No. 98-1199

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 *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS


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## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . iii

PRELIMINARY STATEMENT . . . . . 1

INTEREST OF AMICUS . . . . . 2

STATEMENT OF THE CASE . . . . . 3

FACTUAL AND PROCEDURAL BACKGROUND . . . . . 3

SUMMARY OF ARGUMENT . . . . . 4

ARGUMENT . . . . . 5

I. THE PROHIBITION ON MANDATORY FUNDING OF POLITICAL AND IDEOLOGICAL SPEECH BY PRIVATE GROUPS DOES NOT IMPAIR THE EDUCATIONAL FUNCTION OF THE UNIVERSITY . . . . . 5

II. THE DENIAL OF FUNDING DOES NOT INFRINGE THE RIGHTS OF OTHER STUDENTS . . . 6

III. THE COMPELLED FINANCING OF POLITICAL AND IDEOLOGICAL SPEECH OF OTHERS INFRINGES OBJECTORS' CONSTITUTIONAL RIGHTS AND THERE IS NO VITAL GOVERNMENTAL INTEREST SERVED BY SUCH INFRINGEMENT . . . . . 7

A. Funding Political and Ideological Advocacy Groups Is Not Germane to the Essential Function of the University. . . . . 13

B. Funding Political and Ideological Speech by Private Groups Does Not Serve Vital Interests of the Government . . . . . 20

C. Use of a Mandatory Fee to Fund Political and Ideological Speech and Actions of Other Unnecessarily Burdens Free Speech . . . . . 23

CONCLUSION . . . . . 28

## TABLE OF AUTHORITIES

***Page***

**CASES**

*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) . . . . . *passim*

*Air Line Pilots Assoc. v. Miller,* ___ U.S. ___,
118 S.Ct. 1761, 140 L.Ed.2d 1070 (1998) . . . . . 12, n.7

*Buckley v. Valeo*, 424 U.S. 1 (1976) . . . . . 24

*Carroll v. Blinken*, 957 F.2d 991 (2d Cir.1992) . . . . . *passim*

*Carroll v. Blinken*, 42 F.3d 122 (2d Cir.1994) . . . . . 17

*Ellis v. Brotherhood Railway Clerks*,
466 U.S. 435 (1984) . . . . . 15, n.9

*Federal Election Comm'n v. Massachusetts Citizens
for Life, Inc.*, 479 U.S. 238, 256 n. 9 (1986) . . . . . 7

*Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985) . . . . . *passim*

*Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457,
117 S.Ct. 2130 (1997) . . . . . 25, n.16

*Hays County Guardian v. Supple*,
969 F.2d 111 (5th Cir. 1992) . . . . . 9

*Hollingsworth v. Lane Community College*,
No. 97-35451, 1999 U.S. App. LEXIS 5391
(9th Cir. March 24, 1999) . . . . . 22, n.15

Kania v. Fordham, 702 F.2d 475, 479-80 (4th Cir. 1983) . . . . . 9

## TABLE OF AUTHORITIES (cont'd)

***Page***

**CASES (Cont'd)**

*Keller v. State Bar of Cal.*, 496 U.S. (1990) . . . . . *passim*

*Lathrop v. Donohue*, 367 U.S. 820 (1961) . . . . . 12

*Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991) . . . . *passim*

*Marks v. United States,* 430 U.S. 188, 193 (1977) . . . . . 14, n.8

Regan v. Taxation With Representation of Wash.,
461 U.S. 540 (1983) . . . . . 25

*Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) . . . . . *passim*

*Smith v. Regents of the University of California*,
4 Cal.4th 843, 16 Cal.Rptr.2d 181,
844 P.2d 500 (1993) . . . . . 6, 10, 18, 19

*Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998) . . . . . 3, 4

*West Virginia State Board of Education v. Barnette*,
319 U.S. 624 (1943) . . . . . 7

**OTHER AUTHORITIES**

Irving Brant, J*ames Madison: The Nationalist* 354 (1948) . . . . 26

Federalist No. 10 . . . . . 20, n.14

Thomas Jefferson, Notes on the State of Virginia 233
(2d Amer.ed., 1794) . . . . . 26

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## BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

## PRELIMINARY STATEMENT

This brief is submitted by Atlantic Legal Foundation, Inc. in support of respondents.

This Court has before it an important constitutional question: whether a public university can force objecting students to fund private organizations which engage in political and ideological activities, speech, and advocacy. The Court of Appeals and district court concluded that it could not, and we believe that these judgments were correct.

Atlantic Legal Foundation urges affirmance of the determination by the United States Court of Appeals for the Seventh Circuit that the funding of political and ideological advocacy by private student groups through a mandatory student activities fee violates the First Amendment rights of students who do not agree with the views advocated by such groups.

## INTEREST OF AMICUS

Atlantic Legal Foundation ("ALF") represented the student plaintiffs in two of the cases that have been cited by both sides in this case: *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985) and *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.1992). ALF is thus familiar with the relevant law, and intimately familiar with the way in which public universities seek to promote political speech and activism through compelling students to fund the speech of others.[1,2]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than Atlantic Legal Foundation or its counsel.

[2] We are advised that the parties have filed consents to the submission of *amicus curiae* briefs supporting both sides in this case.

## STATEMENT OF THE CASE

Students attending the University of Wisconsin-Madison must pay a student activity fee. A portion of this mandatory fee is distributed to private organizations which engage in political and ideological activities. Plaintiffs, students at the University of Wisconsin-Madison, sued the Regents of the University, under 42 U.S.C. §1983, claiming that forcing objecting students to fund such organizations violates their First Amendment rights, as well as other federal and state statutes. The United States District Court for the Western District of Wisconsin granted plaintiffs summary judgment on their freedom of speech and association claims, dismissed the remaining claims, and entered an injunction which both barred such funding and established a detailed opt-out mechanism (Pet. Ap. 78a-99a). The United States Court of Appeals for the Seventh Circuit affirmed the district court's determination that forcing objecting students to fund private organizations which engage in political and ideological activities violates the First Amendment (*Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998), Pet. Ap. 13a-51a).

## FACTUAL AND PROCEDURAL BACKGROUND

We adopt the statement of the procedural and factual background of the case found in the opinion of the United States Court of Appeals for the Seventh Circuit, *Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998)(Pet. Ap. 13a-51a). Subsequent to the Court of Appeal's decision on the merits, that court denied the petition of petitioners for rehearing, which denial is reported at 157 F.3d 1124 (7th Cir. 1998)(Pet. Ap. 1a-12a).

There is no real dispute that many of the student groups

funded through the mechanism of the mandatory fee engage in political and ideological activities. Many of them engage in political lobbying at the local, state and national level; some of them overtly support political candidates; some of them are part of national organizations, and send a portion of the monies they receive from the student fee funds to state-wide or national organizations, which in turn lobby and support political candidates. Many of them advocate positions on issues that have little or no relation to campus life or to the concerns of students *qua* students (as distinct from concerns many people, including but not limited to students, share). Many of the student-fee funded groups advocate strong ideological positions. 151 F.3d at 720-722.

## SUMMARY OF ARGUMENT

The prohibition of the use of mandatory student fee money to fund political and ideological speech and political action by private groups does not impair the educational function of a university. There is no threat to "campus life" because many activities that are part of the educational experience would be untouched by the elimination of funding of private political and ideological groups. Voluntary contributions would be sufficient to foster diverse political or ideological advocacy.

The elimination of forced funding of political and ideological speech does not infringe the speech rights of those groups that heretofore have been funded. There is no constitutional right to have one's speech subsidized by others.

## ARGUMENT

## I.

## THE PROHIBITION ON MANDATORY FUNDING OF POLITICAL AND IDEOLOGICAL SPEECH BY PRIVATE GROUPS DOES NOT IMPAIR THE EDUCATIONAL FUNCTION OF THE UNIVERSITY

There is no threat to "campus life" or the "educational experience" as some *amici* supporting the Regents assert. The students do not challenge the Regents' use of the non-allocable portion of the student activity fee to pay for operating costs of auxiliary operations, to pay debt service, to provide student health services, to support the Wisconsin Union [the student center], to finance the recreational sports budget and to provide required reserves for these functions.

The students also do not challenge the Regents' use of the allocable portion of the student activity fee to fund the student government; the Regents' use of the allocable portion of the student activity fee to fund the student newspaper, or the Distinguished Lecture Series; the Regents' use of the allocable portion of the student activity fee to fund private organizations which do not engage in political or ideological speech, activities, or advocacy; or, indeed, the Regents' use of the allocable portion of non-objecting students' activity fees to fund private organizations engaging in political or ideological speech, activities, or advocacy; *See* 151 F.3d at 721-722

## II.

## THE DENIAL OF FUNDING DOES NOT INFRINGE THE RIGHTS OF OTHER STUDENTS

The Regents do not dispute that these private groups engage in political and ideological speech. Instead, they argue that the First Amendment protects the rights of these organizations to engage in such speech. That is a classic red herring: the students do not ask that the speech of any student organization be restricted, they merely ask that they not be compelled to subsidize speech with which they do not agree[3].

The Regents and the *amici* supporting them rely on the First Amendment's guarantee of free speech as support for their position. They argue that the university can create a "forum of money" so long as the forum is viewpoint-neutral. This argument misapprehends the issue and the teaching of this Court.

There is no threat in the students' position and the Court of Appeals decision of restricting the speech of any private organization. *See, e.g., Smith v. Regents of the University of California*, 4 Cal.4th 843, 16 Cal.Rptr.2d 181, 844 P.2d 500, 503 (1993) ("In fact, the case has nothing to do with restrictions on speech. It goes without saying that all students are free to organize, to promote their ideas, and to seek by all

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[3] The Court of Appeals characterized the students' position as a desire not to subsidize speech with which they disagree, but the students themselves, and we also, urge that an objector need not disagree with the speech of others in order to be exempt from funding that speech, rather the objector has a right to abstain from supporting that speech even if he or she is neutral or apathetic about the issue.

legal means to persuade others that their views are correct...."). The Regents and their supporters would convert a right to speak by some into an entitlement to have others unwillingly facilitate, aid and abet that speech.

## III.

## THE COMPELLED FINANCING OF POLITICAL AND IDEOLOGICAL SPEECH OF OTHERS INFRINGES OBJECTORS' CONSTITUTIONAL RIGHTS AND THERE IS NOT VITAL GOVERNMENTAL INTEREST SERVED BY SUCH INFRINGEMENT.

This Court has long recognized two necessary corollaries to the First Amendment's guarantee of free speech: the right not to speak, *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943); and the right not to be compelled to subsidize others' speech, *Abood v. Detroit Bd. of Educ*., 431 U.S. 209 (1977); *Keller v. State Bar of Cal.,* 496 U.S. (1990). It is based on these familiar corollaries, and specifically *Abood* and *Keller*, that the plaintiffs challenge Wisconsin's mandatory student fee policy. The First Amendment does not guarantee that the government will subsidize speech, *see*, *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 n. 9 (1986) ("[T]here is no right to have speech subsidized by the Government."), and, indeed, we submit that the mandatory subsidization of the speech of others, contrary to the desires of individual students violates their rights to free speech and free conscience.

The Regents and may of their *amici* rely heavily on *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995) for the proposition that once the university has created a forum, it cannot discriminate against

political and ideological speech. That argument misses the point: the issue is whether the university or any governmental agency can create a forum for political and ideological advocacy and action by using other people's money.

In *Rosenberger*, students who published a Christian newspaper at the University of Virginia challenged the university's denial of their request for funding from the university's mandatory student activity fees. Although the university had used student fees to pay for printing costs for nonreligious newspapers, the university denied the plaintiffs' request because of the newspaper's religious content. *Id.* at 825-27. This Court held that the student activity fees created a "forum of money" and that, once established, the forum had to be made available on a viewpoint-neutral basis.

While *Rosenberger* did not consider the precise question presented in this case, the Court clearly provided guidance. It referred to the *Abood* and *Keller*[4] analysis:

> The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. *See Keller v. State Bar of California,* 496 U.S. 1, 15-16, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990); *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 235, 236, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

*Rosenberger,* 515 U.S. at 840; Justice O'Connor, concurring,

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[4] *Abood v. Detroit Board of Ed.*, 431 U.S. 209 (1977); *Keller v. State Bar of California,* 496 U.S. 1 (1990) .

was more explicit: "Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. *See, e.g., Keller v. State Bar of California,* 496 U.S. 1, 15, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990); *Abood v. Detroit Board of Education,* 431 U.S. 209, 236, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)." *Rosenberger*, 515 U.S. at 851.[5]

Not only did this Court in *Rosenberger* refer to *Abood* and *Keller*, but every circuit court which has considered the constitutionality of mandatory student activity fees has applied the *Abood* and *Keller* analysis, although the circuits differ on their implementation of the analysis. *See Galda v. Rutgers,* 772 F.2d 1060, 1063-64 (3d Cir. 1985); *Carroll v. Blinken*, 957 F.2d 991, 997 (2d Cir. 1992); *Hays County Guardian v. Supple,* 969 F.2d 111, 123 (5th Cir. 1992); *Kania v. Fordham,* 702 F.2d 475, 479-80 (4th Cir. 1983). *See also,*

[5] The Regents and many of the *amici* supporting them rely, mistakenly, on *Rosenberger*. As the Court made abundantly clear, in that case it considered only the constitutionality of viewpoint discriminatory disbursement of student activity fees, not the constitutionality of forcing students to fund private political and ideological organizations. *Rosenberger,* 515 U.S. at 840.

*Smith v. Regents of the University of California,* 4 Cal.4th 843, 16 Cal.Rptr.2d 181, 844 P.2d 500, 511 (Cal. 1993).[6]

In *Abood*, 431 U.S. 209, this Court held that the Detroit Board of Education could compel non-union teachers to pay a fee in lieu of dues, explaining that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222 and so "long as [the union] act[s] to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 223.

This Court then drew a clear distinction between using compulsory fees for collective bargaining and for political speech:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative.

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[6] The Regents and their *amici* seek to avoid the *Abood-Keller* analysis, implicitly acknowledging that under that line of cases, the students must prevail. Alternatively, the argue that the "germaneness" test of *Abood* and *Keller* is satisfied because of the *ipse dixit* by the university that funding political and ideological advocacy and political action enhances the "educational environment." Such argument is fallacious because (1) it gives the university unlimited power to determine when it can infringe constitutional rights in the name of "education" and (2) germaneness cannot be construed so broadly to "*include political or ideological activities*." *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 516 (1991) (emphasis supplied).

> Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

*Id.* at 235-36 (emphasis supplied)

In *Keller*, this Court began by explaining *Abood*:

> *Abood* held that unions could not expend a dissenting individual's dues for ideological activities not *germane* to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

*Id.* at 13-14, 110 S.Ct. 2228.

*Keller*'s holding ("The State Bar may therefore constitutionally fund activities *germane* to those goals....", 496 U.S. at 13) and *Abood*'s qualification (the Constitution requires that expenditures for ideological cause *not germane* be financed by voluntary funds, 431 U.S. at 235, 97 S.Ct. 1782), make "germaneness" a critical test. *Keller* set out guidelines for determining whether expenditures are "germane" to the organization's legitimate functions and thus constitutionally

permitted: "[T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.' " *Id.* at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)).

After *Abood* and *Keller*, this Court in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991) considered the constitutionality of various union expenditures under the germaneness analysis, suing a three-step analysis for determining whether union expenditures violated objecting employees' First Amendment rights. To be constitutional, the expenditure must be (i) "germane to collective bargaining; (ii) justified by the government's vital policy interest in labor peace and avoiding 'free-riders'; and (iii) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.[7] As *Lehnert* holds, the germaneness test involves more than whether the activity is germane to the governmental interest. It also requires that the university show that the exaction is vital to achieving the legitimate policy interests of the government and that it not unnecessarily burden the free speech rights of objectors. We shall refer to this test as the "*Abood-Keller-Lehnert*" analysis.

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[7] This Court recently reaffirmed this test in *Air Line Pilots Assoc. v. Miller,* ___ U.S. ___, 118 S.Ct. 1761, 140 L.Ed.2d 1070 (1998).

We submit that the compelled funding of political and ideological speech and actions by private groups on and off campus does not satisfy the three prongs of the *Abood-Keller-Lehnert* analysis.

### *A. Funding Political and Ideological Advocacy Groups Is Not Germane to the Essential Function of the University.*

"Germaneness" involves two questions: whether there is some legitimate governmental interest justifying compelled funding and whether the specifically challenged expenditure is germane to that interest. In this case, the Seventh Circuit held that the students did not contest the Regents' a legitimate interest in the compelled funding of the student government or student organizations in general. Thus the question in this case is whether the challenged activity is germane to the government's asserted interest.

The Regents assert an interest in "education." We do not, of course, dispute that the proper purpose of the university is education. The Regents then assert that funding private organizations which engage in political and ideological activities is germane to education because the funding allows more diverse expression, and this in turn is educational. However, we believe that "germaneness" cannot be read so broadly as to justify the compelled funding political and ideological advocacy, activities and speech by private organizations. In *Keller*, the California State Bar defended its funding of lobbying on nuclear weapons, abortion, and prayer in public schools by arguing that it was authorized to fund activities "in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." 496 U.S. at 15. This Court rejected

such an broad definition of germaneness, holding that expenditures to advance such policies as gun control or a nuclear weapons freeze clearly fell at "the extreme ends of the spectrum" of expenditures, were not germane to the organization's purpose, and therefore were unconstitutional. *Id.* at 15-16.

*Lehnert* involved a challenge to the union's use of dues to fund lobbying related to the teaching profession and state policy towards public employees generally (activities that we submit were closer to the core purpose of the union than the funding of political and ideological groups is to "education)." Nevertheless, the *Lehnert* Court held that "Where, as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." 500 U.S. at 520 (plurality[8]). The Court concluded

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[8] In *Lehnert*, five justices adopted the three-prong analysis described, but only four of the five agreed on the application of the factors. Four believed that the challenged lobbying was not germane to collective bargaining, while one thought that it was. The Court's holding is that lobbying was not germane to the union's legitimate purpose. *See Marks v. United States,* 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds' ....") (citation omitted). The four justices who did not join in the majority opinion also concluded that the lobbying activities could not be financed, but applied a "statutory duties test" instead of the three-prong analysis. 500 U.S. at 558 (Scalia, concurring in part, dissenting in part).

"that the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." *Id.* at 522 (plurality opinion).
Thus this Court rejected a broad interpretation of "germaneness" and looked at the specific purposes of the union to determine the constitutionality of its use of the mandatory fee.

When presented with a similarly expansive assertion of interest in *Keller* --the advancement of the law-- this Court rejected such a broad construction of germaneness. *Keller,* 496 U.S. at 15-16.

In the *Abood-Keller-Lehnert* line of cases, this Court rejected arguments that political and ideological speech is germane to the governmental interest involved. In fact, in *Lehnert*, this Court stated that germaneness cannot be read so broadly in the context of a private sector union as to "*include political or ideological activities*." *Id.* at 516 (emphasis added).[9]

Germaneness cannot be so broadly read in the case of a university as to include forced funding by students of private political and ideological groups. Many of the groups are part of or affiliated with organizations which exist outside the

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[9] In *Ellis v. Brotherhood Railway Clerks*, 466 U.S. 435, 452 (1984) this Court held that even though the union activities in question may benefit collective bargaining, the benefits were too attenuated to be "germane" and therefore legitimately funded out of compulsory dues.

university setting[10]. They are private groups which may be open to non-students and indeed controlled or guided by non-students. Unlike course materials or lectures on socialism, or the environment, or cultural diversity (positions many of these groups advocate), the groups that espouse those ideologies or policies are only incidentally concerned with education -- their primary goal is the implementation of their ideological beliefs or, even more blatantly, by direct participation in the political process (*e.g.* by lobbying legislators, propagandizing to the general public, rating candidates or supporting candidates for city-wide, state-wide or national office). The fact that some educational benefit may be derived from these activities is secondary, sometimes purely incidental, and sometimes only a "cover" for political action. They are not sufficiently germane to the core educational purpose of the university and the mere incantation of the shibboleth "education" cannot overcome a practice, repugnant to the First Amendment, of forcing objecting students to fund private political and ideological speech of such organizations.

The Regents argue that education is an expansive governmental interest, which they contrast with the "limited" interests of collective bargaining and oversight of the bar involved in *Abood* and *Keller*. They argue that because the

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[10] For example, WISPIRG, the UW Greens, the International Socialist Organization, and Amnesty International all have non-university counterparts, and their policies reflect those adopted by their off-campus affiliates. Various college and university PIRGs are parts of state-wide organizations, many with their administrative offices removed from any campus; the campus PIRG chapters send all (in the case of New York PIRG) or part of their student-fee revenue to the state headquarters. Most state PIRGs belong to U.S. PIRG, a national organization, and funnel some of their student-fee derived revenue to the national organization's office in Washington.

interest is so broad, more activities, including political and ideological activities, are germane. The Regents correctly recognize the breadth of "education," but fail to see the circularity of their argument. It might be said that every experience in life is in a sense "educational," even if it merely teaches you that you do not want repeat the experience.[11]

The Regents also rely on *Carroll v. Blinken,* 957 F.2d 991 (2d Cir.1992) ("*Carroll I*"), and *Carroll v. Blinken*, 42 F.3d 122 (2d Cir.1994) ("*Carroll II*"), wherein the Second Circuit applied the "germaneness" analysis of *Abood* and *Keller* and held that a state university could constitutionally fund the New York Public Interest Research Group with students' activity fees even though some students disagreed with that speech "as long as that organization spends the equivalent of the students' contribution on campus and thus serves the university's substantial interests in collecting the fee." 957 F.2d at 992[12]. In

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[11] In a similar sense, getting being on campus or on the streets of nearby may be "educational," because the victim may learn what places to avoid or what times of day are unsafe, but one would hardly claim that the criminal activity is constitutionally protected, even if the perpetrator were a fellow student.

[12] *Carroll I* required that NYPIRG "spend[ ] the equivalent of the students' contribution on campus," 957 F.2d at 1002, while *Carroll II* required that NYPIRG spend the equivalent on (1) "activities that foster a 'marketplace of ideas' on the [State University of New York] campus; (2) activities that provide SUNY Albany students with hands-on educational experiences; and (3) extra-curricular activities for SUNY Albany students, both on and off the Albany campus, that fulfill SUNY educational objectives." 42 F.3d at 128. We believe that *Carroll II* was incorrectly decided, because it adopted a much too broad interpretation of the university's educational mission. This Court's guidance on interpreting "germaneness," stated in *Keller* and *Lehnert*, counsels against adopting the broad reading of "germaneness" which the Second

*Galda v. Rutgers*, 772 F.2d 1060 (3d Cir.1985), the Third Circuit applied the *Abood* and *Keller* "germaneness" analysis and concluded that while the New Jersey Public Interest

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Circuit took in *Carroll.* *Carroll* did not consider the additional requirements stated in *Lehnert* -- that the activity supported be germane to a" vital" government interest and not unduly burden the rights of objectors. In a case involving the forced funding of political and ideological speech, those factors are of utmost significance.

In *Smith v. Regents of the University of California*, 844 P.2d 500, *cert. den.,* 510 U.S. 863 (1993), the California Supreme Court followed *Galda* and rejected *Carroll.* In *Smith*, students at the University of California at Berkeley challenged as violative of their First Amendment rights the school's mandatory activity fee which financed the student government and other student activity groups. The students objected to the use of their money to subsidize political or ideological activities of private organizations. The California Supreme Court held that:

> The principles that we derive from *Carroll* and *Galda*, as well as *Keller* and *Abood*, are these: A university may, in general, support student groups through mandatory contributions because that use of funds can be germane to the university's educational mission. At some point, however, the educational benefits that a group offers become incidental to the group's primary function of advancing its own political and ideological interests. To fund such a group may still provide some educational benefits, but the incidental benefit to education will not usually justify the burden on the dissenting students' constitutional rights. Phrased in terms of the tests that courts have applied, a regulation that permits the mandatory funding of such groups is not "narrowly drawn to avoid unnecessary intrusion on freedom of expression" and it "unnecessarily restrict[s] constitutionally protected liberty, [when] there is open a less drastic way of satisfying its legitimate interest."

*Id.* 844 P.2d at 511 (internal citations omitted).

Research Group offered some educational benefits to students, such benefits were "incidental" to the organization's primary political and ideological purpose, and this incidental educational benefit did not justify the infringement of the dissenting students' speech and association rights:

> Although the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's stated objectives of a frankly ideological bent. To that extent the educational benefits are only "incidental"--arising from or accompanying the principal objectives--and subordinate to the groups' function of promoting its political and ideological aims.

*Galda*, 772 F.2d at 1065.[13]

Even if germaneness could be construed as broadly as the Second Circuit did, (but which the Third Circuit, the Seventh Circuit and the California Supreme Court in *Smith* did not), the Seventh Circuit's ruling should nevertheless be affirmed because, as we show below, the Regents cannot show that the compelled funding is by vital interests of the government, and does not add significantly to the burdening of free speech inherent in achieving those interests.

### *B. Funding Political and Ideological Speech by Private Groups Does Not Serve Vital Interests of the Government.*

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[13] Atlantic Legal Foundation was counsel to the student plaintiffs in both *Galda* and *Carroll*. We believe that the Third Circuit's analysis, and its view that the Court must examine the centrality to education of the funded organization's activities, is correct.

The second leg of the *Abood-Keller-Lehnert* examines whether the compelled fee is justified by vital policy interests of the government. *Lehnert,* 500 U.S. at 520. For labor unions, those policy interests include both labor peace and avoiding "free riders" and for an "integrated bar" association "the state's interest in regulating the legal profession and improving the quality of legal services" justified the compelled association inherent in the integrated bar. *Keller*, 496 U.S. at 13-14.

We do not dispute that there is a vital government interest in education. For even a vital policy interest to survive scrutiny under *Lehnert*, however, it must justify *compelled* funding of the private activity. Neither the interest in education nor the interest in student participation in university governance[14] constitutes a vital interest in *compelling* students to fund private organizations which engage in political and ideological speech. In *Lehnert* non-union members challenged various union expenditures, including "lobbying activities related not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the

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[14] We will concede also, *arguendo*, the government may have an interest in allowing students to share the governance of the university system , although we do not believe that the latter interest is "vital." It also creates serious risks that the majority in student government, who by definition are "activists" will abuse their power and impose burdens on students who are more interested in the classroom or the athletic field than campus politics. As was noted in Federalist No. 10, there is a greater danger of undemocratic factions arising in small polities. This risk is aggravated by the "hands off" policies of most school administrators, who would argue that the non-activist students are "learning a lesson in politics or government." The record in this case and other student fee cases shows that university administrators pay little attention to how the student fee money allocated to student government is actually spent and the activities of its recipients.

employee's profession or of public employees generally. . . ." 520 U.S. at 521-522. In determining the constitutionality of the expenditures, a plurality of the *Lehnert* Court analyzed the vital policy interests involved -- labor peace and preventing free riders -- and concluded "[l]abor peace is not especially served by . . . charging objecting employees for lobbying, electoral and other political activities that do not relate to their collective-bargaining agreement." *Id.* at 521. Labor peace would not be enhanced "[B]ecause worker and union cannot be said to speak with one voice, it would not further cause harmonious industrial relations to compel objecting employees to finance union political activities as well as their own." *Id.* *Lehnert* stands for the proposition that there must be a "common cause" to justify compelled funding. In the union cases, where the union and nonunion members share a common cause -- collective bargaining on wages and working conditions -- a vital policy interest has justified compelled funding, but where there was no common interest -- for example on political campaigning and lobbying on issues not related to collective bargaining matters -- the exaction is not justified.

In this case, while there may be a common cause to promote education, and even if *arguendo* there is a common cause in "shared governance," there is no common cause

between the private organizations which engage in political and ideological speech and the objecting students.[15]

Far from further the shared interest in education, forcing objecting students to fund objectionable organizations undermines that interest. In courses on philosophy, political science, history, religion and humanities students are taught the values of individualism and the right and value of dissent. The Regents would have the law teach students that despite their dissent they must fund organizations promoting views that are abhorrent to them.

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[15] In this case, petitioners and many of the *amici* supporting them rely heavily on the "educational" mission of universities and the deference the courts "owe" to school administrators in determining whether a particular activity promotes that mission. Moreover, the administrators also as the courts to rely on the *ipse dixit* of the school administration. We submit that the "educational" function is often used as a pretext for ideological advocacy. Indeed, the catalog of goals the universities are said to promote indicates as much. For example, the Ninth Circuit in *Hollingsworth v. Lane Community College*, No. 97-35451, 1999 U.S. App. LEXIS 5391 at *2 (9th Cir. March 24, 1999), the court included in its list of virtues "instilling civic activism." *See also Carroll v. Blinken*, 957 F.2d 991, 992 (2d Cir. 1992)(describing "transmission of . . . civic duty" as a function of the school). We submit that the government has no proper role in promoting "civic activism," or that if it does, it should be funded, as is the federal election campaign fund, out of *voluntary* designations of a portion of the student fee.

***C. Use of a Mandatory Fee to Fund Political and Ideological Speech and Actions of Other Unnecessarily Burdens Free Speech.***

Even if the Regents could satisfy the first and second prongs, they cannot satisfy *Lehnert*'s third and final prong by proving that the forced funding does not "significantly add[ ] to the burdening of free speech inherent in achieving those interests." This branch of the analysis recognizes that any time the government forces individuals to fund private organizations, a burden on free speech and association may incidentally result, but that burden may be justified by an important governmental interest. Assuming there is a vital governmental interest in funding (which we have concluded there is not), the question then becomes whether a specific expenditure adds to the burden on speech inherent in the mandated funding of the organization in the first instance. If it does, funding those expenditures cannot constitutionally be required even if it is germane to an organization's mission.

The method for determining whether using compelled fees to fund a private organization which engages in political and ideological activities "significantly adds to the burdening of free speech," was also addressed in *Lehnert*. The Court held that funding political lobbying and using objecting employees' funds to gain public support "present[s] additional 'interference with the First Amendment interests of objecting employees.' " 500 U.S. at 521-522 (internal citation omitted). The Court explained:

> The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing petitioners' funds for political lobbying and to garner the support of the

> public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." [*Wooley v.] Maynard*, 430 U.S. 705, 715, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.

*Id.* at 522 (plurality opinion). The Court further explained that "Although First Amendment protection is in no way limited to controversial topics or emotionally charged issues, the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect." *Id.* at 521-22. (emphasis supplied)

In this case the burden on objecting students' speech "is particularly great"; the private organizations use the funds to "garner the support of the public in its endeavors," and as "an instrument for fostering public adherence to an ideological point of view" which the students find objectionable.

Some of the *amici* supporting the Regents (*e.g.* the AFL-CIO, the Brennan Center at NYU, The State of New York, *et al.*, and the United Council of University of Wisconsin Students, Inc.) rely on *Buckley v. Valeo*, 424 U.S. 1 (1976) stand for the proposition that the university can use the student activity fees to fund private organizations even if those organizations engage in political and ideological activities and

speech. In *Buckley*, Congress appropriated monies from income tax revenue to fund political organizations. The student activity fee, however, is not a tax. *Rosenberger* made this clear: "the $14 paid each semester by the students is not a general tax designed to raise revenue for the University." *Rosenberger*, 515 U.S. at 841. *See also*, 515 U.S. at 851-52, 115 S.Ct. 2510 (Justice O'Connor, concurring) ("The Student Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.").

The Regents attempt to justify compelling the objecting students to fund these organizations because without funding less speech, and less controversial speech, will result. That may be true, but the Constitution does not mandate that citizens pay for the speech, let alone the "controversial speech" of others. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) ("Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantage of that freedom.'").[16] *See also*, Thomas

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[16] This Court's recent decision in *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 117 S.Ct. 2130 (1997), supports the distinction between political and ideological ("controversial") speech and innocuous speech. In *Glickman*, this Court in a 5-4 decision upheld the constitutionality of an assessment by the Department of Agriculture used in part to finance advertising of certain agricultural products. The Court relied on three characteristics of the regulation at issue to distinguish it from laws that the Court has found to abridge the First Amendment right to freedom of speech: (i) the marketing orders imposed no restraint on the freedom of any producer to communicate any message to any audience; (ii) the orders did not compel any person to engage in any actual or symbolic speech; and (iii) they did not compel the any producer to endorse or to

Jefferson, Notes on the State of Virginia 233 (2d Amer.ed., 1794) ("[I]t is error alone which needs the support of government. Truth can stand for itself."). The Constitution guarantees that the people cannot be compelled to pay for such speech: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234-35 n. 31, 97 S.Ct. 1782 (quoting Irving Brant, J*ames Madison: The Nationalist* 354 (1948)).[17]

If the university truly seeks to create a "free marketplace of ideas," each idea will gain the support -- in adherents and financial resources -- it earns on its merits. Like any free

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finance any political or ideological views. The third factor was cited repeatedly by the majority. *See, e.g.*, 117 S.Ct. at 2140. ("in any event, the assessments are not used to fund ideological activities."). The majority recognized, however, that "[C]ompelled contributions for political purposes. . .implicated First Amendment interests because they interfere with the values lying at the 'heart of the First Amendment [--] the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.' "117 S.Ct. at 2139 (quoting *Abood,* 431 U.S. at 234-35). In *Glickman*, the four justices in the minority would have invalidated the orders because the First Amendment protects individuals against government compulsion to fund private speech *whether or not the speech at issue is political or ideological*. 117 S.Ct. at 2157 (Souter, dissenting). All nine justices in *Glickman* viewed the compelled funding of political and ideological views as unconstitutional.

[17] The compulsion Madison condemned is of even greater concern because in *Rosenberger*, this Court held that if the university funds any private political or ideological organizations it must fund them all, including Socialists, Nazis, the KKK, the Black Panthers, the Jewish Defense League, the Nation of Islam, the Christian Coalition, and various religious groups.

market, the marketplace of ideas should neither depend on subsidies nor be inhibited by artificial restraints.

## III. CONCLUSION

The mandatory student fee policy at the University of Wisconsin does not pass constitutional muster. Funding of private organizations which engage in political and ideological activities is not germane to a university's educational mission, there is no vital interest in compelled funding, and the burden on the students' First Amendment rights to freedom of belief outweighs any governmental interest asserted.

The ruling of the Court of Appeals should be affirmed.

Dated: August 13, 1999

Respectfully submitted,

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**Certificate of Service**

Martin S. Kaufman, an attorney admitted to practice before the bar of this Court, hereby declares under penalty of perjury that three copies of the foregoing brief of *amicus curiae* Atlantic Legal Foundation in support of the petitioner were served on the following counsel of record for the parties, by depositing same in a postal depository box under the care of the United States Postal Service, in a properly addressed, Priority first class postage prepaid envelopes addressed to them at:

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