No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents

BRIEF AMICUS CURIAE OF NATIONAL LEGAL FOUNDATION

In support of *Respondents*

Filed August 13, 1999

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INTEREST OF AMICUS CURIAE[1]

The National Legal Foundation (NLF) is a public interest law firm with fourteen years experience litigating First Amendment issues before various state and federal courts, including this Court. In addition, the NLF's in-house think tank, the Minuteman Institute conducts research into historical and jurisprudential issues relating to the First Amendment and the legal and political theories underlying both the Founding of our nation and contemporary legal debates.

The NLF deals daily with the issues presented by this case. The NLF believes, given the split in the federal Courts of Appeals on these issues, that a proper resolution of this matter is of great significance to America's students and to all citizens who speech might be compelled. Further, the decision reached by this Court will directly impact the course of future litigation that the NLF undertakes in the public interest.

The NLF believes that its insight into the issues presented by this case will be of assistance to this Court.

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[1] Counsel of record to the parties in this case have consented to the filing of this brief through blanket consent letters which have been filed with the Clerk. No counsel for any party authored this brief in whole or in part. To date no person or entity, other than the regular donors of the amicus curiae have made any monetary contribution to the preparation or submission of this brief. A grant application is pending with the Alliance Defense Fund for work done on this brief. The Alliance Defense Fund is a 501 c 3 organization that helps public interest law firms and private attorneys fund their work in the public interest. The Alliance Defense Fund did not control the content of this brief, did not help author it, and did not even see it prior to completion.

SUMMARY OF THE ARGUMENT

The panel decision of the Seventh Circuit was correct in holding that the mandatory student fees program at the University of Wisconsin-Madison violates the First Amendment of the United States Constitution. This conclusion can be reached either under the *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991), test or by relying on first principles.

Under both the views of the Founding Fathers and this Court's precedents, the student fees, absent an opt-out provision for objecting students, constitute impermissibly compelled speech. In analyzing whether speech is impermissibly compelled, it is important to consider the freedom of conscience. Failure to take the freedom of conscience into account has led several jurists to wrong conclusions about mandatory student fee programs.

ARGUMENT

I. THE UNIVERSITY OF WISCONSIN-MADISON'S MANDATORY STUDENT FEE IS AN UNCONSTITUTIONAL COMPULSION OF POLITICAL AND IDEOLOGICAL SPEECH.

At the heart of this case is a proposition that was settled long ago by those who founded this nation: government cannot compel individuals to endorse or pay for ideas that violate their freedom of conscience. The three judge panel that decided the case at the Seventh Circuit saw the case this way. *Southworth v. Grebe*, 151 F.3d 717, 718 (7th Cir. 1998) (hereinafter, *panel decision*). Even those judges who dissented from the denial of rehearing *en banc* wrote nothing that would indicate disagreement with this proposition; rather they simply found no compelled speech. *Southworth v. Grebe*, 157 F.3d 1124 (7th Cir. 1998) (Opinions of Rovner, J. and of Wood, J. each dissenting from denial of rehearing *en banc.*) (Hereinafter, *rehearing denial*).

Thus, whether one agrees with the panel or with the rehearing dissenters as to the proper application of *Abood v. Detroit Bd. of Education,* 431 U.S. 209 (1977) and *Keller v. State Bar of California*, 496 U.S. 1 (1990) or of the test in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991),[2] all can agree that compulsion *vel non* is the heart of the controversy. The panel's key discussion of compulsion takes place in the context of the *Lehnert* test's third prong. *Southworth, panel decision,* at 730-31. However, it is equally valid as a stand alone discussion. Thus, should this Court find compulsion—and the main function of this brief is to demonstrate the existence of compulsion—it should conclude that the University of Wisconsin-Madison's (UW-Madison) mandatory student fee policy violates the First Amendment. This Court could so conclude either by embracing the panel's use of *Lehnert* or by resorting to first principles.

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[2] As the panel opinion pointed out, there is also a split in the circuits as to the proper application of *Abood* and *Keller*. *Southworth, panel decision,* at 723. Judge Rovner objected to the use of the *Lehnert* test, believing that it was not controlling. *Southworth, rehearing denial,* at 1126-27.

As will be discussed below, the panel's position is supported by this Court's precedents concerning compelled speech and demonstrates a proper understanding of first principles. The panel was thus correct when it characterized the UW-Madison program as compelled speech. On the other hand, Judge Wood's opinion, dissenting from the denial of rehearing *en banc*, demonstrates a misunderstanding of first principles in that she

> take[s] issue with the panel's fundamental premise—that the fee is a compelled subsidy of speech itself, rather than a compelled subsidy of a neutral forum for speech. In my view, there is a dispositive difference for First Amendment purposes between requiring someone to fund a forum, and requiring someone to support the speech of any or all speakers who come to use the forum.

Southworth, rehearing denial, at 1128.

The examination of this "dispositive" issue must compare the approach of the panel opinion and that of Judge Wood's opinion. This brief will also examine the approach of Judge Rovner, who also dissented from the denial of rehearing *en banc,* and the approach of the Ninth Circuit in *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032 (9th Cir. 1999). *Rounds* is significant in that it is a mandatory student fee case decided after the panel decision was issued.

In its discussion of compelled speech, the panel quoted Thomas Jefferson from *Abood's* footnote 31: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *Southworth, panel decision*, at 730 (quoting *Abood*, 431 U.S. at 234 n.31). It is important to note the larger context of the *Abood* footnote.

The discussion of compulsion in *Abood* to which the Jefferson quote is appended as a footnote is as follows:

> The fact that the appellants are compelled to make, rather than prohibited from making,

> contributions for political purposes [as was the case in Buckley v. Valeo, 424 U.S. 1 (1976)] works no less an infringement of their constitutional rights. For 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. See Elrod v. Burns, [427 U.S. 347, 356-57 (1976)]; Stanley v. Georgia, 394 U.S. 557, 565; Cantwell v. Connecticut, 310 U.S. 296, 303-304. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642.
>
> These principles prohibit a State from compelling any individual to affirm his belief in God, Torcaso v. Watkins, 367 U.S. 488, or to associate with a political party, Elrod v. Burns, supra; see 427 U.S., at 363-364, n. 17, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.
>
> We do not hold that a union cannot constitutionally spend funds 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. Rather, the Constitution requires only 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 234-36 (footnotes omitted).

Footnote 31 occurs at the end of the first sentence in the quotation above. By examining the fuller *Abood* context, it is clear that the sentiment contained in the Jefferson quotation utilized in the panel opinion is fully consistent with the continuing jurisprudence of this Court, i.e., the panel did not simply extract some long-abandoned view of Jefferson and attempt to use it to prop up a result for which it could find no better support.

Quite to the contrary, as the *Abood* Court pointed out, there is a long line of cases which echo exactly the concerns of Jefferson. In fact, the concerns about compelled speech in the factual context of this case are more real today than ever before. As the panel pointed out: "The compulsion which Madison [read Jefferson] condemned is of heightened concern following *Rosenberger* [*v. Rector and Visitors of the Univ. of Va.*], 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) . . . ." *Southworth, panel decision* at 730 n.11.

The heightened concern occurs in the context of mandatory student activities fees because the entire fee is not being challenged. Appellees are not claiming that fees *cannot* be collected. Instead, they are merely contending that they cannot be *compelled* to fund beliefs with which they disagree. *Id.* at 721-22. Since fees *will be* collected, the panel had it exactly right when they wrote:

> If the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights.

Id. at 730 n.11.

Thus, the panel is correct in its realization that the concerns of Jefferson are pertinent today and indeed, more, so than ever under the facts before the Court. Moreover, the panel's discussion also provides the basis to reconcile its holding with that of *Rosenberger*. Rather than "the panel's decision appear[ing] to create a serious conflict with the premise underlying [this] Court's decision in *Rosenberger*" as Judge Wood claims, *Southworth, rehearing denial,* at 1127, the panel correctly applied this Court's precedent to the factual situation anticipated by Justice O'Connor in her *Rosenberger* concurrence. In a passage quoted in part by the panel, *Southworth, panel decision* at 722, Justice O'Connor wrote:

> Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. See, e. g., *Keller v. State Bar of California*, 496 U.S. 1, 15 (1990); *Abood v. Detroit Board of Education*, 431 U.S. 209, 236 (1977). . . . While the Court does not resolve the question here, the existence of such an opt-out possibility not available to citizens generally, provides a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding, and from government funds generally. Unlike monies dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government neither pays into nor draws from this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds. The Student Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.

Rosenberger, 515 U.S. at 851(O'Connor, J., concurring)[3]

The panel's analysis is simple and correct. Mandatory fees do not create a conflict with *Rosenberger* provided students are allowed to opt out of political and ideological funding. *Southworth, panel decision* at 730 n.11.[4]

Thus there can be no real question but that the UW-Madison program, absent an opt-out provision, constitutes the kind of compelled speech that concerned Jefferson and that this Court has found to be unconstitutional in a variety of contexts, including the cases canvassed in *Abood* (*supra*, pp. 4-6).

II. THE ISSUE BEFORE THIS COURT MUST BE EXAMINED IN LIGHT OF THE FREEDOM OF CONSCIENCE

A. THE DISPOSITIVE ISSUE IS NOT FORUM-CREATION

While it seems clear that the UW-Madison program falls squarely within parameters of unconstitutional compulsion, there remains the argument advanced by Judge Wood that

> there is a dispositive difference for First Amendment purposes between requiring someone to fund a forum, and requiring someone to support the speech of any or all speakers who come to use the forum.

Southworth, rehearing denial, at 1128.

The prior discussion of the panel's handling of *Rosenberger* and of Justice O'Connor's anticipation of the problem now before the Court could, without more, dispose of Judge Wood's contention. However, there is another line of reasoning which supports the panel's opinion and undermines Judge Wood's position. Once

[3] The panel also pointed out the similar point made by the *Rosenberger* majority. *Southworth, panel decision,* at 722, (quoting *Rosenberger*, 515 U.S. at 840).

[4] Any difference in the administration of the student funds in *Rosenberger* and the student funds at UW-Madison does not impact the point being made here: the necessity of an opt-out provision for political or ideological speech.

again, this line of reasoning starts with the Founders and continues to this day in the precedents of this Court. This line of reasoning covers much of the same jurisprudential territory covered by the discussion of *Abood's* footnote 31, above. It requires, however, covering that territory from an additional vantage point. After all, Judge Wood herself interacted with *Abood* and *Keller* and found them of "only limited help," *Southworth, rehearing denial*, at 1129, because she believed that " a forum-creation analysis rather than a compelled speech analysis is appropriate." *Id.*

The added vantage point that is needed is a freedom of conscience analysis. While a compelled speech rubric and a freedom of conscience rubric are clearly related, something crucial gets missed when the freedom of conscience lens is not peered through. This is true of Judge Wood's position, as will be examined here, and of Judge Rovner's position and of the position of the Ninth Circuit in *Rounds*, both of which will be examined *infra*.

The importance of the freedom of conscience to our Founders is perhaps best exemplified by James Madison's famous *Memorial and Remonstrance*. 8 *The Papers of James Madison* 298 (Robert A. Rutland, et al., eds, 1973)

While there are clear differences between the UW-Madison program and the proposed 1785 Virginia "Bill establishing a provision for Teachers of the Christian Religion" against which Madison wrote, the principles apply with equal force to both situations. Indeed, as will be noted below, this Court has applied the principles of the *Memorial and Remonstrance* in several different contexts.

As is the case with the student fees at issue in the instant case, Madison faced a program which proposed to collect fees, i.e. taxes, from all citizens and disburse them in a manner violative of the freedom of conscience.[5] Indeed, under the wisdom of the

[5] Perhaps the key difference has already been pointed out by Justice O'Connor in her concurring opinion in *Rosenberger*. In the portion of her opinion quoted earlier, Justice O'Connor noted that the possibliity of opting out is a possibility in the case of the mandatory fees but would not be a possibility in a case involving

Memorial, UW-Madison's fee provisions allowing political and ideological funding would never have been adopted. Certainly, its wisdom at least mandates an anti-compulsion opt-out.

From a document replete with fundamental principles of the American experiment in ordered liberty, the excerpts which follow below warrant careful attention, both because they have continued animate this Court's jurisprudence and because they are particularly pertinent to the instant case. Of course, this Court is no stranger to the *Memorial and Remonstrance* nor to the debate over how to interpret it in an Establishment Clause context. See, e.g., the opinions of Justices Thomas and Souter in *Rosenberger*. *Rosenberger,* 515 U.S. 819.

However, we note that what Madison wrote about the freedom of conscience applies beyond the question of establishment of religion. Clearly, it applies to questions of the free exercise of religion and extends to freedom of thought and belief of a type not normally brought under the heading "religioun." This was made clear by this Court in *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624 (1943):

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Id. at 642.

Therefore as we look at the following language from Madison's *Memorial and Remonstrance*, we can take the keystone principle of freedom of conscience and apply it to the case now before this Court. In fact, the general principle may well be easier to apply to contexts other than establishment of religion. Madison wrote in part:

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taxes. *Rosenberger*, 515 U.S. at 851(O'Connor, J., concurring). We will return to the significance of this *infra*.

> we hold it for a fundamental and undeniable truth, "that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men . . . .
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> . . . . If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of Conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us . . . .
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> . . . .
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> . . . . "[t]he equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the "Declaration of those rights which pertain to the good people of Virginia, as the basis and foundation of Government," it is

> enumerated with equal solemnity, or rather studied emphasis.

8 *The Papers of James Madison* 298, 299-300, 304 (Robert A. Rutland, et al., eds, 1973).

The point, at bottom, is that compelling funding in violation of conscience is antithetical to the principles upon which this nation was founded. Madison stated this in the strongest of terms:

> it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it.

Id. at 300.

There is no doubt that students at UW-Madison, absent an opt-out provision, are compelled to fund speech with which they disagree. Judge Wood's analytical framework is incorrect when she writes that:

> there is a dispositive difference for First Amendment purposes between requiring someone to fund a forum, and requiring someone to support the speech of any or all speakers who come to use the forum.

Southworth, rehearing denial at 1128.

This way of framing the question presupposes that UW-Madison is *either* requiring its students to fund a forum *or* requiring them to support the speech of individual speakers. While one might conceive of a forum in which this "either/or" analysis could be correct, it is not correct *here*. What the UW-Madison program does

is require the students to *both* fund a forum *and* support, i.e. fund, individual speakers.

Clearly, under the previous discussion, this "both/and" requirement is unconstitutional. The appellees have not challenged the funding of the constitutionally permissible (albeit perhaps unwise) aspects of the forum. They have only challenged the unconstitutionally compelled funding of political and ideological speech. We have seen that under the wisdom of the *Memorial and Remonstrance*, UW-Madison would have been better off not funding political and ideological speech at all. However, having done so, it must allow an anti-compulsion opt-out. Once again, this reflects exactly the situation anticipated by Justice O'Connor and it is exactly the solution required by the panel.

Justice O'Connor's comments in her *Rosenberger* opinion also point out that the opt-out provision is available here where it might not be available in a pure taxing situation. *Rosenberger*, 515 U.S. at 851(O'Connor, J., concurring). This is another reason why the principle of freedom of conscience is easier to apply in a non-establishment of religion context: the debate between Justices Thomas and Souter over whether the *Memorial* was primarily addressing equality need not be resolved in favor of either view since that particular principle of the *Memorial* is not applicable to student fees. While the freedom of conscience must be honored in both situations, the present case at least has one complicating factor that can be eliminated.

Furthermore, the opt-out satisfies not only the view of James Madison in the *Memorial and Remonstrance*. Rather it satisfies the view of this Court on the question of conscience, as well. The opinions of this Court upon which the panel relied in its analysis all reflect the same concern Madison expressed in the *Memorial*. In canvassing, *Abood*, *Keller*, and *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, the panel noted several times the key passage from *Abood* and it use by the *Glickman* Court:

> Relying on our compelled speech cases, however, the [*Abood*] Court found that compelled contributions for political purposes unrelated to collective bargaining

> implicated First Amendment interests because they interfere with the values lying at the "heart of the First Amendment[--]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." (quoting *Abood*, 431 U.S. at 234-35).

Southworth, panel decision, at 731 (quoting *Glickman*, 521 U.S. at ___, 117, S.Ct. at 2139).

An reexamination of the longer *Abood* passage quoted on pages 4-6, *supra*, through the lens of the freedom of conscience yields an interesting result. The first sentence addresses compelled funding:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes [as was the case in Buckley v. Valeo, 424 U.S. 1 (1976)] works no less an infringement of their constitutional rights.

Abood, 431 U.S. at 234 (footnote omitted).

However, the next portion of the quotation speaks the language of the freedom of conscience:

> For 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. See Elrod v. Burns, supra, at 356-357; Stanley v. Georgia, 394 U.S. 557, 565; Cantwell v. Connecticut, 310 U.S. 296, 303-304. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe

> > what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642.
>
> These principles prohibit a State from compelling any individual to affirm his belief in God, Torcaso v. Watkins, 367 U.S. 488, or to associate with a political party, Elrod v. Burns, supra; see 427 U.S., at 363-364, n. 17, as a condition of retaining public employment.

Abood, 431 U.S. at 234-35.

It is only thereafter that the *Abood* Court analyzed the compelled funding facts before it:

> They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher. We do not hold that a union cannot constitutionally spend funds 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. Rather, the Constitution requires only 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.

Id. at 235 (footnote omitted). The Court was clearly analyzing a compelled funding of speech case through a freedom of conscience lens.

The panel's application of the *Glickman/Abood* principle to the facts of the instant case is what was dispositive.

> In essence, allowing the compelled funding in this case would undermine any right to "freedom of belief." We would be saying that students like the plaintiffs are free to believe what they wish, but they still must fund organizations espousing beliefs they reject. Thus, while they have the right to believe what they choose, they nevertheless must fund what they don't believe.

Southworth, panel decision, at 731. We note as we did at the outset that this analysis is dispositive whether the case is decided under the *Lehnert* test or upon first principles.

Because Judge Wood did not look at the UW-Madison program through a freedom of conscience lens she identified the wrong element of the case as being dispositive. Similarly, Judge Rovner and the Ninth Circuit's *Rounds* opinion also failed to use the freedom of conscience vantage point and came to erroneous conclusions.

B. THE DISPOSITIVE ISSUE IS NOT ATTRIBUTION

Judge Rovner thought the critical issue was attribution. *Southworth, rehearing denial,* at 1125-26. She attempted to distinguish *Abood* and *Keller* on the ground that in those two cases "the recipients of the funds were themselves engaging in the challenged speech . . . [whereas] the recipient of the funds in this case is not itself engaging in the challenged speech, nor is that speech even attributable to it." *Id.* at1125. Judge Rovner repeatedly came back to this point and also pointed out that the appellees conceded that the funding arrangement is designed to create a forum and that they do not object to that. *Id.*

However, this brief has already addressed the fact that the UW-Madison program *both* creates a forum *and* compels speech. Because Judge Rovner missed the freedom of conscience vantage point, she concentrated on the issue of attribution. However, the key

factor in this Court's freedom of conscience/compelled speech jurisprudence is not attribution but rather contribution. Furthermore, the locus of the inquiry should not be on the recipient of the funds, but rather on the one who is compelled to give.

C. THE DISPOSITIVE ISSUE IS NOT WHETHER THE SPEECH IS "PERSONAL"

Finally, missing the freedom of conscience vantage point also led the Ninth Circuit to the wrong conclusion in *Rounds*. It is true that the *Rounds* court purported to distinguish its case from the instant case on factual grounds. *Rounds*, 166 F.3d 1040. Since there is a split in the circuits on the issue of student fees and since *Rounds* was decided subsequent to the issuance of the panel decision in this case, its analysis is "on the table."

It is important to note that its rational is flawed. The key for the *Rounds* court was whether the speech was "personal":

> Further, the challenge in this case does not present an instance of compelled *personal* speech, for no *personal* speech is compelled from anyone. No student is required to "confess by word or act" belief in any message, as was the case in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943). Nor is any student required to act as a courier for an ideological message, as was the case in Wooley v. Maynard, 430 U.S. 705, 715 (1977).

Rounds, 166 F.3d at 1038 (fotenote omitteed) (emphasis added).

In this assertion, the Ninth Circuit committed two errors. First, it is not true that the students were not required to "confess by word or act" a belief. They were required to "confess" a belief by the act of funding it. Second, by inserting the word "personal" in its description of the speech in question, the *Rounds* court introduced a foreign element into its compelled speech analysis. As this brief has demonstrated, neither Jefferson and Madison nor this Court has ever found the personal nature of the speech to be the critical element in assessing the validity of a measure. Over and over again, the

concern has been quite the opposite: one's freedom of conscience can be violated when one is compelled to give one's money to pay for someone else's speech. Because the *Rounds* court did not look through the lens of the freedom of conscience, it missed this point altogether. Instead, it lighted upon the rather unique aspect of Mr. Maynard's license plate and ignored the vast majority of compelled speech cases.

CONCLUSION

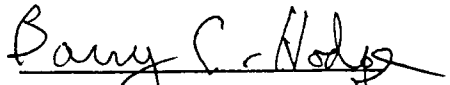
We end where we began. The heart of this case is a dispute that was settled long ago by those who founded this nation: government cannot compel individuals to endorse or pay for ideas that violate their freedom of conscience. Here, the UW-Madison student fee program does just that. Under the political theory upon which this nation was founded and under the precedents of this Court, the mandatory funding of political and ideological speech with which individual students disagree is clearly an unconstitutional compulsion.

When the writings of Founders such as Jefferson and Madison and the precedents of this Court are examined from the additional vantage point of freedom of conscience, we avoid certain analytical pitfalls. First, we see that the opinion of the Seventh Circuit panel is not in conflict with this Court's opinion in *Rosenberger*. Rather, the panel arrived at the only possible decision that was in harmony with *Rosenberger*.

Second, we avoid incorrect frameworks that can only lead to the wrong conclusion. The key is not forum-creation. It is not attribution. It is not the personal nature of the speech. The key is instead the simple proposition stated so long ago by Thomas Jefferson and reiterated by this Court in *Abood*: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *Abood*, 431 U.S. at 234 n.31.

In light of the foregoing this Court should affirm the decision of the Seventh Circuit.

Respectfully submitted
this 13th day of August, 1999.



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