No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents

BRIEF OF CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Filed August 11, 1999

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INTEREST OF *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is set forth in the appendix to this brief. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether the First Amendment's rights of religious exercise, speech, and association protect students at a state university from being compelled, through a mandatory student activity fee, to support organizations that take political or ideological positions contrary to the students' deep convictions of conscience. The court of appeals held that the First Amendment does prohibit such compulsion, relying on this Court's decisions holding that neither unions nor state bar associations could compel their members to support political or ideological groups to which they are conscientiously opposed. See *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991). *Amicus* the Christian Legal Society agrees with respondents and the court of appeals that the imposition of a student activity fee at a state university is subject to the same First Amendment restrictions as the imposition of fees by unions and state bar associations. We further

[1] No counsel for either party authored this brief in whole or in part. The Alliance Defense Fund helped defray the expenses of preparation of this brief.

agree that under the approach of *Abood*, *Keller*, and *Lehnert*, students may not be compelled to pay that portion of the activity fee that goes to groups to support political and ideological activity that the students oppose.

The primary purpose of this brief is to address a central argument advanced by the University and its supporting *amici*. They suggest that protection of students' rights not to be forced to fund causes they oppose is inconsistent with this Court's holding in *Rosenberger v. Rectors of Univ. of Virginia*, 515 U.S. 819 (1995), that a state university may not discriminate on the basis of viewpoint in disbursing funds raised by a student activity fee. In effect, the University claims that when student activity funds are distributed to groups on a viewpoint-neutral basis, *Rosenberger* forbids any student to object to being forced to fund any particular group, no matter how much the student abhors the group's doctrines. Under the University's position, a black student might be forced to contribute money that is given to the Ku Klux Klan, or a Jewish student money that is given to a neo-Nazi group.

The University's argument misapprehends the basis for both *Rosenberger* and the *Abood/Keller* line of decisions, and therefore conjures up a conflict where none exists. *Rosenberger* concerns the disbursement of funds and requires that the state itself be viewpoint-neutral in such disbursement, while the court of appeals' decision (following *Abood* and *Keller*) concerns the collection of funds and simply protects a private individual's right to refuse to provide money to groups he opposes. Indeed, as we will show, both the viewpoint-neutral disbursement of funds and protection of objecting students' rights serve the same fundamental interest: keeping a state university

in a posture of respecting individual students' choices concerning sensitive matters of conscience like politics, ideology, and religion.

The University and its supporting *amici* predict dire consequences from recognizing the students' rights against compelled association in this context, but those warnings are unfounded. The doctrine of *Abood* and *Keller* has always been limited to fees imposed by certain limited-purpose state-created entities, such as the fee charged by the University here, as opposed to the expenditure of some portion of general tax revenues by the general government. The doctrine has also been limited to a separable fee, or fee component, imposed for the specific purpose of funding speech, lobbying, and other forms of expression. For these reasons, protecting the students' rights here will not threaten programs of the general government, which are not only funded from general tax revenue, but which also usually serve substantive governmental goals apart from just the promotion of free expression. Likewise, protecting students against compulsion here will not endanger the funding of faculty activities, auditoriums or other physical fora. As we will discuss, pro rata opt-outs from payments attributable to these elements would indeed compromise "vital [educational] interests" across the board, and therefore may be denied under *Abood*, *Keller*, and *Lehnert*.

ARGUMENT

1. The Compelled-Support Doctrine Of *Abood* And *Keller* Properly Governs This Case And Is Fully Consistent With This Court's Decision In *Rosenberger.*

In *Rosenberger v. Rectors of Univ. of Virginia*, 515 U.S. 819 (1995), this Court held that a state university, in disbursing funds from a mandatory activity fee collected from students, may not set a criterion for student organizations receiving funds that discriminates based on the viewpoint espoused by the organization. In particular, the Court held that "for the University to deny eligibility [for funds] to student publications because of their viewpoint" violated the Free Speech Clause and was not required by the Establishment Clause. *Id.* at 845. The Christian Legal Society strongly supports the result in *Rosenberger*, having filed an *amicus curiae* brief in that case supporting the requirement that a state university act on a viewpoint-neutral basis in disbursing funds from student activity fees.

The University argues that *Rosenberger* forbids the recognition of any First Amendment right for a student to object to that portion of his mandatory activity fee that supports political and ideological activities to which he is conscientiously opposed. The University asserts that the right to object to such state-compelled support, recognized in *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), disappears whenever a wide range of student organizations are eligible to receive disbursements from the student activity fund on a viewpoint-neutral basis. In

short, the University claims that the principles of *Rosenberger* are in tension with those of *Abood* and *Keller*, and that in this purported conflict the rights against compelled speech and association recognized in *Abood* and *Keller* must be subordinated and limited.

At the outset, we question the University's premise in equating the student-fee funding program here with a true public forum such as a park, or university rooms made available to all student groups (see *Widmar v. Vincent*, 454 U.S. 263 (1981)). The decisionmakers here, the student government and the Board of Regents, have much more than a ministerial role in allocating the funds raised by the activity fee. The student government reviews detailed applications filed by student groups and determines how much money each organization is eligible to receive. See Respondents' Brief in Opposition at 3, 16-17 (citing record). Although many groups receive some money, most receive very little, while in the 1995-96 school year "[a] select group of 17 campus organizations received large allotments . . . ranging from $6905.00 to $481,673.00 each." *Id.* at 3 (citing record). In contrast, in a full-fledged public forum such as a park, or the set of classrooms in *Widmar*, the government's role is generally limited to scheduling access to the forum. The government's added role here in funding decisions calls into doubt the University's claim that the students are simply contributing to the funding of a wholly neutral public forum.

Even assuming that the student-fee funding program equates with other, full-fledged public fora, the University's attempt to conjure up a conflict between *Rosenberger* and *Abood/Keller* is seriously misguided. The two lines of

decisions pose no conflict once it is recognized that *Rosenberger* deals with state conditions on eligibility for receiving disbursements of funds, while *Abood*, *Keller*, and *Lehnert* deal with the compelled collection of funds from persons who object to particular ideological uses of the funds. Indeed, as we will show, the two lines of decisions work in harmony, together assuring that the support of sensitive political and ideological expression will generally reflect the conscientious choices of students rather than compulsion or favoritism by state university decisionmakers.

There is certainly no logical conflict between the principles of *Rosenberger* and those of *Abood* and *Keller*. As the court of appeals put it, *Rosenberger* "considered only the disbursement of student activity fees; it did not consider the constitutionality of forcing students to fund private political and ideological organizations." 151 F.3d at 723 n.3. It is perfectly consistent to hold, as *Rosenberger* did, that a university may not exclude an organization from receiving funds, or otherwise discriminate against it in eligibility, according to its viewpoint – and at the same time hold, under *Abood*, *Keller*, and *Lehnert*, that the university may not collect or pass on funds from students who conscientiously object to supporting the organization in question. Courts can consistently hold, for example, that a university may not disqualify a student group from receiving any student activity funds simply because it expresses anti-Semitic views, and also that a Jewish student may object to that portion of his fee that goes to support the anti-Semitic views. The latter holding does not require the state university to set any condition of its own excluding certain viewpoints from receiving funds.

Rather, following *Abood* and *Keller* merely respects the conscientious decision of private individuals, the students, not to contribute funds to a viewpoint with which they disagree. The University still may raise funds from non-objecting students, and it still must distribute those funds in a viewpoint-neutral manner under *Rosenberger*.

Rosenberger itself treated the principles it announced as compatible with those of the *Abood/Keller* line of decisions because the two involved different aspects of the student-fee process. *Rosenberger*, in dealing with the issue of university discrimination in disbursements, emphasized that "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." *Rosenberger*, 515 U.S. at 840. The Court at that point cited *Keller* and *Abood*, indicating that those decisions should govern the distinct claim concerning the collection of funds. See also *Rosenberger*, 515 U.S. at 851 (O'Connor, J., concurring) (also citing *Keller* and *Abood* in suggesting possibility of "a Free Speech challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees"). These explicit citations belie the argument that *Abood* and *Keller* can have nothing to do with this case merely because a wide range of student organizations receive funds. Accord *Curry v. Regents of University of Minnesota*, 167 F.3d 420, 422 n.4 (8th Cir. 1999) (stating, in analogous case, that "[t]he nondiscriminatory distribution by University of funds available for the support of student organizations as required by *Rosenberger* . . . is not at issue in this action

because the University's system for distributing the fees collected has not been challenged by the plaintiffs").

In short, by ignoring the distinction between (i) *state*-imposed conditions on eligibility for the receipt of funds and (ii) *private individuals'* objections to being compelled to provide support to activities they oppose, the University manufactures a supposed tension between *Rosenberger* and *Abood/Keller*. It then resolves that supposed tension by arguing that a student's right to refuse to provide money to groups she opposes simply vanishes when those groups are included among "the speech of many groups [funded] on a viewpoint-neutral basis." Br. for Petitioners at 23 (arguing that "the principles [of *Abood*, *Keller*, and *Lehnert* are] inapposite in this University setting"). This attempt to narrow the *Abood/Keller* line of decisions is inconsistent with their express language and underlying principles.

Nothing in *Abood* or *Keller* suggests that the right to object to compelled support there depended on a finding that the state had supported certain causes over others in a non-neutral fashion. The constitutional violation was not that the state actor favored some viewpoints or causes over others, but rather that the state actor, whatever else it did, required the objector to pay funds that went to support organizations promoting causes with which the objector deeply disagreed. The Court explained that the state actor had required the objector "to contribute to the support of a cause he may oppose" (*Abood*, 431 U.S. at 235), and that, in the words of Thomas Jefferson, " 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " *Keller*, 496 U.S. at 10; *Abood*, 431 U.S. at

234 n.31 (both quoting I. Brant, *James Madison: The Nationalist* 354 (1948)). *Abood* and *Keller* require that expenditures " 'must 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.' " *Keller*, 496 U.S. at 10 (quoting *Abood*, 431 U.S. at 235-36) (brackets inserted). The right recognized in *Abood* and its progeny is a right of noncompulsion, not a right of neutrality.

Even if the mandated fee funds a whole host of causes based on purely ministerial, viewpoint-neutral conditions, the objector has still been compelled, through part of the fee, to "furnish contributions of money for the propagation of opinions which he disbelieves." For example, the fact that the University here funds a variety of student ideological expression and lobbying would not dispel the fact that it had taken some money from a Jewish student and given it to an anti-Semitic group, or some money from a student who believes abortion is murder and given it to a group lobbying for unrestricted abortion. The unions in *Abood* and *Lehnert* could and doubtless did fund a wide variety of political and ideological causes unrelated to collective bargaining, but they still were required to deduct the pro rata share collected and passed on from members who objected to the particular individual use of that share. And the state bar association in *Keller* could and did lobby on a variety of political issues not directly related to legal practice – from mandatory polygraph tests for state employees, to restrictions on the importation of workers from other countries, to initiatives for gun control and a nuclear-weapons freeze (496 U.S. at 6 n.2) – but it still had to reduce pro

rata the share collected and passed on from lawyer members who objected to the particular use of the share.

In the face of the clear language and rationales of *Abood* and *Keller*, the University and its supporting *amici* struggle to establish that compelled support of an objectionable group is not compelled support when the group is part of a large number of organizations in a broad forum. See, e.g., Br. for Petitioners at 29 (collection of fee "is not properly regarded as compelled speech"). But the distinctions that the University and its supporters offer cannot stand under this Court's longstanding jurisprudence concerning compelled speech and association.

For example, the University and several *amici* argue that when the student fee goes to support a public forum of student groups, no observer will reasonably think that the objecting student endorses the speech to which he objects. See, e.g., Br. for Petitioners at 30 ("there is neither representation nor perception that the organizations receiving funding . . . reflect the views of . . . all students").[2] But such an attribution is not a necessary condition for a compelled-speech violation; if it were, many of this Court's previous decisions would have to be overturned. Few if any observers think that all union members endorse all their union's lobbying activities, or that

[2] See also, e.g., Brief of American Civil Liberties Union (ACLU), *et al.* at 16-17 ("it is implausible to argue that the private political speech of student groups at UW will be attributed to respondents merely because respondents' student fee helped support the public forum"); *id.* at 19 (student groups "do not purport to represent respondents' views").

all lawyers in a state endorse their bar association's political stances; yet *Abood* and *Keller* still treated these situations as unconstitutionally compelled speech. Likewise, no one would think that a newspaper forced to print a reply from a political candidate it had criticized endorses or adopts that reply, yet this Court held that requiring such a right-of-reply violates the newspaper's First Amendment rights by compelling it to support the candidate's speech. *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). The Court also forbade a state to require car owners to display a license plate carrying an ideological motto to which they objected (*Wooley v. Maynard*, 430 U.S. 705 (1977)) – even though, as the dissent observed, displaying the plate as all citizens do "carrie[d] no implication that [the objecting car owners] endorse that motto or profess to adopt it as a matter of belief." *Id.* at 721-22 (Rehnquist, J., dissenting). And the Court struck down a state requirement that a utility include in its quarterly billing statements messages from a consumer group, even though few observers would assume that the utility agreed with the group's messages. *Pacific Gas & Electric Co. v. Public Utilities Comm.*, 475 U.S. 1 (1986). See also Abner S. Greene, *The Pledge of Allegiance Problem*, 64 Fordham L. Rev. 451, 483-86 (1994) (showing that few compelled speech cases involve attribution of views to the objector).

These decisions make it clear that there can be unconstitutional state compulsion on an individual to support speech even though no one will actually believe that the individual agrees with the speech. The court of appeals, therefore, correctly concluded that "[i]t matters not

whether a third party attributes the organization's political and ideological views to the objecting student." *Southworth v. Grebe*, 151 F.3d 717, 732 (7th Cir. 1988).

Likewise, it also does not matter that the objecting students here are free to disavow the views of groups that they oppose (see, e.g., Br. for Petitioners at 34; Br. of ACLU, *et al.* at 16). The newspaper in *Tornillo*, the automobile owner in *Maynard*, and the utility in *Pacific Gas* each had ample opportunity to disclaim any agreement with the views they were compelled to support. See, e.g., *Pacific Gas*, 475 U.S. at 16 n.11 (possibility of disclaimer might dispel any impression of endorsement, but did not dispel compulsion of speech); *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting) (noting that "any implication that [car owners] affirm the [license plate] motto can be easily displaced" by adding a bumper sticker expressing their disagreement). Yet the Court still found a violation of the First Amendment in each of those cases.

The University cites *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), which held that the state did not violate a shopping center owner's rights by requiring him to allow groups to speak on his property. *Pruneyard* did refer to the wide range of groups being supported and the possibility of a disclaimer to show that the property owner was not being associated with the views of any group. But the compelled-support framework of *Abood* and *Keller* constitutes a distinct category of compelled-speech claims that does not depend on any direct effect on the objector's own speech. See *Pruneyard*, 447 U.S. at 98 n.2 (Powell, J., concurring in the judgment) ("Even if a person's own speech is not affected by a right of access to his property, a requirement that he lend

support to the expression of a third party's views may burden impermissibly the freedoms of association and belief.") (citing *Abood*).

More precisely, the *Abood/Keller* analysis applies to compulsion by "specialized" entities (*Keller*, 496 U.S. at 12) created by the state "to provide a special service for a discrete group of people." Note, *A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled-Speech Rights at American Universities*, 82 Minn. L. Rev. 1425, 1454 (1998). When such a limited-purpose entity goes beyond providing those specific services and into supporting ideological activity, the First Amendment as interpreted in *Abood* and *Keller* limits the entity's ability to extract fees from the discrete group it is supposed to be serving. The University, and particularly the student decisionmakers allocating the activity-fee fund, are analogous to unions and bar associations: the state has given them the specific task of providing and advancing educational and campus-related services for the University's student body. It is entirely appropriate to apply *Abood* and *Keller* to ensure that mandatory student fees are confined to those purposes, and not diverted to activities such as lobbying against Nigerian imports, protesting a black church's opposition to homosexuality, and other political, ideological, off-campus activities shown in the record of this case (see Respondents' Br. in Opp. at 4-9).

The proper distinction, therefore, is not between compulsion to support causes or organizations and compulsion to support them as part of an open forum. Rather, the distinction is between the state imposing its own conditions on an organization's eligibility for funds –

where, under *Rosenberger*, the conditions must be viewpoint-neutral – and the individual student objecting to particular uses of a share of his compelled fee – where, under *Abood* and *Keller*, the individual has a right to object based on the ideological viewpoint that the share will go to support. Applied to this case, the rule of *Abood* and *Keller* does not put the University in the position of discriminating on the basis of an organization's viewpoint; it simply requires the University to respect, on a neutral basis, the individual student's choice of whether or not to support particular political or ideological activities. What *Rosenberger* disapproved was "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students." 515 U.S. at 836. A university expresses no such disapproval itself when it merely respects the choice of each student not to support lobbying for ideologies she opposes. *Rosenberger* required that a university allocate student funds based on "some acceptable neutral principle" (*id.* at 835); respecting and implementing student choice across the board, with respect to any viewpoint a student finds abhorrent, is indeed such a neutral principle.

As such, the rule of *Abood* and *Keller* is not just reconcilable with the principles of *Rosenberger*; the two actually work together in harmony. Both decisions work to ensure that the support of sensitive political and ideological expression will generally reflect the conscientious choices of individuals rather than compulsion or favoritism by state decisionmakers. *Abood* and *Keller* obviously serve this principle by preventing state actors from exacting that portion of a mandatory fee that would support causes that the objector conscientiously opposes. But the

holding of *Rosenberger* serves this purpose as well. As we argued in our amicus brief in *Rosenberger*, forbidding any state-imposed condition that excludes a group from eligibility for funds because of its viewpoint (in that case a religious one) generally serves the purpose of keeping the state in a posture of "substantive neutrality," minimizing the effect that the state's own rules have in either encouraging or discouraging students to choose or support that or any other viewpoint. Brief *Amici Curiae* of Christian Legal Society, *et al.*, at 6 (filed 12/15/94).

If a forum for student group expression funded by student activity fees is to reflect the choices of individual students with as little distortion as possible, then any reduction in allocation to a group must be limited to the pro rata amount attributable to those who object to supporting the group's activity. The objecting students here seek only that remedy, of course: they have never challenged the University's right to use "the allocable portion of *non-objecting* students' activity fees to fund" ideological activity. *Southworth*, 151 F.3d at 721 (emphasis added); *id.* at 734 (vacating part of district court injunction that "fail[ed] to limit itself to fees paid by objecting students").[3] Denying a student organization access to funds altogether – as the University of Virginia did to the student religious publication at issue in *Rosenberger* –

[3] Some of the *amici* supporting the University simply ignore this fundamental distinction. See, e.g., Brief of United States Student Association, *et al.* at 7, 16 (arguing that the court of appeals' decision compels the University "to exclude organizations that take political or ideological positions" and requires "the exclusion of certain organizations from the University's forum").

distorts individuals' choices by denying the organization the benefit of support from those students who have no objection to giving it (either because they do not disagree with the group or because they do not object to funding it even though they disagree with it). The kind of state-imposed denial of eligibility at issue in *Rosenberger* disfavors the excluded student group, thus discouraging the expression of its viewpoint, far beyond the extent necessary to protect the choice of those who object to funding the group. The state-imposed exclusion from eligibility, therefore, has the overall effect of distorting, rather than reflecting and implementing, students' choices with respect to the support of political or ideological activity.

By contrast, the combination of nondiscriminatory access under *Rosenberger* with a pro rata "opt out" under *Abood/Keller* serves and implements student choice. Under this combination of rules, the amount of support that flows to various ideological organizations from a mandatory student fee is a function of those who wish to support the organization, or at least have no objection to doing so. Such an approach lets the expression of each political or ideological student organization "flourish according to the zeal of its adherents and the appeal of its dogma" (*Zorach v. Clauson*, 343 U.S. 306, 313 (1952)), rather than according to compulsion by the state.

Such an arrangement does not, as some *amici* claim, amount to imposing a "heckler's veto" on unpopular speech (see, e.g., Br. of ACLU, *et al.* at 22). The partial opt-out from funding does not prevent any group from speaking, nor does it impose a fee or any other restriction on a group. Indeed, student groups flourish at the University without seeking or receiving any funding from

the fee; of more than 600 registered student organizations, almost 450 of them (approximately 75 percent) receive no funding. Respondents' Br. in Opp. at 2 (citing record). Unlike the "heckler's veto," the court of appeals' ruling does not shield any student from being exposed to political or ideological speech and lobbying because he disagrees with it; it merely protects each student from being forced to be an instrument of promoting such speech and activity.

For these reasons, the framework of *Abood*, *Keller*, and *Lehnert* applies to the collection of activity fees to fund a range of student groups. Under those decisions, the allocation of a share of student activity fees from objecting students must meet a three-part test showing, in essence, that the particular use is sufficiently "germane" to the University's mission. See *Lehnert*, 500 U.S. at 519. We also agree, for the reasons set forth in the court of appeals' opinion and the petitioners' brief, that the allocation of fees to support a number of the political or ideological activities shown in the record of this case is not sufficiently germane to education to justify compulsion against objecting students.

2. Affirming The Students' Rights Against Compelled Support In This Defined Context Will Not Undercut Other Government Programs And Expenditures.

The University and its supporting *amici* predict horrendous results if students are permitted to challenge the compelled funding of political and ideological activities they oppose. But the *Abood/Keller* approach, as applied

by the court of appeals here, contains a number of limiting principles that make the University's dire warnings unfounded.

2.1 First, the University and some *amici* suggest that protecting the students' rights here would allow them to object to classroom teaching with which they disagree and to seek a pro rata reduction in their tuition.[4] But the funding of faculty through general tuition revenues obviously differs from a separable activity-fee component supporting only lobbying and other ideological expression by student groups.

In the first place, this Court has never applied the *Abood/Keller* framework to expenditures funded out of unsegregated general revenues; rather, previous decisions have always distinguished general tax revenues from specific fees aimed at supporting ideological activities or expression. See, e.g., *Keller*, 496 U.S. at 12-13; *Rosenberger*, 515 U.S. at 841 ("Our decision [concerning student fees] cannot be read as addressing an expenditure from a general tax fund."); accord *Buckley v. Valeo*, 424 U.S. 1, 91-92 (1976) (rejecting free speech challenge to "appropriation from the general revenue" to fund election campaigns because "every appropriation by Congress uses public

[4] See, e.g., Brief of States of New York, *et al.* at 18-19 (warning that students could "likewise object to that portion of their tuition payment which supports academicians who voice controversial political viewpoints through their university research and professional writings"); Brief of American Council on Education, *et al.* at 11 (claiming that students "could challenge tuition payments that supported research, faculty appointments, class topics, or lectures with which they philosophically disagreed").

money in a manner to which some taxpayers object").[5] Therefore, although there are some distinctions between university tuition and general taxes, it is questionable whether *Abood* and *Keller* would apply to expenditures funded from general university revenues.

More importantly, even under the *Abood/Keller* approach, the funding of faculty unquestionably is sufficiently germane to a university's basic educational mission, and any student claim to the contrary would be dismissed as frivolous. The decision in *Lehnert*, which the court of appeals correctly applied here, says that the mandatory collection of a fee must satisfy three conditions or else it violates an objector's rights against compelled support of and association with speech. See 500 U.S. at 519 (opinion of Blackmun, J.).[6] Under the first

[5] The reasons for this distinction are both conceptual and practical. General revenues fund a whole host of activities, many of them central to the operation of the organization in question; the individual contributing to such revenues can in no way assert that he is being compelled overall to support pure speech. In addition, the practical difficulties would multiply vastly if the task were to identify and separate that minuscule portion of general, unsegregated revenues that went to fund speech to which the dissenter objected. By contrast, a specific fund aimed at promoting expression, which is never mixed with other funds, presents far fewer practical difficulties: as Justice O'Connor put it in *Rosenberger*, "a fee of this sort appears conducive to granting individual students proportional refunds." 515 U.S. at 851 (O'Connor, J., concurring).

[6] As the court of appeals correctly found, these three factors, though set forth in a plurality opinion, constitute a holding of the *Lehnert* Court because a fifth justice agreed with the factors (though not with the plurality's application of them). See *Lehnert*, 500 U.S. at 534 (Marshall, J., concurring in part and

condition, activity by faculty, who teach the courses that the University offers to students, is obviously "germane" to the University's basic purpose of education; if teaching is not germane, then no activity is. It is entirely different, however, to say that student lobbying for various kinds of legislation, from tax cuts to abortion rights – as many of the groups in question here did – is germane to the educational process. As the court of appeals recognized, such an unlimited reading is inconsistent with this Court's previous interpretations. See *Southworth*, 151 F.3d at 724-25. *Keller*, for example, rejected the bar association's claim that "advanc[ing] a gun control or nuclear weapons freeze initiative" was germane to the association's mission of "regulation of the legal profession." 496 U.S. at 15. And *Lehnert* forbade a teacher's union to compel objecting members to support public relations and lobbying campaigns for greater state subsidies to education, even though the union (quite plausibly) argued that such efforts might have some effect in improving the situation of its member teachers. 500 U.S. at 527, 528-29.

The funding of faculty easily satisfies the other two requirements of *Lehnert* as well, because the funding of a faculty member's teaching activities cannot be separated from the faculty member's other university-related activities. If faculty salaries were reduced on a pro rata basis according to student objections, a university would find it

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dissenting in part) (joining part II of the plurality opinion, which adopted the three factors). In *Air Line Pilots Assn. v. Miller*, 523 U.S. 866, 118 S. Ct. 1761, 1766 (1998), this Court treated the three-prong test as *Lehnert*'s full-fledged holding.

harder to attract qualified faculty to do the essential work of teaching. All students receive educational benefits from the work of the various teachers at a university, and if some students were allowed to withhold tuition because of objectionable faculty activity, the whole teaching enterprise would suffer. The support of faculty, therefore, plainly meets *Lehnert*'s second condition; it is "justified by the government's vital policy interest in [education] and avoiding 'free riders.' " 500 U.S. at 519. For similar reasons, the support of faculty through tuition revenues meets the third *Lehnert* condition; it does "not significantly add to [any] burdening of free speech that is inherent" in the state operating and subsidizing a university in the first place. See *id.*

2.2 The University and its supporting *amici* also suggest that protecting the dissenting students here would allow dissenters "to opt out of sharing the costs of constructing an auditorium, classroom or other public space where ideas they object to might be expressed." Br. for Petitioners at 32. Again, however, to the extent that such facilities are funded out of general university revenues (as is typical), we doubt that the *Abood/Keller* framework even applies. Moreover, the provision of such facilities, like the maintenance of a teaching faculty, cannot be divided and allocated to different groups. If some portion of funding for an auditorium is withdrawn because of *Abood*-type objections, the resulting reduction in the facility's size or maintenance will adversely affect the forum as a whole, not just the activity of those groups to whom the dissenting students object. Because the result will be to hobble the forum altogether, rather than just reduce the funds to particular groups based on student choice,

the University would have the kind of "vital interest" in denying any opt-outs that *Lehnert* demands, and the compulsion on students would be no greater than is inherent or necessary to support the forum in the first place. By contrast, as we have already noted, the record here shows that the denial of funds to individual groups does not significantly affect the vitality of any forum. As of 1995-96, nearly 450 student organizations existed and operated at the University without receiving any activity-fee funding, almost 75 percent of the total number of student organizations.

2.3 Finally, the University implies that upholding the students' rights here would permit taxpayers to object to "a state political subdivision's providing funding to private organizations for the provision of community services." Br. for Petitioners at 35. This contention is outlandish, however, and we urge the Court to identify it as so. Again, there are two dispositive differences from this case. First, as has already been discussed above, the right against compelled support has never applied to tax-supported expenditures of the general government or "traditional government agencies." *Keller*, 496 U.S. at 13 (distinguishing "the very specialized characteristics" of state bar association "from the role of the typical government official or agency"). As we have already discussed, the University, and more precisely the student government decisionmakers who allocate activity fees, constitute a special limited-purpose entity analogous to a union or bar association rather than a traditional government agency.

In addition, a program "for the provision of community services" (whether education, social welfare services,

health care) differs from a program whose purpose is simply to facilitate private groups' expression. In the former case, the government is funding private organizations not to facilitate their expression, but rather to obtain the services they provide. The individual is being compelled to support the services that the organization provides, not the ideological speech in which the organization engages; and consequently the compelled-speech framework of *Abood/Keller* is simply inapplicable. Passages in both *Keller* and *Abood* make clear that government cannot be hampered in achieving substantive policy goals by objections from individual taxpayers. See, e.g., *Keller*, 496 U.S. at 13, quoting *United States v. Lee*, 455 U.S. 252, 260 (1982) (" 'The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs.' "); *Abood*, 432 U.S. at 259 n.13 (Powell, J., concurring in the judgment) ("Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends money in ways the taxpayer finds abhorrent."); see also *Buckley*, 424 U.S. at 92 (rejecting free speech challenge to tax-supported funding of elections because "every appropriation made by Congress uses public money in a manner to which some taxpayers object").

To be sure, when the government funds a wide range of private organizations that provide a desired service, the whole gamut of speech of those organizations does not become the government's speech. If that were true, then religious organizations providing such services would be disqualified from participating in such a neutral program of funding, since the Establishment Clause

prohibits the government itself from engaging in religious speech – but this Court has made it more and more clear that religious organizations may constitutionally participate in programs of funding for services.[7] Thus, the government's ability to fund a range of private service providers without taxpayer opt-outs does not depend solely on the proposition that " 'government may speak despite citizen disagreement with the content of its message' " (*Keller*, 496 U.S. at 10-11 (quoting Brief for Respondent State Bar in *Keller*, at 16)). More precisely, it depends on the proposition that " 'government must take substantive positions' " and may pursue " 'legitimate goals' " (*id.*), and therefore it may legitimately cooperate with private organizations to achieve such shared goals without thereby taking on all of those organizations' expression as its own.

In contrast to such a program of funding service providers, the University of Wisconsin's activity-fee program can only be seen as supporting expression untied to any substantive policy goal. There is nothing in the policies of the University or the student government that suffices to restrict funding to organizations providing defined campus services, and not surprisingly numerous funded organizations have among their prime activities lobbying for contentious political and ideological causes often far removed from the campus. See Respondents' Br.

[7] See, e.g., *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997 (1997); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Washington Dept. of Services*, 474 U.S. 481 (1986).

in Opp. at 4-9 (detailing examples of political and ideological speech and lobbying on non-campus issues).[8] When as here, the overwhelming purpose of the fee exaction is to compel the support of speech, then correspondingly, in the words of Justice Powell, "[t]he withholding of financial support [from objectionable causes] is fully protected as speech" as well. *Abood*, 431 U.S. at 259 n.13 (concurring in the judgment).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[8] These examples undercut the University's claim that all funded organizations advance the substantive condition of "provi[ding] services to a diverse student body" (Br. for Petitioners at 43) – except in the empty, tautological sense that any expression is (assertedly) a service to students.