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No. 98-1189

IN THE

Supreme Court of the United States

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

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF COMMUNITY COLLEGES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN COLLEGE PERSONNEL ASSOCIATION, ASSOCIATION OF AMERICAN COLLEGES AND UNIVERSITIES, ASSOCIATION OF AMERICAN UNIVERSITIES, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS, NAWE: ADVANCING WOMEN IN HIGHER EDUCATION, AND THE COLLEGE BOARD IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*

The American Council on Education ("ACE") is a non-profit national educational association founded in 1918. ACE's membership includes approximately 1,800 public and private colleges, universities, and educational organizations throughout the United States. As a leading participant in higher education affairs, ACE seeks to promote the interests of all members of the academic community—students, faculty, administration, and the institutions themselves. ACE participates as an *amicus curiae* only on rare occasions when a case presents issues of substantial importance to higher education in the United States. This is such a case.[1]

The remaining *amici* on this brief are: the American Association of Community Colleges, which represents 1,100 two-year institutions; the American Association of State Colleges and Universities, which represents over 370 state colleges and universities, sponsors research, and publishes reports on higher education; the American College Personnel Association, which represents over 6,500 college and university student affairs professionals; the Association of American Colleges and Universities, which represents over 650 public and private colleges and universities with the purpose of improving liberal education; the Association of American Universities, which represents 62 major research universities; the National Association of State Universities and Land-Grant Colleges, which represents over 170 public research universities; the National Association of Student Financial Aid Administrators, which represents over 3,200 postsecondary institutions, individuals, agencies and students and seeks to promote effective administration of student financial aid; NAWE: Advancing Women in Higher Education, which serves administrators, faculty and students, plus leaders from associations, business, and government agencies with the purpose of advancing women in higher education and related fields; and The College Board, which represents over 3,300 colleges and universities, secondary schools, university and school systems, and education associations and agencies and seeks to maintain academic standards and to broaden access to higher education.

The freedom of universities to define and pursue their educational mission is of vital concern to *amici*. Fundamental to that mission is the ability of a university to create on its campus a "marketplace of ideas"—exposing students to diverse views, offering opportunities for robust debate, and allowing presented truths to compete for understanding and acceptance. This marketplace includes not only the classroom but also many other aspects of university life, including participation in student government and student activity groups. By funding these groups through student fees, universities create an on-campus forum for the expression of a wide range of viewpoints on a variety of issues.

This Court has granted certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in *Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998) ("*Southworth I*"), and has certified as the question before it "[w]hether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech."

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that those attorneys listed on this brief authored the brief in whole. No person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief *amicus curiae*. Letters of consent as required by Supreme Court Rule 37.3 are appropriately filed with the Clerk of this Court.

Board of Regents of the Univ. of Wis. v. Southworth, 119 S. Ct. 1332, 1332 (1999). This issue is of great concern to the many public universities that collect some type of mandatory student fee and is therefore of great concern to *amici*.

Amici request that this Court answer the question certified in the negative and reverse the decision below for the following three reasons.

First, a university's use of mandatory fees to create a fund that provides support on a neutral basis to a broad array of different organizations does not offend the First Amendment. This funding does not compel speech or association connected with any particular viewpoint. Instead, the mandatory fees collected by the University of Wisconsin merely create a forum for the expression of diverse perspectives.

Second, even if this use of fees does rise to the level of compelled speech or association, it does not run afoul of the First Amendment. Support of a student activity fund, and of the organizations that ultimately receive support from the fund, is germane to a university's effort to further its educational mission by fostering and sustaining a marketplace of ideas.

Finally, requiring universities to distinguish "political" from "non-political" or "ideological" from "non-ideological" organizations, and to discriminate in funding based upon these distinctions, would compel universities to engage in conduct that is, at best, impracticable, and, at worst, unconstitutional.

ARGUMENT

I. A UNIVERSITY'S USE OF COMPULSORY FEES TO CREATE A STUDENT ACTIVITY FUND SHOULD BE ANALYZED AS THE CREATION OF A FORUM, RATHER THAN AS COMPELLED SPEECH AND ASSOCIATION

A. A University, as a Marketplace of Ideas, Has a Compelling Interest in Promoting the Presence of a Diversity of Viewpoints

" 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.' " *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quotation omitted). A university can provide this atmosphere only by offering an environment in which a rich diversity of ideas, values, and perspectives is championed and challenged. In this sense, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.' " *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Keyishian v. Board of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967)).

This marketplace trains future citizens and leaders by providing "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.' " *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.N.Y. 1943)). If a university is to provide such training, some members of the academic community will inevitably encounter speech that they find unfamiliar, even abhorrent. Furthermore, learning to tolerate and respond to such speech is an important part of the educational process. "To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open dis-

course towards the end of a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

The marketplace extends beyond the classroom to extracurricular activities, which are "a critical aspect of campus life." *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring). Education involves more than tests, textbooks, lectures, and libraries. Fundamentally, it is about the development of character.[2] Consequently, education does not end at the classroom door, but permeates campus and university life. As this Court recognizes, a "great deal of learning occurs informally." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 n.48 (1978) (opinion of Powell, J.) (quoting William J. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)). Indeed, since the nineteenth century, extracurricular activities have played an increasingly significant role in advancing the core mission of universities:

> Over time . . . extracurricular programs have come to be seen not merely as useful services but as an integral part of the educational process itself. Educators point to the dangers of a college that stresses only learning and cognitive skills while ignoring opportunities for students to engage in cooperative activities in which each relies on the efforts of others and is relied upon by others in return. . . . More and more, [extracurricular activities] are regarded not only as a source of enjoyment but as ideal experiences for learning to cooperate and take responsibility for the welfare of one's peers.
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> . . . .

[2] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 863, 112 Stat. 1581, 1826 (Congress recognizes that "the development of virtue and moral character, those habits of mind, heart, and spirit that help young people to know, desire, and do what is right, has historically been a primary mission of colleges and universities . . . .").

> . . . The contemporary college or university does not concentrate only on formal education; it assumes the larger responsibility of promoting human development in all its forms.

Derek C. Bok, *Higher Learning* 51-52 (1986); *see also* Frederick Rudolph, *The American College & University: A History* 136-55 (1990) (describing the increasing significance of extracurricular activities in the history of American colleges and universities). In sum, "[t]he work of a university cannot . . . be measured strictly in terms of courses, curricula, and examinations. Dewey wrote, 'The only way to prepare for social life is to engage in social life.' " *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 526 (Cal. 1993) (Arabian, J., dissenting) (quotation omitted).

Numerous lower courts recognize that education extends beyond the classroom and that a university's educational mission therefore includes the funding of campus activities, such as student groups and newspapers. *See, e.g., Carroll v. Blinken*, 957 F.2d 991, 1000 (2d Cir. 1992) (recognizing the "quite common vision of the university as more than the sum of classes in its course catalog—as a sort of sanctuary where young adults grow in a myriad of ways," and upholding the use of mandatory fees to fund a public interest research organization); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983) (upholding student funding of a university newspaper); *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb.) (upholding the use of mandatory student fees to subsidize a school newspaper), *aff'd*, 478 F.2d 1407 (8th Cir. 1973). Lower courts have acknowledged the important educational interests advanced by student groups, including "the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate." *Carroll*, 957 F.2d at 1001.

In sum, colleges and universities hold a unique position in our society and pursue a correspondingly unique mission. Their business is to provide "that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring). This mission can be achieved only by fostering a marketplace of ideas on campus and by ensuring that the resultant diversity of thoughts and perspectives informs the full range of experiences—from course selections to lecture series to student organizations. If a university is barred from this essential business, it cannot prepare its students "to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee*, 505 U.S. at 590.

B. Consistent with the First Amendment, a University Can Use Mandatory Fees to Fund a Neutral Forum that Helps Support a Diverse Variety of Organizations

In holding that the University of Wisconsin violated the First Amendment, the Seventh Circuit relies upon cases such as *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990). Those cases, however, involve neither the special mission of higher education nor university funding of a neutral forum. Rather, those cases address direct and compulsory funding of *specific* organizations—a union in *Abood*, and a state bar in *Keller*—that took positions on political and ideological issues. For First Amendment purposes, the distinction is critical. The importance of this distinction was underscored by the three judges who dissented from the denial of rehearing *en banc* in this case. *See Southworth v. Grebe*, 157 F.3d 1124 (7th Cir. 1998) ("*Southworth II*") (Rovner, J., dissenting). As the *Southworth II* dissenters recognized, in *Abood* and *Keller* the recipients of the funds themselves

engaged in the challenged speech. In those cases, "the private groups were funded because of their political and ideological positions, and for the purpose of furthering those positions. Therefore, the speech presented by those groups was attributable to the union and the bar association." *Southworth II*, 157 F.3d at 1126.

In contrast, students at the University of Wisconsin (and many other colleges and universities) pay fees not to particular groups but to the student government, which then uses the money to fund a wide array of organizations in a viewpoint-neutral manner.[3] "The speech of the offending groups can hardly be attributed to the student government, which funds groups of radically different views." *Id.* at 1125. "[T]he student government has not aligned itself with any political or ideological viewpoint. It does not fund the groups because of their political or ideological speech, and no one even suggests that the speech engaged in by those groups can be attributed to the student government itself." *Id.* at 1126; *see also Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1037-38 (9th Cir. 1999) ("[T]he 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 . . . .") (quotation omitted); Kari Thoe, Note, *A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled-Speech Rights at American Universities*, 82 Minn. L. Rev. 1425, 1445 (1998) ("While union and bar dues are used to

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[3] The only exception to this procedure may be Wisconsin PIRG, for which funding is authorized by direct student referendum. (Pet'r Pet. Writ Cert. at 6.) This brief does not address the separate and different issue raised by this direct funding, although the "germaneness" analysis discussed below would apply to this funding as well.

fund the voice of one entity—the union or bar association, respectively—the student fees are used to fund a public forum.").

The University of Wisconsin simply requires its students to support a neutral forum, just as if it "built a large auditorium and held it open for everyone." *Southworth II*, 157 F.3d at 1129 (Wood., J., dissenting). The fact that this case concerns a fund, rather than a physical space like an auditorium or an amphitheater, does not mean that forum analysis does not apply. To the contrary, in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), this Court recognizes that, although a student activity fund "is a forum more in a metaphysical than in a spatial or geographic sense," nevertheless "the same principles are applicable." *Id.* at 830.

Application of these principles makes clear that a critical difference exists between (a) supporting a forum and (b) supporting the speakers that ultimately use that forum. Thus, in *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court rejected a university's argument that if it were to allow religious groups to use its buildings it would create an impression that it endorsed religion in violation of the Establishment Clause: "[B]y creating a forum the University does not thereby endorse or promote any of the particular ideas aired there." *Id.* at 272 n.10.[4] A student compelled to pay a restoration fee for a university amphitheater can hardly complain that her First

[4] *See also* Carolyn Wiggin, Note, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 Yale L.J. 2009, 2017 (1994) ("[T]he lack of content-based standards . . . enables the system to support a legitimate campus forum, and this in turn creates a distance between those who fund the forum and any particular view expressed within it, thus avoiding unconstitutional forced speech.").

Amendment rights are violated because she disagrees with some of the speakers who appear there. She has no greater constitutional cause to complain of a content-neutral student activity fund because she disagrees with some of the organizations it ultimately supports.

If a forum supports organizations in a truly neutral fashion, as is stipulated here, (Pet. App. 106a, ¶ 12), and thereby funds groups that take radically differing positions on the same issues, it cannot be said to endorse or promote any particular group or any specific position. *See* Robert M. O'Neil, *Student Fees and Student Rights: Evolving Constitutional Principles*, 25 J.C. & U.L. 569, 574 (1999) ("As for the funded groups . . . the inescapable variety—indeed cacophony—of their publicly expressed views avoids any plausible inference or attribution of sponsorship on the part of any individual dues payer."). Neutral funding of student groups creates a neutral forum; it does not constitute endorsement or promotion. *See Widmar*, 454 U.S. at 272 n.10 ("Undoubtedly many views are advocated in the forum with which the University desires no association.").

It is true that the funds at issue here ultimately find their way to organizations that engage in political and ideological activities. As the *Southworth II* dissenters observed, however, "[t]he chain of custody of the funds cannot itself be enough to raise a constitutional issue." *Southworth II*, 157 F.3d at 1126 (Rovner, J., dissenting). If the "chain of custody" were to suffice, endless constitutional absurdities would follow. Students could challenge tuition payments that supported research, faculty appointments, class topics, or lectures with which they philosophically disagreed. *See id.* at 1126, 1128. This result would destroy public education and the use of public fora of all kinds to support discussion of issues of public interest and concern.

C. The Cases Cited By the Court Below Do Not Support the Proposition that this Case Should Be Analyzed Under the Standards of *Abood-Keller* Rather Than Under the Standards of Forum Creation

According to the court below, the analysis set forth by this Court in *Abood* and *Keller* applies in this case. *See Southworth I*, 151 F.3d at 722-23. In so holding, *Southworth I* points to some dicta in *Rosenberger* that refers to *Abood* and *Keller*. *See Southworth I*, 151 F.3d at 722. *Amici* respectfully submit that the court below attached excessive significance to this passing reference and too little to *Rosenberger's* unequivocal declaration that it was not addressing the question now presented.

The court below further stated that, "[n]ot only does *Rosenberger* direct us to *Abood* and *Keller*, but every other circuit to have considered the constitutional uses of mandatory student activity fees has applied [this] analysis (although the circuits are split on how exactly the analysis applies)." *Southworth I*, 151 F.3d at 723. Although the cases cited do refer to *Abood* and *Keller*, unlike *Southworth I*, they also recognize the important difference between mandatory funding of a neutral forum and mandatory funding of an organization that itself engages in political or ideological activity. For example, *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3d Cir. 1985), strikes down a university's use of mandatory fees to fund a public interest group separately listed on students' bills, but distinguishes that situation from one in which student groups compete for their fair share of contributions from an "activity fund."

In sum, because of the unique mission of universities in our society, the particular nature and purpose of student activity funds in assisting universities to achieve that mission, and the neutral role of the student government in distributing the fees, forum analysis rather than *Abood-Keller* analysis applies here.

II. EVEN IF A UNIVERSITY'S USE OF MANDATORY FEES TO FUND STUDENT GOVERNMENT AND ORGANIZATIONS IS ANALYZED UNDER *ABOOD-KELLER* AS COMPELLED SPEECH AND ASSOCIATION, RATHER THAN AS THE CREATION OF A NEUTRAL FORUM, SUCH A USE OF FEES DOES NOT VIOLATE THE FIRST AMENDMENT

The court below holds that the question presented by the use of fees is "whether the challenged activity is germane to the government's asserted interest." *Southworth I*, 151 F.3d at 724.[5] The court acknowledges the interest articulated by the University. "[F]unding private organizations which engage in political and ideological activities is germane to education because the funding allows for more diverse expression and this in turn is educational." *Id.* *Southworth I* concludes, however, that " 'germaneness' cannot be read so broadly as to justify the compelled funding of private organizations which engage in political and ideological advocacy, activities and speech." *Id.*

Amici submit that this conclusion is flawed in two significant respects. First, *Southworth I* wrongly assumes that the breadth of a university's educational mission is analogous to the breadth of a union's interest in collective bargaining (*Abood*) or a state bar's interest in regulating the legal profession (*Keller*). *See Southworth I*, 151 F.3d at 725. Second, the court fails to grant an appropriate level of deference to the University's judgment

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[5] *Southworth I* goes beyond the germaneness test of *Abood* and *Keller* to apply the three-prong test adopted by a plurality in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). *See Southworth I*, 151 F.3d 717, 724 (7th Cir. 1998). The reasons stated here to distinguish *Abood* and *Keller* distinguish *Lehnert* as well.

about the nature of its educational mission and the best ways to advance that mission.

A. The Challenged Use of Mandatory Fees Is Germane to a University's Broad Educational Mission, Including Its Interests in Promoting Diverse Expression and in Providing a Marketplace of Ideas

Abood and *Keller* involve contexts very different from colleges and universities. *Keller* holds that compulsory state bar dues cannot be used to finance ideological activities unrelated to the purposes of the compelled association—regulation of the legal profession and improvement of legal services. Similarly, *Abood* holds that a union may not use a dissenting individual's dues to fund ideological activities not germane to collective bargaining. The purposes of the State Bar in *Keller*, to supervise attorney conduct, and of the union shop in *Abood*, to negotiate contracts, are relatively narrow and definable. The educational mission of a university is substantially broader. *See Rounds*, 166 F.3d at 1039 ("The goals of the university are much broader than the goals of a labor union or a state bar, and they are inextricably connected with the underlying policies of the First Amendment.").[6]

It is the business of a university to create a marketplace of ideas, exposing its students to a broad range of viewpoints on many issues, including the political and the ideological. This happens in classrooms—in courses in history, literature, political science, sociology, philosophy, and many other disciplines. It happens in auditoriums—when guest lecturers speak on ethics, contemporary problems, civil rights, and the like. And it happens in extracurricular activities—in connection with student government, student newspapers, and student organizations identical to those at issue here. Neither state bars nor unions—nor perhaps any institutions other than American colleges and universities—have this broad mission and mandate.

[6] *See also* William Walsh, Comment, *Smith v. Regents of the University of California: The Marketplace is Closed*, 21 J.C. & U.L. 405, 423 (1994) ("[T]he organizations' purposes in *Keller* and *Abood* were much narrower than the university's purpose. It is much easier to see something as 'political' or 'ideological,' and therefore ineligible for funding, because it is unrelated to collective bargaining, than it is to distinguish the same from an 'educational mission.' ").

As a result, numerous courts recognize that a university's mission unquestionably reaches the funding of student organizations. Thus, the Second Circuit holds that a university may allocate student activity fees to a group with whose speech some students disagree. *See Carroll v. Blinken*, 957 F.2d 991, 992 (2d Cir. 1992). *Carroll* recognizes three distinct university interests served by the compulsory fee: "the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate." *Id.* at 1001; *see also Hollingsworth v. Lane Community College*, No. 97-35451, 1999 U.S. App. LEXIS 5391, at *2 (9th Cir. Mar. 24, 1999) (finding that the mandatory fee scheme is supported by substantial governmental interests in "promoting extracurricular activities, teaching specific skills and instilling civic activism, and creating a forum for vigorous debate and free exchange of ideas" and finding that the fund is "germane" to those purposes within the meaning of *Keller* and *Abood*); *cf. Smith v. Regents of the Univ. of Cal.*, 65 Cal. Rptr. 2d 813, 818-19 (Cal. Ct. App. 1997) (recognizing that participation in the university student senate "teaches specific leadership and advocacy skills . . . and provides a campus forum for vigorous discussion on matters of campus and public concern").[7]

[7] For a helpful discussion of the history of this case, see O'Neil, *supra*, at 575-77.

Southworth I errs by construing narrowly the breadth of a university's educational mission.

B. Courts Should Afford Universities Wide Latitude to Determine Whether the Use of Student Fees Is Germane to Their Educational Mission

Amici respectfully submit that the court below failed to give proper deference to the University of Wisconsin's decision that the use of mandatory fees advances its educational mission. Universities have interests in academic freedom that are a special concern of the First Amendment. This freedom is lost if courts do not afford universities discretion to define the contours of their educational mission and to determine the most effective means of achieving it. Judicial intervention in academic decision-making affects not only the academic freedom of the university, but it results as well in a loss of the freedom of the students, faculty, and other members of the academic community, all of whom participate in and help to create the marketplace of ideas.

For these reasons, this Court has recognized that government intervention in the intellectual life of a university is to be avoided. *See, e.g., Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring). Universities are "characterized by the spirit of free inquiry," and academic freedom gives the university the ability "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 262-63; *see also Keyishian*, 385 U.S. at 602-03; *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985) (reaffirming the principle of "restrained judicial review of the substance of academic decisions" and noting judicial "reluctance to trench on the prerogatives of state and local educational institutions"). Lower courts follow this authority and stress

their reluctance to second-guess university judgments on such matters. *See, e.g., Carroll*, 957 F.2d at 999 ("[A]cademic freedom . . . would not long survive in any meaningful way if courts were to take upon the task of micromanaging the everyday affairs of our nation's colleges."); *Rounds*, 166 F.3d at 1039 ("[A] university's determination that an organization contributes to the university community is presumptively valid.").

In this case, the University of Wisconsin—a campus with a rich history of the "robust exchange of ideas," *Keyishian*, 385 U.S. at 603—made a judgment that funding a forum that supports a wide variety of student groups, including some engaged in political and ideological activities, plays an important role in its educational mission. This decision deserves respect, "breathing room," and some significant measure of deference. *Southworth I* improperly limited the University's academic freedom to decide how its students "shall be taught," *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring), to decide how "to provide that atmosphere which is most conducive to speculation, experiment and creation," *id.*, and to decide how to provide the "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian*, 385 U.S. at 603 (quotation omitted).

III. FORCING THE UNIVERSITY TO DISTINGUISH BETWEEN "EDUCATIONAL" ORGANIZATIONS AND "POLITICAL" OR "IDEOLOGICAL" ORGANIZATIONS RISKS VIOLATING STUDENTS' FIRST AMENDMENT RIGHTS

The court below effectively requires universities to distinguish political from non-political, and ideological from non-ideological organizations, and then to grant or withhold funding based upon these distinctions. Such distinc-

tions may be constitutionally workable in the context of the activities of a union or a state bar, where the government has a narrower interest and where that interest does not include exposure to a diverse marketplace of ideas. Such distinctions emphatically do not work in the context of a university, however, where the government has a broad interest, and where that interest includes exposure to various political and ideological perspectives. Further, in the context of university campus activities, such distinctions not only fail to work, but they actually create significant constitutional mischief.

Consider a student debate club that sponsors a public forum on presidential impeachment; or a student economic society that hosts a series of speakers on tax reform; or a student group that distributes leaflets asserting that a university discriminates because it hires too few minority professors; or a film society that sponsors a film concerning the events at Tiananmen Square; or an environmental organization that presents a series of lectures on the impact of logging; or a literary studies club that funds a panel discussion of alternative theories of literary criticism, including Marxist, feminist, deconstructionist, and Freudian approaches. At some point it simply becomes impossible to separate the ideological and political from the educational and informative. *See Smith*, 844 P.2d at 524-25 (Arabian, J., dissenting).

Furthermore, a university that attempts to make such distinctions, and then to make funding decisions based upon them, may run afoul of First Amendment prohibitions against content- and viewpoint-based discrimination. In other words, forcing universities to draw these lines does not avoid constitutional difficulties; it compounds them. The University of Wisconsin uses the mandatory activity fee to create a public forum that distributes fees on a content-neutral basis. (Pet. App. 106a, ¶ 12.) By

supporting groups without regard to the content or viewpoint of their speech, the forum detaches funding decisions from endorsement or condemnation of the political or ideological positions of the different organizations. In contrast, the holding of the *Southworth I* court, which would require the University to refuse funding for groups that are too ideological or political, violates the rule against content and viewpoint discrimination in a public forum.

Viewpoint discrimination is obvious when a university treats organizations differently because of their specific orientation or message, for example by electing to fund the Young Republicans but not the Young Democrats. But constitutional problems also may arise when a university treats organizations differently because they approach issues from a political viewpoint. For example, in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), this Court holds that it "discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except for those dealing with the subject from a religious standpoint." *Id.* at 384-85. A speaker may not be denied access to a forum "to suppress the point of view he espouses on an otherwise includible subject." *Id.* at 385; *see also Rosenberger*, 515 U.S. at 893-94.

Just as a university cannot provide less favorable treatment to organizations that have a "religious" viewpoint, so a university cannot provide less favorable treatment to organizations that have a "political" viewpoint. For example, if two groups that address women's issues exist, a campus Women's Studies Club that discusses but does not advocate political positions, and a campus National Organization for Women ("N.O.W.") that takes positions

on public policy, funding the former but not the latter may impermissibly discriminate against N.O.W. on the basis of its political viewpoint.

Faced with a project that calls upon them to do the impossible, with the knowledge that in the effort they might also do the unconstitutional, many universities will respond by funding no student organizations at all or only those that seem to pose no risk whatsoever.[8] As the dissenting judges in *Southworth II* cautioned, such a requirement may "spell the end, as a practical matter, to the long tradition of student-managed activities on these campuses." 157 F.3d at 1127 (Wood, J., dissenting). As funding fails, and as organizations disband, some voices—including, in all likelihood, the most provocative and stimulating, if also the least popular voices—will no longer be heard at our universities. The marketplace of ideas on our campuses will suffer immeasurably.

[8] An "opt-out/refund" procedure might address certain constitutional concerns, *see O'Neil, supra*, at 575, 578, and use of such a procedure certainly should not be foreclosed by this Court. For the reasons set forth in this brief, however, such a procedure should not be required to save the constitutionality of mandatory fees.

CONCLUSION

For all of the above reasons, *amici* respectfully urge that this Court reverse the decision of the Seventh Circuit.

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