No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondent

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE ON BEHALF OF RESPONDENT

Filed August 12, 1999

QUESTION PRESENTED FOR REVIEW

I. Is the First Amendment offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech?

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On Writ of Certiorari to the
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Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE ON BEHALF OF RESPONDENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dep't of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including the following cases: *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Davis v. Monroe County*, 119 S. Ct. 29 (1998); *Kolstad v. American Dental Ass'n*, 119 S.Ct. 2118 (1999); *Slack v. McDaniel*, Sup.Ct. No. 98-6322 (October Term 1998) and *State of Wyoming v. Houghton*, 119 S. Ct. 1297 (1999), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred cases nationally, including numerous public school issues involving the Establishment Clause, the Freedom of Speech Clause and the Free Exercise of Religion Clause. The

[1] The parties have consented to the filing of this brief. Counsel for The Rutherford Institute authored this brief in its entirety, with able research assistance from Tammy L. Evans, Chicago-Kent College of Law (*J.D.* expected 2000). No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Institute has published educational materials and taught continuing legal education seminars in this area as well.[2]

II. SUMMARY OF ARGUMENT

This Court has repeatedly held that an individual has a right not to be coerced to subsidize another's speech. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). While the Court has not specifically addressed compulsory speech in the context of mandatory student fees, it has raised the question whether student fees may be susceptible to a Free Speech Clause challenge by objecting students.[3] When confronted with an issue involving compelled speech, this Court has repeatedly referred courts to its holding in *Abood* and *Keller* for guidance. In addition, this Court has provided guidelines for determining whether compelled subsidization of speech is constitutionally permissible by articulating a three-part test. *Lehnert v. Ferris Faculty Ass'n, et al.*, 500 U.S. 507 (1990). For compelled subsidization to be permissible, the government must establish the following: (1) the mandatory

[2] John W. Whitehead has published several dozen books and articles on constitutional and civil rights issues. *See, e.g., Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L. REV. 149 (1992); *The Conservative Supreme Court and the Demise of the Free Exercise Clause*, 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997); and *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997-1998 Term*, 71 TEMPLE POL. & CIV. RTS. L. REV. 773 (1998). The Institute also publishes informational pamphlets and briefs addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

[3] *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 851 (1995) (O'Connor, J., concurring).

fee is germane to some otherwise legitimate government scheme; (2) the mandatory fee furthers a vital policy interest of the government; and (3) the forced funding does not significantly add to the burdening of free speech inherent in achieving those interests. *Id.* at 519.

The Court is now called upon to decide whether the mandatory student fee imposed by the University of Wisconsin-Madison violates the First Amendment freedom of speech rights of students who oppose the political and ideological views funded by their fees. *Amicus curiae* The Rutherford Institute respectfully suggests the mandatory student fee does unlawfully compel students to subsidize speech with which they disagree. The mandatory fee is not germane to some otherwise legitimate governmental scheme and does not further the University's asserted interest in the education of its students. Furthermore, the mandatory fee significantly burdens the students' First Amendment freedom of speech rights, insofar as they are not allowed to graduate and do not receive their diplomas if the mandatory student fee is not paid each semester.

III. ARGUMENT

While the Constitution does not prohibit a compulsory organization such as a union from spending funds for the expression of political views or other ideological causes not germane to its purposes, the Constitution does require that such expenditures be "financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Abood*, 431 U.S. at 235-36; *Keller*, 496 U.S. 1. Because the compulsory student organization in the instant case is indistinguishable in form and

function from the compulsory union and bar association reviewed in *Abood* and *Keller*, the standards set forth in those cases govern here.[4] In an *Abood/Keller* compelled organization scheme, federal and state appellate courts have almost unanimously applied the three-part *Lehnert* test to determine whether the mandatory student fee is permissible.[5] Compelled funding of speech is permissible under *Lehnert* if the University establishes the following elements: (1) the mandatory fee is germane to some otherwise legitimate government scheme; (2)

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[4] In *Keller*, *supra*, the Court unanimously applied the standards set out in *Abood* to a state bar association on the basis of a rather utilitarian analysis that a bar association was more like a union than a government agency because its principle funding came not from appropriations made to it by the legislature, but from dues levied on its members, and because it represented a discrete group of individuals for a common benefit of members. *Keller*, 496 U.S. at 11. For the same reasons the Associated Students of Madison (hereinafter "ASM") is clearly not an arm of the State of Wisconsin, but a compulsory membership organization.

[5] *See Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 503, *cert. denied*, 510 U.S. 863 (1993) ("The Constitutional guarantees of free speech and association do not permit the state to make speech a matter of compulsion and coercion. As the present system of funding student activities has that effect, it cannot be continued without affording dissenting students an appropriate remedy."); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993) ("We find the University's educational goals sufficiently weighty to justify the University's subsidy of a student-run newspaper."); *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) ("The minimal and indirect restriction on Kania's constitutional rights worked by the University's funding of *The Daily Tar Heel* does not violate the fourteenth amendment."); *Good v. Associated Students of Univ. of Wash.*, 542 P.2d 762, 769 (1975) ("If such views are expressed only as a part of the exchange of ideas and there is no limitation or control imposed so that only one point of view is expressed through the program, there is no violation of the constitutional rights of the plaintiff."); *Galda v. Rutgers*, 772 F.2d 1060 (3rd Cir. 1985), *cert. denied* 475 U.S. 1065 (1986) (applying similar analysis to hold compelled student subsidy unconstitutional under *Abood*.)

the mandatory fee furthers a vital policy interest of the government; and (3) the forced funding does not significantly add to the burdening of free speech inherent in achieving those interests. *Lehnert*, 500 U.S. at 519. For the reasons discussed below, the Petitioner's compelled funding scheme fails all three prongs for the *Lehnert* test.

A. THE MANDATORY FEE IS NOT GERMANE TO AN OTHERWISE LEGITIMATE GOVERNMENT INTEREST

The Supreme Court first addressed compelled speech in *Abood*, in which it examined a mandatory service fee imposed by a union on non-union teachers. *Abood*, 431 U.S. 209. The Court held that unions could not expend dissenting individuals' dues for political or ideological activities that were not germane to the purpose for which compelled association was justified, *i.e.*, collective bargaining activities. *Id.* at 235-36. The Court also cautioned that unions could not coerce objecting employees against their will or threaten them with loss of government employment. *Id.*

Similarly, this Court struck down the use of mandatory bar dues to fund lobbying on political and ideological issues in *Keller*, 496 U.S. at 14. In *Keller*, the State's interest in regulating the legal profession and improving the quality of legal services justified the compulsory dues requirement. *Id.* at 8-9. This Court found the compelled funding germane to the State's asserted interest because the expenditure promoted an efficient legal system in California, which benefits its citizens and attorneys. However, this Court stressed that California could not fund activities of an ideological nature which fell outside the aforestated areas of activity. *Id.* at 14.

The Respondents do not contest the legitimacy of the University's professed interest in the education of its students, but challenge the germaneness to the University's interest of compulsory funding of speech. The University described their interest as germane in the following manner:

> Because vibrant student speech is at the core of the University of Wisconsin's mission and because the provision of student services to a diverse student body is an essential University function, expressly authorized by the Wisconsin Legislature, if the germaneness test applies, the student activity fee at the University of Wisconsin-Madison should be upheld.

(Petitioner's Brief, p. 37.) The University's germaneness argument glosses over this requirement to the degree that it becomes circular in nature. The Wisconsin legislature has drawn its interest in establishing the ASM broadly, to encompass not only the admittedly legitimate purpose of providing common representation of student concerns to the administration and provision of student services, but also the expansive and virtually illimitable mission of "educating" students and the public. So defined, the compulsory fees could be spent on virtually any speech or activity simply by virtue of the legislature's prodigious declaration of purpose, a result certainly not contemplated by the Court in *Abood* and *Keller*. Nonetheless, in determining whether the challenged expenditure is germane to the expressed interest, this Court has held that germaneness cannot and should not be applied broadly. *See Abood*, 431 U.S. at 220; *Keller*, 496 U.S. at 15-16. The purposes of collecting and distributing mandatory student fees should thus be narrowly drawn in furtherance of a legitimate governmental purpose that is one carefully construed so as not to infringe on the free speech rights of student members.

The use of mandatory union dues to fund political activities was held in *Lehnert* to be too attenuated to justify the compelled support and funding of objecting employees. 500 U.S. 507. This Court stressed in *Lehnert* that unions cannot constitutionally compel their employee members to subsidize political activities outside the limited context of contract ratification. *Id.* at 522.

> Where, . . . the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, . . . *the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees.*

Id. at 520 (emphasis supplied). The Court applied a narrow reading of germaneness, holding that the challenged political activities related to the financial support of its employees and not contract ratification. *Id.* Likewise here, the University's use of mandatory fees to fund political and ideological activities does not justify the compelled funding and support of objecting students. Affording close scrutiny of the germaneness requirement pursuant to *Lehnert* clearly demonstrates that the challenged funding results in little or no benefit to the educational mission of the University. Recognizing the difference between permitting the State through its university system to exact student assessments to further extra-curricular education and permitting it to make exactions for funding issue politics poses no more of a constitutional hurdle than that precise same type of distinction did in *Abood* and *Keller*.

In asserting the germaneness of its mandatory student fee scheme, the University relies on the Second Circuit Court of

Appeals' holding in *Carroll v. Blinken*, 42 F.3d 122 (2nd Cir. 1994), *aff'd and remanded by* 105 F.3d 79 (2nd Cir. 1997). In *Carroll*, the Court held that a state university could constitutionally compel its students to subsidize a private political organization. *Id.* at 124. However, *Carroll* actually cuts against, not in favor of, Petitioner's argument for a very important reason. The state university in *Carroll* required those organizations awarded portions of the mandatory student fees to match the amounts received and to donate those amounts back to the university for the benefit of the students.[6] The absence of such a reimbursement mechanism in the present case should likewise be held fatal to the Petitioner's scheme.[7]

Like the activities held insufficiently germane to admittedly legitimate governmental interests in collective bargaining and integrated bar associations in *Abood* and *Keller*, the University cannot expend objecting students' fees to fund private political and ideological activities because those activities are not nearly germane enough to the University's

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[6] *Galda v. Rutgers*, 772 F.2d 1060 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) also involved a mandatory student fee imposed by a state university, portions of which were awarded to several organizations, including organizations whose primary purpose was to further particular political and ideological views. Unlike the scheme in *Carroll*, however, the University did not require reimbursements from funded groups. The Court in *Galda* concluded that while the private political organizations offered some educational benefits to the students, the benefits were incidental to the organizations' primary political and ideological purposes. *Id.* at 1065. Therefore, the Court held that the incidental educational benefits did not justify the infringement of the objecting students' speech and association rights. *Id.*

[7] *See, however, Ellis v. Brotherhood of Railway, Airline, & Steamship Clerks*, 466 U.S. 435 (1984) holding that a union rebate scheme for reimbursing objecting employees *ex post facto* for costs unrelated to the performance of union duties did not pass constitutional muster.

asserted interest in the education of its students to justify the mandatory student fee imposed on the basis of that interest. The education of students does not warrant compelling them to fund political and ideological speech. This Court should hold that the University's mandatory student fee system and the punitive mechanisms it has in place to enforce it are not sufficiently germane to its asserted interest in education to pass constitutional muster.

B. WISCONSIN'S COMPELLED STUDENT FUNDING OF POLITICAL SPEECH IS NOT JUSTIFIED BY A "VITAL POLICY INTEREST" OF THE UNIVERSITY

It has been well recognized by this Court that a university is a classic public forum which operates as a "market place of ideas." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985). *See also Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Abrams v. United States*, 250 U.S. 616 (1919); *United States v. Associated Press*, 52 F. Supp. 362 (1943), *aff'd*, 326 U.S. 1, *rehearing denied*, 326 U.S. 802 (1945); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968); and *Whitney v. California*, 274 U.S. 357 (1927). The central flaw in the Petitioner's argument, as the Court's *amicus* sees it, is that the University would have the Court believe that it is a *vital* government interest to construct a non-spatial forum for the dissemination of ideas over an existing classic public forum - the university campus. It is undoubtedly within a university's discretion to do so, but that does not make it a vital public interest. Petitioner's view is akin to asserting that the government has a compelling state interest in subsidizing

placards and amplification systems for use by citizens who wish to demonstrate in public parks or on sidewalks. As the Court in *Lehnert* noted, "the burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context." *Lehnert*, 500 U.S. at 522. The Court recognized that forced subsidization for public discourse is constitutionally inappropriate:

> Labor peace is not especially served by allowing such charges because . . . our national and state legislatures, the media, and the platform of public discourse are public fora open to all. Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace. Because worker and union cannot be said to speak with one voice, it would not further the cause of harmonious industrial relations to compel objecting employees to finance union political activities as well as their own.

Id. at 521.

The Court has taken note of particular circumstances in which a vital public policy interest is served by the governmental allocation of limited financial or other resources to competing ends. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (First Amendment does not preclude imposition of equal time doctrine on private broadcasters who are licensed by the Government to use scarce resources which are denied to others); *Arkansas Educational Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998) (Arkansas public television broadcaster's decision to exclude independent congressional candidate from televised debate held to be reasonable exercise of journalistic discretion consistent with the First Amendment.); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168

(1998) ("Decency" guidelines for National Endowment for the Arts do not, on their face, impermissibly infringe on First or Fifth Amendment rights.). However, the present case involves no such circumstances, since the University of Wisconsin's mandatory student fee system is funded solely by students and the University cannot establish a need to become involved in the distribution of the mandatory student fee.

In *Red Lion,* this Court addressed two issues: (1) whether the radio station failed to meet its obligation under the fairness doctrine when it refused to provide reply time to an individual personally attacked during a broadcast, and (2) whether the regulations enacted in response to the station's refusal to provide reply time violated the broadcaster's First Amendment freedoms. *Red Lion,* 395 U.S. at 370-71. The Court weighed the Government's authority to limit the use of broadcast equipment because of the limited number of bandwidth frequencies available, and its important policy interest in avoiding the chaos that would likely ensue if anyone were permitted to use any frequency at whatever level he or she desired.

> It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

Id. at 389. *See also Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547 (1990). Recognizing that the power given to the Federal Communication Commission to assure that its broadcasters operate in the public interest is expansive, this Court found the

regulations to be within the authority of the FCC. *Id.* at 385.

The University claims that its interest in providing a neutral and diverse educational atmosphere to encourage various views is sufficiently strong to mandate subsidized funding. However, contrary to the Government's interest in *Red Lion,* the objecting students' interest in free speech is actually inhibited, not empowered, by the University's mandatory student fee system. Nor does Petitioner's compelled funding scheme resemble the system of government administered artistic funding grants upheld in *National Endowment for the Arts v. Finley,* 118 S. Ct. 2168.[8] The Court in *Finley* did not perceive any realistic danger that the criteria would be utilized to preclude or punish the expression of particular views, thereby compromising First Amendment values. The Court also acknowledged the National Endowment for the Arts' (hereinafter "NEA") limited resources to allocate among numerous "artistically excellent" projects, and that the NEA must allocate the grants on the basis of a wide variety of subjective criteria. *Id.* at 2177-78. As a result, this Court found that the NEA must deny a majority of the grant applications that it receives including various "artistically excellent" projects. *Id.* The artists still had ample means to express their artistic talent despite being refused federal funding. *Id.* At 2178. Therefore, this Court held that the challengers of the provision failed to demonstrate a substantial risk that the application of the

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[8] The Congressional amendment at issue, section 954(d)(1), established procedures instructing those judging artistic merit of grant applications to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *National Endowment for the Arts v. Finley,* 118 S. Ct. 2168, 2173 (1998). After the NEA denied the grant applications of four artists, those artists filed suit, challenging the constitutionality of section 954(d)(1).

provision would lead to the suppression of speech, a factor necessary for the Court to invalidate the provision. *Id.* at 2179.

Like the federal subsidy at issue in *Finley*, the University's mandatory student fee is a subsidy scheme created to encourage the expression of a diversity of views from private speakers. However, unlike the NEA funding scheme, the University's mandatory student fee is derived solely from the students' compelled association, and not from the State's general revenues. Further, *Finley* held that although the First Amendment certainly has application in the subsidy context, the government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech at stake, and that as long as the legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. 118 S. Ct. at 2179. Here, the University is not allocating competitive funding on a merit basis; rather it is extracting association dues from objecting students to fund a limited non-spatial forum of expression on a content and viewpoint-neutral basis. Therefore, the University does not and should not enjoy wide latitude in such funding practices.

As aforementioned, the students do not contest that the University has an important policy interest in the education of its students. Nonetheless, to survive strict scrutiny under the *Lehnert* test, the University must justify its compelled funding of the private political and ideological organizations as furthering its "vital interests." *Southworth v. Grebe*, 151 F.3d 717, 727 (7th Cir. 1998), *rehearing en banc denied*, 157 F.3d 1124 (7th Cir. 1998), *cert. granted*, 119 S. Ct. 1332 (1999). To determine whether the challenged expenditure is justified, this Court must first ascertain the vital policy interest involved and then decide whether the interest is appropriately served by

the challenged expenditure. *Lehnert*, 500 U.S. at 521. The University must identify a common cause between those compelled to subsidize speech and the vital policy interests that justify subsidization. 151 F.3d at 727. As the court below phrased it in *Lehnert*, this Court determined that the vital policy interest of the union was labor peace, but the relationship between the union lobbying activities and the employees' contracts was remote:

> Where, as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees.

Id. Finding no common cause between the employees compelled to subsidize the union's activities and the union's vital policy, the court below properly struck down the compelled expenditure. 151 F.3d at 728.

Lehnert instructs that the University's mandatory student fee will be deemed justifiable only if the University's interest in education is served by compelling objecting students to fund political and ideological speech. However, compelling objecting students to fund political and ideological activities does not promote the educational mission of the University. As in *Lehnert*, the relationship between the University's interest in education and the compelled funding of political and ideological speech is too remote and attenuated to be justified, since no common cause exists between the objecting students who are compelled to fund said

activities and the students who propagate such speech by virtue of the University's mandatory student fee.

The mandatory student fee does not promote the University's interest in education, but forestalls the students' ability to express political and ideological views of their own choosing. Instead, many organizations that receive portions of the student fee directly fund political lobbying to further the organization's ideological beliefs. Therefore, having failed to meet the second prong of the *Lehnert* test, the University's mandatory student fee should be held unconstitutional.

C. THE MANDATORY STUDENT FEE SIGNIFICANTLY ADDS TO THE BURDENING OF THE STUDENTS' FREEDOM OF SPEECH IN ACHIEVING THE UNIVERSITY'S ASSERTED INTEREST

To satisfy the third prong of the *Lehnert* test, the compelled expenditure must not significantly add to the burdening of free speech inherent in achieving its asserted interest. *Lehnert,* 500 U.S. at 519. The mandatory student fee is unconstitutional because the University significantly adds to the burdening of its students' freedom of speech rights by forcing students to fund views they may not espouse. Students who object to the compelled funding and refuse to pay the mandatory student fee receive an academic "death penalty;" they cannot graduate and cannot receive their degrees. Clearly, to paraphrase the Court, "allowing the use of dissenters' assessments for political activities...would present 'additional interference with the First Amendment interests of objecting [students].'" *Id.* at 521 (quoting *Ellis, supra,* 466 U.S. at 456).

As a plurality of the Court said in *Lee v. Weisman,* 505 U.S. 577, 596 (1992), "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Amicus* submits the same is true of coerced funding of ideological and political speech. This Court based its decision in *Abood* in large part on this concern, recognizing that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood,* 431 U.S. at 234-35.

The third prong of the *Lehnert* test recognizes the burden on free speech and association that results when the government forces individuals to fund private political and ideological organizations. *See Southworth,* 151 F.3d at 727. The Court determined that the use of dissenting employees' dues to fund and promote political lobbying was unconstitutional because it significantly burdened the dissenting employees' free speech and free expression. *Lehnert,* 500 at 521-22. Furthermore, this Court recognized that the burden upon freedom of speech rights is greatest when the compelled speech is in a public context. *Id.* The First Amendment protects the individual's right of participation in the public sphere from government invasion. *Wooley v. Maynard,* 430 U.S. 705 (1977). In holding that the state of New Hampshire may not constitutionally compel a citizen to display the state motto on vehicle license plates, "Live Free or Die," where the motto was repugnant to their personal beliefs, this Court noted that "the right to speak and the right to refrain from speaking are complementary components of the broader concept of an individual's freedom

of mind." *Id.* at 715. *See also Shelton v. Tucker,* 364 U.S. 479, 487 (1960); *Lehnert,* 500 U.S. 507.

Distinguishable from the present case is this Court's holding in a recent compelled funding case, *Glickman v. Wileman Bros. & Elliott,* 521 U.S. 457 (1997). *Glickman* involved monetary exactions imposed on several growers, handlers and processors of California tree fruits, which the State used for advertising of California fruit, and administrative costs associated with the advertisements.[9] Relying on its prior holdings in both *Abood* and *Keller*, this Court upheld the regulations, finding that the regulations neither imposed a restraint on the freedom of any producer to communicate any message to consumers, nor compelled any person to engage in actual or symbolic speech. *Id.* at 465.

Contrary to this Court's analysis in *Glickman*, the present case involves an imposed restraint on the freedom of the students to communicate messages to the public. The University compels objecting students to fund speech that they do not personally support. In *Glickman,* the regulations imposed by the State promoted the common interests of the growers, handlers and processors, and those individuals were not prohibited in communicating any messages to the public. Unlike the growers in *Glickman* who were forced to pay monetary exactions to the State, the objecting students receive no substantive benefits from the mandatory student fee, and the speech subsidized thereby cannot reasonably be said to

[9] The Court analyzed this case as a compelled funding situation rather than in a commercial speech context, finding the application of commercial speech analysis inconsistent in determining the constitutionality of the collective action program at issue here. *Glickman,* 521 U.S. at 474.

further interests common to most students. By arguing before the Court that the University has an overriding interest in forcing all students, including objectors, to subsidize speech they may find disagreeable as a necessary aspect of their "education," Petitioner turns on its head the Court's constitutional philosophy in this area. As the Court observed in *Lehnert:*

> [L]obbying and electoral speech are likely to concern topics about which individuals hold strong personal views. Although First Amendment protection is in no way limited to controversial topics or emotionally charged issues, the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect.

500 U.S. at 521-22. In essence, Petitioner contends that the State's interest in forcing a student to pay for speech he disagrees with simply on the basis of its belief that he needs to be educated with a "diversity of opinions," overrides the student's right to be free from forced subsidization. Petitioner is asking the Court to rule that the State's "right" to educate students at their own expense trumps their First Amendment free speech rights. *Abood* and *Keller* stand firm against the state-sponsored extraction of money to disseminate views that are contrary to a citizen's conscience; Petitioner's attempt to justify Wisconsin's extraction as "educational" is likewise constitutionally untenable.

The dissent in the Seventh Circuit Court of Appeals' denial for rehearing *en banc* correctly established that when a forum of funding is created, the disbursement of the funds must be determined in a content-neutral manner. *Southworth*

v. Grebe, 157 F.3d 1124, 1125 (rehearing *en banc* denied) (7th Cir. 1998) (Rovner, dissenting). However, the dissents' argument that the mandatory student fee is permissible because the funds are distributed in a viewpoint and content neutral manner is flawed. The neutral distribution of funds does not lessen or discharge the University's violation of its students' freedom of speech rights engendered by its refusal to permit objectors to opt out. Allowing the University to trample on its students' First Amendment rights, as long as it does so in a viewpoint neutral manner, completely undermines the First Amendment. *See Palko v. Connecticut*, 302 U.S. 319, 327 (1937) ("freedom of thought and speech is the matrix, the indispensable condition, of nearly every other form of freedom."); *see also Wooley*, 430 U.S. 705; *Lehnert*, 500 U.S. 507; *Galda*, 772 F.2d 1060; and *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238.

IV. CONCLUSION

The University of Wisconsin's mandatory student fee is an unconstitutional restraint on the students' First Amendment freedom of speech rights. The mandatory student fee is not germane to the University's asserted interest in the education of its students because the benefits derived from compelled funding are only incidental. Furthermore, compelling objecting students to fund organizations whose political and ideological views they do not espouse inhibits rather than furthers the University's interest in its students' education. Finally, the mandatory student fee significantly adds to the burdening of the objecting students' freedom of speech by compelling those students to fund speech, denying them the right of refusal. Having established that the University's mandatory student fee system fails all three prongs of the *Lehnert* test, this Court

should find that the mandatory student fee system is an unconstitutional violation of the students' First Amendment freedom of speech rights.

Respectfully submitted,

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