

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 e-1

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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1 P R O C E E D I N G S

2 (10:02 a.m.)

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

6 Ms. Ullman.

7 ORAL ARGUMENT OF SUSAN K. ULLMAN

8 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 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  
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're 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 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: *Donna M. May*  
(REPORTER)