

Supreme Court, U. S.

F I L E D

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No. 98-1189

IN THE
Supreme Court of the United States

BOARD OF REGENTS OF
THE UNIVERSITY OF WISCONSIN,
Petitioner,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents.

**On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit**

**BRIEF OF *AMICI CURIAE*
UNITED STATES STUDENT ASSOCIATION, *et al.*,
URGING REVERSAL**

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This brief is submitted by the United States Student Association ("USSA"), the Associated Students of Madison, and fifteen of USSA's other state and campus affiliates, in support of the petitioner Board of Regents of the University of Wisconsin. *Amici* seek reversal of the ruling of the Seventh Circuit, affirming in large part the district court's order forbidding the University from using student activity fees to support student organizations that take positions on political or ideological issues.¹

INTEREST OF *AMICI*

USSA is the nation's oldest and largest student organization, representing the student governments of over 300 colleges and universities -- both public and private -- throughout the nation. USSA advocates on behalf of students on issues relating to higher education, focusing principally on defending students' privacy and free speech rights, increasing access to higher education through enhanced financial aid, and ensuring that universities implement fair and open admissions policies. USSA is the recognized student voice in Congress, the White House, and the Department of Education. Associated Students of Madison, a member of USSA, is the student government of the University of Wisconsin at Madison; it is responsible for allocating student activity fees to recognized student organizations, and made the allocations of funds challenged in this proceeding. This brief is also submitted on behalf of the

¹ Letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, *amici* state that no one other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

following affiliated state and campus organizations -- Oregon Student Association, Washington Student Lobby, Minnesota State University Student Association, North Dakota State University Student Association, Oklahoma Student Government Association, Kentucky Board of Student Presidents, Student Association of State Universities of New York, University of California Student Association (representing the student government at all 12 University of California campuses), California State Student Association (representing all 23 campuses in the California State University System), Alaska Coalition of Student Leaders, Colorado Student Association, University of Colorado-Boulder Student Union, Florida Student Association, University of Kansas Student Senate, and Ulster County Community College Student Government.

Amici are organizations that represent the student governments responsible for allocating student fees to qualifying organizations. They have a direct stake in the outcome of this proceeding because they believe that robust and active student debate is the *sine qua non* of a quality university. Because the ruling below threatens the ability of state universities to sponsor student forums for debate, *amici* urge this Court to reverse the judgment below.²

² As democratically-elected student governments, *amici* serve as representatives of the students on the campuses they serve. In this respect, they are different from the student organizations whose activities are at issue here. As discussed below, those organizations represent only those students who choose to associate with them.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case was brought to enjoin the Board of Regents of the University of Wisconsin (the "University") from allocating any portion of the mandatory student activity fee to support student organizations that take positions on ideological or political issues. The Seventh Circuit held that, by imposing a mandatory fee that is used, even in part, to support organizations that take positions on political or ideological matters with which the objecting students disagreed, the University violated the students' First Amendment rights.

This Court should reverse. The Seventh Circuit's ruling is not compelled by, but is in fact inimical to, the First Amendment. The core purpose of the First Amendment is to protect and nurture free expression, not to stifle it. Nothing in the First Amendment forbids state universities from creating a forum for student groups to engage in robust and spirited debate on any subject -- especially political or ideological issues -- so long as the university does not discriminate on the basis of viewpoint. Accepting the Seventh Circuit's view of the First Amendment would transform state university campuses into sterile ivory towers, with student groups, newspapers, speakers bureaus, and debating societies subject to strict censorship rules to ensure that they steer clear of any issue having political or ideological overtones.

This brief will not address each of the flaws in the Seventh Circuit's opinion. Instead, it highlights three key points that might not stand out in the University's more comprehensive treatment of the issues.

1. The First Amendment issue in this case arises because the University uses separately assessed mandatory student fees

to fund a limited public forum dedicated to expressive activity by University students. Had the University used general revenues -- whether from tuition, state aid, or other sources (such as proceeds from football ticket sales) -- there would be no question that the University would have created a limited public forum and that the compelled speech doctrine would not be applicable. In that case, this Court's precedents make clear that the University would *violate* the First Amendment by excluding student groups because they take positions on political or ideological issues. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972). The fact that the fees at issue here come from student activity fees, rather than tuition payments or other funds, cannot justify the Seventh Circuit's failure to apply public forum principles. In either case, money is being exacted from students to support a forum for student debate, and hence public forum principles govern. *Rosenberger*, 515 U.S. at 833-35.

2. Relying on this Court's compelled speech cases, the Seventh Circuit held that the First Amendment forbids a state university from assessing students fees earmarked for the purpose of creating a forum for student discourse, insofar as that discourse includes political and ideological issues. The compelled speech cases are not controlling, however, because here the fee has not been exacted to support the University's own speech, or that of an identified speaker, but rather to create a forum open to all student speakers on a non-discriminatory basis.

To be sure, the general principles developed in cases like *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), have been applied in student fee cases. But with the exception of the

Seventh Circuit, the courts have modified the analysis considerably because the use of mandatory student fees in an academic setting is very different than the use of compulsory bar or union dues. Unlike the union or bar membership cases, where association is unquestionably compelled, University students are not coerced into affiliating with any student organization, and no student organization purports to speak on behalf of all students. Students are free to associate with any organization they choose, or with no organization at all. Thus, unlike compulsory union or bar membership, mandatory student fees do not implicate core associational rights. Recognizing this crucial difference, other courts almost unanimously have held that academic judgments by a university about the germaneness of the activities carried out by student groups to a university's educational mission are presumptively valid and may be set aside in only the rarest instance. This principle was ignored by the court below.

3. Making matters worse, the Seventh Circuit's ruling overlooks altogether the First Amendment rights of the students who support these organizations and who have worked to have them qualify to participate in the University's forum. To be sure, the First Amendment protects the minority from tyrannical oppression by the majority. But the First Amendment also protects the majority as well as the lone dissenter from a heckler's veto. In this case, respondents seek to exclude a handful of student organizations from a university-supported public forum for only one reason -- because respondents disagree with the organizations' messages. That goal, however, is completely incompatible with the First Amendment. The objecting students have every right to avail themselves of the forum. The First Amendment solves their dilemma not by enforcing silence, but by encouraging greater speech and debate. Because the Seventh Circuit's opinion subverts that value, its

judgment should be reversed.

ARGUMENT

THE FIRST AMENDMENT DOES NOT FORBID THE USE OF MANDATORY STUDENT FEES TO CREATE A FORUM FOR STUDENT GROUPS TO ENGAGE IN EXPRESSIVE ACTIVITIES, INCLUDING POLITICAL AND IDEOLOGICAL ACTIVITIES.

I. Public Forum Analysis Compels Reversal.

Although respondents have cast their claim as one to vindicate core First Amendment values, their claim is misguided. Respondents do not claim that the fee system results in any direct restriction on their own rights of speech, expression, or association. Respondents continue to be entitled to speak out on any issue of concern to them, without interference from the University or any of the student organizations that offend them. Nor are respondents compelled to associate or affiliate in any way with any student organization with which they do not agree, and no reasonable person would associate respondents with any such organization.

Because the University exacts fees not to pay for its own speech, but in part to create a forum for expressive activities by all of its students, the controlling legal principles are those that govern limited public forums. *Rosenberger*, 515 U.S. at 834. This Court has long recognized that universities foster a "marketplace of ideas" by providing "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (citation omitted). It is "the business of a university to provide that atmosphere which is most conducive

to speculation, experiment and creation." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). The University of Wisconsin provides that atmosphere by, among other things, allocating a portion of its student activity fees to the student government (*amicus* Associated Students of Madison) which, in turn, distributes some of the monies collected to qualifying student organizations. Through this process, the University has created a limited public forum that encourages "a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834; *see also Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1039 (9th Cir. 1999), *pet. for rehearing and rehearing en banc stayed* (9th Cir., May 4, 1999). *Rosenberger* makes clear that, once a university establishes a forum for students, traditional public forum principles constrain the university's administration of that forum. 515 U.S. at 834-36; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).³

Applying a public forum analysis, it is clear that the Seventh Circuit's conclusion -- that the University is compelled to exclude organizations that take political or ideological positions -- is 180-degrees backwards. A long line of this Court's cases, including *Rosenberger*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), *Widmar*, and *Healy*, which go unmentioned by the Seventh

³ The University has limited access to its forum to recognized student groups that meet a number of neutral criteria. To qualify, an organization must, among other things, be non-profit, be controlled and directed by students, be composed mainly of students, and be engaged in activities that have a relation to campus affairs. Allocated fees may not be used to support partisan political activities.

Circuit, establishes that, once the university creates a limited public forum, it must grant students equal access to that forum and may not engage in viewpoint-based discrimination against speakers. Thus, this Court's public forum jurisprudence *forbids* universities from doing precisely what the court ordered in this case, namely, *excluding* speakers from a public forum because they seek to address political or ideological issues. Indeed, until the Seventh Circuit ruling in *Southworth*, the lower courts had almost unanimously upheld the use of mandatory student fees to support a forum for student discourse over the objections of students who disapproved of the ideological position of a funded group. These courts reasoned that the governmental interest in fostering spirited debate on college campuses outweighed any First Amendment claims by the objecting students not to have what amounts to, at most, a few of their dollars spent for those purposes.⁴

⁴ *Rounds*, 166 F.3d at 1039; *Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475 (1973); *Larson v. Board of Regents of Univ. of Nebraska*, 204 N.W.2d 568 (Neb. 1973); *Veed v. Schwartzkopf*, 478 F.2d 1407 (8th Cir. 1973)(*affirming mem.* 353 F. Supp. 149 (D. Neb. 1973)), *cert. denied*, 414 U.S. 1135 (1974); *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974) (campus newspaper); *Good v. Associated Students of Univ. of Washington*, 86 Wa.2d 94, 542 P.2d 762 (1975); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983) (campus newspaper); *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) ("*Carroll I*"), *on motion to enforce judgment*, 42 F.3d 122 (2d Cir. 1994)("Carroll II"); *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992) (campus newspaper); *Gay and Lesbian Student Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988); *cf. Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982) ("*Galda I*"), (continued...)

Contrary to virtually all of the prior decisions on this issue, the court below apparently thought public forum principles were inapposite because the money used to create and maintain the University's forum comes from student activity fees, rather than from tuition payments or some other source. But that fact cannot possibly bear the weight placed on it by the Seventh Circuit. It is implausible to contend that the constitutional inquiry would be different in this case had the University simply added the \$165 student activity fee to the existing tuition bill. In both cases, the objecting students' argument is the same -- namely, that they are being compelled to support, albeit indirectly, organizations with which they disagree. The question is not, as the Seventh Circuit seemed to believe, how or in what form the funds are paid by the students, but whether the exaction itself violates the First Amendment. As we now show, the compelled speech cases relied on by the

⁴(...continued)
subsequent opinion sub nom. Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986)("Galda II"); *Tipton v. University of Hawaii*, 15 F.3d 922 (9th Cir. 1994). Prior to the Seventh Circuit's ruling here, only the California Supreme Court took a different view. In *Smith v. Regents of University of California*, 844 P.2d 500, *cert. denied*, 510 U.S. 863 (1993), the Court mistakenly regarded the group receiving the portion of the student fee, instead of the fee system itself, as constituting the relevant forum. 844 P.2d at 509 n.8. *Smith* has been severely criticized. Carolyn Wiggins, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees To Support Political Speech at Public Universities*, 103 Yale L.J. 2009 (1994). In light of this Court's holding in *Rosenberger*, *Smith* is no longer of precedential value.

Seventh Circuit undercut, not support, its ruling.⁵

II. The Compelled Speech Cases Do Not Justify The Seventh Circuit's Ruling.

In ruling that a state university violates the First Amendment by requiring students to pay a fee that goes to support organizations that take positions that offend some students, the Seventh Circuit relied on four First Amendment cases -- *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); and *Keller v. State Bar of California*, 496 U.S. 1 (1990) -- and applied them uncritically to a situation for which they were never intended. *Abood*, *Ellis* and *Lehnert* all involved challenges by individuals to the payment of union dues compelled by virtue of "union shop" requirements, where the individuals disagreed with some or all of the union's positions. *Keller* raised similar issues in the context of mandatory bar membership. *Abood* and its progeny do not stand for the proposition that no political speech may be funded by mandatory dues. Only political speech substantially *unrelated* to the entity's core purpose -- that is, the purpose that justifies the mandatory

⁵ Without any explanation, the Seventh Circuit exempted student newspapers and lecture series from its ruling. 151 F.3d at 721, 727 n.8. Apparently, the court recognized that a contrary ruling would end editorial pages in student newspapers, and place off limits most controversial topics for speakers and debating societies. As a matter of logic, there is no principle that limits the reach of the Seventh Circuit's rationale in that manner, since the offensive nature of the "compulsion" is identical in each case.

nature of the dues payment -- may not be funded in that manner.

Abood and the cases that have followed it establish a two-step inquiry where claims of compelled speech are raised in the context of mandatory fees. The first determination focuses on whether the use of the compulsory fee violates the First Amendment rights of the objector. *See Ellis*, 466 U.S. at 449-50. Once an infringement is identified, the second and often more crucial question is whether the compulsion is justified because the speech is germane to the institution's purpose. In the labor context, for example, the answer to this question depends on the balance between the state's interest in furthering the collective bargaining process and the extent to which the funded activity burdens First Amendment rights.

For a host of reasons, until the Seventh Circuit's ruling below, the *Abood* line of authority has not been applied uncritically in cases dealing with mandatory student fees. *See* n.4 *supra*. Indeed, the decision below parts company with virtually every prior decision, where the courts have applied a highly deferential standard of review to the educational judgments that lie at the core of cases like this. *Rounds*, 166 F.3d at 1038-39; *Carroll I*, 957 F.2d at 999; *Carroll II*, 42 F.3d at 128; *Galda I*, 686 F.2d at 166.

This Court has never addressed how courts should evaluate charges of compelled speech where the "compulsion" is to support a university-sponsored forum for students. Lower courts, however, have rightly recognized that treating a diverse and contentious campus exactly as if it were a labor union makes little sense. There are at least three reasons why the intense judicial scrutiny called for by *Abood* has not, and should not, be applied in a university setting.

First, although there is plainly an intrusion on First Amendment rights in the *Abood* cases, there is no such infringement here. Labor unions are authorized to speak for, and to make legally binding decisions on behalf of, all employees regardless of whether they are union members or ardently anti-union. Labor unions also lobby and take public positions on behalf of all employees; they are, in every sense, the employees' "spokesperson." Union dissenters suffer First Amendment injury not simply because they are compelled to affiliate with an organization that takes positions on their behalf to which they do not subscribe, but also because there are no institutional channels available to dissenting employees to voice their views publicly. Thus, those cases involve compelled political association and speech, not simply compelled financial support for a highly diverse forum.⁶

There is no compelled association at issue here. None of the objecting students is compelled in any way to join or be counted as a member of any organization of which they disapprove. Unlike some of the other student fee cases, the payment of a student fee does not automatically confer membership status in any of the student groups at issue here.⁷

⁶ The Ninth Circuit's recent ruling in *Rounds* drives this point home, and concludes that, because there is no compelled speech or association in the student fee context, there is no need to apply strict scrutiny in student fee cases. 166 F.3d at 1037-38 & n.4.

⁷ This contrasts sharply with both *Carroll*, where the payment of student fees automatically made students New York Public Interest Research Group members, *Carroll I*, 957 F.2d at (continued...)

None of the respondents here believes that he or she is a member of any of the allegedly offending organizations, or that any of the organizations is authorized to speak or to take action on his or her behalf. The University forces no student to participate in any organization. Nor do any of these organizations purport to speak generally for students at the University on any matter. Rather, student activity fees support over 100 organizations, each of which contributes distinct viewpoints to the university forum. Thus, unlike the union dissenters who have no institutional outlet to express their views, student dissenters may voice their views freely in the university's forum and may band together with like-minded students to form organizations that advocate their positions in the University's marketplace of ideas.

Even if the Court were to conclude that the mandatory student activity fee implicates First Amendment rights, the only right arguably infringed is the right not to be compelled to contribute to the student government, which in turn allocates a few dollars each semester to a handful of organizations whose messages offend respondents. Given the broad diversity of student groups supported by student activity fees, virtually every student could "object" to what some organization is doing or saying. Surely, the International Socialist Organization likely opposes whatever the Federalist Society supports and *vice versa*. Yet if the Seventh Circuit is correct, neither group could continue to receive student activity fees, no matter how valuable

⁷(...continued)

1003, and *Galda*, where there was a special mandatory fee for a single organization, and a student had to ask for a refund in order to disaffiliate with the organization. *Galda I*, 686 F.2d at 166.

its contribution to the University's educational mission. Even assuming that a compelled contribution to support this kind of student activity could violate the First Amendment -- a proposition with which we disagree -- any intrusion is slight, mainly because the connection between each student's fee and the speech by one of 100 organizations is so remote and the degree of "compulsion" is so minimal.

Second, the relationship between a union and objecting workers is markedly different than the relationship between a university and its students. The principal reason for rigorous review in the *Abood* context is the inherent antagonism between the union exacting the fees and the objectors. A labor union has every incentive to define activities as germane to the collective bargaining process, both because of its self-interest in maximizing its revenues and because it is unconcerned about safeguarding the rights of dissidents. Even in this charged context, however, the Court has warned that the term "germane" cannot be given a cramped reading because a union must have "a certain flexibility in its use of compelled funds." *Ellis*, 466 U.S. at 456. But universities exact student fees not to amplify their own speech or to reward a preferred speaker, but to provide an open and diverse forum for student expression. Thus, the adversity present in the union context is altogether absent in the university setting. Here, the institution -- the University of Wisconsin -- is neither itself a speaker nor is it in an antagonistic position toward respondents; it is, and by law must be, strictly neutral, and respondents have not challenged the University's impartiality here. *See, e.g., Rosenberger*, 515 U.S. at 834.

Third, the nature of the line-drawing is different and intrinsically more complex in a university setting than in a union or bar association context. In the *Abood* line of cases, the

germaneness inquiry focuses on whether an expenditure bears a substantial relationship to the union's mission of bargaining collectively for all employees. Courts closely administer the union-fee line-drawing process, both out of necessity, since there is no other entity that can be trusted to do it, and because the questions that arise -- whether expenditures fall within "the scope of traditional union activities," *Ellis*, 466 U.S. at 446 -- are well within the experience and competence of the courts to resolve.

In marked contrast, the judgments called for in student fee cases hinge on whether the funded activity advances the university's educational mission -- a mission "much broader than the goals of a labor union and state bar" and "inextricably connected with the underlying policies of the First Amendment." *Rounds*, 166 F.3d at 1039. On that issue, courts owe considerable deference to the university. This Court has often admonished that courts should permit universities to define and carry out their own educational missions. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985); *Widmar*, 454 U.S. at 268 n.5; *see also id.* at 279 n.2 (Stevens, J., concurring); *Healy*, 408 U.S. at 180-81; *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). According deference to educational judgments does not denigrate students' First Amendment rights; on the contrary, exacting judicial review carries with it the significant possibility of dampening academic freedom -- a value also protected by the First Amendment. *Sweezy*, 354 U.S. at 250.

The point of this discussion is that, even accepting the Seventh Circuit's view that the *Abood* "germaneness" test plays a role in student fee cases, the test must be applied with, and tempered by, an appropriate recognition of the special role played by universities, which is very different from that of labor

unions or bar associations. After all, it is our nation's universities, not our courts, that are responsible for instilling the citizenship skills students will need as our nation's next generation of leaders. The University of Wisconsin believes that the forum it has created to foster debate and give students the opportunity to play leadership roles in their own organizations is integral to the educational mission of the University. That is a judgment that courts should be, and rightly have been, hesitant to overturn. See *Keyishian*, 385 U.S. at 603. As the Third Circuit put it in *Galda I*, a University's determination of germaneness should be viewed as "presumptive[ly] valid," and set aside only in the rarest instance. 686 F.2d at 166. Because there is no reason to disturb the University's judgment in this case, the Seventh Circuit's decision should be reversed.

III. The Relief Respondents Seek -- The Exclusion Of Certain Organizations From The University's Forum Because Of Their Political Or Ideological Orientation -- Is Incompatible With The First Amendment.

This Court should reverse the judgment below for the reasons outlined in the previous sections of this brief. But if the Court finds that there is any merit to respondents' claim, and *amici* submit that there is none, then the Court must address whether the decision rendered by the Seventh Circuit itself raises constitutional concerns. The remedy ordered in this case -- an injunction forbidding the University from allowing certain organizations to use student fee money to engage in political or ideological activities -- violates the First Amendment rights of those organizations and students that wish to associate with

them.⁸

Although respondents wrap their claim in the language of the First Amendment, it is apparent that they are seeking to use this litigation to silence the voices of those campus organizations with which they disagree. Respondents do not contest that they and the organizations they support have the same access to funding under the student activity fee system as the groups they oppose. The student body and the democratically-elected student government have voted in favor of permitting the targeted organizations to participate in the fee system. Hundreds of their fellow students are involved in the activities sponsored by these organizations. *Cf. Rounds*, 166 F.3d at 1039; *Carroll I*, 957 F.2d at 999-1003. Nonetheless, respondents seek to exercise the proverbial heckler's veto and thereby muzzle these organizations simply because respondents disagree with their messages. The courts should be wary about intervening in a campus dispute that pits one group of students

⁸ *Amici* recognize that the objecting students argue that they are looking for relief only with respect to the *pro rata* share of their fees that go to support the political or ideological work of the organizations that take positions offensive to them. But that argument begs the point. Universities establish mandatory student fees to fund these activities precisely because they recognize that, left to their own devices, students might choose to be "free riders," which would cripple the creation of the forum. Moreover, a university-sponsored forum permits an allocation of funds in a counter-majoritarian way, which ensures that minority voices are not drowned out. And finally, given the small dollar amounts at issue, there is a real concern that the cost of apportioning these fees would dwarf any rebate or refund.

against another, particularly where, as here, each group has equal access to the forum and there is no claim that the forum is being unfairly administered.

Although there are a number of gray areas in First Amendment jurisprudence, it is settled beyond any doubt that a university may not discriminate against speakers based on the speakers' message. *Rosenberger*, 515 U.S. at 829-31 (collecting cases). Once a university has opened up a limited public forum, as the University indisputably has done here, it may not preclude speech on the basis of its viewpoint. *Id.*; see also, e.g., *Gohn*, 850 F.2d at 366; *Tipton*, 15 F.3d at 927.

Respondents are urging this Court to affirm an order requiring the University to do precisely what the First Amendment forbids -- to engage in content control to stifle expression that respondents oppose. This was Judge Arlin Adams' concern in his dissent in *Galda II*, where he observed that the majority "orders a state university to exclude . . . [from a fee] arrangement a group that repeatedly has met all objective requirements of an equal access forum, and that concededly provides substantial educational benefits to the students, simply because the content or objectives of the group's speech are too 'political.'" 772 F.2d at 1072. That result, Judge Adams wrote, "strikes at the heart of the freedom to speak." *Id.* (quoting *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 535 (1980)). Given the facts of this case, the relief respondents seek -- the exclusion of a few speakers in a forum of more than one hundred -- calls into question respondents' entire legal theory.

CONCLUSION

For the reasons set forth above, the judgment below should be reversed.

Respectfully submitted,

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