No. 98-1189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

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 THE NEW YORK PUBLIC INTEREST RESEARCH GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The New York Public Interest Research Group ("NYPIRG") submits this brief as *amicus curiae*, pursuant to Supreme Court Rule 37.3(a). The consents of both the petitioners and the respondents have been obtained and are on file with this Court. NYPIRG submits its brief in support of the petitioners, the Board of Regents of the University of Wisconsin System, et al.

NYPIRG is a nonprofit, nonpartisan organization directed by New York State college and university students and has nineteen local chapters on college campuses across New York State, including campuses within the State University of New York ("SUNY") system. NYPIRG's Board of Directors is composed of elected student representatives from colleges and universities throughout the state. Part of NYPIRG's mission is to train students in the skills of citizenship and advocacy through hands-on experience. NYPIRG teaches students a variety of skills and allows them to put the learning that they receive in the classroom into practice. Students who choose to participate in NYPIRG's activities learn important skills such as research, writing, and public speaking.[2] These students also learn community organization skills and participate directly in the process of civic governance. *See generally Carroll v. Blinken*, 957 F.2d 991, 1000 (2d Cir.) (citing *Carroll v. Blinken*, 768 F. Supp. 1030, 1032 (S.D.N.Y. 1991)), *cert. denied*, 506 U.S. 906 (1992).

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] NYPIRG's activities at SUNY Albany during the 1997-98 academic year included: a campaign to improve on-campus recycling; running an environmental fair; managing a Small Claims Court Action Center; organizing a book-exchange for students; and producing consumer guides for SUNY Albany students.

Part of NYPIRG's operating budget derives from mandatory student fees collected from students on the campuses at which NYPIRG has a chapter. Dissenting students at SUNY Albany challenged NYPIRG's funding on the same grounds that respondents have challenged the funding system at the University of Wisconsin. After a trial, the district court and then the Second Circuit found that the use of mandatory fees to fund NYPIRG was constitutional. *See Carroll v. Blinken*, 957 F.2d 991, 1000 (2d Cir.), *cert. denied*, 506 U.S. 906 (1992). The funding system at the University of Wisconsin, which the Seventh Circuit found unconstitutional in *Southworth v. Grebe*, 151 F.3d 717, 719-721 (7th Cir. 1998) , *cert. granted*, 119 S. Ct. 1332 (1999), is essentially the same as the one that the Second Circuit found constitutional in *Carroll*, 957 F.2d 991.

Unlike the Seventh Circuit, the Second Circuit weighed the competing First Amendment interests of all the parties and determined that the university's and the student body's interests in fostering a diverse and unfettered marketplace of ideas outweigh the First Amendment interests of dissenting students, so long as the mandatory fee was used to support campus-based activities. That ruling strikes the proper balance between the interests of the university and objecting students. Since this rule has been in place, no student has challenged the operation of the SUNY Albany funding system and there has been no litigation as a result.

In light of its experience in addressing the same issues that are presented here—including a full trial before a district court and three separate appeals to the Second Circuit—NYPIRG believes it can provide a useful perspective on the First Amendment issues presented in this case. Additionally, because of the similarities between the funding system at the University of Wisconsin and the funding system at SUNY Albany, NYPIRG has a direct interest in the proper resolution of this case.

SUMMARY OF ARGUMENT

The Second Circuit's rulings in the *Carroll v. Blinken* litigation highlight the deficiencies of the Seventh Circuit's ruling below. The Seventh Circuit has given precedence to an individual student's objection to "political" or "ideological" speech over the university's reasons for creating a viewpoint-neutral forum for the benefit of all students at the university. The Seventh Circuit's approach jeopardizes rather than protects free speech because it allows individual students' objections to sterilize campus speech and invites a tyranny of the majority to stifle the speech of disfavored campus groups. The ruling below also intrudes insidiously on the educational judgments and prerogatives of the State of Wisconsin and its state university. Furthermore, the Seventh Circuit's holding requires the University of Wisconsin to engage in unconstitutional viewpoint-based discrimination against student groups that it deems to be engaging in "political" or "ideological" speech.

By contrast, the Second Circuit, when faced with a similar challenge, balanced the important First Amendment interests of the dissenting students, the university, and the student body as a whole and determined that the university's interests—(a) the promotion of extracurricular activities; (b) the facilitation of participatory civics training; and (c) the stimulation of robust debate—outweighed the individual students' rights to be free from compelled speech. The Second Circuit properly deferred to the educational judgment of the university, insisting only that the university ensure that a dissenting student's money be used to support campus-based activities.[3] Significantly, the Seventh Circuit issued its injunction affecting

[3] The Second Circuit later clarified that by "on campus" it did not intend to impose any geographic restrictions on the use of mandatory student fees; indeed, the term was a "convenient shorthand for referring to expenditures that further the substantial interests of SUNY Albany." *See Carroll v. Blinken*, 42 F.3d 122, 127 (2d Cir. 1994).

numerous student groups without the benefit of any record or findings that those groups' activities did not enhance the University of Wisconsin's appropriate educational interests or the limited public forum that the university designated. Again, in contrast, the Second Circuit correctly found that the university itself should determine whether the activities of a particular student group further the university's significant interests.

The Second Circuit's holdings strike the proper balance between the interests of all parties, preserve the purpose and integrity of the forum funded by mandatory student fees, and do not force the university to engage in unconstitutional viewpoint-based discrimination against student groups. Moreover, the Second Circuit offered significant protections to the First Amendment rights of the dissenting students by requiring that the activities that are funded by the mandatory fees be campus-based activities that further the educational interests of the university. The Seventh Circuit, by contrast, misapplied the "germaneness" test by analyzing whether *student groups* rather than the *activities* in which those groups engaged were germane to the university's interests.

ARGUMENT

POINT I

THE SECOND CIRCUIT'S HOLDINGS IN *CARROLL v. BLINKEN* PROPERLY BALANCE THE FIRST AMENDMENT INTERESTS AT STAKE HERE, UNLIKE THE DECISION BELOW

In deciding that SUNY Albany's mandatory fee system was constitutional, the Second Circuit struck the proper balance between competing First Amendment interests by deferring largely to the university's educational judgment while ensuring that the rights of dissenting students are adequately protected. The Second Circuit carefully considered the competing First Amendment interests at stake and found that the best means both to protect those interests and avoid the kind of viewpoint-based discrimination that this Court later found unconstitutional in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), was to allow SUNY Albany broad discretion in creating and fostering a public forum for the benefit of all SUNY Albany students. At the same time, however, the Second Circuit protected the rights of dissenting students by holding that student groups that receive funding must use those funds for campus-based activities.

A. *Carroll I*

In *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, 506 U.S. 906 (1992) ("Carroll I"), students at SUNY Albany challenged the use of their student activity fee to support NYPIRG.[4] The Second Circuit found that there were competing First Amendment interests involved and determined that those interests must be weighed against each other to determine the constitutionality of the funding mechanism. *See id.* at 995.

The Second Circuit afforded great weight to the dissenting students' First Amendment rights,[5] finding that even the small contribution that each SUNY Albany student indirectly made

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[4] In 1989, each student at SUNY Albany paid a $55.00 mandatory student fee. *Id.* at 993. This fee was then distributed to "a variety of extracurricular organizations, 'provided that the purpose and activities of the organization[s] are of [an] educational, cultural, recreational or social nature.' " *Id.*

[5] The Second Circuit possibly went too far in recognizing the dissenting students' rights to be free from compelled speech. Indeed, NYPIRG supports petitioners' argument that when a university creates a viewpoint-neutral limited public forum the infringement on dissenting students' First Amendment rights are so minimal and attenuated as not to constitute compelled speech at all.

to NYPIRG—and that NYPIRG then used for expressive activities—constituted some degree of compelled speech. *See id.* at 997. The court then noted that "it is against [the dissenting students'] right to be free of compelled speech that we weigh the university's interests in compulsion." *Id.* at 995.

In analyzing SUNY Albany's interests in funding NYPIRG, the court noted that the funding provision was "not intended to restrict free speech. On the contrary, it seeks to expand campus speech by facilitating the activities of a wide variety of speakers." *Id.* at 999. The court also determined that the university operated this limited public forum in a viewpoint-neutral manner because it did not grant or withhold funds based upon the viewpoint or content of a recipient's speech. *See id.* The court then applied a test that is used to determine the constitutionality of limited public fora and looked to "whether the regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985), and citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989); *Schad v. Mount Ephraim*, 452 U.S. 61, 69 n.7 (1981); *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

Applying this standard, the court recognized that SUNY Albany had three distinct interests in maintaining its funding system: "1) the general promotion of extracurricular activities, 2) the facilitation of what the district court called 'participatory civics training,' and 3) the stimulation of robust campus debate on a variety of public issues." *Carroll I*, 957 F.2d at 999 (citation omitted). The court then found that funding NYPIRG through mandatory student fees furthered each of these interests.

First, the court found that SUNY Albany's mandatory student fee supports a system "whereby a multitude of political, educational, social and recreational organizations receives funds" and which was intended to further "a particular and of

course 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." *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring)). The court found that the allocation to NYPIRG "is consistent with the university's desire to enrich the overall extracurricular lives of students." *Id.*

Second, the court found that SUNY Albany's interest in educating its students was furthered by NYPIRG because NYPIRG "teaches specific, concrete skills—research, speaking, writing, organization and advocacy." *Id.* Third, the court found that the most important interest that was furthered by SUNY Albany's funding of NYPIRG was the stimulation of "uninhibited and vigorous discussion on matters of campus and public concern." *Id.* The court found that

> SUNY Albany's interest in sponsoring and maintaining a thriving campus forum of vigorous advocacy and political action is itself a concern of constitutional dimensions, since a central purpose of the First Amendment is to guarantee the free interchange of views and energetic debate.

Id. at 1001 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

The court concluded that these three factors were "substantial enough to justify the infringement of [the dissenting students'] First Amendment right against compelled speech that occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG." *Id.*

Because NYPIRG has a statewide structure, the court was presented with the issue of NYPIRG's possible use of funds for activities *not* related to SUNY Albany student activities, an issue not presented in this case. The court afforded generous protection to the dissenting students' claims: "we are mindful of our duty to ensure that even incidental burdens on

[the dissenting students'] speech be narrowly drawn. . . . Hence we are unwilling to go farther than necessary to fulfill SUNY Albany's substantial interest, and do not believe that these concerns can justify NYPIRG's off campus expenditures." *Id.* at 1002 (citations omitted). The court compared NYPIRG's off campus expenditures with the union acts that are "outside the limited context of contract ratification or implementation"—or non-germane activities—in the agency shop cases. *See id.* at 1002 (citing *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519-22 (1991); *Keller v. State Bar of Cal.*, 496 U.S. 1, 12 (1990)).

Even with the generous consideration given to the individual students' objections, the Second Circuit held that SUNY Albany could constitutionally allocate dissenting students' activity fees to NYPIRG so long as NYPIRG spent the money that it received from students on campus-based activities.[6] *See id.* at 995-1003. It was later determined by the district court[7] and later on appeal that NYPIRG had complied with the court's mandate.[8] *See Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994).

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[6] The court also ruled that NYPIRG could not constitutionally define its membership as all students enrolled in the University (and therefore required to pay the student activity fees), and could extend membership only to those who actively sought it. *Carroll I*, 957 F.2d at 1003.

[7] The district court found that "NYPIRG was already in compliance with the requirement that it spend as much money at SUNY Albany as it receives in student activity fee." *See Carroll v. Blinken*, 42 F.3d 122, 125 (2d Cir. 1994).

[8] In the years between the decision in *Carroll I* and the pending *Southworth* litigation, SUNY Albany has required annual reports of NYPIRG's activities at SUNY Albany that were supported by the allocated student activity fees. No SUNY Albany student has objected to the funding of NYPIRG's activities and no litigation has been brought since *Carroll I*.

B. *Carroll II*

The holding in *Carroll I* was clarified without substantial change in *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994) ("*Carroll II*"). In *Carroll II*, the Second Circuit made clear that SUNY Albany was not required to impose a *geographic* restriction on the activities of a funded student organization—but required SUNY Albany to conduct a fact-specific inquiry to ensure that the activities of any given organization, including NYPIRG, further the "substantial interests of the university and its community that justify the curtailment of the students' First Amendment rights." *Id.* at 127 (Miner, J.). The court reiterated its unwillingness to micromanage the affairs of universities and student organizations and set forth a general standard that SUNY Albany should follow in determining whether particular activities should be funded with mandatory student fees. *See id.* at 128.

The court held that student groups could use mandatory student fees for any of the following: "(1) activities that foster a 'marketplace of ideas' on the SUNY Albany campus; (2) activities that provide SUNY Albany students with hands-on educational experiences; and (3) extra-curricular activities for SUNY Albany students, both on and off the Albany campus, that fulfill SUNY educational objectives." *See id.* at 128.

C. The Second Circuit's Holdings in *Carroll I* and *Carroll II* Strike the Proper Balance Between the Interests of All Parties

Unlike the Seventh Circuit in *Southworth*, the Second Circuit recognized this Court's tradition of "accord[ing] wide latitude to universities to define and carry out their own educational missions." *Carroll I*, 957 F.2d at 999 (citing *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978)). The Second Circuit also applied this Court's well-settled principle that colleges and universities have the right to use broad discretion in formulating their

educational mission, which includes the right to promote vigorous debate amongst the student body. *See Carroll I*, 957 F.2d at 999-1001 (citing *Widmar v. Vincent*, 454 U.S. 263, 267-68 n.5 (1981); *Healy v. James*, 408 U.S. 169, 180 (1972); *Keyishian v. Board of Regents of State of New York*, 385 U.S. 589, 603 (1967)).

Accordingly, the Second Circuit thoughtfully weighed the competing First Amendment interests of *all the parties* involved and found that the university's interests were substantial enough to justify the infringement of appellants' First Amendment rights. *See Carroll I*, 957 F.2d at 1001. This solution is superior to the Seventh Circuit's holding in *Southworth* in three important ways. First, it preserves the purpose and integrity of the limited public forum by allowing the university to foster the marketplace of ideas. Second, it protects dissenting students' First Amendment rights by ensuring that funded activities further the university's significant interests. And third, unlike the Seventh Circuit's holding in *Southworth*, it does not require the university to engage in viewpoint discrimination but allows all groups to be eligible for funding, regardless of viewpoint so long as the funded activities further the university's interests.

This result is also supported by public forum case law. The result in *Carroll I* is entirely consistent with this Court's holding three years later in *Rosenberger*, 515 U.S. 819 (1995). In *Rosenberger*, this Court found that a mandatory student activity fee similar to the one challenged in both *Carroll I* and *Southworth* created a non-traditional public forum. *See id.* at 829-30. This Court further found that a public forum created through the use of mandatory student activity fees must be administered in a content- and viewpoint-neutral manner to avoid discrimination between viewpoints, which would run afoul of the First Amendment. *See id.* at 837; *see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (holding 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 childrearing except those dealing with the subject matter from a religious standpoint").

The Second Circuit properly focused on the activities of the groups in question—rather than the groups themselves—allowing the university to foster a diverse marketplace of ideas without engaging in the type of viewpoint-based discrimination that is *required* under the Seventh Circuit's opinion in *Southworth*. *See Southworth*, 151 F.3d at 733 (requiring the University of Wisconsin to review each student organization to avoid "fund[ing] organizations which engage in political or ideological activities, advocacy, or speech").[9] The *Carroll* solution recognizes, where the *Southworth* solution does not, that requiring the university to examine and monitor each student group and then ferret out those that could conceivably engage in political or ideological speech requires the very type of state supervision and value judgment against which the First Amendment was designed to protect.[10]

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[9] *See also* 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, 1459-60 (1998) (advocating "activities-based exclusions" from the limited public forum rather than "group-based" exclusions).

[10] As Justice Brandeis wisely noted in *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring):

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through

This Court should therefore reject the analysis and conclusions of the Seventh Circuit in *Southworth* and take the Second Circuit's approach in *Carroll I* and *Carroll II* because it is more consistent with this Court's precedent and creates a workable, constitutional remedy for any potential First Amendment violations.

POINT II

THE UNIVERSITY OF WISCONSIN MAY NOT, CONSISTENT WITH THE FIRST AMENDMENT, BE REQUIRED TO DETERMINE WHICH GROUPS ENGAGE IN "POLITICAL" OR "IDEOLOGICAL" ACTIVITIES AND THEN RESTRICT FUNDING OF THOSE GROUPS FROM THE SEGREGATED FEE

The decision below mandates an unacceptable result whereby the University of Wisconsin is forced to identify, review, and refuse to fund those student organizations that engage in "political" or "ideological" speech. *See Southworth*, 151 F.3d at 735 ("We therefore hold that the Regents cannot use the allocable portion of objecting students' mandatory activity fees to fund organizations which engage in political or ideological activities, advocacy, or speech, and they are hereby enjoined from doing so."). This result *requires* that the state engage in the very type of viewpoint-based discrimination that this Court found unconstitutional in *Rosenberger*, 515 U.S. 819 (1995).

The Seventh Circuit requires that all student groups be subjected to potential exclusion from the public forum if they choose to engage (or incidentally engage) in any political or ideological speech. This result is clearly antithetical to this

public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Court's 1995 holding in *Rosenberger*. There, this Court unequivocally stated that the state may not "impose[ ] financial burdens on certain speakers based on the content of their expression." 515 U.S. at 828. By requiring universities to monitor the activities of each student organization that is eligible to receive a portion of the student activity fee, the *Southworth* remedy would leave universities with only two options: (1) to monitor each organization to ensure that students' funds are *never* used to support organizations whose speech could potentially be characterized as "political" or "ideological" by any faction of the student community; or (2) to shut down the forum in its entirety in recognition of the fact that, in any public forum, there will *always* be views with which some people disagree.

The first option, requiring the university to monitor student groups, is clearly irreconcilable with this Court's First Amendment jurisprudence and long-standing recognition of the academic freedom essential to the university community. *See, e.g., Healy v. James*, 408 U.S. 169, 180-81 (1972) ("The college classroom with its surrounding environs is peculiarly the marketplace of ideas, and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."); *Keyishian*, 385 U.S. at 603 ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"); *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

This monitoring—and viewpoint-based restriction on funding eligibility—also requires the university to oversee and make value judgments regarding the *exact point* where a student organization's speech has become "too political" or "too

ideological." *See Galda v. Rutgers*, 772 F.2d 1060, 1072-73 (3d Cir. 1985) (noting that where a group has met the objective requirements to receive funding as part of a student forum, and the state denies funding to that group "simply because the content or objectives of the group's speech are too 'political,' [it] strikes at the heart of the freedom to speak." (Adams, J., dissenting)), *cert. denied*, 475 U.S. 1065 (1986); *see also* 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, 1452-53 (May 1998) ("While the *Southworth* remedy allows 'educational' views on world events or family planning, it does not allow so-called 'political' views on the same subjects. Thus, the remedy prohibits viewpoints on subjects 'otherwise within the forum's limitations.' " (citing *Rosenberger*, 515 U.S. at 829-30)).

The second option, which would require universities to shut down the forum completely in order to satisfy the concerns of a vocal minority of student dissenters, allows the proverbial "heckler's veto" of the *public forum itself*. Such a result flies in the face of this Court's long-standing recognition that "[t]he Nation's future depends upon leaders trained through 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.' " *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943), *aff'd*, 326 U.S. 1 (1945)). And, as this Court noted in *Rosenberger*:

> If the topic of the debate is, for example, racism, then exclusion of several views on the problem is just as offensive to the First Amendment as exclusion of only one. *It is as objectionable to exclude both* a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.

517 U.S. at 831 (emphasis added). The remedy imposed by the *Southworth* court could easily devolve into just the type of universal exclusion of controversial ideas that was specifically denounced in *Rosenberger*. In addition, the remedy mandated below impedes the university's First Amendment interest in funding a forum robust with opposing viewpoints.

POINT III

THE LOWER COURT MISAPPLIED THE "GERMANENESS" TEST BY FOCUSING ON WHETHER PARTICULAR STUDENT GROUPS WERE GERMANE TO THE UNIVERSITY'S INTERESTS AS OPPOSED TO THE ACTIVITIES IN WHICH THOSE GROUPS ENGAGED

The court below analyzed respondents' claim by applying its own version of "germaneness analysis," *Southworth*, 151 F.3d at 723, to determine whether the segregated fee was constitutionally permissible. The court used a version of the three-part test set forth in *Lehnert*, 500 U.S. at 519 (finding that to justify the infringement on non-union workers' First Amendment rights in an agency shop, "*chargeable activities* must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." (emphasis added)). The *Southworth* court then found that the use of the segregated fee to support "political" or "ideological" *student groups* independently failed each of the three parts of the *Lehnert* test and therefore violated the dissenting students' First Amendment rights. *See Southworth*, 151 F.3d at 729.

The court radically misinterpreted the *Lehnert* test by applying it to *student groups* as opposed to the *chargeable*

activities in which those student groups engaged.[11] *See Southworth*, 151 F.3d at 725 ("germaneness cannot be read so broadly as to include forced funding of *private political and ideological groups*" (emphasis added)). The Seventh Circuit examined whether *private political and ideological groups* were themselves germane to the university's mission.[12] Under the circuit court's rule, a non-union worker in an agency shop could not be compelled to contribute to the union *at all* if the union ever espoused political or ideological views with which the worker disagreed. This Court has made it clear that this is not the correct result.

The Second Circuit in *Carroll I* cited to the agency shop cases in support of the proposition that dissenting students' mandatory fees must be used for campus-based activities. *See Carroll I*, 957 F.2d at 1002. The court stated: "Students opposed to NYPIRG can be made to tolerate some compromise of their First Amendment rights when the benefits of a varied extracurricular life, hands-on civics training, and robust campus debate are all around them to approvingly take part in, actively oppose, or merely witness dispassionately firsthand." *Id.* (citing *Lehnert*, 500 U.S. at 519-22). The Second Circuit found that the agency shop cases created a limitation on the activities that a student group could engage in—specifically "off campus" activities. Insofar as NYPIRG's activities furthered the university's legitimate educational interests, i.e., were "germane," the infringement on the dissenting students' rights were found to be justified. By contrast, the Seventh Circuit never addressed whether the

[11] NYPIRG agrees with petitioners' arguments regarding the "germaneness" test.

[12] In a particularly confusing passage, the court below rejected as too "expansive" the Regents' claim that the university's interest in funding the forum was "educational." Instead of trying to narrow down an acceptable formulation of the university's interest, the court merely "reject[ed] the Regents' argument." *Id.* at 725.

activities of the eighteen student groups that were challenged furthered the University of Wisconsin's educational interests.

CONCLUSION

For all of the above reasons and the reasons set forth in petitioners' brief, this Court should reverse the decision of the Seventh Circuit in *Southworth v. Grebe*, 151 F.3d 717 (1998).

Respectfully submitted,

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