No. 98-1189

In the
Supreme Court of the United States

October Term, 1998

Board of Regents of the University of Wisconsin, *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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

the University of Washington,

86 Wash.2d 94, 542 P.2d 762

(Sup.Ct. 1975)

Hays County Guardian v. Supple,

969 F.2d 111 (5th Cir. 1992),

cert. denied, 506 U.S. 1087 (1993)

Healy v. James,

408 U.S. 169 (1972)

Kania v. Fordham,

702 F.2d 475 (4th Cir. 1983)

Keller v. State Bar of California,

496 U.S. 1 (1990)

Keyishian v. Board of Regents,

385 U.S. 589 (1967)

Lace v. University of Vermont,

131 Vt. 170, 303 A.2d 475

(Sup.Ct. 1973)

Miami Herald Publishing Co. v. Tornillo,

418 U.S. 241 (1974)

National Endowment for the Arts v. Finley,

524 U.S. 569 (1998)

Pacific Gas & Elec. Co. v. Public

Utilities Comm'n of California,

475 U.S. 1 (1986)

Pruneyard Shopping Center v. Robins,

447 U.S. 74 (1980)

Regan v. Taxation with Representation,

461 U.S. 540 (1983)

Rosenberger v. Rector & Visitors

of the University of Virginia,

515 U.S. 819 (1995)

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Wisconsin is one of its statewide affiliates. Since its founding in 1920, the ACLU has participated in numerous cases before this Court involving the application of First Amendment principles to state universities, both as direct counsel and as amicus curiae. E.g., Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995); Healy v. James, 408 U.S. 169 (1972). This case presents those issues again, and its proper resolution is a matter of significant concern to the ACLU and its members.

People For the American Way (People For) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has more than 300,000 members nationwide. People For has frequently represented parties and filed amicus curiae briefs in litigation seeking to defend First Amendment rights, including cases involving freedom of speech and religious liberty. People For has joined in filing this amicus brief to help vindicate the important free speech principle at stake in this case -- namely, that a public university does not offend the First Amendment by operating a viewpoint-neutral public forum designed to promote a "marketplace of ideas."

STATEMENT OF THE CASE

This case was brought by a group of students from the Madison campus of the University of Wisconsin (UW), who object to the University collecting a mandatory student fee, and then making a portion of it available to student organizations that engage in political or ideological activities. Although respondents stipulated below that this funding is made available to all registered student organizations (RSOs) on a viewpoint-neutral basis, Pet.App. at 106a, 12, they nonetheless contend that they are constitutionally entitled to opt out of a system that inevitably supports at least some organizations whose views they do not share. An understanding of the actual funding process at UW is critical to any analysis of that claim.[2]

The Student Fee System

Like many universities, both public and private, the University of Wisconsin requires its students to pay an annual fee, in addition to tuition, that is used to support a broad variety of student services and organizations. During the 1995-96 school year, the fee for each full-time student at UW was $330. The money is collected on a semester basis and deposited in a segregated fee account maintained by the University. Pursuant to Wis. Stat. §36.09, both the Board of Regents and the students have control over this segregated fee account under an arrangement commonly referred to as "shared governance."[3]

The segregated fee is divided into two categories: allocable and nonallocable. Respondents do not challenge the nonallocable fees.[4] Likewise, respondents do not challenge that portion of the allocable fees used to fund the Child Care Tuition Assistance Program, the Wisconsin Union Directorate Distinguished Lecture Series, the third year of the recreational sports budget, and the United Council. Nor do respondents challenge that portion of the allocable fees used to fund student groups that cannot be described as either political or ideological. Respondents do contend, however, that by permitting access to the allocable fees by student groups with political or ideological viewpoints, the Regents have violated the First Amendment principle against compelled speech, even in the context of a broadly inclusive program.

Registered Student Organizations

Any registered student organization at UW is eligible for funding from the allocable fees. The standard for becoming an RSO is content-neutral. Specifically, a student group seeking to qualify as an RSO must establish that: (a) it has a formalized structure; (b) it is not-for-profit; (c) it is composed mainly of students; (d) it is controlled and directed by students; (e) its mission is related to student life on campus; (f) it will abide by all federal, state, city, and University nondiscrimination laws and policies; (g) it will abide by the financial and other regulations specified in the Student Organization Handbook; and (h) it will register with the Student Organization Office and provide a primary contact person. There are currently more than 600 RSOs at the University of Wisconsin. There is no evidence in the record that any group has ever been denied RSO status for any reason, and certainly no evidence in the record that any group has ever been denied RSO status on a viewpoint discriminatory basis.

Access to Allocable Fees

RSOs can receive funding in three different ways. The most common route is to seek Student Government Activity Funding by applying directly to the Associated Students of Madison (ASM). As the official representative of the student body, ASM has been granted decisionmaking authority over the allocable fees under the University's system of "shared governance." See n.3, supra. Utilizing this authority, ASM awarded approximately 126 operating grants, 6 travel grants, and 57 special event grants during the 1995-96 academic year. Alternatively, those RSOs that provide direct and ongoing services to students can seek money from the General Student Services Fund, which is administered by a subcommittee of ASM known as the Student Services Finance Committee. These grants are generally larger in amount. However, an organization that receives a grant from the General Student Services Fund cannot also receive an operating grant from the Student Government Activity Fund. Finally, the student body can itself vote to fund or defund a specific group or activity through a referendum process that is initiated by obtaining the petition signatures of five percent of the ASM members.[5]

Regardless of which funding mechanism is used, the payment process is the same. RSOs do not receive lump sum grants. Instead, the organizations must submit a requisition or other appropriate business form requesting payment for a specific expense. An employee of the Office of the Dean of Students, working with ASM, then orders the disbursement of the money. Except for membership fees paid in lump sum to WISPIRG, United Council and other multi-campus membership organizations, no money actually goes to the organization itself to pay its bills. Employees of funded organizations receive their salaries or stipends via the university payroll system.

The Proceedings Below

Respondents' motion for summary judgment was granted by the district court based on the stipulated facts submitted by the parties. Pet.App. at 78a-98a. Relying on a series of cases decided by this Court in the context of union dues and bar dues, see, e.g., Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977); Keller v. State Bar of California, 496 U.S. 1 (1990), the district court held that UW's mandatory student fee represented a form of compelled speech in violation of the First Amendment. The Seventh Circuit affirmed on the same grounds,[6] *and then later denied a petition for rehearing en banc. 157 F.3d 1124 (7th Cir. 1998). Three judges dissented from the denial of the en banc petition on the theory that this case, like Rosenberger, involved the creation of a limited public forum, and that the Rosenberger Court had carefully distinguished between support for a forum and support for the views expressed in that forum. Id. at 1125.*

SUMMARY OF ARGUMENT

Four years ago in Rosenberger, this Court held that the University of Virginia had created a limited public forum by using its mandatory student fees to fund a large and diverse group of student organizations. The Court therefore rejected the University's claim that the funding of a student religious publication would represent an endorsement of religion in violation of the Establishment Clause. As the Court pointed out, access to a public forum does not depend on whether the government agrees with the speaker's message. Accordingly, the speaker's message cannot be attributed to the state merely because it takes place in a public forum.

Properly understood, this case involves a straightforward application of the identical principle, albeit viewed through the doctrinal prism of compelled speech rather than religious endorsement. Like the University of Virginia, the University of Wisconsin has used its mandatory student fees to create a limited public forum available to all registered student organizations without regard to their political affiliation or ideological viewpoint, if any. Given the existence of a limited public forum, respondents' fear that they will be falsely identified with speech that takes place in the public forum has no factual or legal merit.

Indeed, this is a much easier case than Rosenberger for at least two reasons. First, whatever one thinks about the merits in Rosenberger, the constraints imposed by the Establishment Clause on the government's ability to fund religion raise a host of issues that are simply not presented by this record.[7] *Second, the university in Rosenberger had a far closer connection to the funded student groups than respondents can assert in this case. Here, as in Rosenberger, respondents' mandatory student fee is paid to the university, where it is used to create a general fund that is then made available to all eligible student organizations. If the university's direct connection to funded student groups did not create a constitutionally impermissible link in Rosenberger, then respondents' indirect connection to funded student groups does not create a constitutionally impermissible link here.*[8]

Because we believe this case is properly analyzed under the public forum doctrine, it is unnecessary to consider whether UW's decision to fund a broad array of student organizations is germane to its educational mission. As a technical matter, that issue only becomes relevant if there actually is a compelled speech violation. Nevertheless, it is worth noting that this Court has long recognized universities as the quintessential "marketplace of ideas." See Keyishian v. Board of

Regents, 385 U.S. 589 (1967). The Wisconsin legislature has likewise recognized the importance of intellectual diversity in defining its goals for higher education in the state. Wis. Stat. §36.01. Surely, a student fee system that facilitates debate on a wide range of topics fits easily within the educational mission of a university.

Finally, unlike a genuine compelled speech case, respondents have no right to a rebate on whatever relatively small portion of their mandatory fee is actually used to support the political and ideological groups they have identified as objectionable. In the factual context of this case, respondents are in the same position as taxpayers who object to the use of a municipal park for a controversial political rally. They can certainly make their objection known, and even use the forum as their vehicle for doing so, but they may not express their displeasure by withholding taxes. Moreover, if the effect of a rebate procedure were to reduce the level of funding available to unpopular groups participating in an otherwise public forum, the rebate procedure itself would constitute a form of viewpoint discrimination in violation of the First Amendment.

ARGUMENT

I.THE STUDENT ACTIVITY FUND CREATED BY UW IS A LIMITED PUBLIC FORUM THAT PROVIDES FINANCIAL SUPPORT TO ELIGIBLE STUDENT GROUPS ON A VIEWPOINT NEUTRAL BASIS

According to the Seventh Circuit, this case presents a "very limited constitutional question." 151 F.3d at 722. The court of appeals defined that question as "whether the Regents can force objecting students to fund private organizations which engage in political and ideological activities, speech and advocacy." Id. If that were actually the question presented by this case, we might well agree with the panel's conclusion. In our view however, the threshold question that needs to be resolved is whether UW has created a limited public forum by using mandatory student fees to fund eligible student organizations on a viewpoint-neutral basis. Rosenberger leaves little doubt that the answer to that question must be yes. The Seventh Circuit thus reached the wrong conclusion because it asked the wrong question.

For purposes of this case, the student activity fund in Rosenberger and the student activity fund at UW are functionally indistinguishable. Both funds are supported by mandatory student fees assessed in addition to tuition. Both funds use neutral criteria to determine funding eligibility. And both funds subsidize a broad array of student groups engaged in a wide variety of expressive activities, including political and ideological speech. If public forum analysis was appropriate in Rosenberger, it is at least equally appropriate here.

That conclusion is unaffected by the fact that UW has created what Rosenberger described as "a forum more in a metaphysical than in a spatial or geographic sense." 515 U.S. at 830. The same was true in Rosenberger itself. See also National Endowment for the Arts v. Finley, 524 U.S. 569, __, 118 S.Ct. 2168, 2178 (1998)(acknowledging that government funding programs can qualify as public forums if they are made generally available to eligible applicants). What is far more significant is that UW has used its student activity fees in a manner that faithfully reflects the University's "broad mission" to provide educational opportunities for all its students in furtherance of "the search for knowledge and individual development." Wis. Stat. §36.01.

Like the student groups in Rosenberger, registered student organizations at UW are a key component of the university's educational mission and serve important educational goals. As the Student Handbook notes: "The University gains or loses directly by the quality of [RSO] programs, the skill of [RSO] leadership, and the success [RSOs] have in reaching large numbers of students." See Preface to Student Handbook (Dean's Letter).[9] This observation, in turn, reflects the University's recognition that "[i]n a student organization, [students] can develop and enhance [their] leadership skills and [their] ability to function cooperatively as part of an organization -- skills that will be necessary throughout your life and especially as you begin your career." Student Handbook, at 4.

Most universities, including UW, therefore encourage broad participation in student organizations. At UW, this is part of the "second curriculum." See Preface to Student Handbook. That educational choice, however, has constitutional consequences. Once university facilities are made generally available to student organizations, those facilities constitute a limited public forum that cannot be selectively denied to particular groups because of the content of their speech, absent a compelling justification. See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981). According to the Court's decision in Rosenberger, the same principle applies to university programs designed to fund private speech. Indeed, the notion of a public forum as a "marketplace of ideas" has particular resonance in the university setting:

The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." United States v. Associated Press, 52 F.Supp. 362, 372.

Keyishian v. Board of Regents, 385 U.S. at 603; see also Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)("No one should underestimate the vital role in a democracy that is played by those who guide and train our youth").

This Court has long understood that the metaphor of education as a "marketplace of ideas" is "not confined to the supervised and ordained discussion which takes place in the classroom." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 512-13 (1969). It also includes "personal intercommunication among students," which "is not only an inevitable part of the process of attending school; it is also an important part of the educational process." Id. This is especially true in the university setting where students have the opportunity to "actively shap[e] their collegiate and social environments with these environments simultaneously providing the potential for transforming the individual." Eric L. Dey & Sylvia Hurtado, "College Students in Changing Contexts," in Higher Education in American Society at 249, 250 (3d ed. 1994). Part of the "role of the university [is] as a neutral ground where the clash of ideas is unfettered." David A. Wilson, "The Public Service Role of the State University in a Changing World," in The Future of State Universities at 85 (Leslie W. Kiepplin, et al., eds. 1985).

Accordingly, this case cannot be decided, as the Seventh Circuit suggested, by pointing to the principle that student groups have no entitlement to funding because the government is not required to subsidize speech. 151 F.3d at 721. While that statement may be true as a general matter, see, e.g., Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983), it has no application in this case where the Regents have already decided that the university's educational objectives would be enhanced by creating a viewpoint-neutral subsidy for student speech. The question is not whether a government decision to deny funding can be challenged, but whether a government decision to grant funding can be challenged. The distinction matters, particularly here where the government has chosen to make funding available on a viewpoint-neutral basis.

The success of the Regents' educational choice to promote the expression of multiple views through the creation of a public forum is demonstrated by the factual record, which shows that more than 600 RSOs currently operate at the University of Wisconsin. These student groups range in subject matter from the philosophical (e.g., Students of Objectivism), to the political (e.g., Campus Coalition for Israel), to the conservative (e.g., Federalist Society), to the liberal (e.g., UW Greens), to the socialist (e.g., International Socialist Organization), to the apparently apolitical (e.g., Badger Crops Club). As this Court emphasized in Rosenberger, "[t]he quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment." 515 U.S. at 836.

Given the expansive nature of the funded student activity at UW, the Seventh Circuit's reliance on Abood and Keller was fundamentally misplaced. Unlike this case, neither Abood nor Keller involved a limited public forum. In Abood, the Court held that a nonunion member has a right to insist that the union not use his mandatory agency shop fees to subsidize "ideological causes," even if those causes are supported by a majority of the union membership, unless they are "germane" to the union's responsibilities as collective bargaining agent. 431 U.S. at 235. In Keller, the Court held that lawyers in California, who are required by statute to join the state bar, have a right to insist that their mandatory bar dues not be used to endorse legislative initiatives, even if those initiatives are favored by a majority of the bar's membership, unless they are "germane" to the bar's designated role in regulating the profession and improving the quality of legal services. 496 U.S. at 13-14.

Amici support both those holdings, but neither decision is controlling here. Rather, those cases stand for the proposition that individuals cannot be compelled to endorse the political views of membership organizations that the state has forced them to join or support for other, unrelated reasons. In this case, respondents are not being asked to join any organization or endorse any political views. See Rounds v. Oregon State Bd. of Education, 166 F.3d 1032, 1037 (9th Cir. 1999)(rejecting a compelled speech challenge analogous to the one raised by respondents in this case). They are simply being required to contribute to the maintenance of a public forum at UW that is available to all students, including respondents, on an equal basis.

Of course, recognizing the right of the Regents to create a limited public forum at UW does not insulate the operation of that forum from First Amendment review. The principle that any public forum must be administered in a viewpoint-neutral manner applies to universities as well as other government agencies. For example, in Healy v. James, 408 U.S. 169, this Court ruled that the First Amendment had been violated when a local chapter of the Students for a Democratic Society (SDS) was denied official recognition and access to university facilities by Central Connecticut State College. More recently, this Court ruled in Rosenberger that the University of Virginia had violated the First Amendment by refusing to fund a student religious publication.

This case does not raise such problems because there is no claim of viewpoint discrimination. To the contrary, respondents have stipulated that "the process for reviewing and approving allocations for funding [at UW] is

administered in a viewpoint neutral fashion."[10] That concession is critical.

II.THE EXISTENCE OF A LIMITED PUBLIC FORUM DEFEATS RESPONDENTS' COMPELLED SPEECH CLAIM

A.Respondents' Compelled Speech Claim Depends On A Showing That They Have Been Forced To Associate With Political Views They Do Not Share

Compelled speech violates the principle of individual conscience that is central to the First Amendment. But there is no violation of individual conscience unless the state has actually compelled someone to show support for a particular message through word or action. The classic compelled speech case is West Virginia State Bd. of Educ. v. Barnette, 319 U. S. 624 (1943), where the Court held that West Virginia could not require its elementary school students to salute the flag and recite the pledge of allegiance. The compulsion to speak and act in Barnette was directly enforced by the state: nonconforming students were subject to expulsion; their parents were subject to imprisonment and fine. Id. at 629. Similarly, in Wooley v. Maynard, 430 U.S. 705 (1977), the Court struck down a New Hampshire statute that prohibited motorists from obscuring the motto, "Live Free or Die," on the state license plate. Like Barnette, the link in Wooley between the individual and the prescribed state message was direct and unmistakable.[11]

That has been true, as well, in this Court's other compelled speech cases. See, e.g., Torcaso v. Watkins, 367 U.S. 488 (1961)(holding that public officeholders cannot be compelled to declare their belief in God); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)(holding that newspaper cannot be compelled to provide a right of reply to candidates it has criticized); Elrod v. Burns, 427 U.S. 347 (1976)(holding that sheriff's employees cannot be compelled to support sheriff's political party); Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986) (holding that utility company cannot be compelled to include message from opposition group in utility's billing envelope).

Conversely, the Court has refused to uphold a compelled speech claim when the connection between the complaining individual and the prescribed state message is neither explicit nor reasonably inferred. For example, in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), a shopping center owner denied student leafletters access to the shopping center to distribute political pamphlets and collect petition signatures. When the students sued for access, the shopping center cited Wooley in support of its contention that any order requiring it to make its facilities available to the students for their expressive activities would amount to a form of compelled speech. This Court rejected that claim, finding the asserted connection between the shopping center and the students' speech too attenuated. The Court pointed to three factors that distinguished Pruneyard from Wooley and Barnette: first, because the shopping center was considered a public forum under California law, it was unlikely that the views expressed by the leafletters would be attributed to the shopping center; second, the state was not promoting or discouraging any particular viewpoint; and third, the shopping center was free to disavow the leafletters' views. While respondents' compelled speech claim arises in a different context, the factors highlighted in Pruneyard also make this case distinguishable from the compelled speech cases relied on by the Seventh Circuit.

B.The Viewpoint-Neutral Forum Established By UW Does Not Create Any Real Or Perceived Link Between Respondents And The Messages Delivered By Other Private Speakers Using The Forum

As in Pruneyard, the university's decision to maintain a public forum effectively severs any link between respondents and the speech they challenge in this case. If the private religious speech of university students is not attributable to the university, even when it occurs in a public forum that the university itself has created and funded, see Rosenberger, then it is implausible to argue that the private political speech of student groups at UW will be attributed to respondents merely because respondents' student fee helped support the public forum where that speech takes place.

Widmar v. Vincent, 454 U.S. 263, provides a useful guidepost. Although the plaintiffs in Widmar raised an affirmative speech claim, as opposed to the compelled speech claim raised by respondents here, this Court's summary of the governing legal principles is instructive:

> *First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.*
>
> *Second, the forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC.*

Id. at 274 (citation omitted). See also Capitol Square Review and Advisory v. Pinette, 515 U.S. at 763.

Rosenberger demonstrates the power of this principle in the student fee context. As described by the Court, "[t]he object" of the student activity fee was "to open a forum for speech and to support various student enterprises." 515 U.S. at 840. Thus, the Court reasoned, the university did not advance or otherwise endorse the message of a religious publication that participated in the forum on the same basis as all other student organizations.[12] The logic of that holding is irreconcilable with respondents' claim here.

The error of the Seventh Circuit was to look to Abood and Keller for guidance without first considering the legal significance of the Regents' decision to create a public forum, and how that decision affected respondents' compelled speech claim.[13] Unlike student fees used to create a limited public forum in a university setting, see Rosenberger, mandatory dues paid to the union (in Abood) or the state bar (in Keller) are not made available equally to support all viewpoints; instead, they are used systematically for the intended purpose of advancing one viewpoint over another. Unlike the university context where the student activity fee supports a variety of speakers expressing multiple views on disparate subjects, the speech produced by union and bar dues is narrowly focused and directly associates the dues paying member with a singular and partisan message ostensibly delivered on his or her behalf.

The distinction is critical. As the Court explained in Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, 471 (1997):

> *Abood, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, Abood merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief."*

This interpretation of Abood only further underscores respondents' failure to establish how their "freedom of belief" is abridged by the political and ideological speech of student groups at UW that do not purport to represent respondents' views, and whose entitlement to university funds is determined on the same viewpoint-neutral basis as every other registered student organization.

A majority of lower courts to address the issue of mandatory student fees have recognized this flaw, and have rejected a compelled speech claim in this context precisely because the argument presumes a logical connection that the facts do not support. For example, in Hays County Guardian v. Supple, 969 F.2d 111, 123 (5th Cir. 1992), cert. denied, 506 U.S. 1087 (1993), the court of appeals held that the use of mandatory student fees to fund the student newspaper at Southwest Texas State College did not violate the principle against compelled speech so long as "[t]he University provided the students with the funds needed for the students themselves to engage in debate and did not force ideological conformity." Similarly, in Kania v. Fordham, 702 F.2d 475, 480 (4th Cir. 1983), the court of appeals stressed that the student fees assessed by the University of North Carolina for the "Daily Tar Heel" enhance speech generally by "increas[ing] the overall exchange of information, ideas, and opinions on the campus." In Lace v. University of Vermont, 131 Vt. 170, 176-77, 303 A.2d 475, 479 (Sup.Ct. 1973), the Vermont Supreme Court analogized a university's student activity fund to a "speaker's corner" because it provides "the monetary platform for various and divergent student organizations to inject a spectrum of ideas into the campus community." In Good v. Associated Students of the University of Washington, 86 Wash.2d 94, 542 P.2d 762 (Sup.Ct. 1975)(en banc), the Washington Supreme Court recognized that the collection of mandatory student fees is appropriate so long as they are not used to promote one viewpoint over another. Accord Arrington v. Taylor, 380 F.Supp. 1348, 1363-64 (M.D.N.C. 1974), aff'd without opinion, 526 F.2d 587 (5th Cir. 1975); Veed v. Schwartzkopf, 353 F.Supp. 149, 152 (D.Neb.), aff'd without opinion, 478 F.2d 1407 (8th Cir. 1973), cert. denied, 414 U.S. 1135 (1974).

Respondents can point to no First Amendment precedent that allows political or ideological speech in a public forum to be singled out for less than equal treatment. Traditional First Amendment rules point in precisely the opposite direction. Even Abood and Keller permit the use of mandatory fees for political purposes so long as those political purposes satisfy the germaneness standard. And while the germaneness standard has never been imposed as a restriction on the use of a public forum, its application to the facts of this case leads to the same conclusion. The mandatory student fees charged by UW have helped to promote a core educational function identified by the state legislature, see p.10, supra, by promoting the creation of a "marketplace of ideas" that has become an integral part of university life.

III.AN OPT-OUT SYSTEM IS UNNECESSARY AND IMPROPER IN A LIMITED PUBLIC FORUM WHERE THE

STUDENT FEES SUPPORT THE FORUM, NOT THE SPEECH IN THE FORUM

It is respondents' request to withhold a portion of their student fees that jeopardizes core First Amendment values by using the unpopularity of certain groups as an excuse to reduce the resources that would otherwise be available to support divergent viewpoints on the university campus. If respondents' fees were not withheld from the student activity fund in general, but were instead subtracted from the grants paid to student groups that respondents had identified as objectionable, those First Amendment problems would be magnified still further.

> ***As this Court observed in Healy v. James:***
>
> ***[T]he Constitution's protection is not limited to direct interference with fundamental rights . . . [The] possible ability [of SDS] to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."***

408 U.S. at 183 (citation omitted). Applying the same principle in Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992), the Court struck down an ordinance that penalized controversial groups by making the cost of a parade permit depend on the likelihood of a counterdemonstration. "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." Id. at 134-35.

This Court has recognized that an opt-out system can be an appropriate remedy in a true compelled speech case. See, e.g., Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986). But an opt-out system is an inappropriate response to public discontent with unpopular speech in a public forum. Under those circumstances, an opt-out procedure becomes equivalent to a financial "heckler's veto." Instead of increasing the cost for unpopular groups seeking to exercise their First Amendment rights, as in Forsyth County, it would diminish the resources available to defray those costs. Either result is impermissible.

Permitting a refund or opt-out from the Regents' pursuit of their legislatively mandated mission would be akin to allowing taxpayers to refuse to participate in government- sponsored programs. As Justice Powell explained in Abood:

> ***Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is that the Government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.***

431 U.S. at 259 n.13 (Powell, J., concurring).

That principle was also recognized in Keller, where the specialized function of the state bar was specifically distinguished from the role of a typical government agency:

> ***[T]he very specialized characteristics of the State Bar of California . . . distinguish it from the role of a typical government official or agency. Government officials are expected as a part of the democratic process to represent and to espouse the views of the majority of their constituents . . . . If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.***
>
> **** * * * ****
>
> ***The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers.***

496 U.S. at 12-13 (citations omitted).

Unlike the state bar in Keller or the union in Abood, the Board of Regents is a state agency that broadly represents the interests of Wisconsin citizens. In the absence of a compelled speech claim, an opt-out is unnecessary. And, given the existence of a public forum, an opt-out would raise its own serious constitutional problems by converting a viewpoint-

neutral forum into a one that is viewpoint discriminatory, thereby opening the door to future challenges that pose an even more direct threat to principles of academic freedom, as the dissent below recognized. 157 F.3d at 1128.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

Jon G. Furlow
(Counsel of Record)

Michael, Best & Friedrich, LLP
One South Pinckney Street
Firstar Plaza, Suite 700
Madison, Wisconsin 53701
(608) 257-3501

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Peter M. Koneazny
ACLU of Wisconsin Foundation
207 East Buffalo, #325
Milwaukee, Wisconsin 53202
(414) 272-4032

Elliot M. Mincberg
Judith E. Schaeffer
People For the American Way Foundation
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-4999

Dated:June 14, 1999

---

1 Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, coun-sel for amici states that no counsel for a party authored this brief in whole or in part and no person, other than amici, its members, or its coun-sel made a monetary contribution to the preparation or submission of this brief.

2 The description that follows is largely based on the a set of stipulated facts agreed to by the parties. Pet.App. at 100a-112a.

3 The principle of shared governance is set forth in Wis. Stat. ?36.09(5), which provides:

> *The students of each institution or campus subject to the re-sponsibilities and powers of the board, the president, the chan-cellor and the faculty shall be active participants in the imme-di-ate governance of and policy development for such institu-tions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. Students in consultation with the chan-cellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student ac-tiv-i-ties. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.*

4 Those fees are used for debt service, certain fixed operating costs, re-quired reserves, student health services, the Wisconsin Union, the first and second year recreational sports budget, and University Health Services.

5 The use of a referendum process to approve or reject specific grant ap-pli-cations by a majority vote of the student body may well present a dif-fer-ent and more problematic set of constitutional issues. The refer-en-dum process at UW has never been the focus of this litigation, however, and its constitutionality was not separately addressed by either court be-low. Under the circumstances, amici respectfully suggest that this case does not present a proper vehicle to address the referendum question. At a minimum, amici believe that this Court should not consider the con-stitutionality of the referendum process at UW without remanding for a fuller development of the factual record since the referendum process ap-parently operates in different ways at different universities. Compare Carroll v. Blinken, 957 F.2d 991 (2d Cir.), cert. denied, 506 U.S. 906 (1992)(upholding an advisory referendum), with Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), cert. denied, 475 U.S. 1065 (1986)(striking down a binding referendum).

6 Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998). The Seventh Cir-cuit cited dicta in Rosenberger referring to the "possibility" of a com-pelled speech claim. 151 F.3d at 722. That tentative observation, how-ever, falls far short of supporting the decision below.

7 Both the ACLU and People For submitted amicus briefs in Rosen-berger arguing that the university?s Establishment Clause concerns were valid on the facts of that case.

8 The opposite is equally true. If the Court were now to determine that the more attenuated link here is sufficient to support a compelled speech claim, then Rosenberger must be reexamined and reversed.

9 The 1996-97 Student Handbook is part of the record in this case.

10This is not to say that a viewpoint discrimination case could not be made out on different facts. It is always possible that funding decisions might be improperly manipulated so that less popular student groups, or stu-dent groups with a minority political or ideological view, receive lower levels of funding, or no funding at all. Cf. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995). The present case, however, does not raise any "as applied" challenge.

11The dissenters in Wooley agreed on the governing principle but dis-agreed on its application to the facts of that case. 430 U.S. at 721-22 (Rehn-quist, J., dissenting).

12 Rosenberger reserved judgment about whether direct funding of a re-li-gious organization would violate the Establishment Clause and, thus, tip the balance in favor of prohibiting religious groups from participating in the university?s program. That issue is not raised in this case, but could properly be raised in a future "as applied" challenge to any proposed funding of a religious organization.

13 The California Supreme Court made the same error in Smith v. Re-gents of the University of California, 4 Cal.4th 843, 844 P.2d 500 (Sup. Ct.), cert. denied, 510 U.S. 863 (1993), by assuming without discussion that the mandatory student fees were linked directly to the challenged speech rather than supporting a public forum on a viewpoint-neutral basis. The only public forum discussion contained in the majority opin-ion in Smith concluded, unsurprisingly, that the funded student groups were not themselves public forums.