No. 98-1189

In the Supreme Court of the United States

OCTOBER TERM, 1998

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

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BRIEF OF AMICI CURIAE WISCONSIN STUDENT PUBLIC INTEREST RESEARCH GROUP, ASSOCIATED STUDENTS OF MADISON, AND OTHER INTERESTED STUDENT ORGANIZATIONS

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This case presents the question 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. It is not. Indeed, just the opposite is true: As this Court has repeatedly recognized, public universities further First Amendment principles by bringing together diverse groups of students and fostering the free and open exchange of ideas.

INTEREST OF AMICI CURIAE

This brief is filed on behalf of the Associated Students of Madison ("ASM"), the Wisconsin Student Public Interest Research Group ("WISPIRG"), and 119 other student organizations (see Appendix for complete listing of organizations) with a direct stake in the outcome of this litigation.[1/]

Amicus ASM is the student government at the University of Wisconsin at Madison, which is empowered under Wisconsin Statutes Section 36.09(5) to control the fees about which respondents complain.[2/] ASM, its constituent committees, and its agents are principally responsible for distribution of the collected fees on a viewpoint-neutral basis to some 150 registered student organizations at the Madison campus. ASM plays a vital role, therefore, in the creation and maintenance of the fee system, which provides educational and extracurricular opportunities to students and a broad

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1/ Letters providing the consent of the parties are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, amici state that the brief was drafted in its entirety by amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae, their members, or their counsel.

2/ Wisconsin's statutes mandate that "the students of each institution or campus . . . shall have primary responsibility for the formulation and review of policies concerning student life, services, and interests." Wis. Stat. § 36.09(5) (1992). In accordance with that mandate, the ASM decides how to allocate the funds collected from the University's student activity fees. *Id.* The University's Board of Regents, however, reviews the ASM's allocation of those funds, and the Regents have final authority to determine whether those allocations comport with the University's educational mission. *Id.*; *see also Southworth v. Grebe,* 151 F.3d 717, 720 (7th Cir. 1998). In addition, contrary to any suggestion by the Court in *Southworth*, 151 F.3d at 720, the referendum demonstrating support for WISPIRG is not binding on the ASM or the Board of Regents.

range of services to the greater University of Wisconsin at Madison community. ASM is representative of the type of student governance structures at other University of Wisconsin campuses.

Amicus WISPIRG and the other amici are registered student organizations at the University of Wisconsin's Madison, Milwaukee, Oshkosh, and Platteville campuses, funded in whole or in part by mandatory fees at issue in this case. These organizations represent broad and diverse viewpoints on a range of educational, cultural, social, political, and pre-professional issues, and they are integral to the presentation, discussion, and debate of issues and ideas on the University of Wisconsin campuses. Collectively, they represent thousands of participating students within the University of Wisconsin System. Each of these organizations, as well, provides co-curricular and extra-curricular educational opportunities to students. Some, like WISPIRG, offer opportunities for students to earn course credit while gaining important real-world skills outside the classroom. During the semester most recently completed, Spring 1999, over 60 students enrolled in such course credit internships. By encouraging discussion and debate of issues on campus, and by encouraging students to become involved in activities outside the classroom, these registered student organizations facilitate participatory civics training and encourage learning by doing. The contributions made by student organizations to the University System's mission lie at the heart of its commitment to service learning.

SUMMARY OF ARGUMENT

In considering the constitutionality of the University of Wisconsin-Madison's student activity fee, the United States Court of Appeals for the Seventh Circuit should have recognized both the vital role our nation's universities and colleges play in educating an informed, participatory

citizenry, and the special role accorded these institutions by this Court. Instead, the Court of Appeals narrowly interpreted the purpose of post-secondary education and neglected this Court's ample precedent to the contrary.[3/]

At its heart, the Court of Appeals opinion rests on a theory that university students may never be compelled to fund the "propagation of opinions" with which they disagree. That approach to the First Amendment, however, undermines the public policy of the State of Wisconsin, destroys the significant educational benefits flowing from our nation's public universities and colleges, and rejects a litany of Supreme Court precedent upholding both the value of education and the importance of freely exchanging ideas in that setting. Quite simply, the Seventh Circuit opinion provides no constitutional basis for distinguishing between a university lecture by a professor with a particular viewpoint and funding a student group that speaks out on a political issue. Both activities provide educational benefits to

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[3/] The Seventh Circuit's opinion also conflicts with the holding of every other Court of Appeals that has considered the constitutionality of funding mechanisms similar to those at issue here. *See, e.g.*, *Hollingsworth v. Lane Community College*, 173 F.3d 860 (table), No. 97-35451, 1999 WL 173574 (9th Cir. Mar. 24, 1999) (upholding use of student activity fees to fund public interest research group); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032 (9th Cir. 1999) (upholding use of student activity fees used to fund eighty university organizations, including athletic, culturally-oriented, and political groups, and public interest research group); *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994) (upholding use of student activity fees used to fund educational, cultural, recreational organizations, and public interest research group); *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) (same); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992) (upholding use of student activity fees used to fund student newspaper); *Veed v. Schwartzkopf*, 478 F.2d 1407 (8th Cir. 1973), *aff'g* 353 F. Supp. 149 (D. Neb. 1973) (upholding use of student activity fees used to fund student newspaper, student association, and speaking program).

students, both are funded with moneys collected from students, and both fulfill an important governmental interest in educating an informed and active citizenry.

The court below reached the wrong result by misapplying the holding of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny. Those cases hold that a public institution (or institution acting pursuant to governmental authority) may use its members' money to support speech germane to a significant governmental interest. The State of Wisconsin has a significant, if not compelling, interest in providing a post-secondary education that trains its students to be informed and active citizens. Through the content-neutral funding of the student groups in question, Wisconsin creates a limited, but open, public forum which is germane to its interest and, indeed, nurtures "[a] tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rectors & Visitors of the Univ. of Virginia*, 515 U.S. 819, 835 (1995).

Moreover, the *Abood* line of cases does not even apply where, as here, the government is engaging in a traditional function — providing a post-secondary education — and is using its funds to further that goal. It is well recognized that there can be no legitimate objection to the government's use of funds to subsidize speech incidental to a traditional governmental function.

The Court of Appeals also erred by characterizing the issue as one of compelled speech. The nexus between the objecting students' funding of the limited public forum at the University and the student groups' speech does not mean that these students are being unconstitutionally compelled to speak in support of the groups in question. To the contrary, placing limits on the funding of certain groups in the forum, based on the content of their speech, would be constitutionally impermissible. The severe limitation

imposed by the Court of Appeals regarding the method for spending or returning the objecting students' fees will inevitably lead to a form of impermissible prior restraint or evisceration of the benefits of the forum altogether.

For all these reasons, the Court of Appeals' judgment should be reversed.

ARGUMENT

I. A Public University May, Consistent with the First Amendment, Use Mandatory Student Fees to Support a Public Forum for the Diverse Expression of Political or Ideological Ideas.

This Court has repeatedly held that the First Amendment does not limit a public institution's use of funds collected from its individual members — even to support causes with which some of those members may disagree — when the use of those funds is germane to the institution's purpose. Creating an environment that encourages the free and open expression of ideas is germane to the University of Wisconsin's purpose, as is its collection and disbursement of student fees to that end. Indeed, a number of this Court's opinions extolling the value of "academic freedom" emphasize that encouraging the broad expression of diverse views is central to a university's mission. That principle controls here.

A. *The Abood Doctrine Is Satisfied As Long As The Use Of The Mandatory Fee Is Germane To A Legitimate Governmental Purpose.*

A line of this Court's decisions stands for the proposition that a government entity (or an entity acting pursuant to governmental authority) may use its members' funds to support speech activities — even ideological or political activities with which some of its members may disagree — when that speech is germane to the entity's legitimate public

purpose. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Under these cases, courts must first determine whether there exists a significant governmental interest in the activity at issue. If such an interest exists, the court must then determine whether particular expenditures are relevant to that interest.

The Court in *Abood* addressed an "agency-shop" agreement between a union and a government employer. A Michigan labor statute required all employees to pay the union a "service fee" equal to union membership dues, whether or not they joined the union. The Court recognized that the union's use of the mandatory fee raised First Amendment concerns, even when these fees were used to pay for union activities germane to collective bargaining. "An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative." *Abood*, 431 U.S. at 222. For example, an employee's "moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan." *Id.* Or an employee "might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class." *Id.* But even so, the Court concluded, "such interference [with dissenting employees' First Amendment interests] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.*[4/]

[4/] The Court's decision in *Abood* relied, in part, on two previous decisions interpreting the Railway Labor Act. In *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), the Court held that the RLA permitted the use of members' dues to support collective bargaining

(continued...)

With regard to union activities unrelated to collective bargaining, however, the employees' constitutional concerns became paramount. The First Amendment, the Court held, barred the union from using mandatory fees to support political speech with which employees disagreed, if that speech was not germane to collective bargaining. *Id.* at 235-36. The issue for the Court was not whether the speech could be characterized as political or ideological, but whether it was germane to the union's statutory purpose.

In *Keller*, a unanimous Court reaffirmed *Abood*'s germaneness test and applied it to integrated state bar associations. California required attorneys licensed to practice law there to join the State Bar of California, an organization created under state law to regulate the legal profession. *Keller*, 496 U.S. at 4-5. Applying *Abood*, the Court held that "the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (citation omitted). Mandatory fees could thus be spent "for activities connected with disciplining members of the Bar or proposing ethical codes for the profession," but not "to endorse or advance a gun control or nuclear weapons freeze initiative," issues not germane to the State Bar's legal purpose. *Id.* at 15-16.

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[4] (...continued)
activity, but said that "a different problem would be presented" if the union funds were used for purposes "not germane to collective bargaining." *Id.* at 235. That "different problem" was presented in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), in which the Court construed the RLA to deny the union the authority to spend dissenting members' funds to support causes to which those employees object.

Following on the heels of *Keller*, the Court in *Lehnert* addressed another First Amendment challenge to the Michigan labor statute that was at issue in *Abood*, this time considering whether a series of specific expenditures were germane to the collective bargaining purpose of a teachers' union. *Lehnert*, 500 U.S. at 519. The Court found that the local union could charge objecting employees for their pro rata share of the costs associated with the activities of the state and national affiliates — even where those activities did not directly benefit the local members — as long as the expenses were otherwise germane to the union's collective bargaining role. *Id.* at 522. Accordingly, the Court permitted the union to charge employees for expenses such as those incurred through the participation of local delegates in the state or national union conventions, where bargaining strategies were discussed. *Id.* at 530.[5]

B. *Funding Student Groups To Support A Forum For The Diverse Expression Of Ideas Is Germane To the Significant Governmental Interest In Providing Post-Secondary Education.*

Creating an environment that encourages free, robust, and wide-open discussion and debate is not only germane to the mission of institutions of higher education; it is essential. And the funding of a broad array of student groups on a

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[5] More recently, the Court has recognized in the context of commercial speech, rather than political or ideological speech, the ability of government entities to compel the funding of speech when it is germane to a legitimate governmental interest. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, ---, 117 S. Ct. 2130, 2140 (1997). In *Wileman Bros. & Elliott,* even the dissent recognized that *Abood* stands for the proposition that if the government has "important[] and legitima[te]" interests, it may be permissible to have "incidental infringements of the [objecting member"] interests in unfettered speech and association." *Id.* at 2145-46 (Souter, J., dissenting).

content-neutral basis is certainly germane to fostering such an open forum.

1. *The State of Wisconsin has a significant governmental interest in providing post-secondary education.*

The Court has repeatedly recognized the government's special role as educator. That "special role" stems from the government's obligation to prepare "individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Indeed, the "Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs." *Board of Educ. v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring). It is for this reason the Court recognized in its landmark desegregation decisions that an education that encourages students to "engage in discussions and exchange views with other students," *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950), is "the very foundation of good citizenship," *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

Recognizing the importance of post-secondary education, Wisconsin has adopted what is referred to as the "Wisconsin Idea," the concept that "[t]he boundaries of the university are the boundaries of the state."[6/] The Wisconsin Idea is reflected in the legislature's mission statement for the University of Wisconsin System:

[6/] The author of this quote is unknown, although former President of the University of Wisconsin Charles R. Van Hise and former Dean of Extension Louis Reber "made similar remarks. Robert H. Foss, [a] former editor of the University's Press Bureau, . . . has claimed credit for the expression, but his claim cannot be verified." Jack Stark, *The Wisconsin Idea: The University's Service to the State*, *in* State of Wisconsin Blue Book 1995-1996, at 101-02 (1995 Joint Comm. on Legisl. Organization, Wisconsin Legislature).

> The mission of the [University of Wisconsin] system is to 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. Basic to every purpose of the system is the search for truth.

Wis. Stat. § 36.01(2) (1992). Like other public colleges and universities, the University of Wisconsin lays the foundation for good citizenship by creating an environment that encourages civic engagement and the free and open discussion of ideas.

2. *The content-neutral funding of hundreds of student groups is germane to the University's interest in providing a post-secondary education.*

The parties stipulated in the district court that the "process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion." Pet. for Cert. at 106a. The germaneness inquiry must therefore address whether Wisconsin's funding of these student organizations of diverse political, cultural, ideological, and religious affiliations is germane to the legitimate governmental purpose of providing post-secondary education.

Perhaps more than any other institutions in our society, our colleges and universities serve as the meeting grounds for the airing of diverse viewpoints and the focal point for spirited, intellectual debate. The legitimacy of the

governmental interest in providing an open forum for the expression of diverse views resonates in several of the Court's recent decisions involving the application of the First Amendment to institutions of higher education. In *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995), for example, the Court held that the exclusion of a particular viewpoint from campus debate would not only violate the First Amendment's free speech guarantee, but would undermine the very purpose of education. In the university setting, the Court explained, the government "acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger,* 515 U.S. at 836. Encouraging "free speech and creative inquiry" improves the educational experience on our nation's campuses, which are "vital centers for the Nation's intellectual life." *Id.*

The question that divided the Court in *Rosenberger* was how to reconcile the First Amendment's prohibition on viewpoint discrimination with the line of Establishment Clause cases that bar direct state funding of sectarian religious activities. *Id.* at 847 (O'Connor, J., concurring). The Court's rationale for concluding that a university *could* fund a religious publication from student fees without violating the Establishment Clause was that the context of the funding — a university's broad commitment to the expression of a diverse range of ideas — should have made clear that the University of Virginia was not endorsing the religious message of the publication that received the funds. Justice Kennedy's opinion for the Court emphasized that the University's funding of the religious publication at issue did not endorse its religious teachings; the University's important interest was in realizing the academic benefits that derived from a diverse forum for expressing ideas, of which the

religious publication was but one of many.[7/] The student activity fee reflected "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.* at 840. And in citing *Healy v. James*, 408 U.S. 169, 180-181 (1972), the *Rosenberger* Court reaffirmed the principle that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[8/]

Indeed, the Court has a longstanding intolerance for any limitations on open forums in the university context. Limitations on open and spirited debate on our campuses "impose a strait jacket upon the intellectual leaders in our colleges and universities that would imperil the future of our Nation." *Keyishian v. Board of Regents,* 385 U.S. 589, 603, 605-606 (1967) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)). Further, "the Nation's future depends upon leaders trained through a wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Id.* (citations and brackets omitted); *see also Sweezy*, 354 U.S. at 263 ("A university is characterized by the

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[7/] Likewise, Justice O'Connor explained in her concurring opinion, "[t]he widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University." *Id.* at 850 (O'Connor, J., concurring).

[8/] The special treatment accorded universities is also evident in *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Court upheld the government's ability to withhold federal funding from healthcare providers that counseled abortion as a family-planning method. The Court pointed out that in the university context such conditions on funding might nonetheless violate the First Amendment because "the university is a traditional sphere of free expression so fundamental to the functioning of our society." *Id.* at 200.

spirit of free inquiry, its ideal being the ideal of Socrates — 'to follow the argument wherever it leads.' . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.").

As Justice Powell wrote in his controlling opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), universities have a need to create an environment on our nation's campuses that will foster the "robust exchange of ideas." *Id.* at 313. Quoting an article by William Bowen that discussed the admissions policies of Princeton University, Justice Powell observed that a "great deal of learning occurs informally. It occurs through interactions among students . . . who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." *Id.* at 313 n.48 (citing William Bowen, *Admission and Relevance of Race*, Princeton Alumni Weekly, Sept. 26, 1977, at 9).

Contrary to these precedents, the Court of Appeals erroneously insisted on a narrow definition of educational purpose. Specifically, the court rejected the argument advanced by the University that "funding 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," *Southworth,* 151 F.3d at 724, scoffing that "everything is in a sense educational," *id.* at 725. The Court of Appeals' narrow definition of germaneness, however, conflicts with this Court's recognition of the broad purposes of post-secondary education in decisions such as *Healy* (universities properly endeavor to create an open "marketplace of ideas"), 408 U.S. at 181, and, most recently, *Rosenberger* (recognizing that "student life in its many dimensions includes the *necessity* of

wide-ranging speech and inquiry"), 515 U.S. at 840 (emphasis added).

Apart from simply pronouncing that "germaneness cannot be read so broadly," *Southworth,* 151 F.3d at 724, the Court of Appeals has not provided any rationale to dispute that the groups funded by the student fee, whether they be political or ideological[9/] or merely social, further the State of Wisconsin's legitimate interests in post-secondary education. As the Second Circuit noted in upholding a similar funding mechanism in *Carroll v. Blinken*, 957 F.2d 991, 1001 (2d Cir. 1992), funding of such an open forum promotes "extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate [and] together [such interests] are substantial enough to justify the infringement of appellants' First Amendment right against compelled speech." That is to say, the funding of a broad array of student groups is germane to the University's purpose.

3. *The Court of Appeals improperly applied the standards in Lehnert.*

In addition to its narrow interpretation of germaneness, the Court of Appeals relied on two other standards articulated by this Court in *Lehnert*: that the activities "be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and . . . not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert,* 500 U.S. at 519. Even if these additional standards were applicable in the university setting, however, the Seventh Circuit erred in applying them here.

9/ Although groups may engage in political or ideological speech, the Board of Regents strictly prohibits the use of student fees for partisan political activity. *See* University of Wisconsin System Board of Regents Financial Policy & Procedures Paper No. 20 (June 8, 1987).

With respect to the first standard, the Court of Appeals acknowledged that "there may be a common cause in education and shared governance," but nonetheless found that the standard was not met because "there is no common cause between private organizations which engage in political and ideological speech and the objecting students." *Southworth,* 151 F.3d at 728. In *Lehnert*, the key issue was whether the programs "further[ed the] cause of harmonious industrial relations." 500 U.S. at 521. The analogy in the university context, however, is not whether the objecting students share a common cause with every goal of the groups in question. *But see Southworth*, 151 F.3d at 728. The appropriate analogy is whether funding these groups furthers the government's vital interest in educating an informed and productive citizenry. The Wisconsin legislature, the governing administrators for the University of Wisconsin System, and this Court in other cases, have concluded that the funding of diverse student activities does further this interest.

The Court of Appeals also improperly applied *Lehnert*'s free-rider analysis. The court below suggested that no free-rider problem exists because (1) non-students are permitted to participate in and benefit from the activities funded from the student fees, and (2) the organizations funded with these fees have no obligation to represent the objecting students' views. *Southworth*, 151 F.3d at 728. Neither reason is persuasive. First, the concern about free riders is not abated merely because some non-students may benefit from any particular program. A proper free-rider analysis would treat the limited public forum at issue here like any other public good, such as a public park in Madison. Even if that public park were occasionally used by nonresidents, the free-rider problem associated with creating and maintaining a public good that benefits all of Madison's residents would still exist. Second, the entire student body — including the objecting students —

benefits from the robust exchange of ideas and the diversity of viewpoints that these student groups bring to the campus, whether or not these groups represent the views of objecting students. *Cf. Bakke*, 438 U.S. at 312 (Powell, J.) (noting that a diversity of backgrounds and viewpoints add to the "'speculation, experiment and creation' . . . essential to the quality of higher education").

With respect to the second standard, the Seventh Circuit found that even if funding student groups is germane to, and justified by, the public interest in education, it "significantly add[s] to the burdening of free speech that is inherent" in the context of a university community. 151 F.3d at 729. Once again, however, the court misapplied the *Lehnert* test. *Lehnert* recognized that a certain degree of "burdening of free speech . . . is inherent in the allowance of an agency or union shop," 500 U.S. at 519, but found that requiring objecting, nonunion members to support "lobbying and electoral speech" created a burden that went significantly beyond that inherent burden, *id.* at 521. The Seventh Circuit, in conclusory fashion and without any factual foundation, found that supporting political or ideological speech by the student groups must likewise create a significant burden on the objecting students. The burden on objecting students, however, is no more significant than the burden on their speech inherent in their inclusion in the university community. When their student fees indirectly support a speaker on campus that they might object to, there is no greater burden on these students' First Amendment interests than follows from their payment of tuition used to support a host of other university programs with which they may disagree. Using mandatory student fees to support student groups in a viewpoint-neutral fashion entails no more "significant burden" than they otherwise confront in choosing to be a student at a public university.

4. *Any attempted distinction between "political or ideological" speech and other speech is illusory.*

The Seventh Circuit's analysis also relies on the erroneous assumption that "political or ideological" speech can be easily distinguished from other types of speech. Although the court took pains to point out that respondents are objecting only to "political or ideological" activities[10/] of certain groups and not, for example, to student newspapers or the campus lecture series programs, *Southworth*, 151 F.3d at 721, affirmance of the decision below could wreak havoc with virtually all student activities funded by student fees.

Under the Court of Appeals' decision, public college and university administrators would be forced to decide on a case-by-case basis, possibly depending on who objects, whether a group's activities are "political" or "ideological." Even if school administrators determined that a particular group's activities were not "political" or "ideological," additional questions could be raised when that group invited a speaker to campus or included an article or editorial in its publication; speakers on campus frequently have a political message and

[10/] To the extent the objecting students suggest that lobbying activities are somehow more egregious than other forms of "political or ideological" speech by these groups, it is a distinction without constitutional significance. First, it is not clear how in a constitutional context a court can differentiate between lobbying and other political speech. Administrators on campuses across the country, and undoubtedly the courts, would be forced to consider when comments become "lobbying" as opposed to educational or merely "political," but somehow short of lobbying. Second, the objecting students are not compelled to support speech any more or less when that "political" speech is made on the University of Wisconsin-Madison campus rather than a mere mile away at the State Capitol. Groups engaged in "lobbying" provide students with real-life civic experiences and train students to work with and oversee professionals. They are upholding the Wisconsin Idea that the University and its students should be giving something back to the State by using their educational experiences to foster societal improvements.

student publications often contain political editorials. And virtually all student organizations — student newspapers and campus lecture series programs included — could be subject to the same type of review. The Seventh Circuit does not reference any, and there is no, constitutionally significant distinction between this broad range of activities and the activities the objecting students challenge here.

Furthermore, having the University determine whether every student activity is "political" or "ideological" would involve the University in precisely the type of review function based on speech content that the First Amendment prohibits. *See Rosenberger*, 515 U.S. at 828-29, 835 ("The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them.").[11/] Because the school administrators' decisions could be questioned, the courts inevitably would become embroiled in this process of reviewing student activities, with the inherent danger of imposing a "strait jacket upon the intellectual leaders in our colleges and universities [that] would imperil the future of our Nation." *Sweezy*, 354 U.S. at 250; *see also Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) (expressing a "reluctance to trench on the prerogatives of state and local educational institutions"). It is one thing for a court to determine whether particular

[11/] Indeed, the process for applying for funds might require each would-be recipient to make a prior showing to the University that its speech would be non-ideological or non-political, in effect setting up a prior restraint on access to the "metaphysical forum" created by the student activity fees. Such a prior restraint would itself be unconstitutional. *See Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (fee schedule for parade permits that required administrator to examine "the content of the message" to be conveyed was unconstitutional); *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-60 (1975).

speech or activities are germane to a specific purpose such as collective bargaining (*Abood* and *Lehnert*) or advancing the legal profession (*Keller*). It is quite another thing for a court to involve itself in determining whether particular student activities are political or ideological. The latter would be unworkable, would stifle the open marketplace of ideas on our nation's campuses, and has no constitutional basis.

II. The First Amendment Permits the University, as a Governmental Entity, to Fund Speech Without Regard to Individual Objections.

For the reasons described above, the University of Wisconsin-Madison's distribution of funds collected from student fees satisfies *Abood's* germaneness test. Whether that test is satisfied or not, however, *Abood* and its progeny are properly applied only to non-governmental organizations (such as unions in *Abood* and *Lehnert*, and a state bar association in *Keller*), and not to a public university engaging in governmental functions.

The Court consistently has held that the First Amendment is not violated when the government uses tax revenues to subsidize speech incidental to "normal governmental functions," even though particular taxpayers may object to the message that the government chooses to fund. When the government engages in speech itself, or when it pays other organizations or individuals to speak on its behalf, government need not restrict itself to funding only those messages with which every taxpayer agrees. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1992); *National Endowment for the Arts v. Finley*, 524 U.S. 569, ---, 118 S. Ct. 2168, 2179 (1998); *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 beliefs.").

Indeed, although Justice Powell concurred with the Court's opinion in *Abood* because he believed that the First Amendment required broader opt-out rights for individual employees, he nonetheless recognized that government in general — and government-funded educational institutions in particular — need not provide opt-out rights when engaged in traditional governmental activities: "Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring). In *Keller*, the Court followed Justice Powell's rationale and explicitly found *Abood* inapplicable to governmental entities when they are engaged in traditional governmental activities, *i.e.*, "the typical government official or agency." *Keller*, 496 U.S. at 12. "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." *Id.* at 12-13.

There can be no doubt that public education is a traditional governmental activity. The Court has long recognized government's important role in providing an education to prepare "individuals for participation as citizens" and to preserve "the values on which our society rests." *Ambach*, 441 U.S. at 76; *see also Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U.S. 79, 87 (1907) ("Education is one of the purposes for which what is called the police power may be exercised.") (Holmes, J.). The speech-related decisions of a public educational institution — decisions such as "a university selecting a commencement speaker . . . or a public school prescribing its curriculum" — may not be attacked by those who object to the ideas expressed, even though their tax dollars or tuition moneys are

being used to fund the speech they find objectionable. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, ---, 118 S. Ct. 1633, 1639 (1998).

Further, the student activity fee at issue here is no different from the tax revenue or tuition that the University of Wisconsin uses to fund all of its other expenditures, including faculty salaries, course offerings, lecturers, and speakers.[12/] And while some students "undoubtedly find the viewpoints of some faculty members, expressed either in the classroom or in scholarship, to be offensive," and while these viewpoints are subsidized through tuition and tax dollars, "[t]he First Amendment surely does not mandate that researchers be funded on consenting-student-by-consenting-student basis on the theory that tuition is a compelled subsidy of these researchers' speech." *Southworth*, 157 F.3d 1124, 1128 (7th Cir. 1998) (D. Wood, J., dissenting from the denial of rehearing en banc).

If it were otherwise, discussion and debate would be enfeebled and the First Amendment would be enervated:

12/ The distinction between student activity fees and general university funds may be relevant to this Court's Establishment Clause jurisprudence, which bars direct public support for sectarian religious activities. *See Rosenberger*, 515 U.S. at 841 (1995) ("Here, the disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment. This is a far cry from a general public assessment designed and effected to provide financial support for a church."). *Rosenberger* distinguished the student activity fee from "proceeds of the general [tax] assessments" as part of its Establishment Clause analysis. *Id.* at 851 (O'Connor, J., concurring); *see also id.* at 890 (Souter, J., dissenting) (noting that under the majority's analysis, "the bar against direct aid applies only to aid derived from tax revenue"). When the Establishment Clause is at issue this distinction matters because the constitutional inquiry is whether government is creating the "impression" that it is "endorsing religion." *See id.* at 841. But the distinction is irrelevant here.

> Just as these plaintiffs have a 'hit list' of organizations to which they object, other students will have their own lists. At a large and diverse university like the University of Wisconsin at Madison, some students will almost certainly object just as strongly to a Christian Coalition, or to the Federalist Society, or to the Pro-Life Action League as these plaintiffs do to WISPIRG, the Campus Women's Center, the Lesbian, Gay, Bisexual Campus Center, and the rest.

Id. at 1129. Rather than protecting free speech and the public university's unique role in society as a true "marketplace of ideas," applying *Abood* to the University of Wisconsin would effectively place a "heckler's veto" in the hands of every student who found the views of any other student to be objectionable. *Cf. Reno v. ACLU*, 521 U.S. 844, 847 (1997) (invalidating Communications Decency Act because the Act conferred "broad powers of censorship, in the form of a 'heckler's veto' upon any opponent of indecent speech").

The Court of Appeals implied that the impact on student groups of allowing this type of individual veto can be minimized though reliance on some sort of opt-out mechanism. *See Southworth*, 151 F.3d at 734. An opt-out procedure, however, is not constitutionally required. *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring). Furthermore, an opt-out scheme neglects both the importance of budgeting to student groups' overall effectiveness and the important message to the student body at large of a university community committed to an open public forum. As the Second Circuit found in *Carroll*, considering the funding of New York Public Interest Research Group ("NYPIRG") by the students at State University of New York Albany:

> Clearly, the ability of NYPIRG and other campus groups to function effectively is tied to the level of resources they can muster in support of their activities. Of equal importance is the stability and predictability the fee scheme provides . . . Viewed from the students' perspective, an alternate funding scheme would seem less likely to commit the university community to the goals of enriching campus life and promoting debate. Rather, funding would be balkanized and students would cease to be linked by a common bond to the tolerant support of all points of view.

957 F.2d at 1001-02.

Alternatively, of course, the University could eliminate the student fee altogether. But as Judge Wood observed, that would be a "perverse way indeed to safeguard the kind of free and open political and intellectual debate that lies at the heart of the First Amendment, and that is especially important in a university setting." *Southworth*, 157 F.3d at 1129 (D. Wood, J., dissenting). If some students object to the ideas expressed by other students in the University's public forum, the proper remedy cannot be to restrict access to the forum or to eliminate the forum altogether. As Justice Brandeis observed over seventy years ago, the remedy to be applied is not silence but "more speech." *Whitney v. California,* 271 U.S. 357, 377 (1927) (Brandeis, J., concurring).

III. The University of Wisconsin's Allocation of Student Fees Does Not Compel Speech or Association.

Another reason not to apply *Abood* and its progeny here is that the University's allocation of student fees cannot reasonably be equated with compelling an objecting student's speech or association in violation of the First Amendment.

The Court of Appeals offers up the oft-quoted bromide that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Southworth*, 151 F.3d at 730 (quoting *Abood*, 431 U.S. at 234 n.31 (quoting Irving Brant, *James Madison: The Nationalist* 354 (1948))). In fact, "Americans often have money extracted from them and used to promote objects which they ideologically oppose. The most obvious example is the taxpayer." Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L. Rev. 3, 26 (1984). Almost as obvious an example is the student whose tuition money and activity fees may be used to pay the salaries of professors who teach what he does not believe, to fund research whose goals he does not share, or to pay lecturers whose speech he cannot abide.

These exactions do not violate the First Amendment's proscription against compelled affirmation or association. No one could mistake the payment of taxes or tuition — or of the student activity fees at issue here — as a compelled endorsement of views that a taxpayer or student may find objectionable. Unlike the plaintiffs in *Abood* and *Keller*, who were compelled to fund specific messages espousing only the organization's point of view, the objecting students here are not being compelled to fund any particular organization's message. Instead, their student activity fees are used to fund a neutral forum that allows myriad points of view to be debated and discussed. And unlike the plaintiffs in *Abood* and *Keller*, who could not use the organization's funds to subsidize viewpoints in opposition to those paid for by their organizations, the objecting students here have the right to apply to the ASM for funds to promote their own viewpoints in the forum created by the University. As Judge Wood noted in her dissent from the denial of rehearing en banc, the court

below wrongly classified the student activity fee as "a compelled subsidy of speech itself, rather than a compelled subsidy of a neutral forum for speech." *Southworth*, 157 F.3d at 1128 (D. Wood, J., dissenting).

Judge Wood's characterization of the student activity fees is firmly rooted in this Court's First Amendment jurisprudence. *Rosenberger* is grounded on the very principle that a university may use public funds to support student groups precisely because the use of funds cannot be perceived as an endorsement — whether by the University or of its students — of the ideology or beliefs of a particular recipient of university funds; instead, disbursements from the student activity fee reflect "the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission." *Rosenberger*, 515 U.S. at 840. The views expressed by WISPIRG and other groups that respondents find objectionable "will not likely be identified" with respondents and they "are free to publicly dissociate themselves from the views" expressed by WISPIRG and other student groups. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (holding that a state constitution requiring owners of private shopping centers to permit "speech and petitioning" on their premises did not violate their First Amendment rights against compelled speech and association). In these circumstances, respondents have been compelled neither to espouse views they do not hold, nor to associate with groups whose views they do not share.

The absence of compelled speech is also reflected in the breadth and neutrality of the student government's funding of student groups with the student fees. The moneys are used to fund the speech of a multitude of student organizations espousing a wide array of political and ideological views. And the student government allocates available funds to

student groups in a viewpoint-neutral fashion. *See* Pet. for Cert. at 100a - 112a. The structure and purpose of this arrangement is hardly surprising: "It is commonplace to require funding of a neutral forum: the taxpayers of the United States support the Mall in Washington, which is used by speakers with a virtually infinite range of viewpoints." *Southworth*, 157 F.3d at 1128 (D. Wood, J., dissenting).

As this Court held in *Rosenberger*, the collection and disbursement of these student activity fees similarly creates a public forum — perhaps "more in a metaphysical than in a spatial or geographic sense" — but a public forum nonetheless, governed by the same First Amendment principles as other public forums. *Rosenberger*, 515 U.S. at 830. The University of Wisconsin has used the student activity fees it has collected to create a "metaphysical public forum" dedicated specifically to speech activity. In these circumstances, the University may not constitutionally exclude WISPIRG — or any other student group that engages in "speech activity," regardless of whether its speech is "political" or "ideological." *See id.* (citing cases); *cf. FCC v. League of Women Voters*, 468 U.S. 364, 381-82 (1984) (holding that Congress may not require a public television station to refrain from engaging in "editorializing" as a condition for receiving public funds). To exclude groups that most actively promote speech and debate is to eviscerate all meaning from the University of Wisconsin's statutory mission.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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