

Supreme Court, U. S.

F I L E D

JUN 14 1999

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No. 98-1189

In The
Supreme Court of the United States

BOARD OF REGENTS, UNIVERSITY OF WISCONSIN,

Petitioner,

v.

SOUTHWORTH, SCOTT, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE STUDENT PRESS LAW CENTER,
THE ASSOCIATED COLLEGIATE PRESS, AND
COLLEGE MEDIA ADVISERS, INC., AS AMICI
CURIAE IN SUPPORT OF PETITIONER

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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.

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INTERESTS OF THE AMICI CURIAE

Amici are three non-profit, student media organizations that have a compelling interest in the determination of the question presented to this Court: 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.¹ *Amici* represent student publications, including many student newspapers that serve as the primary source of information for their campus. Most of these publications engage in political or ideological speech and many are dependent upon student fee support. An affirmation by this Court of the decision of the court of appeals could threaten the very existence of student media on hundreds of public college campuses nationwide.

The Student Press Law Center is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free expression rights of student journalists. As the only national organization in the country devoted exclusively to defending the legal rights of the student press, the Center has collected information on student press

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of the brief.

cases nationwide and has submitted various *amicus curiae* briefs, including to this Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). The Center has produced a number of publications on student press law, including its book, *Law of the Student Press*, Student Press Law Center, Inc., 2d ed. (1997), and its thrice-yearly magazine, the SPLC Report.

The Associated Collegiate Press is a division of the National Scholastic Press Association, a non-profit association of student media groups at colleges, universities and secondary schools throughout the United States and in several other countries. Founded in 1921, the college division represents about 700 media organizations and more than 20,000 college journalists. The associations provide journalism education and recognition opportunities for their members, including reporting competitions and programs on press law and ethics.

College Media Advisers, Inc., represents the people who advise the nation's collegiate newspapers, yearbooks, magazines, and electronic media. With more than 700 members from coast to coast, the nonprofit CMA has been working since 1954 to support both new and veteran advisers of college media programs. CMA's mission is to educate and inform advisers about their roles in serving students and about the teaching, advising, and production of collegiate media. It also seeks to advance the quality of the student media its members advise. To achieve this mission, CMA offers conventions, workshops, conferences and seminars; serves as the authoritative voice of the collegiate media and advisers; provides and disseminates research and information for and about collegiate media and advising; and provides a learning

environment that promotes excellence and ethical standards in all aspects of mass communication.

Amici are gravely concerned over the decision rendered by the court of appeals in this case, which could cripple student media on America's public college and university campuses. *Amici* accordingly support the Petitioner in challenging the decision.

SUMMARY OF THE ARGUMENT

It has long been clear that expression by college students at publicly funded institutions is to be afforded the highest degree of First Amendment protection. *Healy v. James*, 408 U.S. 169, 180 (1972). Numerous lower courts have recognized that student media increase the overall exchange of information, ideas, and opinion on campuses; that student publications are a vital part of a university's educational mission; and that some form of mandatory fee support of such publications is germane to a university's duties as an educational institution.

A significant percentage of public college newspapers and broadcast stations receive student activity fee funding, and many could not publish without it. Although the court of appeals purported to leave open the question of whether public colleges and universities could subject student publications and broadcast stations to funding restrictions if they engage in political or ideological expressive activity, *Southworth v. Grebe*, 151 F.3d 717, 727, n.8 (7th Cir. 1998), the fact is that virtually all student news media provide some sort of political commentary or opinion. After the decision of the court of

appeals in this matter was handed down, the Student Press Law Center began receiving calls for help from student editors at public colleges where administrators and others relying on that decision threatened to revoke activity fee funding if the student publication persisted in writing “political” or “ideological” editorials. It is difficult to imagine a greater threat to student expression on a college campus than shutting down the primary student newspaper for lack of funding – yet that is the insidious nature of the court of appeals’ decision and exactly what *amici* foresee as the result if that decision is allowed to stand. Accordingly, *amici* urge this Court to recognize that effect and to follow instead the proper balance already struck by this Court in the analysis applied in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

ARGUMENT

- A. This Court has recognized that a college is a “marketplace of ideas” where students should be encouraged to speak freely and openly, and the lower courts have protected that special marketplace against various forms of censorship.**

For more than 30 years, this Court has made it clear that expression by college students at publicly funded institutions is to be afforded the highest degree of First Amendment protection. *Healy v. James*, 408 U.S. 169, 180 (1972). This Court in *Healy* recognized that a “college classroom with its surrounding environs is peculiarly the

‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.” *Id.* at 180-81.

College media play an integral role in fostering free expression on campus. The lower courts have taken this Court’s statements in *Healy* to heart, and have allowed public college administrators to censor student media only when they can clearly show the speech is legally unprotected (libelous, obscene, violative of copyright, etc.) or when they can demonstrate that some significant and imminent physical disruption of the campus will result from the publication’s content. *See, e.g., Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1973), *cert. denied*, 430 U.S. 982 (1977); *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975), *cert. denied*, 423 U.S. 834 (1975); *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973); *Bazaar v. Fortune*, 476 F.2d 570, *aff’d en banc with modification*, 489 F.2d 225 (5th Cir. 1973 (per curiam), *cert. denied*, 416 U.S. 995 (1974); *Lueth v. St. Clair Community College*, 732 F. Supp. 1410 (E.D. Mich. 1990); *Sinn v. Daily Nebraskan*, 638 F. Supp. 143, 148 (D. Neb. 1986), *aff’d*, 829 F.2d 662 (8th Cir. 1987); *Mazart v. State*, 441 N.Y.S.2d 600, 605 (N.Y. Ct. Cl. 1981); *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983), *cert. denied*, 442 So. 2d 453 (La. 1983); *Panarella v. Birenbaum*, 32 N.Y.2d 108, 343 N.Y.S.2d 333 (N.Y. 1973); *State Board for Community Colleges v. Olson*, 687 P.2d 429 (Colo. 1984), *appeal after remand*, 759 P.2d 829 (Colo. Ct. App. 1988).

In several of these cases, the attempted censorship of student media took the form of elimination of student fee funding for publications that offended the administrators

or some students who were paying mandatory fees used in part to fund the media. According to one student press expert, by 1985, the lower courts had considered 20 cases challenging the legal authority for state colleges to use mandatory student fees to finance student publications. L. Ingelhart, *Student Publications: Legalities, Governance, and Operation*, at 47 (Iowa State University Press 1993). In each case, the student publication won, and the funding continued. *See, e.g., Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992); *Stanley, supra*, 719 F.2d 279; *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); *Arrington v. Taylor*, 380 F. Supp. 1348, 1366 (M.D.N.C. 1974); *Veed v. Schwartzkopf*, 353 F. Supp. 149, 152 (D. Neb. 1973); *Larson v. Board of Regents*, 204 N.W.2d 568 (Neb. 1973).

Most recently, this Court made clear that public schools cannot use the denial of support based in part on student activity fee funding as a method of dictating the viewpoint of a student publication. *Rosenberger, supra*, 515 U.S. at 837.

Many of the cornerstone cases cited above were decided at a time of great unrest on this nation's campuses – a time when the campus marketplace of ideas was almost overwhelmed by conflicting viewpoints. The student press reported and commented on war protests, demonstrations over lowering the voting age to match the draft age, and the evolution of women's rights. Activities, ideas, and beliefs we have come to take for granted originated in the open forum provided by this nation's college campuses. Throughout that troubled time, the lower courts protected student expression at public universities and recognized the important role of student

media in fostering debate on campuses by refusing to allow student fee support to be cut for those media.

B. A significant percentage of public college publications receive student activity fee funding, and many could not publish without it.

There is little doubt that without the support of the student fee funding protected by the lower courts, a significant percentage of public college media would not have survived. During the 1980s, the United States had approximately 3,600 public and private college campuses. Ingelhart, *supra*, at xii. On these campuses there were more than 3,000 student newspapers, nearly 2,000 yearbooks, and at least 1,800 magazines or other student publications. *Id.* Circulations of these publications approached 25 million copies annually, and expenditures approached \$150 million annually. *Id.* There were hundreds of other types of publications produced by student organizations, and hundreds of student-operated radio stations on the air. *Id.* At the close of the decade, there were almost 20 student-run television stations. L. Kopenhaver & R. Spielberger, *Survey Update*, 34 C. Media Rev. 30, 36 (Spring/Summer 1996). In recent years, these publications also have begun posting information and fostering debate on the Internet.

While student publications in the United States typically receive revenue from a combination of sources, such as subscriptions, advertising, general college funds and student activity fees, very few campus publications are entirely financially independent from their university. For example, at the end of the 1980s, only 11 student

newspapers were totally funded by advertising revenue – 10 at public universities and one at a private college. Ingelhart, *supra*, at 53.

During that same time period, more than 90 percent of the newspapers and magazines, and nearly 80 percent of yearbooks, were financed in some way by allocations from general college funds or from mandatory student fees. *Id.* at xii.

The most recent survey data available indicates that most student publications remain dependent on university funding of some sort, including student activity fees. In 1995, for example, student activity fees funded (either wholly or in part) 43.3 percent of student newspapers, 25 percent of student magazines, 36.4 percent of student television stations, 35.5 percent of campus radio stations, and 37.6 percent of student yearbooks. *Survey Update, supra*, at 34-37. By 1998, 32.5 percent of the nation's student newspapers received 50 percent or more of their revenue from student fees. L. Kopenhaver & R. Spielberger, *Independent College Newspapers: Do They Meet the Standards?*, 36 C. Media Rev. 4, 9 (Summer 1998).

Elimination of student fee support for the student press would destroy most campus publications. *See, e.g., Joyner, supra*, 477 F.2d at 460. If the publications managed to survive, they would be but a shadow of their formerly vibrant selves, with reduced coverage and scant circulations. Ingelhart, *supra*, at 60. Student publications do not operate like the "commercial" press. It is unrealistic to expect most campus newspapers to rely on advertising and subscription revenue in the same manner as the commercial media, which have a complement of full-time

circulation directors, bookkeepers, advertising sales staff members, drivers, carriers, and newsstand dealers. *Id.* at 61. Moreover, many schools are located in small towns or rural areas that do not have the advertising base to support a student newspaper. Without student fee support, such publications would cease to exist.

Colleges and universities have long recognized that an active student press provides an important component of their educational mission, one that both deserves and requires financial support. As Professor Ingelhart stated:

College administrators, teachers, and board members are realizing that espousal of a free press, with its imperfections, hoopla and stridency, provides great learning for the practical journalist and the campus reader alike. It is the best practical example and exercise of what the tussle of thinking and learning is all about. It is almost impossible to teach thinking, learning, testing, experimenting, mistaking, achieving, creating, and knowing in the sequester called a classroom and then deny any public evidence that such things might be occurring on the campus among the students. The campus press is a clarion demonstration of the university's being a university doing the work of a university. As such it belongs on the campus, in the catalog, and in the budget.

Ingelhart, *supra*, at xii-xiii.

Any decision that would require an end to student fee support will, as a practical matter, force many colleges to forego the enormous educational value of a strong, robust and vital student press.

C. The decision of the court of appeals, if allowed to stand, threatens the public forum provided by student media at public universities.

The court of appeals purported not to address the issue of student fee support for campus-wide "official" student publications because the plaintiffs did not challenge fee support for those publications. *Southworth*, *supra*, 151 F.3d at 727, n.8. The basis for the court of appeals' holding, however, is not so limited: "Whether or not the student fees directly fund the political or ideological activities is irrelevant; the First Amendment is offended by the Regents' use of objecting students' fees to subsidize organizations which engage in political and ideological activities." *Id.* at 732.²

The simple fact is that virtually all student publications provide some political or ideological commentary or opinion. Those opinions frequently offend, anger or tantalize someone, and often launch vibrant debate on campuses. Such is the great history and contribution of student publications in this country. One of the first cases in the lower courts to deal with a challenge to student fee support for a student publication provides an example. In *Arrington v. Taylor*, *supra*, plaintiffs objected to the University of North Carolina student newspaper's editorial positions on endorsements of the candidacies of Hubert H. Humphrey, George McGovern and Sergeant Shriver,

² Indeed, the wording of the Question Presented on which this Court granted certiorari does not exclude student fee support for student media from the issue before the Court. See page i, *supra*.

among many others, and to positions taken on "the use of busing to integrate public schools, . . . the United States intervention in Cambodia, the impeachment and removal of Richard M. Nixon, the appointment of William H. Rehnquist, the death penalty, the Equal Rights Amendment, student strikes, Food Worker's strikes, protests against the war in Southeast Asia, and abortion." 380 F. Supp. at 1357. In denying the challenge to the use of the objecting students' fees partially to subsidize the student paper, the *Arrington* court correctly recognized that a lively editorial page encourages political debate throughout a campus:

The Daily Tar Heel . . . provides a forum for those who operate it to express their views. The positions advocated in The Daily Tar Heel are no more permanent than the brief tenure of its editors and writers. Moreover, the Daily Tar Heel is much more than a forum for its staff. It not only prints timely local and national news items, but also invites and prints views contrary to expressions by those in control.

Id. at 1362.

Student media are no less vibrant today. In the past school year, the Student Press Law Center has collected copies of student publications that editorialized from various political perspectives on issues ranging from the legalization of marijuana, election endorsements, the presidential impeachment trial, gay and lesbian rights, and resegregation of universities due to the end of affirmative action. The editorial and opinion pages of the *Minnesota Daily*, for example, a well-respected, fee-supported student publication serving one of the nation's

largest campuses at the University of Minnesota, reflect issues of concern today. In the past three months, The Daily has taken editorial positions or published commentary on NATO airstrikes against Serbia,³ the Israeli-Palestinian conflict,⁴ the proposed constitutional amendment to ban desecration of the U.S. flag,⁵ and this Court's recent decision allowing a school district to be sued for student sexual harassment.⁶

Not surprisingly, the lower court's decision already has had a negative impact on this nation's campuses. The Student Press Law Center has begun to receive calls from college journalists who report that school administrators and others in control of funds are beginning to tell them to discontinue printing political editorials or endorsements. For instance, at Florida A & M University, the student senate voted March 3, 1999, to freeze funding of the official student newspaper, The Famuan, after the paper ran political editorials prior to campus elections. *Famuan Funds Frozen*, The Famuan, March 18, 1999, at 1. The student senate said it cut funding because the paper published political endorsements as part of its student government election coverage, something the newspaper has done periodically for at least 20 years. In April, the

³ *Airstrikes will not solve any problems*, Minn. Daily, March 30, 1999, at 6.

⁴ Imed Labidi, *Israel's tragic past is key to Palestine's future*, Minn. Daily, March 8, 1999, at 8.

⁵ *Protecting the flag will burn free speech*, Minn. Daily, May 5, 1999, at 6.

⁶ *Harassment suits do not belong in schools*, Minn. Daily, May 27, 1999, at 6.

student senate passed a preliminary budget for The Famuan that decreased the 1999-2000 student fee allocation by 31 percent. See *"Paying for free speech: Student dissenter cases threaten 'political and ideological' censorship of the college media,"* SPLC Report, at 30 (Spring 1999).

At the University of North Carolina at Chapel Hill, new student government rules prohibit the allocation of student activity fee money to any campus organization that publishes or makes political endorsements, including the alternative campus magazine, the conservative Carolina Review. The University of North Carolina student legislature added a provision to its code prohibiting student activity fee funding of any "political and ideological" activity or speech by any campus student organizations. *Id.*

Thus, despite the court of appeals' disclaimer, affirmation of the lower court's decision will at the very least create confusion regarding funding for student publications and will threaten their very existence.

D. The expressive activity of student organizations receiving student activity fees should not be regulated, as long as there is a neutral process for disbursing the fees.

As argued by the Petitioner and other *amici*, which arguments will not be repeated in any detail by these *amici* here, the proper analysis for challenges to the funding of expressive activity on college campuses should be similar to that already adopted by this Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). *Rosenberger* held that when a university

sets up a system whereby students contribute fees to a general activity fund, and those funds are in turn distributed to a diverse group of campus organizations, the university creates a limited public forum that engenders certain rights in forum participants. Such rights include the requirement that a school distribute funds in a neutral manner to campus organizations. *Id.* at 834-5. Although reserving the precise question presented here, *see id.* at 840, the Court in *Rosenberger* concentrated its analysis on the peculiar importance to the nation's intellectual life of the open fora with diverse participants which colleges provide, and on the level of neutrality of any policies by which the state fosters participation therein. *Id.* at 841-846. In the course of applying that neutrality analysis to the question of the denial of student fee-based state support for a Christian student publication, this Court recognized the unique role universities play in fostering free speech and the dangers posed by government attempts to restrict it:

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

Rosenberger, supra, 515 U.S. at 835, citing *Healy, supra*, 408 U.S. at 180-81, *Keyishian v. Board of Regents of Univ. of State*

of N.Y., 385 U.S. 589, 603 (1967), and *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Relying on these decisions of this Court, lower courts other than the court of appeals here have appropriately recognized that a university is different from the labor unions and state bar organizations at issue in the compelled association cases cited by the court of appeals in the instant case. *Cf. Southworth, supra*, 151 F.3d at 722, citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977), and *Keller v. State Bar*, 496 U.S. 1, 13 (1990). They have observed that “[t]he goals of the university are much broader than the goals of a labor union or state bar, and they are inextricably connected with the underlying policies of the First Amendment.” *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032, 1039 (9th Cir. 1999). They have recognized that the provision of student activity fees to assist expressive student organizations should not be regulated as long as the process for disbursing those fees is neutral and supports a wide variety of student political and ideological activity. *Id.* Such a system fosters the limited public forum envisioned in *Rosenberger*, 515 U.S. at 829-30, that encourages “a diversity of views from private speakers” on college campuses. *Id.* at 834. Such a system also assures the vitality of the campus press, and the vital role it plays in creating and fostering the campus forum. For those important reasons, articulated in detail by Petitioner and other *amici*, these *amici* respectfully urge the Court not to allow the decision of the court of appeals to stand.



CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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