No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents

BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Filed August 12, 1999

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INTEREST OF *AMICUS CURIAE*

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel's activities include educating the public regarding civil liberties and the role of law in the judicial process in preserving and implementing individual freedoms and the democratic process. As part of advancing its purpose, Liberty Counsel coordinates with local attorneys and members of the academic community to provide educational resources and opportunities to both the lay and legal communities, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amicus curiae* briefs on a variety of issues.

Liberty Counsel is particularly interested in protecting the First Amendment rights of freedom of speech/expression and religious liberty. Liberty Counsel is also interested in insuring that governmental entities such as state universities adequately fulfill their statutory mandate and vital social role, including maintaining the cohesiveness of a vibrant student body, while minimizing any infringement upon students' First Amendment liberties.

Liberty Counsel files this Brief in support of the Respondents in order to assist this Court in rendering a reasoned decision concerning the First Amendment impact of

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent of the parties are attached hereto with the filing of this brief the only exception being the letter of consent of the Petitioner which is on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

mandatory student fees and the constitutional analysis in such a context. Attorney Mathew D. Staver has previously appeared before this Court and through this Brief attempts to lend his assistance in the proper evaluation of the constitutional infringement and application of the constitutional analysis.

SUMMARY OF ARGUMENT

By withholding students' grades and diplomas to compel payment of student activities fees and student referendum assessments, the Board of Regents of the University of Wisconsin (hereinafter "the Board" or "University") violates objecting students' First Amendment rights of freedom of conscience and freedom from compelled speech and compelled association.

The underlying principle of the First Amendment is the protection of the "sphere of intellect and spirit from all official control." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). This Court has consistently held that freedom of conscience is central to the First Amendment. *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-235 (1977). Additionally, the University's exaction of fees constitutes compelled speech. This is because government regulation of funding for political expression constitutes regulation of expression itself. *Buckley v. Valeo*, 424 U.S. 1 (1976) Money is the equivalent of speech, because "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S. at 19. The University's compelled funding scheme also implicates First Amendment rights of association. Making a contribution serves to affiliate a person with a candidate, party or cause, even if the identity of the contributor is not publicly disclosed. *Buckley*, 424 U.S. at 22. As with compelled speech,

"governmental action that may have the affect of curtailing freedom to associate is subject to the closest scrutiny," *Buckley*, 424 U.S. at 25.

The "germaneness analysis" is inapplicable in the present context. Under the germaneness analysis, individuals may be required to endure some infringement of First Amendment liberties when the organization involved acts for the common cause of the membership and within its unique, governmentally-endorsed role serving the greater good of society. Thus, the "germaneness" test has been applied to unions, bar associations and agricultural cooperative advertising programs which have relatively narrow and unique missions in the representation of their membership and the preservation of social order. These policy considerations are absent when applied to the University of Wisconsin.

If the "germaneness" test is actually applied to the University, then the University's purpose under that analysis must be defined in terms of the its unique academic role. Funding of Registered Student Organizations is not germane to that purpose, since participation in any independent student activities is purely voluntary and there is generally no academic credit or grade.

The "germaneness" test is more appropriately applied to the Associated Students of Madison ("ASM"), which is the official entity representing the student body. The funding of independent Registered Student Organizations is not germane to those representative functions.

ARGUMENT

I.

COMPELLING THE PAYMENT OF STUDENT FEES WHICH ARE USED TO SUPPORT OBJECTIONABLE POLITICAL AND IDEOLOGICAL ACTIVITIES OF INDEPENDENT STUDENT ORGANIZATIONS VIOLATES THE FIRST AMENDMENT PROTECTIONS OF FREEDOM OF CONSCIENCE AND FREEDOM FROM COMPELLED SPEECH AND COMPELLED ASSOCIATION, THEREBY TRIGGERING THE HIGHEST LEVEL OF CONSTITUTIONAL SCRUTINY.

The University of Wisconsin's scheme of mandatory student fees violates the First Amendment. Strict scrutiny must be applied. Forced dues also violate freedom of conscience and freedom from both direct and indirect compulsion of speech and association. Strict scrutiny is triggered because the University imposes an unconstitutional condition upon the receipt of a state university diploma.

A.

The Violation Of Freedom Of Conscience Created By Mandatory Financial Support Of Objectionable Political And Ideological Activities Requires Strict Scrutiny.

The University withholds grades and diplomas in order to compel every student to pay a fixed student activities fee.

An allocable portion of this fee is then distributed, through the Associated Students of Madison, with Board approval, to independent Registered Student Organizations, including numerous organizations whose primary purpose is political and ideological activism. The compulsory extraction of fees to support objectionable, political and ideological expression is a violation of several First Amendment liberties, most importantly the freedom of conscience.

The First Amendment protects "freedom of thought", "freedom of mind" and a "sphere of intellect and spirit". *Wooley v. Maynard*, 430 U.S. 705, 706 (1977). This freedom of conscience and intellectual autonomy is the centermost pillar of the First Amendment. "At the heart of the First Amendment is the notion that an individual should be free to believe as he will, that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state." *Glickman*, 521 U.S. 457, 472 (1997)(quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-235 (1977)). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what is orthodox in politics, nationalism, religion or other matters of *opinion*." *West Virginia Board of Education v. Barnette*, 419 U.S. 624, 642 (1943).

The healthy function of a democratic society is inextricably linked to the right to think, believe and act independent of any government intrusion. *See Elrod v. Burns*, 427 U.S. 347, 372 (1976). The concept of free trade in the marketplace of ideas is even more central to an open society than free markets in tangible commodities. "The best test of truth is power of the thought to *get itself* accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919)(emphasis added). The concept of government intrusion to alter or even enhance the content of

public debate "is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. at 48-49. "Our political system and cultural life rest upon ...the principle that each person should decide *for himself or herself* the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994)(emphasis added).

At the zenith of the First Amendment's protection of intellectual autonomy is the protection afforded to political and ideological belief and expression. This is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). Known as "core political speech," political and ideological expression has consistently received the highest protection from this Court.

This Court has also noted that there is no substantial distinction between political speech and the funding of such speech. *Buckley*, 424 U.S. 1; *See also Glickman,* 521 U.S. at 458 (distinguishing a regulation of commercial speech "from laws we have found to abridge the freedom of speech" in part because the "[marketing orders] do not compel the producers to endorse *or to finance* any political or ideological views.")(emphasis added).

In *Abood*, this Court held that compelling contributions for political expression implicates First Amendment interests specifically because it "interfere[s] with the freedom of conscience which lies at the heart of the First Amendment." *Abood*, 431 U.S. at 234. Just as "each person [is free to] decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence," *Turner Broadcasting*, 512 U.S. at 622, each individual must also be free to decide for himself which ideas are deserving of

financial support.

In the present case, the University, through the Associated Students of Madison, funds political and ideological speech which is repugnant to many students. The University deprives the individual students of the freedom to decide for themselves "the ideas and beliefs deserving of expression, consideration" and financial support. *Turner*, 512 U.S. at 641. The University has therefore intruded into the students' intellectual autonomy, creating for many a "crisis of conscience" by compelling the financial support of repugnant speech. As this Court has often noted, "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234-235, n.31 (quoting Irving Brandt, *James Madison: The Nationalist,* p. 354 (1948)).

B.

Compulsory Financial Support Of Objectionable Political And Ideological Activities Constitutes Compelled Speech And Compelled Association, Which Merits Strict Scrutiny.

The University's mandatory student activities fee also triggers strict scrutiny because it acts as a direct compulsion of core political speech. Several lower courts have suggested that funding of speech does not raise constitutional concerns because it does not require the contributor to engage in any personal speech. *See, e.g., Rounds v. Oregon State Board of Higher Education*, 166 F.3d.1032 (9th Cir. 1999); *Good v. Associated Students of the University of Washington*, 542 P.2d 762 (1975). Yet this Court has regularly equated compelled funding with compelled speech, echoing James Madison's

protest:

> Who does not see...that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Abood, 431 U.S. at 234-235 n.31 (quoting 2 *The Writings of James Madison*, 186 (Hunt Ed., 1901))

In at least two lines of cases, this Court has recognized that contribution of funds for political and ideological activities is direct expressive conduct which merits First Amendment protection. In F.E.C.A. cases, this Court has recognized that government regulations of political contributions and expenditures "operate in an area of the most fundamental First Amendment activities," and that such regulations impose direct and substantial, rather than merely theoretical, restraints on the quantity and diversity of political speech. *Buckley*, 424 U.S. at 14, 19. In *Railway Employees V. Hanson*, 351 U.S. 225 (1956); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Abood*, 431 U.S. at 209, and succeeding cases, this Court has recognized that "just as the First Amendment prohibits compelled speech, it prohibits -- at least without sufficient justification by the government -- compelling an individual to render financial support for others' speech." *Glickman*, 521 U.S. at 457. In *Machinists v. Street*, this Court recognized that use of mandatory fees "to promote the propagation of [objectionable] political and economic doctrines, concepts and ideologies 'raises constitutional questions of the utmost gravity.'" 367 U.S. at 744, 749. In *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991), this Court rejected Justice Marshall's

argument that merely funding union activities did not constitute a "conscription of expressive capacities." 500 U.S. at 541 (Marshall, J., dissenting). Rather, this Court held that:

> By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds acceptable." The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion.

Lehnert, 500 U.S. at 523 (citation omitted).

The above observation applies to this context with equal weight. By requiring the payment of funds which it permits to be used in part "for political lobbying and to garner the support of the public" for objectionable policies and programs advocated by various Registered Student Organizations, the Board intrudes upon "the individual's right of participation in these spheres" and effectively compels the support of public debate when the student would prefer to remain silent.

Clearly, confiscation of money for support of political and ideological debate constitutes compelled speech. It is precisely this label which has been applied to the line of cases descending from *Railway Employees*, 351 U.S. at 225 and *Street*, 367 U.S. at 740, through *Abood*, 431 U.S. at 209, *Lehnert*, 500 U.S. at 507 and *Keller*, 469 U.S. at 1 (1990) and extending to *Glickman*, 521 U.S. at 457. These cases all involve financial support for speech rather than direct personal speech, and yet are properly described as "compelled speech"

cases. The funds which are generated are not analogous to a "metaphysical forum" which Justice Kennedy described in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), but rather the monetary equivalent of actual speech. Money merely serves as a transferable resource or a means of exchange. In this context, as in *Buckley*, money is converted into speech and must be treated as such.

Strict scrutiny has generally applied to government action which compels speech. The sole exception involving representative entities legislatively created to serve vital government interests is inapplicable in this case.

The University's mandatory student activities fee also implicates the First Amendment freedom of association. A financial contribution to a candidate or ideological group serves to affiliate the contributor with that candidate or ideology. *Buckley*, 424 U.S. at 22. In addition to actively contributing to the propagation of the donee's speech, a contribution is a symbolic declaration of alliance with the donee and its other supporters. Moreover, a contribution's symbolism of affiliation is not reduced by its anonymity, since the First Amendment similarly protects against involuntary disclosure. *Buckley*, 424 U.S. at 64. A contributor's declaration of allegiance by his financial support is therefore a meaningful and protected expression, even if it is known only to the contributor.

The University's allocation of mandatory student fees to support political and ideological speech, without allowance for students' objections, constitutes an impermissible compulsion of a symbolic declaration of allegiance to repugnant beliefs. Strict scrutiny must apply because in this context there is no competing legislative policy to serve a

broader social good through a representative entity.

Strict scrutiny also applies where the indirect effect of a government regulation burdens First Amendment liberties. *Buckley*, 424 U.S. at 64. Thus, strict scrutiny must apply in this case because the University's mandatory student activities fee indirectly compels actual speech. Compulsory dues violates the freedom of silence which is the necessary corollary of freedom of speech.

The freedom to choose when to speak and what to say necessarily includes the freedom to choose when *not* to speak and what *not* to say. *Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). The University's use of allocable fees to fund political and ideological expression indirectly compels students to speak in order to counterbalance the effect of their involuntary support of others' objectionable expressions. Having paid the student activities fee, the student must either silently consent to the objectionable speech which the student is involuntarily financing, or is compelled by the resulting "crisis of conscience" to counterbalance that support with an expression of opposition, whether financially or vocally. (Indeed, this very litigation is an expression of opposition to the funded speech, although the remedy sought is not a silencing of the speech but a termination of the obligatory funding of it.) The University's funding policy is therefore constitutionally defective because it "risks forcing [students] to speak when [they] would prefer to remain silent." *Pacific Gas and Elec. Co. v. PUCC*, 475 U.S. 1, 18 (1986).

None of the characteristics of the University's funding policy justify the burden that it imposes. That the funds are distributed to a multiplicity of student groups on an allegedly content neutral basis does not diminish the First Amendment

infringements. "It simply means that students must fund more than one unwanted view." *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3rd Cir. 1985). To paraphrase Justice Kennedy in *Rosenberger*, the "declaration that debate is not skewed so long as multiple voices are [funded] is simply wrong; the debate is skewed in multiple ways." *Rosenberger*, 515 U.S. at 831-832. Funding of multiple groups simply provides no assurance that there will be representation of all opposing viewpoints within the marketplace of ideas; nor is there any assurance that opposing viewpoints will be equally funded. Indeed, the reality at the University of Wisconsin is that the debate is distorted by disproportionate funding of a narrow spectrum of viewpoints.

Similarly, a student's option to participate in a student organization or to create his own does not mitigate the constitutional infringement. Having contributed to the support of disagreeable ideologies, a student has no choice but to either implicitly consent to such activities or to actively oppose them. While the student may cancel or counterbalance unwilling support of an ideology by actively challenging it, that activity does not similarly cancel the constitutional injury. Rather, it is multiplied since the student is first compelled to sacrifice his conscience by compelled support of repugnant ideas, and then is compelled by that "crisis of conscience" to sacrifice his freedom to refrain from speaking.

Thus, the First Amendment violations inflicted by compelled funding are not minimized by either content-neutral distribution or a dissenting student's option of participating in debate. The students are still compelled against their will to fund the activities of organizations whose ideas are repugnant to them. It does not justify the burden that everyone else is similarly burdened or that all may speak and seek funding for their speech.

Additionally, the claim of content-neutral distribution in this case is illusory because the record bears out that ASM's distribution of funds does not actually occur on a content-neutral basis. The eighteen political/ideological student organizations receiving disbursements of student fees reflect a disproportionate (if not complete) concentration on the liberal and anti-establishment spectrum of political activity. There does not appear to be a single conservative or mainstream student organization which has been granted funding for its political activity.

Even those courts which have allowed mandatory student fees for funding of political speech have held that "there must be in fact a spectrum represented, not a single track philosophy." The funding scheme "cannot become the vehicle for the promotion of one particular viewpoint..." *Good v. Assoc. Students of University of Washington*, 542 P.2d 762 (Wash. 1975). This Court has expressed concern that there is a "perception of government endorsement" where a narrow selection of viewpoints "threatens to dominate the forum." *Rosenberger*, 515 U.S. at 850-851 (O'Connor, J., concurring). "In fulfilling its role, it is expected that a university will strive for balance and afford adequate opportunity for offering opposing viewpoints." *Galda*, 772 F.2d at 1067. The disproportionate funding of a narrow spectrum of viewpoints reflects "presumptively unconstitutional...attempts to suppress a particular point of view...in funding..." *Rosenberger,* 515 U.S. at 830.

Certainly there is no content-neutral justification for an assessment imposed by a student referendum, for the specific funding of a single student organization. Such an assessment is nothing short of a majoritarian confiscation of funds for the advancement of a single political view. No court has found any justification for such assessments. *See, e.g.*, *Galda*, 772

F.2d at 1060.

Content-neutral distribution is not a justification for forcible collection of funds, since the actions of distribution and collection each have distinct First Amendment implications. However, a *lack* of content-neutral distribution as reflected in this case, magnifies the compelled speech concerns pertaining to funding. While a distribution to multiple speakers does not eliminate the compelled speech effect of forcible funding, a concentration of funds in a narrow spectrum of viewpoints creates the "perception of endorsement," creating an even more acute coercion on those who object to financial support.

The University's fee policy compels the student to sacrifice either his conscience or his silence. In either instance, a violation of the First Amendment is unavoidable, as the First Amendment protects the entire "sphere of intellect and spirit" from such government intrusion.

II.

IF APPLIED, THE "GERMANENESS" ANALYSIS MUST FOCUS ON THE REPRESENTATIVE ROLE AND PURPOSE OF THE ASSOCIATED STUDENTS OF MADISON.

Reduced scrutiny does not apply in this context because there is no vital government interest in the speech activities of private student groups. However, if applied, the "germaneness analysis" should not focus on the University as a whole, but rather on the Associated Students of Madison. That organization most closely fits the representational entities to which the "germaneness analysis" has been previously

applied.

A.

The "Germaneness" Analysis Does Not Apply To The University Of Wisconsin As A Whole.

The "germaneness analysis" in *Abood*, 431 U.S. 209 (1977); *Keller*, 496 U.S. 1 (1990); and *Lehnert*, 500 U.S. 507 (1991), evolved in the context of "highly specialized vocational groups, organized around the narrow interests of a single industry or profession and designed to speak for those interests with essentially one voice." *Smith v. Regents*, 844 P.2d 500, 520 (Cal. 1993)(Arabian, J., dissenting). This Court has never previously applied the "germaneness analysis" outside of the context of such representational groups. *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984); *International Assoc. of Machinists v. Street*, 367 U.S. 740 (1961); *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991); *Airline Pilots Assoc. v. Miller*, 523 U.S. 866 (1998).

Each of these decisions involved a representative entity created by legislative enactment to serve both the "common cause" of the membership and a policy interest of greater social stability and cohesiveness. For such organizations, the fulfillment of their statutory mission requires an ability to speak with a single voice on behalf of their membership. This Court recognized the vital government interests at stake in the creation and regulation of these organizations and has declined to apply strict scrutiny to speech activities "germane" to their statutory purpose. The "germaneness analysis" has been applied to unions, professional organizations, and agricultural cooperatives.

This Court has long recognized that Congress has ordained the existence of unions in the pursuit of "industrial peace and stabilized labor management relations..." *Railway Employees Dep't. v. Hanson*, 351 U.S. at 233-234. This is because unions are "organized around the narrow interests of a single industry...and designed to speak for those interests with essentially one voice," *Smith v. Regents of the University of California*, 844 P.2d at 520. "Congress determined it would promote peaceful labor relations to permit a labor union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its costs, and that legislative judgment was surely an allowable one." *Abood*, 431 U.S. at 219.

Similarly, this Court recognized a "substantial analogy between the relationship of [a state bar association] and its members, on the one hand, and the relationship of employee unions and their members. on the other." *Keller,* 496 U.S. at 12. Further, this Court recognized that state bar associations, similar to unions, are legislatively commissioned to serve the interests of social welfare and cohesiveness, "by improving the quality of the legal service available to the people of the state," and "[aiding] in all matters pertaining to the advancement of the science of jurisprudence or the improvement of the administration of justice."[2] Because of the particular need for such representative organizations to speak with one voice in pursuit of their legislatively ordained mission, any dissent must necessarily give way to the common

[2]It is this same representative function which permits the government itself to collect taxes and make specific and potentially controversial policy determinations. "The reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring).

cause which is the foundation and mission of that organization. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Abood*, 431 U.S. at 223 (quoting *Street*, 67 U.S. at 778 (Douglas, J., concurring).

In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), this Court held that legislative enactment of a cooperative program requiring only generic advertising for California tree fruit growers withstood a First Amendment challenge. Although that case involved only commercial speech with no ideological or political content, this Court was also guided by the observations of *Abood*, *Lehnert* and *Keller* "that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group". *Glickman,* 521 U.S. at 458.

Thus, the context of the "germaneness analysis" arises out of the conflict between the legislatively-endorsed mission of certain representative entities which necessarily requires a unified voice, and the First Amendment rights of dissenting members of those entities. *Abood*, *Keller*, and *Lehnert*, balance these competing interests by subordinating the First Amendment interests of dissenters to the legislative obligation of such representative entities to speak in a single voice on matters central to its legislative mission and in furtherance of the "common cause" of the membership.

In the present case, the University of Wisconsin has no legislative mission to act as representative of its students, nor does it seek to speak with a unified voice. Indeed, contrary to the legislative goal of uniformity which underlies unions,

professional organizations and cooperative advertising programs, the University distinctly seeks to promote diversity. Modern universities are "peculiarly the marketplace of ideas. The nation's future depends upon leaders trained through wider 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. Bd. of Regents of New York*, 385 U.S. 589, 603 (1967)(quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). Quite the opposite of fostering conformity, the University encourages independent thinking, dissent and challenge of that which is orthodox. *See, e.g., Smith v. Regents of the University of California,* 844 P.2d 500 (1993)(Arabian, J., dissenting)("the University's educational mission is precisely to combat orthodoxy by encouraging the dissemination of a multiplicity of views and interests, many of which will inevitably provoke controversy, debate and opposition.") The University therefore cannot claim the benefit of the "germaneness analysis," which centers upon a legislative policy decision to foster uniformity on behalf of the "common cause" of the membership and of society as a whole.

In further contrast to "compelled speech" cases employing the "germaneness analysis," a university is neither "highly specialized" nor "organized around narrow interests... Its mission is not centered on the goal of representing an industry or a profession, 'but rather on academic training in a multitude of industries and professions, and a stimulation of "intellectual growth and fulfillment [through] a wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues...'" *Smith*, 844 P.2d 500, 519 (Arabian, J., dissenting)(citation omitted). Thus the University cannot claim the narrow or "highly specialized" purpose characteristic of the representative entities found in

the compelled speech cases.

The "germaneness analysis" simply does not fit the context of this dispute. There is no legislative policy establishing a representative body for the purpose of uniformity and social stability. Absent those policy considerations, strict scrutiny must apply as in all other situations where government regulation affects core political expression.

B.

Even If The "Germaneness" Analysis Is Applied To The University Of Wisconsin, The Analysis Must Only Apply To The University's Unique Academic Purpose.

If the "germaneness analysis" can be applied at all to the University, the University cannot be attributed a purpose which is generically described as "educational." Entities which have been granted a reduced scrutiny under the "germaneness analysis" have a purpose which is highly specialized, both narrowly defined and unique in function. A purpose which is "educational" is "so broad as to encompass all of life". *Southworth v. Grebe*, 151 F.3d 717, 725 (7th Cir. 1998). There is something to be learned in every daily activity but a state university's interest in "education" does not extend to the activities of independent organizations. For the University to claim that funding independent student organizations is germane to its purpose because there are educational components to those activities is to paint with too broad a brush. While it is true that a university's communal atmosphere and extra-curricular activities provide learning opportunities through a broad range of life experiences, it does not follow that these are sufficient governmental interests to

justify constitutional infringements.

Under the "germaneness analysis," the question is whether that organization's political and ideological activities have been germane or pertinent to its unique purpose and primary goal. The unique purpose and primary goal of the university is academic instruction. All other aspects of university life are peripheral to this purpose, including any interest in political activism by private student organizations.

The primacy of the University's academic purpose is observable in various ways. Without students there would be no University and students become so only by enrollment in academic courses. A student's progression through the University is measured in terms of academic courses completed, culminating with the awarding of a diploma. The academic curriculum is the central and indispensable aspect of the University's purpose and function.

This cannot be said for extra-curricular activities, particularly activities of private student groups. While the University may encourage participation in various extra-curricular activities as part of a well-rounded university experience, participation is not mandatory. There are no grades or attendance requirements; one might attend college (and even graduate with highest honors) without ever having once participated in a Registered Student Organization. It seems beyond debate that academic success should be and is given a higher priority over participation in extra-curricular activities; indeed, threshold academic standards are often prerequisites to extra-curricular activities such as sports programs.

The peripheral nature of Registered Student Organizations is underscored by the fact that they are largely

independent of University management. While the academic program is wholly within the University's unilateral discretion and authority, the purposes and activities of independent student organizations are left largely to the students.

Finally, unlike its academic programs (and unlike unions, professional associations and cooperative programs), a university cannot claim that it is fulfilling a unique role through student organizations. The University is not the sole source for participation in music, athletics or the arts, nor is it the sole vehicle for stimulating public debate or developing community or cultural awareness. These activities are not "the cause which justified bringing the group together," *Abood,* 431 U.S. at 223, but are rather activities which naturally arise in a community which has already been brought together.

The University argues that it has an interest in training the "educated citizen". But this is an obligation and an ideal imposed upon every social institution, beginning with the family and shared by schools, churches and the host of civic and community organizations unrelated to colleges and universities.

Independent student organizations -- particularly those with political and ideological goals -- are not concerned with exploring and investigating new ideas and opinions as the University's academic program is. Rather, they are concerned with staking out certain intellectual ground and defending and advocating it to the rest of the world.

The activities of private student organizations may contribute to "learning how to live in a pluralistic society." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). It does not follow that the University has a governmental interest in

enhancing these activities sufficient to justify First Amendment intrusions. While extra-curricular activities and independent student groups create valuable opportunities for the students, they are merely valuable adjuncts to the academic purpose of college education. They are fringe benefits. While these opportunities enhance the college atmosphere and the opportunities for broader personal development, they are neither indispensable nor central to the college purpose. They are not of sufficient importance to justify constitutional violations which challenge the fundamental freedoms of our society.

For the University to claim that it is entitled to confiscate funds in order to promote controversy and political debate is to pervert the First Amendment in the name of preserving it. In his dissent in *Smith*, 844 P.2d at 500, Judge Arabian argues that confiscatory funding of extracurricular student groups is appropriate because "the university also has a major responsibility for the development of an enlightened and engaged citizenry." But as the majority observed:

> At the heart of the dissenting opinion is a frank proposal to sacrifice students' constitutional right not to be compelled to support political causes in order to teach them about the fundamental republican virtues upon which this nation was founded. The irony of that proposal speaks for itself.

Smith, 844 P.2d at 503.

Indeed, the University has previously expressly recognized that its interest in student debate does not supersede the First Amendment. University of Wisconsin Financial Policy and Procedure Paper No. 20 prohibits the use

of student activities fees for "activities that are politically partisan or religious in nature." In briefing before the Seventh Circuit, the University stated the policy was enacted "to protect students' rights under the First Amendment." *Southworth*, 151 F.3d at 730 n.11. Clearly, if the University's "educational" interests in the speech of student groups prevailed over students' First Amendment rights, such a policy would have been unnecessary.

Accordingly, if the "germaneness analysis" is to apply at all to the University as a whole, the University's purpose must be defined as academic instruction, since that is the University's primary purpose and it constitutes the unique role which the University serves to the common interests of all of its students. The University simply cannot claim, for purposes of the "germaneness analysis," that its purpose or governmental interest is so sweepingly educational as to include all of life and encompassing all those activities which are beneficial but not central to its academic curriculum.

C.

If Applied At All, The "Germaneness" Analysis Should Only Focus On The Associated Students Of Madison, The Official Student Representative Body.

The existence and function of independent student organizations simply does not serve any legislative purpose, and strict scrutiny should apply. But if the "germaneness analysis" is to be applied at all in this context, the analysis is best applied to the purpose and function of the Associated Students of Madison. That entity is both the representative of the student body and the entity which controls the distribution of allocated funds to the independent student organizations.

It should be observed at the outset that the Associated Students of Madison is not itself a party to this action. Respondent's challenge the University's mandatory funding policy. The challenge is thus whether the University has any justifiable basis for acting as collection agent for the Associated Students of Madison; there is no challenge to the decisions of the Associated Students of Madison once it receives those collected funds.[3] Nevertheless, applying the "germaneness analysis" to the University's forcible collection of funds requires an evaluation of the role and purpose of the Associated Students of Madison. As previously noted, the "germaneness analysis" has been applied in a limited context of statutorily-created representative entities serving a legislative mission to promote broader social stability and cohesiveness.

The Associated Students of Madison is the representative body which speaks for the University of Wisconsin students. It also has primary authority over most of the allocable funding. Because the Associated Students of Madison is a representative entity seeking to advance the "common cause" of the students in various ways, it is the entity whose purpose is of concern in applying the "germaneness analysis."

III.

EVEN UNDER THE REDUCED SCRUTINY OF THE "GERMANENESS ANALYSIS," THE UNIVERSITY OF WISCONSIN'S MANDATORY STUDENT FEE POLICY IS

[3]In any event, the University has final authority to approve or disapprove ASM's allocation of funds, pursuant to Section 36.09(5) of the Wisconsin code.

UNCONSTITUTIONAL

A.

The Support Of Political And Ideological Activities Of Independent Student Organizations Is Not Germane To The Representative Purpose And Function Of The Associated Students Of Madison

In its representative capacity, the Associated Students of Madison performs many valuable functions on behalf of the students. In addition to presiding over matters of student governance, it acts as a voice before the University on various issues, including review and recommendations for the use of non-allocable student activities fees (which cover debt service, fixed operating costs of auxiliary operations, student health services, and the first and second year of the recreational sports budget).

However, in the distribution of funds to the independent Registered Student Organizations, the Associated Students of Madison does not act in any representative capacity, i.e., it does not act in the interest of all students or seek to promote a "common cause". Indeed, the Board argued before the Seventh Circuit that funding did not constitute compelled speech precisely *because* "the organizations do not purport to speak for all students." *Southworth v. Grebe,* 151 F3d 717, 732 (1998).

The Associated Students of Madison would be permitted, under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990); and *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991), to adopt its own specific positions and opinions on

matters of internal interest. But there is no broad governmental or social interest in the funding of private student organizations, nor is such funding "germane" or necessary to its role as representative of the students. None of the student organizations acts on behalf of the entire student body. A review of the eighteen organizations receiving student fees and engaging in political and ideological activities reveals that each of these organizations have highly specific political agendas which do not broadly reflect the interests of all students. Even taken as a whole, the organizations reflect a very narrow spectrum of political ideologies, with a decidedly heavy concentration of left-wing or liberal organizations. (There does not appear to be a single conservative or mainstream organization receiving ASM funding!)

The University cannot justify the mandatory payment of student activities fees without permitting allowance for objecting students, because the funding of political and ideological speech by registered student organizations is not germane to ASM's representative function, nor does it promote any common cause of the students. And in significant contrast to the legislative policy guiding *Int'l. Assoc. of Machinists v. Street,* 367 U.S. 740 (1961); *Abood*, 431 U.S. 209; *Lehnert*, 500 U.S. 507; and *Keller*, 496 U.S. 1, any legislative authorization for ASM's distribution for allocable funds does not appear to advance an overarching legislative policy to promote social cohesion and stability. In the absence of such strong legislative policy considerations, there can be no justification for compelling mandatory student fees, without accommodation to objecting students.

The discretion which ASM exercises in the funding decisions is also indicative of a lack of "germaneness." Germaneness applies to those functions which are central and

necessary to the representative entities' purpose and function. Funding of political and ideological student organizations cannot be "germane" when it is wholly elective and discretionary.

The lack of government regulation also reflects a lack of germaneness. Unions and bar associations are subject to substantial legislative or judicial control, reflective of the high governmental interest in those entities. Registered Student Organizations operate largely independent of University and ASM review, reflecting a correspondingly low governmental interest.

That funding such organizations is not "germane" to ASM's purpose and function is further underscored by the prevalence of unfunded organizations. Approximately 70% of the registered student organizations do not receive any ASM funding whatsoever. Clearly, the existence of such organizations is not dependent upon ASM funding, and thus the funding cannot be considered essential, necessary or "germane" to ASM's purpose and function.

Moreover, many of the activities of the political and ideological student organizations reflect substantial off-campus activities, and exportation of funds to support national parent organizations. This undercuts any claim that the funding of such organizations benefits the entire campus student body.

B.

The Mandatory Payment Of The Full Student Activities Fee And Any Student Referendum Assessment Is Not Narrowly Tailored And Is More Burdensome Than Necessary

The University's funding scheme also fails under the "germaneness analysis" because that analysis requires that, even if "germane," the activity must not intrude upon First Amendment liberties more than is necessary to accomplish its purpose. Even if the University could claim that it had a substantial interest in funding the political and ideological speech of registered student organizations, the evidence does not suggest that that interest would be undercut allowing accommodation to objecting students.

Allowing accommodations to dissenting students would not accomplish a complete defunding of political and ideological student groups (as argued in Justice Arabian's dissent in *Smith v. Regents of the University of California*, 844 P.2d 500 (Cal. 1993)). Respondents are only seeking an opportunity for dissenters to opt-out from the funding of such organizations. The University may continue to collect and disburse funds from non-objecting students.[4] Furthermore, the evidence does not suggest that political student groups depend upon University funding for their existence. That 70% of student organizations obtain no funding, and that many organizations receiving funding donate portions of it to parent organizations, suggests that university subsidies are not truly necessary.

Nor does the accommodation of such objections create any significant accounting difficulty for the University. The University need not permit piecemeal objections, with varied withholdings or refunds depending on the number of objectionable organizations receiving funding. The University

[4]There is no challenge to payment of the activities fee for non-political student organizations. That fee would continue to be required, and the organizations funded, in the same manner as before.

may simply impose a "zero-sum" withholding or refund policy, by which any objection to the funding of any ideological or political group results in a withholding or refund of the entire percentage of the allocable fee distributed among such groups.[5] Consent to any allocation would consent to all, but the student retains that freedom to choose.

There is no justifiable claim that allowing students to opt out of funding political and ideological activities would significantly deplete the resources available to such groups. Students who opt out would remain free to privately contribute to the organizations they might endorse and organizations remain free to solicit such contributions.

Nor can the university claim a significant concern with "free riders" since it presently permits membership in such groups by non-students, who pay no fees to the university at all. Additionally, students wishing to become members in various organizations might be required to pay a membership or a supplemental admission fee in the absence of proof of payment of the student activities fee.

The university simply has no compelling interest in subsidizing political and ideological activities of independent student groups, without accommodation to objecting students. Nor does the evidence demonstrate that the current scheme is narrowly tailored, and that the university cannot continue to adequately promote a diversity of such factions without such an accommodation.

Accordingly, even if the "germaneness analysis" is the

[5]Such "blind" objections would also avoid the dilemma of a student declaring his opposition to a particular group, which of itself may constitute compelled speech.

applicable test in this context, the funding scheme still does not survive constitutional scrutiny and an accommodation must be allowed to the objecting students. The compelled funding of the political and ideological speech of independent, Registered Student Organizations is simply not supported by a sufficiently strong governmental interest.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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