

No. 98-1189

Supreme Court, U. S.
F I L E D

JUN 14 1999

CLERK

IN THE
Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY
OF WISCONSIN SYSTEM, *et al.*,

Petitioners,

—v.—

SCOTT HAROLD SOUTHWORTH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF OF THE LESBIAN, GAY, BISEXUAL AND
TRANSGENDER CAMPUS CENTER AT UW-MADISON,
FORTY-NINE OTHER STUDENT GROUPS,
THE NATIONAL CONSORTIUM OF DIRECTORS OF
LESBIAN, GAY, BISEXUAL, AND TRANSGENDER
RESOURCES IN HIGHER EDUCATION, AND
LAMBDA LEGAL DEFENSE AND EDUCATION FUND AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

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

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INTERESTS OF THE *AMICI CURIAE*¹

The *Amici Curiae* file this brief in support of Petitioners. *Amici* participate in this case because the decision below, unless reversed, will seriously harm the extracurricular “marketplace of ideas” and the array of student support services that the University of Wisconsin at Madison (“University” or “UW”) provides and deems essential to its educational goals. Similar programs now in place at most other public universities will also be undermined. And in the process, the role of innovative, small, or controversial student groups on campus will diminish most severely, to the detriment of all students.

Fifty student groups from public and private colleges and universities around the country join this brief, including the Lesbian, Gay, Bisexual and Transgender Campus Center (“LGBT Campus Center”), which is a Registered Student Organization at the University and one of the 18 groups whose funding through mandatory fees plaintiffs oppose. The LGBT Campus Center provides educational programs and individual support services, including peer counseling and referrals to other resources; maintains a library and a research collection of documents; and works to ensure a “pluralistic university environment that includes lesbians, gays, and bisexuals.” R34, Att. B. It also fosters communication among students (including through a newsletter), works for positive relations among student groups, and serves as a “safe space utilizable by all.” R34, Att. B. The LGBT Campus Center has received support from the General Student Services Fund and an events grant from the Associated Students of Madison. The

¹Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for either party, and no one other than *Amici* and their counsel has made any monetary contribution to its preparation.

remaining student group *amici* are listed in the Appendix.

The National Consortium of Directors of Lesbian, Gay, Bisexual, and Transgender Resources in Higher Education is a professional organization that includes the directors of over 50 campus centers that address issues and provide services related to sexual orientation. Many of the centers receive funding through mandatory student fee systems at their schools.

Lambda Legal Defense and Education Fund (“Lambda”) is the nation’s oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, and people with HIV/AIDS. Lambda appears here to urge that appropriate First Amendment standards govern this dispute; to help ensure that the full range of views about sexual orientation and related issues continues to be aired vigorously at the University and other campuses; and to help ensure that services important to lesbians and gay men continue to remain available, among the many services that public universities offer for the welfare of their students.

SUMMARY OF ARGUMENT

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 depends upon the structure and nature of the policy or program. Here, the University uses a mandatory student fee to fund two viewpoint-neutral grant programs for diverse organizations: the Associated Students of Madison (ASM) grant program, which encourages a full spectrum of expressive and associational activity by the University’s Registered Student Organizations (RSOs); and the General Student Services Fund (GSSF), which supports groups that provide direct services to students and thereby advance student health, safety, and academic success. Both the ASM and the GSSF programs serve vital University needs

and are structured to respect the First Amendment, not to offend it.

This brief considers each of those two programs separately. Because plaintiffs’ claims present a new kind of compelled subsidy case, the Court should analyze each program by returning to the fundamental questions it examined in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the first case of its kind. There, the Court looked at whether the plaintiffs had a cognizable First Amendment injury; if so, whether the government had weighty enough interests to justify that injury under a balancing test; and, finally, whether any continuing safeguards were necessary to preserve the constitutional balance. The “germaneness” safeguard, however, which the Court developed to achieve and maintain a constitutional balance in compelled subsidy cases involving single, representative organizations, has no place in the present context of University grant programs.

When the plaintiffs and all other students must help pay for the University’s ASM and GSSF programs, they do not suffer any constitutional injury, even if they object to the expression or beliefs of some groups eventually supported by those University funding streams. The mandatory student fees fund a viewpoint-neutral, limited public forum for RSO expression and a viewpoint-neutral, multi-faceted student services program, not specific organizations and their ideologies. Plaintiffs can no more devise a cognizable First Amendment injury here than they could if they objected to an individual professor’s political views, indirectly supported through their tuition payments, or if they objected to controversial procedures or information offered by private healthcare professionals, indirectly supported through the discrete part of the mandatory fee that funds healthcare at UW.

Moreover, even if plaintiffs had significant First Amendment interests at stake, the University’s compelling

needs to generate robust extracurricular debate and to provide a safe, supportive environment for learning through various student services would justify the mandatory fees challenged here. The University has crafted necessary but well-bounded grant programs to serve its core interests. The ASM and GSSF programs, including their financial support of some organizations that engage in political and ideological speech, should prevail in the constitutional balance and be left intact.

ARGUMENT

- I. THIS COURT SHOULD USE THE SAME THREE-PART PROCESS OF CONSTITUTIONAL ANALYSIS FOR PLAINTIFFS' COMPELLED SUBSIDY CLAIMS AS THE COURT BEGAN WITH IN *ABOOD*, BUT THE MUCH DIFFERENT FACTUAL CONTEXT HERE DICTATES THAT THE PARTICULARS OF THAT ANALYSIS SHOULD DIVERGE FROM THE PRIOR UNION AND BAR CASES.

Beginning with *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and continuing through *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997), this Court has decided a number of cases raising the claim that compelled financial contributions to a **single private entity** that advances **common** interests — but also engages in expressive activity with which some contributors disagree — violates the First Amendment. To assess whether the plaintiffs in *Abood* had a valid claim, the Court examined three issues. First, is there a cognizable First Amendment interest or injury at stake? See 431 U.S. at 222, 229-35. If so, then second, does the government have sufficiently weighty reasons to justify, on balance, some or all of the infringement on plaintiffs' interests? *Id.* at 229, 232-37. Third, are there any continuing limitations or safeguards necessary to preserve the constitutional balance? *Id.* at 235-42. This is the analytic framework that the Court should return to in this case, but the

vastly different setting and different type of compelled payments at issue lead to much different answers than in the prior cases.

Abood and its progeny, firmly grounding their analysis in the factual background at hand, where the single supported entity was most commonly an “agency shop” union, devised a “germaneness” test and an expense-by-expense application of that test to preserve the constitutional equilibrium between serving government interests and minimizing First Amendment harms:

[I]n *Abood* ..., we found no constitutional barrier to an agency shop agreement between a municipality and a teacher's union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent.

Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 466 U.S. 435, 447 (1984). See also *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310-11 (1986); *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 519 (1991). In light of the “substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other,” the Court likewise found that a state could constitutionally require contributions to a unified bar association. *Keller v. State Bar of California*, 496 U.S. 1, 12, 13-14 (1990). The germaneness standard, and internal procedures to enforce that line between the entity's permitted and forbidden expenditures of objectors' fees, were again necessary, however, to maintain the constitutional balance in the bar context. 496 U.S. at 14-17.

Abood, *Keller*, and later cases developed the ultimate germaneness benchmark, and its accompanying procedures, to provide the ongoing constitutional limits that are appropriate when the state designates a single, representative organization to make common cause for many and requires all covered individuals to subsidize that entity.

Here, plaintiffs present a substantially different type of compelled subsidy claim. The plaintiff students are required to subsidize **state programs** that in turn fund **many organizations** to provoke **diverse** expression, an array of student services, and varied learning-by-doing at a public university. This case does not involve the same injury, same government interests, or same need for continuing safeguards as do the union and bar collective representation cases. *See infra* at 11-22, 25-30.

Thus, the court of appeals erred in beginning at the end point of the nuanced constitutional balance struck in the single-entity cases and in applying it to this distinct context. *See* 151 F.3d at 724 (adopting *Lehnert*'s formulation of the germaneness analysis as the test for this case). Instead, this Court should ask the fundamental constitutional questions appropriate for this first-of-its-kind compelled subsidy case, the same three questions that the Court had to consider in *Abood*. And as the *Abood* line of cases did, the Court should answer those questions based upon a careful grounding in the factual background of this university-centered dispute and the multi-organization funding programs at issue.

The court of appeals similarly erred in its legal analysis by proceeding as if a sole, artificially simplified university policy were at issue here, a policy that required all students to directly "fund private organizations which engage in political and ideological activities, speech and advocacy." 151 F.3d at 722. Plaintiffs' challenge to the University's mandatory fee and the school's eventual support of eighteen particular

organizations, however, implicates three different University funding mechanisms (and no direct compelled contributions to any private group). This Court should separately assess each state funding program, its purposes and parameters, to ensure that this case constitutionally tests the real contributions to University programs that plaintiffs are compelled to make.²

II. A PUBLIC UNIVERSITY DOES NOT VIOLATE THE FIRST AMENDMENT WHEN IT REQUIRES ALL STUDENTS TO HELP PAY FOR A VIEWPOINT-NEUTRAL, LIMITED PUBLIC FORUM DESIGNED TO FOSTER DIVERSE SPEECH AND ASSOCIATIONAL ACTIVITY AMONG STUDENTS.

The University of Wisconsin, like virtually all universities, strongly encourages the associational and expressive activities of a full spectrum of student organizations in order to provide a "second curriculum" that supplements classroom teaching. Stipulation of Facts ("Stip.") ¶ 25, Att. H. As this Court has recognized, "universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995). Moreover, the range, "quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment." *Id.* Nor is it overstatement to emphasize that "[t]he Nation's future depends upon leaders trained [at universities] through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967). Registered Student

²This brief does not address whether the funding mechanism that allows a portion of the mandatory fee to be allocated by student referendum comports with the First Amendment. Only one of the organizations with which plaintiffs disagree, WISPIRG, receives its funding through that process.

Organizations at UW help fill this need for multiple perspectives, vigorous debate, and “the search for truth,” defined by statute as the basic purpose of the state university system. Wis. Stat. § 36.01(2).

- A. Mandatory Financial Support Of The ASM Grant Program Does Not Cause Constitutional Injury To The Plaintiffs.
 1. With The ASM Portion Of The Mandatory Fee, UW Students Fund A Viewpoint-Neutral Limited Public Forum For Registered Student Organizations.

To foment student group activity, the University has established a funding stream available only to RSOs and administered by the Associated Students of Madison.³ As explained below, the ASM grant program mirrors the Student Activities Fund (SAF) the Court had before it in *Rosenberger* and is a limited public forum.

A state creates a public forum when it has opened its property “for use by the public as a place for expressive activity.” *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37, 45 (1983). The forum “may be created for a limited purpose such as use by certain groups, e.g. *Widmar v. Vincent* [454 U.S. 263 (1981)] (student groups), or for the discussion of certain subjects. . . .” 460 U.S. at 46 n.7. And the government property that the state makes available for expressive activity may be money, rather

³The University has charged a separate student fee, along with tuition, since the 1800s. The ASM and GSSF portions of the fee challenged here came about after a study revealed that the University did not have a similar range of services and activities, “such as debate teams, concert performances, guest lecture series” and other expressive presentations, as most universities; the University acted to repair that deficit. See R26, Att. A at 1733.

than physical space. See *Rosenberger*, 515 U.S. at 830 (the University of Virginia’s “SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable”). The essence of a limited public forum is equal access for all eligible speakers, regardless of the content or viewpoint of their speech, once the parameters for that channel of communication have been set.⁴

ASM grants are “major funding sources” for student organizations, Stip. ¶ 25, Att. H, chart at 41-42, and are the most common way those groups receive University financial support. Each semester four to five dollars of each student’s mandatory fee pays for this grant program. See Stip. ¶¶ 5-6.

To qualify as an RSO and thus be eligible for ASM support, a group must (1) be a not-for-profit, formalized organization, (2) be controlled and directed by students, (3) be composed mainly of students, (4) relate to student life on campus, (5) abide by all non-discrimination laws and policies, and (6) abide by all the financial and other regulations contained in the Student Organization Handbook. Stip. ¶ 25, Att. H at 1. “Recognizing that student organizations play a significant role in the education of UW-Madison students,” the ASM program gives operations grants “to support the ongoing needs of” RSOs. Stip. ¶ 25, Att. H at 39. It also awards event grants, which can only fund RSO events that are on or near the campus in Madison and open to all students. Stip. ¶ 25, Att. H, chart at 41-42. Finally, RSOs can receive small ASM travel grants, if the travel is “central to the purpose” of the organization. Stip. ¶ 25, Att. H at 39. None of the ASM

⁴See *Rosenberger*, 515 U.S. at 829 (“[o]nce it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set”; it may not “discriminate against speech on the basis of its viewpoint”); *Perry Education Association*, 460 U.S. at 46 (although state not required to indefinitely retain the open forum it has designated, “as long as it does so it is bound by the same standards as apply in a traditional public forum”).

allocations can be used for politically partisan events or activities. Stip. ¶ 25, Att. H, chart at 41-42; J.A. 252.

Within these general parameters, ASM grants are provided on a viewpoint-neutral basis. Stip. ¶ 12. Very few applications are unsuccessful. *See* J.A. 138-52 (only six out of 189 requests did not receive support). During the 1995-96 school year, the ASM subsidies enabled many groups to show films, to bring theatrical or cultural events to campus, and to sponsor prominent guest speakers. *Id.* ASM event grants underwrote the Federalist Society's debates on affirmative action and tort reform, another group's foreign affairs forum, and a presentation on human rights in Tibet. *Id.* Operations grants paid for items such as printing, postage, equipment rental, subscriptions and advertising to enable 126 RSOs to pursue their associational and expressive goals, including 40 "last minute" grants that particularly help "newly formed organizations," Stip. ¶ 25, Att. H at 39. The RSOs that took advantage of ASM funding ranged from the International Socialist Organization to the Wildlife Ecology Club, the Business and Tax Law Association to the Filipino-American Student Organization. J.A. 138-52.

No cash goes to any of the supported groups. Stip. ¶ 21. After a grant is made, covered expenses are paid out of the state treasury directly to creditors through an invoice and requisition process that the Office of the Dean of Students oversees. *Id.*; J.A. 244-52.

As in *Rosenberger*, the University's ASM grant program "expends funds to encourage a diversity of views from" student organizations, 515 U.S. at 834, and creates a monetary limited public forum. *See* 515 U.S. at 829-30. The ASM funding scheme matches the SAF in *Rosenberger* in all material respects and there is no dispute in this case that forum

principles apply.⁵ It is the University's requirement that all students help pay for the ASM viewpoint-neutral forum, even if they disagree with political or ideological ideas expressed by participants, that must be assessed here.

2. Because Their Student Fees Fund The University Forum, And Not Individual Private Groups, Plaintiffs Do Not Suffer A Cognizable First Amendment Injury.

Contrary to plaintiffs' arguments and the decisions below, the ASM grant program does not implicate plaintiffs' First Amendment interests in the same way that the union fees in *Abood* — or other forced payments to a single representative body — affected dissenters. In the earlier compelled subsidy cases, the forced link to a union or bar association impinged dissenters' associational freedoms, *see Abood*, 431 U.S. at 225, and also implicated "a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 117 S. Ct. at 2139. With the ASM funding they challenge, plaintiffs are not required to align themselves with the efforts of any representative entity, nor are they compelled to contribute to a private organization and its particular viewpoint.

⁵Indeed, the plaintiffs themselves have proceeded in this litigation as if the whole allocable portion of the segregated fee, or at least the collective funding streams challenged here, created one forum and have conceded that the existence of a limited public forum can be taken as a premise in assessing all of their claims. *See* Appellees' Br., No. 97-1001 at 26 ("[t]he students do not dispute that the University has created a public forum of funding for student groups"). They should be held to that concession for both the ASM and GSSF grant programs, and other briefs before the Court take that premise as a starting point. *Amici* in this brief, however, provide the Court with a separate factual and legal analysis of each program, because each can stand on its own, distinct merits.

Rather, plaintiffs pay a charge to the University to fund its limited public forum. They are helping the University construct a stage for diverse free expression. Paying this fee to the state, which then uses it for a viewpoint-neutral program to underwrite the expenses of all kinds of student groups, “cannot [rightly] be said to engender any crisis of conscience” among plaintiffs or other students. *See Glickman*, 117 S. Ct. at 2139. It is only by discounting the structure and neutral nature of the ASM forum, and proceeding as if they must directly fund isolated participants in the forum whose speech they find objectionable, that plaintiffs conjure First Amendment injury.

As several judges of the Seventh Circuit emphasized, the “chain of custody” of funds “cannot be enough to raise a constitutional issue.” 157 F.3d at 1126 (Rovner, J., dissenting from denial of rehearing *en banc*). Although a tiny fraction of plaintiffs’ fees could be traced to state treasury disbursements for individual organizations’ costs, all mandatory fee payments made to the University that, in turn, the ASM allocates to more than 100 groups, were collected by the school to support First Amendment activity in general, across the full spectrum of views. *Id.* Contributing to this monetary forum for speech from a multitude of orators does not implicate plaintiffs’ freedom of belief, any more than special fees or tuition payments used to build a physical forum, such as a school auditorium or meeting room, would. Likewise, students cannot invoke the First Amendment to challenge portions of their tuition supporting professors’ views with which they disagree, because they are being forced to pay for the whole faculty — not any one professor’s speech. *Cf. Libertarian Party of Indiana v. Packard*, 741 F.2d 981, 989-90 (7th Cir. 1984) (no First Amendment rights implicated where state license plate assessment ultimately funds political party activity; motorists’ money is “going ‘to facilitate and enlarge public discussion and participation in the electoral process’”).

That plaintiffs’ beliefs are deep-seated, or that the forum includes political and ideological expression, does not change the analysis and give plaintiffs a cognizable First Amendment interest here. Those deep-seated beliefs remain intact. The Seventh Circuit never examined plaintiffs’ alleged injury in light of the true, viewpoint-neutral nature of the ASM portion of the fee, and erred in relying on single entity cases to find a “particularly great” First Amendment burden here. 151 F.3d at 729 (quoting *Lehnert*, 500 U.S. at 522). While the depth of an individual’s beliefs together with compelled direct support for an advocacy organization with contrary political views might create an especially significant infringement on First Amendment interests, *see Lehnert*, 500 U.S. at 521-23 (non-majority part of opinion),⁶ those considerations are not even arguably at play where an individual is merely contributing to a state program that does not have a particular stance on any issue.

The complete lack of First Amendment injury should end plaintiffs’ claim that their forced subsidy of ASM grants is unconstitutional.

- B. Even If The Objecting Students Had Significant First Amendment Interests At Stake, The University’s Core Need To Encourage Diverse Student Group Expression, Including Political And Ideological Expression, Through A Funding Forum Would Outweigh Those Individual Interests.

Could plaintiffs find some First Amendment interest at stake in their contribution to the University’s limited public forum, for all the reasons and given all the facts summarized

⁶*But cf. Abood*, 431 U.S. at 232 (“Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective ‘political’ can properly be attached to those beliefs the critical constitutional inquiry.”).

above, that interest would have to be quite small.⁷ If a cognizable injury from the compelled subsidy of speech is found, *Abood* shows that the governing constitutional test should be a balancing one. *See* 431 U.S. at 229; *see also id.* at 225. The Court has never used strict scrutiny in a forced financial subsidy case, as plaintiffs sought below, nor have the lower courts. *See Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032, 1037-38 & n.4 (9th Cir. 1999); *Carroll v. Blinken*, 957 F.2d 991, 999 (2nd Cir. 1992) ("*Carroll I*"), *cert. denied*, 506 U.S. 906 (1992). In addition, the specialized "germaneness" benchmark evolved — after an initial balancing inquiry — for the distinct, single-representative-entity context, and as explained further below, is incompatible with the state grant programs for diverse groups that are now before the Court. On balance, any minimal injury that plaintiffs might suffer from helping pay for the ASM program would easily be justified by the University's strong interests here.⁸

⁷It is important to review the injuries that plaintiffs admittedly do not suffer here. They are not being compelled to speak or to associate with any organization. They admit that the fee does not create "the false impression that the objectionable groups are speaking for the plaintiffs." R42 (Plaintiffs' Reply Br.) at 2. The only *asserted* injury in this case is that plaintiffs are forced to financially support "groups they would not support voluntarily because they contradict the plaintiffs' personal religious and ideological views." *Id.* Thus, at most "First Amendment interests" are implicated here, not any wholesale assault on a fundamental right. *See generally Glickman*, 117 S. Ct. at 2139.

⁸*See Kania v. Fordham*, 702 F.2d 475, 477 n.3, 480 (4th Cir. 1983) (in case involving mandatory student funding of campus newspaper, stressing that the "extent of the abridgement is properly considered in striking the constitutional balance between the educational goals of a state university and the speech and association rights of its students" and holding that "the minimal and indirect restriction on Kania's" rights from the mandatory fee was constitutional).

Compelled student funding of newspapers — without any opt out

Amici will go on to show, however, that even if plaintiffs' First Amendment interests were as substantial as the Seventh Circuit found them to be, the University's compelling justification for this forum would still outweigh plaintiffs' objections to funding it.

1. Varied Student Group Activity Lies At The Heart Of A Public University's Mission; A Viewpoint-Neutral Funding Forum Allows All Kinds Of Groups, Including Small Or Controversial Ones, To Be Strong Participants In University Life.

Student groups' First Amendment activity and "creative inquiry" on university campuses constitutes "one of the vital centers for the Nation's intellectual life." *Rosenberger*, 515 U.S. at 836. It is the very "business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); Wis. Stat. § 36.01(2). As UW has recognized and emphasized in this case, the robust debate engendered by wide-ranging student group expression is crucial to its educational mission and to its role in the larger society. *See* Brief for Petitioners.⁹

mechanism — has routinely been upheld, although those vehicles for "increas[ing] the overall exchange of information, ideas, and opinions on the campus[.]" unlike the limited public forum here, are not truly viewpoint-neutral. *See Kania*, 702 F.2d at 480, 477 n.5; *see also Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993).

⁹As the Second Circuit wrote in *Carroll I*, 957 F.2d at 1001,

A university where NYPIRG petitions against nuclear power, where environmental groups advocate greater recycling, where opponents of South Africa debate opponents of divestment, and partisans of a dozen other causes press their cases is a university fulfilling its traditional mission in a free society. Were it

The viewpoint-neutral ASM forum directly and substantially advances the University's strong interest in vibrant student group expression. This University, like most other institutions of higher learning, has determined that funding assistance is necessary to generate the diverse range of organizational activity and speech that makes up a functioning extracurricular "marketplace of ideas." See J.A. 178 ¶ 2. By offering equal access to the ASM grants for all RSOs, the University gives even new, small, or "fringe" groups the financial ability to find members, sponsor events, test ideas, and be heard by large numbers of other students.¹⁰ Those more novel or controversial participants in campus life provide an essential part of all students' education, even if — and, in part, because — some students become convinced that the ideas expressed are wrong. "To endure the speech of false ideas . . . and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

Given its aims, the University of course allows political and ideological speech within the forum. Robust political debate, on the structure of government, the meaning of the Constitution, the appropriate content of laws, civil rights issues, and many more political questions, must be heard if the ASM forum is to serve its vital educational purpose. And without the financial assistance made available to all RSOs, the level of political debate and the spectrum of voices heard

otherwise, college would be a very quiet, intellectually diminished and ultimately irrelevant place.

¹⁰Public fora like the ASM program "even the playing field" somewhat for all speakers who fall within the definition of the forum. Any group can take the stage and project its message, whereas outside the forum its ability to communicate may be hampered by its small size or lack of popularity and attendant constraints on fundraising.

at the University would greatly diminish. Rather than showing any injury to plaintiffs' interests, *see supra*, the political demonstrations, reactions to legislative proposals, opposition to the death penalty and even to capitalism generated by RSOs that receive ASM support show that the funding forum is working to accomplish the University's core mission.¹¹

Because the Seventh Circuit erroneously looked at this case through the lens of a single-entity compelled subsidy dispute, it failed to comprehend the University's overwhelming interest in this viewpoint-neutral funding forum. The court of appeals pointed to "the importance of a common cause for justifying the compelled funding" and found pivotal that "there is no common cause between private organizations which engage in political and ideological speech and the objecting students." 151 F.3d at 727-28. That false approach ignored that the University's great interest here is in diversity and dissent, not common cause.

Likewise, the courts below essentially concluded that "political and ideological" expression could meaningfully be distinguished from educational expression, and that political or ideological groups were less worthy participants in the University forum. *See, e.g.*, 151 F.3d at 725 ("the International Socialist Organization is only incidentally concerned with education. Its primary goal is the promotion of its ideological beliefs. The fact that some educational benefit may come from it is secondary, and therefore not sufficiently germane to overcome the objecting students'

¹¹*See Sweezy*, 354 U.S. at 251 ("History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society [or in a university]").

constitutional rights.”). That conclusion flies in the face of what the ASM funding forum is all about — giving voice to groups with all kinds of strong ideologies and political beliefs to **thereby** provide an essential component of a university education. No participant or perspective in such a viewpoint-neutral forum can be viewed as less “germane” or educational than another, for different speech will enlighten different students and the most obscure or tangential comment may spark inspiration or reveal truth.

2. The ASM Grant Program Is Carefully Structured To Serve The University’s Vital Interests.

While equal access and freedom of expression are the necessary touchstones within the ASM forum, the University has carefully defined the boundaries of its funding program. This is a limited public forum open only to RSOs, which must be composed mainly of students and be student controlled, among numerous other requirements. *See supra* at 9. In addition, electioneering and other partisan political activities are outside the scope of the forum for all groups. *See Stip.* ¶ 25, Att. H, chart at 41-42; J.A. 252. The University has made the judgment, similar to boundaries set at other schools, that this one category of political activity — with its inherent focus on individual, non-student political candidates — should not be included within its funding program.

Some funded RSOs address issues in the state legislature (which meets a few blocks away from campus), hold off-campus events, or travel to conferences, but those activities do not change the very University-focused nature of the ASM forum. The Ten Percent Society, for example, contributes to the extracurricular marketplace of ideas exactly as the University intends when it communicates to other students, through its Internet home page, that it favors legislation allowing same-sex marriage and condemns the Wisconsin

Legislature for banning such unions. *See* 151 F.3d at 721.¹² ASM-funded events must be near the campus if they are outside its physical boundaries and must be open to all students. Similarly, the few travel grants paid for by the forum must be central to an RSO’s purpose, and therefore those trips will significantly enrich the group’s associational and expressive activity back at UW. *See supra* at 9-10.

Mandatory, rather than voluntary, funding is necessary (1) to guarantee that the ASM account has enough money to accomplish its educational purposes and (2) to spread the cost of this “second curriculum” among all the students who benefit from it — every student at UW. If paying the ASM portion of the mandatory fee were optional, significantly less money would fund the ASM forum, as those who objected to the forum as a whole, disagreed with the speech of particular groups, or felt the need to save money withheld payment. If the University raised the ASM portion of the fee to compensate for the loss of some student funders, more would likely opt out as the financial burden rose. With any voluntary system, the students willing to support the ASM forum would be paying for an essential aspect of others’ education and carrying them as free riders. The myriad student groups that the ASM program encourages, their expression and events that come to the attention of all students, and the competing ideas that they engender, greatly benefit every young person who comes to UW for an education, even if particular students decline to join any RSO and are affronted by speech in the

¹²Contrary to the court of appeals’ portrayal, however, this specific communication (like many others objected to by plaintiffs) was not paid for with ASM (or GSSF) grant funds. The Ten Percent Society received an ASM operations grant for other, general expenses. J.A. 181, ¶ 34. None of the RSOs hire professional lobbyists. *Cf. Carroll v. Blinken*, 42 F.3d 122, 127 (2nd Cir. 1994) (“*Carroll II*”) (“professional lobbying efforts . . . ‘stretch[] the nexus between the extracted fee and SUNY Albany’s educational interests too far’”).

forum. *See supra* at 15-18.¹³ Just as every student must pay for tuition, every student appropriately pays for the vibrant extracurricular marketplace at the University. *See Keller*, 496 U.S. at 12.

3. No Additional Safeguards Are Necessary To Preserve The Constitutional Balance.

The decisions below not only erred in finding a constitutional violation, but also in their use of the single private entity cases as a reference point for crafting a remedy. *See* 151 F.3d at 733 & n.16 (imposing on University the ongoing procedural requirements of *Chicago Teachers Union v. Hudson*, including the need to give any objectors “a reasonably prompt decision by an impartial decision maker concerning the propriety of” expenses paid by mandatory fees). Those unnecessary “remedial” efforts ignored the essential differences between a private, politically active entity collecting fees to advance its policy positions, on the one hand, and a state University collecting fees to fund a limited public forum for student groups, on the other. The differences bear emphasis again here, because they underscore that, in response to the second and third *Abood* questions, there are no additional limitations or procedures that should be grafted on to the basic, state-established parameters of this forum.

When the government charges a fee and sets up a

¹³This is a different “free rider” argument than the one the court of appeals rejected. The fact that all RSOs must open their doors to all students does not create the only significant free rider problem here. *Cf.* 151 F.3d at 728. Whether or not a student participates in any RSO, or in one of the large number that receive support through ASM grants, he or she benefits from the presence and speech of this whole array of groups that combine to form a challenging, stimulating University community. That free ridership is also “calculated” and not “incidental,” *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part), for the University must strive to educate all its students.

viewpoint-neutral funding program for a certain category of private speakers, it does not share the self-interested perspective of any of those individual actors; instead, it is beholden to the broader public interest and the Constitution. Especially where the state has created a limited public forum, the First Amendment imposes a clear, continuing obligation to respect the parameters of the forum and to avoid viewpoint discrimination. *See supra* at 9 & n.4. Thus, without any additional mandate or procedure, funders of the forum are strongly protected against a viewpoint-biased, partisan misuse of their contributions. In contrast, when a union collects a mandatory fee, that single private organization has a clear self-interest in maximizing the fee and using it for its full range of advocacy efforts; in such circumstances, the ongoing germaneness standard and elaborate procedures to enforce it must be judicially required of the union. Neutral government programs for diverse organizations are manifestly different.

Indeed, if expressive organizations satisfy a forum’s own limitations on permitted speakers and topics, they cannot constitutionally be subjected to further judgments about germaneness. Once the doors of a limited public forum swing open, all speech within its boundaries — no matter how “esoteric” or “ideological” — must stand on an equal footing. *See Rosenberger*, 515 U.S. at 829-30 (viewpoint discrimination, and content discrimination that goes beyond setting bounds of the forum, are impermissible). Furthermore, any system of individualized fee opt-outs and challenges, based on disagreement with particular expression, would threaten to introduce impermissible viewpoint discrimination into a monetary forum’s grant process by making more money available for non-controversial groups and less for controversial ones.¹⁴ If the elaborate protections and

¹⁴Plaintiffs have alternatively suggested that instead of an opt-out, all students should be asked to opt-in and individually designate the groups

procedural requirements in the union cases were carried over to this University setting, with its over 40,000 students and over 600 RSOs, the costs of those procedures alone would greatly diminish the size and vibrancy of the forum. *See* 157 F.3d at 1129 (Wood, J., dissenting from denial of rehearing *en banc*).

For all of these reasons, the ongoing safeguards used in single-entity compelled subsidy cases cannot be, and need not be, imported into the new context now before the Court.

III. A PUBLIC UNIVERSITY DOES NOT VIOLATE THE FIRST AMENDMENT WHEN IT REQUIRES ALL STUDENTS TO HELP PAY FOR A PROGRAM THAT FUNDS VARIED STUDENT SERVICES TO ADVANCE HEALTH, SAFETY AND ACADEMIC SUCCESS.

The General Student Services Fund (GSSF) underwrites critical support services that enable the large, diverse student body at UW to focus on learning. Though this grant program's emphasis is on practical needs, while the ASM program emphasizes robust extracurricular debate, the two are equally important, complement one another, and share many characteristics that lead to the same conclusion about their constitutionality. Like mandatory contributions to the ASM forum, mandatory contributions to the viewpoint-neutral, wide-ranging GSSF grant program do not impose a cognizable injury on objecting students; even if there were harm to First Amendment interests, as plaintiffs assert, the University's

that are to receive University support through their mandatory fee, as with the Combined Federal Campaign. Such a scheme would obliterate the public forum aspect of the current funding program, set up to give voice to a wide range of substantive speech (not to facilitate fundraising, like the Combined Federal Campaign), and transform the RSO subsidies into a wholly viewpoint-based popularity contest.

needs prevail in the *Abood* balance; and the GSSF program should remain intact, without any new limitations or safeguards.

A. Mandatory Financial Support Of The GSSF Grant Program Does Not Cause Constitutional Injury To The Plaintiffs.

1. With The GSSF Portion Of The Mandatory Fee, UW Students Fund A Viewpoint-Neutral, Multi-Faceted Student Services Program.

The GSSF program gives many organizations the financial ability to "provide direct, ongoing services to significant numbers of UW-Madison students;" the funded services are ones that "contribute significantly to student health, safety, or academic success." *Stip.* ¶ 13, J.A. 236. GSSF grants will be made only if other sources of sufficient funds are not available to underwrite the student service a group provides. The Student Services Finance Committee (SSFC), which allocates GSSF monies, "expects groups to continually search for other available funding." J.A. 236.

Most of the organizations that receive GSSF grants are RSOs. *See Stip.* ¶ 17; J.A. 178, ¶ 3. University departments and community-based service organizations are also eligible, provided they meet all of the requirements and conditions for funding. J.A. 237. In addition to the criteria related to purpose and other sources of funding discussed above, the organization must keep and make available detailed financial records, records measuring the number of students served, and client evaluations. J.A. 238. Any organization that is primarily political is ineligible to receive a student services grant. *Id.*

GSSF grant recipients are encouraged to use student volunteers, in addition to paid student staff, to provide their service. *See* J.A. 237-38; J.A. 178, ¶ 3. If both students and

non-students are served, the GSSF grants should fund "only those portions of the programs that directly serve students." J.A. 237. Moreover, no GSSF grant recipient can use those funds for political lobbying or for politically partisan activities. J.A. 238; J.A. 252.

The SSFC process for reviewing applications and allocating GSSF money is viewpoint-neutral. Stip. ¶ 12. The central issue is whether such funding is necessary to support a service that directly aids many UW students and that significantly advances student health, safety, or academic success. *See supra* at 23. Applicants must identify "specific University needs and problems of the identified target population which th[e] service intends to address," discuss the "size, extent, or severity of the problem(s)," and cite supporting documentation. Stip. ¶ 25, Att. I, at 4.

The GSSF program creates the incentive for and financially sustains a diverse, innovative array of widely used student services, which not only directly help students, but also provide unique educational experiences in community service for student leaders, staff and volunteers. In 1995-96, for example, the largest GSSF grants went to the SAFERide Bus service, the student radio station, and the Greater University Tutoring Service (GUTS). J.A. 137. The program funded a Community Law Office, groups that work to prevent rape and help rape victims, a Student Tenant Union, and Vets for Vets, a support service for veteran students. Similarly, as the Associate Dean of Students has described,

This [GSSF] group of services also includes the Lesbian, Gay, Bisexual Center and the Campus Women's Center which provide information and support for LGB students and women at the University, groups that have been and may yet be targets of discrimination, attack or ignorance. For many students, these centers with their staff, small

libraries, and various programs are important sources of support and serve as evidence that they are welcomed to the University community.

J.A. 178, ¶ 3. The UW project of the Madison AIDS Support Network received a GSSF grant "to target the University community for special efforts to provide information about AIDS to students." *Id.*¹⁵

The amount of each student's mandatory fee that pays for the GSSF program each semester has recently ranged from approximately \$6.50 to \$13.50. Stip. ¶¶ 5-6. Organizations that receive GSSF support, like ASM grant recipients, do not get cash or lump sum payments from the University. Rather, the University itself pays the expenses covered by the grant to third party creditors or employees. Stip. ¶ 21. All the GSSF program money remains in the state treasury until such bills are paid to cover the costs of service provision. J.A. 244-52.

2. Because Their Student Fees Fund The University's Broad Services Program, And Not Individual Private Groups, Plaintiffs Do Not Suffer A Cognizable First Amendment Injury.

Plaintiffs frame their case as if the state is forcing them to contribute directly to a few of the GSSF grant recipients, the

¹⁵Plaintiffs exaggerate the political activities of UWGreens, the RSO awarded the smallest GSSF grant in 1995-96, and depart from the undisputed facts. *See* J.A. 181, ¶¶ 24-27. Even if plaintiffs could establish that UWGreens' mission or some of its activities fell outside the GSSF program requirements, however, that would be an isolated implementation issue and not grounds for striking down the University's policy decision to establish this fund and pay for it with mandatory student fees. Plaintiffs are, regardless, funding the overall viewpoint-neutral GSSF program and not any single group. *See infra* at 26-28. Moreover, plaintiffs challenge only University policy in this suit, and do not here challenge individual implementation decisions at the ASM or SSFC level. *See* J.A. 8, ¶ 77.

few whose activities or perspectives plaintiffs do not endorse. As shown above, that is not an accurate portrayal of what the GSSF portion of the mandatory fee does. It goes into the state treasury, and from there helps pay for the costs of a varied range of student services, which have in common only (a) their help to large numbers of students, (b) their benefit to health, safety, and academic success, and (c) their inability to find funding elsewhere. The GSSF funding process is concededly viewpoint-neutral. Moreover, this University effort to make as many practical services available to students as possible does not have an expressive agenda, let alone a political or ideological one. Like the ASM program but in another realm, this is a state program designed to support many organizations and their diverse contributions to campus life.

Thus, payment of the GSSF portion of the mandatory fee inflicts no First Amendment injury on students, because it is simply payment to the University for this viewpoint-neutral services program. Subsidizing such a grant program does not engender a cognizable "crisis of conscience," *Glickman*, 117 S. Ct. at 2139, or interfere with students' freedom of belief, even if they strongly disagree with the actions or views of one or more individual organizations that eventually receive GSSF support. *See also supra* at 11-14. The plaintiffs cannot make their fee and the GSSF financial support that aids particular groups into a federal constitutional matter, any more than they could challenge the portion of the fee that goes to the University health service, which might employ doctors or contract with organizations that vocally support abortion, or to the Child Care Tuition Assistance Program, which undoubtedly provides tuition grants to some politically active students with views unlike plaintiffs.¹⁶

¹⁶*See generally Goehring v. Brophy*, 94 F.3d 1294, 1303 (9th Cir. 1996) (distinguishing the injury at issue in *Keller* from mandatory student fees that fund student health insurance programs, which in turn pay for

This lack of First Amendment injury holds true even if grant recipients facilitate the political speech of others through their service provision, or if the services themselves might be seen to embody a political message. For example, the student radio station, in addition to the public service information it provides, also likely gives air time to individuals' political expression and debate. Similarly, both the Campus Women's Center and *amicus* LGBT Campus Center publish newsletters as part of their support for women and gay people on campus, with articles expressing the various views of contributors on political and other subjects.¹⁷ Moreover, because Vets for Vets provides support services for veterans and works to ensure their equal place in the University community, and the Women's Center and LGBT Campus Center serve similar goals, the existence or activities of those groups could be termed political. Likewise, the Student Tenant Union's help for renters and the Rape Crisis Center's work to prevent rape or support rape survivors have political aspects. Yet each organization remains only one among many funded through the GSSF program. J.A. 137. The services program itself is viewpoint-neutral and designed by the University to improve the health, safety and academic success of the student body,

private abortion providers; "the characteristics and function of the University are much more akin to those of the typical government agency than are those of the State Bar. The University, like a state government, provides a wide spectrum of services to students, whereas the State Bar acts largely as an intermediary between its members and the state government, working to advance certain specialized interests"), *cert. denied*, 520 U.S. 1156 (1997).

¹⁷Contrary to the record, both plaintiffs and the court of appeals describe items in these newsletters that reflect solely the views of the author and portray them as expression of the funded group. *See* J.A. 174, ¶¶ 5-6, 8; J.A. 181, ¶¶ 13-21. Although authors writing in their newsletters have mentioned particular legislative proposals, neither the Campus Women's Center nor the LGBT Campus Center engages in lobbying. *Id.*

not to serve any political or advocacy goal. As such, it does not give rise to a First Amendment claim by students who object to this use of their mandatory student fee.

B. Even If The Objecting Students Had Significant First Amendment Interests At Stake, The University's Important Health, Safety, And Educational Needs, Greatly Served By The GSSF Program, Would Outweigh Those Interests.

The University cannot accomplish its mission unless its students have the safety, physical health, self-esteem, time, and academic resources that are necessary prerequisites to study and learning at the university level. *See* R26, Att. A at 1732 ("universities are obligated not only to provide high-quality academic programs, but also to provide supportive activities affecting student academic achievement, life, and interests"; it is "essential to creat[e] a healthy, stable environment suitable for effective teaching and learning"). The General Student Services Fund, along with other student services paid for with direct allocations of the mandatory fee, ensures that all UW students will be able to take advantage of the challenging academic program and other learning experiences (such as the ASM forum) without their attention being diverted by weighty personal or practical concerns.

Students who have safe transportation, help with legal or housing problems, knowledge about rape prevention and AIDS prevention, help in coping with other sexuality issues, tutoring resources, and a sense of community and belonging at the University will fully engage in the educational process, as university students must to succeed. These are the types of services available thanks to the GSSF program. J.A. 137. Indeed, the Campus Women's Center, like many of the other GSSF grant recipients, provides not one but multiple services that can make a crucial difference in individual students' lives. The Center offers free child care, runs facilitated support

groups on such subjects as depression, eating disorders, and surviving sexual assault, and runs a referral service to hook students up with other social service agencies, in addition to publishing its newsletter and maintaining a library. J.A. 174, ¶ 3. The LGBT Campus Center offers analogous help, information, and support. *See supra* at 1.¹⁸

In addition, the University benefits from the hands-on learning opportunities that the GSSF service organizations represent. The students who plan new service programs, lead existing ones, and work or volunteer for these groups learn what it means to run a service agency and give back to their immediate community. As GSSF staff and volunteers enable their student clients to cope with practical problems and focus more attention on learning, the service providers also expand their knowledge. *See Carroll II*, 42 F.3d at 128 (constitutional to fund "activities that provide . . . students with hands-on educational experiences" with mandatory fees).

Most importantly, though, this University understands that its heterogeneous students have a variety of pressing health, safety, and academic resource needs. Both to pave the way for students' pursuit of demanding educational goals and to act responsibly toward the young people in its care, the University uses this fund to fill those social service needs. The GSSF funding criteria, moreover, underscore that these services would not be available but for the GSSF grant program. *See supra* at 23. Therefore, even if objecting students had significant First Amendment interests in avoiding the GSSF portion of the mandatory fee, the University's weighty goals would prevail under the balancing test.

¹⁸Programs like these are often funded by universities through money raised with a mandatory student fee. *See, e.g., Chess v. Widmar*, 635 F.2d 1310, 1312 n.1 (8th Cir. 1980) (funding of Student Services Commission, Women's Union, and others), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981).

Like the ASM program, this carefully designed, viewpoint-neutral grant system for a wide array of service groups is constitutional as it stands and does not require any remedy. There is no danger here, as there was in the union and bar cases, of the University pursuing a narrow, partisan end with these fees. It is constitutionally bound to adhere to viewpoint neutrality. Furthermore, the GSSF program itself screens applicants to ensure that their services will have a significant impact on campus. Thus, as with the ASM funding stream, no separate "germaneness" inquiry or fee opt-out could be applied without cutting into the heart of the program and the important state interests it serves. *See supra* at 19-22.

CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Date: June 14, 1999

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