No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

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 *AMICI CURIAE* OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, AND HADASSAH IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICI CURIAE*[*]

Americans United for Separation of Church and State

Americans United for Separation of Church and State (Americans United) is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court, including Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 1995). Americans United is composed of approximately 60,000 members nationwide and maintains active chapters in several states. Americans United members adhere to various religious faiths, with some holding no religious affiliation. Members are united in their commitment to maintaining the separation of church and state, and believe that the funding of religious activity runs afoul of this principle.

Anti-Defamation League of B'nai B'rith

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and

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[*]Letters of consent to the filing of this brief have been filed with the Clerk of Court by counsel of record for the parties in this case in accordance with U.S. Sup. Ct. R. 37. Pursuant to U.S. Sup. Ct. R. 37.6, *amici* disclose that no counsel for any party in this case authored in whole or in part this brief, and that no person or entity other than *amici curiae* made a monetary contribution to the preparation of this brief.

religious prejudice in the United States. ADL adheres to the principle that the above goals and the general stability of democracy are best served through the separation of church and state and the protection of the right to free exercise of religion. In support of this principle, ADL has previously filed *amicus curiae* briefs in numerous cases including Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Board of Education of Kiryas Joel School District v. Grumet, 512 U.S. 687 (1994); Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986); and Lemon v. Kurtzman, 403 U.S. 602 (1971).

Hadassah, The Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of America, Inc., is the largest women's organization and the largest Jewish membership organization in the United States, with over 300,000 members nationwide. Hadassah also has a proud history of protecting the rights of the Jewish community in the United States. Founded in 1912, Hadassah has long been committed to strict separation of church and state pursuant to the belief that it serves to guarantee religious freedom and diversity. Hadassah has participated in numerous *amicus curiae* briefs in support of this vital principle.

SUMMARY OF ARGUMENT

In Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995), the Court upheld the use of a university student activity fee for a publication asserting a religious viewpoint. The Court will be asked in this case to evaluate the impact of this holding on the issues presented here. In doing so, *amici* urge the Court to be cognizant that the principles enunciated in Rosenberger -- neutrality, even-handedness, diversity of viewpoints, and general availability of a benefit -- are particularly suited to evaluating the constitutionality of funding programs that are created and designed to facilitate expressive activity, commonly known as "public fora." These principles are less determinative, however, of the constitutionality of funding schemes that do not constitute such fora. In the latter case, the Court's Establishment Clause decisions demonstrate that, even in the context of a neutral program, other principles of equal jurisprudential pedigree serve to limit the availability of funding for religious activities and institutions. Thus, in the event that the Court finds that the neutrality of the program at issue in this case obviates the need for an opt-out to be made available to the plaintiffs, the Court's Establishment Clause jurisprudence dictates that this holding should be limited to the context of public fora for speech activities.

ARGUMENT

Introduction

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

Petitioners argue that the student activity fee does not constitute "compelled speech" because it funds a viewpoint neutral forum rather than any particular point of view. This argument relies on Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995),[1] in which this Court upheld the use of a university student activity fee for a publication asserting a religious viewpoint in a limited public forum for speech activities. See Pet. for Cert. at 14. Although the case at bar does not raise an Establishment Clause question,[2] the Court's treatment of Rosenberger may have a substantial impact on Establishment Clause issues that are presented to this Court and the state and lower federal courts in the future -- such as the public funding of private school vouchers and faith-based delivery of social services, which are currently being defended with arguments much like those made by Petitioners here. See Jackson v. Benson, 578 N.W.2d 602 (Wis.), cert. denied, 119 S. Ct. 466 (1998). Accordingly, while *amici* do not take a position

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[1] *Amici* filed a friend of the court brief in Rosenberger on behalf of the University of Virginia.

[2] Although Respondents' objections to certain groups rest in part on their religious convictions, none of the student organizations in question engages in religious speech or activity. See Resps.' Opp. to Pet. for Cert. at 4-10 (listing organizations plaintiffs find objectionable and describing objections). This may be due in part to the fact that University of Wisconsin regulations prohibit the use of student activity fees for "[a]ctivities which are politically partisan or religious in nature." See Guidelines for Expenditures from Student Segregated University Fees and Campus Activity Receipts § III.B.6. However, we may assume that student speech with a religious perspective is funded, or will be funded in the future, in accordance with the holding of Rosenberger, 515 U.S. at 837.

on the precise issue presented in this case, we submit this brief because of the important Establishment Clause implications of this issue, and to urge the Court to cabin its decision in a manner that is consistent with the Court's Establishment Clause jurisprudence.

"Neutrality" is Pivotal to the Constitutionality of Government Funding of Free Speech Fora, But Is Only One of Many Factors to Be Considered in Assessing the Constitutionality of Other Kinds of Government Funding Programs.

In Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 837-46 (1995), the Court held that a religious student newspaper could participate in a general university program for funding student enterprises and publications without violating the Establishment Clause. Litigants around the country have argued that it follows from Rosenberger that "neutral" funding programs, such as a school voucher scheme that applies to secular and parochial private schools, pass constitutional muster. See, e.g., Strout v. Albanese, No. 98-1986, 1999 W.L. 329272 (1st Cir. May 27, 1999); Jackson, 578 N.W.2d at 616. While the constitutional propriety of such funding schemes is not presented in this case, *amici* urge the Court, in writing the Opinion in this case, to be cognizant of the distinction between the role of neutrality in the free speech/public fora context -- such as that presented here -- and the role of neutrality in other contexts not before the Court.

Issues of access to government space and funding have received considerable attention from the Court in the past several years. See National Endowment for the Arts v. Finley, 118 S. Ct. 2168 (1998); Rosenberger, 515 U.S. 819 (1995); Capitol Square Review and Advisory Bd. v. Pinnett, 515 U.S.

753 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985); Widmar v. Vincent, 454 U.S. 263 (1981). In each of these cases, the Court asked whether the program or service at issue was created and designed to facilitate expressive activity. See, e.g., Rosenberger, 515 U.S. at 834; Cornelius, 473 U.S. at 802-03. The Court has been inclined to uphold or authorize access when the government, "following neutral criteria and evenhanded policies," has extended access or benefits to recipients "whose ideologies and viewpoints, including religious ones, are broad and diverse." Rosenberger, 515 U.S. at 839. This is because the principles that animate the Free Speech Clause require that government remain viewpoint neutral and refrain from regulating speech on the basis of disagreement with its content. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).[3]

The requirement of viewpoint neutrality served as the

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[3]Programs that fund government functions or messages -- even where the government employs private individuals to further its goals -- do not constitute public fora and thus need not necessarily comply with the neutrality principle. See Rust v. Sullivan, 500 U.S. 173, 193-196 (1991). However, while the free speech restrictions are diminished in the context of government speech because government has wide discretion in formulating the content of its own speech and policies, the Establishment Clause limitations are enhanced because the activity carries with it the government's imprimatur. See Finley, 118 S. Ct. at 2178; Lamb's Chapel, 508 U.S. at 390-91; Rust, 500 U.S. at 193.

basis for the Court's Free Speech *and* Establishment Clause holdings in Rosenberger. See 515 U.S. at 828-37 (free speech ruling rests on prohibition on viewpoint discrimination); id. at 837-46 (Establishment Clause ruling results from fact that the object of the student activity fee "is to open a forum for speech and to support various student enterprises . . . in recognition of the diversity and creativity of student life"). Thus, viewed correctly, Rosenberger is at its heart a free speech case. See Finley, 118 S. Ct. at 2178.[4]

These criteria -- general availability, neutrality, evenhandedness, and diversity of viewpoints -- are appropriately suited for addressing issues of access to fora created for expressive activity, even where funding may be involved. And, indeed, a university setting, with its tradition of academic freedom and commitment to creative thinking and open inquiry, is the paradigmatic context for such a forum:

> [I]n the University setting, . . . the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began

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[4] See Kathleen M. Sullivan, Parades, Public Squares and Voucher Payments: Problems of Government Neutrality, 28 Conn. L. Rev. 243, 255 (1996) ("*Rosenberger* concerned the equivalent of a public square. . . . The University of Virginia subsidy program had merely provided a platform for private speech, largely unregulated as to subject matter except for the exclusion of religion").

> as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.

Rosenberger, 515 U.S. at 835-36; see also id. at 840 (noting that "wide-ranging speech and inquiry" is "an integral part of the University's educational mission"); accord Finley, 118 S. Ct. at 2178.

However, in the context of funding schemes that do not involve free speech fora, the Court has placed significantly less emphasis on neutrality, recognizing other principles of "equal historical and jurisprudential pedigree." Rosenberger, 515 U.S. at 849 (O'Connor, J., concurring). This is because there are "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions . . . even under a neutral program that includes nonsectarian recipients." Id. at 842. Thus, Rosenberger "neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence." Id. at 852 (O'Connor, J., concurring).

Accordingly, while religious speech must be treated like its non-religious counterparts in the context of public fora for

expression,[5] this principle does not hold true in the context of funding schemes that are not designed for expressive activities. Otherwise, government would be required to provide grants for spiritual counseling merely because it funds secular counseling services, to pay for the construction of college chapels merely because it pays for science buildings, to allow public school teachers to pray with their students merely because they engage them in discussions on secular subjects, and to subsidize sectarian schools to the same extent as the public schools. Yet, each of these practices has been disapproved by the Court. See Bowen v. Kendrick, 487 U.S. 589 (1988) (holding that using counseling grants for religious purposes would be unconstitutional); Tilton v. Richardson, 403 U.S. 672 (1971) (prohibiting use of federal construction grants for religious buildings); School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203 (1963) (prohibiting school sponsored prayer and Bible reading); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 787 (1973) (rejecting equalization argument as inviting the "massive, direct subsidization of sectarian elementary and secondary schools").

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[5]Even in the free speech context, the Court has recognized that neutrality is not the only factor in an Establishment Clause inquiry. In Rosenberger, several other factors guided the Court's decision: that the funds came from student fees, not tax dollars, see 515 U.S. at 840-41; that the funds were disbursed directly to a vendor to pay for speech activity, and did not flow to the "coffers" of a religious group, see id. at 842-43; id. at 850 (O'Connor, J., concurring); that the fee was used for a secular activity (in that case, printing), see id. at 840-41; and that payments to religious organizations "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity" were prohibited, see id. at 840.

The holding in Tilton highlights the insufficiency of neutrality as a controlling principle in Establishment Clause cases. In Tilton, the Court upheld the constitutionality of the Higher Education Facilities Act, which provides funds for the construction of college and university facilities. Private and church-related colleges were eligible to receive federal funds under this neutral and generally available program, but the program prohibited the use of funded facilities for sectarian instruction or as a place of worship. Notwithstanding this prohibition and the neutrality of the program, the Court interpreted the law to exclude participation by pervasively sectarian colleges -- the equivalent of parochial schools -- and struck down a provision of the law that allowed funded facilities to revert to religious use after twenty years. See 403 U.S. at 683; see also Hunt v. McNair, 413 U.S. 734, 743-44 (1973) (upholding use of revenue bonds to finance construction of college facilities, where recipient institution was not pervasively sectarian and constructed facilities could not be used for sectarian instruction or religious worship).

This principle was reaffirmed in Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976), in which the Court upheld a government grant program with the same caveat: the funds could not be given to pervasively sectarian colleges and could not be used for religious purposes. Emphasizing the limits to the neutrality principle in the funding context, the Court stated:

> The Court has taken the view that a secular purpose and facial neutrality may not be enough, if in fact the State is lending direct support for religious activity. The State may not, for example, pay for what is actually religious education, even though it purports to be paying for a secular one, *and even though it makes its aid available to secular and religious institutions alike.*

Id. at 747 (emphasis added). Each of these cases involved a general aid program that provided benefits to a broad array of secular and religious institutions on an evenhanded basis, but in none of them was that fact dispositive.

The Supreme Court's more recent cases have reaffirmed the principle that evenhandedness alone does not ensure the constitutionality of a funding program. In Bowen v. Kendrick, 487 U.S. 589 (1988), the Court upheld a facial challenge to the Adolescent Family Life Act (AFLA), a federal grant program that provides funds on a neutral basis to a "wide spectrum" of secular and religiously affiliated institutions engaged in pregnancy counseling and family planning services. Id. at 602, 608. Even though the Court upheld the program's facial constitutionality, it noted that there was "no intimation in the statute that at some point, or for some grantees, religious uses are permitted." Id. at 614. But even more to the point, the Court remanded the case to the district court to consider "whether in particular cases AFLA aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.'" Id. at 621 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)). Thus, notwithstanding the breadth and neutrality of the program, the Court held that religious uses of federal funds would still be unconstitutional. Justice O'Connor underscored this point in her concurrence, stating that "*any* use of public funds to promote religious doctrines violates the Establishment Clause." Id. at 623 (O'Connor, J., concurring) (emphasis in original).

The holdings in Mueller v. Allen, 463 U.S. 388 (1983), Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1987), or Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), do not represent departures from these principles. To be sure, program neutrality was critical to the analysis in each of these cases; however, it was only one of several factors the Court considered. Witters and Zobrest involved disability entitlement programs under which the plaintiffs had preexisting interests; thus, those holdings were little more than extensions of the unremarkable proposition that "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier." Witters, 474 U.S. at 486-87. Even under those facts, the Witters Court cautioned that a state could not "grant aid to a religious school, whether cash or in kind, where the effect of the aid is that of a direct subsidy to the religious school." Id. at 487. Mueller involved a tax deduction involving benefits that were so removed from the sectarian schools that they could only be characterized as "attenuated." Mueller, 463 U.S. at 399. Although the Court deemed neutrality important, the case turned as much on the absence of any significant financial benefit flowing to the parochial schools. See id. at 400.

The significance of considerations other than neutrality to an Establishment Clause inquiry that does not invlove a forum for speech is most clearly seen in Zobrest. After noting the neutrality of the program at issue, the Court went on to emphasize the lack of *any* financial benefit to the religious school, 509 U.S. at 10 ("no funds traceable to the government ever find their way into sectarian schools' coffers"), and to observe that the program "did not relieve sectarian schools of costs they otherwise would have borne in educating their students." Id. at 12. And in its most recent Establishment

Clause decision, Agostini v. Felton, 117 S. Ct. 1997 (1997), the Court reaffirmed the importance of factors other than neutrality, highlighting that the aid at issue in the case did not involve the flow of funds to parochial schools and supplemented rather than supplanted the schools' curricula. See id. at 2013.

In sum, the emphasis placed by the Court on the neutrality of funding programs varies considerably, depending on the nature of the program. When evaluating free speech fora, the Court has deemed neutrality to be of central importance; in other contexts, the Court has deemed other principles to have equal jurisprudential pedigree. Thus, in the event that the Court finds that the neutrality of the University of Wisconsin's program justifies the imposition of a student activity fee without offering an opt-out to objectors because of the nature of the forum created by the fees, we respectfully submit that the Court should limit this justification to the specific context before it, namely, the funding of fora for speech activities. In so doing, the Court would render a ruling that is consistent with its prior holdings under both the Free Speech and Establishment Clauses.

CONCLUSION

Amici urge the Court to fashion a decision that is in accord with its free speech *and* Establishment Clause jurisprudence.

Respectfully Submitted,

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