No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

THEBOARD OF REGENTS OF THE UNIVERSITY
OF WISCONSIN SYSTEM, ET AL.,
Petitioners

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,
Respondent

BRIEF FOR RESPONDENTS

Filed August 13, 1999

QUESTION PRESENTED

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

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STATEMENT OF THE CASE

The University Requires Students to Pay the Fee

The Board of Regents requires all students enrolled at the University of Wisconsin-Madison ("University") to pay a mandatory fee, called the "segregated fee." J.A. 9. The University will not allow students to graduate or receive their grade transcripts if they refuse to pay the mandatory fee. Answer ¶ 9. Students cannot receive a refund of the portion of the fee that funds campus organizations the students find objectionable. Answer ¶ 1. Full-time students attending the University during the first semester 1995-96 school year were required to pay a fee of $331.50. J.A. 10.

The segregated fee has two parts, the allocable and the nonallocable, and many subparts. The Board of Regents prohibits the student government from controlling or directing the nonallocable fee. J.A. 13-14. The student government only directs the allocable portion of the mandatory fee. *Id.*

The students in this case ("students") objected to the requirement that they fund private campus groups. They objected specifically to funding 18 student organizations because of their opposition to the groups' political and ideological advocacy:

Amnesty International
Campus Women's Center
Community Action on Latin America
Internationalist Socialist Organization
La Colectiva de Aztlán
Lesbian, Gay Bisexual, Campus Center
Madison Treaty Rights Support Group
Madison AIDS Support Network

MADPAC
Militant Student Union
National Organization for Women (student chapter)
Progressive Student Network
Student Labor Action Coalition
Student Solidarity
Ten Percent Society
United States Student Organization
UW Greens
WISPIRG (Wisconsin Public Interest Research Group)

The student government funds these groups through three categories of the allocable fee: the General Student Services Fund ("GSSF"), the budget of the Associated Students of Madison ("ASM")(the student government) and the WISPIRG fund. J.A. 133-152.

The students have not objected to funding such things as the student health service (J.A. 133 and 135), the child care tuition assistance program (J.A. 134), the campus shuttle bus (J.A. 135), or the study center (called GUTS). J.A. 16.

The Fee Funds Less Than One-Third of Campus Groups

Most student groups at the University - at least 71% - receive no student fee money. In the 1995-96 school year, there were 623 Registered Student Groups at the University. J.A. 255. The total number of student organizations that received any fee money at all was 183, which includes some groups that are double-counted. See J.A. 16-17 (GSSF allocations) and J.A. 137-152 (ASM grants). This means that 29% of the registered student groups received funding from the fee and 71% of the student groups did not even apply for funding and operated successfully on campus without using mandatory fee money.

The segregated fee money funds the general overhead expenses of each organization receiving funding. J.A. 250-51.

Most of the campus organizations that receive mandatory fee money received ASM grants. There are four types of ASM grants. During the 1995-96 school year, ASM awarded 81 operations grants, ranging from $100.00 to $863.00, with an average grant of $382.00, J.A. 143-150; 39 last minute operations grants totaling $3,954.00, ranging from $40.00 to $175.00, with an average grant of $101.00, J.A. 150-152; 57 event grants ranging from $150.00 to $7,000.00, with an average grant of $1,279.00, J.A. 139-43 and six travel grants ranging from $150 to $400, with an average grant of $255.00. J.A. 138.

A select group of 17 campus organizations received the much larger GSSF grants, ranging from $6,905.00 to $481,673.00 each for providing services to students on campus. J.A. 16-17 and 137. Some of these were legitimate services containing no component of advocacy, such as the shuttle bus and the study center. However, the only "service" provided by many GSSF-funded groups was advocating their viewpoints to others and urging them to join their causes.

The Funded Campus Organizations Engage in Political and Ideological Advocacy

WISPIRG

The Wisconsin Public Interest Research Group (WISPIRG) received $49,500.00 from the segregated fee during the 1995-96 school year. J.A. 40 and 65. WISPIRG receives $45,000 from a direct referendum that students approved in 1993, and another $4,500 from the GSSF fee process. *Id.* There are two organizations called "WISPIRG." J.A. 171. Student WISPIRG

is the one that receives student fee money and engages in substantial political and ideological advocacy.

Student WISPIRG published candidate scorecards

The Student WISPIRG published a voters' guide called "WISPIRG's Green Voter Guide" for candidates running for the U.S. House seat, Wisconsin Second District. J.A. 76-79. Student WISPIRG attached the voter guide to its GSSF grant application in 1995-96. J.A. 65. The voters' guide gave the candidates' stands on various pieces of federal legislation, such as the National Bottle Bill (H.R. 1818 and S.818), the moratorium on new solid waste incinerators until the year 2000 (H.R. 2488) and 14 other issues. *Id.*

Student WISPIRG engaged in lobbying

In its application for University funding, Student WISPIRG boasted that "WISPIRG-generated letters, postcards, phone calls and lobbying convinced U.S. Representative Scott Klug to co-sponsor H.R. 188, a bill designed to shift one billion dollars from fossil fuel research to renewable energy research." J.A. 350. Student WISPIRG also said that it worked to support the Endangered Species Act and the National Bottle Bill introduced in Congress. J.A. 351-52.

The newsletter of Student WISPIRG repeatedly published articles chronicling its lobbying efforts at the Wisconsin Legislature on "the impacts of mining in Wisconsin." J.A. 70. Student WISPIRG also stated that it "worked with state legislators, environmental groups and other concerned citizens in an effort to promote state legislation to reform outdated mining laws and bring mining standards up to the level of other industries." J.A. 352 (emphasis added).

WISPIRG, the UW Greens and others sponsored Earth Week 1995. J.A. 21-22. In one Earth Week event, WISPIRG and the UW Greens led a march to the State Capitol to protest Governor Tommy Thompson's spending priorities by "composting" the budget, rather than using the environmentally unfriendly method of burning it. *Id.*

Student WISPIRG funded political activism by U.S. PIRG with student fee money

Student WISPIRG annually gives part of its University fee money to its parent organization, U.S. PIRG, giving $2,500 to U.S. PIRG in 1995-96. J.A. 66. WISPIRG defined U.S. PIRG as "[t]he national advocacy and research branch of the state PIRG's." *Id.* WISPIRG stated that U.S. PIRG's "[p]rofessional staff represents students in the U.S. Congress on issues such as the environment, consumer protection, and democracy." *Id.*

U.S. PIRG published extensive candidate evaluations in its voters' guide. J.A. 80-91. The voters' guide listed whether members of Congress supported or opposed the "public interest vote" on specific pieces of legislation. *Id.* Student WISPIRG used this information in its own voters' guide for Wisconsin congressional candidates. J.A. 79.

Student WISPIRG also contributed $7,828.00 of its student fee money to "PIRG Development." J.A. 66. This money pays for "national staff backup," and "[n]ational campus materials such as ... grassroots organizing manuals." *Id.* Thus, Student WISPIRG sent $10,328.00 of its $49,500 grant to national PIRG organizations for their activism.

Campus Women's Center

The Campus Women's Center received $34,200.00 from the

segregated fee during the 1995-96 school year. J.A. 24. The Campus Women's Center publishes a newsletter, called, "The Source." In its February/March 1996 issue, the editor, Jennifer Axen, wrote that "I am proud to publish the words of those who have refused to relax their integrity. The women who contributed to this issue of The Source, stand as shining examples of those who refuse to soft-pedal [sic] their voices - even when traversing the most unreceptive ground.♀" J.A. 94.

Campus Women's Center lobbied against pro-life bill

One of the articles the Campus Women's Center "was proud to publish" in that Feb./March 1996 issue, opposed Wisconsin Assembly Bill 441, the "Informed Consent Bill" on abortion:

> We must act now to block the bill. You can obtain a copy of the bill at the Legislative Reference Bureau. Familiarize yourself with its contents and get prepared to defend women's rights to reproductive choice when the bill hits the Senate floor in March. For more information or to find how you can become further involved, contact Jennifer at the Campus Women's Center: 262-8093. ♀

Cert. Pet. at 19a; J.A. 96. Although the Source carried a boilerplate disclaimer, ("Opinions expressed in The Source are those of the contributors and do not necessarily reflect those of the collective." *Id.*), the Campus Women's Center invited readers to call its phone number (J.A. 93) "to find out how you can become further involved" in the lobbying effort against the informed consent bill. The Campus Women's Center also published articles opposing legislation reforming welfare, changing family leave laws, banning same-sex marriage and feticide; and supporting legislation limiting protests at abortion

clinics. J.A. 97-105.

Campus Women's Center sponsored pro-choice art

The Campus Women's Center co-sponsored a multi-media presentation called "Wake Up Little Susie/Warnings." J.A. 335. "Wake Up Little Susie" showed the "extreme danger" women suffered without legalized abortion before *Roe v. Wade*. J.A. 340. The second presentation, "Warnings," "is the work of a Jewish feminist enraged by anti-choice propaganda equating abortion with the Holocaust and abortion-rights activists with Nazis." J.A. 24-5 and 343.

Campus Women's Center cosponsored gay film festival

The Campus Women's Center cosponsored the Third Annual Gay and Lesbian Film Festival (J.A. 25) with two other fee-funded groups, the Lesbian Gay Bisexual Campus Center and the Ten Percent Society. J.A. 107. The Festival presented various homosexual films, including one in which "[m]ilitant anti-porn feminist Bernice-Be-Good battles it out with a band of proud sex workers and their pussy-powered Kung Fu," *id.*, and "Viva Knival shows off her sex-positive attitude with a host of Fischer Price toys ..." *Id.*

UW Greens

The UW Greens received $6,905.00 from the segregated fee during the 1995-96 school year. J.A. 26.

UW Greens supported Ralph Nader for president and lobbied the Wisconsin Legislature

During the 1996 presidential campaign, the UW Greens distributed from their office campaign literature supporting

Ralph Nader's bid for President on the Green Party ticket, as well as general information about the Green Party USA, a political party. Cert. Pet. 18a. Scott Southworth obtained the campaign materials at the UW Greens literature box by its office. Second Affidavit of Scott Harold Southworth, District Court number 47 (referenced at J.A. 5). The UW Greens lobbied the state legislature in favor of three Assembly bills to limit mining in the state. J.A. 26. The UW Greens also joined WISPIRG to protest the Governor's budget priorities by marching to the state capitol and "composting" his budget. *Id.*

The UW Greens also opposed use of Bovine Growth Hormone in milk and dairy products, urged people to boycott Shell Oil and embargo Nigerian exports because of Nigeria's alleged environmental and human rights abuses, and opposed "Structural Adjustment Programs" imposed by the World Bank on poor Third World nations. *Id.*

International Socialist Organization

During the 1995-96 school year, the International Socialist Organization received an operations grant of $350.00. J.A. 27.

The International Socialist Organization promotes socialism through various debates and rallies. The organization discussed the alleged advantages of socialism over capitalism on its Internet website (J.A. 27):

> Reforms within the capitalist system cannot put an end to oppression and exploitation. Capitalism must be overthrown.

The International Socialist Organization opposed the Republicans' Contract with America, supported affirmative action, and opposed "racism, sexism and homophobia." *Id.*

Socialists disrupt church service

On April 12, 1995, the International Socialist Organization joined with others to disrupt a church service at a black church in Madison because it sponsored two speakers who oppose homosexuality. J.A. 126-129. About 400-500 demonstrators massed outside of the church, holding signs, chanting, blowing whistles, beating metal garbage can lids, etc. *Id.* The protestors chanted "Queer Mob Rule," "Two, Four, Six, Eight, We Don't Want Your Christian Hate," and "Bring Back The Lions." *Id.*

Ten Percent Society

During the 1995-96 school year, the Ten Percent Society received an ASM operations grant of $550.00. J.A. 27. The Ten Percent Society is a pro-homosexual group that works "to ensure that LGB's [lesbians, gays, and bisexuals] have a study environment free of homophobia and harassment. We envision a day when all barriers between LGB's and straight people have fallen and we can all be ourselves without fear of verbal abuse." J.A. 27-28.

Political advocacy

The Ten Percent Society has "also been active in the political arena as necessary. In the past we have struggled against homophobia in the military and on campus, we have held candidate forums for student areas, and we have gone head to head with the administration as is becoming necessary again. In the future we will continue are [sic, "our"] newly begun attempt to get domestic partner insurance by networking with as many students as are willing." J.A. 28.

The Ten Percent Society supports same-sex marriage

and opposed attempts in the Wisconsin Legislature to ban it. Appellees' App., Seventh Cir. at 154-55. The organization also condemned the Student Health Insurance Plan because it does not extend coverage to the unmarried homosexual partners of students. J.A. 355; Appellees' App., Seventh Circuit at 159-61.

Support for "coming out"

The Ten Percent Society cosponsored a Coming Out Series in October 1996 with another fee funded organization, the Lesbian, Gay, Bisexual Campus Center. The Coming Out Series was a "celebration of LGBT [lesbian, gay, bisexual, transgender] pride at the University of Wisconsin at Madison." J.A. 114. The Ten Percent Society sponsored a similar "Out and About Conference" in April 1995, which included a speech by Ann Northrop, described as the "dyke activist from hell." Appellees' App., Seventh Circuit at 153.

Opposition to evangelical Christianity

The Ten Percent Society opposed the request by an evangelical Christian campus group, Chi Alpha, for an ASM operations grant. J.A. 130-31. Chi Alpha is affiliated with the Assemblies of God Church. The Ten Percent Society condemned Chi Alpha as a "radical right-wing fundimentalist [sic] organization," J.A. 130, and argued that it was illegal and unconstitutional to fund a group that opposes homosexuality. *Id.* The Ten Percent Society lobbied the student government to reverse itself and deny funding to Chi Alpha. J.A. 132.

Other student organizations

The students also submitted evidence of other campus groups funded by the mandatory fee that engaged in political or ideological advocacy the students found objectionable:

Amnesty International J.A. 322-24.
Community Action on Latin America J.A. 30-31; 329-32.
La Colectiva Cultura de Aztlán J.A. 314-17.
Lesbian, Gay Bisexual Campus Center J.A. 22-24; 106-21.
Madison AIDS Support Network Appellees App., Seventh Circuit, 119-20.
MADPAC J.A. 33; 320-21.
Madison Treaty Rights Support Group J.A. 33-34; 318-19.
Militant Student Union J.A. 308-09.
National Organization for Women (student chapter) J.A. 33; 325-26.
Progressive Student Network J.A. 28-29; 357-58.
Student Labor Action Coalition J.A. 31-32; 310-11.
Student Solidarity J.A. 32; 312-13.
United States Student Association Appellees App., Seventh Circuit, 188-191.

The University does not dispute most of the evidence the students submitted of the political and ideological activism. engaged in by the funded campus organizations, J.A. 21-34 (statement of uncontested facts). However, the University now argues that the courts below have relied partially on inaccurate evidence about what the funded campus organizations did.

Both sides submitted this case to the District Court on cross motions for summary judgment. J.A. 4-5; Petitioners' Brief at 5. The University did not argue that there were genuine disputes over material facts, as required by Fed. R. Civ. P. 56. The District Court granted the student-plaintiffs' motion for summary judgment. Cert. Pet. at 77a-99a. The University appealed to the Seventh Circuit and petitioned this Court, but did not raise the issue that the District Court had wrongly

granted summary judgment because there were genuine disputes about material facts.

It is odd that the University now claims factual inaccuracies concerning the activities of the campus groups, because it does not make any difference in the resolution of the substantive merits of this case. Under the University's theory of the First Amendment, campus groups may use mandatory fee money for just about anything "educational," including lobbying the legislature, publishing voter guides on candidates, handing out campaign literature and more.

The student-respondents have not mischaracterized the evidence of the political and ideological activities of the funded organizations. The lower courts were not persuaded by the University's evidence of bare denials by the leaders of the funded groups offered in their affidavits, in light of the overwhelming evidence of their advocacy and activism. The University's failure to raise this issue about supposed disputed facts in the lower courts, combined with the irrelevancy of these factual disputes, makes the University's point meritless.

The Objecting Students

Three law students enrolled at the University of Wisconsin-Madison's law school filed the original complaint. Other students joined the lawsuit as the original plaintiffs graduated. J.A. 3. All of the students described themselves as Christians and as holding conservative political beliefs. J.A. 20-21.

These students believe that all students have the right to express their opinion at the University by distributing literature on campus, renting rooms at the University for speeches, lobbying the Wisconsin Legislature and the Congress, supporting and opposing political candidates, conducting

protest rallies, etc. J.A. 21. They disagree with the views expressed by some campus groups funded by the segregated fee. They believe that students should be able to attend the University without the Board of Regents requiring them to fund private campus groups that express views they oppose. *Id.*

SUMMARY OF ARGUMENT

The analysis of the University's mandatory fee system must begin with the First Amendment right not to speak. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). Government cannot compel individuals to speak or to fund the advocacy of others. The University infringes on the students' constitutional rights by compelling them to fund the political and ideological advocacy of private campus groups the students would not fund voluntarily. The University must show a compelling state interest implemented by the least restrictive means to justify the compelled funding.

The University fails the compelling state interest test because the mandatory fee is not necessary to encourage robust debate by campus organizations. Over 70% of the student groups on campus receive no funds from the mandatory fee. The University substitutes its judgment for the individual students' judgment on what private groups to support.

The existence of a nonspatial forum of money as in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) does not decide this case. *Rosenberger* addresses how student fees are distributed, and coerced fee cases like *Abood v. Detroit Board. of Education*, 431 U.S. 209 (1977) address how student fee money is collected. The Seventh Circuit's judgment should be affirmed.

I.

THE FIRST AMENDMENT PROTECTS A PERSON'S RIGHT NOT TO SPEAK AND PROHIBITS THE GOVERNMENT FROM COMPELLING INDIVIDUALS TO FUND ADVOCACY BY PRIVATE GROUPS

A. "No Coerced Funding of Others' Advocacy" Is A Basic Principle Of The First Amendment.

The analysis of the University's mandatory fee system must begin with the fundamental First Amendment principle that a person has a right not to speak. Government cannot compel individuals to speak or to fund the advocacy of others.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995), this Court stated that "[s]ince all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." This echoes the earlier statement by Justice Brennan writing for the Court in *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988), that "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *See also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) ("[I]nvoluntary affirmation c[an] be commanded only on even more immediate and urgent grounds than silence.")

This Court has applied this principle to prohibit the government from forcing individuals to convey messages against their will. In *Pacific Gas and Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), this Court struck down a California state requirement that a utility company include an unwanted flyer by a consumer activist group in its billing envelopes. In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court extended the principle to exempt objectors from displaying the New Hampshire state motto on their car licenses. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court invalidated a Florida law requiring newspapers to provide space for response by political candidates criticized by the newspaper.

The government can also violate peoples' First Amendment right not to speak by forcing them to contribute financially to private advocacy groups. This Court applied this First Amendment principle to compulsory union dues in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and ruled that the government's requirement compelling teachers to contribute to the union's political advocacy violated the teachers' First Amendment rights when the advocacy was unrelated to collective bargaining. *Abood*, 431 U.S. at 234-35.

Abood traced the foundation of the right against compelled funding to the general right of conscience that undergirds the entire First Amendment:

> For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society, one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Id. This Court has reaffirmed the *Abood* rationale in *Chicago*

Teachers Union v. Hudson, 475 U.S. 292 (1986), and *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).

This Court also extended the principle of no compelled funding of others' advocacy to mandatory bar dues in *Keller v. State Bar of California*, 496 U.S. 1 (1990). In *Keller*, this Court found unconstitutional the rule that attorneys contribute to the State Bar of California for its lobbying efforts at the legislature on political matters unrelated to "regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13.

The *Abood-Keller* line of cases root the principle of "no compelled funding of others' advocacy" in the writings of Thomas Jefferson and James Madison surrounding the legislative battle against Virginia's efforts to compel its citizens to fund the religious teachers of their choice, and the ultimate defeat of that compelled funding effort by the passage of Virginia Bill for Religious Liberty.

Patrick Henry in 1784 introduced "A Bill Establishing a Provision for the Teachers of the Christian Religion," which proposed that Virginians be forced to give money to support "a Christian teacher" but that each individual taxpayer could decide which "Christian teacher" to support with his tax money. *See Everson v. Board of Education*, 330 U.S. 1, 73 (1947); *Flast v. Cohen*, 392 U.S. 83, 106 (1968); *Flores v. City of Boerne*, 521 U.S. 507, 560 (1997) (O'Connor, J., dissenting). Although the Virginia Legislature had disestablished the Anglican Church in 1776, the debate continued whether the state could compel individuals to fund a religious teacher of their choosing. *Id.*

James Madison wrote the Memorial and Remonstrance Against Religious Assessments to oppose this bill, stating:

> the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[.]

2 The Writings of James Madison 186 (Hunt ed. 1901), quoted in *Everson*, 330 U.S. at 65-66.

The Virginia Legislature failed to pass the bill compelling funding of Christian teachers and instead passed Thomas Jefferson's Virginia Bill for Religious Liberty. *See Everson*, 330 U.S. at 11. Jefferson's bill codified Madison's sentiments from the Memorial and Remonstrance. Jefferson included this oft-quoted statement in the Bill:

> [T]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical...

Virginia Bill for Religious Liberty, quoted in *Everson*, 330 U.S. at 13.

This Court has used Madison's Memorial and Remonstrance to help interpret the entire First Amendment, including the Free Speech Clause. This controversy greatly influenced Madison's drafting of the First Amendment in Congress several years later. *Everson*, 330 U.S. at 11. In *Abood*, this Court referenced both Madison's "three pence" quote and Jefferson's "sinful and tyrannical" quote as authority to decide the compelled union dues question. *Abood*, 431 U.S. at 234 n.31. This Court also referenced these Madison and Jefferson quotes in *Keller*, 496 U.S. at 10; *Hudson*, 475 U.S. at 305 and *McGowan v. Maryland*, 366 U.S. 420, 465 (1961).

Madison and Jefferson opposed the compelled funding so vigorously because they understood that those controlling the government will tend to misuse its power to sustain their authority. Rulers can further their hegemony by forcing their citizens to fund those espousing the prevailing orthodoxies, either religious or secular. In order to guard the individual's right of conscience from government infringement, the First Amendment broadly prohibits government efforts to force unwilling citizens to contribute to the private speech of others.

B. The University Violates The Principle Of "No Compelled Funding" With Its Rule Mandating The Fee.

The University violates this foundational First Amendment principle by forcing students to contribute to a fund that gives money to various campus groups in order to further their advocacy. The Board of Regents requires all full-time students at the University to pay a mandatory fee each semester. JA-9. Students will not graduate or receive their grade transcripts if they refuse to pay the mandatory fee. Answer, ¶ 9. There is no way that students may be excused from paying the portion of the fee that funds campus groups that engage in political or ideological advocacy with which they disagree. Answer, ¶ 1.

In *Abood,* the dissenting teachers who objected to paying the mandatory union dues stated a violation of the First Amendment because the "government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Abood,* 431 U.S. at 234. Here the Board of Regents conditions a student's participation in a significant state benefit -- attendance and graduation from the state university -- on paying a fee to fund the political and ideological advocacy of private campus groups. The record is replete with examples of this advocacy by the funded campus organizations. A student who

withholds payment of the segregated fee may not graduate or receive his grade transcript, greatly hampering the student's ability to transfer to another school, seek employment, etc. Therefore, the University's compulsory fee infringes on the students' First Amendment rights.

II.

THIS COURT SHOULD USE THE COMPELLING STATE INTEREST TEST TO ANALYZE THIS CASE

A. First Amendment Violations Require Strict Scrutiny.

When the government infringes on a person's First Amendment rights, "[i]t must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). This test applies to universities. *Widmar* applied it to the University of Missouri-Kansas City's content-based exclusion of religious speakers. The compelling state interest test is the one this Court normally applies in cases involving violations of the freedom of speech, including coerced speech cases. *See, e.g., Riley v. National Federation of the Blind,* 487 U.S. at 800; *Pacific Gas & Electric Co. v. Public Utilities Commission,* 475 U.S. at 17; *Wooley v. Maynard,* 430 U.S. at 716.

B. A Compelling State Interest Must Exist To Trigger Application Of The Germaneness Test.

In the mandatory fee cases such as *Abood* and *Keller,* this Court has not stated explicitly that it was using the compelling state interest test, although that was implicitly the test used in those cases. *Abood* and *Keller* refer to a "germaneness" test.

See Abood, 431 U.S. at 235; *Keller*, 496 U.S. at 13. In *Hudson*, this Court indicated that the germaneness test is a version of the compelling state interest test:

> Infringements on freedom of association may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Hudson, 475 U.S. at 303 n.11 (internal quotation marks omitted).

The compelled funding is "germane" if it pays for the expenses related to the compelling state interest. Courts use the germaneness test to determine which expenses are chargeable to those forced to pay as essential to furthering the compelling state interest identified in the particular case, and which expenses are not chargeable to those required to pay. *See, e.g. Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991) (distinguishing between costs chargeable to all workers as collective bargaining costs and costs which are not).

Some of the lower courts addressing mandatory student fee cases have interpreted *Abood* and *Keller* as directing them to use the compelling state interest test. *See, e.g., Smith v. Regents of the University of California*, 4 Cal.4th 843, 844 P.2d 500, 16 Cal.Rptr.2d 181, 188 (1993); *Galda v. Rutgers*, 772 F.2d 1060, 1066- 68 (3rd Cir. 1985); *Carroll v. Blinken*, 957 F.2d 991, 999 (2nd Cir. 1992).

The Seventh Circuit below did not use the compelling state interest test, but its version of the "germaneness test," which it viewed as distinct from, and less rigorous than, the

compelling state interest test. However, under either test, the Seventh Circuit stated that the students prevail:

> Conversely, the plaintiffs assert that strict scrutiny is the correct standard of review. However, because the plaintiffs win under the *Lehnert* analysis, the plaintiffs cannot complain as to the standard of review. Moreover, while the *Lehnert* analysis derived by the Supreme Court from *Abood* and *Keller* appears to be the appropriate test (as recognized by *Rosenberger*), we note that the Regents' policy also cannot survive the more exacting strict scrutiny standard.

Southworth, 151 F.3d at 731 n.13; Cert. Pet. at 43a n.13. Although the students here obviously agree with the result at the Seventh Circuit, they disagree that the compelling state interest test and the germaneness test are different tests.

The Seventh Circuit used *Lehnert* to analyze this student fee case because it is the most recent case in the *Abood* line. However, *Lehnert* awkwardly fits a student fee situation, because it assumes that the government has already established a compelling state interest to uphold a forced funding requirement. *Lehnert* does not apply in this case because the University has not first demonstrated that it has a compelling state interest supporting use of the coerced funding requirement. Although the Seventh Circuit was not wrong in using *Lehnert*, this Court should analyze this case according to a straightforward compelling state interest test.

The Ninth Circuit recently added to the confusion by ruling that in the context of mandatory student fees, "strict scrutiny is not required," *Rounds v. Oregon State Board of Higher*

Education, 166 F.3d 1032, 1038 n.7 (9th Cir. 1999). The Ninth Circuit explained that "because mandatory exactions do not involve personal endorsements, such exacting scrutiny is not required," *id.*, and instead used what it perceived as a lesser standard called the "germaneness test." *Id.* The Ninth Circuit is wrong because no decision of this Court allows the government to force people to fund others' advocacy as long as it is clear that the coerced individuals do not endorse the views they are forced to fund.

Therefore, this Court should clarify that the germaneness test is a specific application of the strict scrutiny test, used when a portion of a mandatory fee is justified by a compelling state interest. The germaneness test sorts out which expenses may be charged to the unwilling contributors as necessary for furthering the compelling state interest and which expenses may not. This Court should state clearly that the germaneness test is not a more permissive standard permitting more government coercion of individuals to fund offensive speech.

C. There Is No "Free Rider" Problem In This Case, So Use of the Germaneness Test Is Unnecessary.

The students' situation at the University does not parallel the "free rider" problem that existed between the dissenting employees and the union in *Abood.* A person would be a "free rider" if he could withhold all of his dues money from the union, yet still enjoy the higher wages and increased benefits negotiated by the union. This free rider issue convinced this Court in *Abood* and *Lehnert* to uphold compelled funding of collective bargaining costs, because the union's efforts resulted in tangible, quantifiable benefits to the employee. There is no parallel "free rider" issue in this case. The Third Circuit in *Galda* agreed, ruling that the free rider situation "does not exist in the circumstances here" of Rutgers' compelled fee system

at issue in *Galda*, 772 F.2d at 1067.

The only "benefit" the student-respondents receive from the organizations they object to funding at the University is the "benefit" of having the groups tell them that their beliefs are wrong. This is nothing like the concrete benefits of increased wages employees received in *Abood.* In this case, the constitutional issue is not that the funded groups may suffer from free riders, but that students are being ideologically "run over" by those driving the mandatory fee system.

Also, there is no free rider issue here because most of the funded groups desire to convert students and others to their viewpoint through their public advocacy. Their ideological zeal motivates them to promote their beliefs and recruit others to join their cause. They are not concerned with whether everyone attending their events paid the mandatory fee, but with convincing them to adopt their views. The free rider issue legitimately at issue in *Abood* and *Keller,* has no parallel in this case. Therefore, strict scrutiny applies here.

III.

THE UNIVERSITY FAILS TO SHOW A COMPELLING STATE INTEREST DONE BY THE LEAST RESTRICTIVE MEANS

A. The University Must Show A Compelling State Interest For The Specific Mandatory Fee Requirement, Not Its General Educational Mission.

The Constitution requires the University to show a compelling state interest for the *specific mandatory fee system*, not the general educational mission of the University. This Court said so in *Wisconsin v. Yoder,* 406 U.S. 205, 221 (1972):

> We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

Although *Yoder* was a free exercise case, the Amish claim triggered strict scrutiny, which is the same test here. The University must show it has a compelling interest in forcing students to fund the political and ideological advocacy of groups the students find objectionable, and that there is no less restrictive means to accomplish this governmental interest. This the University cannot do.

B. The University Lacks a Compelling State Interest To Justify The Mandatory Fee.

The University's educational mandate may be broad, but it is constrained by the First Amendment. "We note that state colleges and universities are not enclaves immune from the sweep of the First Amendment," *Healy v. James,* 408 U.S. 169, 180 (1972). The University cannot define its educational mission so broadly that it can violate the First Amendment.

The University defines its educational mission as facilitating "exposure to diverse and competing views." Brief of

Petitioners at 42. With that rationale, the University can justify about anything in the name of education, even things that transgress the First Amendment. For example, there may be educational benefits in compelling students to attend religious chapel services, ("the homilies are informative") but the Constitution would prohibit such a compelled attendance requirement. *See, e.g., Anderson v. Laird,* 466 F.2d 283 (D.C. Cir. 1972) (rule mandating compulsory attendance at chapel services for students at the military academies is unconstitutional). It may be educational to have students recite the Pledge of Allegiance, or the Ten Commandments or the Communist Manifesto, but the University could not compel students to do so. *See West Virginia Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943). Universities may not invoke educational reasons to justify violations of students' constitutional rights. The University must implement its educational mission in a way that conforms to the Constitution.

The University's desire to use mandatory fees is also suspect because the University asserts an interest to justify it that is very similar to the basic First Amendment -- allowing differing viewpoints to compete for acceptance in the marketplace of ideas. Government generally cannot use compelled fees to promote the First Amendment, so neither should the University.

The Constitution's freedom of speech reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan,* 376 U.S. 254, 270 (1964). Justice Oliver Wendell Holmes wrote that freedom of speech operates best in a free marketplace:

> [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and [the] truth is the only ground

> upon which [the peoples'] wishes safely can be carried out.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

The university environment operates also as a marketplace of ideas. "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." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). This Court in *Healy* stated that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'" *Healy*, 408 U.S. at 180-81.

In a marketplace of ideas at a state university or elsewhere, the First Amendment prohibits government from compelling people to fund the speech of others. The reason for this is that the First Amendment leaves the ultimate decision of which ideas to accept or reject to the individual, not the state. "[A]n individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state." *Abood*, 431 U.S. at 235. Also, this Court stated:

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.

Turner Broadcasting System v. FCC, 512 U.S. 622, 641 (1994). These reflect the words of Thomas Jefferson in the Virginia

Bill for Religious Liberty that "Almighty God hath created the mind free and ... that all attempts to influence it by temporal punishments, or burthens [sic], or by civil incapacitations, tend only to beget habits of hypocrisy and meanness." *Everson*, 330 U.S. at 12-13.

By extracting money from students and distributing it to various campus groups, the University is substituting its governmental judgment for the accumulated judgment of individuals as to which ideas and groups to support, oppose, or to remain indifferent about. Even if there is educational value to a compelled funding system, it transgresses the First Amendment. "To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. National Federation of the Blind*, 487 U.S. at 791.

The University cannot excuse a compelled fee on the grounds that it is helping those advocating under-represented viewpoints by giving them needed financial assistance so they can proclaim their message more effectively. This is merely the government substituting its value judgments for those of the individual, by imposing a financial disadvantage on individuals to enhance the voices of others. This the First Amendment condemns. "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976).

The reason why the First Amendment leaves the decision of what ideas to support financially to the individual is because the decision of whom to fund is ultimately based on personal values and moral systems. Even if the University repealed all of its viewpoint-discriminatory policies restricting use of the

mandatory fee, the compelled funding system cannot ultimately be value-free and content-neutral, because University officials and the student government must use some moral or ethical yardstick to determine what groups to fund and how much they should receive. University officials and student government members will tend to fund those groups that espouse the ideas of those running the University, reinforcing their prevailing orthodoxies. At the University, the groups receiving the most money reflected were strongly liberal or left-wing, such as WISPIRG ($49,500.00); the Campus Women's Center ($34,200.00); the Lesbian, Gay, Bisexual Campus Center ($22,042.00) and the UW Greens ($6,905.00).

That is why Madison, Jefferson and the First Amendment leave such value-laden determinations about which ideas and viewpoints to support to each individual to make, rather than the government. The University distorts the natural workings of the marketplace of ideas with its selective subsidies coerced from the students.

C. The Compelled Fee System Is Not The Least Restrictive Means To Further Student Exposure To A Wide Range Of Ideas.

The University's system is not essential nor the least restrictive means to fulfill its interest that students be exposed to various competing viewpoints for the following reasons:

1. Student groups now express a wide range of viewpoints on campus without receiving any funding from the mandatory fee.

In the 1995-96 school year, at most 183 (29%) of the 623 Registered Student Groups at the University of Wisconsin-Madison received any type of funding from the mandatory fee.

That means that 71% of the student groups operated successfully on campus without using money coerced from other students.[1] It is doubtful that the organizations will wither without the mandated funding. They will simply lose the luxury of having the University do their fundraising for them.

Many nonfunded campus organizations advocate similar or the same ideas as the funded organizations. See J.A. 255-99 for various groups and a short description of their beliefs. A number of the nonfunded organizations are pro-environmentalist, support homosexual rights, feminism, abortion and socialism, just as the funded organizations do. This shows that there is significant support among the students for ideas espoused by the funded organizations. These organizations will not disappear if the funding system changes to conform to the Constitution because many students on campus support the ideas they espouse. The mandatory fee is not critical to their continued existence.

Student groups now express a broad spectrum of viewpoints at the University by holding meetings and rallies in campus buildings, distributing literature, publishing Internet websites, etc. The Constitution requires state universities to grant equal access to those facilities. *Widmar v. Vincent*, 454 U.S. 263 (1981). A financial subsidy to prop up a select subset of groups is not necessary to sustain the expression of diverse viewpoints on campus.

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[1] This is consistent with the experience at the University of Virginia at the time of *Rosenberger*. During the 1990-91 school year, only 34% of the official student groups at Virginia received funding from the mandatory student fee. "During the 1990-1991 academic year, 343 student groups qualified as [groups eligible for funding from the mandatory fee]. One hundred thirty-five of them applied for support from the SAF, and 118 received funding." *Rosenberger*, 515 U.S. at 825.

There is no long historical tradition of state universities using mandatory fees to fund activist groups. Student organizations have flourished for decades without funds from a compelled fee. Using mandatory fee money to fund political and ideological groups began during the Vietnam War era, as indicated by the explosion of litigation in the 1970's.

Before that time, state universities did not use mandatory fees to fund advocacy groups on campus. For example, in 1875, the student fee at the University of Wisconsin paid for "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 paid for "admission to athletic contests, concerts, class dues, cap and gown fees, science laboratory fees, etc." 38 Op. Wis. Att'y Gen. 516, 518 (1949). The Wisconsin Attorney General in 1974 questioned whether the University could require students to pay a mandatory fee supporting a PIRG group, which was a new development on campus. 63 Op. Wis. Att'y Gen. 385, 388 (1974). The explosion of litigation on mandatory student fees did not begin until the 1970's, with the rise of student activism on campus. Universities have no long tradition of using mandatory fees to fund campus activist groups.

2. The University does not actively work to make sure it actually funds diverse or under represented viewpoints.

Those who allocate the fee money do not use it to promote "ideological affirmative action." That is, the University does not determine what viewpoints are "under represented" on campus and then fund groups espousing those ideas in order to broaden the range of viewpoints expressed on campus. Which

groups receive money depends on which groups apply and the value-based priorities of those controlling the student government.

Student organizations will spring up without a mandatory fee, because human beings attend state universities, and it is the nature of humans to join together with like-minded individuals to further a common cause. The mandatory fee does not create that phenomenon. Over 400 student organizations have formed at the University of Wisconsin without the mandatory fee. Why is that broad range of groups inadequate to show sufficient "diversity" on campus? Even if the University did want to implement "ideological affirmative action" on campus, it would be highly subjective to decide how many more groups need to be funded to show sufficient "diversity."

3. The University contradicts its goal of promoting diverse viewpoints by prohibiting funding to partisan political groups and religious groups.

One hallmark of a compelling state interest is that the government pursues it consistently. The official policy of the University prohibits the funded student organizations from engaging in partisan political or religious activity. J.A. 252. This shows that the University's formal fee system policies do not promote all viewpoints when other countervailing interests become more significant. The policy creates the interesting anomaly that the mandatory fee will not fund the Republicans or the Democrats on campus, but will fund the International Socialist Organization, WISPIRG and the UW Greens and their political activism because they are not "partisan." The California Supreme Court encountered a similar situation at the University of California and stated that funding the Young Spartacus League but not Republicans and Democrats "borders on the absurd" *Smith*, 16 Cal.Rptr.2d at 193-94.

IV.

THE EXISTENCE OF A *ROSENBERGER* FORUM DOES NOT NULLIFY THE STUDENTS' RIGHT TO BE EXEMPT FROM FUNDING OTHERS' SPEECH

A. *Rosenberger* Does Not Answer the Question Of Whether Students Have A Constitutional Right To Opt Out Of The Requirement To Funds Others' Advocacy.

This Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) does not answer the question presented in this case, because *Rosenberger* addresses how student fee money is distributed. *Abood* and *Keller* address the principles for how the fee money is collected.

The University claims that if it can show that it distributes the segregated fee in a viewpoint neutral manner as required under *Rosenberger* then it can compel students to pay the fee. The University reads *Rosenberger* much too broadly. This Court never intended *Rosenberger* to thwart the opt-out rights of dissenting students to be exempted from involuntarily funding the speech of others. Operation of a *Rosenberger* forum does not nullify the students' *Abood* rights.

This Court clearly stated that it was not dealing with the collection question in *Rosenberger*, and indicated that such a question would be resolved by *Abood* and *Keller*:

> The [student] 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 v. State Bar of California*, 496 U.S. 1, 15-16 (1990) and *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 235-236 (1977).

Rosenberger, 515 U.S. at 840.

Additionally, Justice O'Connor in her concurring opinion in *Rosenberger* expressed an openness to the position that university students have a right to opt out of paying a mandatory fee that funds the advocacy of others under the First Amendment principles expressed in *Abood* and *Keller*.

> 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 [Citations omitted].

Rosenberger, 515 U.S. at 851.

The Seventh Circuit properly rejected the University's argument that *Rosenberger* addresses the collection issue:

> The Regents try to shoehorn this case into *Rosenberger*. However, as the Court made abundantly clear, it considered only the disbursement of student activity fees; it did not consider the constitutionality of forcing students to fund private political and ideological organizations. *Rosenberger*, 515 U.S. at 840.

Southworth, 151 F.3d at 722, n.1; Cert. Pet. at 23a, n.1. The Eighth Circuit recently reached the same conclusion that *Rosenberger* applies to distribution of student fees, not to their collection. *See Curry v. Regents of the University of Minnesota,* 167 F.3d 420, 422 n.4 (8th Cir. 1999).Therefore, the University errs by pointing to *Rosenberger* and away from *Abood* and *Keller* to decide this case.[2]

B. The University Can Obey The First Amendment Principles Expressed In *Abood* and *Rosenberger* Simultaneously And Without Conflict.

The University needlessly pits the *Abood* principle of "no compelled contributions" against the *Rosenberger* principle of "no viewpoint discrimination in distributing funds." Although both flow from the First Amendment, the University argues that they cannot or should not be implemented at the

[2] The students agreed to a stipulation that "[t]he process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion," (J.A. 14-15), because the University does not enforce any of its formal policies that operate as viewpoint-based exclusions like the one struck down in *Rosenberger*. University policy prohibits campus organizations from spending student fee money for "[a]ctivities which are politically partisan or religious in nature." J.A. 252. The University has conceded that it could not enforce the ban on religious speech after *Rosenberger*. Another University policy prohibits campus groups from receiving GSSF funds if they "have a *primarily* political orientation (i.e. is not a registered political group)" (J.A. 238)(emphasis in the original) or "have a *primarily* religious orientation" *Id.* The University also prohibits campus organizations from using fee money "for any lobbying purposes." *Id.* The respondents could find no evidence that the University enforces these policies currently. For example, WISPIRG and the UW Greens lobby the state legislature with no consequences for violating University policy.

same time.

But there is no inherent tension between *Abood* and *Rosenberger.* They do not conflict or collide. Instead, they complete the protection for those who receive funding and those who pay mandatory fees. There is no reason why the University cannot implement both sets of First Amendment principles simultaneously in the operation of its fee system.

The University has a duty to obey the First Amendment. "We note that state colleges and universities are not enclaves immune from the sweep of the First Amendment," *Healy,* 408 U.S. at 180. Because the *Rosenberger* principles and the *Abood* principles both flow from the First Amendment, the University must implement both sets of principles at the same time.

That means that the University must abide by the equal access principle of the *Rosenberger-Widmar* line of cases by allowing all registered student organizations, whatever their viewpoint, to apply for funding. Additionally, the University must also abide by the principles of the *Abood-Keller* line of cases and exempt all objecting students from paying for the forum of funding for student groups.

To implement both sets of principles is to protect people from viewpoint discrimination in two different ways. All student groups, no matter what their viewpoint, are eligible to seek funding from the student fee fund, whatever the size of that fund (*Rosenberger*). Students are protected from funding viewpoints they would not voluntarily support financially (*Abood-Keller*). No exclusions due to viewpoints, no compulsions due to viewpoints. These principles are complementary, not contradictory. *Rosenberger* and *Abood* are not in conflict. They can both be implemented at the same time in the University's fee system.

C. *Rosenberger* Does Not Address Campus Groups Funded By Direct Referendum, Like WISPIRG.

Even if *Rosenberger* applies to cases involving collection of fees, it cannot apply to the situation in which a campus group receives funding by a direct referendum, because no *Rosenberger* forum exists in a referendum context. It is true that most of the campus organizations at the University receive their funding via one of the two systems involving application and evaluation by the student government - the GSSF and ASM processes (J.A. 16-17).

However, campus organizations can also receive funding by a third method -- approval directly by the students via a referendum. *Id.* WISPIRG receives $45,000[3] of its funding annually from the results of a 1993 referendum. J.A. 40. (See also Appendix of the Appellees, Seventh Circuit, No. 97-1001, p. 1 - "WISPIRG base funding of $45,000 passed by student referendum in 1993.").

Through the referendum process, the students approved a per capita assessment on each student for WISPIRG alone. During 1995-96, each student paid $ .71 to WISPIRG. J.A. 12.

The referendum process does not create a *Rosenberger* forum of money because only one group is funded. The referendum allowed a majority of students to force every student to fund WISPIRG. The money flows to the student government, which then hands the money directly over to

[3] In 1995-96, WISPIRG received $4,500.00 from the student government's GSSF grant process, in addition to the $45,000 it received from the 1993 student referendum, for a total of $49,500 in student fee money that year. J.A. 65; 185-86 and Appendix of Appellees, Seventh Circuit, No. 97-1001 p. 1.

WISPIRG. J.A. 18. The money is not distributed to a number of student organizations. Therefore, *Rosenberger* has no relevance to $45,000 of WISPIRG's annual funding.

But the *Abood-Keller* principle applies to a referendum funding system because the University compels the students to pay the fee imposed by the referendum. *Abood* and *Keller* apply to collection situations involving mandatory fees, whether generated by a referendum or a *Rosenberger* forum. *Rosenberger* in contrast addresses the important, but more limited situation of viewpoint restrictions a university uses when distributing student funds. *Abood* and *Keller* applies to WISPIRG's funding from the referendum, but *Rosenberger* does not.

D. The Students' Right Not To Fund The Advocacy of Others Is Not Nullified Because The Fee Funds Many Groups.

The University violates the First Amendment whether it compels students to fund one group or many. Thus, the University's argument that the student fee funds many groups, rather than one union as in *Abood* or one bar association as in *Keller,* is constitutionally irrelevant.

The student government compels payment of this money for the express purpose of funding the advocacy of campus groups. It is money that at least in part is specifically raised for the purpose of giving to student advocacy groups to underwrite their general overhead expenses. See list of "Appropriate SUF [Segregated University Fees] Expenditures," J.A. 247-251 (listing appropriate expenditures as including staff salaries, facilities, equipment, supplies, debt service reduction and promotional items).

It makes no difference that the student government acts as the "pass through" for the money from the pockets of the students to the coffers of the campus organizations. "That this slice of student activity fee is briefly in the hands of the Student Association while being funneled from students to NYPIRG does not diminish the fact that a transfer has taken place." *Carroll v. Blinken*, 957 F.2d 991, 997 (2d Cir. 1992).

To claim that the students are funding a nonspatial forum and are not funding the various organizations obscures the reality of what actually happens. The money leaves the hands of the students and remains in the form of money when it reaches the various campus groups. The fee money funds the actual speech the groups express.

It is doubtful that the result in *Abood* would have been different if the union had funded multiple candidates for a political office rather than one. The fact that the union or the University chooses to fund multiple voices, even conflicting viewpoints, does not nullify the employees' or the students' right not to fund political and ideological advocacy they find objectionable.

It makes no difference for constitutional purposes that organizations funded by the mandatory fee "express viewpoints with which the plaintiffs both agree and disagree." J.A. 39. The *Abood* principle against coerced funding applies to all groups, whether one opposes them, agrees with them or is indifferent about them. The Third Circuit rejected the same argument the University makes here:

> [I]f the university compelled a student to make separate contributions to both the Democratic and Republican National Committees, the evil is not undone; it is compounded. Adherents to each party would be forced to pay a fee to the other political group, a clearly unconstitutional exaction.

Galda v. Rutgers, 772 F.2d 1060, 1067 (3rd Cir. 1985).

The historic context of Madison's Memorial and Remonstrance demonstrates that the government cannot force people to subsidize others' speech, even if the contributor agrees with the speech. The proposed bill that Madison opposed would have compelled Virginia taxpayers to fund only Christian teachers that they agreed with. *See Everson*, 330 U.S. at 36, 73; *Flast v. Cohen*, 392 U.S. at 106; *McGowan v. Maryland*, 366 U.S. at 465; *Flores v. City of Boerne*, 521 U.S. at 560 (O'Connor, J., dissenting). The government and the University cannot substitute their judgment for the individual's selection of which groups to support financially.

V.

ALLOWING STUDENTS TO OPT OUT OF PAYING THE FEE WILL NOT PERMIT TAXPAYERS TO OPT OUT OF PAYING FOR PARKS, SIDEWALKS AND SCHOOLS

Requiring the University to obey the First Amendment and allow students to opt out of funding its *Rosenberger* forum will not "open the floodgates" and permit people to opt out of paying for physical forums such as streets, sidewalks and public schools when they are used for expressive activities. The University and several amici argue that the students should lose because if they can opt out of paying for a nonspatial *Rosenberger* forum of money, then taxpayers can sue to have their taxes rebated when streets, parks, sidewalks, etc. are used for speech they find objectionable. Permitting students to opt

out of paying the mandatory fee will not open the floodgates for these hypothetical taxpayer cases.

A. Student Fee Money Is Not Tax Revenue.

Citizens could not sue cities for tax rebates when offensive groups like the Nazis march in the streets or rally in the park or school. Tax money funds their construction and maintenance. A taxpayer has no constitutional right to refrain from paying taxes for some purpose he or she opposes. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 385, n.16 (1984); *Buckley v. Valeo*, 424 U.S. 1, 91-92 (1976); *Keller,* 496 U.S. at 12-13. However, student fees differ from taxes because they do not produce general operating revenues. *See Rosenberger*, 515 U.S. at 841. Allowing students to opt out of paying a mandatory fee does not translate into a taxpayer opt out action when objectionable groups use streets, sidewalks or public schools.

Also, government builds streets, sidewalks, city parks and public schools primarily for purposes such as transportation and public education, rather than expressive activities by private groups. An occasional protest march on a street, or meeting by a community organization in a public school, does not detract from that fact. Therefore, granting relief to the students here does not create a taxpayer cause of action.

B. Universities Determine Who Receives Fee Money By Extensive Investigations, Unlike Government's Ministerial Role In Scheduling Use Of Parks, Schools Or Sidewalks.

The government's involvement with student fees is much more extensive than the government's passive role in scheduling use parks and other physical forums for expressive

activities by private groups. Private groups or individuals decide whether they want to use the physical forum. The government only acts in a ministerial role in maintaining orderly scheduling of the facility.

In contrast, the typical university student fee system gives the student government and the Board of Regents significant involvement in the process and wide discretion to decide which groups will have access to the forum of money. The members of the student government peruse detailed applications, hold hearings and deliberate as legislative bodies to allocate the funds among the campus groups. The reason for this is that there is usually not enough money to go around, so the student government must determine who gets the money and how much. The student government has total discretion to deny access to the *Rosenberger* forum of money, but the government caretakers of a physical forum lack such sweeping discretion to deny groups access to the forum.

Physical forums and *Rosenberger* money forums operate differently regarding dissenters. If someone disagrees with the views expressed by a group meeting in a city park, the dissenter can organize his own rally and express his opposing views in the same park. But if the student government chooses to fund a group some students find objectionable, there is no equivalent recourse. Even if objecting students formed an opposing group and applied for funding, the University has total power to reject the application. The mandatory fee irrevocably takes money away from a student that he or she might have otherwise given to another campus organization that he or she supports.

The only way to protect the dissenting students' First Amendment rights is to allow them to decline to pay the mandatory fee. That allows the dissenting students to express their opposition to the ideas advocated by the funded groups.

C. Use of Student Fee Money "Consumes" the Forum.

A court can legitimately rule that students have the right to opt out of paying a mandatory fee but that taxpayers don't have a parallel right to opt out of paying taxes for parks and sidewalks because of the "consuming the forum" difference between the nature of money and physical places like streets and auditoriums. When the forum is a *Rosenberger* forum of money, the funded group's expressive activity "consumes the forum." The funded organization must spend the money in order to advocate its ideas, thereby "consuming" the forum. The money is gone, so a second group cannot reuse the same money to express opposing ideas.

In contrast, a physical forum like an auditorium or a park is not destroyed or "consumed" by a group expressing ideas there. Taxpayers opposing the Nazis when they rally in a park can hold a counter rally the next day in the same park. But if the campus Nazis receive $20,000 for the 1999-2000 school year, the money is gone and those who oppose the Nazis cannot re-spend the same money the next year. An opposing group has no guarantee that it will receive funding from the mandatory fee the next year when the student government makes its allocations. Because the act of advocacy consumes a *Rosenberger* forum, allowing student *Abood* rights to opt out of paying the fee before the advocacy group spends it is the appropriate way to protect the objecting students' right of conscience and right not to speak. However, because users of a physical forum do not consume it when they use it, taxpayers have no need for the same kind of recourse that students need when they are compelled to fund the advocacy of private groups.

D. Private Groups Use Many Physical Forums At No Cost To The Taxpayers.

Many governmental units charge fees to private groups for using physical public forums, such as a public school building. The fee covers the government's costs for the private group's use of the facility. The Fourth Circuit recently described such a fee system in an equal access building rental case. "This rent is designed to reimburse the School Board for any expense incurred by the use of the school." *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703, 708 (4th Cir. 1994). Taxpayers in these situations suffer no harm. They cannot claim they are subsidizing speech they disagree with because the groups using the building pay for all expenses incurred by their use of the facility.

E. *Pruneyard* Does Not Control This Case.

This case is not similar to *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) because the students have never allowed public access to their personal funds. The University contends that *Pruneyard* parallels this case and should control its outcome. In *Pruneyard*, this Court upheld a California Supreme Court decision permitting speakers to enter a privately-owned shopping mall and advocate their message. Petitioners' Brief at 33-35. Because the mall was open to the public, and the activists' message would not be associated with the mall owners, this Court ruled there was no violation of the owners' freedom of speech or constitutional rights under the Takings Clause. The University argues that the shopping mall in *Pruneyard* matches the student fee mechanism here and therefore should be upheld.

However, the relevant parallel to the *Pruneyard* shopping mall is not the funding forum, but to the money of the

individual students. The students have not opened the "private property" of the money in their wallets for use by the public the way the shopping mall owner opened his property to the public for their access. The University has drawn the parallel to the wrong place.

This Court later clarified that *Pruneyard* does not apply if the property owner objects to the message conveyed by those using his property, as the students do here:

> Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content based. *PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible.

Pacific Gas & Electric Co., 475 U.S. at 12.

The students do not want their property -- their money -- being used to promote the message of campus groups they oppose. *Pruneyard* does not apply to this case.

VI.

AS THE LOWER COURTS DID, THIS COURT SHOULD STATE THE CONSTITUTIONAL PRINCIPLES GOVERNING POSSIBLE REMEDIES

A. Individual Students And Not University Officials Should Decide Which Campus Groups To Support Financially.

The Seventh Circuit and the District Court addressed the constitutional principles governing possible remedies to this violation of the students' First Amendment rights. The first principle this Court should point out is that individual students, and not the University, decide whether a group is "political and ideological" and should be supported finacially by the student. The First Amendment protects the right of individuals, not the government, to decide which private campus groups to support financially.

The test cannot be that the University has the responsibility to discern what speech by funded groups is "educational" enough to require all students to pay for it, and what speech is too "political and ideological" so that students cannot be required to pay for it. It would be a distinction too difficult and too subjective for University officials to make. That is why the First Amendment leaves such decisions to the consciences of individuals, not the government.

However, the First Amendment does not limit its protection to political and ideological speech. "But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters ... is not entitled to full First Amendment protection." *Abood*, 431 U.S. at 231. If this Court decides not to expand the "political and ideological

advocacy" category that it uses in the compelled fee cases, it should clearly state that individuals, not the University or the government, should determine what is "political and ideological" and what is not.

Also, it would be unconstitutional for the University to ban campus organizations from using the student fee money for "political and ideological" purposes. Such a viewpoint-discriminatory prohibition would violate *Rosenberger* and would not adequately protect the students' opt out rights. Any new system should have the students, and not the University deciding which campus groups to fund.

The University may require students to fund its own speech, or speech by private individuals the government authorizes to speak the official government message. In *Rosenberger,* this Court stated:

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.

Rosenberger, 515 U.S. at 833. *See also Rust v. Sullivan,* 500 U.S. 173, 194 (1991).

This means the University can force students to pay the salaries of University professors or pay for the University's course of studies. If this Court recognizes a right of students not to pay a fee that funds private campus advocacy groups, this will not mean that the students will also have the right to opt out of paying for the University Biology Department

because they disagree with something taught by a professor. Although professors have academic freedom to espouse their own viewpoints, they are still employees of the University and official facilitators of the University's degree-granting programs. There is no constitutional right to opt out of paying for the government's message.

The University can also compel students to pay for services that benefit all students, as long as the service offers a tangible benefit to students generally, like the increased wages and benefits negotiated by the unions for the employees in *Abood.* It is not a "service" to students for the University to force them to fund organizations espousing views the students oppose.

Therefore, students have no First Amendment objection to paying for a legitimate service, such as the health service, a shuttle bus or a tutorial service, as they do at the University of Wisconsin. One key to determine whether the organization offers a service rather than advocacy would be to determine whether the organization was formed by people joining together to advocate their common ideas collectively, or was the organization formed to provide a service that benefits a broad portion of the student body. If the University can show that the fee funds a service that benefits students like the increased wages in *Abood*, then the University can make that fee mandatory.

B. The University Cannot Have A Remedy That Takes Students' Money and Requires Them To Seek A Refund.

In fashioning a remedy, one constitutional rule the Seventh Circuit stated that the University must follow is that it "cannot even temporarily collect from objecting students the portion of the fees which would fund organizations that engage in

political and ideological activities, speech or advocacy, whether or not the organization also provides some a service in doing so." Cert. Pet. 50a.

The Seventh Circuit pointed out that this Court has ruled that a refund system for union dues does not meet constitutional standards. Cert. Pet. 46a-47a. *See Ellis v. Brotherhood Railway Clerks*, 466 U.S. 435, 443-45 (1984) and *Hudson*, 475 U.S. at 305 ("[A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that the dissenters' funds may be used temporarily for an improper purpose"). The Third Circuit ruled that a "temporary exaction of the PIRG fee from plaintiffs could not be justified." *Galda*, 772 F.2d at 1062.

The University still violates the First Amendment rights of the students if it substitutes a "negative check-off" for its current system. A "negative check-off" is one in which a university takes the students' money, and requires the individual students to do something in order to get their money back. The student-respondents argue that only something like a "positive check-off" meets constitutional standards, because it preserves the right of individual students to determine which groups to fund. Under a positive check-off system, students must consent to the taking of their fee money by the University.

C. Constitutional Alternatives Exist In Which Campus Groups Could Receive Funding Without Violating The Rights Of Objecting Students.

The University could step out of the funding process for private campus organizations and allow them to succeed or fail on the merits of their own ideas. If the University wishes to remain in the funding process, it should make the system voluntary to comply with constitutional norms. Here are two

possible systems that would protect the students' First Amendment rights against coerced funding:[4]

1. Each student chooses which specific groups to fund.

The University could include with the fee statement a list of all the Registered Student Organizations. Each student would designate which groups he or she would like to fund. The total amount would be added to the fee statement and the student would voluntarily pay that amount. The University would then pass the money through to the student groups. This program would be similar to the federal employees' Combined Federal Campaign this Court described in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 790-91 (1985).

2. Each student decides whether to fund a "Subsidized Speech Fund"

Another acceptable remedy would be for the University to bundle all of the advocacy groups' funding into one category. The University could decide how much money it will award to each group. On the fee statement, there would be a line for the "Subsidized Speech Fund," with a statement explaining that it subsidizes student groups, and list how much each student should donate in order to fully fund this endeavor. Each student would decide individually whether to check that box and add

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[4] The University objects that possible solutions like these nullify the student government's power under the "shared governance" in Wisconsin Statute 36.09(5). This statute gives the student government some governmental authority to allocate funds collected from students from a mandatory fee. However, the student government and the Wisconsin Legislature must obey the First Amendment. Shared governance does not permit the student government to violate the First Amendment rights of individual students.

that amount to his or her fee statement. This program is similar to the ones many states, including Wisconsin, operate through their state income tax forms. The state lists a number of charities, wildlife preservation funds and political parties and asks taxpayers to check off any of the groups they wish to contribute to.

CONCLUSION

The students respectfully request that this Court affirm the judgment of the Seventh Circuit.

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Respectfully submitted,

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