson's bill declared "[t]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." 2 *id.* at 545. Mandatory fees violated the individual's freedom of thought, even if some of the funds supported speech with which an individual agreed, because they deprived the citizen of the freedom to choose which speech to support. Even if it were only forcing the citizen to contribute to a "teacher of his own religious persuasion," the bill declared, the government still violates the citizen's rights because it "is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness." *Id.* Jefferson and Madison feared that any government interference at all in the area of speech would distort what we today call the marketplace of ideas: "truth is great and will prevail if left to herself; that she is the

proper and sufficient antagonist to errour, and has nothing to fear from the conflict, unless by human interposition, disarmed of her natural weapons, free argument and debate." 2 *Id.* at 546. Civil government should interfere not with what people believe and say, but when "principles break out into overt acts against peace and good order." *Id.* In the end, these arguments carried the day and convinced Virginia's legislature to reject the assessment in favor of Jefferson's declaration of religious freedom.

Efforts by founders such as Jefferson and Madison to dis-establish the Anglican church represented a broader belief that the state should not be in the business of shaping a citizen's mind and views. To be sure, other states in the revolutionary and critical periods maintained established churches, and we cannot definitively conclude that all of the framers who voted for the First Amendment in Congress and the state ratifying conventions believed it to codify the lessons of the Virginia experience. Nonetheless, this Court has and should take the Assessment Con troversy as a guide to the understandings of two of the principle motivating minds behind the Declaration of Independence, the Constitution of 1787, and of the Bill of Rights concerning the concepts of freedom of religion, freedom of speech, and freedom of thought. Jefferson and Madison believed that these rights prohibited the state from imposing a mandatory fee on its citizens to be used to fund political or ideological speech with which they disagreed. As such, their views lend important support from the framing for the same principle in this Court's case law.

Indeed, the facts of this case underscore the interrelated purposes of the religion and speech clauses of the First Amendment. Out of their religious convictions, respond-

ent students do not wish to support the political speech disseminated by some student groups. Respondent students' religious views give rise to certain political and ideological views; political and ideological speech can offend an individual's religious as well as his or her political beliefs. Petitioners' funding, therefore, of political and ideological views that offend respondents, using respondents' own money, violates both their freedom of religion and their freedom of speech, both of which are essential components of the freedom of thought at the core of the First Amendment.

Any asserted public forum justification would not have altered this application of Jefferson and Madison's views. Both Jefferson and Madison opposed the general assessment, even though it would have benefited all Christian churches, rather than only the Anglican church. A broader funding scheme did not alleviate the violation of individual rights that arose from compulsory fees to pay for views with which the payers disagreed. Jefferson and Madison would not have believed the violation of the dissenting students' rights to be cured if the state took a portion of the money and provided it to student groups whose views the students shared, just as Jefferson and Madison would not have thought the general assessment to have been constitutional if Virginia had distributed the tax dollars to each Christian sect. To them, the constitutional violation would have occurred when the state coerced any citizen to provide a single dollar to support views with which he or she disagreed. Where, as here, this is what the government has done, the original understanding of the First Amendment suggests that this Court must invalidate the mandatory payments.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

RENEE GIACHINO *
NATIONAL SMOKERS ALLIANCE
901 N. Washington St.
Suite 400
Alexandria, VA 22314
(703) 739-1324

JOHN YOO
BOALT HALL SCHOOL OF LAW
University of California
Berkeley, CA 94720
(510) 643-5089
Institutional Affiliation for Identification Purposes Only

* *Counsel of Record*