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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 FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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This brief *amicus curiae* is filed by the National Education Association ("NEA") with the written consent of the parties, as provided in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*[1]

NEA is a nation-wide employee organization with approximately 2.4 million members, the vast majority of whom are employed by public educational institutions—including public colleges and universities. Particularly be-

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[1] Counsel for a party has not authored this brief in whole or in part. No person or entity other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or filing of this brief.

cause of this latter constituency, NEA has a strong interest in whether and to what extent the First Amendment rights of students impact on the ability of public colleges and universities to expend mandatory student activity fees to implement educational programs and otherwise fulfill their educational missions. This case necessarily will provide guidance as to that issue.

SUMMARY OF ARGUMENT

The threshold task in this case is to determine the appropriate analytical framework to apply in dealing with respondents' challenge to the use of their mandatory student activity fees by the Board of Regents of the University of Wisconsin System. The court below concluded that "the issue before us is properly reviewed under the authority of *Abood* [*v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)] and *Keller* [*v. State Bar of Cal.*, 496 U.S. 1 (1990)]," 151 F.3d 717, 723 (7th Cir. 1998)—and it applied the "germaneness analysis" that originated in those cases and was developed by their progeny, particularly *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991). As demonstrated by petitioners and their other supporting *amici*, the Seventh Circuit misapplied this analysis, and the decision of that court therefore is wrong even when judged on its own terms.

This Court need not reach that question, however, because the Seventh Circuit's fundamental premise—*i.e.*, that the *Abood/Keller* "germaneness analysis" is controlling—is itself wrong. This is not to suggest that *Abood* and *Keller* are not relevant here. They are indeed relevant—and dispositive—but not because of the legal principle relied upon by the court below. In his opinion concurring in the judgment in *Abood*, Justice Powell agreed that "[c]ompelled support of a private association" impinged upon the First Amendment rights of those persons being

compelled, but he emphasized that such compelled support "is fundamentally different from compelled support of government." 431 U.S. at 259 n.13. In *Keller*, this Court unanimously embraced this critical distinction drawn by Justice Powell, noting that "government as we know it" would be "radically transformed"—indeed, " 'could not function' "—if every person had a First Amendment right to insist that public monies not be expended in a manner that he or she found politically or ideologically objectionable. *Id.* at 12-13 (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)).

It is this so-called "government speech" doctrine—rather than the "germaneness analysis"—that is applicable in the instant case. The University of Wisconsin Board of Regents is a "traditional governmental agenc[y]," *Keller*, 496 U.S. at 12, which—in the exercise of its statutory authority to provide a system of public higher education for the people of Wisconsin—has chosen to establish a program pursuant to which mandatory student activity fees are used to fund the activities of on-campus student organizations representing a broad cross-section of American society. Whether financial sponsorship of such a program is a wise exercise of the Board's statutory authority may be open to debate. But under the government/non-government distinction drawn by Justice Powell in *Abood* and embraced by this Court in *Keller*, that debate must take place in a political forum, and not in the federal courts under the guise of a First Amendment challenge.

ARGUMENT

I.

The Wisconsin Legislature has determined that it is "in the public interest to provide a system of higher education which enables students of all ages, backgrounds and levels

of income to participate in the search for knowledge and individual development." Wis. Stat. § 36.01 (1998). The legislatively-assigned mission of that system—"to be known as the university of Wisconsin system," *id.* § 36.03—is as follows:

> [T]o develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities, scientific, professional and technological expertise and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training and public service designed to educate people and improve the human condition. [*Id.* § 36.01(2).]

The Wisconsin Legislature has vested primary responsibility for governance of the University of Wisconsin system in a Board of Regents. Wis. Stat. § 36.09(1). The Board of Regents has the power, *inter alia,* to establish "tuition and fees incidental to enrollment in educational programs or use of facilities in the system," *id.* § 36.27(1), and to determine how those monies are to be expended. However, with respect to the use of mandatory student activity fees—"which constitute substantial support for campus student activities"—the Board of Regents is required by statute to act in consultation with the students, in recognition of the students' "primary responsibility for the formulation and review of policies concerning student life, services and interests." *Id.* § 36.09(5).

The Board of Regents has for nearly twenty-five years administered a program pursuant to which a portion of the mandatory student activity fees is used to fund extracurricular student activities. This program is identical in all relevant respects to the University of Virginia program that was before this Court in ***Rosenberger v. Rector and Visitors of University of Virginia,*** 515 U.S. 819 (1995). Like the program in ***Rosenberger,*** the University of Wisconsin program uses these fees to defray the expenses of registered on-campus student organizations of various kinds, in order "to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life." 515 U.S. at 840. As such, the University of Wisconsin program—again like the University of Virginia program—"reflect[s] the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission." *Id.*

Respondents—a group of students at the University of Wisconsin-Madison—have sued the Board of Regents, claiming an infringement of their First Amendment rights to the extent that their mandatory student activity fees are used by the Board to fund on-campus student organizations "that engage in political and ideological advocacy, activities and speech" to which respondents are opposed. *Southworth v. Grebe,* 151 F.3d 717, 718-19 (7th Cir. 1998).[2]

II.

Acknowledging that this Court "has yet to determine" whether the First Amendment provides a basis for the type of challenge here asserted by respondents, the Sev-

[2] Although respondents have disavowed any challenge to the use of their fees to fund the University-wide student newspaper or the Distinguished Lecture Series, *see* 151 F.3d at 721, 727 n.8, respondents' position necessarily would permit such a challenge—unless one indulges in the fantasy that the student newspaper has no discernible editorial viewpoint and the distinguished lecturers express no opinions on controversial issues.

enth Circuit found that *Rosenberger* "provide[s] guidance on the appropriate analysis for such a challenge." 151 F.3d at 722. According to the court below, *Rosenberger* "direct[s] us" to the "germaneness analysis" that originated in *Abood* and *Keller*, and was further developed in *Lehnert*. *See* 151 F.3d at 722-724. Applying that analysis, the Seventh Circuit concluded that respondents have a cognizable "First Amendment interest" in conscientiously objecting to payment of that portion of their mandatory student activity fees that is used to fund on-campus student organizations that they oppose—a "First Amendment interest" that, in the Seventh Circuit's view, is not overcome by the Board of Regents' asserted interest in furthering its educational mission. 151 F.3d at 724-31.

The foregoing conclusion is in error because its foundational premise is fatally flawed: this case is *not* controlled by the *Abood/Keller* "germaneness analysis," which is bottomed on the principle "that individuals have a First Amendment interest in freedom from compulsion to subsidize speech and other expressive activities *undertaken by private and quasi-private organizations*." *Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457, 481-82 (1997) (Souter, J., dissenting) (emphasis added). What students at the University of Wisconsin are being compelled to subsidize is a program of sponsorship of extracurricular student activities *undertaken by the State of Wisconsin* in the exercise of the State's judgment that such a program is in the public interest. In this context, it is abundantly clear from Justice Powell's concurring opinion in *Abood* and this Court's unanimous opinion in *Keller* that the students have *no* "First Amendment interest in freedom from compulsion to subsidize" elements of that government program that they may find politically or ideologically offensive.

A. In *Abood*, the issue was whether the First Amendment was violated by the compelled payment of service fees *to a labor union* under a Michigan labor relations statute authorizing "agency shop" agreements between public employers and unions representing public employees. The *Abood* Court found that the compelled payment of such fees had "an impact upon" the plaintiff employees' "First Amendment interests," because "[a]n employee may very well have ideological objections to a wide variety of activities *undertaken by the union* in its role as exclusive representative." 431 U.S. at 222 (emphasis added). This Court went on to hold that the validity *vel non* of the compelled payment of the service fees under the First Amendment turned on the purposes for which the union expended those fees. If those purposes were "germane to its duties as collective-bargaining representative," *id.* at 235, the compelled payment passed constitutional muster because of the "important government interests"—*i.e.*, labor peace and the avoidance of "free-riders"—furthered thereby. *Id.* at 224-25. Conversely, the compelled payment of service fees to be used "for political and ideological purposes unrelated to collective bargaining" was found impermissible under the First Amendment because no comparable governmental interests were furthered by such expenditures. *Id.* at 232-37.

In his opinion concurring in the judgment, Justice Powell agreed that "[c]ompelled support of a private association" impinged upon the First Amendment interests of those persons being compelled, but pointedly noted that such compelled support

> *is fundamentally different from compelled support of government.* Clearly, a local school board does not need to demonstrate a compelling state interest every time its spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting

> the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. [431 U.S. at 259 n.13 (emphasis added).]

In *Keller*, members of the State Bar of California, relying on *Abood*, brought a First Amendment challenge to the use of their compulsory bar association dues "to finance certain ideological or political activities to which they were opposed." 496 U.S. at 4. The California Supreme Court found *Abood* inapposite on the ground that the State Bar was a governmental agency and, as such, free without First Amendment "constraints" to expend its revenue "for any purposes within its authority," including purposes that some might find offensive. *Id.* at 10 (quoting 767 P.2d 1020, 1029). On writ of certiorari to this Court, the State Bar invoked this so-called "government speech" doctrine:

> "The government must take substantive positions and decide disputed issues to govern. . . . So long as it bases its actions on legitimate goals, government may speak despite citizen disagreement with the content of its message, for government is not required to be content-neutral." Brief for Respondents 16. See also *Abood, supra*, at 259, n.13 (Powell, J., concurring in judgment) ("[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people"). [496 U.S. at 10-11.]

Although the *Keller* Court in a unanimous opinion rejected the position of the State Bar of California and reversed the California Supreme Court, it did *not* take

issue with the "government speech" doctrine as such, or with that doctrine's rationale as explicated by Justice Powell in footnote 13 of his *Abood* concurrence. To the contrary, this Court fully embraced the "government speech" doctrine—and, indeed, elaborated upon its rationale—but concluded that the State Bar was not properly treated as "government" for purposes of applying the doctrine:

> [T]he very specialized characteristics of the State Bar of California discussed above serve[] to distinguish it from the role of the typical government official or agency. Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. Cf. *United States v. Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").
>
> The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional governmental agencies and officials on the

> other hand, render unavailing [the State Bar's] argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees. [496 U.S. at 12-13.] [3]

B. It is clear from the foregoing that the court below was mistaken in its foundational premise that the *Abood/Keller* "germaneness analysis" is controlling here. This is *not* a case of compelled funding of a private association of employees "which is representative only of one segment of the population, with certain common interests," *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in judgment), or of a quasi-private state bar comprised of attorneys providing only "specialized professional advice to those with the ultimate responsibility of governing the legal profession," *Keller*, 496 U.S. at 13. It is, rather, a case of compelled funding of a "traditional governmental agenc[y]," *id.* —the University of Wisconsin Board of Regents—charged by statute with the responsibility of providing a system of public higher education for the people of Wisconsin. In short, this case arises in a "fundamentally different" context than *Abood* and *Keller*, and should be decided by the application of the legal principle that is appropriate in that context. *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in judgment).

[3] In *Glickman*, this Court recently found *Abood* and *Keller* controlling in the context of a First Amendment challenge to agricultural marketing orders which—as approved by the Secretary of Agriculture—compelled growers, handlers and processors of California tree fruits to contribute to the cost of generic advertising of California nectarines, plums and peaches, 521 U.S. at 471-74, but this decision does not undermine the distinction that we urge in text. Although the Secretary of Agriculture might have argued that the case was controlled by the "government speech" doctrine rather than the *Abood* and *Keller* "germaneness analysis," he expressly waived the argument, and this Court did not consider the point. *See* 521 U.S. at 482 n.2 (Souter, J., dissenting).

The applicable legal principle is that individuals have *no* "First Amendment interest in freedom from compulsion" to pay a *governmental* assessment based upon political or ideological objections to the manner in which the resulting revenues are expended *by the government*. Although this Court reversed the California Supreme Court in *Keller*, it had no quarrel with that court's observation that " '[a] governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority,' " 496 U.S. at 10 (quoting 767 P.2d at 1029), without subjecting itself to the kind of First Amendment conscientious-objection challenge upheld in *Abood* and *Keller*.

III.

In opining that compelled support of a private organization should be treated differently from compelled support of government for First Amendment purposes, Justice Powell offered the following rationale: because government acts in a *representative* capacity on behalf of *all* the people within a jurisdiction, each and every person within the represented class properly can be deemed to have consented to the government's tax and spending policies, without regard to whether he or she personally objects to some or all of those policies.[4] "The same cannot be said of [the expenditure of service fees by] a union, which is representative only of one segment of the population, with certain common interests." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in judgment).

[4] To be sure, that consent would not extend to government tax or spending policies that worked an *independent* violation of the Constitution—such as, to provide an extreme example, a discriminatory tax on African-Americans in violation of the Fourteenth Amendment—for there the government would be exceeding the bounds of its consented-to representative authority.

This rationale plainly applies here. The Board of Regents is the governmental agency charged with the statutory responsibility to provide the people of Wisconsin with "a system of [public] higher education which enables students of all ages, backgrounds and levels of income to participate in the search for knowledge and individual development." Wis. Stat. § 36.01. The Board of Regents has chosen—in the exercise of that responsibility—to establish a program under which all students attending the University of Wisconsin are given the opportunity to be exposed to the viewpoints—and participate in the real-world activities—of a myriad of on-campus student organizations representing a broad cross-section of American society, and to fund that program by means of a mandatory student activity fee. Whether financial sponsorship of such a program is a wise exercise of the Board of Regents' statutory authority to represent the people of Wisconsin in matters pertaining to public higher education may be open to debate. But it cannot be debated that the Board of Regents has in fact acted in a representative capacity in establishing and maintaining such a program. That being so, the remedy for those persons who find the Board of Regents' program offensive or misguided in whole or in part lies in the normal political channels, and not in the federal courts under the guise of a First Amendment conscientious-objection challenge.

In its unanimous opinion in *Keller*, this Court cited approvingly to footnote 13 of Justice Powell's *Abood* concurrence, *see* 496 U.S. at 11, but it did not stop there. The *Keller* Court went on to observe that "government as we know it" would be "radically transformed"—indeed, "'could not function'"—if every person had a First Amendment right to insist that public monies not be spent in a manner contrary to his or her views or beliefs. *Id.*

at 12-13 (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)). This additional rationale for treating compelled support of a private organization differently than compelled support of government for First Amendment purposes—like Justice Powell's rationale—is unassailable:

> Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never been so exalted above the powers and the compulsion of the agencies of government. [*Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 268 (1934) (Cardozo, J., concurring).]

Indeed, one need not venture very far from the facts of this case to demonstrate the "lengths" to which recognition of the First Amendment right claimed by respondents "would carry us":

> [T]he University of Wisconsin obviously compels its students to make other payments as well, notably tuition. . . . The University uses [tuition] for its operations, and the lion's share of the budget in most universities goes to faculty salaries and research support. Some students undoubtedly find the viewpoints of some faculty members, expressed either in the classroom or in scholarship, to be offensive. Suppose, for example, there is a doctor in the medical school researching more effective ways to use fetal tissue for organ transplants. It is easy enough to imagine a student finding this antithetical to her religious or moral views. Or suppose the University disburses tuition funds to a sociologist who is exploring the hypothesis that children suffer long-term harm

> if their mothers work while the child is still under the age of 10. A different student may find that equally offensive. [*Southworth v. Grebe*, 157 F.3d 1124, 1128 (7th Cir. 1998) (D. Wood., J., dissenting from denial of rehearing *en banc*).]

See also Lathrop v. Donohue, 367 U.S. 820, 860 (1961) (Harlan, J., concurring in judgment) ("Nor do I . . . believe that a state taxpayer could object on Fourteenth Amendment grounds to the use of his money for school textbooks or instruction which he finds intellectually repulsive, nor for the mere purchase of a flag for the school.").

IV.

The court below accepted (at least for purposes of argument) the principle that there is no First Amendment right to object on political or ideological grounds to the government's "appropriation of public funds raised through *taxation*." 151 F.3d at 732 (emphasis added). But the court found that that principle did not shield the Board of Regents from the First Amendment challenge in this case because the mandatory student activity fee

> does not equate to a tax. *Rosenberger* made this clear, stating that "the $14 paid each semester by the students is not a general tax designed to raise revenue for the University. . . . Our decision, then, cannot be read as addressing an expenditure from a general tax fund." *Rosenberger*, 515 U.S. at 841. [151 F.3d at 732.]

This analysis is flawed even on its own terms, because it assumes—incorrectly—that the University of Wisconsin's mandatory student activity fee is not a "tax." Black's Law Dictionary 1457 (6th ed. 1990) defines a "tax" as follows (quoting Story, Const. § 950):

> In a general sense, any contribution imposed by government upon individuals, for the use and service of the state, whether under the name of toll, tribute, tallage, gabel, impost, duty, custom, excise, subsidy, aid, supply, or other name.

See also Rosenberger, 515 U.S. at 890 (Souter, J., dissenting).

Nor is this definition at odds with the position that this Court took in *Rosenberger*. We note initially that *Rosenberger* was an Establishment Clause case. In this uniquely sensitive—and somewhat murky—area of First Amendment jurisprudence it is understandable that this Court would seek to limit its holding to the facts presented, lest it be inappropriately extended to other contexts in which public financial aid to sectarian institutions "would run contrary to Establishment Clause concerns dating from the earliest days of the Republic." 515 U.S. at 840. Accordingly, the *Rosenberger* Court chose its words with particular care, refusing to equate the student activity fee in that case with "a general tax," *id.* at 841—*i.e.*, one which can be used for unlimited purposes —and cautioning in turn that its decision should not "be read as addressing an expenditure from *a general tax fund*." *Id.* (emphasis added). *Rosenberger* did not present—much less answer—the question of whether the University of Virginia's student activity fee could be equated with *any* type of tax for *any* purpose.

But even if, for argument's sake, we were to answer the latter question "no"—and proceed on the assumption that the Univerity of Wisconsin's mandatory student activity fee cannot be equated with any type of tax for any purpose—the outcome here would be the same, inasmuch as there is nothing in the "government speech" doctrine to suggest that it applies only to revenue derived from "taxation." Indeed, the teaching of *Keller* is to the contrary. The doctrine presumably would have applied

in that case if the California State Bar had been deemed to constitute a "traditional governmental agenc[y]," 496 U.S. at 13, notwithstanding the fact that there is no principled distinction between compulsory bar association dues and mandatory student activity fees. Moreover, the *Keller* Court quoted with approbation, 496 U.S. at 10, the California Supreme Court's observation that "[a] governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purpose within its authority" without subjecting itself to a First Amendment conscientious-objection challenge.

V.

As we have shown, students at the University of Wisconsin do not have a First Amendment right to object to the government program at issue in this case any more than does a citizen to object to the decision of government to spend his or her money "in furtherance of a war, whether for attack or defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral," *Hamilton v. Regents, supra*, 293 U.S. at 268. But the analogy is not a perfect one, and we would be remiss if we did not point out that respondents in fact have *less* cause to complain of a First Amendment violation than do anti-war taxpayers or other similarly-situated conscientious objectors.

Under *Rosenberger*, a public university operating a government program of the type at issue here is bound independently by the First Amendment to fund on-campus student organizations on a viewpoint-neutral basis, notwithstanding the usual rule that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." 515 U.S. at 832-35; *see also National Endowment for the Arts v.*

Finley, 524 U.S. 569, 118 S. Ct. 2168, 2178-79 (1998); *id.* at 2184 (Scalia, J., concurring); *id.* at 2190-93 (Souter, J., dissenting). Accordingly, respondents "could presumably form their own student group and receive funds for the expression of" viewpoints contrary to those of the on-campus student organizations that they oppose, and, indeed, "some [respondents] belong to a group [*i.e.*, the Federalist Society] that already does so." *Southworth*, 157 F.3d at 1127 (Rovner, J., dissenting from denial of rehearing *en banc*). In these circumstances, respondents hardly can lay legitimate claim to greater First Amendment rights than a run-of-the-mill conscientious objector who—if offended by a government program—cannot even demand an "offsetting" expenditure.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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