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

AMICUS CURIAE BRIEF OF OWEN BRENNAN ROUNDS; H.E. FRIEDERICH VON CARP; HARRISON LYNCH; ED MATTHEWS; AND STUDENTS FOR LEGAL GOVERNMENT 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Rules

IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, Owen Brennan Rounds, H.E. Friederich Von Carp, Harrison Lynch, Ed Matthews, and Students for Legal Government respectfully submit this brief amicus curiae in support of Respondents Scott Southworth, *et al.* All parties consented to the filing of this brief. The letters of consent have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, Amici affirm that no counsel for any party in this case authored this brief in whole or in part and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Owen Brennan Rounds, H.E. Friederich Von Carp, Harrison Lynch, and Ed Matthews were students at the University of Oregon in Eugene, Oregon. They objected to paying a mandatory fee to subsidize the Oregon Student Public Interest Group Educational Fund ("OSPIRG EF"). In a decision issued February 23, 1999, the Court of Appeals for the Ninth Circuit rejected their First Amendment claims against the Oregon State Board of Higher Education, the University of Oregon, OSPIRG EF, and a number of state and university officials. *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032 (9th Cir. 1999), *pet. for reh'g pending decision in Southworth granted* (*Rounds*, 9th Cir. 1999).

In its *Rounds* decision, the Ninth Circuit found that First Amendment claims in the student activity fee context warrant only intermediate scrutiny. *Id* at 1037. The Ninth Circuit also found that OSPIRG EF engages only in "educational," not "political," activities, *Id.* at 1038, and that support of OSPIRG EF's activities with mandatory student fees does not offend the First Amendment. *Id.* at 1040. The *Rounds* students filed a petition for rehearing which the Ninth Circuit has deferred pending resolution of *Board of Regents v. Southworth.*

SUMMARY OF ARGUMENT

Amici support the determination by the court below that the First Amendment prohibits the compelled funding of private student groups' political and ideological activities. Even if, however, the Court determines that some such compelled funding can survive constitutional scrutiny, Amici submit that such funding of political activity is unconstitutional when (i) the targets of the funded group are not students *qua* students but, rather, federal and state political leaders and the population at large, and (ii) the funded group spends the greater part of the funds derived from mandatory fees at locations geographically far removed from the campus of origin.

ARGUMENT

Introduction

The First Amendment protects a person's right *not* to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("*Roberts*") ("Freedom of association . . . plainly presupposes a freedom not to associate"). This right is infringed upon when a person is compelled to subsidize the expressive activities of another. *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977) ("*Abood*") ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."). Compelled funding must be "carefully tailored" to minimize this infringement. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (1986) (citing *Roberts,* 468 U.S. at 623 (1984) for the proposition that "[i]nfringements on freedom of association 'may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'").

The constitutionality of compelled funding has arisen in two relatively narrow contexts, agency-shop cases and integrated-bar cases. *Abood,* 431 U.S. 209 (1977); *Keller v. State*

Bar of California, 496 U.S. 1 (1990) ("*Keller*"). This Court has not addressed compelled funding in the educational context. In the agency-shop and integrated-bar contexts, however, this Court has held that compelled funding does not violate the First Amendment provided that the subsidized activity is *germane* to the government interest that justifies the exaction. *Abood,* 431 U.S. at 235-36; *Keller,* 496 U.S. at 13-14.

In the context of agency-shop cases, compelled funding that is germane to collective bargaining is carefully tailored to minimize infringement on First Amendment rights by application of three factors. First, the purpose behind the agency-shop laws, labor peace through collective bargaining, is a legitimate government purpose. Second, in the face of the free-rider problem discussed *infra*, compelled funding is the most narrowly tailored manner in which the government can achieve this purpose. Third, the government's purpose, collective bargaining, is relatively narrow and requiring subsidized activities to be germane thereto ensures that compelled speech is as narrowly drawn as possible.

These same three factors apply in the context of integrated-bar cases. First, the purpose behind integrated-bar laws, regulation of the legal profession and the improvement of the

legal system, is a legitimate government purpose. Second, again because of the free-rider problem, compelled funding is the most narrowly tailored manner in which the government can ensure these purposes. Third, the government's interest, regulation of the legal profession and improvement of the legal system, is relatively narrow and requiring that subsidized activities be germane thereto ensures that compelled speech be as narrowly drawn as possible.

In the agency-shop and integrated-bar contexts, the government's purposes are legitimate and the free-rider problem mandates compelled funding. Accordingly, the only factor left to assess is whether the subsidized activities are *germane* to the applicable governmental purpose. Moreover, because these purposes are relatively narrow, the germaneness inquiry assures that compelled funding is as narrowly drawn as possible and therefore constitutional.

The mandatory-student-fee context presents a more difficult problem. The purpose behind compelled funding, education, is obviously a legitimate governmental interest, but it is by no means clear that there is a free-rider problem. In the absence of a free-rider problem, the government's educational mission may be pursued without compelled funding, and which would eliminate impositions on associational freedoms.

Amici suggest that this Court consider whether there is a sufficient concern with free-riders in the compelled student fee context to justify mandatory exactions. In the absence of such a concern, the objecting students should not be required to fund voluntary third-party activities. If compelled funding is found to be justified, Amici suggest that simple germaneness to education is not of itself sufficient to establish that the compelled speech is as narrowly drawn as possible, and that the government's interest in education should be pursued in ways that are significantly less restrictive of associational freedoms than the compelled funding of political and ideological activities. Finally, even if compelled funding of political activities is found to be justified in the educational context, Amici respectfully request that the Court provide guidance to the effect that such funding is not warranted if the funded entity (i) targets off-campus political leaders and the general population (ii) from locations geographically far removed from the campus that is the source of the funds.

The Free-Rider Problem

Mandatory funding is necessary in the agency-shop and integrated-bar contexts because of the free-rider problem. *Abood,* 431 U.S. at 224; *Keller,* 496 U.S. at 12; *Lehnert v. Ferris*

Faculty Association, 500 U.S. 507, 520-21 (1991) ("*Lehnert*"). The free-rider problem arises because non-union employees and collective bargaining representatives share a common cause. *Abood,* 431 U.S. at 222-23 (citing with approval Justice Douglas' concurrence in *International Association of Machinists v. Street*, 367 U.S. 740, 778 (1961) ("*Machinists*"), in which Justice Douglas wrote, "[t]he furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy". Non-union employees directly benefit from a collective bargaining representative's ability to negotiate favorable terms of employment; if non-union employees were allowed not to fund the efforts of collective bargaining representatives, they would receive the benefits of union negotiation without bearing the costs. This free-rider problem can *only* be mitigated by requiring non-union employees to fund the collective bargaining related activities of collective bargaining representatives. Because of the free-rider problem, the governmental interest of labor peace cannot be pursued through collective bargaining without compelling non-union employees to fund the activities of collective bargaining representatives. The same free-rider problem applies, though less

directly, in the integrated-bar context. *Keller,* 496 U.S. at 12.

It is not clear, however, that this free-rider problem applies in the educational context. In the instant case, the government has compelled students to fund the expressive activities of voluntary student groups and justified such compelled funding on the basis of its interest in education. In the educational context, however, the free-rider problem is more attenuated; any educational benefits that a student group might provide do not directly benefit students who oppose the funding of such a group. For example, a conservative student derives no direct educational benefit from the expressive activities of a student socialist group; the conservative student is opposed to the expressive activities of such a group and will not willingly participate in those activities. Because the conservative student receives no direct educational benefit from the socialist group's expressive activities, the conservative student will not become a free-rider by failing to fund the socialist group.

It might be argued that the mere existence of the socialist group provides some indirect educational benefit to the conservative student. Any such benefit, however, is a far cry from the direct benefits that create the free-rider problem in the agency-shop and integrated-bar contexts.

This difference in magnitude, if not in kind, suggests that compelled funding should be found unconstitutional because there are less restrictive ways for the government to pursue its educational goals than to require students to pay for political positions with which they disagree.

Assuming that a free-rider problem is found to exist in the educational context, the next question is whether the activities are tailored sufficiently narrowly to justify the imposition on the First Amendment.

The Breadth of "Education"

Infringement of First Amendment freedoms requires that the subsidized activity be germane to the governmental purpose. *Abood,* 431 U.S. at 235-36; *Keller,* 496 U.S. at 14. Because collective bargaining and regulation of the legal system are relatively narrow purposes, the germaneness requirement ensures that compelled speech is as narrowly drawn as possible.

Education, the governmental purpose purportedly served in the mandatory student fee context, is a significantly broader purpose than collective bargaining or regulation of the legal profession. While these latter purposes are narrow enough to provide some limits on compelled funding, education is not. The court below in

the case at bar recognized this when it stated that "everything is in a sense educational." *Southworth,* 151 F.3d at 725. The Supreme Court of California also recognized this in *Smith v. Board of Regents of the University of California*, 4 Cal. 4th 848 (1993), *cert. denied*, 510 U.S. 862 (1993), when it stated that in contrast to the purposes in the agency-shop and integrated-bar contexts, "the University's educational function is extremely broad; it potentially encompasses all of life." *Id.* at 855. Indeed, it is common wisdom that the best way to learn to do something is by doing it, and participation in the expressive activities of any student group will provide at least some educational benefit to those whom participate. Thus, it could be argued that the activities of all student groups are to some extent "germane" to the education of those who participate.

The broad nature of education, unlike collective bargaining and lawyer regulation, means that it does not provide a criterion that ensures that compelled speech is as narrowly tailored as possible. That a particular expressive activity is merely "germane" to education does not conclusively establish that the activity does not offend the First Amendment. The California Supreme Court recognized this in *Smith* when it stated:

> [A] group's dedication to achieving its political or ideological goals, at some point, begins to outweigh any legitimate claim it may have to be educating students on the University's behalf. To fund such a group through mandatory fees will usually constitute more of a burden on dissenting students' speech and associational rights than is necessary to achieve any significant educational goal. The University can teach civics in other ways that involve a lesser burden on those rights, or no burden at all. *Id.*

Amici suggest that, unlike collective bargaining and the regulation of the legal profession, education does *not* provide a criterion sufficient to establish the constitutionality of compelled funding. Rather, Amici suggest that the court below was correct in holding that subsidized political and ideological activities violate objecting students' First Amendment rights even if the funding somehow promotes education. Simply put, the government can pursue its interest in education in ways less restrictive to First Amendment rights than compelling students to fund political and ideological activities of voluntary, independent student groups with which they disagree simply because those activities might provide some educational benefit to other students.

The Meaning of "Political" Activity and the Insufficiency of the Educational Element

As discussed above, governments can pursue educational goals in ways less restrictive of First Amendment freedoms than to compel the funding of the political and ideological activities of student groups. Compelled funding must be as narrowly drawn as possible to achieve a legitimate government purpose, *Chicago Teachers Union v. Hudson*, 475 U.S. at 302-03; this suggests that compelled funding of political and ideological student activities is prohibited by the First Amendment.

In the *Rounds* decision, the Ninth Circuit stated that OSPIRG EF's activities were "educational," not "political." 166 F.3d at 1040. The *Southworth* court did not entertain such a distinction, and the Ninth Circuit's holding in this regard seems peculiar; indeed, in light of the record in the *Rounds* case, which is based upon OSPIRG EF's own statements and materials, it appears that OSPIRG does indeed engage in what fairly can be characterized as political or ideological activities. For example, the record establishes that OSPIRG EF engaged in the following activities (citations are to Exhibits A, B, and C, copied from the record):

- Lobbying President Clinton by sending post cards urging him to prevent a controversial timber sale in Oregon (Exhibit A at 2-3)

- Lobbying Congress by collecting signatures for an environmental petition to be sent to then Speaker of the House of Representatives Newt Gingrich and other members of Congress (Exhibit A at 6-7)

- Lobbying the Secretary of Energy by sending signed light bulbs in an effort to increase funding for renewable energy programs (Exhibit A at 8)

- Lobbying the Oregon legislature to retain the state's recycling program through a post card campaign and testifying at public hearings (Exhibit B at 1)

- Lobbying for the Toxic Use Reduction Act (Exhibit C at 2)

- Backing legislation to set "organic" food quality standards (*Id.*)

- Registering students as voters (Exhibit B at 2)

- Sending petitions to Congress to mark the 25th anniversary of Earth Day (Exhibit A at 4)

- Educating the general population about the Endangered Species Act (which was up for reauthorization before the 104th Congress) (Exhibit A at 5)

Amici believe that OSPIRG EF's activities do implicate First Amendment protections even though Amici have consistently conceded that there is some educational component to OSPIRG EF's activities. Amici also concede that there are many other voluntary student organizations on the University of Oregon campus that receive mandatory fee funds and that engage in activities that implicate the First Amendment; for example, the funding of the Muslim Student Association on the University of Oregon campus obviously raises the First Amendment issue of establishment of religion. Amici restricted their challenge to the mandatory funding to OSPIRG EF's political activities because, unlike all other entities that receive incidental fees from the University of Oregon, (i) OSPIRG EF directs its efforts to off-campus audiences (President Clinton, Congress, then-Speaker Gingrich, *etc.*), and (ii) the vast majority of funds OSPIRG EF receives from University of Oregon students is spent at OSPIRG EF's administrative headquarters in Portland and at other locations many miles distant from the Eugene campus. Amici claimed that these two factors – the off-campus nature of both the targets and the organizational heart of the funded group –

clearly implicated the First Amendment and that, because there was an insufficient nexus between the activities and the educational purpose, such funding was unconstitutional. Amici seek from this Court a ruling in the instant case that, at a minimum, preserves these claims before the Ninth Circuit and, perhaps, ultimately this Court.

CONCLUSION

Unlike the agency-shop and integrated-bar situations, no "free-rider" problem arises from the funding of voluntary student organizations with mandatory exactions. Accordingly, the First Amendment should be construed to prohibit those exactions. If, however, it is determined that mandatory exactions may, under certain circumstances, be used to fund voluntary student organizations, Amici respectfully submit that it would not be a constitutional use of such authority to fund an organization engaging in political activities that are (i) directed toward off-campus politicians and populations, and (ii) administered and governed from a geographic location many miles distant from the campus that is the source of the funds.

Respectfully submitted,

/s/ Thomas H. Nelson

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Of Attorneys for Amici