

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BOARD OF REGENTS OF THE UNIVERSITY OF
WISCONSIN SYSTEM, ET AL., Petitioners v. SCOTT
HAROLD SOUTHWORTH, ET AL.

CASE NO: 98-1189

PLACE: Washington, D.C.

DATE: Tuesday, November 9, 1999

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Supreme Court U.S.

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BOARD OF REGENTS OF THE :

4 UNIVERSITY OF WISCONSIN :

5 SYSTEM, ET AL., :

6 Petitioners :

7 v. : No. 98-1189

8 SCOTT HAROLD SOUTHWORTH, :

9 ET AL. :

10 - - - - - X

11 Washington, D.C.

12 Tuesday, November 9, 1999

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:02 a.m.

16 APPEARANCES:

17 SUSAN K. ULLMAN, ESQ., Assistant Attorney General,
18 Madison, Wisconsin; on behalf of the Petitioners.

19 JORDAN W. LORENCE, ESQ., Fairfax, Virginia; on behalf of
20 the Respondents.

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10 please the Court. The University of Wisconsin, like public and
11 private universities across the country, has long had and
12 encouraged a wide range of student activities. At the
13 University of Wisconsin, these activities are supported in
14 part by disbursements from a student activity fund which
15 is a viewpoint-neutral forum for student groups.

16 The First Amendment does not prohibit the
17 University of Wisconsin from requiring all students to
18 contribute to this viewpoint-neutral forum.

19 QUESTION: Counsel, in -- in the course of your
20 argument, it seems to me that there are three different
21 things happening here. One is that the funds are allocated through the
22 student council in a viewpoint-neutral manner, as you've
23 just said.

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 98-1189, the Board of Regents of the University of Wisconsin System v. Scott Harold Southworth.

Ms. Ullman.

ORAL ARGUMENT OF SUSAN K. ULLMAN

ON BEHALF OF THE PETITIONERS

9 MS. ULLMAN: Mr. Chief Justice, and may it
10 please the Court:

11 The University of Wisconsin, like public and
12 private universities across the country, has long had and
13 encouraged a wide range of student activities. At the
14 University of Wisconsin, these activities are supported in
15 part by disbursements from a student activity fund which
16 is a viewpoint-neutral forum for student groups.

17 The First Amendment does not prohibit the
18 University of Wisconsin from requiring all students to
19 contribute to this viewpoint-neutral forum.

20 QUESTION: Counsel, in -- in the course of your
21 argument, it seems to me that there are three different
22 things happening here.

23 One is that the funds are allocated through the
24 student council in a viewpoint-neutral manner, as you've
25 just said.

1 Secondly, funding can result from a referendum.
2 Like WISPIRG had a referendum and the funds were paid by
3 reason of the referendum, which it seems to me is not
4 viewpoint-neutral.

5 And third -- and third -- some of the funds are
6 used or may be used -- I'm not sure -- for what we might
7 call quintessential political activity, hypothetically --
8 this didn't happen -- going to the New Hampshire primary
9 and attending rallies and so forth.

10 It seems to me that all three of those present
11 maybe different problems, and at some point in your
12 argument, if you could just address those.

13 MS. ULLMAN: There are three different funding
14 schemes.

15 The first is the GSSF funding, which is funding
16 for organizations that provide services to significant
17 numbers of students at the UW-Madison.

18 The second is --

19 QUESTION: Now, as to that, are the funds paid
20 out by the Board of Regents?

21 MS. ULLMAN: The funds are allocated by a
22 student group. All the funds are in the State treasury
23 and are paid. They're not paid in a lump sum to the
24 group. The group has to fill out a requisition form, and
25 then the bill is paid by the fund.

1 QUESTION: And are they limited to certain
2 purposes?

3 MS. ULLMAN: They are. They are limited to
4 services for significant numbers of students in the areas,
5 of student health, student life on campus, that sort of
6 thing.

7 QUESTION: But I mean the funds that are paid
8 out. Are they paid out to support telephone bills or
9 letter writing or what?

10 MS. ULLMAN: Yes. There are specific budgets,
11 and they -- for the service organizations, they are for -
12 - for example, they can be the bus service and that passes
13 to all the students. One of the groups they've challenged
14 is the Campus Women's Center. That funds the physical
15 place that the forum is, as well as the activities of the
16 center.

17 QUESTION: Is it -- is it fair to say that the
18 ultimate control over the payment of funds in this
19 category is retained by the university?

20 MS. ULLMAN: The ultimate control, yes, but it
21 is -- it is a student group in all three that determine
22 the funds and the university provides a check --

23 QUESTION: The university, at least in the first
24 category, can -- I guess they haven't done it, but they
25 could say, no, we're not going to pay out the money for -

1 - for what you have selected in this respect.

2 MS. ULLMAN: In all three categories, in theory
3 the university could --

4 QUESTION: Including the referendum category?

5 MS. ULLMAN: Yes.

6 QUESTION: Why don't you argue, as some of the
7 amici did, that in fact for that reason, you should
8 analogize -- we should analogize the position of the --
9 the university to the university's position when it
10 decides how to spend its own money, how to choose its
11 curriculum, how to invite speakers to the campus, if it
12 does that?

13 MS. ULLMAN: It --

14 QUESTION: Why don't you argue? Is there a
15 reason not to argue that?

16 MS. ULLMAN: It is analogous to that situation,
17 but here it is the students that are choosing which groups
18 will speak, and that is very important --

19 QUESTION: So, you're saying the analogy is not
20 perfect, in other words.

21 MS. ULLMAN: Because the university itself is
22 not speaking.

23 QUESTION: And do you -- do you -- do you wish
24 to adopt the position that -- that some of the friends of
25 the Court have taken, or -- or do you, in effect, wish us

1 not to adopt that position?

2 MS. ULLMAN: I think -- I think we hold up under
3 either position. I think our position this Court doesn't
4 need to go as far as the position of some of the amici. I
5 think we hold up under the students determining where the
6 money shall go.

7 QUESTION: But who --

8 QUESTION: Ms. Ullman --

9 QUESTION: -- performs the checking function?

10 You say in your brief that there's one exception for
11 partisan political activity. And Justice Kennedy brought
12 that up as one possibility. Who exercises the check to
13 determine whether these student groups are engaged in
14 partisan political activity?

15 MS. ULLMAN: There is a representative from the
16 Dean of Students Office who participates at the committee
17 meetings and someone from the Dean of Students Office who
18 must sign off on the requisitions for the funds. There
19 hasn't been any example in our record of the university
20 turning down some funding because it's politically
21 partisan.

22 QUESTION: That is against the guidelines, I
23 take it. If it were determined that a request for
24 something was politically partisan, it would be turned
25 down?

1 MS. ULLMAN: It is against the guidelines.

2 QUESTION: Ms. Ullman, you say -- you say it's
3 viewpoint-neutral. What does that -- I mean, somebody has
4 to make a decision whether it's the students or the
5 university which speakers are going to be funded and which
6 aren't. What if there is a -- a student chapter of the
7 KKK that -- that applies for funding? I assume somebody
8 makes the decision that they will or will not get funding.
9 Right?

10 MS. ULLMAN: Such a group would get funding,
11 assuming that the group --

12 QUESTION: Automatically?

13 MS. ULLMAN: If it comes to the forum and does
14 its application correctly, is compliance -- in compliance
15 with the rules of being a registered student organization,
16 doesn't discriminate, can fulfill those requirements, then
17 it will get funding.

18 QUESTION: See, that -- that's what I didn't
19 understand. Is it the case that all of the groups that
20 didn't get funding under this program, didn't request
21 funding?

22 MS. ULLMAN: That's correct, with the handful of
23 exceptions of groups who didn't fill out their
24 applications properly.

25 QUESTION: I take it that even though partisan

1 political activity is not to be funded by -- lobbying
2 activities, lobbying in the legislature is -- may be. Is
3 that correct?

4 MS. ULLMAN: Under one policy, it says lobbying
5 should be excluded. We haven't found anything in this
6 record that student activity funds paid for lobbying.
7 There was lobbying, but there was no evidence that the
8 funds paid for it.

9 QUESTION: Well, but I -- I suppose funds could
10 be given to an organization generally that engages in
11 lobbying, and the -- the organization could say, well, we
12 get our lobbying money from somewhere else. But then the
13 student funds would simply supply other expenses of that
14 organization.

15 MS. ULLMAN: Yes. The student funds generally
16 went to postage and printing, office supplies, things of
17 that nature.

18 QUESTION: Ms. Ullman, I have a basic question
19 about why we should, in the first instance, adopt the --
20 the forum analysis here. It's a metaphorical forum. I
21 mean, we start with that. We're not talking about a
22 physical public forum.

23 And there -- there are two ways of looking at
24 what goes on. One way, to be sure, is to look at it as a
25 metaphorical forum, and another way is not to look at it

1 as a forum and simply to look at it as a mechanism for
2 funding various groups which have ideological and various
3 partisan identifications.

4 One -- or the question in my mind is what reason
5 is there to adopt the -- the forum metaphor rather than to
6 look directly at who gets the money. One reason that
7 occurred to me would be that there was no other way or no
8 practical way to have this sort of ferment of comment and
9 -- and speech except in this fashion. And yet, that
10 doesn't seem to be the case because I think -- what -- 70
11 percent of the student organizations seem to get along
12 without going through this process and availing themselves
13 of the activity fund.

14 So, my -- I'm left with the question of why
15 should we adopt the forum metaphor as opposed simply to
16 looking to where the money goes.

17 MS. ULLMAN: I think there are several reasons
18 for the forum metaphor. First of all, in Rosenberger,
19 this Court did recognize that a student activity fund is a
20 forum like a park or any other forum.

21 QUESTION: Well, the legitimacy of the -- of the
22 practice as a whole was not at issue in Rosenberger, as I
23 recall. It was simply whether, if you have it, you have
24 to provide it to -- to particular religious groups, as
25 well as to everybody else.

1 MS. ULLMAN: That's correct, and the parties
2 here on both sides viewed this as a forum.

3 And in answer to your point about the hundreds
4 of groups that don't get funding, I don't think that's
5 actually an accurate representation of what's going on.
6 Here we have a snapshot of one year and these 125 groups
7 get funding, but each year the groups that get funding
8 change. So, to say 70 percent of them don't get funding,
9 that might be true in a different --

10 QUESTION: Well, does it change -- does it
11 change radically? I mean, are there years in which 98
12 percent get funding?

13 MS. ULLMAN: I don't know that the percent
14 changes radically, but out of the 18 groups that the
15 respondents objected to, 2 of those were not funded the
16 next year. So, that's a large --

17 QUESTION: Okay. Well, it still leaves me, I
18 think, with -- regardless of what the exact proportions
19 may be, it still leaves me with a question, why we should
20 adopt the -- the forum metaphor. And if -- if the
21 argument were you can't have the kinds of speech which is
22 valuable in a university setting without this practice,
23 and hence the forum metaphor, in fact, is a way of
24 describing a -- a -- at least a value of great importance,
25 then I could understand that as a reason for adopting the

1 metaphor.

2 But given the fact that there are so many
3 organizations in which I presume speech is going on and
4 people are coming to visit and speak and so on, who don't
5 avail themselves of this, I'm -- I don't have that reason.
6 At least it's not obvious to me. And I don't know what
7 the other reasons are for adopting that -- that form of
8 analysis.

9 MS. ULLMAN: I -- I'm not sure that your second
10 statement is true, that these groups are having speakers
11 come anyway. Certainly the vast bulk of the speech that's
12 discussed in the record is all coming from these groups.
13 It takes money to invite a speaker. So, the groups that
14 are inviting speakers to campus do need some funding.

15 QUESTION: But do you have -- and I don't want
16 to get picky about it, but do you have record support here
17 for the proposition that you simply cannot get prominent
18 outside voices who stimulate thought without this kind of
19 centralized funding mechanism?

20 MS. ULLMAN: I do have support from the Dean of
21 Students who said that it takes an honorarium or travel
22 expenses to get speakers --

23 QUESTION: Well, sure, but lots of organizations
24 invite us to speak, and they come up with their own
25 honorariums. I don't know why that necessarily implies

1 the need for the university to -- to be the middle man
2 here.

3 MS. ULLMAN: The university made the judgment
4 that it is very important to it to have all of these
5 different groups funded. And the reason that the forum
6 analogy works is because the students pay the money into a
7 fund, and then all groups can speak.

8 QUESTION: Well, Ms. Ullman, I'm curious to know
9 -- we've talked about having speakers come to campus and
10 the -- the forum analogy generally. But I got the
11 impression from the opinion of the court of appeals that a
12 number of these funded groups don't purport to put up
13 speakers and invite everybody to come. They simply go
14 about their -- their business, whatever it is.

15 MS. ULLMAN: I don't -- I don't agree that
16 that's true, but it -- the forum is the pot of money.
17 It's not -- I'm not claiming that each individual group is
18 holding a forum.

19 QUESTION: Well, I was just -- I was just
20 curious factually, you know, whether or not it supports a
21 forum analogy. Aren't there some of these groups who do
22 not have big meetings on campus and invite speakers, but
23 simply go about the work they're supposed to go about?

24 MS. ULLMAN: When I -- in our joint appendix is
25 an excerpt from the funding application of many of these

1 objected-to organizations, and they all talk about how
2 they want to educate other students and what they'll do.

3 QUESTION: Well, I'm sure how they want to, but
4 what -- what formal steps do they take to go ahead with
5 this, I mean, other than just, you know, grab somebody
6 while they're walking between classes?

7 (Laughter.)

8 MS. ULLMAN: They do do that. They use
9 chalkings. They do poster. And they do invite speakers.
10 They have art exhibits. They have photo exhibits. So,
11 they're engaging in all sorts of types of --

12 QUESTION: Well, I'd like to talk about WISPIRG
13 for a moment. Number one, that doesn't match the public
14 forum description you've given us so far because this was
15 a direct referendum where 51 percent of the votes were
16 enough to -- to fund \$40,000-plus to WISPIRG. So that, it
17 seems to me, is much different from the public forum
18 argument that you've been making.

19 Secondly, just on the Chief Justice's point, the
20 WISPIRG application says that through its -- through
21 organizing new chapters throughout the State, this
22 additional income will allow WISPIRG to hire professional
23 staff necessary to play an even more effective role on
24 environmental and consumer protection issues.

25 Now, if you're -- if you're going to be candid

1 with us to tell us what's happening here, you should
2 address that as well.

3 MS. ULLMAN: All right. WISPIRG did voluntarily
4 have a referendum that went to the student body, and it
5 was voted that they would get a certain amount from each
6 student's fees. WISPIRG then had to go through the GSSF
7 funding process. It had to fill out the application. It
8 had to have a hearing before the committee where they
9 would decide its funding. The committee voluntarily views
10 that referendum as binding, and they use that as a
11 minimum --

12 QUESTION: But that's not -- that's not
13 viewpoint-neutral -- a viewpoint-neutral forum.

14 MS. ULLMAN: That's correct. WISPIRG is getting
15 the funding through the services.

16 QUESTION: So, we have two cases here and not
17 just one.

18 MS. ULLMAN: That's correct. We have funding of
19 services and we have funding of all groups as a forum.

20 QUESTION: Excuse me. You say WISPIRG is just
21 services?

22 MS. ULLMAN: WISPIRG was funded through the
23 mechanism for student --

24 QUESTION: I don't care what -- what mechanism
25 it was funded through. Was it just providing student

1 services?

2 MS. ULLMAN: Yes. WISPIRG in its application
3 says that in the past year it has served more than 20,000
4 people, 75 percent on the campus.

5 QUESTION: What -- what does it serve them with?
6 Meals? What?

7 MS. ULLMAN: It says it's offered them volunteer
8 and internship programs for course credit and that they've
9 had at least 5,000 students use their educational
10 materials on environmental and consumer issues.

11 QUESTION: Well, I mean, you could call any
12 speech serving students then, I mean, if -- if that's your
13 definition of serving students, telling them things.

14 MS. ULLMAN: The -- we have a stipulation as to
15 what the services organizations will do, and the
16 respondents haven't challenged that any particular --

17 QUESTION: Well, they've certainly challenged
18 that -- that this organization engaged in activities that
19 didn't constitute student services --

20 MS. ULLMAN: Yes, and that --

21 QUESTION: -- including lobbying.

22 MS. ULLMAN: That's factually disputed, whether
23 they engaged in lobbying.

24 QUESTION: Yes. We're talking about what the
25 other side claims.

1 MS. ULLMAN: Right.

2 QUESTION: Given the position of the district
3 court and the court of appeals, we never got to the point
4 of examining these discrete questions because both the
5 district court and the court of appeals thought the whole
6 thing was no good. So, it may well be that this separate
7 category bears further pretrial development. But they
8 didn't have an opportunity to do that.

9 MS. ULLMAN: That's true. The case was resolved
10 on summary judgment, and the lower courts didn't seem to
11 acknowledge the separate funding --

12 QUESTION: But if you -- if you can't defend
13 WISPIRG on a public forum analogy, how do you defend it?
14 I'm still waiting for that?

15 MS. ULLMAN: I'm -- I'm defending it as being
16 one of the services organizations funded through the
17 service mechanism.

18 QUESTION: Well, but why does -- why does that
19 make a difference? You called it a service organization,
20 and yet it's just interested in propagating its views.

21 MS. ULLMAN: I think that's simplifying too
22 broadly what WISPIRG does.

23 QUESTION: Well, but it does do a good deal of
24 propagating of its views I take it.

25 MS. ULLMAN: Certainly, and it views -- I mean,

1 it views its own speeches educating the students, and
2 that's part of -- what are faculties doing too with
3 telling the students --

4 QUESTION: Well, I'm sure the Republican and the
5 Democratic parties think the same thing.

6 QUESTION: As well as the KKK.

7 QUESTION: Could -- could we go back to Justice
8 Kennedy's first question? There are three different kinds
9 of funding programs going on?

10 MS. ULLMAN: That's right.

11 QUESTION: The GFF, which you say is analogous
12 to a forum, and then the -- the student referendum
13 mechanism, and what's the third?

14 MS. ULLMAN: Sorry. The first is GSSF, which is
15 funding services, and the second is ASM, which is the
16 forum. That's the Associated Students of Madison, the
17 student government. And the third was WISPIRG that had a
18 referendum and then went through GSSF.

19 QUESTION: There was a stipulation in the record
20 that the activity fund is administered in a viewpoint-
21 neutral fashion?

22 MS. ULLMAN: That's correct.

23 QUESTION: Did that extend only to the GSFF
24 money or what?

25 MS. ULLMAN: It was for the ASM money.

1 QUESTION: ASM.

2 MS. ULLMAN: Which is the one that's the forum.

3 And it extended to GSSF insofar as no group was
4 discriminated against -- no group -- there's no evidence a
5 group was denied funding for its views, but they were
6 screened as to whether they were service --

7 QUESTION: But the stipulation does not extend
8 to the student referendum mechanism I gather.

9 MS. ULLMAN: Right.

10 QUESTION: All right.

11 QUESTION: And the referendum would also work to
12 de-fund, as I understand it. That the students could
13 veto. If somebody gets through the regular process and
14 the students can have a referendum and say we don't want
15 that group funded. Isn't that so?

16 MS. ULLMAN: I do know that the United States
17 Student Association lost its funding by referendum the
18 year after it got funding in here. So, that must be true.
19 What happened was they asked for funding again and it was
20 voted down.

21 QUESTION: What was that organization?

22 MS. ULLMAN: It's an organization of different
23 student governments.

24 QUESTION: I guess the First Amendment is
25 supposed to, in part, protect views that are unpopular.

1 MS. ULLMAN: That's correct.

2 QUESTION: But I would think a referendum would
3 pick out the views that on campus were popular.

4 MS. ULLMAN: That --

5 QUESTION: So, what is that you suggest we do
6 about this campus referendum?

7 MS. ULLMAN: I think the campus referendum for
8 WISPIRG went through the student services organization,
9 and I think funding services for significant numbers of
10 students is a legitimate function for any university. And
11 if there's a problem with a particular organization that
12 got funding through that mechanism, that it's not really a
13 service or something like that, that's a specific
14 challenge to a case. There's no reason to throw out --

15 QUESTION: So, in your view the campus could
16 have only liberal organizations which are just popular on
17 campuses and the conservative ones, which happen to be
18 very unpopular -- they wouldn't give any of the money to.

19 MS. ULLMAN: No, that -- that --

20 QUESTION: I mean, on -- on this -- on this --
21 through this route. You'd call it a service. Is that --
22 is that basically what you're saying? In other words, if
23 it's called a service, money for a service, in your
24 opinion they could give them only to the liberal
25 organizations which are popular and not give them to the

1 conservative ones which are unpopular, if it's called a
2 service.

3 MS. ULLMAN: I don't -- I don't really think
4 it's fair to say if it's called a service.

5 QUESTION: No, no, but I'm trying to elicit your
6 view.

7 MS. ULLMAN: Right.

8 QUESTION: What is -- what is --

9 MS. ULLMAN: If -- if it could fit the criteria
10 for being a service, which we had stipulated to what that
11 includes --

12 QUESTION: And that criteria is?

13 MS. ULLMAN: That it provides direct, ongoing
14 services to significant numbers of UW-Madison students.
15 The funds should also contribute significantly to student
16 health, safety, or academic success.

17 QUESTION: But that includes hiring professional
18 staff to have a more effective role in environmental and
19 consumer protection issues.

20 MS. ULLMAN: WISPIRG was --

21 QUESTION: That's a service in your view.

22 MS. ULLMAN: Well, WISPIRG was able to show to
23 this organization that it was providing a service. The
24 Dean of Students --

25 QUESTION: That's a service in your view, what

1 I've just quoted.

2 QUESTION: Yes.

3 MS. ULLMAN: Everything WISPIRG is providing
4 together is -- yes --

5 QUESTION: Well, then service is just a great,
6 huge Mother Hubbard type of blanket.

7 (Laughter.)

8 QUESTION: Is -- is -- I mean, if -- if that is
9 the service, then presumably all sorts of organizations
10 that may have quite partisan views and spend their time
11 trying to persuade students of their -- of their merit are
12 all engaged in services to the students.

13 MS. ULLMAN: No. WISPIRG received its funding
14 and the Dean of Students said it has -- WISPIRG has been
15 especially effective in helping students identify projects
16 that fit with their academic work in the classroom so that
17 students can experience both the service and learning
18 around this same topic.

19 QUESTION: Yes, but that was, by no means, all
20 that that organization did, was it?

21 MS. ULLMAN: It -- no, it did a lot of things.
22 That's for sure.

23 QUESTION: But let -- let me understand what
24 you're saying. Is it only the services branch of funding
25 that can be mandated or vetoed by a student referendum? I

1 thought the student referendum could -- could knock out
2 somebody who gets another kind of funding as well.

3 MS. ULLMAN: I don't think the student
4 referendum could just knock out any group, but that is not
5 clear in our record. Our --

6 QUESTION: Well, now --

7 MS. ULLMAN: -- all the student groups are
8 getting funding through the ASM.

9 QUESTION: Is -- is it your statement that the
10 student referendum only applies to the services category?
11 Is there somewhere where we can see this in the university
12 regulations or something?

13 MS. ULLMAN: I don't know. The --

14 QUESTION: As far as we know, the student
15 referendum applies to all -- all of these three different
16 sorts of funding.

17 MS. ULLMAN: I guess in theory it could.

18 QUESTION: That's quite a big problem, isn't it?
19 I mean, your -- your own amici have run away from you on
20 this WISPIRG issue.

21 MS. ULLMAN: Right.

22 QUESTION: And -- and so now if this student
23 referendum applies to the whole business, it's going to be
24 pretty hard to get the minorities funding.

25 MS. ULLMAN: Well, the -- the important

1 mechanism that's getting funding here is this forum. It
2 wouldn't be practical for groups that are getting just
3 very small amounts to go try to set up this referendum
4 process. It would cost them more to do that than they are
5 getting in this funding. Hundred -- more than a hundred
6 groups are getting funding from the forum, and they
7 express all different views. And the university wants
8 those minority groups to be -- or unpopular groups to be
9 able to speak too. And that's --

10 QUESTION: And that's -- all that -- all that is
11 a service.

12 MS. ULLMAN: No. That is the Associated
13 Students of Madison forum funding.

14 QUESTION: In -- in your view was the newspaper
15 in the Rosenberger case a service? It sounds to me like
16 it is as you define it, and I simply can't buy that
17 argument.

18 MS. ULLMAN: I -- I don't think it needed to be
19 a service. It was part of the forum in that case, and in
20 this case the 125 student groups are part of -- the vast
21 bulk of the groups that are funded are through the forum.
22 They aren't funded through this service organization.

23 If I could reserve some time.

24 QUESTION: Ms. Ullman, would you just clarify
25 one point for me? Will you tell me how the university

1 defines partisan political activity? What falls under
2 that label that's not permitted to be funded? I mean, one
3 question came up about lobbying, and I wasn't sure whether
4 you said yes or no to that.

5 MS. ULLMAN: The -- there are two policies. One
6 is for the GSSF student funding, that mechanism, and it
7 says the organization does not have a primarily political
8 orientation, i.e., it is not a registered political group,
9 and shall not use SUFAC funds for any lobbying purposes.

10 dollars. QUESTION: So, lobbying is definitely one.

11 MS. ULLMAN: Using the funding for those
12 purposes.

13 QUESTION: Well, is it only to prevent -- I -- I
14 take it that partisan organizations are excluded from
15 these benefits not merely because they -- they lobby but
16 because they are partisan political organizations.

17 MS. ULLMAN: That's correct.

18 QUESTION: Well, if that -- and -- well, maybe I
19 shouldn't get ahead of myself. Why -- why does the online
20 university so accept them? What's the reason for that?

21 MS. ULLMAN: The university has traditionally
22 excluded partisan political and religious activities.

23 After Rosenberger, its policy --

24 QUESTION: Well, let's leave religion out for a
25 minute and -- and just talk about politics. I mean, you

1 know, the core First Amendment value is in political
2 speech. Why is political speech excluded?

3 MS. ULLMAN: Only partisan political speech.

4 QUESTION: Partisan political speech.

5 MS. ULLMAN: And that --

6 QUESTION: Why is it excluded?

7 MS. ULLMAN: Because the university wants to
8 avoid the appearance of political favoritism. The
9 Wisconsin legislature provides hundreds of millions of
10 dollars to the university each year.

11 QUESTION: But it's not that the university
12 believes there's a First Amendment reason for the
13 exclusion.

14 MS. ULLMAN: I don't --

15 QUESTION: It just doesn't want politics in any
16 way that might be identified with the university. It
17 doesn't want to get in Dutch with the legislature
18 basically I guess.

19 MS. ULLMAN: That's right. It wants to confine
20 the forum to the purposes that it defined it for. In
21 Rosenberger, they also excluded political activities of
22 electioneering and lobbying.

23 QUESTION: If you're excluding that kind of
24 politics, what does that do to your -- to your forum
25 analysis?

1 MS. ULLMAN: I don't think it harms the forum
2 analysis.

3 QUESTION: It's rather than an odd forum, isn't
4 it?

5 MS. ULLMAN: No. It only excludes a very narrow
6 band of partisan political.

7 QUESTION: It excludes a narrow band which in
8 fact is the -- is the principal object in the first
9 instance of First Amendment protection.

10 MS. ULLMAN: Yes, but there's still at this
11 forum a wide range of speech that can be heard. And the -
12 - this Court has recognized that you can exclude a class
13 of speech in Cornelius v. the NAACP.

14 QUESTION: All right. Can the -- do you take
15 the position that the university could exclude funding for
16 an avant garde arts organization?

17 MS. ULLMAN: I don't think so. That sounds like
18 it would be viewpoint-based rather than --

19 QUESTION: That's -- that's right. That's the
20 way it sounds to me and it sounds to me as though you've
21 got the same point with your political exclusion.

22 MS. ULLMAN: No. We're excluding an entire
23 class of speech, an entire category. We're not excluding
24 a particular viewpoint.

25 QUESTION: Just partisan political, though.

1 That's -- that's a viewpoint it seems to me. If I hold
2 these views but I'm not a Democrat, I can -- you know, I
3 can spew them. But if -- if I -- and get funded for it.
4 But if I -- once I affiliate with a party, then I can't.

5 MS. ULLMAN: I -- I think the -- the university
6 has limited the partisan political. The respondents
7 haven't challenged that category of funding. They've
8 challenged the funding mechanism. If there's a problem
9 with excluding partisan political, then that's a
10 Rosenberger type case that isn't here.

11 Thank you.

12 QUESTION: Very well, Ms. Ullman.

13 Mr. Lorence, we'll hear from you.

14 ORAL ARGUMENT OF JORDAN W. LORENCE

15 ON BEHALF OF THE RESPONDENTS

16 MR. LORENCE: Mr. Chief Justice, and may it
17 please the Court:

18 For each one of the three parts of the
19 university's funding system, the referendum, the services
20 that are funded under GSSF, and the ASM system, the same
21 constitutional principle applies. The university violates
22 the -- the principle against compelled funding of
23 political and ideological speech laid out in Abood and
24 Keller.

25 With the referendum system, we do not even have

1 a Rosenberger issue at all because it arguably cannot be a
2 forum at all. Rosenberger is relevant to the GSSF
3 services aspect and the ASM, but in both cases they are
4 mainly -- the main part of both of those is to fund the
5 political and ideological activities and advocacy of these
6 groups. Services --

7 QUESTION: Well, I thought there was stipulation
8 in the record that the funding process is administered in
9 a viewpoint-neutral fashion.

10 MR. LORENCE: That's right.

11 QUESTION: Is there such a stipulation?

12 MR. LORENCE: Yes, Justice O'Connor.

13 QUESTION: Okay. I guess that doesn't extend to
14 the referendum process.

15 MR. LORENCE: It -- it does not. It -- it does
16 not.

17 QUESTION: Okay.

18 QUESTION: Can we leave that referendum out of
19 it on the theory that it isn't really developed fully in
20 front of us in the lower court opinions in anything and
21 simply express no view on it and deal with the rest of it?
22 What would be wrong with doing that?

23 MR. LORENCE: I think you have sufficient --
24 Justice Breyer, sufficient things in the record to see
25 that these groups that are funded by the referendum,

1 WISPIRG, engage in very obvious political and ideological
2 speech. The students are compelled to fund it.

3 QUESTION: Yes, yes. All that's true. What I'm
4 thinking is that most of the case, except for that, is
5 presented to us in terms of what the First Amendment
6 requires in respect to a system that's viewpoint-neutral.
7 The problem with that referendum is -- is perhaps it
8 isn't. And so, would it make sense for us and can we in
9 this case leave that part of it out, say it isn't
10 developed fully in the record or in -- in the courts
11 below, even if it is in the record, and deal with the rest
12 of it?

13 MR. LORENCE: I think it's an easier case. I
14 think it's more straightforward. I think it's an obvious
15 issue of compelled speech, and I think this Court could
16 easily separate that out and say the other ones may be a
17 closer call because of a Rosenberger issue, but the -- the
18 referendum is definitely way over the compelled speech
19 line of Abood and Keller. And I think that you could
20 handle it that way.

21 Now, the other one --

22 QUESTION: May I ask -- may I ask this --

23 MR. LORENCE: Yes.

24 QUESTION: -- general question, if -- some of
25 these things obviously are troubling that have been

1 identified in the questions. I'm wondering if they are
2 troubling just because it's financed by student speech or
3 would it be equally troubling if it was financed out of
4 the general tuition or appropriation by the legislature.
5 Would you think a program would be valid if it were
6 financed with State funds?

7 MR. LORENCE: There would be no First Amendment
8 claim -- challenge that could be brought if it was funded
9 by taxation --

10 QUESTION: I understand that, but that -- I'm
11 trying to leave that out and ask you whether you think the
12 program has these vices in it that would survive no matter
13 how it was funded.

14 MR. LORENCE: Well --

15 QUESTION: As long as it's State money or
16 student money, either one.

17 MR. LORENCE: If it's -- if it's tuition money,
18 I think it would depend on how it's done.

19 QUESTION: It's done exactly the same as in this
20 case.

21 MR. LORENCE: I think that then it would mean
22 there's no government -- they're not agents of the
23 government. They don't come under the government speech
24 doctrine. They're not part of the university program.
25 Even though they're being paid by tuition, it's basically

1 they're giving them money and say, do what you want,
2 promote --

3 QUESTION: So, that would --

4 MR. LORENCE: -- your own agenda.

5 QUESTION: Could they salvage the program by
6 abolishing student fees and increasing the tuition in
7 exactly the same amount? Would you have a constitutional
8 objection to the program if they did that?

9 MR. LORENCE: It -- Justice Stevens, it would
10 depend on how they do it.

11 QUESTION: They do it just the way they do it in
12 this record.

13 MR. LORENCE: I think that we could because --
14 but it would be a -- it would be shifting tuition to pay
15 for a group in a way that they -- they have not used
16 tuition ever before.

17 QUESTION: Yes, but -- but a fairly simple
18 solution. I'm just wondering if you think it would be a
19 valid solution.

20 MR. LORENCE: Well, if they're going to make
21 these groups agents of the university, then --

22 QUESTION: They're going to do exactly what they
23 do here except they just raise the money a little
24 different --

25 MR. LORENCE: Then I think there would still be

1 a challenge because they -- they would be giving
2 government -- they would be giving private money to
3 private groups to do their -- that are independent of the
4 university to pursue their own political and
5 ideological --

6 QUESTION: See, the thing that strikes me about
7 the case is I'm not -- I'm wondering if the source of the
8 funds is really the problem or the way in which their
9 program is administered is the real problem. That's what
10 I'm trying to sort out in my mind.

11 MR. LORENCE: Well, I think that the -- the
12 government speech doctrine I think provides a line here
13 that maybe this is -- I'm trying to discern what you might
14 be getting at here -- that -- if we're talking about
15 things that the university is funding with its academic
16 program with tuition where it says, this is the University
17 of Wisconsin, these are our agents, that type of thing, I
18 think that would be a government speech issue. There
19 would be no challenge to that. There would be no First
20 Amendment right to opt out of funding something like that.

21 QUESTION: Well, what if the university uses
22 tuition money to have speakers that come from all these
23 various perspectives at a university auditorium?

24 MR. LORENCE: I think that that --

25 QUESTION: They use the tuition money to do

1 that.

2 MR. LORENCE: That would be acceptable because,
3 from what I understand, it would be part of the government
4 -- it would be the University of Wisconsin extending its
5 agency or sponsorship or something over that event. And I
6 don't think there could be a challenge.

7 QUESTION: Well, what if the university does
8 that and lets a student group meet to decide what speakers
9 will be invited?

10 MR. LORENCE: Some of these issues in the
11 middle, I'm not exactly sure. The facts would have to be
12 specific, but I think the issue -- where the line would be
13 drawn, as it was in Rosenberger and Rust, is, is this a
14 government speech, is this a government actor with the
15 authority or the sponsorship, agency of the university --

16
17 QUESTION: Well, if the university is saying, we
18 want every student to pay \$50 a semester to an activity
19 fund and we require that and it's going to be used for
20 these activities, then why isn't that government speech?

21 MR. LORENCE: Because there is -- it's clear
22 from the -- the student operations handbook, which is in
23 the record. It's not in the joint appendix -- that the -
24 - the registered student organizations are distinct,
25 separate, independent, private, that they -- they are --

1 they're talked about how they are not university actors.
2 In fact, they could not be sued -- the university could
3 not be sued to say one of your groups did something wrong.
4 They're clearly separate from the government here, from
5 the university. So, the --

6 QUESTION: But I don't understand that. Surely
7 the government can invite an outside group to come and
8 give a speech or put on a presentation using government
9 money, tuition money to ask them to do that.

10 MR. LORENCE: That's correct.

11 QUESTION: And you'd have the same situation.

12 MR. LORENCE: Yes. I -- I think that it would
13 -- I think the issue would be sponsorship. Is this the
14 University of Wisconsin sponsoring this event? Then I
15 think it would be a government speech -- it would be
16 protected under the government speech doctrine. If it's,
17 well, we're kind of inviting you in an informal way, but
18 the sponsorship is with the private organization, then I
19 think it would be private speech still.

20 QUESTION: What do you mean by sponsorship? In
21 other words, what -- what is this magical quality of
22 sponsorship? Isn't the only issue is -- is speech being
23 promoted and -- and who, in effect, is -- is responsible
24 for paying for it?

25 MR. LORENCE: Well, as -- as I understand the

1 government speech doctrine from Rust -- and it was
2 discussed somewhat in Rosenberger -- that the -- that
3 there's no claim to challenge the government's own speech
4 or when the government designates agents --

5 QUESTION: Right, right.

6 MR. LORENCE: -- to be their speakers.

7 QUESTION: Yes.

8 MR. LORENCE: So, if there's an invitation by
9 the university for someone off campus to come on and
10 speak, maybe the -- the speaker is controversial -- I
11 think the -- and I think the issue would be is this -- is
12 there some sort of sponsorship. Is this the government -
13 -

14 QUESTION: What you're getting at I think is --
15 is the government ultimately responsible for this. Isn't
16 that it? I mean, if the government is -- if -- if the
17 government authority is being used to raise the money and
18 -- and thereby to make the invitation possible and the
19 government approves this use, the government establishes
20 the means by which selection shall be made, it sounds like
21 government speech. And the -- you're -- you're
22 introducing at least a rhetorical element of sponsorship,
23 and I just don't understand what sponsorship might be in
24 addition to these items I've just checked off.

25 MR. LORENCE: Justice Souter, what you said I

1 think is what I'm trying to get at. I think to --

2 QUESTION: Okay.

3 MR. LORENCE: -- to capsulize it in one word,
4 I'm having some difficulty doing that. But what you're
5 saying I think is what I'm trying to say.

6 QUESTION: Well, I don't -- I don't -- I didn't
7 understand that to be government speech. I thought the
8 government speech doctrine applied to speech which the
9 government does not disclaim. I mean, I'm sure when --
10 when they have these forums of the sort you're discussing
11 now, the university says, you know, when we bring in
12 whoever it is, his views are not necessarily those of the
13 university. As far as I'm concerned, that's the end of
14 the government speech doctrine.

15 The purpose of the government speech doctrine is
16 to enable the government to take positions on -- on public
17 issues against the KKK, against all sorts of things that
18 the government thinks is bad. And that doesn't violate
19 the First Amendment. The government is entitled to take
20 positions. But what the -- the hypothetical that's been
21 posed to you does not involve the university taking
22 positions. It just involves the university sponsoring it.
23 I don't -- I don't see that that invokes the government
24 speech doctrine.

25 MR. LORENCE: Well, Justice Scalia, what you're

1 saying is -- is definitely the application of how the
2 doctrine has been done in the cases of this Court. But I
3 think that it would also be within the parameters of that
4 doctrine to say that the university can operate a system
5 where it has speakers, professors, outsiders that come in
6 and speak views, and the university can protect them in a
7 sense from a case like this --

8 QUESTION: I can see that too where -- where the
9 university selects professors and decides what courses
10 will be -- will be taught and so forth as part of its
11 instructional mission and with -- you know, with an eye to
12 the subject matter. It won't let any subject matters be
13 taught and so forth, nor any views. I mean, it'll -- you
14 know, scientifically worthless views it won't let in.
15 That's not viewpoint-neutral, but it's part of the
16 university's instructional program.

17 And if the hypothetical were the university
18 establishes a forum in which it selects the speakers, then
19 -- then I could understand that that's part of its
20 instructional program. But when the university just sets
21 up a forum and says, we'll pay the money, the students can
22 decide what -- what speakers they want, you -- you say
23 that still comes within government speech because it is,
24 quote, sponsored by the university. I don't -- I don't
25 see that at all.

1 MR. LORENCE: I -- I think that I'm not talking
2 about mere labels. I'm thinking about the reality of
3 what's going on, of the situation. If it's basically the
4 university or the government pulling the strings,
5 operating it, then I think it comes under the government
6 speech doctrine. And this -- that's a limitation, I
7 think, on the -- the cause of action --

8 QUESTION: I agree with that, if -- if what you
9 mean by pulling the strings and operating it is selecting
10 the speakers.

11 MR. LORENCE: Yes, yes.

12 QUESTION: What about the situation in which the
13 university says, we think a babble of voices is a very
14 good thing? Is -- and we are going to pay for those
15 voices. We are going to pay to get them here. You can
16 see that and I thought you were saying that too would fall
17 within the umbrella of government speech, or it should.

18 MR. LORENCE: Well, I think --

19 QUESTION: Is that your position or isn't it?

20 MR. LORENCE: Yes. I mean, I think that the --

21
22 QUESTION: Okay.

23 QUESTION: That's a government that has nothing
24 to say.

25 (Laughter.)

1 QUESTION: I mean --

2 MR. LORENCE: The -- the point of this is so
3 that the government -- the university can have a State
4 university system if it wants. The difference here, under
5 Abood and Keller, is that people cannot be compelled to
6 fund private speech of independent entities which is what
7 we have here.

8 QUESTION: Why aren't they doing that if they -
9 - if there is no student activity fee and it just comes
10 out of tuition? I mean, they're compelled to pay for all
11 kinds of things they may not believe in that are being
12 taught on the campus.

13 MR. LORENCE: I think tuition itself does not
14 answer the question, that it's paid by tuition. I think,
15 Justice Ginsburg, it has to be -- is there some level of
16 university control over this because the university said
17 in its brief that it uses tuition money to pay for the
18 instructional program of the university. So, I think if
19 it was paying for these groups with tuition money, it
20 would transform them into agents of the university. They
21 would be part of the instructional program, which I think
22 most of these groups would object to. They want their
23 independence. They want to be able to freely lobby at the
24 Wisconsin legislature on their issues.

25 QUESTION: But I don't understand why the

1 university couldn't say we'll run it exactly as we've been
2 running it. We'll delegate the authority to make the
3 decisions of the various student groups, but instead of
4 using a student activity fee, we'll just put in a pot of
5 money at their disposal.

6 MR. LORENCE: Well --

7 QUESTION: I think you'd still have the same
8 objection.

9 MR. LORENCE: Well, the --

10 QUESTION: Or maybe you wouldn't. You haven't
11 really made it clear to me whether you would or --

12 MR. LORENCE: The university as a State actor
13 may have an educational mission that's broad, but it still
14 has a constitutional --

15 QUESTION: It's whatever the mission of this
16 program is. They just say, we're going to finance it in a
17 different way. Would it become all right or wouldn't it?
18 I can't figure out from your -- you've given me a lot of
19 legal answers, but I don't know, it seems to me it's a yes
20 or no question and I don't --

21 MR. LORENCE: I -- Justice Stevens, I don't
22 think I can give a straight answer in that it would depend
23 on exactly how they're doing it. I think --

24 QUESTION: They're doing it just the way they're
25 doing it now.

1 QUESTION: Just the way the record shows in this
2 case.

3 MR. LORENCE: If they're doing it the same way
4 they're doing it now with tuition money, I still think
5 there would be a cause of action --

6 QUESTION: Of course -- of course --

7 MR. LORENCE: -- because the groups would be
8 independent of the university.

9 QUESTION: Now, I think you're right. I mean,
10 that's -- that's -- but that -- if you agree with that,
11 then I don't think the fact that your people object to
12 some of the speech has anything to do with the case. It's
13 just that the -- the program as a whole is objectionable
14 because it's slanted one way or another and funds certain
15 activities.

16 MR. LORENCE: Well -- well, it's -- it's because
17 they're funding the speech of these organizations as
18 opposed to some sort of conduit for it, that the speech is
19 converted into the speech of -- the message of these
20 groups.

21 QUESTION: I -- I take it there are two
22 principles. One is that the State university can teach
23 what it wants as it wants to teach it.

24 MR. LORENCE: Yes.

25 QUESTION: The other is that it violates the

1 First Amendment to compel a private person to speak when
2 he or she does not want to.

3 MR. LORENCE: That's exactly right, yes.

4 QUESTION: And we're trying to accommodate these
5 two principles.

6 MR. LORENCE: Yes.

7 QUESTION: And it's a question of proximity and
8 degree. There are going to be some close calls.

9 MR. LORENCE: Yes.

10 QUESTION: This case in your view is not a close
11 call because we're not using tuition funds.

12 MR. LORENCE: That's right. That's exactly
13 right, Justice Kennedy.

14 QUESTION: Well, then why -- why -- if you can
15 -- I can understand how you analogize it to Abood and the
16 bar cases --

17 MR. LORENCE: Yes.

18 QUESTION: -- because you're saying that here,
19 as a condition for going to the State university --

20 MR. LORENCE: Yes.

21 QUESTION: -- you have to give money, let's say,
22 to the IWW, the -- the Wobblies, or something --

23 MR. LORENCE: Right.

24 QUESTION: -- you know, or --

25 MR. LORENCE: Yes.

1 QUESTION: That would be very analogous.

2 MR. LORENCE: Yes.

3 QUESTION: But then the reply is, that's not
4 what's happened here. It's not that you've giving money
5 to a union or the Wobblies or somebody. Rather, what
6 you're doing is giving money to a bunch of organizations
7 so that all, in a viewpoint-neutral way, have a chance to
8 engage the students in a certain amount of activity that
9 is at least distantly related to a educational objective.

10 And so, why doesn't that difference make the
11 difference? Whether you call it a public forum, whether
12 you don't call it a public forum, who cares? Basically
13 the difference is what I just described, and why doesn't
14 that make the difference in terms of the First Amendment?

15 MR. LORENCE: Justice Breyer, because the
16 students have a First Amendment right not to speak. So,
17 to fund some voices that they agree with or don't care
18 about and some that they disagree with, I still think
19 violates the -- the principle.

20 QUESTION: But in the concept -- context of the
21 university setting from -- from ancient times,
22 universities have been places where ideas, including
23 political ideas --

24 MR. LORENCE: Yes.

25 QUESTION: -- are debated. That's part of the

1 life of the university. And it seems to me the difficulty
2 with your position is that you're asking us to do
3 something which is against the tradition of universities
4 for many, many years, many centuries.

5 MR. LORENCE: Well, Justice Kennedy, I -- I
6 think that it is clear from the record that wide-range
7 debate will not disappear or be significantly diminished
8 by allowing objecting students to opt out.

9 QUESTION: Gee, I'm not -- you accept the
10 proposition that this is a -- a timeless function of
11 universities? I don't know, from the Middle Ages they
12 have funded student groups to --

13 MR. LORENCE: No, no.

14 (Laughter.)

15 QUESTION: No, they've had diverse speech.
16 They've had diverse -- of course, they --

17 QUESTION: Yes, they have diverse professors
18 whom they hire and -- and who are speaking on behalf of
19 the university presumably. This is --

20 MR. LORENCE: I -- I would point out to this
21 Court on this matter that at the joint appendix 300, the
22 university states that the mandatory fee system is not the
23 -- the primary way that groups are funded. The primary
24 sources of funding for most student organizations are
25 membership dues and other fund raising ideas. This is

1 from the student handbook that's distributed to all the
2 student organizations. It's at page 300 of the joint
3 appendix. So, even the university doesn't view the
4 mandatory fee system as essential or critical to the
5 existence of this.

6 QUESTION: How -- how old is -- is this fee? I
7 just wonder whether universities are going to crumble if
8 -- if they can't do this kind of thing. How -- is this a
9 longstanding tradition in -- in universities?

10 MR. LORENCE: No. No. In fact, from what we
11 can tell, it's -- it's -- it may have started at the
12 beginning of the university, but the funding of these
13 kinds of groups can only be traced back to the Vietnam War
14 era from the Wisconsin Attorney General opinions and stuff
15 like this. So, this is a very recent innovation to fund
16 these kind of ideological advocacy groups on campus.

17 QUESTION: Mr. Lorence, you -- you have and
18 members of the Court have from time to time invoked or
19 mentioned the principle of the right not to speak.

20 MR. LORENCE: Yes.

21 QUESTION: And I'd like you to comment on this.
22 I at least have understood the right not to speak to be a
23 right not to a vow of silence, but rather a -- a right not
24 to espouse a position. If that is correct, then the
25 argument that you keep being met with, that in fact there

1 is such a variety of voices here, that this funding
2 mechanism simply cannot be analogized to being forced to
3 speak a particular position, adopt a particular position,
4 or sponsor a particular position. Would you comment on
5 that?

6 Is that, as I have just characterized it, a
7 proper way of looking at the -- at the right not to speak,
8 and -- and if so, why are you not vulnerable to the
9 argument that when there is no one voice, the principle
10 really does not support you?

11 MR. LORENCE: Well, a couple of things. I think
12 in Abood and Keller, Justice Souter, that if the union or
13 the bar association had been funding multiple candidates
14 or differing points of view to -- to kind of be more
15 inclusive or something like that, this problem still would
16 remain, that there -- there would still be a violation
17 there.

18 QUESTION: Well, I don't know.

19 QUESTION: Well, do you accept that the -- the
20 right not to speak is simply the right not to have
21 yourself associated with -- with that view? I thought --
22 I thought we had a case that said a newspaper could not
23 be compelled to accept advertising that would obviously be
24 representing the views of somebody else and not of the
25 newspaper itself.

1 MR. LORENCE: That's correct. It's -- it's --

2 QUESTION: So, it isn't just a matter of your
3 being identified with that -- with that view. You
4 shouldn't -- you shouldn't have to have your -- your means
5 used to espouse it if you don't want to.

6 MR. LORENCE: Yes. Your -- you have a
7 constitutional right, Justice Scalia, to just stand back
8 and say, I'm going to not enter into this debate, and I'm
9 not going to fund a position in this debate --

10 QUESTION: Well --

11 MR. LORENCE: -- that I don't agree with.

12 QUESTION: But you don't -- you don't place your
13 -- your objecting students, I take it, in the same
14 position as a newspaper which is asserting a peculiar
15 editorial freedom. Maybe you do.

16 MR. LORENCE: Well, they're promoting the
17 message of the organizations. Maybe they're not being
18 identified, that Scott Southworth supports the views of
19 the socialist organization, but they're definitely --

20 QUESTION: Well, they're promoting -- you're --
21 you're right. They're promoting a message, but that
22 doesn't describe the totality of what's going on. They
23 are facilitating the promotion of a series of messages
24 which may be, indeed, quite inconsistent as among
25 themselves. And whatever that is, that is something

1 different from being compelled as a union member or a bar
2 association member to take a particular -- to fund a
3 particular position in the course of -- of partisan
4 political activity.

5 MR. LORENCE: Well, in -- in light of
6 Rosenberger, that the university cannot discriminate on
7 the basis of viewpoint, which means that students -- it
8 would be impermissible for students to lobby the student
9 government or the university and say, cut off funding to
10 the -- the X group because we don't agree with them. They
11 have to be funded on a viewpoint-neutral basis.

12 I think that the only -- that Rosenberger points
13 to a Abood/Keller type solution here so that dissenters
14 who object to these groups have a way to protect their
15 right of conscience. If -- if we don't do that, then that
16 means, as was brought up earlier, the African American
17 students can be compelled to support the KKK, the Jewish
18 students can be compelled to support a group that wants to
19 put Israel --

20 QUESTION: Well, but again, your -- the force of
21 your argument depends on denying that what you are -- what
22 your students are supporting is a funding mechanism, is a
23 pot from which money is taken. Instead, you analyze it
24 down immediately to the individual groups.

25 And I'm, in effect, asking you the converse of

1 the question that I asked the -- the lawyer on the other
2 side. Why is it that I should look at this -- why should
3 I analyze this case as being funding for individual groups
4 as opposed to funding for a -- a pot of gold from which
5 quite disparate and inconsistent voices can have access?

6 MR. LORENCE: Well, Your Honor, that -- let me
7 try this, Justice Souter, that if there's a campus
8 auditorium and a group speaks there, at the end of the
9 meeting, the auditorium remains, it's under university
10 control, and the group goes home. Under this system, if
11 this is a forum of money, the money is given over to the
12 group and is converted into their message. The money
13 becomes the speech --

14 QUESTION: Well, but the value of the
15 auditorium, in a way, is converted into messages. I mean,
16 if you want to take the long view, at some point
17 auditoriums wear out and they fall down with use. So, you
18 can say that every group that packs the auditorium is
19 taking something out of the fabric and -- and is using it
20 for the -- for the purpose of -- of espousing the group's
21 message. The only difference, it seems to me, one of
22 time.

23 MR. LORENCE: Well, I -- I think there's more to
24 it than that, Justice Souter. I mean, I think it's just
25 not that we've got some wear and tear on an auditorium

1 when a group uses it. I think that when you're giving
2 money to them, you're funding the -- what they're -- what
3 they're given money for is to fund their overhead
4 expenses, to -- underwrites their whole basic mission of
5 what they're pushing here.

6 QUESTION: Yes, but the -- the argument -- well,
7 but -- that -- that -- let's -- let's say you -- you may
8 have two arguments here. One, that the funding is going
9 further than the funding should go for purposes of speech.
10 That's one argument I think you were getting at at the
11 end. And I -- I don't mean to dismiss that.

12 But if you put that to the side for the moment,
13 the -- the argument that the -- that the money is being
14 used to -- to fund and espouse a particular speaker's
15 viewpoint, is simply a way, I think a -- perhaps a -- is
16 -- the answer to that is simply the same answer as the
17 auditorium answer. The auditorium answer would be, look,
18 we can't have a babble of voices without an auditorium for
19 the -- for them to speak.

20 And with respect to your objection, the
21 university would say, we simply cannot have this variety
22 of speakers without some underwriting. We've got to get
23 them here. They -- they won't come otherwise, and we
24 ought to have this speech. So that it seems to me that
25 the -- again, the -- the university's role in supplying

1 the auditorium and -- and a funding mechanism is
2 essentially the same.

3 MR. LORENCE: Well, Your -- Your Honor, I -- I
4 think that there's still direct funding here, that -- I
5 don't think, for example, the union in Abood could have
6 said, we're funding both the Republican and the Democratic
7 candidates because we think it would enhance the electoral
8 process to have both voices --

9 QUESTION: We would have had some new union
10 officers, if they had been doing that.

11 MR. LORENCE: That's right.

12 (Laughter.)

13 MR. LORENCE: That -- that's correct, Your
14 Honor.

15 That they couldn't somehow disassociate
16 themselves and say, these objecting union members in
17 Abood, they have nothing to complain about. They agree
18 with one side or the other. So, we've somehow put enough
19 buffer between here that we can -- that there's no First
20 Amendment claim. I just don't want to compound the
21 problem.

22 QUESTION: Well, I didn't want to get into this,
23 but if -- if you get to that point, then you get to --
24 really to the question of -- of your analogy with -- with
25 Abood. And -- and the -- the union organization, in fact,

1 is -- is a -- is a membership organization. And we don't
2 have that feature here. And -- and so, when -- when you
3 carry the -- the argument as you did, the question would
4 then come up in the union or the bar association case, is
5 -- is this going to be the very justification for compelling
6 the membership or the -- or the support for activities?
7 So, I think your -- I think that -- I think that injects
8 another element in the argument.

9 MR. LORENCE: Well, and I would say that the
10 university as a State actor has a constitutional duty to
11 respect the -- the right of conscience of the students.
12 Their education mission must be subordinate to that, that
13 -- they -- they cannot view the students' right of
14 conscience as some sort of roadblock between education --
15

16 QUESTION: May I ask you about an activities
17 fee? 90 percent goes for sports events, 5 percent for the
18 annual yearbook, and 5 percent for the student newspaper.
19 Would that be permissible? Because -- and the student
20 newspaper gets captured by a communist board of directors
21 in editorial policy.

22 (Laughter.)

23 QUESTION: That happens all the time.

24 (Laughter.)

25 MR. LORENCE: That's right.

1 QUESTION: At least it did when I was in school.

2 QUESTION: But -- but they call it --

3 (Laughter.)

4 QUESTION: And -- and when it does, they call it
5 a service.

6 (Laughter.)

7 QUESTION: What about that answer? What about
8 that hypothetical?

9 MR. LORENCE: Your Honor, let me just speak --

10 QUESTION: And I might say also there's a

11 greater danger that the student will be identified as
12 associated with the views of the school paper than when
13 you got an indirect thing like this.

14 MR. LORENCE: That's about three hypos in one
15 here, Your Honor, that -- Justice Stevens, that -- I would
16 say it this way. There's no Abood complaint against non-
17 speech activities. So, I think the athletic stuff would
18 be fine.

19 If -- if there's -- there's no --

20 QUESTION: That's the easy part.

21 MR. LORENCE: Right.

22 QUESTION: The newspaper is the hard part.

23 (Laughter.)

24 MR. LORENCE: The Abood case -- there's no Abood
25 claim for government speech. The newspapers may fall into

1 that, the student newspapers, if it's the official
2 university one. We don't have that case here, and I -- I
3 know that all the lower courts have resolved it the other
4 way.

5 And the third thing -- I don't recall, Justice
6 Stevens -- was?

7 QUESTION: Well, it's -- it's captured by a
8 group with which the person who has to pay the activity
9 fee violently disagrees, particularly because it's the
10 University of Chicago Daily Maroon that's associated with
11 all students of the University of Chicago. Of course,
12 that's not a State --

13 MR. LORENCE: I think that if there were -- I do
14 not know the answer to it because I think there's a
15 government speech issue. If you have Rosenberger's
16 newspaper, I think people could object to funding its
17 Christian proselytizing.

18 QUESTION: But we were talking here about a
19 university newspaper. Isn't the argument available that
20 this is one of the instructional devices at the
21 university --

22 MR. LORENCE: Yes, yes.

23 QUESTION: -- and that it should take particular
24 views is -- is no more extraordinary than that you should
25 have a communist professor?

1 MR. LORENCE: That's right, Your Honor.

2 QUESTION: Which also happens.

3 MR. LORENCE: That's right, Justice Scalia, yes.

4 That's right, Your Honor.

5 In conclusion, the Seventh Circuit correctly
6 ruled that the University of Wisconsin's mandatory fee
7 system violates the Abood and Keller rights of the
8 students. The university may have an educational mission,
9 but it has a greater First Amendment duty to protect and
10 recognize the right of conscience of each individual
11 student.

12 QUESTION: If you allowed opt-out as -- as
13 Abood, and then you have students that don't opt out, so
14 you still have a fund --

15 MR. LORENCE: Yes.

16 QUESTION: Could the students who opt out then
17 make a demand for viewpoint-neutral funds?

18 MR. LORENCE: If the -- if the funds were --

19 QUESTION: You're a Wobbly. You -- you opt out
20 and so your funds aren't used. Can they then demand that
21 the funds that are used still be used on a viewpoint-
22 neutral basis?

23 MR. LORENCE: There might be a free rider
24 question there, Your Honor. I'm not sure.

25 QUESTION: Thank you, Mr. Lorence.

1 Ms. Ullman, you have 1 minute remaining.

2 REBUTTAL ARGUMENT OF SUSAN K. ULLMAN

3 ON BEHALF OF THE PETITIONERS

4 MS. ULLMAN: Setting aside WISPIRG, the other
5 groups that were funded through GSS were services and
6 there's no claim that there was any viewpoint
7 discrimination there. The University of Wisconsin --

8 QUESTION: You mean really services.

9 MS. ULLMAN: Yes.

10 The University of Wisconsin has determined that
11 it is important to facilitate the speech of diverse
12 groups, that this furthers the university's educational
13 mission and First Amendment values.

14 Thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Ullman.

16 The case is submitted.

17 (Whereupon, at 11:02 a.m., the case in the
18 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,
Petitioners v. SCOTT HAROLD SOUTHWORTH, ET AL.
CASE NO: 98-1189

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: Diana M. May
(REPORTER)