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

AMICUS CURIAE BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

Filed August 13, 1999

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

The National Right to Work Legal Defense Foundation, Inc. ("Foundation"), files this brief *amicus curiae* with the written consent of all parties. Sup. Ct. R. 37.3(a).[1] It supports Respondents' position that this Court should affirm the decision of the United States Court of Appeals for the Seventh Circuit.

[1] We have lodged letters of consent with the Clerk of the Court as required by Rule 37.3(a). Pursuant to Rule 37.6, the Foundation's counsel certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Foundation is a nonprofit, charitable, legal aid organization. Its purpose is to protect the right to work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. It is the only such organization operating on a national basis.

The Foundation has supported several major constitutional cases involving employees' rights to refrain from paying compulsory dues and fees to labor organizations for political activity, lobbying, litigation, and other forms of union ideological advocacy and activism. These cases, in which Foundation attorneys represented the plaintiff employees, include *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Foundation attorneys also have represented employees in many cases in lower courts that have involved application of the principles enunciated by this Court in *Abood* and later decisions.

The court of appeals relied on this Court's union-dues precedents in its decision in this case. *See Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998), *cert. granted sub nom. Board of Regents of Univ. of Wis. Sys. v. Southworth*, 119 S. Ct. 1332 (1999). Therefore, the Foundation is concerned with this case, because reversal of the court of appeals' decision could seriously undermine the constitutional rights of nonunion employees, recognized in *Abood* and its progeny, not to subsidize union political and ideological activity. The Foundation also believes that its attorneys' extensive experience in litigating union compulsory-dues cases will give the Court a unique and helpful perspective on the important issues this case involves.

SUMMARY OF THE ARGUMENT

Part I.

This Court's holdings in its decisions concerning the constitutionality of compulsory union agency fees and mandatory state bar dues control here, because these cases all involve coerced financial support of private or quasi-private organizations that engage in political and ideological advocacy. These cases all thus involve infringements upon the rights not to speak and not to associate for political and ideological purposes. These rights are at the core of the First Amendment and protected as fully as the rights to speak and to associate. Therefore, to pass constitutional muster, the schemes in these cases must meet traditional First-Amendment strict scrutiny, which requires the government to show that its regulations narrowly serve compelling governmental interests.

Although the Court has not explicitly so stated, it has in fact applied strict scrutiny in its union agency-fee and compulsory bar-dues cases. In those cases, the Court has not deferred to state claims of ambiguous state interests. Rather, it has required the state to show that a discrete, vital state interest justifies coerced financial support of the unions and bar associations. The Court also has narrowly limited constitutionally chargeable activities, protected by the First Amendment, to those that directly serve the governmental interest that justifies the compulsory fee. And, it has required that the procedures for determining chargeable costs be carefully tailored to minimize the infringement on First-Amendment rights.

Part II.

In *Lehnert v. Ferris Faculty Ass'n* the Court established a strict, three-part test for determining whether the costs of activities may constitutionally be included in mandatory fees: to be chargeable an activity must be (1) "'germane' to" the governmental purpose for which compelled association is justified; (2) justified by a "vital" governmental interest; and,

(3) "not significantly add to" any burden on First-Amendment rights inherent in coerced support of the governmental purpose justifying the fee. 500 U.S. at 519. The court of appeals correctly required that all three parts of this test be met here, because *Lehnert* stated it in the conjunctive, not the disjunctive. Moreover, as the various opinions in *Lehnert* all show, the Court there required that all three parts of the test be satisfied.

The Court's later decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), is not to the contrary. *Glickman* is distinguishable from these cases, because it did not involve coerced financial support of ***any*** political or ideological advocacy. Moreover, *Glickman* implicitly addressed all three prongs of the *Lehnert* test. It necessarily did so, because permitting coerced financial support of speech and association that meets only one part of that test does not satisfy due process, much less strict scrutiny.

Part III.

The court of appeals correctly rejected an escrow-and-refund remedy, and required instead an advance reduction of objecting students' fees to that amount that can, based on experience, be expected to be distributed to organizations engaged only in constitutionally chargeable activities. Such a reduction is required by this Court's decision in *Teachers Local 1 v. Hudson*. It is necessary, because state coerced ***collection*** of compulsory fees for a private organization ***inherently*** infringes on First-Amendment freedom of association, and because even temporary collection of amounts to which such an organization has no valid claim unjustifiably deprives an individual of his or her own property. Any burden that calculating an advance reduction, based on spending in a prior year, might impose on the party collecting the fees, or organizations that want to use them, does not justify the infringement on individual constitutional and property rights that occurs absent such a reduction.

ARGUMENT

I. Mandatory Student Fees, Like Compulsory Union Agency Fees and Bar Dues, Are Not Excepted from Normal First-Amendment Strict Scrutiny.

Petitioners, the members of the Board of Regents of the University of Wisconsin System (collectively, "the Board"), and most of its *amici curiae*, argue that this case is not controlled by this Court's holdings concerning the constitutionality of compulsory union agency fees and mandatory state bar dues, because those decisions did not involve a "limited public forum." (*E.g.*, Pet'rs' Br. at 29-30.) However, as the Board's *amicus curiae* American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") cogently explains, this Court's agency-fee and bar-dues cases do control here, because:

> There is no dispositive legal difference between mandatory fees that finance a forum for expressive activities and mandatory fees that otherwise further expressive activities. In both cases, the connection between the fee payer and the expressive activities is purely financial, rather than personal. In both cases, even the financial connection between the fee payers and the expressive activities may be more or less remote depending upon the number of organizational levels the fee passes through before being ultimately used for expressive activity. And, in both cases, the content of the expressive activity is not determined by the government.

(AFL-CIO Br. at 3.)[2]

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[2] The directness of the connection between the fee payer and the expressive activities was irrelevant in the agency-fee cases. *See Lehnert*, 500 U.S. at 516 ("To force employees to contribute, ***albeit indirectly***, to the promotion of [social, political, and ideological] positions implicates core

(continued...)

Where the AFL-CIO's argument, and the Board's alternative argument analyzing this case under the Court's agency-fee and bar-dues decisions, err is that they fail to acknowledge that these cases all require application of traditional First-Amendment strict scrutiny.

Governmental requirements that individuals, as a condition of public benefits, pay private and quasi-private organizations fees used for political and ideological purposes infringe on the First-Amendment freedoms of speech and association. *See Lehnert*, 500 U.S. at 516-17 (union agency fees); *Keller v. State Bar*, 496 U.S. 1, 9-10, 13-14 (1990) (mandatory bar dues); *Hudson*, 475 U.S. at 301-02 & n.9 (agency fees); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-36 (1977) (agency fees). This is so, because the "'right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all,'" *Lehnert*, 500 U.S. at 516-17 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); and because "'freedom of association . . . plainly presupposes a freedom not to associate.'" *Hudson*, 475 U.S. at 302 n.9 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

Consequently, just as in the union and bar cases, strict scrutiny is necessary in determining whether, and to what extent, the Constitution permits the requirements involved here. Where political and ideological speech and association are concerned, "regulation of First Amendment rights ***is always subject to exacting judicial review***." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981) (emphasis added). To justify such regulations, the government must prove that they "'serve compelling state interests, unrelated to the suppression [or coercion] of ideas, that cannot be achieved through means significantly less restrictive of associational [and expressive] freedoms.'" *Hudson*, 475 U.S. at 303 n.11 (quoting *Roberts*, 468 U.S. at 623); *see Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989).

[2] (...continued)
First Amendment concerns") (emphasis added); *Hudson*, 475 U.S. at 307 n.18 ("With respect to an item such as the [local] Union's payment of $2,167,000 to its affiliated state and national labor organizations, . . . either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required").

The Board and its *amici* ignore this traditional First-Amendment standard. They argue that the Court should defer to the Board's "academic judgment . . . that the provision of services to a diverse student body and the creation of a limited public forum for the expression of the full range of ideas of interest to students is . . . central to the University's educational mission." (Pet'rs' Br. at 43; *see, e.g.,* Am. Council on Educ. Br. at 16-17.) Strict scrutiny does not permit such deference.

Admittedly, the Court has not stated in those precise words that "strict scrutiny" applies in its union agency-fee and compulsory bar-dues cases. However, the Court does not always formally announce that it is applying strict scrutiny when it does so. On the other hand, the Court does usually except a class of regulation from First-Amendment strict scrutiny only explicitly, as it did with commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S.557, 561-63 (1980). The Court has not only not explicitly excepted the compulsory fee cases from strict scrutiny, but also has implicitly applied strict scrutiny in these cases, as four members of the Court pointed out in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 482-83 (1997) (Souter, J., dissenting).[3]

[3] Although the Court's opinion in *Lehnert* only implicitly applied strict scrutiny, Justice Scalia, joined by three other Justices, explicitly applied it in his opinion concurring in the judgment in part and dissenting in part. *See Lehnert*, 500 U.S. at 556-57 (opinion of Scalia, J.).

The Court recognized as much in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). *Riley* held that state action compelling speech is "content-based regulation" and "subject to exacting First Amendment scrutiny," unless the speech is purely commercial, because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.* at 795-98. The Court there cited *Abood* for the proposition that the First Amendment equally fully protects "compelled speech and compelled silence." *Id.* at 796-97.

When *Abood* addressed what union activities nonunion public employees may constitutionally be compelled to subsidize as a condition of employment, it gave ***no*** deference to the Michigan legislature's judgment that it served a valid state interest for public-sector exclusive bargaining agents to exact agency fees "for legislative lobbying and in support of political candidates," 431 U.S. at 215. The Court recognized that there may be a connection between those activities and public-sector collective bargaining. *See id.* at 228. However, it nonetheless ***rejected*** that connection as a basis for coercing speech and association, relying on strict-scrutiny cases such as *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion) and *Buckley v. Valeo*, 424 U.S. 1 (1976). *See Abood*, 431 U.S. at 232-36.[4]

Abood held that the First Amendment prohibits a union's expenditure of dissenting nonmembers' agency fees "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative."

[4] *See also Lehnert*, 500 U.S. at 517 (*Abood* "established that the constitutional principles that prevent a State from conditioning public employment upon association with a political party, see *Elrod*, . . . similarly prohibit a public employer 'from requiring [an employee] to contribute to the support of an ideological cause he may oppose as a condition of holding a job' as a public educator") (quoting *Abood*, 431 U.S. at 235) (citation omitted).

431 U.S. at 235-36. Thus, as the Court later put it in *Lehnert*, "chargeable activities must (1) be 'germane' to the collective-bargaining activity" of the union "and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519.

Lehnert's second criterion for chargeability is that "chargeable activities must . . . be justified by the government's ***vital*** policy interest in labor peace and avoiding 'free riders.'" 500 U.S. at 519 (emphasis added). The adjective "vital" shows that the Court was applying strict scrutiny, because "vital" means "essential to the existence or continuance of something; indispensable; . . . of greatest importance." *Webster's New Twentieth Century Dictionary* 2044 (2d ed. unabr. 1978).

Contrary to *amicus curiae* United States Student Association's assertion that "the term 'germane' cannot be given a cramped reading," (U.S. Student Ass'n Br. at 14), that term implies strict scrutiny. "Germane" means "closely related." *Webster's New Twentieth Century Dictionary* 767 (2d ed. unabr. 1978); *accord Black's Law Dictionary* 816 (rev. 4th ed. 1968). Thus, the only activities fully protected by the First Amendment that may constitutionally be charged to objecting fee payers are those that relate ***directly*** to the governmental interest that justifies the compulsory fee, *i.e.*, collective bargaining in the union case, and education here.

For example, the only "flexibility in its use of compelled funds" for activities "involv[ing] the expression of ideas" that the union was permitted in *Ellis v. Railway Clerks* was when those activities were "essential to the union's discharge of its duties as bargaining agent." *Compare* 466 U.S. 435, 448-51 (1984) *with id.* at 456-57 (conventions and nonpolitical publications). However, when expressive activities, such as organizing, had only an "attenuated connection with collective bargaining," *Ellis* held them nonchargeable even though they made the union "more successful at the bargaining table." *Id.* at 451-53.

This narrow reading of the germaneness test is reinforced by its application in *Lehnert*. Justice Blackmun, joined by three other Justices, determined that where "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." 500 U.S. at 520 (opinion of Blackmun, J.). Justice Scalia, joined by an additional three Justices, agreed: "the challenged lobbying expenses are nonchargeable," because, "though they may certainly affect the outcome of negotiations, [they] are no part of th[e] collective-bargaining process." *Id.* at 559 (opinion of Scalia, J.). Only Justice Marshall disagreed, criticizing the "principal opinion" for "creating a ***very narrow*** rule for testing the constitutional acceptability of charges for lobbying activity." *Id.* at 535 (Marshall, J., dissenting in part) (emphasis added).

Unlike *Abood* and *Lehnert*, *Hudson* concerned procedures for collecting agency fees. It did not address "'the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters.'" *Hudson*, 475 U.S. at 294, 304 n.13 (quoting *Ellis*, 466 U.S. at 447). Nonetheless, *Hudson* also demonstrates that normal First-Amendment strict scrutiny is necessary in determining what activities objecting fee payers may constitutionally be required to subsidize.

In *Hudson*, the Court quoted *Roberts*, 468 U.S. at 623 (which cited *Abood*), *Elrod*, 427 U.S. at 363, and earlier statements of the strict-scrutiny test for the conclusion that,

> although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure [for determining chargeable costs] be ***carefully tailored*** to minimize the infringement.

475 U.S. at 302-03 & n.11 (emphasis added) (footnote omitted). Far greater reason exists to tailor carefully and apply narrowly the legal standard for determining chargeable costs, because the legal standard is even more important to that determination than the procedure by which the standard is applied.

The Court also implicitly applied strict scrutiny in *Keller v. State Bar*, 496 U.S. 1 (1990). *Keller* described constitutionally chargeable activities as those "germane to," or in which a state bar is "acting essentially as professional advisers to those ultimately charged with," "the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13-15. Thus, like the Court's agency-fee decisions, *Keller* requires that chargeable activities bear a ***direct*** relationship with the governmental interest supporting the compulsory fee. Moreover, *Keller* confirmed that the governmental interest that chargeable expenses must directly advance is not what a state or a state agency broadly asserts it to be, as the Board argues here. It is only the narrow, vital interest that ***this Court*** identifies as sufficient to justify a compulsory fee. *See id.*

Several of the Board's *amici* contend that *Abood* and its progeny are distinguishable, because those cases involved compelled support of particular viewpoints, while the mandatory fees here support multiple viewpoints. (*See, e.g.*, Brennan Cent. for Justice's Br. at 19-21.) That is an immaterial distinction. The right to refrain from speaking is a "right to refrain from speaking ***at all***." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added); *accord Lehnert*, 500 U.S. at 516-17. In *Abood*, the Court held that objecting nonmembers need not specify which union political and ideological expenditures they oppose; nonmembers adequately state a First-Amendment claim if they allege generally that they oppose "ideological expenditures of ***any*** sort that are unrelated to collective bargaining." 431 U.S. at 239-42 (emphasis added). Thus, for example, a union cannot constitutionally use objecting nonmembers'

agency fees for "soft money" contributions to both the Republican and Democratic parties, or for portions of a union publication airing both sides of a legislative issue.[5]

Amicus AFL-CIO suggests that strict scrutiny is unnecessary here because the "First Amendment interest in withholding otherwise valid financial exactions on the basis of conscientious objection to the eventual use of the money" is "relatively weak." (AFL-CIO Br. at 18.) *Amicus* Lesbian, Gay, Bisexual and Transgender Campus Center similarly argues that only a "balancing inquiry" is necessary, because "at most 'First Amendment interests' are implicated here, not any wholesale assault on a fundamental right." (Lesbian, *etc.*, Br. at 14 & n.7 (quoting *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472 (1997)).) These arguments are wholly without merit.

Limitations "upon the freedom to contribute [to political causes] 'implicate ***fundamental*** First Amendment interests.'" *Abood*, 431 U.S. at 234 (quoting *Buckley*, 424 U.S. at 23) (emphasis added). That individuals "are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." *Id.*; *see also Riley*, 487 U.S. at 796-97 ("in the context of protected speech, the difference [between compelled speech

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[5] The Court's approval of "public financing of election campaigns" in *Buckley v. Valeo*, 424 U.S. 1, 91-93 (1976), is not to the contrary. The Court there explicitly pointed out that the public financing "scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree," as in the agency-fee and bar-dues cases. *Id.* at 91 n.124. That scheme involves only "appropriation by Congress" of "public money." *Id.* at 91-92. The court of appeals correctly found that the mandatory student fees here are not public funds. *Southworth*, 151 F.3d at 732; *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 840-41 (1995); *id.* at 851-52 (O'Connor, J., concurring); *cf. Keller*, 496 U.S. at 11-13 (the California State Bar is not a government agency for purposes of the First-Amendment rule against forced contributions to political and ideological causes).

and compelled silence] is without constitutional significance"). Consequently, to force individuals "to contribute, albeit indirectly, to the promotion of [social, political, and ideological] positions implicates ***core*** First Amendment concerns." *Lehnert*, 500 U.S. at 516 (emphasis added).

Glickman did not overrule this proposition. It confirmed it. *Glickman* accepted *Abood*'s premise "that compelled contributions for political purposes unrelated to collective bargaining implicated First Amendment interests ***because they interfere with values lying at the 'heart of the First Amendment.'***" 521 U.S. at 472 (quoting *Abood*, 431 U.S. at 234) (emphasis added). *Glickman* simply distinguished *Abood* and related cases because the assessments in *Glickman* were "not used to fund ideological activities," but only purely commercial product advertising. *Id.* at 469-70, 473-74.

The question presented here, as defined by this Court, is "[w]hether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are being used in part to support organizations that engage in ***political*** speech." *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 119 S. Ct. 1332, 1332-33 (1999) (granting certiorari) (emphasis added). Therefore, *Abood* and its progeny are not distinguishable. The Board must satisfy strict scrutiny to justify collection of the portion of these mandatory fees that subsidizes political and ideological speech.

II. Mandatory Fees Must Satisfy All Three Prongs of the *Lehnert* Test for the Chargeability of Activities.

Lehnert established a three-part test for the chargeability of union activities in an agency fee: "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; ***and*** (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519 (emphasis added). As

we have seen in Part I of this brief, this test is a particular application of strict scrutiny.

For mandatory fees generally, this test is (1) whether an activity in question is "'germane' to the [governmental] purpose for which compelled association [i]s justified"; (2) whether a "vital" governmental interest justifies coerced financial support of the activity; and (3) whether coerced financial support of that activity adds significantly to any burden on First-Amendment rights inherent in coerced support of the governmental purpose justifying the fee. *See Keller*, 496 U.S. at 13-14.

Because the *Lehnert* test uses the conjunctive, "and," not the disjunctive, "or," all three parts of the test must be satisfied for an activity to be constitutionally chargeable to an objecting compulsory fee payer. So concluded the court of appeals here:

> As *Lehnert* made clear, "germaneness" is not the be-all/end-all question in the constitutional analysis, but rather is only the first prong: Under *Lehnert*, not only must the mandatory fee be germane to some otherwise legitimate economic or regulatory scheme, the compelled funding must also be justified by vital interests of the government, and not add significantly to the burdening of free speech inherent in achieving those interests.

Southworth, 151 F.3d at 727; *accord Glickman*, 521 U.S. at 485 (Souter, J., dissenting).

Amicus AFL-CIO argues that *Glickman*, not *Lehnert*, "provides the most authoritative statement of the applicable principles," for two reasons. First, the AFL-CIO says, "*Glickman* is both later and more comprehensive." (AFL-CIO Br. at 10-11 n.7.) That claim is belied by the fact that, after *Glickman*, the Court repeated the *Lehnert* test in *Air Line Pilots Ass'n v. Miller*, 118 S. Ct. 1761, 1766 (1998). Moreover, *Glickman* is distinguishable from this case, and from *Lehnert*, in a critical

respect. *Glickman* involved no question of coerced financial support of "***any*** political or ideological views." *Glickman*, 521 U.S. at 469-70, 473 (emphasis added).

The AFL-CIO also contends that *Glickman* is more authoritative than *Lehnert* because Justice Marshall: (a) joined in the portion of the *Lehnert* opinion stating the three-part test "only to the extent that it is consistent with Justice Marshall's own analysis" of the chargeability of lobbying expenditures; and, (b) described "the *Lehnert* plurality's three-part standard in the negative rather than the affirmative, indicating an understanding that all three mentioned conditions need *not* obtain before lobbying expenditures are chargeable." (AFL-CIO Br. at 10-11 n.7.) Both contentions misread *Lehnert*.

The AFL-CIO's first inference from Justice Marshall's opinion echoes Judge Rovner's assertion, in dissenting from the Seventh Circuit's denial of rehearing *en banc* here, that the portion of Justice Blackmun's *Lehnert* opinion dealing with lobbying activities "received the support of only four justices, and thus is not controlling." *Southworth v. Grebe*, 157 F.3d 1124, 1127 (7th Cir. 1998) (Rovner, J., dissenting). The AFL-CIO's and Judge Rovner's error is that they ignore Justice Scalia's opinion in *Lehnert*, concurring in the judgment in part and dissenting in part, joined by three Justices other than those who joined in Justice Blackmun's opinion.

In discussing the *Lehnert* three-part test, Justice Scalia contested only its vagueness and Justice Blackmun's "overly broad concept of 'germaneness'" in applying that test. *See* 500 U.S. at 550-51, 557-58 (opinion of Scalia, J.). Justice Scalia did ***not*** contest Justice Blackmun's conclusion that lobbying expenditures "outside the limited context of contract ratification or implementation" are nonchargeable, because they fail all three parts of the test, *id.* at 519-22 (opinion of Blackmun, J.).

To the contrary, Justice Scalia explicitly "***agree[d]*** that the challenged lobbying expenses are nonchargeable," because they "are no part of th[e] collective-bargaining process." *Id.* at 559

(opinion of Scalia, J.) (emphasis added). Because Justice Scalia also explicitly applied strict "First Amendment scrutiny," *see id.* at 556-57, he thus implicitly recognized that lobbying "outside the limited context of contract ratification or implementation" impermissibly adds significantly to the agency shop's burden on nonunion employees' First-Amendment rights. In short, Justice Blackmun's opinion concerning lobbying represented the views of the Court's majority and controls here.

The AFL-CIO's second inference from Justice Marshall's opinion—that all three prongs of the *Lehnert* test "need not obtain before lobbying expenditures are chargeable"—is directly refuted by Justice Marshall's opinion itself. Justice Marshall explicitly explained that,

> As the [principal] opinion observes, ***even if a given cost is found to be 'germane' to a union's collective-bargaining duties and to further the two governmental interests that inform the scope of germaneness***, the cost may still be nonchargeable if it involves "additional infringement of First Amendment rights beyond that already accepted [in the union shop arrangement], and . . . that is not justified by the governmental interests behind the union shop itself."

Id. at 539-40 (opinion of Marshall, J.) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 456 (1984)) (emphasis added) (other alterations in original).

The opinions of the Court and Justice Scalia in *Lehnert* also refute the AFL-CIO's contention that all three parts of the *Lehnert* test need not be met for an activity to be chargeable. Part IV-F of Justice Blackmun's opinion is the opinion of the Court, because not only Justice Marshall joined it, but also Justice Kennedy. *Id.* at 534 (Marshall, J., concurring in part), 562-63 (Kennedy, J., concurring in the judgment in part). In that part, the Court concluded that expenses incurred preparing for an illegal strike that did not occur met the first two prongs of the test. Nonetheless, the Court found it necessary also to

determine that such expenses "impose no additional burden upon First Amendment rights." *Id.* at 531-32. And, Justice Scalia commented that "apparently all expenditures that pass" the Court's "germaneness" test "must also meet" the "two further tests" the Court added. *Id.* at 557 (opinion of Scalia, J.).

Thus, all of the *Lehnert* opinions show that all three parts of the *Lehnert* test must be met for an activity to be chargeable. In *Glickman*, Justice Souter, dissenting, objected that the Court there "***appears*** to hold that a compelled subsidy of speech does not implicate the First Amendment if the speech either is germane to an otherwise permissible regulatory scheme or is non-ideological, so that each of these characteristics constitutes an independent, sufficient criterion for upholding the subsidy." 521 U.S. at 483 n.3 (Souter, J., dissenting) (emphasis added). However, we respectfully submit that the Court did not so hold, and could not correctly have so held, in *Glickman*.

Such a holding was not necessary to the Court's decision in *Glickman*, because the commercial speech at issue there was ***both*** "unquestionably germane to" the governmental interest served by the regulatory scheme ***and*** nonideological. *Id.* at 473 (opinion of the Court). Moreover, in making ***both*** of those determinations, rather than just one or the other, *Glickman* in fact implicitly addressed all three prongs of the *Lehnert* test. *See id.* at 471-73. It did so necessarily because, as we have just shown, the entire Court agreed in *Lehnert* that, as Justice Marshall there said,

> even if a given cost is found to be "germane" to a union's collective-bargaining duties and to further the two governmental interests that inform the scope of germaneness, the cost may still be nonchargeable if it involves "additional infringement of First Amendment rights beyond that already accepted [in the union shop arrangement], and . . . that is not justified by the governmental interests behind the union shop itself."

500 U.S. at 539-40 (opinion of Marshall, J.) (quoting *Ellis*, 466 U.S. at 456) (alterations in original).

The obverse also must be necessary for coerced financial support of speech or association to be constitutional. That is, even if a private organization's activity is not political or ideological, coerced support of it is not constitutionally permissible unless it is germane to a governmental interest served by the regulatory scheme involved. The necessary degrees of "germaneness" and strength of the governmental interest might be lesser in such a case, as *Glickman* ruled. Even so, the activity must bear ***some*** relationship to a legitimate ***governmental*** interest, or the coercion is not rational, much less justified by a compelling governmental interest.

Thus, for example, in upholding the chargeability of "[i]nformational support services" in the union's publication in *Lehnert*, the Court held that those expenditures occasioned "no additional infringement of First Amendment rights," because the speech was "neither political nor public in nature." Yet, the Court also found it necessary to decide that those services were germane to collective bargaining: "[a]lthough they do not ***directly*** concern the members of petitioners' bargaining unit, these expenditures ***are for the benefit of all***. . . . [T]hese expenses are comparable to the *de minimis* social activity charges approved in *Ellis*." *Lehnert*, 500 U.S. at 529 (emphasis added). Significantly, the social activities at issue in *Ellis* were held chargeable because, "[w]hile these affairs are not central to collective bargaining, ***they are sufficiently related to it*** to be charged to all employees." 466 U.S. at 449 (emphasis added).

However, as the First Circuit recognized in *Schneider v. Colegio de Abogados*, if government "compel[s] certain individuals to help pay for a *private* benefit system for other individuals," that is "an arrangement that triggers due process concerns if not First Amendment ones." Consequently, mandatory fees "may be used to finance only core activities not including 'nongermane, nonideological' ones." 917 F.2d 620, 638 (1st Cir. 1990) (quoting *Teachers Local 1 v. Hudson*, 475

U.S. 292, 304 n.13 (1986)); *see also Hudson v. Teachers Local 1*, 743 F.2d 1187, 1194 (7th Cir. 1984) ("due process" "implies that [an agency-fee] procedure must make reasonably sure that [objecting nonmember] employees' wages will not be used to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological"), *aff'd on other grounds*, 475 U.S. 292 (1986).

In sum, the *Lehnert* three-part test is necessarily conjunctive, as the Court itself stated it and has applied it, not disjunctive, as *amicus* AFL-CIO would like to have it. The court of appeals correctly required the Board to show how the transfer of mandatory student fees to organizations that engage in political and ideological speech satisfies all three parts of the test. Moreover, because political and ideological speech are at stake here, all three parts of the test apply in their strictest form. The court of appeals found that the coerced subsidies here did not meet any part of that test even without strict scrutiny. *See Southworth*, 151 F.3d at 735. Therefore, those subsidies, with even greater reason, "also cannot survive the more exacting strict scrutiny standard." *Id.* at 731 n.13.

III. Because Collecting Compulsory Fees Compels Association and Takes Individuals' Property, Advance Reduction to Exclude Undeniably Nonchargeable Amounts Is Required by the First Amendment and Due Process.

The court of appeals held that "the University cannot even temporarily collect from objecting students the portion of the fees which would fund organizations which engage in political and ideological activities, speech, or advocacy." *Id.* at 735 (emphasis omitted). The Board's *amicus curiae* University of California Student Association ("Association") argues that the court of appeals should, instead, have accepted "the University's proposal for a refund mechanism." The Association claims that this Court's "compelled speech cases make clear that it is constitutionally acceptable to collect fees from dissenters, place them into an interest bearing escrow account, and to subsequently refund the portion of the fees that were

[*sic*] used for nonchargeable political or ideological activity." (U. Cal. Student Ass'n Br. at 16.)[6]

The court of appeals' rejection of a refund mechanism was not error, as *amicus* Association argues, (*id.*). It was both appropriate and necessary under this Court's decisions.

The Association relies on the fact that *Ellis*, 466 U.S. at 443-44, identified "advance reduction of dues and/or interest-bearing escrow accounts" as "readily available alternatives" to the statutorily and constitutionally impermissible "pure rebate approach." (*See* U. Cal. Student Ass'n Br. at 16-17.) However, as *Hudson* explained, *Ellis* merely "noted the possibility of 'readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts.'" *Ellis* did ***not*** decide whether an interest-bearing escrow account without advance reduction would be constitutionally sufficient, because, "for purposes of that case, it was sufficient to strike down the rebate procedure." *Hudson*, 475 U.S. at 304 (quoting *Ellis*, 466 U.S. at 444).

Whether an advance reduction is necessary was addressed for the first time in *Hudson*.[7] The union there had established an escrow for 100% of objectors' service fees. This Court held that, ***in addition*** to that escrow, and other safeguards, an "appropriately justified ***advance reduction . . . [is] necessary*** to minimize both the impingement [of the agency shop on employees' First-Amendment interests] and the burden" of objection. *Id.* at 309 (emphasis added). It would not have been necessary

[6] The fees would be both in escrow and "used for nonchargeable political or ideological activity," because the Association's proposal is for escrow of only part of the fees. *See infra* pp. 26-27.

[7] However, *Ellis* did refer approvingly to the fact that the Court had earlier "suggested a ***more precise advance reduction*** scheme in *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)." 466 U.S. at 443 (emphasis added).

for the Court to hold that the union must "provide ***adequate justification*** for the advance reduction of dues," *id.* (emphasis added), if the Court required no advance reduction at all.

The Association claims that "a majority of the circuits . . . have upheld the use of escrow-refund mechanisms." (U. Cal. Student Ass'n Br. at 23.) However, only one circuit has unequivocally held that *Hudson* does not require advance reduction; and that was a split decision. *Gibson v. Florida Bar*, 906 F.2d 624, 631 (11th Cir. 1990) (2-1 decision), *cert. dismissed*, 502 U.S. 104 (1991). The positions on this issue of the other circuits the Association cites are hardly clear:

- *Grunwald v. San Bernardino City Unified School District* held that "escrow accounts obviate the need for advance reductions." 994 F.2d 1370, 1374 n.2 (9th Cir. 1993).[8] However, it also interpreted "*Hudson* as expressing a ***strong preference*** for identifying nonunion members early enough so that the deduction-escrow-refund procedure can be avoided altogether." Therefore, *Grunwald* ruled that, to "employ the more cumbersome and intrusive deduction-escrow-refund procedure, the union must . . . show that the preferred method of doing things[, *i.e.*, advance reduction,] is impossible or, at any rate, far more costly or cumbersome." *Id.* at 1375 (emphasis added).[9] That has not been shown here. *See infra* pp. 27-28.

[8] *But cf. Dean v. TWA*, 924 F.2d 805, 809 (9th Cir. 1991) (the argument that an objecting nonmember "should have sought a judicial injunction against collection of the dues" by a union that had no *Hudson* procedures, "rather than reducing payment and challenging the dues after [his] discharge" for noncompliance with an agency-shop agreement, "is inconsistent with the Supreme Court's rejection of ***any type*** of rebate remedy") (emphasis added).

[9] The *Grunwald* panel split 2-1 on whether the union had met that burden. *Compare* 994 F.2d at 1376 (majority opinion) *with id.* at 1378-80 (Brunetti, J., dissenting).

• Advance reduction was not an issue, and apparently was part of the union's collection procedure, in *Andrews v. Cheshire Education Ass'n*, 829 F.2d 335 (2d Cir. 1987). *See id.* at 337-41.

• *Crawford v. Air Line Pilots Ass'n* interpreted this Court's decisions as permitting "an escrow-and-rebate plan." However, that was *dicta*, because the union there gave an "advance reduction" to objecting nonmembers who opted out of payroll deduction and paid their fees directly. *See* 870 F.2d 155, 161 (1989), *adopted en banc*, 992 F.2d 1295, 1302 (4th Cir. 1993). Moreover, *dicta* in another Fourth Circuit case concluded that an advance reduction is constitutionally required under *Hudson*:

> The core principle underlying all of the decisions prescribing allocation procedures is that the correct amount of a service fee to be charged nonunion employees for collective bargaining must be established, to the extent practicable, *in advance*. . . .
>
> . . . [T]his underpinning principle mandates that the union follow required procedures in advance of assessing a fee. . . .

Dashiell v. Montgomery County, 925 F.2d 750, 756 (4th Cir. 1991).

• The First Circuit's opinion in *Schneider v. Colegio de Abogados* does not indicate that the plaintiffs contended that advance reduction was required, so the court did not address the issue. *See* 917 F.2d 620, 626-27, 635-37 (1st Cir. 1990).

• The decision in *Hohe v. Casey* cited by the Association was on an appeal from denial of a preliminary injunction. That decision explicitly was "not intended to intimate any opinion regarding the ultimate merits." 868 F.2d 69, 70, 74 n.7 (3d Cir. 1989). Moreover, the procedure in *Hohe* provided an advance reduction, so that what the union escrowed there was the amount remaining after it had already reduced the employees' fees. *See Hohe v. Casey*, 695 F. Supp. 814, 815 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir. 1989).

In contrast to these cases, two different panels of the Sixth Circuit have squarely and unequivocally ruled that

> *Hudson* clearly rejects the premise that a union may continue to collect a service fee equal in amount to the union dues once a non-union member has objected to such a procedure. Rather, the union must instead deduct from the service fee that amount which is undisputedly used for political or ideological functions.

Damiano v. Matish, 830 F.2d 1363, 1369 (6th Cir. 1987); *accord Tierney v. City of Toledo*, 824 F.2d 1497, 1502-04 (6th Cir. 1987).[10] In *Damiano*, the court explained that this "advanced reduction method is clearly a less burdensome method of accommodating non-union employees," because escrow of the part of dues that indisputably represents ***non***chargeable expenses "would unduly deny the employee's unqualified right to his property" and "insure that the dissenting employee could

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[10] *See also Finerty v. NLRB*, 113 F.3d 1288, 1290 (D.C. Cir.) (dictum) (quoting *Ellis*, 466 U.S. at 457 n.15) ("the union must calculate 'what proportion of [union] expenditures went to activities that could be charged to dissenters' and then make an appropriate ***reduction*** in the agency fee required of objecting nonmembers") (emphasis added) (other alteration in original), *cert. denied*, 118 S. Ct. 558 (1997); *In re Chapman*, 509 A.2d 753, 764-65 (N.H. 1986) (Souter, J., concurring) (citing *Hudson* for the proposition that one way to avoid the violation of First-Amendment rights caused by use of compulsory bar dues for lobbying "would be to require the [bar] to provide a mechanism for a ***reduction in dues*** reflecting the extent to which the lobbying is not germane or reasonably related to those responsibilities approved in *Lathrop" v. Donohue*, 367 U.S. 820 (1961)) (emphasis added).

not use this property for his own preferred political, ideological or other elected purposes." 830 F.2d at 1369-70.

The escrow-refund scheme proposed by *amicus* Association is inconsistent with two principles on which *Hudson* rests.

First, although "a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly," additional procedural safeguards are necessary, "because ***the agency shop itself*** impinges on the nonunion employees' First Amendment interests." *Hudson*, 475 U.S. at 309 (emphasis added). However, if coerced financial support of a private association impinges on First-Amendment rights even with no risk of improper spending, then not only spending is the infringement, but also collection. Consequently, *Hudson* enunciated "constitutional requirements for the Union's ***collection*** of agency fees," *id.* at 310 (emphasis added), not just "'a way of preventing compulsory subsidization of ideological activity,'" *id.* at 302 (quoting *Abood*, 431 U.S. at 237).

Here, the taking of property itself gives rise to a First-Amendment claim, because it ***serves goals that themselves infringe upon First-Amendment freedoms***, as in *Elrod v. Burns*, 427 U.S. 347 (1976), *Abood*, *Hudson*, and *Keller v. State Bar*, 496 U.S. 1 (1990). The First-Amendment infringement inherent in the taking in these cases is forced association with a private or quasi-private organization through the coerced collection of contributions, fees, or dues. *See Keller*, 496 U.S. at 13; *Hudson*, 475 U.S. at 301-02 & nn.8-9; *Elrod*, 427 U.S. at 355 (plurality opinion).[11] The individual's inability to use those funds for his or her own expressive and associational purposes,

[11] "Compelled support of a private association is fundamentally different from compelled support of government." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in judgment); *see Buckley v. Valeo*, 424 U.S. 1, 91 & n.124 (1976). The organizations for which the fees at issue here are collected are indisputably "private organizations." *Southworth*, 151 F.3d at 719-20.

identified in *Damiano*, is an additional effect of the forced association first recognized in *Elrod*, 427 U.S. at 355-56 (plurality opinion).

When free association is infringed, even if only partially, as by the contribution limitations in *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976), the infringement may be sustained only "if the State demonstrates a sufficiently important interest and employs means ***closely drawn*** to avoid ***unnecessary*** abridgment of associational freedoms." *Id.* at 25 (emphasis added). In *Abood*, *Hudson*, and *Keller*, the Court found such a state interest, but only to the extent that compulsory fees are limited to a proportionate share of the costs of certain functions of a union or compulsory bar association ***and*** collected with certain "carefully tailored" procedural safeguards. *Hudson*, 475 U.S. at 302-03; *see Keller*, 496 U.S. at 13-17.

"Careful" or "narrow tailoring" may not "require elimination of ***all*** less restrictive alternatives." *Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989) (emphasis added). However, it does "require the government goal to be substantial, and the cost to be ***carefully*** calculated. Moreover, since the State bears the burden of justifying its restrictions, it must ***affirmatively establish*** the reasonable fit" between the restrictions and the state's objective. *Id.* at 480 (emphasis added) (citation omitted).

Second, in "this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Hudson*, 475 U.S. at 304 n.13. Even if the deprivation is only temporary, "[d]etermining the adequacy of predeprivation procedures requires consideration of the Government's interest in imposing the temporary deprivation, the private interests of those affected by the deprivation, the risk of erroneous deprivations through the challenged procedures, and the probable value of additional or substitute procedural safeguards." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (plurality opinion); *see Connecticut v. Doehr*, 501 U.S. 1, 11-12 (1991).

Escrow without advance reduction satisfies neither First-Amendment careful tailoring nor the due-process test, particularly here.

There may be "practical reasons why '***[a]bsolute*** precision' in the calculation of the charge to nonmembers cannot be 'expected or required,'" *Hudson*, 475 U.S. at 307 n.18 (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)) (emphasis added). Nonetheless, ***some*** meaningful degree of "'[p]recision . . . must be the touchstone' in the First Amendment context." *Id.* at 303 n.11 (quoting *NAACP v. Button*, 371 U.S. 414, 438 (1963)). Collection of monies that indisputably will not be used for lawfully chargeable activities, even if escrowed and later rebated, is inherently ***im***precise. It thus violates the First Amendment, because it is a means "substantially broader than necessary to achieve the government's interest," *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989), in seeing that all individuals in a particular group subsidize only lawfully chargeable activities. Coerced payment of monies to which a private organization is not entitled, whatever the amount, is an infringement on the individual's associational freedom different ***in kind*** from, and thus materially greater than, payment of monies that the organization is arguably due.

Collection of nonchargeable amounts also denies due process. It presents a ***certainty*** of erroneous deprivation. And, it adversely affects the individual's interests, not just in having more money, but also in not associating with a private organization more than necessary to serve the state's interest in mandatory association and in "us[ing h]is property for his own preferred political, ideological or other elected purposes." *Damiano*, 830 F.2d at 1370.

Moreover, the escrow-and-refund scheme proposed here by *amicus* Association would almost inevitably permit the private organizations receiving objecting students' fees to ***spend*** them for constitutionally nonchargeable political and ideological purposes. Under that scheme, only a "proportion of the fees based on previous years' experiences with refund requests

[w]ould be placed in escrow." (U. Cal. Student Ass'n Br. at 10.) In other words, only the part of the fees that, based on experience, is undoubtedly nonchargeable would be escrowed.[12] The remainder, including portions that objecting students might reasonably dispute, would be given to the private associations for unrestricted spending. The Association admits as much when it says that the University would "subsequently refund the portion of the fees that were [*sic*] ***used*** for nonchargeable political or ideological activity." (*Id.* at 16 (emphasis added).)

The Association argues that advance reduction would infringe on the right of "the majority of students who have no objection to the use of their fees for political activities . . . to engage in and financially support such speech without being silenced by the minority." (*Id.* at 6.) This argument is bogus. The court of appeals' advance reduction applies only to the fees of "*objecting* students." *Southworth*, 151 F.3d at 735. No one would be "silenced." The private organizations receiving student fees would be free to use the fees of students who do not object for politics. However, the "majority" has no right to compel others to support its chosen speech: "The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 776 (1994).

The Association also argues that "a refund-escrow system is the only practical way to institute a student fee reduction," because "neither student government nor the university has sufficient information at the time fees are collected to calculate

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[12] This is precisely the opposite of what *Hudson* contemplated. *Hudson* did not hold that "a 100% escrow is constitutionally required," because it allowed that unions need not escrow the independently audited portion of objecting nonmembers' fees "that no dissenter could reasonably challenge." Unions must escrow only "the amounts reasonably in dispute." 475 U.S. at 310 & n.23. That does not include the portion a union concedes it cannot reasonably claim to retain based on the prior year's expenses.

what fees, if any, will be used in the upcoming school year for political and ideological activity." (U. Cal. Student Ass'n Br. at 8-10). This argument, too, is wholly without merit.

A union does not know what political activity it will undertake in the coming year when it sets its dues and the fee reduction for objecting nonmembers before a fiscal year begins. *Hudson* considered that fact by permitting the advance reduction to be based on the preceding year's expenditures. 475 U.S. at 307 n.18.[13] The Association ***concedes*** the feasibility of that practice here, because it proposes that the partial escrow amount can be "based on previous years' experiences." (U. Cal. Student Ass'n Br. at 10.)

The Association's spurious "practical" argument against advance reduction is at best merely a complaint that advance reduction is administratively inconvenient. However, "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law," *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974). "Nor is additional expense occasioned by [meeting the ordinary standards of due process] sufficient to withstand the constitutional requirement." *Bell v. Burson*, 402 U.S. 535, 540-41 (1971). Therefore, the "'burden or inconvenience'" of annually determining the constitutionally chargeable portion of mandatory fees ***before*** collecting the fees "'is hardly sufficient to justify contravention of the constitutional mandate.'" *Keller*, 496 U.S. at 16-17 (quoting with approval *Keller v. State Bar*, 767 P.2d 1020, 1046 (Cal. 1989) (Kaufman, J., dissenting)); *see also Ellis*, 466 U.S. at 444 ("administrative convenience" is insufficient justification for denying objectors an "advance reduction of dues and/or interest-bearing escrow accounts").

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[13] *See also Allen*, 373 U.S. at 122-23 & n.8 (while "the proportion of the union budget devoted to political activities may not be constant," a dissenting nonmember is ***"entitled" to "a reduction of future . . . exactions*** from him by the same proportion" that nonchargeable expenses bear to total expenses) (emphasis added).

In sum, the court of appeals correctly rejected any sort of refund scheme and properly enjoined the Board to carry out an advance reduction procedure.

CONCLUSION

Except for its failure to acknowledge that strict scrutiny applies, the court of appeals correctly decided this case. Students, like employees and attorneys, have a fundamental First-Amendment right to choose freely the political and ideological causes they support with their money. State-coerced financial support of private organizations that engage in political and ideological advocacy does not directly serve government's educational interest in the university context. Moreover, to the contrary, as the court of appeals recognized, "forcing objecting students to fund objectionable organizations undermines that interest," because it is inconsistent with "the values of individualism and dissent" that are, or should be, taught in this nation's institutions of higher education. *Southworth*, 151 F.3d at 728.

For the above reasons, the Court should affirm the court of appeals' decision.

Respectfully submitted,

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