

No. 98-1189

Supreme Court, U. S.

F I L E D

JUN 14 1999

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**In the Supreme Court
of the United States**

OCTOBER TERM, 1998

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 FOR THE STATE OF OREGON AS
AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a public university violates a student's First and Fourteenth Amendment rights by requiring him or her to pay an "incidental" or "activity" fee and then using part of that fee to fund a variety of groups, selected according to content-neutral eligibility criteria, even if some of those groups engage in political or ideological advocacy or activity that the student opposes.

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INTEREST OF THE STATE OF OREGON

The State of Oregon shares an interest in this case with other states and has a unique interest as well.

I. Oregon's shared interest.

Like Wisconsin and many other states, Oregon has a system of higher education whose member institutions collect from their students a mandatory "incidental fee" and use a part of it to fund a variety of groups, some of which engage in political or ideological activity. Also in common with other states', Oregon's higher education administrators regard this forum of organizations as an important part of students' education and maintaining it as an important aspect of the universities' educational mission. If this Court affirms the opinion of the United States Circuit Court for the Seventh Circuit in this case, it will at least undermine the vitality of these fora and perhaps eliminate many of them altogether.¹

Further, the logical momentum of the Seventh Circuit's opinion pushes public higher education in a dangerous direction. As that court recognizes, its reasoning leads inevitably to the following Draconian conclusion: "[I]t is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights." *Southworth v. Grebe*, 151 F.3d 717, 730 n.11 (1998). The *Southworth* plaintiffs, for whatever reasons, chose not to challenge the student newspaper, the Distinguished Lecture Series, student government organizations, or tuition-funded speech. *Id.* at 720. But the

¹ Oregon concurs in the arguments set forth in the Amicus Curiae brief of New York in support of Petitioners.

sweeping language of the *Southworth* court clearly and correctly demonstrates that, had plaintiffs chosen to challenge *all* student-funded activities or groups that engaged in political or ideological speech, the challenge would have succeeded. Fee-funded campus activities involving speech—the newspaper, radio and television station, websites, lecture series, student organizations—would be silenced, or turned into vacuous purveyors of sports stories, class schedules, social activities and Greek gossip.

Other casualties lie even closer to the core of higher education’s mission. Like students from other universities, University of Oregon students pay tuition that is used to create, support, staff and organize externships. Students work for state and federal legislators, for state and federal agencies, for Legal Aid, for District Attorneys, for charities and for businesses. Their labor amounts to a cost-free subsidy of these organizations. Under *Southworth*, many of these placements would violate the First Amendment rights of a student who disagrees with the host organization’s ideology or politics because student fees are being used to support the “offensive” speech of a private organization.

Ultimately, the logic of *Southworth* undermines the very nature of higher education in a democracy. Although the Seventh Circuit’s holding that students may not be “forced to financially subsidize speech with which they disagree,” *id.* at 721, applies by its terms only to the subsidized speech of “private organizations,” *id.* at 718, 722, 725, nothing in the opinion reveals a principled method to distinguish that speech from the university’s own speech, including the curricular or

published speech of its faculty. The court explains the difference between prohibited subsidies to private-organization speech and permitted subsidies to university speech as follows:

[U]nlike, for example, a political science class on socialism, the International Socialist Organization is only incidentally concerned with education. Its primary goal is the promotion of its ideological beliefs. The fact that some educational benefit may come from it is secondary, and therefore not sufficiently germane to overcome the objecting students’ constitutional rights.

Id. at 725.

Both private organization speech and curricular speech would be subjected to the same analysis focussing on the speech’s “germaneness” to the university’s educational mission, the governmental policy advanced by the speech, and the degree to which it offends the students’ freedom from compelled expression. *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991). Curricular speech would fare slightly better than private organizations’ speech, to the extent that the former could more easily be justified as primarily educational. But the fact remains that *Southworth* invites a regime in which any student’s objection to the allegedly political or ideological content of a faculty member’s teaching or publication is measured against some determination of whether this expression is primarily educational or primarily political. Compounding the harm this rule would inflict on higher education is the Seventh Circuit’s narrow definition of what

qualifies as “primarily educational”: only those expressions or activities that obviously and directly educate students. *Id.* at 724–27. Thus, for example, a law professor whose scholarship contributes to the debate on tort reform by arguing that society is disserved by punitive damage awards, will have her work subjected to institutional and ultimately to judicial scrutiny in order to determine if its “primary” purpose is “directly” to educate students, or whether that purpose is subordinate to the “ideological” agenda of the insurance defense bar. Yet it is emphatically the mission of the modern university to avoid this kind of scrutiny—to *encourage* expression that is unconstrained by the need to appease anybody’s political sensibilities.

Indeed, in this and other respects the underlying premise of the Seventh Circuit opinion is antithetical to the premise underlying democratic higher education. The Seventh Circuit finds offense in requiring students to pay for the expression of ideas they oppose; higher education, on the other hand, rests on the idea that students cannot legitimately know what ideas they oppose until those ideas have been thoroughly articulated. For that reason, this Court has always found that the Constitution not only permits, but protects, the “wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues.’” *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (internal citation omitted). Presumably that exchange of ideas is equally vital when the “multitude of tongues” includes those that are funded by incidental fees as well as those funded by tuition.

II. Oregon’s unique interest

In 1995, a group of University of Oregon students sued the Oregon State System of Higher Education, along with several university administrators and other public officials, alleging that the University’s use of mandatory incidental fees to fund the Oregon Student Public Interest Research Group Education Fund (OSPIRG EF) violated the students’ speech and associational rights under the First and Fourteenth Amendments. The District Court granted the State’s motion for summary judgment and dismissed the case. A three-judge panel of the Ninth Circuit affirmed. *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032 (1999). Plaintiffs filed a Petition for Reconsideration and Suggestion for Rehearing En Banc. In an Order filed on May 3, 1999, the Panel informed the parties of its decision to “defer further action * * * pending resolution of *Board of Regents v. Southworth* * * *.”

Oregon, then, has an immediate and concrete interest not only in the outcome of *Southworth* but in the degree to which that outcome depends on facts that are particular to that case and different from the facts in *Rounds*. As the Ninth Circuit noted, resolution of cases involving the use of compelled fees for political speech “necessarily involves a fact-intensive inquiry.” *Rounds*, 166 F.3d, at 1037. Oregon’s objective in appearing as *amicus curiae* is to ensure that this Court does not decide the case before it in terms that may be inadvertently overbroad. For that reason, Oregon quotes the following factual determinations from the Ninth Circuit panel opinion:

[Incidental] Fees are authorized by Oregon statute to finance programs the Board of Higher Education deems "to be advantageous to the cultural or physical development of students." OR. REV. STAT. § 351.070 (3)(d) (1997).

The University has developed an elaborate system to ensure compliance. In order to qualify for funding, an organization must first be recognized by the Associated Students. Criteria for recognition includes a requirement that the organization engage in activities of common interest to students. If recognized, the organization may apply for funding by submitting a budget request. Organizations then can receive funding by either approval of a majority vote of the entire student body or through a budget process that includes approval of various committees of the Associated Students as well as the Student Senate. The budget allocation also must be approved by the President of the University and the Board of Higher Education.

* * * *

Over eighty University organizations, including athletic, culturally-oriented, and political groups, received funding from the Fees during the 1995-96 academic year.

Among the groups that received funding was the OSPIRG EF, a statewide organization run entirely by students to address issues of concern to students.* * * OSPIRG EF is a nonpartisan organization funded entirely by student activity fees that aims to develop students' potential to become educated and responsible citizens who are informed about the American legislative process and political system. Towards this end, the OSPIRG EF offers students the opportunity to ex-

plore public policy issues, participate in extra-curricular activities, organize and engage in community service efforts, and acquire leadership skills. Although students are responsible for running and governing the OSPIRG EF at both the local and the state levels, a paid professional staff is available to assist the student workforce.

* * * *

[W]e note that * * * Students are not afforded "automatic membership" by paying the Fees, nor are the Students required to participate in OSPIRG EF's activities. Under the Oregon system, the Fees are allocated among scores of campus organizations representing many diverse viewpoints. Membership in any campus organization is elective.

* * * *

Finally, we must underscore that the Oregon system differs markedly from other state PIRGs whose funding by university students has received judicial scrutiny.* * * Under the Oregon scheme, the OSPIRG EF is a separate entity from the Oregon State Public Interest Research Group ("OSPIRG"), an organization that does engage in legislative lobbying and more overtly political action. No Fees are allocated to OSPIRG; only OSPIRG EF receives funding. Thus, the Oregon system bisects political and educational functions and limits university funding to educational activities.

* * * *

* * * The record indicates that OSPIRG EF * * * is a non-partisan organization whose objective is to provide college students hands-on experience in recog-

nizing, researching and solving the problems of society.

* * * *

166 F.3d, at 1034–39 (paragraphs re-arranged; internal citations omitted). Oregon, then, has a system for collecting, distributing, and using students’ incidental fees that differs markedly from many other states. Oregon respectfully requests this Court to recognize these differences to the extent that they might be implicated in its opinion.

SUMMARY OF ARGUMENT

The analysis derived from the context of labor law cases, in particular from *Lehnert v. Ferris Faculty Assn.*, has little or no relevance in the higher education context. Spending a worker’s union dues to promote the union’s political agenda bears no resemblance to spending a student’s incidental fee exaction to sponsor a forum consisting of groups and activities chosen without regard to their political or ideological stance.

ARGUMENT

Government can compel monetary contributions from citizens; it can also sponsor and engage in ideological expressive activity. U.S. CONST, art. I, § 8 (power to tax); *Rust v. Sullivan*, 500 U.S. 173 (1991) (power to espouse and sponsor ideological speech). Paradoxically, however, using mandatory exactions to fund ideological expression raises issues under the First Amendment. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). This paradox results from the interaction of two principles. One is that the First Amendment

protects not only the right to speak freely but the right to be free from compelled speech. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The second is that spending money to fund political advocacy is itself a form of political advocacy. *Buckley v. Valeo*, 424 U.S. 1 (1976). Thus, compelling citizens to expend money and then using that money to facilitate or sponsor political advocacy is to compel citizens to engage in political advocacy.

The First Amendment interest in freedom from compelled support of political speech, however, is not absolute. To take an obvious example, tax money funds the streets, parks, and other public fora wherein passionate political advocacy occurs and is not only permitted but protected. *E.g.*, *Hague v. CIO*, 307 U.S. 496 (1939) (streets); *Widmar v. Vincent*, 454 U.S. 263 (1981) (university campus; religious speech). If every citizen had the right to veto government expenditures that supported expressive activity with which he or she disagreed, “debate over issues of great concern to the public would be limited to those in the private sector.* * *” *Keller v. State Bar of California*, 496 U.S. 1, 12–13 (1990). The courts have therefore formulated guidelines to sift permitted compulsory extractions from impermissible ones. That process began in cases involving public labor law (including the law governing an integrated bar association). The basic principles announced in those cases, however, do not translate sensibly into the context of higher education.

The most recent of the labor cases, *Lehnert v. Ferris Faculty Assn.*, summarizes the earlier ones by announcing the following test: using a mandatory exaction of union dues to

fund political expression is constitutional only if the expression is “germane to collective bargaining; justified by the government’s vital policy interest in labor peace and avoiding ‘free-riders’; and does not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.” *Id.* at 519.

The Seventh Circuit opinion in *Southworth* is a straightforward (albeit flawed) application of this test from *Lehnert*, using an extremely stringent definition of “germane.” Incidental fees substitute for union dues; education substitutes for labor peace; and the burden on the dissenting fee-payers remains constant. The rule thus translates approximately as follows: mandatory incidental fees can be used to subsidize university activities involving advocacy or political speech if the activities are directly and primarily for the purpose of educating students, and do not significantly add to the burdening of free speech that is inherent in the requirement that students pay an “incidental” or “activity” fee.

But these substitutions result in a distorted analysis. As this Court has frequently recognized, one of the essential functions of higher education (as distinct from organized labor) is to provide intellectual debate, including political and ideological debate. *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S., at 603. Providing students with exposure to a diversity of viewpoints, in fact, is such a vital state interest that it justifies an exception to even the most fundamental mandate of the Equal Protection Clause—governmental neutrality in matters of race. *Regents of Univ. of*

California v. Bakke, 438 U.S. 265 (1978). The purpose of the university’s “incidental fee” or “student activity” exactions is to serve that vital state interest by creating and exposing students to a broad spectrum of subjects, viewpoints and expressive opportunities. Thus, any first amendment analysis of student incidental fee uses must take account of the fact that the state’s interest in allowing ideological expression is more important in the university than in the workplace. The exchange of ideological or political views is not only *germane* to the mission of the university; it *is* one of the missions of the university.

Further, the First Amendment offense caused by the compelled expression is radically *less* in the university context when the allegedly offending group is funded as part of a unitary fee assessment because, unlike the union dues-payer, the student fee-payer is sponsoring a forum that embraces a variety of ideological, religious, philosophical and other viewpoints. Dues payers who dissent from their union’s or bar’s position suffer a First Amendment injury because their viewpoint is not given voice by the group, and because the group voice that does speak contrary to their viewpoint will be attributed to them. Student fee-payers who dislike the ideological position of a funded group, on the other hand, may join other funded groups that are more congenial to their views—and if none exists they are free to form one.

For these reasons, direct translation of the analysis from labor cases into the university context makes no sense. One way to remedy this mismatch would be to recognize, in applying the *Lehnert* rule, that (1) the definition of

“germaneness” must be broad, because (as the *Southworth* court recognizes, 151 F.3d, at 725) almost any activity or idea can be germane to the education of a student who participates in or learns about it; (2) the governmental interest in providing a broad spectrum of viewpoints and activities for university students is vital and self-validating; and (3) the burden on fee-payers will be small so long as the fees are used to fund organizations representing a spectrum of ideologies chosen on a content-neutral basis, access to that forum by new organizations remains open, and no student is considered a “member” of any organization by virtue of his or her mandatory funding.

Alternatively, this Court could simply retain the *Abood-Keller-Lehnert* analysis for labor cases, and acknowledge what is already implicit in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) that universities’ incidental fee exactions are different from union dues, and they are especially different when the exactions are used to fund a multi-organization menu of student-serving organizations. In this analysis, fee systems such as Wisconsin’s, at issue in this case, and Oregon’s, at issue in *Rounds*, would survive, as would others in which student fees fund a variety of organizations chosen under criteria that are content and viewpoint neutral, open to all applicants, with no membership implied by an individual’s fee payment.

CONCLUSION

For the reasons stated above, the judgment of the U.S. Seventh Circuit Court of Appeals in *Southworth v. Grebe* should be reversed.

Respectfully submitted,

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June 14, 1999