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Supreme Court, U. S.

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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 *AMICUS CURIAE* THE BRENNAN CENTER
FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL
OF LAW IN SUPPORT OF PETITIONERS**

BURT NEUBORNE
KIMANI PAUL-EMILE
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW
161 Avenue of the Americas
Fifth Floor
New York, NY 10013
(212) 998-6730

SCOTT D. MAKAR
Counsel of Record
ROBERT BERGEN
MICHAEL J. FREVOLA
CAMILLE NICODEMUS
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

Attorneys for Amicus Curiae
The Brennan Center for Justice at
New York University School of Law

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INTEREST OF *AMICUS CURIAE*

With the consent of the parties, the Brennan Center for Justice at New York University School of Law submits this brief *amicus curiae* in support of Petitioners.¹ Letters of consent are on file with this Court.

The Brennan Center for Justice at New York University School of Law (the “Center”) is a non-partisan institute dedicated to a vision of inclusive and effective democracy. The Center unites the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice William Brennan, Jr. To that end, the Center has created a Democracy Program and a Poverty Program, which undertake projects that promote equal citizenship and other core ideals of democratic government.

The Center files this brief *amicus curiae* in support of Petitioner because the University of Wisconsin’s assessment of mandatory, non-refundable student activity fees to support, on a viewpoint-neutral basis, a limited public forum for the purpose of fostering an environment of learning and debate for all students, enhances the speech rights of all those participating in the forum and, thus, does not vest dissenting students with the right to opt out of the collective enterprise. The Center takes an interest in this case because of its implications for the ability of government to assist individuals lacking the financial resources to participate fully in the free market of ideas, and submits this brief in the hope of providing a workable framework for deciding student fee actions.

1. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus*, has contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

Pursuant to state law, the University of Wisconsin System is charged with a broad educational mission including “[f]oster[ing] diversity of educational opportunity [and] serv[ing] and stimulat[ing] society by developing in students heightened intellectual, cultural and humane sensitivities.” WIS. STAT. § 36.01 (1998). To assist in the execution of this mission, the Wisconsin Legislature enacted a provision that required the collection from each student in the University of Wisconsin System a mandatory, non-refundable student activity fee segregated from the students’ fees for tuition. *See* WIS. STAT. § 36.09(5) (1998). Primary responsibility for the allocation of the funds collected through assessment of this mandatory student activity fee was delegated to the campus student governments by the Board of Regents of the University of Wisconsin System (the “Board”), although by statute the Board retained “final confirmation” authority for the disposition of the mandatory student activity fee. *Id.*²

Respondents are (or were) students at the University of Wisconsin-Madison during the pendency of this lawsuit. Respondents commenced this action against the Board in the United States District Court for the Western District of Wisconsin, seeking, *inter alia*, declaratory and injunctive relief for the University’s alleged violations of Respondents’ First Amendment right of free speech. Specifically, Respondents alleged that their free speech rights were violated by the University’s requirement that Respondents fund various student organizations that espoused viewpoints with which Respondents disagreed.

2. The University of Wisconsin System, the University of Wisconsin-Madison, the Board and the University of Wisconsin-Madison’s student government are collectively referred to herein as the “University.”

Both Respondents and the University moved in the district court for summary judgment. Among other issues, the parties stipulated that contribution to the mandatory student activity fee is required under state law and that the University’s process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion. Both Respondents and Petitioners have conceded in briefs below that the mandatory activity fee funding program constitutes government creation of a public forum for the promotion of free speech pursuant to this Court’s holding in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

The district court granted Respondents’ motion for summary judgment on their freedom of speech claim, which determination was affirmed by judgment of the United States Court of Appeals for the Seventh Circuit dated August 10, 1998. The University requested rehearing of its appeal *en banc*, which request was denied by the United States Court of Appeals for the Seventh Circuit (three judges dissenting) by its opinion dated October 27, 1998.³

In January 1999, Petitioners, the members of the Board, requested that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 10, 1998. This Court granted the Board’s petition on March 30, 1999.

3. The opinion of the United States District Court for the Western District of Wisconsin is unreported. The opinion of the United States Court of Appeals for the Seventh Circuit, dated August 10, 1998 and affirming the district court’s decision, is reported at 151 F.3d 717 (7th Cir. 1998). The opinion of the United States Court of Appeals for the Seventh Circuit, dated October 27, 1998, denying rehearing *en banc* of the University’s appeal and containing the dissenting opinions of three judges, is reported at 157 F.3d 1124 (7th Cir. 1998).

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment right to free speech typically is implicated when government limits or suppresses speech. When government seeks to expand or produce a forum for speech, however, the First Amendment provides mutually exclusive protections for individuals in two distinctly different settings:

(1) When a government entity acts to enhance private speech, as in the establishment of a public forum on government property or the direct payment of speech subsidies, the First Amendment forbids the government entity from discriminating on the basis of viewpoint in granting access to the speech-enhancing resources. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829-31 (1995) (citations omitted).

(2) Conversely, when government itself generates speech, the First Amendment guarantees a dissenting individual the right to “opt out” of a government-mandated speech program. For instance, an opt-out is available where government requires an individual to express support for a particular viewpoint that is offensive to the individual’s beliefs. *See, e.g., West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Likewise, an opt-out is mandated where a government-sanctioned private entity (such as a labor union engaged in an agency shop, or an integrated bar association) uses a portion of a dissenting individual’s government-compelled contribution to advance a single political viewpoint that is not germane to the organization’s core purpose. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

The Seventh Circuit decision below conflated these two forms of First Amendment protection and thereby permitted a dissenting individual to opt out of supporting a government-

created public forum, even when the public forum is being administered in a viewpoint-neutral manner. Because involuntary support of a single viewpoint is the *sine qua non* of a compelled speech claim, a First Amendment opt-out is available only in those settings where First Amendment viewpoint-neutrality protection is unavailable. *See, e.g., Abood*, 431 U.S. at 220-21; *Barnette*, 319 U.S. at 634-35. In the public forum context, an individual’s First Amendment rights are protected not by permitting opt-outs, but by the assurance of viewpoint-neutrality in the administration of any fee-based program. In First Amendment settings such as a public forum, where viewpoint discrimination is prohibited, the issue of compelled speech does not arise. The constitutionally guaranteed participation of varied and contradictory voices precludes the involuntary association of any individual with any particular voice. If opt-out protection were extended to individuals asked to support a public forum, which by its very nature must be inclusive of even highly controversial views, the ability of government to foster or create a forum for speech would be circumscribed dramatically.

In *Rosenberger*, this Court observed that a university’s funding of a variety of student organizations through a student activity fund creates a public forum for the purpose of promoting free speech and intellectual debate on campus. *Rosenberger*, 515 U.S. at 830. The free speech rights of dissenting students are safeguarded fully by requiring that *all* political or ideological positions — including those held by Respondents — have available equal access to the public forum funded through their mandatory activities fee.

Despite this important protection, the Seventh Circuit held that the University’s imposition of the mandatory, non-refundable activity fee infringed upon individuals’ First Amendment freedoms under the rubric of *Abood* and its progeny because some of the groups that received viewpoint-

neutral funding advocated political views objectionable to Respondents. This concept, however, would grant a free speech right to opt out of virtually any government-imposed financial obligation that ultimately provides funding to groups with which individuals disagree. The insistence on an individual opt-out where collective funds are used to create a viewpoint-neutral forum is inconsistent with the very idea of government. Such a limitless opt-out would re-cast government as merely a voluntary association of individuals who may decide unilaterally which obligations of citizenship to honor.

This Court has repeatedly, and necessarily, rejected such an atomistic view of our society. Even in the more sensitive arena of religious freedom, this Court has denied individuals the right to opt out of financial support for programs for the collective benefit of society, despite those individuals' religion-based objections. *E.g.*, *United States v. Lee*, 455 U.S. 252 (1982) (rejecting Free Exercise claim to exemption from social security tax); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (rejecting Establishment Clause claim to real estate tax exemption to church as part of broad grant of exemptions to eleemosynary institutions).

In light of these principles, *amicus* respectfully urges that this Court reject First Amendment "opt-out" rights under the circumstances of this case.⁴

4. *Amicus*' argument supports the University's distribution of the allocable portion of the mandatory student activity fee insofar as the funds are distributed on a viewpoint-neutral, non-discriminatory basis. *Amicus* takes no position on the distribution of mandatory student activity fees by the University pursuant to student referenda.

ARGUMENT

I.

THE USE OF MANDATORY STUDENT ACTIVITY FEES TO SUPPORT A PUBLIC FORUM ON A UNIVERSITY CAMPUS DOES NOT VIOLATE THE FIRST AMENDMENT'S BAN ON COMPELLED SPEECH BECAUSE THE FIRST AMENDMENT REQUIREMENT OF VIEWPOINT-NEUTRALITY FULLY PROTECTS DISSENTING STUDENTS' FREE SPEECH RIGHTS BY ASSURING THAT NO STUDENT IS REQUIRED TO AFFIRM OR SUPPORT ANY PARTICULAR OPINION EXPRESSED IN THE PUBLIC FORUM

When government involves itself in the generation of speech, this Court has established two types of mutually exclusive First Amendment protections to deal with radically different settings. In one setting, when government elects to use collective resources to assist private speakers to participate in the marketplace of ideas, as in the establishment of a public forum on government property, the First Amendment prohibits government from engaging in viewpoint discrimination in allocating access to the forum. *See, e.g.*, *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-94 (1993); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985).

In the wholly different setting where government itself compels speech, the First Amendment guarantees a dissenting individual the right to "opt out" of such compelled speech rather than support it financially or by deed. *See, e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1, 9-10 (1990); *Abood v. Detroit*

Bd. of Educ., 431 U.S. 209, 235-36 (1977); *Wooley v. Maynard*, 430 U.S. 705, 715, 717 (1977); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Thus, as in the flag salute case of *Barnette*, where a government regulation or policy forces an individual to express support for a particular viewpoint that is offensive to the individual's beliefs, the First Amendment guarantees the dissenting individual the right to opt out of the government-compelled speech program. See *Wooley*, 430 U.S. at 715, 717; *Barnette*, 319 U.S. at 642. Similarly, as in the agency shop or bar association cases, where a government-sanctioned entity uses members' compulsory financial support to express a particular political viewpoint on an issue that is not germane to the organization's core purpose, a dissenting individual may demand a *pro rata* opt-out. See *Keller*, 496 U.S. at 17; *Aboud*, 431 U.S. at 237-38.

The Seventh Circuit decision below conflated these two First Amendment settings by permitting a dissenting individual to opt out when the only appropriate First Amendment protection was the enforcement of viewpoint-neutrality. As this Court's jurisprudence makes clear, a First Amendment opt-out right exists only where viewpoint-neutrality protections are absent. Thus, where government conscripts individuals to advance its public policy as part of the government's right to speak, dissenting individuals are guaranteed a First Amendment right to opt out. Similarly, where non-governmental entities like labor unions or bar associations, which speak in one voice in accordance with government's public policy, use compulsory funds to advance a particular viewpoint, dissenting individuals are permitted to opt out. But where, as here, viewpoint-neutrality protections are fully applicable, no basis exists for permitting a First Amendment opt-out.

The case law makes clear that the First Amendment opt-out protection is triggered only where there is compelled

speech — where a single viewpoint is being expressed to which all individuals must adhere or with which all group members are identified. This Court has never extended the opt-out protection of the First Amendment to a public forum, and for good reason. Whether a public forum is physically situated in a public park, on a sidewalk or in a transit bus, or is metaphysically present in the free-ranging opportunity created by subsidizing a broad spectrum of student organizations, no single individual, other than the actual speaker, can be identified with the wide variety of speech being expressed.

Allowing individuals whose funds support a public forum to opt out is, therefore, not necessary to protect their First Amendment rights. Enforcement of the ban on viewpoint-based discrimination already performs that function. The right to opt out of financially supporting a public forum would, however, grant certain individuals tyranny over the rights of others. The collective action necessary to create a venue for speech would be transformed into a voluntary assembly of individuals, each of whom, by opting out, could rend the common fabric and make such public fora impossible to sustain.

Thus, the fundamental flaw in the reasoning of the court in *Southworth* is its failure to recognize that the First Amendment guarantee of viewpoint-neutrality is separate and mutually exclusive from the right to opt out.⁵ Where a First

5. In fact, the *Southworth* decision specifically held that the University must provide *both* protections:

If the university cannot discriminate in the disbursement of funds, it is imperative that the students not be compelled to fund organizations which engage in political and ideological activities — *that is the only way to protect the individual's rights.*

(Cont'd)

Amendment right of viewpoint-neutrality exists, as in a public forum, no supporter of the public forum can be said to advance any particular idea. It is only in settings where viewpoint-neutrality is not required that opt-out rights are necessary to protect against compelled speech.

A. The University’s Use of the Student Activity Fee to Subsidize a Broad Array of Speakers in a Viewpoint-Neutral Fashion Constitutes a Limited Public Forum

There is no doubt that the use of mandatory student fees to subsidize speech on the University’s campus creates a public forum that must be administered in a viewpoint-neutral manner. This Court has made it clear that college campuses in general, and student activity funds in particular, are public fora subject to the First Amendment protections of content- and viewpoint-neutrality. *Rosenberger*, 515 U.S. at 831 (observing that “[t]he [student activity fund] is a forum more in the metaphysical than in a spatial or geographic sense, but the same principles are applicable”); *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) (holding that “[t]he campus of a public university, at least for students, possesses many of the same characteristics of a public forum”).

The free speech interests of dissenting students are, therefore, fully protected by the First Amendment ban on viewpoint discrimination in allocating access to the forum. Under *Rosenberger*, the University’s student activity fee creates, at a minimum, a limited public forum made up of many voices chosen on a viewpoint-neutral basis. Respondents are not entitled to an opt-out from the University’s program because, as *amicus* demonstrates *infra*, under a regime of viewpoint-neutrality, no dissenting student

(Cont’d)

Southworth v. Grebe, 151 F.3d 717, 730 n.11 (emphasis added), *reh’g en banc denied*, 157 F.3d 1124 (7th Cir. 1998).

is compelled to affirm a particular belief or support a particular organization.

B. The University’s Use of the Student Activity Fee to Subsidize a Broad Array of Speakers in a Viewpoint-Neutral Fashion Does Not Violate the First Amendment Ban on Compelled Speech Because No Dissenting Student is Compelled to Affirm or Financially Support a Particular Belief or Organization

A corollary to the First Amendment’s guarantee of freedom of speech is the guarantee that individuals cannot be “compelled to speak” either by affirming a particular idea or doctrine, *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 642, or by financially supporting a particular viewpoint with which the individual disagrees. *Keller*, 496 U.S. at 5; *Abood*, 431 U.S. at 235.

In *Barnette*, Justice Jackson captured the essence of the First Amendment ban on compelled speech. In invalidating compulsory flag salutes, he wrote:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.

Barnette, 319 U.S. at 642.

Compelled affirmation of belief is an affront to human dignity. Whether the compulsion takes place in the context of religious intolerance,⁶ or political zeal,⁷ a free society

6. A principal reason that the Founders insisted on protections for religious liberty in the Bill of Rights was to ensure that individuals would be free from the use of government to compel religious belief.

(Cont’d)

cannot permit government power to be used to force individuals to affirm a belief in an officially prescribed idea. In *Barnette*, West Virginia required the children of Jehovah's Witnesses to pledge allegiance to the flag of the United States, despite the fact that their religious beliefs forbade them to acknowledge the sovereignty of any earthly power. *Barnette*, 319 U.S. at 629. This Court invalidated the requirement. *Id.* at 643. In *Wooley*, New Hampshire required its citizens to display the motto "Live Free or Die" on their car license plates, forcing individuals to appear to affirm belief in an idea they actually opposed. *Wooley*, 430 U.S. at 707. This Court invalidated the requirement. *Id.* at 717. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), Massachusetts required parade organizers to permit gays to march in a privately sponsored St. Patrick's Day Parade, thus compelling the parade organizers to appear to affirm ideas that they opposed. *Id.* at 574. This Court invalidated the requirement. *Id.* at 581. In each of the compelled belief cases, an individual was forced to make public obeisance to a particular idea with which the individual disagreed.⁸

(Cont'd)

See, e.g., Barnette, 319 U.S. at 646 (Murphy, J., concurring) (stating that "[o]fficial compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country after what Jefferson characterized as the 'severest contests in which I have ever been engaged' ") (quoting 1 THOMAS JEFFERSON, AUTOBIOGRAPHY, pp. 53-59).

7. Many efforts to compel affirmations of belief have been driven by political concerns. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating state university regulations requiring faculty members, as a condition of continued employment, to sign certificates stating, *inter alia*, that they were not Communists).

8. For additional cases invalidating efforts to compel an affirmation of belief, *see, e.g., Torcaso v. Watkins*, 367 U.S. 488 (Cont'd)

In addition to precluding government from forcing individuals to affirm or appear to affirm ideas with which they disagree, the compelled speech doctrine also prevents government from coercing individuals to provide financial support for disfavored ideas, whether or not they publicly affirm the idea. Thus, for example, the ban on compelled speech is violated when government officials require employees or contractors to contribute funds to a particular candidate or political party in order to obtain employment or promotion. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (invalidating removal of towing service from approved list for failure to contribute to incumbent mayor); *Branti v. Finkel*, 445 U.S. 507 (1980) (holding that newly named public defender could not dismiss assistants merely because they belonged to opposing political party); *Elrod v. Burns*, 427 U.S. 347 (1976) (same). Similarly, compelled speech concerns are implicated where a non-governmental entity uses compulsory dues to fund a particular viewpoint on an issue not germane to the organization's purpose. *Keller*, 496 U.S. at 9; *Abood*, 431 U.S. at 235-36. In each of the compelled financial support cases, an individual was required to give financial support to a particular idea with which the individual disagreed.

Respondents argue that the prohibition on government-compelled speech recognized in *Barnette* and *Wooley*, and

(Cont'd)

(1961) (invalidating law requiring all holders of public office to affirm belief in the existence of God); *Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating state rule that veterans' property tax exemption was available only to persons who affirm that they do not advocate forcible overthrow of government); *Cummings v. Missouri*, 4 Wall (71 U.S.) 277 (1867) (invalidating requirement of disavowal of Confederate sympathy in order to preach); *Ex parte Garland*, 4 Wall (71 U.S.) 333 (1867) (invalidating requirement of disavowal of Confederate sympathy in order to practice law in federal court).

applied by the Court in *Abood* and *Keller*, requires the University to offer *pro rata* refunds to dissenting students of any portion of their compulsory student fees used by organizations that espouse positions with which the dissenting students disagree. Respondents reason that, in the absence of a *pro rata* refund, the dissenting students are forced, in Justice Jackson's words, to "confess by . . . act their faith in" ideas with which they disagree in violation of their First Amendment rights. This Court, however, has never recognized a right to a refund for dissenting contributors who provide financial support to a public forum.

1. *Respondents Have Not Been Compelled to Affirm or to Appear to Affirm Any Particular Belief*

The mere payment of a mandatory student activity fee, a small percentage of which funds a public forum on a university campus, is not a compelled affirmation of belief within the meaning of *Barnette* and its progeny. To the contrary, the student activities fees are used to fund a forum that is open to a wide range of speakers and is designed to facilitate the exchange of information and diverse student ideas and opinions. Financial support for such a forum does not require students to endorse an offensive message, see *Barnette*, 319 U.S. at 631-32, affirm objectionable beliefs or ideological messages, see *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion); *Wooley*, 430 U.S. 1428, respond to a hostile message when they would prefer to remain silent, see *Pacific Gas & Elec. Co.*, 475 U.S. at 15, or be publicly identified or associated with another's message, see *Hurley*, 515 U.S. at 577; cf. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87-88 (1980).

By paying the fees at issue here, Respondents are not compelled to engage in any actual or symbolic speech, nor are they used as involuntary conduits for the University's

expressive activity. See *Wooley*, 430 U.S. at 715; *Barnette*, 319 U.S. at 641-42; see also *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988) (invalidating statute requiring that professional fundraisers recite state-instituted disclosure statement when soliciting charitable contributions). Indeed, since the University imposes no viewpoint restraints on the freedom of students to communicate their messages, the mandatory payment in no way impairs Respondents' ability to express their own political or ideological positions. See *Martin v. City of Struthers*, 319 U.S. 141 (1943) (invalidating general anti-solicitation regulation that impaired religious group's freedom of speech by precluding door-to-door distribution of literature); cf. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding requirement of financial support of generic advertising by dissenting members of government-established growers association).

The student activity fee assessed to each university student is used to support a forum for student groups to engage in speech, debate and other activities for the benefit of the entire student body. The fund is accessible to student groups without regard to viewpoint or ideology, and no particular side on any issue is encouraged or advanced to the exclusion of others. Rather, the funds are used, consistent with the University's mandate, to stimulate debate and encourage students to expand their views and consider various perspectives and viewpoints. The University's creation of such a forum goes to the heart of any university's purpose:

the University's educational mission is precisely to combat orthodoxy by encouraging the dissemination of a multiplicity of views and interests, many of which will inevitably provoke controversy, debate and opposition. The collection and disbursement of the mandatory fee play an

integral part in the University's educational function, by providing students with the modest financial assistance necessary to engage in student government and parliamentary debate, to organize around common interests, and to advocate and argue ideas in the spirited intellectual atmosphere of the university campus.

Smith v. Regents of the Univ. of Cal., 844 P.2d 500, 520 (Cal. 1993) (*en banc*) (Arabian, J., dissenting).

The broad and varied nature of the speech forum at issue precludes any "association" between an individual student and any of the contradictory and competing messages propounded by the various student groups. Thus, no students are coerced into speaking in order to disassociate themselves from messages they may find objectionable. Indeed, the more diverse the views expressed through the support of the fee, the less likely it is that any student can be seen as supporting any particular view.

This Court already has explicitly rejected the argument that compelled support of a public forum results in a compelled affirmation of belief. In *PruneYard*, the California Supreme Court had construed its state constitution as imposing a viewpoint-neutral requirement that the owner of a large shopping center permit persons to engage in First Amendment activities on his private property. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 78 (1980). The owner argued, *inter alia*, that the California rule forced him to appear to endorse speech with which he disagreed. *See id.* at 86. This Court held that a state law requirement that a shopping center be available for political activity on a non-discriminatory, content-neutral basis did not compel the property owner to affirm, or to appear to affirm, belief in any of the speech expressed in that forum. *See id.* at 86-88; *see also Capitol Square Review Bd. v. Pinette*, 515 U.S. 753

(1995) (rejecting argument that permitting Ku Klux Klan to sponsor a cross in a public forum would appear to give government endorsement to message).

Similarly, Respondents are not associated with the voices that speak through the student activity fee forum. Instead, like the landowner in *PruneYard*, they merely are required to support a viewpoint-neutral forum. Indeed, a university's primary purpose is to educate its students through providing them with diverse opportunities to acquire, disseminate and interpret information. In doing so, universities prepare students to become productive members of society. In the words of this Court:

[t]he classroom is particularly the "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) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

In furtherance of a broad educational mandate, many universities create a forum for the exploration and presentation of many varied and often controversial political and ideological perspectives. Through such a forum, students are exposed to diverse political and ideological viewpoints. The University does not coerce these students into accepting any particular political or ideological position advocated by funded student groups. Instead, the University exposes students to controversial ideas — the quintessence of education. *See Widmar v. Vincent*, 454 U.S. 263, 278-80 (1981); *Healy v. James*, 408 U.S. 169, 181 (1972); *Keyishian*, 385 U.S. at 603.

2. *Respondents Have Not Been Compelled to Provide Financial Support For A Particular Viewpoint*

Nor have Respondents been forced to provide financial support to any particular idea, except the idea of free speech itself. The prohibition on government pressure to support a *particular* candidate or viewpoint should not be confused with support for a government effort to establish a non-discriminatory, subsidized public forum open to *all* viewpoints. It is, of course, true that the government may *not* require individuals to provide financial support to an objectionable viewpoint as a condition to retain an economic benefit or other right. *See, e.g., O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 714 (1996). A mere "association" with a public forum, however, cannot lead to a compelled affirmation of belief claim. *E.g., PruneYard*, 447 U.S. at 86-88. Likewise, compelled financial participation in a plan to subsidize a forum for all speakers on a non-discriminatory, viewpoint-neutral basis does not constitute compelled financial support for the ideas espoused by any one of the subsidized speakers.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), Congress provided viewpoint-neutral subsidies to all candidates for President. Objectors argued that the subsidy program compelled them to support the ideas of candidates with whom they disagreed. *See id.* at 92. In words that apply to the University's creation of a student public forum, this Court rejected the challenge, stating:

Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, Subtitle H

further, not abridges, pertinent First Amendment values.

Id. at 92-93.

By parallel reasoning, the University's use of student fees to create a forum that increases opportunities for speech in a non-partisan, viewpoint-neutral manner is the type of constitutionally permissible activity that does not endanger an individual's First Amendment freedom.

Respondents ignore *PruneYard* and *Buckley*, which, like the *Southworth* decision,⁹ involved mandated support for a viewpoint-neutral public forum. Instead, Respondents rely on cases where support was required for a single viewpoint. In *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), this Court construed provisions of the governing statute to require a labor union to refund to dissenting workers the *pro rata* portion of mandatory agency shop dues used to support particular political candidates. In *Abood*, this Court

9. In fact, the court in *Southworth* incorrectly relied on dicta in *Rosenberger* to distinguish *Buckley*. This Court in *Rosenberger* noted that "[t]he neutrality of the [university's funding] program distinguishes it from a tax levied for the direct support of a church or group of churches." *Rosenberger*, 515 U.S. at 840. The court in *Southworth* apparently relied on this Court's comment that "the \$14 paid each semester by students is not a general tax designed to raise revenue for the University," *id.* at 840-41, in concluding that the student fee was not a general tax, and was therefore exempted from the tenets of *Buckley*. *See Southworth*, 151 F.3d at 732 (quoting *Rosenberger*, 515 U.S. at 841). However, from this Court's comment in *Rosenberger* that "[t]his is a far cry from a general public assessment designed and effected to provide financial support for a church," *Rosenberger*, 515 U.S. at 841, it seems clear that this Court merely was distinguishing the student fee from a government-imposed tax to fund religion, and that the distinction between designated fees and taxes was not intended to create a dichotomy in the landscape of First Amendment protections.

applied First Amendment compelled speech analysis to reach the same result. In *Keller*, this Court applied *Abood* to mandatory state bar dues and required *pro rata* refunds to dissenting members of the organization for political expenditures designed to advance a particular viewpoint. See also *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (restricting use of compulsory union dues to activities related to contract negotiations).¹⁰

The key difference between *Abood* and *Keller* on the one hand, and *PruneYard*, *Buckley* and *Southworth* on the other, is that the former involved the use of members' fees to support a single, partisan political agenda to the exclusion of others, while the latter cases involved the funding of viewpoint-neutral open forums. As a dissenting judge stated in the denial of rehearing *en banc* in *Southworth*,

[t]here is a crucial difference between a requirement to pay money to an organization that explicitly aims to subsidize one viewpoint to the exclusion of other viewpoints, as in *Abood* and *Keller*, and a requirement to pay a fee to a group that creates a viewpoint-neutral forum, as is true of the student activity fee here. The former is subject to additional First Amendment constraints and must therefore allow dissenters to opt out of the fund; the latter satisfies the First Amendment's

10. In each setting, this Court previously had upheld the requirement that all persons served by the collective or regulatory organization participate in its financial support. See, e.g., *Lathrop v. Donohue*, 367 U.S. 820 (1961) (upholding compulsory bar membership and dues); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) (upholding compulsory union dues in agency shop); see also *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding requirement of financial support of generic advertising by dissenting members of government-established growers association).

concerns with the plurality of views inherent in its viewpoint-neutrality.

Southworth v. Grebe, 157 F.3d 1124, 1125-26 (Wood, J., dissenting), *denying reh'g en banc*, 151 F.3d 717 (7th Cir. 1998).

Thus, the use of student fees payable to the University's student government to fund a viewpoint-neutral public forum cannot be equated with the expenditure of mandatory agency shop/bar association dues for partisan political purposes. If Respondents were to prevail, whenever a government entity supports speech, anyone compelled to contribute financially to that entity — by virtue of taxes, tuition, fees or other means — could assert a violation of the First Amendment's ban on compelled speech. Indeed, if mandatory support of a public forum were treated as compelled identification with the particular speakers who use the forum, it would become administratively impossible for government to create a public forum. Under *Abood*, financial contributors to the forum could opt out of their financial obligations whenever they disagreed with one or more of the speakers who used it.

Finally, this Court should reject the notion that compelled financial support of a viewpoint-neutral public forum can be equated with compelled financial support of the speakers who use that forum. In doing so, this Court would not weaken its historic refusal to countenance compelled speech. A coherent, interlocking set of First Amendment norms provides effective protection against unfair efforts by the state to compel support for *any* idea, without imposing disabling restrictions on collective action. In settings where a governmental unit seeks to use mandatory fees to subsidize speakers, compelled support of a particular disfavored idea is impossible because this Court has imposed a First Amendment requirement of viewpoint-neutrality that prevents the funds from being diverted exclusively to

designated partisan uses. *Rosenberger*, 515 U.S. at 829 (mandating provision of state university subsidies to religious publications on same terms as secular publications); *see also Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (deferring to public television decision to subsidize political debate involving fewer than all the candidates as long as candidates were not excluded on basis of viewpoint). On the other hand, in settings where government itself compels the speech, as in *Barnette*, or where mandatory fees are collected and disbursed to speakers on the basis of viewpoint by private organizations free from a First Amendment obligation to be viewpoint-neutral, as in *Abood* and *Keller*, dissenting individuals are entitled to a First Amendment opt-out. *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991). In both settings, the First Amendment protects against compulsory support of a disfavored idea, while permitting effective collective action in support of important social goals.

II.

RESPONDENTS' INSISTENCE ON A RIGHT TO EXERCISE INDIVIDUAL VETOES OVER THE UNIVERSITY'S USE OF MANDATORY STUDENT ACTIVITY FEES IS INCONSISTENT WITH FUNDAMENTAL FIRST AMENDMENT JURISPRUDENCE

The establishment of a viewpoint-neutral public forum is irreconcilable with a right that permits an individual to refrain from indirect support of objectionable speech in that forum. If individuals may opt out of supporting a public forum, which by its very nature must be inclusive of a range of views, the ability of government to promote speech and fora for speech will be effectively eliminated. As one dissenting member of the California Supreme Court stated when that court was presented with this same question, under the opt-out approach:

funding [would] soon devolve into a political popularity contest. Thus, in a setting where provocative ideas should receive the most support and encouragement, precisely the opposite will occur; student groups will be subject to an ideological referendum, and the most marginal groups will receive the least financial assistance. This is truly Orwellian.

Smith v. Regents of the Univ. of Cal., 844 P.2d 500, 526 (Cal. 1993) (*en banc*) (Arabian, J., dissenting).

Under this approach, a court would be required to give serious consideration to virtually any objection to the use of government funds to support programs with which a dissenter disagrees. If a compelled speech claim is to be permitted in the public forum context, then a citizen could demand a *pro rata* refund on his taxes if he disagreed with any speaker announcing his views in a park, street corner, or any governmentally subsidized arena, including advertising in a transportation facility.

This Court has, however, repeatedly rejected individual claims to opt out of the general obligations of citizenship, even in the more heavily protected arena of religious freedom.¹¹ Instead, this Court has recognized that, while government may not compel individuals to affirm, or appear

11. *E.g., Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (rejecting First Amendment claim to religious exemption from minimum wage obligations); *Gillette v. United States*, 401 U.S. 437 (1971) (rejecting First Amendment claim to selective conscientious objection to particular wars); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (rejecting First Amendment challenge to child labor laws); *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) (rejecting constitutional challenge to compulsory vaccination rules); *Reynolds v. United States*, 98 U.S. 145 (1878) (rejecting First Amendment challenge to laws forbidding polygamy).

to affirm, their belief in ideas with which they disagree, the necessity of collective support to empower government to effect comprehensive programs for a variety of societal needs permits the government to impose obligations, including financial obligations, on all members of a group or entity.¹²

Respondents in effect are seeking to create a political analogue to the religion clauses of the First Amendment in their insistence on a free speech right to opt out of state-imposed financial obligations when their monies will be used to fund a broad-based program of support to organizations, some of whose ideas are offensive to Respondents' views. While it is true that the Establishment Clause prevents government from requiring citizens to expend funds in direct support of religion, *see, e.g., Everson v. Board of Educ.*, 330 U.S. 1 (1947), attempting to extend a similar "no support" principle to the expenditure of student fees to support organizations espousing ideas with which the dissenting students disagree would fail under the religion clauses. Even in that more sensitive arena of Free Exercise and Establishment Clause doctrine,¹³ this Court has recognized

12. *E.g., Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding requirement of financial support of generic advertising by dissenting members of government-established growers association); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) (upholding use of compulsory union dues for union convention, publications and social functions); *United States v. Lee*, 455 U.S. 252 (1982) (rejecting religiously based exemption from social security taxation); *Buckley v. Valeo*, 424 U.S. 1 (1976) (rejecting First Amendment objection to government financing of Presidential campaigns); *Lathrop v. Donohue*, 367 U.S. 820 (1961) (upholding compulsory bar membership and dues); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) (upholding compulsory union dues in agency shop).

13. Although *amicus* is aware, in light of this Court's holdings in *Employment Div., Dep't of Human Resources of Ore. v. Smith*, (Cont'd)

that the expenditure of public funds that may benefit religious institutions as part of a general program designed to serve secular purposes does not compel taxpayers to support religious institutions in violation of the Establishment Clause. *See, e.g., Walz v. Tax Comm'n*, 397 U.S. 664, 675-76 (1970) (upholding real property tax exemptions for churches as part of broad grant of exemption to eleemosynary institutions). Thus, in *United States v. Lee*, 455 U.S. 252 (1982), this Court rejected a Free Exercise claim to exemption from social security taxation. *Id.* at 260. The failure of the Free Exercise claim in *Lee* completely undermines Respondents' argument for a First Amendment compelled speech based exemption in this case.

Indeed, if the Seventh Circuit's decision is affirmed, this Court's precedents that have distinctly limited compelled speech claims in the context of collective group interests will be seriously eroded. In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), for example, this Court upheld a requirement of financial support from all members of a government-established growers' association to support generic advertising for the industry. *Id.* at 469-70. The *Glickman* Court rejected the claim of several large growers that they were compelled to speak, noting that the use of assessments to support collective advertising did not require them to personally affirm an objectionable message, to use their own property to convey an antagonistic ideological message, or require them to be publicly identified or associated with another's message. *Id.* at 470-71. The

(Cont'd)

494 U.S. 872 (1990), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) and *City of Boerne v. Flores*, 521 U.S. 507 (1997), that this Court's current standard of scrutiny for governmental regulations pertaining to the religion clauses is less stringent than previously applied, the cases cited in the text were decided at a time when challenges to government regulations made under the religion clauses were examined under exacting scrutiny.

Glickman Court held that “[r]espondents are not required themselves to speak, but are merely required to make contributions for advertising.” *Id.* at 471. If a compelled speech claim permits students to opt out of paying a mandatory student activity fee used to support a forum for the benefit of the entire group, this Court’s decision in *Glickman* and other cases will be cast into doubt. *E.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (rejection of property-owner’s compelled speech claim based on presence of shopping center leafletters propounding offensive messages); *Buckley v. Valeo*, 424 U.S. 1 (1976) (rejection of compelled speech claim based on government financing of Presidential campaigns).

There is also well-settled authority, particularly in the area of free speech, that circumscribes the extent to which the federal courts may engage in questions addressing the content of educational curriculum.¹⁴ Despite this authority, the court in *Southworth* recognized a compelled speech scenario with regard to the student activity fund and applied the *Abood/Keller* line of cases to the University’s funding program in order to determine whether the challenged groups’ activities were “germane” to the University’s purpose.

14. *E.g.*, *Widmar v. Vincent*, 454 U.S. 263, 278-79 (1981) (Stevens, J., concurring) (stating that universities make content-based curriculum decisions on a routine basis and that “[j]udgments of this kind should be made by academicians, not by federal judges”); *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 507 (1969) (stating that “the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (stating that “[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values”).

Southworth, 151 F.3d 717, 724-27, *reh'g denied en banc*, 157 F.3d 1124 (7th Cir. 1998). The circuit courts in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985) and *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994) also applied *Abood* and *Keller* and engaged in a germaneness analysis with regard to funding student groups through student activity fees. Each of these circuit court decisions, in effect, left it to federal judges rather than to educators to determine whether each participant in a student forum was engaged in “political” or “educational” activities.

But the federal judiciary simply is not equipped to second-guess university administrators on the educational value of a vibrant public forum on a university campus. *See, e.g.*, *Widmar*, 454 U.S. at 278-79 (Stevens, J., concurring); *Tinker*, 393 U.S. at 507; *Epperson*, 393 U.S. at 104. The court in *Southworth* explicitly recognized that “everything is in a sense educational (organizing a student activity, engaging in political and ideological speech, even choosing which political party or candidate to fund).” *Southworth*, 151 F.3d at 725. The court in *Galda* likewise recognized the problem judges face in making this distinction, noting that:

[a]n examination of PIRG’s financial documents by a certified public accountant as well as an independent review by the district court established that it was not possible to “numerically quantify ‘political’ and ‘educational’ components of PIRG”. . . .

* * *

Moreover, the evidence revealed that it is impossible to isolate the “educational component” from the ideological pursuits for purposes of apportioning the expenses attributable to each. It

is difficult to believe that it could be otherwise since the educational benefits are intertwined and integrated with the political and ideological objectives. It is no simple task, and probably an impractical one, to formulate principles that could be used to separate the educational component of lobbying, campaigning, or researching a paper that urges passage of certain legislation from the organization's ideological goal which is directly advanced by those activities.

Galda, 772 F.2d at 1063, 1066.

Similarly, in *Rosenberger* this Court noted the inherent difficulties that exist in trying to find a rational distinction between "religious speech" and "speech about religion." *Rosenberger*, 515 U.S. at 845 (quoting *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981)). Although *Rosenberger* and *Widmar* both were based on the Establishment Clause, the passage cited during the *Rosenberger* Court's analysis is relevant: "[e]ven if the distinction [between 'religious speech' and 'speech about religion'] drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer." *Id.* The difficulty in drawing educational versus political distinctions in the university speech forum context, and the fact that engaging in such an exercise would involve federal courts in ongoing oversight of the content of public university education, are both strong reasons for rejecting the *Southworth* court's application of *Abod* and *Keller* to the university setting.

Indeed, if the *Southworth* decision is upheld, a flood of litigation involving public university use of student fees, and virtually every other mandatory payment to a government entity, might sweep through the courts. For example, *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996), which refused to apply *Abod* and *Keller* to a Free Exercise

challenge to the use of mandatory student insurance fees that paid for student abortions, might require reexamination, as might numerous other federal court decisions that have deferred decisions concerning the use of university fees to the educational institutions. *See, e.g., Rounds v. Oregon State Bd. of Higher Educ.*, 1999 WL 86684 (9th Cir., Feb. 23, 1999) (holding that use of compulsory student fees to fund public interest research groups does not violate students' associational rights); *Hays Cty. Guardian v. Supple*, 969 F.2d 111, 122 (5th Cir. 1992) (holding no First Amendment violation in assessing mandatory student fees to support university newspaper), *cert. denied*, 506 U.S. 1087 (1993); *Kania v. Fordham*, 702 F.2d 475, 481 (4th Cir. 1983) (upholding use of mandatory student fees to support university newspaper).

This Court has established a clear body of First Amendment jurisprudence that permits "opt-outs" only in the limited circumstances of compelled speech. Should this Court affirm the Seventh Circuit's decision to expand a dissenting individual's right to opt out to include public forums in general, the affirmance will unsettle sound and well-reasoned precedent in a variety of First Amendment contexts. In light of this Court's existing precedent and the practical consequences that would ensue from an affirmance of the Seventh Circuit's decision, *amicus* respectfully suggests that this Court not recognize a First Amendment "opt-out" right in this case.

CONCLUSION

For the above-mentioned reasons, the decision of the Court of Appeals for the Seventh Circuit below should be reversed.

Respectfully submitted,

BURT NEUBORNE
KIMANI PAUL-EMILE
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW
161 Avenue of the Americas
Fifth Floor
New York, NY 10013
(212) 998-6730

SCOTT D. MAKAR
Counsel of Record
ROBERT BERGEN
MICHAEL J. FREVOLA
CAMILLE NICODEMUS
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

*Attorneys for Amicus Curiae
The Brennan Center for Justice at
New York University School of Law*