IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

BUSINESS LEADERS IN CHRIST, an unincorporated association, *Plaintiff*, v. THE UNIVERSITY OF IOWA; LYN REDINGTON, in her official capacity as Dean of Students and in her individual capacity; THOMAS R. BAKER, in his official capacity as Assistant Dean of Students and in his individual capacity; and WILLIAM R. NELSON, in his official capacity as Executive Director, Iowa Memorial Union, and in his individual capacity, *Defendants*.	Civil Action No. 17-cv-00080-SMR-SBJ **PLAINTIFF'S REPLY TO DEFENDANTS' RESISTANCE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

Defendants' supposedly epic conflict between the First Amendment and civil rights "pillar[s] of democracy" is a dud. Opp. 5 [Dkt. 85]. There is no such conflict here, just a University Policy that nobody is violating but the University. Defendants concoct a conflict by ignoring their own testimony that the Policy only prohibits status-based discrimination and by selectively pretending that expressing beliefs and selecting believing leaders is status-based discrimination. Compounding this illogic, the University gerrymanders the Policy to have "many exceptions," Opp. 17, that just happen to excuse all kinds of *actual* (and widespread) status-based discrimination, while still prohibiting BLinC's religious beliefs and leadership standards. The "conflict" might at least have been interesting had the University consistently applied its Policy to prohibit *all* status-based discrimination and *all* related advocacy. But it has done neither, instead protecting religious beliefs exactly opposite those banned from BLinC's Statement of Faith, allowing other groups to select leaders based on mission alignment, and protecting a wide range of status-based discrimination *in its own programs*. This blatant discrimination clearly violates the First Amendment.

ARGUMENT

The University's limited public forum subsidized by student fees does not diminish BLinC's free speech, exercise, or association rights. BLinC's members pay fees like all other students, and BLinC is entitled to the same treatment as every other group.

I.A. The University's Policy violates the Free Speech Clause.

In a limited forum, government regulation of speech must be reasonable in light of the forum's purpose and cannot discriminate on viewpoint. The University violates both requirements.

Reasonableness. The first rule of reasonableness is simple: the government must "respect the lawful boundaries it has itself set." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S.

819, 829 (1995). Within those boundaries, "content-based judgments" that limit speech based on "views or beliefs" are "impermissible." *Christian Legal Society v. Martinez*, 561 U.S. 661, 703 (2010) (Kennedy, J., concurring). Prior to BLinC, the University's rules were unambiguous. Students could form groups with other "like-minded students," SoF ¶ 8,[1] around shared "areas of interests," SoF ¶ 4, subject to the nondiscrimination Policy, SoF ¶¶ 9-10.[2] Under these clear rules, the University confirmed that "[*a*]*sking prospective members to sign* [*a*] *Statement of Faith would not violate the UI Policy*." SoF ¶ 57 (emphasis in original). This was true even if the statement of faith prohibited homosexual activity, as long as a gay student who was "prepared to sign" and "observe the . . . rules for member behavior" could join. SoF ¶¶ 49-53, 56-60 [App. 0079]. The University explicitly distinguished discrimination on "class characteristics" (forbidden), from standards of "personal conduct" (permitted). *Id*. ¶ 60 [App. 0079]. And student officials at the University were threatened with personal liability *by University officials* if they disregarded this distinction. *Id*. ¶¶ 72, 80. Defendants unanimously testified that this distinction is still central to the Policy. SoF ¶¶ 209, 260, 272, 326, 369, 372, 416. And beliefs about marriage, sexuality, and religion have long been allowed within the forum, as evinced by at least a dozen groups organized around different sides of some or all of these issues. *See, e.g.*, SoF ¶¶ 17-18, 262-66, 444 [App. 0418]. If the purpose of the forum is to "encourage" groups of "like-minded" students, *id*. ¶¶ 5, 8, while prohibiting status-based discrimination, deregistering BLinC because of the content of its beliefs violated, not respected, the University's own boundaries.

[1] References to "SoF" refer to Plaintiff's Reply to Defendants' Responses to Plaintiff's Statement of Material Fact, as it has all parties' full responses to each statement of fact.

[2] Defendants state that student organizations must also operate "*within the limits necessary to accommodate academic needs and ensure public safety*." SoF ¶ 381 (emphasis Defendants'). They have not asserted, however, that those limitations are in any way implicated here.

Viewpoint discrimination. Defendants admit they discriminate.[3] They say that, as a matter of "right" and "heavy responsibility," they must "regulate BLinC's speech" to protect "minority students." Opp. 6. They concede that BLinC "may well be in the minority," yet still conclude that its "'minority' viewpoint" deserves no protection. Opp. 32. They have determined that, on its face, BLinC's "Statement of Faith" expresses a view that "inherently excludes" LGBT students and "is not 'welcoming,'" SoF ¶ 154, even though BLinC expressly welcomes LGBT students to both membership and leadership, SoF ¶¶ 154, 208, 211. By stark contrast, Defendants confess that the Policy "has not been applied identically to each campus group" and makes "many exceptions" to "provide safe spaces for minorities," including by allowing many of them to have both statements of belief *and* leadership/membership policies that exclude students based on protected characteristics. *See, e.g.*, SoF ¶¶ 17-18, 420-27, 440-46.

If there remained any question that this discrimination is viewpoint based, the fact that groups like Love Works and Trans Alliance can hold views opposing BLinC's and screen their leaders, SoF ¶¶ 17, 18, 262-66, 444, while BLinC cannot even "encourage" its leaders to be Christians, *id*. ¶¶ 429-38, removes all doubt. That other groups can screen leaders based on their ideologies, *id*. ¶ 18, including *political* views of marriage, *id*. ¶ 371, clinches the outcome. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (allowing views from secular but not religious perspective is unlawful). Exemptions for fraternities and sports clubs also suffice to make the case, since underinclusive enforcement of the Policy itself shows viewpoint discrimination: the University is favoring the view that fraternities and other

[3] The "as applied" discrimination is so blatant the Court need not address the claim of facial neutrality, though it is false. The Policy discriminates on its face by giving a "Title IX" exemption to fraternities and sports clubs, SoF ¶ 12, but not to religious groups. It also fails facial neutrality by protecting some categories (*e.g.* "service in the U.S. military," SoF ¶ 11) but not others (*e.g.*, service in other militaries, immigration status, and countless other vulnerable groups).

forms of sex-based segregation are more valuable than religious association, even though the former directly undermine the University's *status*-based reasoning, while the latter does not. *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1100 (8th Cir. 2013) ("'Under-inclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'") (citation omitted).

Defendants remain untroubled by their role as censor because their discriminatory enforcement—they claim—is largely the result of incompetence, Opp. 18, 20, 22, not "animus" or "ideological discrimination," Opp. 21-22. But incompetence and illicit motive are not mutually exclusive. And viewpoint discrimination is "subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas'" being regulated. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) (citation omitted).

Defendants' suggestion that sloppy application of the Policy creates a "triable issue of fact," Opp. 17, is also wrong. In *Alpha Delta Chi v. Reed*, the Ninth Circuit remanded for evidence whether exempted groups "were approved inadvertently" by "administrative oversight" or had perhaps already "agreed to abide by the nondiscrimination policy" despite "language in their applications." 648 F.3d 790, 804 (2011). But here the evidence is in. And while Defendants admit some "administrative oversight," Opp. at 18-19, they concede that most exceptions are permanent, including those for fraternities, sports teams, sports clubs, scholarships, single-sex glee clubs, and groups that provide "safe spaces for minorities," "support the University's educational mission," advance the "social purposes of the forum," or are "maintained in the spirit of inclusion and affirmative action." Opp. 5, 17, 18; SoF ¶¶ 12, 17-19, 23-35, 440-46. These admitted exemptions, including those for groups with viewpoints directly opposing BLinC's, are more than enough to sink the Policy interpretation Defendants float for the first time in their brief.

Even the alleged "oversight" is fatal. This is not just an inability "to solve the problem overnight." Opp. 22. Defendants have had more than 570 "overnights" since BLinC identified their discriminatory enforcement, SoF ¶ 170 & App. 1325, and more than 290 "overnights" since this Court enjoined it, Dkt. 36 at 28. And this argument has been a nonstarter from the beginning, since *all* student groups submit their constitutions for approval at their founding and thereafter. SoF ¶¶ 4 [App. 0367], 10. Also, Defendants' post-injunction scrutiny of only *religious* group's constitutions for language about marriage and sexuality, SoF ¶¶ 418-19; their subsequent charade to review all other groups' constitutions for leadership standards based on "beliefs . . . covered in the HR Clause," SoF ¶¶ 410-16; followed by the explicit exemption for fraternities and sports teams, SoF ¶¶ 420-27; plus the newly announced exemptions for groups that provide "safe spaces for minorities," Opp. 18, leads to one conclusion: Defendants hope to save the groups they like and exclude those they don't. Their claim of no viewpoint discrimination because other groups with "identical conservative Christian views on homosexuality . . . have not been deregistered," Opp. 19, is unavailing. They do not even bother to say whether such groups remain as a result of "administrative oversight" that will be corrected after this lawsuit or simply because nobody has complained. But neither reason cures the viewpoint discrimination *vis-à-vis* groups like Love Works, and both reasons reveal underenforcement that is itself evidence of discrimination. *Johnson*, 729 F.3d at 1100. "[A]ctions speak louder than . . . words," and when the University's "purported reasons for denying [an] application are so obviously unreasonable and pretextual," the Court "in the end, [is] left only with the" conclusion that "the [University] disagrees with [BLinC's] beliefs and advocacy." *Cuffley v. Mickes*, 208 F.3d 702, 711 (8th Cir. 2000). This is not rocket science. If the University wants to enact an all-comers policy, *Martinez* shows how. But then the fraternities, glee clubs, and *favored* groups formed around issues of religion or sex-

uality, *see* SoF ¶ 169, would have to go. *Martinez*, 561 U.S. at 704 (Kennedy, J., concurring) ("Here, the policy applies equally to all groups and views"; "[w]ere it shown to be otherwise, the case likely should have a different outcome.").

Strict Scrutiny. Any viewpoint-based regulation of speech is "invalid unless . . . it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Because viewpoint discrimination is a "blatant" and "egregious" form of speech regulation, *Rosenberger*, 515 U.S. at 829, it is extremely "rare" that it would "ever be permissible." *Brown*, 564 U.S. at 799. Defendants' discrimination is not the exception. They first argue that "some" of their Policy exemptions (without disclosing which) are "compelling" because the University has an "educational mission" "to protect . . . civil rights" and to "provide safe spaces for minorities which have historically been the victims of discrimination." Opp. 17-18, 20. But excluding groups with unpopular religious beliefs from categories of those currently entitled to civil rights or historically discriminated against is just another way of saying "we prefer some views over others."

Defendants' second argument fares no better. The existence of exceptions for sports teams and fraternities in "federal laws like Title IX," Opp. 18, does not prove that those exceptions are justified by "a compelling government interest" that would not extend equally to religious groups. Indeed, federal and state law is replete with exemptions protecting religious organizations. *See, e.g.*, 20 U.S.C. § 1681(a)(3) (Title IX exemption for religious organizations); 42 U.S.C. §§ 2000e(j), 2000e-1(a) (Title VII exemption for religious organizations hiring individuals of a particular "religious observance," "practice," or "belief"); Iowa Code Ann. § 216.6(6)(d) (Iowa Civil Rights Act exemption allowing "religious institution[s]" to discriminate on "religion, sexual orientation, or gender identity"). The fact that the University latches on to federal exemp-

tions for fraternal and sports organizations, whose participants approach 20% of the student body, while ignoring similar exemptions for religious organizations, underscores its discrimination and confirms that it has no compelling justification. Considering the Supreme Court's recent injunction that those with traditional views on marriage and sexuality remain free "to teach the[ir] principles" and to "engage those who disagree," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), Defendants' argument that it has compelling reasons to allow half of the debate while excluding the other is particularly inexcusable. *Cuffley*, 208 F.3d at 711-12 (viewpoint exclusion is "not a constitutionally permitted means of expressing disapproval of ideas").

Finally, even if Defendants had a compelling government interest, they have not contested that there are more narrowly tailored ways to achieve it, including by warning students they might not get to lead groups they disagree with or by encouraging groups to voluntarily list leadership criteria so students can weigh in advance whether they want to join. *See* SoF ¶ 213; *see also Cuffley*, 208 F.3d at 711-12 (rather than "engaging in viewpoint-based discrimination" the state can "express disapproval of those views [it does not like] in the strongest terms").

I.B. The University's Policy violates BLinC's freedom of association.

Defendants do not address freedom of association, claiming it "merge[s]" with free speech. Opp. 10. But if true, BLinC is entitled to judgment for the same reason. But merging made more sense for a "neutral" all-comers policy, where few distinct association interests remained. The University cannot hide behind the limited public forum to deliberately prohibit BLinC's association with believing leaders, while favoring fraternities, sports clubs, and groups like Love Works.

I.C. The University's Policy violates the Free Exercise Clause.

Defendants' arguments under the Free Exercise Clause quickly unravel. First, the University argues that the Free Exercise clause does not apply to laws that are neutral or generally applica-

ble Opp. 29.[4] But it then "freely admits that its review process for student constitutions is inconsistent," that the Policy "has not been applied identically to each campus group," and that it in fact allows "many exceptions," including for the largest groups on campus. Opp. 22, 17, 30. And the evidence is clear that the still-evolving Policy has been tailored to "accomplish[] . . . a 'religious gerrymander,' an impermissible attempt to target [BLinC] and [its] religious practices." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (citation omitted). Indeed, the Policy now has so many formal and *de facto* exceptions that it essentially creates a "system of individual exemptions," which automatically triggers strict scrutiny. *Id*. at 567-68. That scrutiny cannot be met here for the same reasons set forth above.

Second, contrary to Defendants' assertion, BLinC does not have to show "discriminatory animus" to prevail on its free exercise claims. *See* Opp. 31. "[T]he free exercise clause is not confined to actions based on animus." *Shrum v. City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (citing cases); *see also Hassan v. City of New York*, 804 F.3d 277, 309 (3d Cir. 2016) (assertions that "overt hostility and prejudice are required to make out claims under the First Amendment" will "easily fail"). "[C]lose scrutiny of laws singling out a religious practice for special burdens is not limited to the context where such laws stem from animus, pure and simple." *Cent. Rabbinical Cong. of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197-98 (2d Cir. 2014).

[4] Defendants also argue that successful Free Exercise claims involve "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections such as freedom of speech." Opp. 29. That argument does not help them, considering their combined suppression of BLinC's religious exercise in selecting leaders and its expression of religious beliefs. *See Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 473 (8th Cir. 1991) (holding that free speech claims "breathe[d] life back into" Free Exercise Clause claims).

Third, the University's "complaint-driven" enforcement argument also fails. Opp. 32-35. The University has spent the last year ostensibly cleaning up its enforcement, SoF ¶¶ 408-27, 439, yet ended up in essentially the same place: targeting religious groups such as BLinC while excusing many other groups' mission- *and* status-based discrimination (for members *and* leaders), SoF ¶¶ 428-38, 440-46. Continuing to defend the "complaint-driven" approach in this context shows that the University is not serious about its own Policy. Here—given that 66% of the complaints *ever filed* were against the same minority religious viewpoint, while Greek groups and sports clubs have gone entirely unscathed—a clearer case for how complaint-driven enforcement harms unpopular faiths could hardly be made.

II. Defendants' effort to control BLinC's leadership violates both Religion Clauses.

The Religion Clauses independently protect BLinC's selection of its leaders from University entanglement. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). This protection applies to all kinds of religious organizations, not just churches. Op. Br. 40-41. Defendants concede that religious student groups can do everything churches do, SoF ¶ 314, and that they are "voluntary" and "separate legal entities from the University" that exist whether or not the University registers them, SoF ¶¶ 5-6. BLinC performs many of the functions of a church. SoF ¶ 99-102, 175-79. And other student groups are, in fact, church groups. SoF ¶ 350. Defendants' sole counter is that such groups lose their First Amendment rights by accepting *de minimis* financial support from an account funded by their own student members. But religious groups do not waive the Religion Clauses by merely "accepting federal and state funds." *Petruska v. Gannon Univ.*, 462 F.3d 294, 309 (3rd Cir. 2006). Nor can the government require a religious institution to "renounce its religious character" as a condition of "participat[ing] in an otherwise generally available public benefit program." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017). Regardless of any other limitations that may be

permitted in a limited public forum, the government is "categorically prohibit[ed]" from getting "involved in religious leadership disputes." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015). And the government is *never* allowed to get entangled in deciding whether sharing "many" of the same "theological views" is sufficient to satisfy a faith's leadership standards. *See* Opp. 6; SOF ¶ 153.

III. BLinC is entitled to a permanent injunction.

Because Defendants make no response to BLinC's arguments concerning the grounds for a permanent injunction, they "are therefore deemed waived." *Dysart v. Gwin*, 2009 WL 1588653, *6 (E.D. Mo. June 5, 2009) (collecting cases).

CONCLUSION

Defendants' conceded and blatant viewpoint discrimination underscores that BLinC is entitled to judgment against all Defendants. Even under Defendants' best cases—*Martinez* and *Alpha Delta*—no reasonable person could think it was okay to excuse sex-based status discrimination, but still deny religious groups a belief-based exemption despite the First Amendment. Favoring groups like Love Works, which holds views and selects leaders based on the same issues as BLinC, just from an opposing perspective, makes Defendants' actions even more egregious. The Court should confirm that those actions are unjustifiable by granting summary judgment.

Respectfully submitted,

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