Supreme Court, U.S.
FILED
JUN 14 1999
CLERK

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 FOR PETITIONERS

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QUESTION PRESENTED

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

LIST OF PARTIES

Actual parties to the proceedings in the court of appeals were:

Michael W. Grebe, Sheldon B. Lubar, Jonathan B. Barry, John T. Benson, Brigit E. Brown, John Budzinski, Alfred S. De Simone, Lee S. Dreyfus, Daniel C. Gelatt, Kathleen J. Hempel, Ruth Marcene James, Phyllis M. Krutsch, Virginia R. Macneil, San W. Orr, Jr., Gerald A. Randall, Jr., Jay L. Smith and George K. Steil, Sr., all in their official capacities as members of the Board of Regents of the University of Wisconsin System. Michael W. Grebe, Sheldon B. Lubar, Brigit E. Brown, John Budzinski, Lee S. Dreyfus, Daniel C. Gelatt, Kathleen J. Hempel, Phyllis M. Krutsch and George K. Steil, Sr., are no longer members of the Board of Regents of the University of Wisconsin System; their positions on the Board of Regents have been filled by Patrick G. Boyle, JoAnne Brandes, Bradley D. DeBraska, Guy A. Gottschalk, Toby E. Marcovich, Frederic E. Mohs, Jose A. Olivieri and Grant E. Staszak.

Petitioners herein,

Scott Harold Southworth, Amy Schoepke, Keith Bannach, Rebecka Vander Werf, Rebecca Bretz, Kendra Fry and Jamie Fletcher.

Respondents herein.

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BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 151 F.3d 717 (CA7 1998) (Pet.-Ap. 13a-51a).[1] The Seventh Circuit's denial of the Petition for Rehearing, and the dissents therefrom, are reported at 157 F.3d 1124 (CA7 1998) (Pet.-Ap. 1a-12a).

[1]The abbreviation "J.A." identifies the indicated pages from the parties' Joint Appendix; "Pet.-Ap." refers to the Appendix to the Board of Regents' Petition for Writ of Certiorari; "R." identifies the district court docket entry by number (*see* J.A. 4-7).

The opinion of the United States District Court for the Western District of Wisconsin (Pet.-Ap. 78a-99a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 10, 1998. Petitioners filed a Petition for Rehearing With Suggestion of Rehearing En Banc, which was denied by Order dated October 27, 1998. The petition for writ of certiorari was filed on January 25, 1999, and was granted on March 29, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

> person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Stat. § 36.01(2) provides:

> 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.

Wisconsin Stat. § 36.09(5) provides:

> The students of each [University of Wisconsin system] institution or campus subject to the responsibilities and powers of the board [of regents], the president, the chancellor and the faculty shall be active participants in the immediate governance of and policy development for such institutions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. Students in consultation with the chancellor and subject to the final confirmation of the board shall have the

> responsibility for the disposition of those student fees which constitute substantial support for campus student activities. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

STATEMENT OF THE CASE

A. Background and Facts.

This case concerns whether the University of Wisconsin-Madison can collect a fee from students, in addition to tuition, to fund services for significant numbers of University of Wisconsin-Madison students and to fund the provision of resources to student groups so they can engage in expressive activity. The parties stipulated that "[t]he process for reviewing and approving allocations for funding [to student groups] is administered in a viewpoint-neutral fashion" (Stip. ¶ 12, Pet.-Ap. 106a). The student organizations' expression runs the full gamut from apolitical to primarily political, and ranges from placards, to art exhibits, to theater performances, to speeches by Nobel laureates, to urging students to let their views be known on specific legislation.

On April 2, 1996, three students attending the University of Wisconsin-Madison law school commenced this action for declaratory and injunctive relief against the Board of Regents of the University of Wisconsin System.[2] Respondents challenged the University of Wisconsin's mandatory student activity fee as compelling them to support

[2] As those students graduated, other students were added as parties.

organizations whose positions they object to, allegedly in violation of their rights of free speech, freedom of association and freedom of religion under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343(3) and (4).

The parties entered a stipulation of facts (Pet.-Ap. 100a-112a), and both sides moved for summary judgment, supplementing the stipulation with affidavit and deposition testimony. The district court granted respondents' motion and entered judgment declaring the University of Wisconsin's student fee system in violation of the First Amendment (Pet.-Ap. 74a-75a). The Board of Regents appealed to the Seventh Circuit Court of Appeals. The first appeal was dismissed for lack of jurisdiction in an unpublished decision, 124 F.3d 205 (CA7 1997), because the district court had only addressed respondents' request for declaratory relief, not their request for injunctive relief (Pet.-Ap. 66a-73a). On remand, the district court issued an injunction establishing a detailed procedure for students to opt out of payment of fees going to student groups determined to be predominantly engaged in political and ideological activities (Pet.-Ap. 61a-65a). The Board of Regents appealed a second time, challenging both the district court's declaratory and injunctive rulings. Respondents filed a cross-appeal on the injunction issue. The court of appeals vacated part of the district court's injunction, but affirmed the lower court's principal holding that the challenged fee system violated the First Amendment. 151 F.3d 717 (Pet.-Ap. 13a-51a).

The Wisconsin statutes establish a broad mission for the University of Wisconsin System. Wis. Stat. § 36.01(2). The parties stipulated that under Wis. Stat. § 36.09(5), students have primary responsibility for the formulation and review of policies concerning "student life, services and interests," and that at the University of Wisconsin-Madison, the

Chancellor has determined that "student life, services and interests" includes: (a) the registration and regulation of student organizations; (b) non-academic social, cultural and recreational programs for students; and (c) services that are initiated and operated by students (Stip. ¶¶ 2, 10; Pet.-Ap. 101a, 105a).[3] Respondents agreed that "[t]he University obviously has a primary interest in promoting good education by creating the appropriate atmosphere for exchange of ideas on campus" (Plaintiffs' Reply Br., No. 96-C-0292-S, at 6 (W.D. Wis. filed Oct. 27, 1996), R. 42). The segregated fee enables the University of Wisconsin-Madison to provide services that are initiated and operated by students (Stip. ¶ 10; Pet.-Ap. 105a), and to enrich campus and student life in ways that are distinguishable from instruction supported by tuition.

For the 1995-96 academic year, full-time students attending the University of Wisconsin-Madison were required to pay a "segregated fee" of $166.75 per semester, or $331.50 for the entire year (Stip. ¶ 5; Pet.-Ap. 102a-103a).[4] The University of Wisconsin-Madison's segregated fee consists of both an "allocable" and a "non-allocable" portion (Stip. ¶ 4; Pet.-Ap. 101a-102a). The larger of the two is non-allocable, so-called because while students have input into budgeting for non-allocable expenditures, the Chancellor has ultimate authority over them (Stip. ¶ 7; Pet.-Ap. 104a). Examples of items funded through the non-allocable category include debt

[3] As University of Wisconsin-Madison students, respondents did not challenge the policies and practices of the other twenty-five campuses of the University of Wisconsin system.

[4] The imposition of a student fee separate from tuition has a long history at the University of Wisconsin, dating from at least 1848. In 1875 the fees covered such expenses as "heating and lighting the university hall and public rooms, music, each diploma, and a matriculation fee in the law department." *The State ex rel. Priest v. The Regents of the University of Wisconsin*, 54 Wis. 159, 163-64, 11 N.W. 472 (1882). In 1949, the fees covered "admission to athletic contests, concerts, class dues, cap and gown fees, science laboratory fees, music fees, etc." 38 Op. (Wis.) Att'y Gen. 516, 518 (1949).

service, fixed operating costs of auxiliary operations, required reserves, the Wisconsin Student Union, the first and second year of the recreational sports budget and University Health Services (Stip. ¶ 9; Pet.-Ap. 105a; *see also* Stip. ¶¶ 5, 6; Pet.-Ap. 102a-104a). For the 1995-96 school year, $134.05 of a full-time student's segregated fee per semester was for non-allocable expenditures, which respondents did not challenge (J.A. 37).

The remaining portion of the 1995-96 segregated fee, $32.70 per semester, consisted of "allocable" fees (Stip. ¶¶ 5, 6; Pet.-Ap. 102a-104a). At the University of Wisconsin-Madison, the allocable category of the segregated fee supported the General Student Services Fund (GSSF), the Child Care Tuition Assistance Program, the Wisconsin Union Directorate Distinguished Lectures Series, the third year of the recreational sports budget, the Associated Students of Madison (ASM) budget, Wisconsin Student Public Interest Research Group (Wisconsin Student PIRG or WISPIRG) and the United Council (Stip. ¶ 11; Pet.-Ap. 105a-106a).

The three major categories at issue in this case are GSSF funding of student services, ASM funding of student groups and funding for the Wisconsin Student Public Interest Research Group.[5]

[5] It should be noted that partisan political activities represent one of two content-based exceptions to mandatory fee funding for student groups (UW Financial Policy and Procedure Paper No. 20 (June 8, 1987), J.A. 244-52; *see also* GSSF Policy Statement (J.A. 236-39)). The other exception, "religious in nature" (J.A. 252; *see also* GSSF Policy Statement, "*primarily* religious orientation" (J.A. 238)), would be invalid under *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). Respondents did not claim that they were members of any group that was improperly denied funding and no evidence was presented of a registered student organization having requested but being denied funding.

1. *GSSF Funding of Student Services.* "Applications to the GSSF are open to all registered student organizations, university departments or community based services" (Stip. ¶ 14, Pet.-Ap. 106a).[6] All of the allocable monies distributed from the GSSF fund are allocated through the Student Services Finance Committee, which is part of the ASM student government (Stip. ¶¶ 12, 13; Pet.-Ap. 106a). The General Student Services Fund received $13.42 per semester per student in 1995-96 (Stip. ¶ 5; Pet.-Ap. 102a-103a), which was in turn distributed as funding for "those services which provide direct, ongoing services to significant numbers of UW-Madison students" (Stip. ¶ 13; Pet.-Ap. 106a).

The service organizations receiving such GSSF funding in the 1995-96 academic year included fifteen organizations[7] only five of which were challenged by respondents, accounting for $1.75 in fees per student per semester.[8]

The Associate Dean of Students at the University of Wisconsin-Madison described the role of the organizations funded by GSSF as follows:

> During the past ten years, a number of student organizations have been formed to deliver particular services to students. Several of these service groups have applied for and received segregated fee allocations through the General Student Services Fund ("GSSF") to cover costs for staff, office rental, office supplies, etc. Legal assistance, tutoring, tenant information, and support for veterans are a few examples of these student-initiated, student-run service programs. This group of services also includes the Lesbian, Gay, Bisexual Center and the Campus Women's Center which provide information and support for LGB students and women at the University, groups that have been and may yet be targets of discrimination, attack or ignorance. For many students, these centers with their staff, small libraries, and various programs are important sources of support and serve as evidence that they are welcomed to the University community. The Madison AIDS Support Network ("MASN") is a larger community information and support organization receiving financial support from several different sources in Dane County. UW-Madison students provide segregated fee funding for additional staff to enable MASN with its county-wide responsibilities to target the University community for special efforts to provide information about AIDS to students. UW Greens and Wisconsin Student PIRG both assist students who wish to investigate environmental issues that affect the local, state, national, and international community and to consider how they might wish to become involved in seeking the resolution of the problem.

(Howard Aff. ¶ 3; J.A. 179-80).

[6] For a full list of guidelines for GSSF-funded services *see* J.A. 236-39.

[7] Thsee were: General University Tutorial Service, the Student Tenant Union, the Campus Women's Center, the UW Greens, the Lesbian, Gay, & Bisexual Center, the Community Law Office, WLHA Student Radio, SAFEride Bus, Madison AIDS Support Network, Rape Crisis Center, Men Stopping Rape and Vets for Vets (Stip. ¶ 17; Pet.-Ap. 108a).

[8] These were: Campus Women's Center ($0.47 of the segregated fees per student per semester), UW Greens ($0.10), Lesbian, Gay, & Bisexual Center ($0.30), Madison AIDS Support Network ($0.36) and United States Student Association ($0.52) (*see* Stip. ¶¶ 5, 6, 17; Pet.-Ap. 102a-104a, 108a and J.A. 37-38 for method of calculation).

Despite the stipulation that GSSF funds "those services which provide direct, ongoing services to significant numbers of UW-Madison students" (Stip. ¶ 13, Pet.-Ap. 106a), respondents repeatedly claim that the only "service" the GSSF-funded organizations offer is that "of disseminating the funded organization's viewpoints on campus" (Resp. to Cert. Pet., No. 98-1189, at 3 (filed Feb. 26, 1998)). To the contrary, while advocacy is integral to some services provided, the record shows that the GSSF-funded organizations provide important services, with political speech only a fraction of a larger range of activities. Moreover, respondents' frequently rely on disputed facts. For example, the purpose of the Campus Women's Center is "to provide a variety of women centered support services, to educate the campus community on a number of women's issues, and to serve as a resource and referral center for all students" (UW-Madison Campus Women's Center brochure, R. 34). As part of its activities, the center has offered support groups in areas such as "self-empowerment, body image & eating disorders, maintaining and establishing healthy relationships, sexuality acceptance, single motherhood, and survivors of sexual assault" (*id.*). In opposing certiorari, respondents claimed that the "Campus Women's Center worked against a bill requiring 'informed consent' from women seeking abortion" and quoted from "The Source," a newsletter published, but not written, by the Campus Women's Center (Resp. to Cert. Pet. at 3, quoting J.A. 96). Preceding the article in The Source Newsletter is a box describing the newsletter and containing a statement that "[o]pinions expressed in The Source are those of the contributors and do not necessarily reflect those of the collective" (J.A. 93). The Outreach and Volunteer Coordinator at the Campus Women's Center filed an affidavit in the district court stating that "[w]e view our newsletter as a forum for the expression of ideas important to women, regardless of which side of an issue is being supported" (Onkeles Aff. ¶ 5, J.A. 175-76), and that "[t]he Women's Center has never taken a stand on the issue of abortion. We

have actively decided not to take a stand in order to avoid alienating women from the Center" (Onkeles Aff. ¶ 7, J.A. 176).

Similarly, respondents object to funding the UW Greens, claiming that they distributed "campaign literature supporting Ralph Nader's bid for President on the Green Party ticket" and "lobbied at the state legislature on various bills dealing with mining" (Resp. to Cert. Pet. at 6). Both allegations are directly contravened by testimony under oath below. John Peck, a part-time staff person at UW Greens, filed an affidavit disputing both statements. According to Mr. Peck, "UW Greens does not prepare or distribute the literature [respondents] have provided of the Greens party. The UW Greens does have these documents in its files. If a person wants to review the UW Greens' files . . . they are welcome . . ." (Peck Aff. ¶ 7, J.A. 167). He further stated that the referenced bills "were not written on behalf of the UW Greens . . . . Representative Spencer Black contacted the groups and asked them if they wanted to join in sponsoring the bills . . . . No monies from the UW Madison student activity fee funded the co-sponsoring" of the bills (Peck Aff. ¶¶ 5, 9, J.A. 167).[9]

Under Wis. Stat. § 36.09(5), the Board of Regents has final authority to approve or disapprove the GSSF-funded allocations (Stip. ¶ 23; Pet.-Ap. 110a). The

[9] In the two instances of GSSF-funded organizations that respondents put before this Court in their Brief in Opposition to the Board of Regents' Petition for Certiorari, respondents' references to facts in the record were not to undisputed facts. If the facts concerning what expressive activity is engaged in by individual organizations are material, then they are disputed, and respondents were not entitled to summary judgment. Fed. R. Civ. P. 56. *See Hunt v. Cromartie*, 119 S. Ct. 1545, 67 U.S.L.W. 4306, 4309 (U.S. May 17, 1999) ("Summary judgment in favor of the party with the burden of persuasion, however, is inappropriate when the evidence is susceptible or different interpretations of inferences by the trier of fact.").

record below reflects that the Board of Regents exercised its authority to disapprove an allocation on only one occasion.[10]

2. *ASM Funding to Student Organizations For Expressive Activity.* Allocable feeds of $4.28 per semester in 1995-96 went to the Associated Students of Madison (ASM), the University of Wisconsin-Madison's student government (Stip. ¶ 5; Pet.-Ap. 102a-103a). ASM is democratically-elected.[11] The $4.28 funded both the operations of the ASM student government and monies to be disbursed to over 100 Registered Student Organizations (RSOs) in 1995-96 through an application and grant process. The parties stipulated that this process is viewpoint-neutral (Stip. ¶¶ 12, 18, and 25, Attach. c; Pet-Ap. 106a, 108a-109a, 111a; J.A. 39, 138-52). Registered Student Organizations can apply to ASM each year for events, operations or travel

[10] In 1991, a committee of the Board of Regents considered then-University of Wisconsin-Madison Chancellor Donna Shalala's denial of a student government grant to the Women's Transit Authority on the grounds that its employment and service practices violated federal and state statutes and University policy by discriminating on the basis of gender. The student government appealed the Chancellor's decision to the Board of Regents, which after review upheld the Chancellor's decision (J.A. 156).

[11] In fact, in 1993 respondent Southworth was elected chair of ASM's predecessor student government and officially disbanded the student government (Southworth Dep. at 36; R. 23).

grants all of which are defined in the Student Organization Handbook 1996-97 (Stip. ¶ 25, Attach. h).[12] To qualify as a Registered Student Organization, an organization must meet certain criteria, including, that it (1) be a not-for-profit group with an established organizational structure; (2) be composed mainly of students; (3) be controlled and directed by students; (4) relate to student life on campus; and (5) comply with all nondiscrimination laws and policies (Stip. ¶ 14, Pet.-Ap. 106a-107a). These requirements for RSOs apply regardless of whether the organization seeks any ASM funding.

The University of Wisconsin-Madison's Dean of Students described the importance of the role of RSOs at the University:

> As students who lead over 500 organizations at the University each year, you make invaluable contributions to the "second curriculum" (extra-curricular activities) in our community. You and your members plan and produce a wide range of programs such as movies, chess tournaments, nationally known speakers, and folk dancers. Through these events, you make a large and complex University smaller for thousands of students.

[12] The parties' stipulation provides the following description of the three funding categories: (1) *Event Grants*: "ASM funds events sponsored by Registered Student Organizations. These events must be in the Madison area and open to all University students;" (2) *Operation Grants*: "Recognizing that student organizations play a significant role in the education of UW-Madison students, ASM has established the *Operations Grant Fund* to support the ongoing organizational needs of student organizations. Printing, postage and office supplies are the major categories of funding;" and (3) *Travel Grants*: "The travel being funded must be central to the purpose of the organization" (Stip. ¶¶ 18 and 25, Attach. h; Pet.-Ap. 108a-109a, 111a; J.A. 302-03).

> You also provide opportunities for your members to develop leadership skills.

(Stip. ¶ 25, Attach. h; J.A. 253).

Over 100 Registered Student Organizations applied for and received funding in the 1995-96 academic year as part of the ASM process (Stip. ¶ 25, Attach. c; J.A. 138-52). Respondents objected to funding only twelve of the registered student organizations that received monies through this process during the 1995-96 academic year.[13] In 1995-96, less than $0.43 from each respondent's fees per semester was attributable to these challenged groups (mathematical result derived from Stip. ¶¶ 5, 25, Attach. c, *see, e.g.*, J.A. 38-39). The challenged RSOs engaged in a range of expressive activities and included some principally political speech. For example, respondents objected to speech by the International Socialist Organization (*see* Resp. to Cert. Pet. at 7-9). Respondents also singled out the Progressive Student Network's "Disorientation Manual" for criticizing petitioners before this Court, the Board of Regents, and Wisconsin's Governor, who appoints them (*id.* at 6-7). The twelve ASM-funded groups to which respondents object added the following expression to the University of Wisconsin-Madison campus: a photo exhibit of the Mexican Revolution (J.A. 218); lectures by prominent human rights or political activists from Central America, including a Nobel Peace Prize winner (J.A. 216); a lecture by a Haitian refugee (J.A. 213-14); a lecture by the late Cesar Chavez (J.A. 218); the production of several theatrical performances (J.A. 219-20); the International Socialist Organization's sponsorship of

[13] These were: Progressive Student Network; International Socialist Organization; Ten Percent Society; Amnesty International; Community Action on Latin America; La Colectiva Cultural de Aztlan; Militant Student Union of the University of Wisconsin; Student Labor Action Coalition; Student Solidarity; Student NOW (Students of National Organization for Women); MADPAC; and Madison Treaty Rights Support Group.

debates with the College Republicans and student newspaper, *The Badger Herald* (J.A. 205); and a lecture by the consulate-general of the Israeli embassy (J.A. 228). None of this expressive activity, whether or not political, was made on behalf of respondents or other students. University funding policy required an express statement to this effect (J.A. 41).

Both the funded RSOs and their allocated amounts change annually and cannot be predicted beforehand in the budgeting process of the Board of Regents or the RSOs themselves. There are over 600 RSOs and the segregated fee was a source of funding *available* to all of these organizations, although the majority of RSOs did not request any funding (*see* J.A. 255-99 for a list of RSOs). "Printing, postage and office supplies are the major categories of funding" for the ASM operations grants (Stip. ¶ 25, Attach. h at 39; Pet.-Ap. 111a; J.A. 303) and constituted the sole or major categories of ASM operations grant funding for all of the student organizations receiving such grants to which respondents object (*see* J.A. 203-04, 207-08, 210-11, 213, 215-19, 220-22, 225-29, 230-31). RSOs "receiving funding do not get cash or a lump sum payment from the ASM;" they must submit "a requisition or other appropriate business form requesting payment" (Stip. ¶ 21; Pet.-Ap. 110a). With certain exceptions not relevant here, "no money actually goes to the organization itself to pay its bills" (Stip. ¶ 21; Pet.-Ap. 110a). RSOs "can reserve University facilities for meetings and events [and] [n]onacademic space in . . . many . . . campus buildings, including recreational, athletic and outdoor campus areas" (Stip. ¶ 24; Pet.-Ap. 110a). RSOs funded by the fee come out on different sides of issues (*see*, *e.g.*, Schoepke Dep. at 17, 25, R. 22; Bannach Dep. at 21, R. 21; Stip. ¶ 25, Attach. c; J.A. 138-52). At least three respondents were members of student organizations receiving this type of funding (Bannach Dep. at 21, R. 21; Schoepke Dep. at 17, R. 22; Southworth Dep. at 6, R. 23). In addition to the twelve organizations to which respondents object, ASM funding in 1995-96 went to the

Federalist Society, the Tort Reform Debate Club, the Law Revue, the American Society of Landscape Architects, the Pre-Veterinary Association and Chi-Alpha Christians in Action (J.A. 139, 142-43, 148, 150).

In both courts below, the Board of Regents and respondents regarded the provision of these funds as creating a limited public forum for student speech. *See, e.g.*, Appellees' Br., No. 97-1001, at 26 (7th Cir. filed Mar. 17, 1997) ("[t]he students do not dispute that the University has created a public forum of funding for student groups"). The parties agreed that the funding of this forum was "viewpoint-neutral" (Stip. ¶ 12, Pet.-Ap. 106a). The Board of Regents has final authority to approve or disapprove the allocations by the student government (Wis. Stat. § 36.09(5); Stip. ¶ 22; Pet.-Ap. 110a), although no evidence was presented that any ASM allocation had been disapproved in the years under consideration (J.A. 156).

3. *Wisconsin Student Public Interest Research Group Funding.* Seventy-one cents of the 1995-96 full-time student segregated fee was allocated to Wisconsin Student Public Interest Research Group (Stip. ¶ 6; Pet.-Ap. 104a). Students directly approved funding of Wisconsin Student PIRG through a campus-wide referendum (J.A. 40), but the budget process is administered by the Student Services Finance Committee as a GSSF grant (J.A. 172). "Wisconsin Student PIRG provides training and co-curricular educational opportunities for students to become involved in issues of importance to them, through which they can gain valuable real world experience. Students may also participate in course credit internships through Wisconsin Student PIRG, under the guidelines established by the University of Wisconsin" (Schumann Aff. ¶ 4; J.A. 170). In the 1994-95 academic year, more than 1,500 students were involved with Wisconsin Student PIRG volunteer and internship programs, with more than sixty interns receiving course credit (R. 26, Bates Nos. 285, 287).

In opposing certiorari respondents claimed that "WISPIRG published a Congressional scorecard for the 1994 election in which it evaluated each candidate for the House of Representatives" and that WISPIRG asked legislators to introduce three bills to the Wisconsin Assembly to restrict mining in Wisconsin (Resp. to Cert. Pet. at 4). However, the Wisconsin Student PIRG Organizing Director testified by affidavit that "Wisconsin Student PIRG does not endorse or oppose candidates for public office and does not publish or distribute materials relating to the legislative records o[f] elected public officials" (*id.*, ¶ 11; J.A. 172). Similarly, she clarified that "Wisconsin Student PIRG does not sponsor legislation in the Wisconsin State Legislature . . ." (Schumann Aff. ¶ 10; J.A. 172). She noted that Wisconsin Student PIRG is separate from Wisconsin State Public Interest Research Group, but the two have been confused because both organizations sometimes employ the same acronym, WISPIRG (Schumann Aff. ¶ 7; J.A. 171).

The Associate Dean of Students at the University of Wisconsin-Madison specifically noted that "WISPIRG especially has been effective in helping students identify projects that fit with their academic work in the classroom so that students can experience both service and learning around the same topic" (Howard Aff. ¶ 3; J.A. 180).

This allocation, like the other ASM and GSSF allocations, is submitted to the Chancellor and the Board of Regents for review and approval pursuant to Wis. Stat. § 36.09(5).

In all, respondent students objected to the funding of eighteen service and registered student organizations in the 1995-96 school year. Respondents agreed that the University of Wisconsin-Madison is not advocating a particular point of view through segregated fee funding (J.A. 39; Bannach Dep. at 13, R. 21; Schoepke Dep. at 25, R. 22). Respondents do not oppose the funding of spatial fora by the University of Wisconsin-Madison, such as providing classrooms, buildings, kiosks or bulletin boards (J.A. 39-40; Southworth Dep. at 25-28, R. 23; Bannach Dep. at 51, R. 21). Respondents do not oppose the student organizations' use of other University of Wisconsin-Madison resources, such as staff and computers with internet access, to facilitate the spread of organizations' views (J.A. 40; Southworth Dep. at 25-26, R. 23). Respondents supported the views of some funded organizations, and were even members of other organizations receiving funding (J.A. 39; Schoepke Dep. at 25, R. 22; Bannach Dep. at 29, R. 21; Southworth Dep. at 5-6, R. 23). Respondents examined with much less intensity in this litigation the expressive activities of RSOs which received funding to which they did not object or whose views they support.

B. The District Court's Decisions.

The district court described the competing interests at issue in this case as the students' "constitutional right not to be compelled to financially subsidize political or ideological activities balanced against the Board of Regents' authority to promote the university's educational mission by providing opportunities for the free expression of diverse viewpoints on difficult and challenging issues" (Pet.-Ap. 86a). The district court applied a mixed analysis with elements of a "strict scrutiny" test and a "germaneness" test (from *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) (the expenditure of compulsory union dues) and *Keller v. State Bar of California*, 496 U.S. 1 (1990) (the expenditure of compulsory bar dues)) (Pet.-Ap. 85a-91a). The district court

concluded that the funding of student organizations whose primary purpose is to advance political or ideological causes is "not germane to the university's function and accordingly not narrowly tailored to avoid the unnecessary infringement of [respondents'] First Amendment rights" (Pet.-Ap. 99a). In so doing, it substituted its judgment for that of the Wisconsin Legislature, the University of Wisconsin and the student government.

Relying principally upon *Smith v. Regents of University of Cal.*, 844 P.2d 500 (Cal. 1993), the district court concluded that the educational benefits of *some* of the student organizations challenged by respondents were incidental to their primary political or ideological purposes, and as to those groups, mandatory funding violated respondents' First Amendment rights (Pet.-Ap. 92a-93a). The court examined individual student groups and concluded that the individual group's expressive activities did not create a forum, and rejected the Board of Regents' argument that a limited public forum was being created by providing funding to a body of numerous RSOs (Pet.-Ap. 95a-97a).

As noted above, the district court's original decision addressed only declaratory relief. On remand the district court granted injunctive relief that closely tracked the procedure established by the Wisconsin Supreme Court for arbitrating objections to the Wisconsin Bar Association's expenditures (Pet-Ap. 58a-59a; *cf.* Wis. SCR 10.03(5)(b)1.-5.). That specific procedure was vacated on the Board of Regents' second appeal (Pet.-Ap. 46a-50a), and the respondents did not seek review of that portion of the court of appeals' judgment.

C. The Seventh Circuit's Decision.

The Seventh Circuit affirmed the district court's ruling that the distribution of the mandatory fee payments to the eighteen organizations violated respondents' rights of

free speech and freedom of association. Consistent with the parties' agreement that the challenged funding mechanism resulted in the creation of a non-spatial forum, the Seventh Circuit recognized that in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, "[t]he Supreme Court held that the student activity fees created a forum of money and that once established the forum had to be made available on a viewpoint-neutral basis." 151 F.3d at 722 (Pet.-Ap. 22a). It was this aspect of the funding mechanism that the court of appeals perceived as offending First Amendment principles: "[i]f the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights." *Id.* at 730 n.11 (Pet.-Ap. 40a).

In reaching this conclusion, the court of appeals looked to *Abood* and *Keller*'s standards of germane organizational speech as the general principles guiding its decision. The actual determination that the challenged fee mechanism violated the First Amendment proceeded from the court of appeals' attempt to apply the three-prong test of whether union expenditures violated objecting employees' First Amendment rights, which a majority of this Court had endorsed in *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507 (1991) (but whose application had been agreed to only by a plurality).

Upon petition for rehearing, a majority of the judges in active service on the Seventh Circuit voted to deny rehearing, but four judges voted to grant rehearing *en banc*. Judge Ilana Diamond Rovner filed an opinion dissenting from the denial of rehearing *en banc*, which was joined by Judges Diane P. Wood and Terence T. Evans. Judge Rovner wrote that "the free expression of a wide range of ideas is central to the educational mission of a university," and noted respondents' concession that the funding arrangement created a forum. 157 F.3d at 1125 (Pet.-Ap. 3a). Judge Wood also

authored a dissent, joined by Judges Rovner and Evans, writing that forum-creation analysis, rather than compelled speech analysis, provided the appropriate standard. Judge Wood recognized the validity of a compelled subsidy of a neutral forum for speech, particularly on university campuses. Like Judge Rovner, Judge Wood emphasized the broad ramifications for public universities of the court of appeals' decision. 157 F.3d at 1127 (Pet.-Ap. 61).

The Board of Regents filed a petition for certiorari seeking review of two questions raised by the Seventh Circuit's decision. This Court granted the petition limited to a question restated by the Court.

SUMMARY OF ARGUMENT

Universities have a long tradition of being centers for vigorous discourse as part of their role in preparing the leaders of tomorrow, and this tradition has never been limited to the classroom. The Board of Regents of the University of Wisconsin System has determined that an essential function of its educational mission is to encourage students to engage in the expression of ideas of interest to them, by providing a modest subsidy to facilitate expressive activity. The Board of Regents has also determined that it is essential to provide certain services to a diverse student population, which at times also involve the expression of diverse viewpoints. Accordingly, the University funds these services and expressive resources through mandatory student fees.

In providing financial resources to student organizations at the University of Wisconsin-Madison to facilitate their expressive activities, the University is creating a limited public forum, as this Court found the University of Virginia had created in *Rosenberger*. In this case, respondents, several current or former undergraduate and law students at the University of Wisconsin-Madison, do not dispute that the challenged student fees fund student services or that they result

in a *Rosenberger* forum. However, respondents contend that payment of the mandatory student fees violates their First Amendment rights of freedom of speech and association insofar as any funding goes to organizations whose views they oppose. Respondents claim a constitutional right to opt out of funding student services and the creation of a forum.

This case places before the Court the question reserved in *Rosenberger*, of whether the First Amendment requires that an objecting student be permitted to opt out of funding a limited public forum in a university setting.

The University's funding of services and its creation of a limited public forum through the distribution of mandatory student fees does not compel speech by respondents or by any other students. There can be no contention that each of the funded registered student organizations (over 100) speak on behalf of all students. There is no single organization that all students must join or that represents all students. The parties stipulated that the student groups are funded on a viewpoint-neutral basis. With respect to student services, the parties stipulated that the funded services were for the benefit of significant numbers of students at the University of Wisconsin-Madison.

Respondents do not, as a matter of constitutional mandate, enjoy the right to avoid paying for the provision of student services and the creation of a forum for robust campus debate and dialogue, any more than they enjoy the right not to pay tuition that results in courses being taught with whose content they disapprove. The funding of student services and a forum for the expression of diverse views does not offend the First Amendment. It instead furthers First Amendment values by promoting vigorous debate in an educational setting entirely suited to that discussion. The court of appeals erred when it failed to apprehend the distinction between being forced to fund a podium for all speech and being forced to fund an individual group speaking at that podium. There is no

constitutional right to opt out of funding a spatial forum, and there is no reason constitutional principles should apply differently to a non-spatial forum. Respondents can obtain funding for the expressive activities of student groups they choose to form or join. Particularly where speech is taking place at a large, public university, the First Amendment's answer to respondents' objections to the speech with which they disagree is more, not less, speech.

The outcome of this case is not dictated by the holdings in *Abood*, *Keller* and *Lehnert*. The differences between the agency-shop unions and the mandatory state bar association that were the sole voices of those objecting (thereby compelling speech), make the principles for which they stand inapposite to this University setting. In *Abood*, *Keller* and *Lehnert*, the funded speech was that of the compulsory membership organization itself—the union's own lobbying activities in the Legislature; the bar association's efforts to promote a nuclear free zone. By contrast, in the instant case, the challenged funding facilitates the speech of many groups, through a system that respondents stipulated distributes monies on a viewpoint-neutral basis.

Alternatively, if this case is properly analyzed under the germaneness tests set forth in *Abood*, *Keller* and *Lehnert*, in light of the Wisconsin Legislature's establishing of a broad educational mission for the University of Wisconsin System, and in light of the viewpoint-neutral allocation of student fees to create a forum for the expression of a multiplicity of ideas and the funding of services to a diverse student population, the challenged system is constitutional. The University should be funding services to aid its students and should be creating an educational environment for the expression of diverse viewpoints to foster vigorous debate, as part of its legislatively-established mission to "search for truth." Wis. Stat. § 36.01(2).

ARGUMENT

I. COMPELLED FUNDING OF SERVICES AND OF A LIMITED PUBLIC FORUM FOR ROBUST DEBATE IN A UNIVERSITY SETTING DOES NOT CONSTITUTE COMPELLED SPEECH OR ASSOCIATION IN VIOLATION OF THE FIRST AMENDMENT.

This Court has recognized that the First Amendment includes a right *not* to speak and a right *not* to associate in certain circumstances. *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (West Virginia law compelling public school students to salute and pledge allegiance to the United States' flag held violative of First Amendment); *Elrod v. Burns*, 427 U.S. 347 (1976) (sheriff's employees could not be compelled to support political party as condition of employment); and *Wooley v. Maynard*, 430 U.S. 705 (1977) (New Hampshire's law compelling license plate display of state's motto, "Live Free or Die," violated First Amendment rights of objecting drivers).

This Court's precedent has also recognized the unique role of universities as places for development, expression, debate and synthesis of ideas, which does not stop at the classroom door. *See, e.g., Rosenberger*, 515 U.S. at 836 ("The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment"; college and university campuses are "vital centers for the Nation's intellectual life . . . ."); *Regents of University of California v. Bakke*, 438 U.S. 265, 312 (1978) ("The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by . . . 'exposure' to the ideas and

mores of students as diverse as this Nation of many peoples."); *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("The college classroom with its surrounding environs is peculiarly the '"marketplace of ideas."'"); and *Keyishian v. Board of Regents of U. of St. of N.Y.*, 385 U.S. 589, 603 (1967) ("The 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.'").

In the present case, the speech funded by the University of Wisconsin-Madison's mandatory student fees ranges from non-political speech to political speech incidental to the provision of services, to political speech by organizations whose very purpose is political. While most speech enjoys First Amendment protections, political speech is the primary concern of the First Amendment. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

In the proceedings below, a tension was believed to exist between a university's role in promoting diverse inquiry and discourse on the one hand, and the right not to be compelled to speak or associate on the other hand. This was, however, a false dichotomy. Respondents were not required either to speak or to become members of any group, but merely to fund, along with all other students at the University of Wisconsin-Madison, a limited public forum in which all might participate.

This Court has identified three types of fora: traditional public fora (such as public parks and streets), limited or non-traditional public fora (where the government has opened up its property to public expressive use, *e.g.*, a school that has opened up its facilities for after-hours activities), and non-public fora (a forum not opened to the public or not a forum at all). *See Arkansas Educ. Television Com'n v. Forbes*, 118 S. Ct. 1633, 1641 (1998). "This Court has recognized that the campus of a public university, at least

for its students, possesses many of the characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). In *Widmar*, this Court found that the University of Missouri at Kansas City had created a limited public forum by accommodating the meetings of student groups in university buildings. *Id.* at 267. *See also Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993) (after-hours access to public school facilities constituted a limited public forum). This Court found in *Rosenberger* that a public university could create a limited public forum by providing funds to cover publication costs of student organizations. 515 U.S. at 825.

Rosenberger involved a challenge to a policy of the University of Virginia authorizing payment of printing costs of student publications, but prohibiting payment for a student publications which "'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'" 515 U.S. at 823. Holding that the viewpoint-based denial of funding transgressed the student's right of free speech, and rejecting the University's argument that funding the publications of religious student groups violated the Establishment Clause, this Court found that a public university could create a limited public forum by providing payments from a Students Activities Fund (SAF) to outside contractors for the printing costs of student group publications. 515 U.S. at 825. The Court stated that "[t]he SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable. *See, e.g. Perry Ed. Assn.[v. Perry Local Educators' Assn.*, 460 U.S. 37], 46-47[, (1983)] . . . (forum analysis of a school mail system); *Cornelius [v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788], 801[, (1985)] . . . (forum analysis of charitable contribution program)." *Rosenberger*, 515 U.S. at 830. However, the student publications themselves were not the forum.

In the present case, the ASM funding at the University of Wisconsin-Madison creates a *Rosenberger* forum. Respondents "do not dispute the University has created an open forum for funding, like the Supreme Court found that the University of Virginia had done for student publications in *Rosenberger*" (Plaintiffs' Reply Br. at 3 (W.D. Wis. filed Oct. 27, 1996), R. 42). The court of appeals also understood that in *Rosenberger*, "[t]he Supreme Court held that the student activity fees created a forum of money and that once established the forum had to be made available on a viewpoint-neutral basis." 151 F.3d at 722 (Pet.-Ap. 22a).

The facts that led this Court to find in *Rosenberger* that a forum had been created by the University of Virginia's system of funding student publications are very similar to the facts of how the segregated fees are distributed at the University of Wisconsin. The students at the University of Virginia paid a mandatory fee of $14 per semester that went to the SAF. *Rosenberger*, 515 U.S. at 824. Likewise, the students at the University of Wisconsin pay a mandatory fee each semester, a small part of which ($4.28) goes to the ASM for distribution to over 100 RSOs for operations, travel or events grants. The purpose of the SAF at the University of Virginia was to "support a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'" *Id.* This is equally true for the segregated fees at the University of Wisconsin. *See, e.g.*, J.A. 303 (ASM grants recognize the "significant role" that RSOs play "in the education of UW-Madison students"). At the University of Virginia "[t]he Student Council, elected by the students, ha[d] the initial authority to disburse the funds, but its actions [were] subject to review by a faculty body chaired by a designee of the Vice President for Student Affairs." *Rosenberger*, 515 U.S. at 824. At the University of Wisconsin, the ASM has comparable authority with oversight by the Board of Regents and University administration (Stip. ¶¶ 3, 12, 23; Pet.-Ap. 101a, 106a, 110a). The University of Virginia authorized payments from its SAF to outside contractors, called "Contracted

Independent Organizations" (CIOs), for printing costs of publications issued by student groups. *Rosenberger*, 515 U.S. at 824. At the University of Wisconsin, "[e]xcept for membership fees paid in a lump sum to WISPIRG, United Council and other multi-campus membership organizations, no money actually goes to the organization itself to pay its bills," organizations must submit requisitions (Stip. ¶ 21, Pet.-Ap. 110a). In *Rosenberger*, a CIO had to pledge not to discriminate in its membership and had to include a disclaimer in all printed materials stating that it was independent of the University. *Rosenberger*, 515 U.S. at 823. At the University of Wisconsin, RSOs likewise cannot discriminate (Stip. ¶¶ 14, 18, Pet.-Ap. 106a-109a; J.A. 41), and must include a disclaimer that the RSOs' views are not those of ASM (J.A. 34, 41). Both Virginia CIOs and Wisconsin RSOs, enjoy access to their respective university's facilities, including meeting rooms and computer terminals. *Rosenberger*, 515 U.S. at 843; (Stip. ¶ 24, Pet.-Ap. 110a; J.A. 40). In *Rosenberger*, this Court found that the "object of the SAF is 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." *Id.* at 840. As attested to by the Dean and Associate Dean of Students at the University of Wisconsin (J.A. 179, 253), and perhaps even more so by the very expression respondents have identified as objectionable (J.A. 57-79, 83-125, 130-32), the University of Wisconsin has succeeded in creating the same type of vibrant forum on its Madison campus.

In holding that the University of Virginia's funding of student publication costs created a limited public forum, the Court in *Rosenberger* explicitly reserved the question raised by this case:

> The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is

> expended for speech to which he or she does not subscribe. *See Keller* [citation omitted]; *Abood* [citation omitted].

Id. at 840. Similarly, in her concurring opinion in *Rosenberger*, Justice O'Connor wrote:

> Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. [citations to *Keller* and *Abood*]. There currently exists a split in the lower courts as to whether such a challenge would be successful.

Id. at 851 (O'Connor, J., concurring) (citations omitted). In the present case, this Court is presented with the question reserved in *Rosenberger*—whether the First Amendment requires that an objecting student be able to opt out of funding a limited public forum in a university setting.

With the question now framed by the facts relating to the University of Wisconsin's actual collection and distribution of student fees, the Board of Regents submits that the compulsory payment of a fee to establish a limited public forum for student expression and to provide services to a significant number of students is not properly regarded as compelled speech subject to the *Abood* and *Keller* standards. Both authors of the dissents from the denial of en banc rehearing below noted that the panel had erred in using a compelled speech analysis rather than a forum creation analysis. 157 F.3d at 1128 (Wood, D.P., J. dissenting) (Pet.-Ap. 10a), 157 F.3d at 1126 (Rovner, J. dissenting) (Pet.-Ap. 4a). *See also Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1038 (CA9 1999) (the funding of the Oregon Student Public Interest Research Group Education Fund was

"not a true case of compelled association"—it was of the "utmost significance that the organizational speech at issue occurs in an academic setting").

In *Abood*, petitioners challenged the mandatory dues paid to an agency-shop union, about which the Court said: "[t]he designation of a union as exclusive representative carries with it great responsibilities." 431 U.S. at 221. In *Keller*, the challenged funding went to "an 'integrated bar'—an association of attorneys in which membership and dues are required as a condition of practicing law in a State." 496 U.S. at 5. In the present case, the Board of Regents is a governing body in a way not shared by the union in *Abood* nor the bar association in *Keller*. The Wisconsin Legislature has specifically authorized the collection of student activity fees by the Board of Regents, and has directed that primary responsibility for distributing such funds be delegated to the students, in accordance with the principle of "shared governance" (Stip. ¶ 2; Pet.-Ap. 101a).

No argument was made in *Abood* and *Keller* that the expressive activities of the union and bar association in any way constituted a forum. To the contrary, the salient feature of those cases was that only a single point of view was funded, with the speech represented as that of the union or bar association members. In contrast, the student fees collected by the University of Wisconsin-Madison fund many points of view on a viewpoint-neutral basis (Stip. ¶ 12; Pet.-Ap. 106a). There is neither representation nor perception that the organizations receiving funding at the University of Wisconsin reflect the views of the University or all students. The University itself is not advocating a particular point of view, and the required disclaimers are noted in the statement of facts. Respondents agree that the funded organizations are not creating the false impression that the "objectionable groups are speaking for" them (Plaintiffs' Reply Br. at 2 (W.D. Wis. filed Oct. 27, 1996), R. 42).

The imposition of a student fee, distributed to student organizations on a viewpoint-neutral basis to facilitate their expression, is fundamentally similar to the construction of a classroom, auditorium, university mall or other university facility available to student groups for meetings, rallies or speech. The "capacity of a group or individual 'to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.'" *Widmar*, 454 U.S. at 267 n.5, quoting *Healy*, 408 U.S. at 181-82. In *Rosenberger*, this Court specifically rejected the argument that "from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not." 515 U.S. at 835. This Court held that it followed from the holdings of cases such as *Widmar* and *Lamb's Chapel* that "a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers . . . the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall." *Rosenberger*, 515 U.S. at 843 (citations omitted). For student groups on the campus of a large public university, postage, copying and office supplies, are among "the customary media for communicating with the administration, faculty members, and other students." *Healy*, 408 U.S. at 181-82 (footnote omitted).

This Court has long recognized the importance of streets and other public places as the physical fora at which much First Amendment expression takes place. *See, e.g.*, *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377 (1997). For public universities, the use of physical facilities for speech and association has been recognized to create a designated or limited public forum for attending students. *Widmar*, 454 U.S. at 267. At times, the creation of a forum will result in speech with which we disagree; at time it will result in speech that is found

loathsome. *Cf. Nat. Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam). We know of no decision of this Court, however, which has recognized a First Amendment right to opt out of funding a forum. The creation of a *Rosenberger* forum furthers First Amendment values with only an incidental and universally-shared burden on students' beliefs. Dissenting students should have no greater right to opt out of supporting this limited public forum than they would have to opt out of sharing the costs of constructing an auditorium, classroom or other public space where ideas they object to might be expressed. The fundamental First Amendment response to individual sensitivities to ideas found objectionable has always been more speech not less. That respondents are adult students choosing to enroll at a large public university, where diverse and robust expression is to be desired, encouraged and expected, hardly makes this fundamental response less appropriate. If respondents do not like what the International Socialist Organization is saying, they should obtain funding for their own student group to advance their view of the truth. As noted in our statement of facts, several of respondents have done just that and are in fact members of RSOs receiving ASM funding.

That some of the speech occurring can be regarded as political does not change this conclusion. Given the status of political speech as the central concern of the First Amendment, it is appropriate for government to establish a forum for it to take place.

Paradoxically, it was the court of appeals' recognition of *Rosenberger*'s requirement of viewpoint neutrality in the distribution of resources for student expression which caused it to perceive a violation of individual liberty. The court stated:

> under *Rosenberger* it would seem that if the university opens up funding to private organizations it must fund not only the

> Socialists and the Greens, but the Republicans, the Democrats, the KKK, Nazis, and the skinheads; the Nation of Islam, the Christian Coalition, and Catholic, Protestant, Jewish, and Islamic organizations. To others, this engenders a "crisis of conscience." For example, when a Christian campus group sought an ASM operations grant, the Ten Percent Society opposed it, contending that it would be illegal and unconstitutional to fund the proselytizing and anti-homosexual advocacy of this Christian organization.

151 F.3d at 730 n.11 (Pet.-Ap. 40a). The court of appeals concluded that "[i]f the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights." *Id.*

The Regents submit that this imperative does not arise under the First Amendment. The First Amendment is not offended by requiring politically liberal homosexual students and conservative, Christian students alike to share equally in the costs of creating a forum for the expression of each other's and all other viewpoints at the University of Wisconsin.

Indeed, this Court has held that under certain circumstances the government may require individuals to provide access to private property where to do so results in a public forum. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court held that the First Amendment rights of the owner of a private shopping center were not infringed by California's decision to recognize public rights of expression and petition in shopping centers. *Id.* at 88. In analyzing whether the owner had a "First Amendment right not to be forced by the State to use his property as a forum for the speech of others," *id.* at 85 (footnote omitted), this Court specifically

noted: (1) that the shopping center was open to the public; (2) that the views expressed by members of the public were not likely to be identified as those of the owner; (3) that no specific message was being dictated by the State of California—that there was no danger of governmental discrimination concerning a particular message; and (4) that the owner could expressly disavow any connection with the message by posting signs. *Id.* at 87.

The forum funded by student fees at the University of Wisconsin is analogous to the "forum" the owner of the shopping center was compelled to allow: (1) the University has created a forum open to all Registered Student Organizations; (2) the respondent students have admitted that the views of the groups are not likely to be considered their individual views (Plaintiffs' Reply Br. at 2 (W.D. Wis.), R. 42); and the ASM requires a disclaimer that the views of the funded organization are not the views of the student government; (3) neither the Board of Regents nor the student government is dictating a specific message—the forum was stipulated to be "viewpoint-neutral;" and (4) respondents and other students are free to form their own student groups and receive the same funding to express their views or their disagreement with the views of any other student group. The court of appeals failed to recognize that whether speech is made on behalf of a dissenting individual is part of a determination of whether there is compelled speech in the first place. 151 F.3d at 732 (Pet.-Ap. 44a) ("The Regents next argue that because the organizations do not purport to speak for all students, the First Amendment is not violated. This is irrelevant. . . . It matters not whether a third party attributes the private organization's political and ideological views to the objecting student"). In *Pruneyard*, the public policy of opening shopping centers had been established by provision of the State's constitution. Similarly, here the Wisconsin Legislature has established that learning at the University of Wisconsin is to extend beyond the classroom (Wis. Stat. § 36.01(2)), and has provided that student fees in addition to tuition be spent on campus student

activities, with students having primary responsibility for distributing the fees under the system of shared governance (Wis. Stat. § 36.09(5)). Moreover, in the present case, there is a much smaller burden on rights of conscience where all students are charged the same amount of money to create a forum than potentially existed in *Pruneyard*, where the requirement to open one's property to expressive activities burdened only those few individuals owning shopping centers or similar properties.

Student government's distribution of a portion of the student fees to organizations providing "direct, ongoing services to significant numbers of UW-Madison students" (Stip. ¶ 13, Pet-Ap. 106a), if it raises a compelled speech issue at all, also does not contravene the First Amendment. The collection of fees separate from tuition to provide student services is authorized by state statute. *See* Wis. Stat. § 36.09. As such, the expenditures are analogous to a state political subdivision's providing funding to private organizations for the provision of community services. It is not uncommon for such organizations to engage in some type of client advocacy. Nevertheless, as noted in our statement of facts, respondents' assertion that the only service the objected-to groups provide in this case consists of their political or ideological advocacy is not true; at least it is seriously disputed.

There is no recognized right to opt out of supporting government programs funded by general tax revenues on the basis of objections of conscience. *See, e.g., Lull v. C.I.R.*, 602 F.2d 1166 (CA4 1979) (rejecting religious objection to payment of taxes used to pay for war or war preparations), *cert. denied*, 444 U.S. 1014 (1980); and *Autenrieth v. Cullen*, 418 F.2d 586 (CA9 1969) (same), *cert. denied*, 397 U.S. 1036 (1970). Moreover, when government appropriates funds to promote its own message, it can generally determine the content. *See Rust*, 500 U.S. 173. Respondents' objections to funding for the service groups is largely an ideological

objection to having to support, through a system of general revenues, social welfare spending with which respondents do not agree. Whatever sympathy might be felt for this view as a matter of political ideology, funding service organizations whose purpose one does not endorse is not the equivalent under the First Amendment of compelling adherence to specific content or viewpoint. A student who is ideologically opposed to mass transit (for example, because of its perceived valuing of conformity and punctuality) would not have a constitutional right to opt out of paying the portion of the 1996-97 student fee used to provide Madison Metro bus passes to all students (J.A. 135). The same should be the case for respondents' objections to organizations like the Campus Women's Center, which addresses issues specific to women students such as gender discrimination, date rape and eating disorders, or the Madison AIDS Support Network, whose GSSF funding went to hiring additional staff to provide information about AIDS to students. Accordingly, respondents challenge to providing support for GSSF-funded service organizations should fail.

In sum, in this case, as in *Rosenberger*, the provision of funding to student groups to facilitate the expression of a broad spectrum of ideas involves "a pure forum for the expression of ideas, ideas that would be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views that principally manifest a belief in" political or ideological views. 515 U.S. at 844. Respondents are not being compelled to speak or associate, and their challenge to providing general support to the creation of a limited public forum should be rejected.

II. THE CHALLENGED STUDENT FEES ARE CONSTITUTIONAL UNDER THE GERMANENESS TESTS ESTABLISHED IN *ABOOD*, *KELLER* AND *LEHNERT*.

As noted above, when the issue in this case was reserved in *Rosenberger*, both the majority opinion and Justice O'Connor's concurrence noted the possible application of *Abood* and *Keller*. The court of appeals attempted to decide this case based on a standard articulated in *Lehnert*, that had further applied the germaneness test of *Abood* and *Keller* to specific union expenditures. Because vibrant student speech is at the core of the University of Wisconsin's mission and because the provision of student services to a diverse student body is an essential University function, expressly authorized by the Wisconsin Legislature, if the germaneness test applies, the student activity fee at the University of Wisconsin-Madison should be upheld.

Abood established a "germaneness" test for determining whether an agency-shop union could spend dissenting members' dues for the expression of political views and the advancement of ideological causes. In *Abood*, this Court held that it did not violate the First Amendment to compel "fair share" contributions by non-union members to a public sector union: "such interference 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." 431 U.S. at 222. This Court explained the boundaries of the First Amendment with respect to a union's expenditure of dues for political or ideological advocacy:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as

> collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.
>
> There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.

Id. at 235-36 (footnote omitted).

In *Keller*, this Court reaffirmed that compulsory bar dues do not impinge upon freedom of association rights, as it had held in *Lathrop v. Donohue*, 367 U.S. 820 (1961), but went on to extend *Abood's* germaneness standard to the funding of ideological and political expression made on behalf of all members. *Keller*, 496 U.S. at 13-14.

In the present case, the court of appeals attempted to follow the principles of *Abood* and *Keller* by applying the three-prong test of whether union expenditures violate objecting employees' First Amendment rights stated in *Lehnert*. Under *Lehnert*'s three-prong test, the expenditure must (1) be "germane to collective bargaining;" (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." 151 F.3d at 724, citing *Lehnert*, 500 U.S. at 519 (Pet.-Ap. 26a).

As discussed in the previous section, *Abood*, *Keller* and *Lehnert* do not provide the appropriate standard for assessing a public university's collection and distribution of student fees under the circumstances of this case. Here, there is no contention that the funded groups are speaking on behalf of respondents. In contrast, the unions and bar associations in *Abood, Keller and Lehnert* were taking positions and expressing views on behalf of all covered individuals. Here, there is no single organization to which all students must belong. In contrast, those cases involved agency-shop unions and an integrated bar. Here, there is funding of services for substantial segments of the student population and the creation of a *Rosenberger* forum through the viewpoint-neutral funding of diverse student expression. In those cases there was advocacy of only one point of view.

However, even if *Abood, Keller* and *Lehnert* control the disposition of this case, these same principled differences between the situations presented in those cases and the one presented here, combined with the unique role of a public university, both in encouraging student expression and in providing services to a diverse student body, lead to the conclusion that the funded activities are germane and that the student activity fee should therefore be upheld.

As previously discussed, this Court's precedent has long recognized the unique role of universities in encouraging expression of a wide range of opinions, including political opinions, and offering a "marketplace" of ideas. Similarly, the circuit courts that have addressed the issue of student activity fee funding have considered the creation of a forum for student expression as central to a university's role, even in those cases where the funding of a particular group was not upheld. *See, e.g., Galda v. Rutgers*, 772 F.2d 1060, 1064 (CA3 1985) (concluding that the New Jersey Public Interest Research Group's educational benefits were incidental to the organization's primarily political and ideological purpose, but distinguishing "the student activity fee [that] is used to

subsidize a variety of student groups . . . that . . . can be 'perceived broadly as providing a 'forum' for a diverse range of opinion.'"); *Carroll v. Blinken*, 42 F.3d 122, 128 (CA2 1994) (holding that student activity fees could be used for activities that foster a "marketplace of ideas" on the SUNY Albany campus); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (CA5 1992) (finding that a university's educational goals justified the subsidy of a University-sponsored newspaper because it "allows students to have first-hand journalism experience difficult to obtain otherwise" and because it "creates a forum for public discussion of University-related issues that can 'stimulate uninhibited and vigorous discussion on matters of campus and public concern.'"); *Kania v. Fordham*, 702 F.2d 475, 477 (CA4 1983) (concluding that a university's partial funding of a student newspaper through mandatory student fees was constitutional because it served "the state's legitimate interest in creating the richest possible educational environment at the University and, in its role as a forum for the expression of differing viewpoints, is a vital instrument of the University's 'marketplace of ideas.'"); *Veed v. Schwartzkopf*, 353 F. Supp. 149, 153 (D. Neb. 1973) (upholding mandatory student activity fees to fund student newspaper, student association and speakers program—"a university is not constitutionally prohibited from financing through mandatory student fees programs which provide a forum for expression of opinion, be that expression oral or written"), *aff'd mem.*, 478 F.2d 1407 (CA8 1973); and *Rounds*, 166 F.3d at 1040 n.5 (upholding funding of Oregon Student PIRG and explicitly rejecting the Seventh Circuit's holding in this case: "[t]o the extent that *Southworth* holds that a public university may not constitutionally establish and fund a limited public forum for the expression of diverse viewpoints, we respectfully disagree . . .").

Similar conclusions have been reached by state supreme courts that have considered the issue. *See Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475 (1973)

(mandatory fee funding constituted a "monetary platform" for introducing spectrum of ideas into campus, students had not shown that university prevented them from presenting their own viewpoints); *Good v. Associated Students of Univ. of Washington*, 86 Wash.2d 94, 542 P.2d 762 (1975) (mandatory fee funding held constitutional when balanced against university's purpose of posing a broad spectrum of ideas, provided expenditures were within statutory authorization); *Larson v. Board of Regents of University of Neb.*, 189 Neb. 688, 204 N.W.2d 568 (1973) (mandatory fees to fund student newspaper, student government and speaker's program held to be part of educational process; so long as many viewpoints were expressed, there was no constitutional violation); *but cf. Smith v. Regents of University of Cal.*, 844 P.2d 500 (public forum cases offer little assistance, no student group claims to be a public forum; when the educational benefits a student group offers become incidental to the group's primary objective of advancing its own political and ideological interests it cannot be funded with compulsory fees).

Consistent with this Court's precedent regarding the centrality of wide-ranging debate and inquiry to the university setting, and consistent with the decisions of lower federal courts and state supreme courts that the creation of a limited public forum for the expression by student organizations furthers a university's function, is the Wisconsin Legislature's definition of the University of Wisconsin's mission. The Wisconsin Legislature has specifically authorized the collection of student activity fees by the Board of Regents, directing that primary responsibility for distributing such funds be delegated to the students, in accordance with the principle of "shared governance," Wis. Stat. § 36.09(5). The Legislature has directed that students should formulate policies on "student life, services and interests" and that students should have "responsibility for the disposition of those student fees which constitute substantial support for campus student activities." Wis. Stat. § 36.09(5). The Wisconsin Legislature has also defined as part of the University of Wisconsin's mission the

extension of the application of knowledge beyond the classroom, even beyond the campuses. Wis. Stat. § 36.01(2).

The position that the University of Wisconsin cannot compel student funding of student services or of a non-spatial forum for expression by student groups (and the corollary that the University can only fund the services and the forum either directly or through voluntary contributions of non-objecting students (151 F.3d. at 730 n.11; Pet.-Ap. 40a)) fails to take into account the University's fundamental educational purpose. The officials appointed by the Governor of the State of Wisconsin to carry out the University's mission, namely the petitioners here, and the University chancellors and deans employed by them, have determined that the funding of student services and the provision of funding to student groups to facilitate their expression are essential to the University's attainment of these educational goals. The facts here are like those in *Rosenberger* where this Court said—"[t]he exaction here . . . is a student activity fee designed to reflect 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." 515 U.S. at 840. Part of a university's educational mission is to enlighten students to opposing views so they can learn to "think for themselves and to separate the 'wheat from the chaff.'" 157 F.3d at 1125 (Rovner, J. dissenting) (Pet.-Ap. 3a). Exposure to diverse and competing views is educational in and of itself and teaches tolerance. The Dean of the University of Wisconsin-Madison attested to the importance of RSOs, going so far as to recognize their offering of a "second curriculum" (Stip. ¶ 25, Attach. h; J.A. 253). In contrast with the Board of Regents' assessment, respondents would rather objecting students silence each other than learn from constructive discussion of ideas with which they disagree. This Court has stated that where possible, "'the remedy to be applied is more speech, not enforced silence.'" *See Texas v. Johnson*, 491 U.S. 397, 419 (1989), citing *Whitney v. People of State of California*, 274 U.S. 357, 377 (1927) (Brandies, J. concurring).

The vibrancy of campus debate and expression that results when over 100 autonomous student organizations are able to receive small operations grants to cover the costs of printing and mailing newsletters and fliers or somewhat larger events grants to sponsor outside speakers, host exhibitions, show films or present theater performances (this is precisely the speech to which respondents object), is by no means the only benefit of the challenged fee system. The students who participate in student organizations are given the opportunity to write, print and distribute newsletters, not for credit, but out of whatever intrinsic interest a group's focus has for them. As broad-ranging as the University's academic and research programs are, there are points of view that are not the subject of classroom discussions or refereed journal articles. Moreover, there is a difference between hearing a viewpoint expressed in a lecture hall and stating it for oneself in the newsletter of a student organization.

Respondent students offered no evidence to refute the academic judgment of the Board of Regents that the provision of services to a diverse student body and the creation of a limited public forum for the expression of the full range of ideas of interest to students is not merely germane, but central to the University's educational mission.[14] The district court specifically found that the University had a "compelling interest in promoting the free exchange of ideas by subsidizing the political and ideological student organizations" (Pet.-Ap. 95a). Respondents' arguments, like the district court and court of appeals' rulings, rely on the premise that the educational benefits of the content of the expressive activities of certain

[14] In fact, respondent Bannach agreed with the Board of Regents that there is "an educational value to students in being exposed to a great many ideas, even those with which they don't agree at the University" and "an educational value in providing students with the opportunity to organize student groups and to run them on their own" (Bannach Dep. at 63, R. 21.)

specific student groups are outweighed by their political or ideological purpose. Thus, the district court, relying on the California Supreme Court's analysis in *Smith v. Regents of the University of Cal.*, held the mandatory student fees unconstitutional when used to provide funding to groups "whose educational benefits to the UW-Madison campus are incidental to [their] political and ideological activities" (Pet.-Ap. 93a). The fundamental error of this position is that it looks to the expression of each particular student group, as though examining the syllabus of a particular course, instead of focusing on the fact that it is the expression of multiplicity of ideas and the opportunities afforded students to engage in that expression, which is germane. What any individual student group chooses to speak on is not the educational focus of the University of Wisconsin. In the context of a union or bar association it makes sense to examine the organization's specific expression. It does not where the "organization" collecting the fees is not speaking, but instead is offering funding to promote opportunities for expression no matter the point of view.

Respondent students' challenge to the Board's determination of what furthers the University's educational mission would thrust courts into discretionary academic decisions, forcing them to engage in student organization-by-student organization analyses of educational benefits. This would be contrary to this Court's admonitions that academic decisions should be left to those charged with overseeing a university's functions. *See, e.g., Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."). This Court's statement in *Rosenberger* of the risks of censorship inherent in a system that attempts to distinguish between student expression based on the content of the expression, applies with equal force to the system underlying the district court's and court of appeals' rulings:

> Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a [political] content. The dissent, in fact, anticipates such censorship as "crucial" in distinguishing between [student publications which may be funded and publications which may not be funded]. . . . That eventually raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of [political] orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression.

515 U.S. at 844-45.

Respondents purported distinction as to what is educational is to accept whatever is taught in courses—*i.e.*, whatever expression is funded by tuition rather than fees. Respondent Southworth candidly stated at his deposition that if the same information were given in a women's studies course and in a pamphlet by the Ten Percent Society, he would not oppose the former, but he would oppose the latter (Southworth Dep. at 23-24, R. 23). In sum, respondents would deny the possibility of any forum for debate since presumably all points of view would have detractors producing an administrative burden that would be unsustainable.

What is occurring in this case is very unlike *Abood*, *Keller* and *Lehnert*, and if occurring there might well have been sustained. The use of mandatory fees to fund services

to "significant numbers of UW-Madison students" (Stip. ¶ 13; Pet.-Ap. 106a), is analogous to a union using member dues to provide disability counseling or a bar association's funding an association for women attorneys. The other principal use of the fees is to provide resources for student expression on a viewpoint-neutral basis, an activity which is integral to a university's role. It would be unusual for a union or bar association to provide small grants to members to facilitate their own expression. But doing so would involve a burdening of conscience for dissenting members that would hardly be comparable to an organization's use of member dues to fund only its own political or ideological speech. The difference between a university's function and that of a labor union or professional association renders the financing of diverse public expression on a viewpoint-neutral basis wholly proper—that is to say, a germane method of carrying out the University's essential function of education. Accordingly, if the proper standard is the germaneness test of *Abood*, *Keller* and *Lehnert*, then the student fees challenged here should be upheld.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

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June 1999