No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE COMMITTEE FOR A CONSTRUCTIVE TOMORROW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Filed August 13, 1999

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

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INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and publishing educational materials that promote, *inter alia,* a limited and an accountable government, the proper role of the judiciary, and the First Amendment's protection of freedom of speech.

In particular, WLF has appeared as *amicus curiae* in or as party to cases supporting freedom of speech under the First Amendment. *See, e.g., Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996); *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Washington Legal Found. v. Henney*, 1999 U.S. Dist. LEXIS 11419 (D.D.C., July 27, 1999). WLF also has supported the First Amendment rights of those who object to being compelled to subsidize speech with which they disagree. *See, e.g., Glickman v. Wileman Bros.*, 117 S. Ct. 2130 (1997); *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 94 F.3d 996 (5th Cir. 1996), *aff'd sub nom.* on Fifth Amendment Takings Clause issue, *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998);

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[1] The Washington Legal Foundation and the Committee For A Constructive Tomorrow hereby declare that counsel for a party did not author this brief in whole or in part, and that no person or entity other than *amici curiae* and their counsel have made a monetary contribution to the preparation or submission of this brief. This brief is being filed with the written consents of the parties which have been filed with the Clerk.

Keller v. State Bar of California, 496 U.S. 1 (1990); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California*, 475 U.S. 1 (1986); *Hollingsworth v. Lane Community College*, 173 F.3d 860 (9th Cir. 1999) (mem.).

In addition, WLF's Legal Studies Division produces and distributes numerous publications, reports, and analyses on a variety of issues, including First Amendment freedom of speech issues. *See, e.g.*, Bork, *Activist FDA Threatens Constitutional Speech Rights* (WLF Legal Backgrounder, Jan. 19, 1996); Kozinski, *Who's Afraid of Commercial Speech?* (WLF Legal Backgrounder, Sept. 21, 1990); Rucker, *Compelled PIRG Student Fees Offend Constitutional Freedoms* (WLF Legal Opinion Letter, May 10, 1996).

The Committee For A Constructive Tomorrow (CFACT) is a Washington, D.C.-based nonprofit public interest organization that promotes free-market and safe technological solutions to current consumer and environmental concerns. CFACT has more than 35,000 citizen supporters throughout the United States and has an advisory board of more than forty leading scientists and experts from a variety of prestigious universities, laboratories, and policy centers around the world. Over the last thirteen years, CFACT has worked with college and university students across the nation to halt the forced subsidization of the various campus Public Interest Research Groups (PIRGs) which have a preferred funding status over all other student organizations.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt the Statement of the Case as presented in the brief of the Respondents.

SUMMARY OF THE ARGUMENT

The First Amendment prohibits state and federal governments (as well as their agencies and instrumentalities) from compelling private speech or from compelling a person to financially support private speech. The government can justify an exception to this rule only if it demonstrates: (a) the existence of an important governmental interest that it can accomplish only by compelling a person to speak or to financially support private speech; *and* (b) that the private speech at issue is "germane" to that governmental interest.

In this case, the University of Wisconsin compels students to pay a student fee, part of which is used to support private speech to which the respondent students object. The student fee system at issue violates the First Amendment because the University has not demonstrated the existence of an important governmental interest that can be advanced only by compelling students to fund private speech. In fact, were the University of Wisconsin to abolish compelled fees, the marketplace of ideas not only would survive, it would flourish. The vast majority of the student groups at the University "speak" and engage in other activities without using any mandatory student fees, much less fees that have been extracted from students who object to some or all of the speech their fees are used to support. Moreover, other universities have established successful marketplaces of ideas by using student fee systems that do not compel dissenting students to finance the private speech of others.

Because the University fails to show an important governmental interest to which the compelled funding of private speech is necessary, the Court need not even reach the second question in the analysis – that is, whether the funded speech to which the students in this case object is "germane" to the identified important governmental interest. The University and its *amici* simply apply the wrong analysis when they argue that the University may compel students to fund private speech, including private speech with which they disagree, as long as the activities and/or speech are "germane" to the University's virtually limitless definition of its own educational mission. Thus, the University incorrectly attempts to collapse the Court's two-part test into one question, and the wrong question at that.

The University and its supporting *amici* also misconstrue *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), when they argue that the limited public forum analysis in that case already resolved the question presented here, and resolved it in favor of the University. The *Rosenberger* Court did not decide whether or how a public university may force students to finance either private speech with which the students disagree, or a limited public forum that funds such speech. In fact, and as the other precedents of this Court make clear, a public university cannot compel students to finance private speech, including speech with which they disagree, in the absence of an important governmental interest that can be advanced only by compelling students to fund private speech. Certainly the University has demonstrated the existence of no such interest in this case. The judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

ARGUMENT

I. THE STUDENT FEE SYSTEM AT ISSUE VIOLATES THE FIRST AMENDMENT BECAUSE THE UNIVERSITY HAS NOT DEMONSTRATED AN IMPORTANT GOVERNMENTAL INTEREST THAT CAN BE ACCOMPLISHED ONLY BY COMPELLING FUNDING OF PRIVATE SPEECH.

The University of Wisconsin compels students to pay a student fee, part of which is distributed to student groups engaging in political and ideological speech. *See Pet. Br.* at 4. Payment of the fee is mandatory because if a student refuses to pay it, the University will withhold the student's grades and will not allow the student to graduate. *See Answer* ¶ 9. The speech in which the various groups engage, and that is at issue in this case, is "private" speech because, as the record makes clear, the student groups are not funded with tuition, and the University specifically disassociates itself from the speech and activities of these organizations. *See* JA-34, 41 (stating that groups must use disclaimers).

A. The University Has Not Demonstrated the Existence Of An Important Governmental Interest That Can Be Accomplished Only By Compelling Support of Private Speech.

The First Amendment prohibits the government from compelling a person to speak or to financially support private speech.[2] If the University is permissibly to compel

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[2] As will be explained *infra* at 18-22, this case presents no question concerning whether or how a public university or other governmental entity can assess tuition or taxes, or the uses (including the funding of speech) to which such assessments may be put. Thus, this

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students to finance the private speech of others, notwithstanding the general First Amendment prohibition on governmental compulsion of private speech, the University must prove two things. First, it must demonstrate the existence of an "important government interest" that can be advanced only by compelling students to fund private speech. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225 (1977) (finding that "important government interests" justified agency shop); *Lathrop v. Donohue*, 367 U.S. 820, 833 (1961). Second, even if the University satisfies this first prong of the analysis, it also must demonstrate that the private speech to which the plaintiffs object is "germane" to the identified important governmental interest. *See Abood*, 431 U.S. at 235-36 (considering whether advancement of ideological cause is germane to purpose of collective bargaining); *Keller*, 496 U.S. at 14 (asking "whether the challenged expenditures are necessarily or reasonably incurred for the purpose" which justified compelled support).[3] Because the University has not acknowledged,

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case concerns only *private* speech and the compelled funding thereof; it does not concern any restrictions on or constitutional questions with respect to the University's own speech or its "academic freedom."

[3] All of the United States Courts of Appeals that have considered compelled funding of private speech in the University context have recognized that First Amendment values are at stake, and have looked to *Abood* and *Keller* for guidance. *See Carroll v. Blinken*, 957 F.2d 991, 996 (2d Cir.) ("*Abood* . . . and its progeny . . . [are] most relevant to the case at hand."), *cert. denied*, 506 U.S. 906 (1992); *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3d Cir. 1985) (finding *Abood* relevant in university context despite differences from union), *cert. denied*, 475 U.S. 1065 (1986); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992) (looking to *Abood* and finding requirement of vital policy interest when government compels individual to subsidize non-governmental speech); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, (Continued...)

much less satisfied, the first prong of the analysis, it has failed to demonstrate the constitutionality of compelling students to pay a fee that funds the private speech of others.

The University and its *amici* ignore the first question before the Court, *i.e.*, whether the University has articulated an important governmental interest that can be accomplished only by compelling students to support the private speech of others. Instead, they turn the correct analysis on its head, and argue that students may be compelled to financially support the private speech of others if the speech is "germane" to a generalized interest in education. *Pet. Br.* at 37-47. Because the University asks and answers the wrong question, it fails to satisfy its burden in demonstrating the constitutionality of its student fee system and of its attempt to compel students to fund the private speech of others.

In *Abood*, the Court began its analysis by addressing "whether an agency-shop provision in a collective-bargaining agreement covering governmental employees is, as such, constitutionally valid." *Abood*, 431 U.S. at 216. It analyzed this issue *before* it reached the question of whether the particular expenditures to which the employees in that case objected were "germane" to the identified important governmental interest. Only after the Court had agreed that "important government interests" could be accomplished only through mandatory collection of the fees at issue, did the Court proceed to address whether the particular objected-

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1036-40 (9th Cir. 1998) (finding that "the principles of *Abood* and *Keller* remain applicable"); *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983) (comparing case at issue to *Abood*); *see also Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 506 (Cal.) (analyzing case using *Abood* and its progeny), *cert. denied*, 510 U.S. 863 (1993).

to speech was "germane" to the articulated important governmental interest. *Id.* at 225, 232-36.

This first question – *i.e.*, whether the University has articulated an important governmental interest that can be accomplished only by compelling students to fund the private speech of others – is also addressed in other relevant cases. *See, e.g.*, *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956) (finding important government interest justifying use of closed shop); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 746-50 (1961) (summarizing *Hanson*). As the Court recognized in *Abood*, the governmental interest in "peaceful labor relations" and in preventing "free riders" justified the mandatory collection of dues to support the union's collective bargaining function. *Abood*, 431 U.S. at 219, 222. Thus, because nonpaying nonmembers could receive tangible benefits such as wage increases through the collective bargaining system and could receive services such as representation in a grievance proceeding, as mandated by the collective bargaining agreement, the important governmental interest could be advanced only through the mandatory payment of dues or fees to the union. This interest justified the compelled support of private speech.

Similarly, although the University and its supporting *amici* extensively cite this Court's decision in *Keller*, they fail to recognize that *Keller* addressed only the second prong in the Court's two-step analysis – *i.e.*, whether particular speech to which the plaintiffs objected was "germane" to the governmental purpose justifying the mandatory payment of bar dues. The first question in the analysis – whether the mandatory payment of bar dues was permissible in the first place – had been answered in the affirmative in *Lathrop v. Donohue*. The analytical step taken by the Court in *Lathrop* is missing from the University's argument.

In *Lathrop*, the Court extensively analyzed the public interest objectives promoted by the "compelled financial support" required of lawyers as a result of the integration of the bar. *Lathrop*, 367 U.S. at 828-30. The Court held that the state constitutionally could compel the payment of dues to advance the "legitimate end of state policy" of, among other things, "elevating the educational and ethical standards of the Bar." *Id.* at 828, 843. Only in light of this holding in *Lathrop* did the Court have occasion to address whether particular objected-to speech being funded by compelled dues was "germane" to the important governmental purpose justifying the compelled payment of bar dues. *See Keller*, 496 U.S. at 98 (noting that although the *Lathrop* Court allowed the integration of the state bar, it reserved questions concerning the use of dues to support political activities).

The University has ignored, and thus failed to meet, its burden of demonstrating the existence of an important government interest to which the compelled support of private speech is necessary. The University asserts a broad educational interest, *see Pet. Br.* at 36, but it does so only for the purpose of arguing that the compelled student fee is "germane" to this educational purpose. This is not even the appropriate analysis for the second prong of the Court's test, and it certainly has nothing at all to do with the first – *i.e.*, whether the University has articulated an important governmental interest that can be served only by compelling students to financially support private speech.[4]

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[4] Whether the students dissent or object to the particular private speech the University seeks to compel is irrelevant to this first prong of

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B. The Empirical Evidence Does Not Support The Contention That Compelled Support of Private Speech Is Necessary To Advance The University's Asserted Educational Mission.

Instead of proving the existence of an important governmental interest which can be accomplished only by compelling the financial support of private speech, the University argues that the compelled support of private speech is "germane" to the University's educational mission. *See Pet. Br.* at 37-47. The Court need not address that question in this case because the University has not shown that compelled support of private speech is necessary to achieve an important governmental interest.[5]

Nevertheless, to the extent that the University attempts to argue that its broad educational mission and its promotion of a marketplace of ideas are important

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the compelled speech analysis. Notably, and correctly, the question on which the Court granted review in this case does not even mention whether or not the students dissent from the speech which the University compels them to support. Of course, only students who object to the speech they must fund are likely to challenge the compulsion of their support, but whether and why the students dissent is not relevant to whether they have proved a First Amendment violation.

[5] To demonstrate the existence of an important governmental interest which can be accomplished only by compelling students to fund private speech with which they disagree, the University must make a concrete showing of that interest and of the necessity for compelled funding. In the First Amendment realm, "mere speculation or conjecture" does not satisfy the government's burden. *See Edenfield v. Fane*, 507 U.S. 761, 770 (1993); *see also City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803, n.22 (1984).

governmental interests that it can accomplish only by compelling students to support the private speech of others, the University's argument must fail. Nothing in this record supports such an assertion. In fact, the record supports precisely the opposite conclusion.[6]

1. The Marketplace Of Ideas At The University Of Wisconsin Will Not Suffer In The Absence Of Compelled Support Of Private Speech.

Far from adversely affecting the number or variety of student groups or the marketplace of ideas, the absence of compelled student support of private speech would have little or no impact on the marketplace of ideas or even on the particular student groups that currently receive student fee funds.[7] The vast majority of the University of Wisconsin's

[6] WLF and CFACT assume, for the purposes of this brief, that the University's purported educational mission and interest in promoting a marketplace of ideas constitute "important government interests." However, limits exist on the government's ability to decree "important government interests." The University cites *Regents of University of California v. Bakke*, 438 U.S. 265, 312 (1978), for the proposition that universities have a very important educational mission. *See Pet. Br.* at 24. But the Supreme Court in *Bakke* struck down the University of California's affirmative action program, finding that the means by which the University sought to attain its goals violated the Constitution. The Court need not determine, in this case, what limits there may be on a public university's ability to articulate "important government interests" to justify compelled support of private speech. Here, even assuming that the University has articulated such interests, it has failed to demonstrate that those interests can be advanced only by compelling the financial support of private speech.

[7] Nonexpressive issues are not at issue in this case, and therefore the Court need not address the circumstances under which students may be compelled to pay a fee that supports nonexpressive activities or
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student groups do not request or receive funding from the mandatory fee: approximately 500 of the 600 on-campus groups exist independently of the mandatory student fee at issue here. *Compare* stip. ¶ 25 *with* JA-255-99. In fact, "the primary sources of funding for most student organizations are membership dues and other fundraising ideas." JA-300. Moreover, as shown below, other universities with a similar interest in robust debate succeed in fostering that debate without requiring students to fund private speech with which they disagree. *See infra* Part I.B.2.

A closer look at the student groups that obtain money from the mandatory student fees at the University of Wisconsin reveals that the fees are rarely the sole, or even the primary, source of funding for those groups. For example, the Ten Percent Society has played a very visible role in this litigation; according to its own records, the segregated fee funding comprises less than five percent of its funding. JA-208 ("Although the Ten Percent Society

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expenditures. A large part of the student fee funding at the University of Wisconsin and at other universities and colleges goes to support nonexpressive activities. For example, at the University of Wisconsin, approximately eighty percent of the funding is "nonallocable" and flows to items such as debt service, fixed operating costs of auxiliary operations, required reserves, the Wisconsin Student Union, the first and second year of the recreational sports budget, and other University Health Services. *Pet. Br.* at 7; Stip. ¶ 7. In 1994, the College of William and Mary applied all of the $660 student fee to support the athletic program. Meabon, *et al., Financing Campus Activities* (National Ass'n for Campus Activities Educational Found. 1996) at 9-10. Other universities and colleges use the funds for financial aid, health services, career services, computer and technology services, athletics, the student union, and recreation centers. *Id.* at 10. Those expenditures, and the assessment of student fees to fund them, are not at issue in this case.

received an ASM grant of $550 in 1995-96, its budgeted income for the year *from other sources* . . . totaled $13,000." (emphasis added)). Thus, even if the Ten Percent Society and other ASM-funded groups were to receive no ASM funds, the University has not demonstrated (nor is it reasonable to assume) that they would cease to exist or that they would not be able to engage in most or all of their current expressive activities.

2. Other Colleges And Universities Foster Debate Without Forcing Students To Fund Private Speech.

Universities across the nation, many of them public universities, use a wide variety of student fee systems to promote the same general goals as the University of Wisconsin. However, in contrast to the University of Wisconsin's system, several of these options avoid forcing any students to financially support private speech, much less private speech with which they disagree. Such options include a "positive check-off system," a "negative check-off-system," a "refundable fee," and funding only for activities that are "on curriculum."

For example, schools such as the University of Washington and the University of California at Berkeley use a "positive check-off" or "pledge" system. *See* Tozloski, *CFACT Survey on State PIRGs and Their Funding* (unpublished study) (1998). In such a system, each student receives a list of groups that are eligible for funding from the student fee. The individual students then check off which of those groups will receive a portion of their student fee. Each student must pay the student fee, but freely decides which groups he or she will fund through that payment.

Under the "negative check-off" system, all groups are eligible to receive a portion of the student's fee unless the student manifests an objection to funding a specific organization. The student can object by "checking off" certain groups whose speech or activities he or she does not wish to fund, either because of an objection to the speech of a particular group or because of any other reason. Thus, the default in this system is that all groups are eligible to receive a part of the student fee. Several of the University of Minnesota and University of Massachusetts schools, the University of Connecticut, and Rutgers University use such a negative check-off system. *See id.*

Under a third option – the mandatory, refundable fee – the student actually can receive a refund of the portion of his or her fee that otherwise would flow to speech or activities that the student does not wish to fund. Trinity College in Connecticut and the College of Staten Island, New York have implemented such a system. *See id.*

Finally, of course, if a university decides that a certain activity or certain speech is necessary to achieving its educational mission, and funding for it should not be left to the vagaries of individual students' choices about whether to fund the particular private speech or activities at issue, the University can attempt to bring that activity or speech "on curriculum" and can fund it with tuition money. For example, at Cornell University, *The Cornell Daily Sun* receives no funds through the university and is completely independent of the University's administration.[8] On the other hand, Cornell's journalism classes are part of the

[8] *The Beginning of the Sun* (updated Mar. 11, 1999) <http://www.cornellsun.com/aboutus.shtml>.

curriculum funded by the university's tuition payments. Should the University decide to bring an activity on curriculum, of course, the constitutional restrictions on a public university's speech and activities would apply, but those questions are not presented in this case.

The Court need not establish in this case the precise universe of constitutional student funding mechanisms for private speech on university campuses, and for that matter, WLF and CFACT do not admit that some or all of the alternative funding mechanisms described here are constitutionally permissible. The important point for present purposes, however, is that a variety of systems may satisfy the requirements of the Constitution. *Cf. Keller*, 496 U.S. at 17 (remanding for determination of constitutional system); *Abood*, 431 U.S. at 235-36 ("the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment"). The above alternatives merely demonstrate the wholesale inability of the University to show that it is necessary to the accomplishment of any important governmental interest, certainly any interest that the University has articulated, for students to be compelled to financially support other people's private speech.

3. No "Free-Rider" Problem Justifies The Mandatory Payment Of Fees That Are Used To Fund Private Speech.

In several previous compelled speech cases, the governmental interest in preventing "free-riders" formed a large part of the justification for allowing the compelled

association or private speech at issue. Thus, the Court has noted:

> A union shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" – to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

Abood, 431 U.S. at 221-22; *see also Street*, 367 U.S. at 776 (Douglas, J., concurring) ("[The] beneficiaries are all the members of the laboring force, . . . [therefore] it was permissible for the legislature to require all who gain from collective bargaining to contribute to its cost."); *Keller*, 496 U.S. at 12 (stating that all lawyers benefit from being admitted to bar and therefore should share certain costs).

In the instant case, the University has pointed to no similar "free-rider" problem that justifies compelling students to support the private speech of others. Indeed, there is no such "free-rider" problem. No evidence indicates that the University's educational mission and its marketplace of ideas would suffer in the absence of compelled student support of others' private speech. *See supra* Part I.B.1, 2. Moreover, dissenting students receive no clear tangible benefit from having their mandatory student fees used to support speech with which they disagree that is in any way comparable to the benefit created by a collective bargaining mandate or by the smooth administration of an integrated state bar.

"[T]he educational benefit to a few students [who are active in political speech] cannot justify the burden on all students' free speech and associational rights." *Smith*, 844 P.2d at 516. Thus, this case is different from *Abood* and *Hanson*, wherein employees received substantial benefits from union representation even if they refused to join the union. *See Abood*, 431 U.S. at 219 (citing *Hanson*, 351 U.S. at 238). By contrast, a student receives no such tangible benefit from being forced to support speech to which he objects. The University trumpets the values of tolerance as a part of the educational mission, and even seems to argue that students can be forced to fund speech to which they object because they will benefit from hearing that speech. *Pet Br.* at 42 ("Exposure to diverse and competing views is educational in and of itself and teaches tolerance.") However, such an argument must fail. Surely the First Amendment prohibits, for example, the government from compelling a Jewish student to provide funds for a group that has as its express purpose proselytizing and converting Jews to Christianity,[9] even if the University believes it would do that student good to be exposed to such views.[10]

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[9] As the Supreme Court of California noted, "Students are, in fact, forced to support causes they strongly oppose... [A] group which espoused the supremacy of a particular race would be eligible to receive mandatory fees so long as it permitted all students to join without discrimination." *Smith*, 844 P.2d at 512.

[10] As this Court has noted, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). *Cf. Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting) ("The premise of our Bill of Rights, however, is that there are some things – even some seemingly desirable things – that government cannot be trusted to do. The very first of these is establishing the restrictions

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The University argues that because the funds support many viewpoints, compelling support for private speech does not violate the Constitution. *See Pet. Br.* at 23. However, forcing students to fund many groups "in no way heals the constitutional infirmity," *Carroll v. Blinken*, 957 F.2d 991, 998 (2d Cir.), *cert. denied*, 506 U.S. 906 (1992). Rather, it "compound[s the evil]," *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986).

C. Student Fees Are Distinguishable Both From Taxes And From Tuition.

The constitutional questions concerning mandatory student fees that are presented in this case are distinct from any issues that might be raised with respect to the collection or expenditure of taxes or tuition (whether for speech or any other use). The University argues that the cases giving the government broad discretion in the use of taxes justify broad discretion in how the University (and/or the student government) spends compelled student fees. *See Pet. Br.* at 35. However, both the majority opinion and Justice O'Connor's concurrence in *Rosenberger* pointed out the difference between taxes and student fees. The majority stated that a mandatory student fee is "not a general tax designed to raise revenue for the University." *Rosenberger*, 515 U.S. at 841. Justice O'Connor clarified that student fees are "not government resources . . . but a fund that simply belongs to the students." *Id.* at 851-52 (O'Connor, J., concurring). Therefore, the University's attempt to use tax cases to support its argument is unpersuasive. *See Pet. Br.* at

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upon speech that will assure 'fair' political debate.").

35 (citing *Lull v. C.I.R.*, 602 F.2d 1166 (4th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970)).

Sound pragmatic reasons justify the different constitutional treatment accorded to mandatory student fees as opposed to taxes. The tax system encompasses millions of individuals, as compared to the much smaller University of Wisconsin student body.[11] This Court justifiably has been greatly concerned with the threat of administrative burden created by an opt-out from the tax system.[12] However, and despite the University's assertions to the contrary, *Pet. Br.* at 45, it is implausible to assume that the University – an institution responsible for millions of dollars in government financial aid – would be incapable of administering a simple check-off system for any student fees it wishes to assess.[13] Indeed, as explained above, many universities have successfully implemented such systems. At most, the

[11] *Cf. Keller*, 496 U.S. at 11 (observing that integrated bar funding "comes not from appropriations made to it by the legislature, but from dues levied on its members by the Board of Governors").

[12] *See, e.g., United States v. Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."); *Autenrieth v. Cullen*, 418 F.2d 586, 588-89 (9th Cir. 1969) ("If every citizen could refuse to pay all or part of his taxes because he disapproved of the government's use of the money, on religious grounds, the ability of the government to function could be impaired or even destroyed."), *cert. denied*, 397 U.S. 1036 (1970).

[13] In fact, "[ASM requests] are subject to the same Business Services pre-audit scrutiny as all other expenditures of University funds." JA-156. Because auditing requirements already exist, a different system would not produce significant additional burdens on University groups.

burden on the University would resemble that in *Keller*: "While such [an opt-out or pro rata refund] would likely result in some additional administrative burden to the [University] and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate." *Keller*, 496 U.S. at 16-17 (citation omitted).

Moreover, the type of injury alleged by the respondents is different in gravity and in kind from the type of injury that might be alleged by a taxpayer objecting to a particular use by the government of the taxpayer's taxes. Because of the vastly larger number of taxpayers that exist in many governmental units than there are students at the University of Wisconsin (not to mention respondents in this case), and because of the vastly larger number and variety of government expenditures than there are groups receiving student fee funds at the University, the respondents have suffered cognizable injury from the expenditure of their student fee funds, even though a dissenting taxpayer could not necessarily establish such injury. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 477, 480 (1982).

Both the University and its supporting *amici* argue at length that because academic freedom is very important, and because the University has a large amount of discretion in the use of tuition money, the Court similarly should find that the University has broad discretion in deciding how to spend mandatory student fees. *See Pet. Br.* at 24-25. The analogy to tuition is unpersuasive; student fees are distinct from tuition in several ways.

First, tuition funds the University's speech, not that of individual students acting as private speakers. *Compare*

Rosenberger, 515 U.S. at 851-52 (O'Connor, J., concurring) (stating that student fees are for use by students) *with id.* at 833 ("When the University determines the content of the education it provides, it is the University speaking. . ."). The government has greater control over speech that it adopts as its own than over speech by private actors. *See, e.g., NEA v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 2179 (1998); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *United States v. Lee*, 455 U.S. 252, 260 (1982) (taxpayer cannot object to use of taxes). Conversely, the contributor has greater control over *private* speech funded by compelled fees than over *governmental* speech funded by taxes or by tuition. *See, e.g., Rosenberger*, 515 U.S. at 851-52 (O'Connor, J., concurring) (distinguishing student fees from taxes). In this case, the University expressly states that the speech at issue is not its own; therefore, as noted above, this case involves forced funding of private speech. *See Pet. Br.* at 30.

Second, tuition at a University constitutes a transfer from a private individual to the University. The mandatory fee represents a transfer from a private individual for the benefit of another private individual or group. For example, the individual who travels courtesy of an ASM travel grant benefits directly from the transfer of funds from a private individual. Thus, this case involves the transfer of money from students to private individuals or groups. The University has determined that the tuition and mandatory fee are distinct, and it cannot now be allowed to argue that they are in fact the same thing.

In any event, the respondents do not challenge the use of tuition. *See Pet. Br.* at 45 (stating that respondent would challenged certain speech if funded by student fees but not if funded by tuition (citing Southworth Dep. at 23-24, R. 23)).

Therefore, this case presents no issue as to the constitutionally permissible uses of tuition.

II. THE STUDENTS NEED NOT SATISFY THE VARIOUS BURDENS THAT THE UNIVERSITY SEEKS TO PLACE ON THEM.

A. The Dissenting Students Need Not Show That They Have Been Mistakenly Identified With The Speech To Which They Object.

The Supreme Court has recognized two distinct First Amendment violations in connection with compelled speech. The first concerns *forced association or identification* with a cause to which the individual objects. The second concerns *compelled financial support* of expressive activities to which the individual objects. *See Southworth v. Grebe*, 151 F.3d 717, 719 (7th Cir. 1998), *reh'g denied, cert. granted sub. nom. Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 119 S. Ct. 1332 (1999) (recognizing two different corollaries to First Amendment). The University fails to distinguish between these two potential violations; the University's assertion that it does not require the students "either to speak or to become members of any group," *see Pet. Br.* at 25, is relevant only to the first potential violation (forced association or identification).

First, the Constitution prohibits the government from forcing individuals to associate with or be identified with causes with which they disagree. *See Wooley v. Maynard*, 403 U.S. 705 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). To establish a violation of this principle, a plaintiff need not show that she has been forced to provide financial support to objectionable causes; instead,

she must demonstrate a danger that she is being identified with the expressive activity with which she disagrees.

Second, the First Amendment protects individuals from being forced to provide financial support for the expressive activities of other private parties. *See, e.g.*, *Abood*, 431 U.S. 209; *Keller*, 496 U.S. 1. Courts in compelled-financial-support cases have not required plaintiffs to demonstrate that third parties associate dissenting plaintiffs with the cause being funded. *See Abood*, 431 U.S. at 211-12 ("[E]very employee represented by a union even though not a union member must pay to the union, as a condition of employment, a service fee equal in amount to union dues. . . . Nothing . . . however, required any [employee] to join the Union, espouse the cause of unionism, or participate in any other way in Union affairs."); *Lathrop*, 367 U.S. at 828 ("We therefore are confronted, as we were in [*Hanson*], only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." (citation omitted)).

Instead, simply forcing a dissenting individual financially support the private speech of others infringes on First Amendment rights. The Court repeatedly has justified this constitutional rule by quoting Thomas Jefferson: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Nothing in this statement or in the Court's First Amendment jurisprudence suggests that compelled financial support is acceptable as long as the person being compelled to provide the financial support is not publicly identified with the private speech being supported. As a result, it is irrelevant for purposes of this case whether an objective observer might think that the respondents support the goals of the Ten Percent Society.

The University also asserts that the opportunity for the students to offer a disclaimer saves the financing system from a compelled speech challenge. Stip. ¶ 72; JA-34, 41 (stating the groups must include disclaimer that its view are not those of ASM); *Pet. Br.* at 15 (explaining that the University requires groups to attach disclaimer that speech is not on behalf of students). But a disclaimer does not answer respondents' objections. A disclaimer does not change the fact that the respondents are being forced to finance the private speech of others, including speech to which they object, and that the University has not demonstrated the existence of an important government interest the accomplishment of which requires the compelling of such support for private speech.

B. The Prohibition On Financing Speech With Compelled Fees Extends Beyond Political And Ideological Speech That A Person Opposes.

Any compelled contribution to a private organization's expressive activities implicates the First Amendment. "[T]he First Amendment fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious, or any other." *Street*, 367 U.S. at 791 (Black, J., dissenting).

To prevail in this case, the students need not demonstrate that the speech to which they object is "political" or "ideological." Although the question on which the Court granted review was limited to compelled funding of "political" speech, no constitutional rule limits the student's First Amendment right not to be compelled to fund

private speech only to the compelled funding of "political" or "ideological" speech. Indeed, as this Court has stated:

> [O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters – to take a nonexhaustive list of labels – is not entitled to full First Amendment protection. . . . 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.

Abood, 431 U.S. at 231-32 (citations omitted).

C. *Rosenberger* Addressed Eligibility To Participate In A Limited Public Forum, Not Who Must Fund The Forum.

As the University admits, this case presents "the question reserved in *Rosenberger*." *Pet. Br.* at 26. Yet, as noted above, the University argues, in essence, that the "limited public forum" discussion in *Rosenberger* already decided the instant case. *Pet. Br.* at 36.

The University is mistaken. *Rosenberger* only addressed to whom the University must grant access once a limited public forum has been established. The question in this case is who the government can force to fund private speech or a limited public forum that finances private speech, and what rights individuals may have when the government seeks to force them to do so.

As the *Rosenberger* majority stated: "The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe." *Rosenberger*, 515 U.S. at 840. Justice O'Connor was even more explicit, stating: "although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees." *Id.* at 851 (O'Connor, J., concurring). In fact, after acknowledging the reserved question, both the majority and Justice O'Connor reference *Keller* and *Abood*, indicating that the compelled speech cases govern the question of mandatory student funding of private speech to which students object. *Id.* at 840; *id.* at 851 (O'Connor, J. concurring). The University improperly discounts the *Rosenberger* Court's guidance on the proper analysis for this question.

Allegedly following *Rosenberger*, the University cites several cases addressing public fora in support of its position, but each is distinguishable from the instant case. *See, e.g., Pet. Br.* at 31. Two of the key precedents on which it relies revolve around access to physical facilities that the Court deemed limited public fora. *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). *Rosenberger* addressed the same access question with respect to a nonspatial forum. None of these three cases, however, addressed appropriate funding mechanisms for the public fora, much less whether individuals could be compelled to pay for a privately-controlled limited public forum. In fact, when the Court has considered cases treating forced subsidization of a forum, it has found constitutional violations. *See, e.g., Turner*

Broadcasting System, Inc. v. F.C.C., 512 U.S. 646 (1994) (striking down "must-carry" provisions); *Pacific Gas & Elec.*, 475 U.S. 1 (striking down state law requiring objecting company to distribute consumer group's information); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down right of reply in a newspaper). *Cf. Buckley*, 424 U.S. at 91 (emphasizing voluntary nature of public financing of presidential elections).[14]

D. Laundering Money Through The Associated Students Of Madison Does Not Erase What Is Otherwise A First Amendment Violation.

The University cannot avoid the First Amendment by creating an additional layer in the administrative scheme through which mandatory student fees are distributed and by which private speech is funded. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 512-13, 520. Just as "no one doubts that [the organizations at issue here] 'speak[]' for First Amendment purposes," *see Carroll*, 957 F.2d at 997, it is equally clear that the students are funding that speech with their compelled student fees. "That this slice of the student activity fee is briefly in the hands of the [ASM] while being funneled from students to [WISPIRG and other groups] does not diminish the fact that a transfer has taken place." *Id.* If

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[14] The University points to a sole exception to the constitutional prohibition on government forcing private individuals to provide a forum: *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *Pet. Br.* at 33-35. As that Court noted, however, "[m]ost important, the shopping center by choice of its owner is not limited to the personal use of appellants." *PruneYard*, 447 U.S. at 87. In addition, the Court in that case found a traditional public forum, not a limited public forum. *Id.* Finally, the Court found that individuals had no alternative location for expression, while in this case, student groups have alternative means of funding. *Id.*

this were not so, any compelled speech violation of the First Amendment likely could be cured simply by the creation of an intermediary through which the compelled funds passed before being handed to the actual speaker or student group.

Nor does the University avoid a First Amendment violation by compelling funds based on a student referendum. By definition, the Bill of Rights is counter-majoritarian. A majority vote cannot circumvent it. As the Seventh Circuit stated in the decision below, "The First Amendment trumps the democratic process and protects the individual's rights even when a majority of citizens wants to infringe upon them." *Southworth*, 151 F.3d at 732.

CONCLUSION

It is not constitutionally permissible for the government to force students at a public university to fund private speech, including private speech with which they disagree. For all of the reasons stated above, the judgment

of the U.S. Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted.

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