No. ____________

# In the Supreme Court of the United States

VIEWPOINT NEUTRALITY NOW!; EVAN SMITH; ISAAC SMITH,

*Petitioners,*

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MINNESOTA; KENDALL J. POWELL, REGENT CHAIR, IN THEIR RESPECTIVE OFFICIAL CAPACITIES; STEVEN A. SVIGGUM, REGENT VICE CHAIR, IN THEIR RESPECTIVE OFFICIAL CAPACITIES; MARY A. DAVENPORT, REGENT IN THEIR RESPECTIVE OFFICIAL CAPACITIES; KAO LY ILEAN HER, REGENT IN THEIR RESPECTIVE OFFICIAL CAPACITIES; MIKE O. KENYANYA, REGENT IN THEIR RESPECTIVE OFFICIAL CAPACITIES; JANIE S. MAYERON, REGENT IN THEIR RESPECTIVE OFFICIAL CAPACITIES; DAVID J. MCMILLAN, REGENT IN THEIR RESPECTIVE OFFICIAL CAPACITIES; DARRIN M. ROSHA, REGENT IN THEIR RESPECTIVE OFFICIAL CAPACITIES; JOAN T.A. GABEL, PRESIDENT IN HER RESPECTIVE OFFICIAL CAPACITY; JAMES T. FARNSWORTH, REGENT IN THEIR RESPECTIVE OFFICIAL CAPACITIES; DOUGLAS A. HUEBSCH, REGENT IN THEIR RESPECTIVE OFFICIAL CAPACITIES; RUTH E. JOHNSON, REGENT IN THEIR RESPECTIVE OFFICIAL CAPACITIES; KODI J. VERHALEN, REGENT IN THEIR RESPECTIVE OFFICIAL CAPACITIES; CALVIN D. PHILLIPS, VICE PRESIDENT FOR STUDENT AFFAIRS AND

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DEAN OF STUDENTS IN HIS RESPECTIVE
OFFICIAL CAPACITY,

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*ON PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE EIGHTH CIRCUIT*

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A student organization of student-service-fee-paying students called Viewpoint Neutrality Now! sued the University of Minnesota based on alleged violations of Free Speech Clause viewpoint neutrality requirements. The coveted student office and lounge space at issue in the University of Minnesota's Coffman Memorial Union is an undisputed limited public forum. The University perennially provides annual leases to the space exclusively to nine cultural centers, where each of the nine cultural centers is a university-recognized student group. By doing so, the University effectively excludes all other university-recognized student groups because there are never any vacancies. The questions presented are:

(1) Whether the Eighth Circuit, in affirming summary judgment for the university, has inaccurately interpreted this Court's dicta in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 48–49 (1983), that a status discrimination claim, as distinguished from a viewpoint discrimination claim, exists to sue the university for violation of First Amendment Free Speech Clause viewpoint neutrality requirements?

(2) Whether the fact that only the same nine cultural centers, which are public university-recognized student groups, have occupied a university's limited public forum student fee supported facility for decades, to the exclusion of all other university-recognized student groups, is sufficient evidence of unreasonable discrimination—either status discrimination or viewpoint discrimination.

## PARTIES TO THE PROCEEDINGS

The Petitioners are Viewpoint Neutrality Now!, a University of Minnesota student organization, Evan Smith and Isaac Smith. They were the plaintiff-appellants below.

The Respondents are: the Regents of the University of Minnesota, Kendall J. Powell, Chair, Steven A. Sviggum, Vice Chair, Thomas J. Anderson, Richard B. Beeson, Mary A. Davenport, Kao Ly Ilean Her, Michael D. Hsu, Mike O. Kenyanya, Janie S. Mayeron, David J. McMillan, Darrin M. Rosha, Randy R. Simonson, in their respective official capacities or their successors; Joan T.A. Gabel, President of the University of Minnesota, in her respective official capacity or her successor; and Maggie Towle, Interim Vice Provost For Student Affairs and Dean of Students, in her respective official capacity or her successor. They were the defendant-appellees below.

## CORPORATE DISCLOSURE STATEMENT

The only non-individual Petitioner is Viewpoint Neutrality Now!, a University of Minnesota student organization. It has no stock. There is no parent public or private corporation that has any interest in the Viewpoint Neutrality Now!.

## RELATED PROCEEDINGS

United States District Court (D. Minn.): *Viewpoint Neutrality Now! v. Powell*, 653 F.Supp.3d 621 (D. Minn. 2023)

United States Court of Appeals for the Eighth Circuit: *Viewpoint Neutrality Now! v. Board of Regents of University of Minnesota*, 109 F.4th 1033 (8th Cir. 2024)

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# In The Supreme Court of the United States

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VIEWPOINT NEUTRALITY NOW!; EVAN SMITH; ISAAC SMITH, PETITIONERS,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MINNESOTA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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**PETITION FOR A WRIT OF CERTORARI**

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. *Viewpoint Neutrality Now! v. Board of Regents of University of Minnesota*, 109 F.4th 1033 (8th Cir. 2024).

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## OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit opinion is reported at 109 F.4th 1033. A-2–21. The district court's opinion and order is reported at 653 F.Supp.3d 621. A-25–51.

## JURISDICTION

The judgment of the court of appeals was entered on July 25, 2024. A-22–23. However, the U.S. Supreme Court, in Application No. 24A378, granted an extension for the time to file a petition for a writ of certiorari from October 23, 2024 to December 12, 2024. A54–55. The jurisdiction of this Court is invoked under 28 U.S. Code § 1254.

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment's Free Speech Clause states, "Congress shall make no law... abridging freedom of speech." The Free Speech Clause has been incorporated via the Fourteenth Amendment to apply to the state and local governments. *See Gitlow v. New York*, 268 U.S. 652 (1925).

## STATEMENT OF THE CASE

This case presents a fundamental question regarding discrimination in a limited public forum on public university property under the First Amendment: whether the court of appeals can create a new cause of action under viewpoint-based discrimination allegations. Here, the court of appeals applies "status discrimination" to allow a university to

exclude, repeatedly and for decades,[1] student organized groups representing similar factions of university students, as other student organized groups, referred to as "cultural centers," gain coveted *free* office space in a facility frequented by the general university population. The court of appeals relied upon dicta in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 48–49 (U.S. 1983) in which this Court opined that a school's access policy to its *nonpublic* mail system depended upon the "status" of a union now representing teachers within the school, as opposed to a rival union who had previously represented some teachers in conjunction with its rival, but no longer did so. The court of appeals in this case applied the same "status discrimination" analysis in *Turning Point USA at Arkansas State University v. Rhodes,* 973 F.3d 868, 876 (8th Cir. 2020) (quoting *Perry*, 460 U.S. at 49) (explaining that a school policy allowing tabling only by recognized student groups necessarily favors those groups' viewpoints over unrecognized groups but noting that "such favoritism [is] status-based discrimination, rather than viewpoint-based discrimination"). The Eighth and Fourth Circuits, as further explained below, are split on the legal question of whether status discrimination claims exist separate and apart from viewpoint discrimination claims. *Speech First, Inc. v. Sands*, 69 F.4th 184, 201–02 (4th Cir. 2023), vacated on other grounds, 144 S. Ct. 675 (2024).

The Eighth Circuit analysis also conflicts with the legal reasoning of the Seventh Circuit decision in *Southworth v. Bd. of Regents of U. of Wisconsin System*, 376 F.3d 757, 769 (7th Cir. 2004). There the

[1] But for one student group, albeit for 13 years, not decades.

court rejected consideration of the length of time a registered student organization was in existence and the amount of past funding decisions because those criteria institutionalized viewpoint discrimination from past years. *Id.* (citation omitted). The court held such criteria as improper because the reliance of such criteria discriminated against less traditional viewpoints in favor of established parties and speech. *Id.*

Similarly, in this case, the university's systematic refusal to accept applications to the limited public forum in favor of years-long embedded registered student organizations, so called minority "cultural centers," is institutionalized favoritism to the particular viewpoints of those RSOs to the exclusion of all other existing minority RSOs. It is not an "all-comers" policy. The university's policy purposefully advantages one set of speakers over others by denying access to the forum to its critics preventing the promotion of the diversity of viewpoints among RSOs in an expected student viewpoint neutral system.

In this case, if a government entity's rationale for limiting the forum is to be inferred from the contours of the limits to the forum itself, should a court defer to a university, as an educational institution, to decide the meaning of the First Amendment. Under the context of "status discrimination" and allowing *any* minimally rationally related governmental goal to limit the forum, allows the institution to define the meaning of the First Amendment and not the courts. Here, the confusion around "status discrimination" claims appears to eviscerate the principles of viewpoint neutrality for limited public forums.

Therefore, the questions presented in this petition are important within the context of limited public forums, and in particular public educational universities with RSOs, regarding the parameters of asserting First Amendment viewpoint discrimination claims.

The space at issue in the University of Minnesota's Coffman Memorial Union is a limited public forum. The University perennially leases the space exclusively to nine student cultural centers, where each of the nine student cultural centers is a university-recognized student group. A-6. By doing so, the University effectively excludes all other university-recognized student groups because there are never any vacancies for the spaces that the cultural centers enjoy. A student organization of student-service-fee-paying students called Viewpoint Neutrality Now! sued based on a violation of Free Speech Clause viewpoint neutrality requirements.

The University of Minnesota[2] allocates 68%[3] of the second floor of the Coffman Memorial Union, "the main student union facility on the Twin Cities

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[2] The Appellees in the court appeals were the individual University's Board of Regents, also sued in their official capacities, but were "dismissed" by the district court. D. Ct. Doc. No. 20, at 18–19. Or to Dismiss (Feb. 2, 2021). However, the dismissal of the Board of Regents was of no "practical consequence." D. Ct. Doc. 20, at 19. Hence, because the district court could award injunctive and declaratory relief sought by the petitioners, the University itself remained as the identified party. *Id.*

[3] D. Ct. Doc. No. 50-3, at 42. Kaardal Decl. Ex. 41, Memo. from Rickey Hall, Asst. Vice Pres, Office of Equity and Diversity (Jan. 27, 2012).

campus,"[4] to nine "cultural centers" from "minoritized backgrounds,"[5] as the University admits, on a semi-permanent basis.[6] Although the University, prior to the 2011 renovation, *invited all* other student organizations to apply for the limited space, it rejected the other student organizations and chose the nine instead, every year for decades.[7] After the 2011 renovation, all other student organizations were not allowed to apply for the coveted space.

Currently, there is no yearly application process for recognized student organizations to apply for the Coffman Memorial Union leases that the nine cultural centers enjoy. *Viewpoint Neutrality Now!,* 109 F.4th at 1040, n. 4 (A-14). Particularly, VNN! challenged the university's lack of a reasonable application process for all student organizations, not the particulars of the current biannual and annual minimal requirements for the nine cultural centers to renew their annual leases:

> VNN does not challenge the renewal criteria, which include the RSO's "[h]istory and [u]niqueness within the campus and greater community," the "[p]rograms, services, and/or events provided by the [RSO]," the "[o]verall utilization of the group's requested space," the RSO's "compliance with the ...

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[4] D. Ct. Doc. No. 57, at 1. Towle Decl. ¶ 3 (Apr. 18, 2022).

[5] D. Ct. Doc. No. 59, at 23–24. University S.J. Memo. at 23-24 (Apr. 18, 2022).

[6] *Id.,* at 4. Towle Decl. ¶ 13.

[7] *Id.*

> Student Conduct Code," and whether the "[m]ission of the group complements the mission" of the University, among several other criteria. This biannual process sorts each RSO into one of three categories, which controls the RSO's ability to continue leasing the space: (1) green, for compliance with the criteria, which means the RSO may continue leasing its current lounge space; (2) yellow, for noncompliance with criteria, which means the RSO may continue leasing its current lounge space but will be reevaluated the following year to either move back to green status or to red status; and (3) red status, which means the RSO is not in compliance with the criteria for a second year, and the group must vacate its lounge space at the end of the current lease. In addition to this biannual renewal process, each space-occupying RSO must also sign a yearly lease, which requires the RSO to meet a few less-demanding standards than the biannual evaluation, such as having no outstanding financial obligations and complying with laws and certain University policies.

*Id.* at 1040 (App. 7-8).

VNN! contended that "it's unreasonable to have an application process where the groups never ever have space" and "not to allow other groups to cycle through." *Id.* at 1042 (App. 17). And, VNN! pointed to record evidence that other University registered

student organizations have sent letters requesting the cultural center lease space since 2005 but to no avail.[8]

The contrast between student groups that have been cultural centers for decades and student groups that can never practically be cultural centers is striking. For example, Hillel, a Jewish student group, never has access to the coveted student lounges, but Al Madinah, a Muslim student group, perennially does.

To be sure, prior to the 2011 renovations, the University published announcements for student group space in Coffman Memorial Union:

> Applications are now available for student group space in Coffman. To apply, please complete the application and turn in to Jason Hancock, suite 500, in Coffman Union….[9]

Although the application process, at that time,

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[8] D. Ct. Doc. No. 50-2, at 9–11, Kaardal Decl. Ex. 12 ("Groups who have applied and did not receive office space in Coffman Memorial Union."). Such student groups include the International Buddy Program, Period, Hillel, Friendship Association of Chinese Students and Scholars, Latino International Student Center, Bharat and 180 Degrees Consulting. D. Ct. Doc. No. 50-2, at 14, 17, 22, 23, 28, 29, 35, 29, 45. Kaardal Decl. Exs. 14, 15, 16, 17, 19, 20, 21, 22, 23 (Emails stating no openings available on the second floor at Coffman.).

[9] D. Ct. Doc. No. 50-1, at 1. Kaardal Decl. Ex. 1 (Apr. 4, 2022). Student Group Space Allocation Procedure. *See also,* General Application. "The General Application is for student groups applying for space within the Student Unions & Activities who do not currently have space…." *Id.* at 40.

was open to *all* registered student groups,[10] the application process itself was divided into three types of applications. The three applications include: (a) the "general application" "for student groups applying for space within the Student Unions & Activities who do not currently have space…;"[11] (b) storage space;[12] and (c) the "renewal application," "for student groups meeting the criteria outlined…If eligible, groups renewing space do not need to fill out a General Application…."[13]

But, the "renewal application" process for the coveted Coffman Memorial Union student lounges was exclusive to the existing nine cultural centers[14] provided the "mission of the group compliments the mission of SUA[15] and the U of M."[16] A "core" tenet of the University's mission is "increasing the exchange of

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[10] *Id.,* at 1; ("Groups applying for space must be registered student groups recognized by the Student Activities Office.") *See generally,* 2011-2012 Application: *Student Group Office Space,* University of Minnesota-Twin Cities, Coffman Memorial Union (CMU). D. Ct. Doc. No. 50-1, at 36–44.

[11] *Id.,* at 40.

[12] *Id.,* at 39.

[13] *Id.,* at 43.

[14] *See e.g.,* D. Ct. Doc. NO. 50-4, at 12–22, Kaardal Ex. 52 (American Indian Student Union); *id.,* at 54–61 (Asian-American Student Union), Kaardal Decl. Ex. 56; D. Ct. Doc. No. 50-5, at 1–11 (Al-Madinah Cultural Center), Kaardal Decl. Ex. 60; *id.,* at 38–46 (Black Student Union), Kaardal Decl. Ex. 52.

[15] "SUA" refers to Student Union & Activities and is a unit with the University's Office for Student Affairs. D. Ct. Doc. No. 57 at 2, Towle Decl. ¶ 4.

[16] D. Ct. Doc. No. 50–1, at 53, Kaardal Decl. Ex. 6 ("Student Group Space Renewal Process").

ideas at the University" by having the cultural centers "hosting events important and interesting to students…and the broader community."[17]

There was no dispute that the cultural centers "semi-permanent" status was reflected in the decades of sole occupancy by those cultural centers, since the 1990's.[18] The nine student groups with the coveted student lounge space leases are:

Black Student Union
Mi Gente Latinx (formerly "La Raza")
Student Cultural Center
Disabled Student Cultural Center
Feminist Student Activist Collective (formerly "Women's Student Activist Collective")
Queer Student Cultural Center
Asian-American Student Union
Minnesota International Student Association
American Indian Student Cultural Center
Al-Madinah Cultural Center

Viewpoint Neutrality Now!, 109 F.4th at 1036–37 (App. 6).

Although the decision to lease the limited public forum space exclusively to the nine identified cultural centers as semi-permanent included Student Union &

[17] D. Ct. Doc. No. 57, at 3, Towle Decl. ¶ 9.

[18] In 2013, the second-floor of Coffman was renovated. D. Ct. Doc. No. 50–14, at 29, Kaardal Decl. Ex. 112.

Activities Board of Governors recommendations,[19] the University adopted the semi-permanent nine cultural centers as its policy.[20] With the annual renewal lease process for the limited public forum space,[21] the University's policy is continuing and renews annually with each approval of the existing nine semi-permanent cultural centers.[22] As the district court opined, the space renewal policy "perpetuates the original allocation" of space on Coffman Memorial Union's second floor.[23]

The university's favoritism towards certain student groups has been controversial resulting in at least three prior lawsuits. *See Curry v. Regents of University of Minnesota*, 167 F.3d 420 (8th Cir. 1999); *Collegians for a Constructive Tomorrow v. University of Minnesota, Board of Regents*, 2018 WL 2293341 (Minn. App. 2018); *Collegians for a Constructive Tomorrow v. University of Minnesota*, 2017 WL 1436075 (Minn. App. 2017).

Viewpoint Neutral Now! is an association of University of Minnesota students who pay student

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[19] D. Ct. Doc. No. 57-2, at 7, Towle Decl. Ex. B.

[20] *Id.,* 57-3, at 3, Towle Decl. Ex. C.

[21] *See e.g.,* D. Ct. Doc. No. 50-4, at 40–51, Kaardal Decl. Ex. 54 (Student Organization Space Use Agreement, Coffman Memorial Union, American Indian Student Union); D. Ct. Doc. No. 50-1, at 38, Kaardal Decl. Ex. 1, at 38 (citing 2011-2012 annual application process at Coffman Union).

[22] *E.g.,* D. Ct. Doc. No. 50-4, at 40 ("The Term of this Space Use Agreement shall be 12 months…."), Kaardal Decl. Ex. 54, ¶ 2, Term.

[23] D. Ct. Doc. No.  at 43, Or. to Dismiss (Feb. 2, 2021).

services fees.[24] Viewpoint Neutrality Now! is formed to support and advocate for viewpoint neutrality and other reforms at the University and is a registered student organization.[25] Under the university's policy, Viewpoint Neutrality Now! is not allowed to apply for the coveted student lounge space at Coffman Memorial Union; therefore, any effort to apply would be futile.[26]

Meanwhile, the nine cultural centers remain free to advocate for their particularized interests. For instance, Queer Student Cultural Center (QSCC) has engaged in expressive activities having joined with Students for a Democratic Society for a "Trans Day of Remembrance and Emergency Response to the Kyle Rittenhouse Verdict."[27] QSCC has also sponsored letter-writing campaigns to legislators.[28]

Mi Gente Latinx (formerly "La Raza") Student Cultural Center pushed for the University of Minnesota to be declared a "sanctuary campus."[29] Mi Gente Latinx joined a protest called "Justice for Woman Lost to State Violence" in 2020.[30] Mi Gente Latinx also joined in an effort to defund the University of Minnesota Police Department.[31] Mi Gente Latinx's

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[24] D. Ct. Doc. No. 1, at 3, Compl. ¶ 2.

[25] *Id.* At the time of the filing of the complaint in April 2020, the student group was not a student registered organization but, is now.

[26] *See e.g.,* D. Ct. Doc. No. 1, at 31, Compl. ¶ 161.

[27] R. Doc. 50–15, at 18, Kaardal Decl. Ex. 122.

[28] *Id.*, at 19, Kaardal Decl. Ex. 123.

[29] *Id.*, at 9–13, Kaardal Decl. Ex. 119.

[30] *Id.*, at 14, Kaardal Decl. Ex. 120.

[31] *Id.*, at 16, Kaardal Decl. Ex. 121.

Gopherlink page states, in part, that it hosts "empowerment-based programming and resources that encourage a movement of consciousness-challenging systems of power and privilege to create an anti-racist environment."[32]

As, for another example, the Feminist Student Activist Collective's (FSAC's) Gopherlink page stated, "The Feminist Student Activist Collective is here to empower women, transgender, and gender non-conforming people to make positive changes in society. We use an intersectional lens to work towards eliminating interrelated inequalities that produce oppression, with a focus on gender and sexuality."[33] FSAC's "tumblr.com" page stated, in part, "Stop by our room anytime for free coffee and feminist rants."[34] FSAC has co-sponsored events with the University Pro-Choice Coalition,[35] and has hosted Camp Wellstone[36] and other co-sponsored events with NARAL Pro-Choice America and Students for a Democratic Society.[37]

And, for one final example, the Black Student Union (BSU) advocates positions on local, state, and national political and ideological issues. BSU describes itself as "Host of Political and Business Related

[32] D. Ct. Doc. No. 50–9, at 40–42, Kaardal Decl. Ex. 94.

[33] *Id.*, at 43–44, Kaardal Decl. Ex. 95.

[34] D. Ct. Doc. No. 50–15, at 20, Kaardal Decl. Ex. 124.

[35] *Id.*, at 48–53, Kaardal Decl. Ex. 115. (Board of Governors Minutes Thursday, April 7, 2016; Student Unions and Activities Board of Governors. (2016)).

[36] D. Ct. Doc. No. 50–9, at 43–44, Kaardal Decl. Ex. 96.

[37] D. Ct. Doc. No. 50–10, at 1–22, Kaardal Decl. Ex. 97.

Events,"[38] as well as being "involved with greater Twin-Cities community political issues facing minorities and students on campus."[39] It has cosponsored recent events with Students for a Democratic Society, including the Justice for Daunte Wright Rally[40], a protest of University of Minnesota involvement in a police task force,[41] Get Police Off Our Campus Rally,[42] and a march to establish a Campus Civilian Police Accountability Council that would give students, workers, and community members full control of the University of Minnesota Police Department.[43] BSU hosted an event on January 29, 2020 called "Activism Beyond the Hashtag,"[44] and an event in 2019 called "Women's Edition, the Power of Melanin."[45] During the Trump Administration, BSU issued a statement opposing the government's immigration policies.[46]

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[38] *Id.*, at 22–34, Kaardal Decl. Ex. 98.

[39] D. Ct. Doc. No. 11, at 35–38, Kaardal Decl. Ex. 99.

[40] https://twitter.com/seanlimmn/status/1383590928103796746?s=21 (Apr. 7, 2021) (last visited Apr. 2, 2022).

[41] D. Ct. Doc. No. 50-15, at 21–25, Kaardal Decl. Ex. 125 (Minnesota Daily Apr. 4, 2021).

[42] https://twitter.com/bsu_umn/status/1266183475427672064?s=21 (May 28, 2020) (last visited May 28, 2020).

[43] D. Ct. Doc. No. 50–15, at 26–29, Kaardal Decl. Ex. 126 (Minnesota Daily Oct. 18, 2020).

[44] https://twitter.com/bsu_umn/status/1221497517042552833?s=21 (last visited Apr. 2, 2022).

[45] https://twitter.com/bsu_umn/status/1105564426197962753?s=21 (last visited Apr. 2, 2022).

[46] https://twitter.com/bsu_umn/status/1013253887795580928?s=21 (last visited Apr. 2, 2022).

The University admits that the 68% at issue of Coffman Memorial Union second-floor space occupied by the nine cultural centers is a limited public forum.[47] Hence, the nine cultural centers occupy 100% of the 68% of limited public forum space at issue. Notably, the space afforded to the cultural centers is free.[48] No evidence exists to suggest the University considers the speech of the cultural centers as its own.

All of this speech is funded and supported through student fees. The University of Minnesota collects mandatory student fees, in addition to tuition, from students at its coordinate campuses, pursuant to the Board of Regents Policy on Student Fees.[49] The student fees are distributed to independent student groups who utilize the fees for expressive activity,

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[47] D. Ct. Doc. No. 59, at 20. University S.J. Memo. at 20 (Apr. 18, 2022). Indeed, there is no evidence to suggest that registered student groups are entitled to office space and some student groups operate without office space, the University nevertheless has opened 68% of Coffman Union to registered student organizations. *See,* D. Ct. Doc. No. 57, at 2. Carvell Decl. ¶ 8 (Apr. 18, 2022).

[48] Until 2005, SUA charged rent to student groups with space on the second floor of Coffman. "We do not believe that there is any 'value added' to charging rent to student organizations because of all the time and effort it takes to invoice…We want to focus on student service relationships that are supportive and positive in return." D. Ct. Doc. No. 50–14, at 1, Kaardal Decl. Ex. 110 (Resolution for Consideration by the 2004-2005 Student Organization Student Services Fee Committee Streamlining Funding Support for Student Organization Office Space. Attached to January 29, 2004 Board of Governors Meeting Minutes – Twin Cities).

[49] Board of Regents Policy: Student Services Fees (D. Ct. Doc. No. 50-9, Kaardal Dec. Ex. 104 (all references to exhibits are to Kaardal Declaration exhibits unless otherwise noted)).

allowing "dynamic discussions of diverse topics in their extracurricular campus life."[50] Student fees fund registered student organizations, facilities and departments of the University of Minnesota, referred to as administrative units.[51] The policy of the University of Minnesota Board of Regents requires, inter alia, student fees be distributed in a "viewpoint neutral" manner.[52]

1. The University's first motion was to dismiss the petitioners' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. It succeeded in part, but failed in part. *Viewpoint Neutrality Now*!, 516 F.Supp.3d 904 (D.Minn. 2021). First, the district court determined that the University had unbridled discretion to determine which media groups would be invited to apply for media-group funding and, hence, to participate in a limited public forum.[53] Thus, Count I survived.

Second, as Count II related to Coffman Memorial Union cultural centers, the district court determined that facts were pled sufficiently to support

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[50] *Id.*

[51] D. Ct. Doc. No. 50–12, at 28–43, Kaardal Decl. Ex. 107 (2020-21 Administrative Units Handbook); D. Ct. Doc. No. 50–12, at 1–27, Kaardal Decl. Ex. 106 (2020-21 Student Organization Handbook). *See* https://regents.umn.edu/sites/regents.umn.edu/files/2020-06/docket-fin-june2020v2.pdf (File: "docket-fin-june2020v2.pdf" Board of Regents Finance & Operations Committee June 2020, Attachment 10, PDF pages 130-133) (last visited Apr. 2, 2022). *See also,* A–2–4.

[52] D. Ct. Doc. No. 50–11, at 52–54, Kaardal Decl. Ex. 104 (Board of Regents Policy: Student Services Fees).

[53] D. Ct. Doc. No. 20, at 38, Or. to Dismiss (Count I).

the issue questioning the constitutionality of the University's policy regarding the access of the created limited public forum.[54] The allocation of space "vested unbridled discretion in the decision-maker."[55] Count II survived. At the same time, the district court dismissed the allegations that the University's website promoting the nine cultural centers violated viewpoint neutrality principles. The court determined that the website, totally controlled by the University was "government speech," and, hence, exempt from First Amendment scrutiny.[56]

Although VNN! alleged the University discriminated on the basis of viewpoint neutrality by denying funding to all partisan political organizations, the district court found they had not alleged such an allegation.[57] There, VNN! alleged that the University violated viewpoint neutrality by adopting a rule that bans student funding to any partisan political organization.[58] If the student group fell within the Student Services Fee Handbook for Student Organizations' "political party," it would not be eligible for funding.[59] Yet, a student organization could sponsor political debates.[60] The district court determined that the University restrictions on limited public forums need not be the most reasonable, but

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[54] *Id.,* at 42–43.

[55] *Id.,* at 43.

[56] *Id,* at 46.

[57] *Id.*, at 48.

[58] D. Ct. Doc. No. R. Doc. 1, at 59, Compl ¶ 312.

[59] *Id.,* Compl. ¶ 314.

[60] *Id.*, at 60, Compl. ¶ 317.

only reasonable to satisfy the First Amendment, *citing Cornelius v. NAACP Leg. Def. and Educ. Fund, Inc.,* 473 U.S. 788, 808 (1985). Count III, thus, did not survive.

Likewise, in Count IV, VNN! argued that the University's requirement for registered student organizations provide financial documentation for 12 consecutive months prior to applying as viewpoint discrimination.[61] The district court disagreed with the U.S. Court of Appeals for the Seventh Circuit's rationale in *Southworth III, Southworth v. Bd. of Regents of U. of Wisconsin System,* 307 F.3d 566, 594 (7th Cir. 2002).[62] The court found the requirement reasonable.[63] Count IV did not survive the motion to dismiss.

Finally, as to VNN!'s allegations under Count V, the district court also dismissed that claim. The court concluded that although the University had an appeal process for students to appeal decisions about funding registered student organizations or media groups, there is no First Amendment requirement for an appeal process "notwithstanding the existence of other safeguards."[64]

2. Next, in the summary judgment motion decision, *Viewpoint Neutrality Now! v. Powell*, 653 F.Supp.3d 621 (D. Minn. 2023) (App. 27-53), the district court first found that VNN!'s media-group

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[61] *See e.g.,* at 63, Compl. ¶¶ 333–338.

[62] D. Ct. Doc. No. 20, at 50.

[63] *Id.,* at 51.

[64] D. Ct. Doc. No. 20, at 52, Or. to Dismiss (Count V).

claim as moot. VNN! had argued that the University's media-group-funding process was unconstitutional because "[t]heVice-Provost for Student Affairs and Dean of Students (VPSA/DoS) has unbridled discretion as to whom may apply for media-group funding violating viewpoint neutrality principles."[65] The court noted that the University did "not deny that the media-group-funding process challenged in plaintiffs' complaint was unconstitutional for this reason."[66]

3. Meanwhile, because the University changed its processes for the subsequent academic years (2021–2022 and 2022–2023) after the year cited in the complaint (2019–2021), the matter was moot to the court's satisfaction.[67] The court commented on the fact that VNN! had made arguments about the new process, but had not amended their complaint to explicitly challenge the new process.[68] However, the district court also noted that it was not ruling that the University's new media-group-funding process was constitutional.[69] In addition, the district court rejected VNN!'s argument regarding exceptions to the mootness doctrine. Relying on this Court's recent decision in *Young Am.'s Found. v. Kaler,* 14 F.4th 879

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[65] D. Ct. Doc. No. 49, at 27, Pl. S.J. Memo. *See also,* D. Ct. Doc. No. R. 67, at 15.

[66] A-41

[67] A-41"[T]he University amended the process to address the plaintiffs' First Amendment concerns." A-41.

[68] *Id.*

[69] A-42.

(8th Cir. 2021), the district court found no evidence that the repealed policy would be reenacted.[70]

When the district court addressed the limited public forum in Coffman Memorial Union, it found no evidence of viewpoint discrimination.[71] Instead, the court found a problem with VNN!'s argument—that it "could be made to *any* limited public forum, as *every* limited public forum includes some participants and excludes others."[72] The district court went on to opine that "[i]t is inherent in the concept of a limited public forum that some groups or speakers will have access to the forum and others will not. It is only when access to the forum is granted or denied based on a group's or speaker's *opinion* or *perspective* (i.e. viewpoint)—rather than based on the *nature* of the group or speaker—that a restriction becomes unconstitutional."[73]

Then, the district court stated that VNN! does "not challenge an on-going process or policy. Instead, they challenge a one-time decision that was made a long time before they enrolled in the University."[74] Notably, the court's declaration, here, contradicts what it and VNN! understood with regard to the annual renewal of the University agreements with the nine cultural centers. It is undisputed that the space renewal policy "perpetuates the original allocation" of

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[70] A-39 *citing Kaler,* 14 F.4th at 887.

[71] A-44–49.

[72] A-45.

[73] *Id.* (original italics).

[74] A-49.

space on Coffman Memorial Union's second floor.[75] The district court held that First Amendment arguments relating to the chilling of future speech were not applicable in the present case.[76]

So, on cross-motions for summary judgment, the district court granted the University of Minnesota's motion and denied the Appellant-Plaintiff's motion.[77] The Notice of Appeal was subsequently filed.

4. On appeal, the U.S. Court of Appeals for the Eighth Circuit held that the university did not engage in viewpoint discrimination, that the university's allocation decision was reasonable, and that the unbridled discretion doctrine did not apply. The Eighth Circuit decided that limited-public-forum favoritism can lead to two different types of claims—"status-based discrimination" and "viewpoint discrimination." A-12. Then, the Eighth Circuit analyzed VNN!'s claims as only "viewpoint-discrimination" and not "status-discrimination"—affirming the district court's grant of summary judgment to the university. But, in order to rule so, the Eighth Circuit interpreted dicta in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 48–49 (U.S. 1983) which only stated an analytical difference between status-based and viewpoint-based discrimination in a nonpublic forum. In other words, this Court had not decided to create a status discrimination claim separate and apart from a

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[75] D. Ct. Doc. No. 20, at 43, Or. to Dismiss (Feb. 2, 2021).

[76] A-50.

[77] A-51.

viewpoint discrimination claim. But, the Eighth Circuit interpreted *Perry* in that way anyways.

This petition for writ of certiorari followed.

## REASONS FOR GRANTING THE PETITION

The Eighth Circuit has opined that in the context of limited public forums, status discrimination is a separate and distinct claim from viewpoint discrimination, yet ultimately allowing the university, not the court, to decide the meaning of the First Amendment. Here, the Eighth Circuit decided "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. Rule 10. There also is a circuit split between the Eighth Circuit and Fourth Circuit.

In this case, the Eighth Circuit decided that limited-public-forum favoritism can lead to two different types of claims—"status-based discrimination" and "viewpoint discrimination":

> By establishing a limited public forum, the University has "the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 49, 103 S.Ct. 948 (1983). Distinctions based on identity are status-based distinctions which are "'inherent and inescapable' in limited public forums." *Turning Point*, 973 F.3d at 876 (quoting Perry, 460 U.S. at 49, 103 S.Ct. 948) (explaining that a school policy allowing tabling only by

recognized student groups necessarily favors those groups' viewpoints over unrecognized groups but noting that "such favoritism [is] status-based discrimination, rather than viewpoint-based discrimination").

A-12. In turn, the Eighth Circuit analyzed VNN!'s claims as only "viewpoint-discrimination" and not "status-discrimination" and, on that basis, affirmed the district court's grant of summary judgment to the university.

But, in order to rule so, the Eighth Circuit interpreted dicta in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 48–49 (U.S. 1983) which only stated an analytical difference between status-based and viewpoint-based discrimination—not creating separate claims. *Perry,* 460 U.S. 37, 48–49. This petition argues that this Court, not the Eighth Circuit, should interpret whether the dicta in *Perry* supports a status-based discrimination claim separate and apart from a viewpoint discrimination claim.

The petitioners also argue that the fact that only the same nine cultural centers have occupied the coveted space for decades, to the exclusion of all other university-recognized student groups, is sufficient evidence of unreasonable discrimination—either status discrimination or viewpoint discrimination.

## I. This Court's dicta in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* (1983) stated a viewpoint neutrality distinction between status discrimination and viewpoint discrimination.

The *Perry* case involved a union and its members bringing an action challenging provisions of a collective bargaining agreement between the school district and an exclusive bargaining representative granting bargaining representative exclusive access to teacher mailboxes and interschool mail system to exclusion of rival union. The United States District Court for the District of Indiana entered summary judgment in favor of bargaining representative and school board, and appeal was taken. The United States Court of Appeals for the Seventh Circuit reversed and remanded, and defendants appealed. *Perry Loc. Educators' Ass'n v. Hohlt,* 652 F.2d 1286 (7th Cir. 1981), *rev'd sub nom. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n,* 460 U.S. 37 (1983). This Court held that: (1)the decision of Court of Appeals was not appealable under statute as having invalidated state statute, but was subject to review by writ of certiorari; (2) public property which is not by tradition or designation a forum for public communication may be reserved by state for its intended purposes, communicative or otherwise, as long as regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose speaker's views; (3) the school mail facilities were not "limited public forum" merely because the system had been opened for periodic use by civic and church organizations or because the rival union had been allowed to use the facilities on an equal footing prior

to defendant union's certification as teachers' exclusive bargaining representative; (4) differential access provided was reasonable considering, among other things, bargaining representative's statutory obligations as exclusive representative of all teachers, and substantial alternative channels remaining open for union-teacher communication; and (5) differential access did not constitute impermissible content discrimination in violation of the equal protection clause. *Perry*, 460 U.S. at 37 (1983).

This Court in *Perry* dicta did distinguish between status discrimination and viewpoint discrimination, in the context of a nonpublic forum—but not to the extent of creating separate claims in a limited public forum context:

> Because the school mail system is not a public forum, the School District had no "constitutional obligation per se to let any organization use the school mail boxes." *Connecticut St. Federation of Teachers v. Bd. of Education Members,* 538 F.2d 471, 481 (CA2 1976). In the Court of Appeals' view, however, the access policy adopted by the Perry schools favors a particular viewpoint, that of the PEA, on labor relations, and consequently must be strictly scrutinized regardless of whether a public forum is involved. There is, however, no indication that the school board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their

> views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

*Perry,* 460 U.S. 37, 48–49 (italics in the original). Significantly, the Court did not announce in *Perry* that there was a status discrimination claim separate and apart from viewpoint discrimination.

## II. The Eighth Circuit's decisions have interpreted the *Perry* dicta so that status discrimination claims are different than viewpoint discrimination claims.

The Eighth Circuit's decisions in this case against the University of Minnesota and an earlier case involving Arkansas State University have interpreted the *Perry* dicta so that status discrimination claims are different than viewpoint discrimination claims for the Eighth Circuit.

The earlier decision is *Turning Point USA at Arkansas State University v. Rhodes,* 973 F.3d 868 (8th Cir. 2020). In that case, state university and unregistered student organization filed suit against

university, administrators, and trustees under § 1983, asserting violation of First Amendment rights of free speech arising out of university's enforcement of unwritten campus policy that limited tabling activities within patio outside student union to registered student organizations and university departments. The district court entered summary judgment for defendants. 409 F.Supp.3d at 677. On appeal, the Eighth Circuit held that the patio located outside state university's student union was "limited designated public forum," and thus, university's limitation on tabling activities within patio to registered student organizations and university departments had to be reasonable and viewpoint-neutral; that the policy involved "status-based discrimination," and not "viewpoint discrimination"; that the university's desire to maintain "living room atmosphere" of patio area was not reasonable justification for distinction of rights to tabling activities within patio as between registered and unregistered student organizations; the policy was not reasonable restriction on speech; and the university administrators and trustees were entitled to qualified immunity from suit. 973 F.3d at 868.

The Eighth Circuit interpreted *Perry* as this Court having "described" such favoritism as "status-based discrimination, rather than viewpoint discrimination":

> According to unrebutted testimony, tabling at the Union Patio is reserved for University departments and registered student organizations. The application form for registering a student organization requires five members, a

> constitution, and an advisor. Such requirements might constitute viewpoint discrimination if they could not be met due to an organization's views. But that is not the case here. Hoggard does not allege viewpoint discrimination. And, at least as applied to her, the Tabling Policy was not viewpoint-discriminatory. True, the Tabling Policy favors the viewpoints of officially-recognized groups over unrecognized groups and individuals. But the Supreme Court has described such favoritism as status-based discrimination, rather than viewpoint-based discrimination. *Perry*, 460 U.S. at 48–49, 103 S.Ct. 948.[5] And because status-based distinctions are "inherent and inescapable" in limited public forums, "[t]he touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.*

*Turning Point USA at Arkansas State University,* 973 F.3d at 876.

Then, the court of appeals went onto apply a reasonable test for status discrimination:

> So our focus, in this case, is the Tabling Policy's reasonableness. Our inquiry takes into account "all surrounding circumstances." *Powell v. Noble*, 798 F.3d 690, 701 (8th Cir. 2015). In particular, we must consider (1) the University trustees' and administrators' expertise in creating

> educational policies; (2) the purpose served by the forum; and (3) the alternative channels of communication available to Hoggard in light of the policies. *See id.* ("A restriction must be reasonable in light of the purpose which the forum at issue serves and the reasonableness of a restriction on access is supported when substantial alternative channels remain open for the restricted communication.") (internal quotation and alteration omitted); *see also Widmar v. Vincent*, 454 U.S. 263, 276–77, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (deferring to a university's judgments about academic affairs, while reviewing the constitutionality of speech restrictions).

*Id.* at 876-77.

Then, in this case, the Eighth Circuit decided that limited-public-forum favoritism can lead to two different types of claims—"status-based discrimination" and "viewpoint discrimination":

> By establishing a limited public forum, the University has "the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n,* 460 U.S. 37, 49, 103 S.Ct. 948 (1983). Distinctions based on identity are status-based distinctions which are " 'inherent and inescapable' in limited public forums." Turning Point, 973 F.3d at

> 876 (quoting Perry, 460 U.S. at 49, 103 S.Ct. 948) (explaining that a school policy allowing tabling only by recognized student groups necessarily favors those groups' viewpoints over unrecognized groups but noting that "such favoritism [is] status-based discrimination, rather than viewpoint-based discrimination").

A-12. In turn, the Eighth Circuit analyzed VNN!'s claims as only "viewpoint-discrimination" and not "status-discrimination" and, on that basis, affirmed the district court's grant of summary judgment to the university.

But, in order to rule so, the Eighth Circuit interpreted the dicta in *Perry,* which only stated an analytical difference between status-based and viewpoint-based discrimination, as if two separate claims had been created:

> We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views.

*Perry,* 460 U.S. 37, 48–49 (italics in the original).

Here, VNN! argues that this Court, not the Eighth Circuit, should interpret whether the dicta in *Perry* supports a status-based discrimination claim separate and apart from a viewpoint discrimination claim.

### III. A circuit split exists because the Fourth Circuit is not adhering to *Turning Point USA at Arkansas State University* on "status discrimination," but there was a dissenting opinion.

A circuit split exists. In *Speech First, Inc. v. Sands*, 69 F.4th 184 (4th Cir. 2023), vacated on other grounds, 144 S. Ct. 675 (2024), the Fourth Circuit distinguished the *Turning Point USA at Arkansas State University* "status discrimination" decision, but there was a dissenting opinion. The case involved a nonprofit organization advocating for protecting free speech rights of college students bringing an action against a public university president alleging that university's bias policy and informational activities policy, which prohibited leaflet distribution on campus without recognized student organization sponsorship, violated First Amendment rights of its student members. The United States District Court for the Western District of Virginia, 2021 WL 4315459, denied the organization's motion for preliminary injunction. The organization appealed. On appeal, the Fourth Circuit held that the organization lacked standing to challenge university's bias policy; the bias policy constituted permissible government speech; that the organization was not likely to succeed on merits of claim that informational activities policy was impermissible prior restraint on speech, as required for issuance of preliminary injunction; and that the organization was not likely to succeed on merits of claim that informational activities policy was unconstitutional speaker-based regulation, as required for issuance of preliminary injunction. *Speech*

*First, Inc.*, 69 F.4th at 184. There was a dissenting opinion. *Id.*

The majority opinion distinguished the *Arkansas State University* "status discrimination" holding and applied "viewpoint discrimination" instead distinguishing the facts of *Turning Point* with those of *Speech First*. In *Turning Point,* the Eighth Circuit found the University's policy as having no relationship between its *nonspecific justifications* and the restriction imposed, finding the policy unconstitutional:

> In *Turning Point*, the Eighth Circuit considered an Arkansas State University policy that permitted tabling in the patio area outside of the student union, but only for "registered student organizations and University departments." 973 F.3d at 873. The university's sole rationale for imposing this restriction was that it wanted the union patio to exist as a "comfortable, living-room atmosphere." *Id.* at 879. Because there was "no rational relationship" between the university's nonspecific justification and the restriction it imposed, the Eighth Circuit held that the policy was unconstitutional. *Id.*

*Speech First,* 69 F.4th at 201–02.

By contrast, in *Speech First,* the Fourth Circuit found that the lack of a *physical* capacity as a

sufficient reason to excuse the University from discriminatory practices:

> Virginia Tech, by contrast, has not relied on an amorphous desire to make its campus more "comfortable." Rather, the University maintains, and the district court expressly found, that the University relies on physical capacity concerns and only restricts informational activities "to official organizations so that Virginia Tech's limited physical resources can be used for the benefit of the most students." *Sands*, 2021 WL 4315459, at *22. This explanation may, or may not, be a "good reason[ ] for distinguishing between registered student organizations and other members of the university community." *Turning Point USA*, 973 F.3d at 879…Given the inadequacy of the record evidence pertinent to the Informal Activities Policy, we cannot second guess the district court's considered judgment.

*Speech First,* 69 F.4th at 201–02. The Fourth Circuit decision overlooks the status discrimination between the haves and the have-nots, between official organizations and those students that are not part of an organization. And as the dissent recognized, allowing for this type of status discrimination, cannot prevail when the nature of the property is inconsistent with expressive activity, when no substantial alternative channels are available for students who wish to exercise their rights to collect signatures and distribute literature. *Speech First*, 69 F.4th at 215.

Nonetheless, the University of Minnesota's policy perennially allows nine student organizations leases to the coveted student lounges for First Amendment activities, for free, while other organizations are prevented from those activities and must incur costs to exercise their First Amendment activities away from a central gathering place within the University.

In this regard, the Eighth Circuit analysis also conflicts with the long-held analysis in the Seventh Circuit in *Southworth v. Bd. of Regents of U. of Wisconsin System*, 376 F.3d 757, 769 (7th Cir. 2004). There the court rejected consideration of the length of time a registered student organization was in existence and the amount of past funding decisions because those criteria institutionalized viewpoint discrimination from past years. *Id.* (citation omitted). The court held such criteria as improper because the reliance of such criteria discriminated against less traditional viewpoints in favor of established parties and speech. *Id.*

In this case, the university's systematic refusal to accept applications to the limited public forum in favor of years-long embedded registered student organizations, so called minority "cultural centers," is institutionalized favoritism to the particular viewpoints of those registered student organizations to the exclusion of all other existing registered student organizations that can be also recognized as "cultural organizations" of the and representative of the university's student population. It distorts the representative character of other registered student organizations.

Moreover, the University's policy is certainly not an "all-comers" policy and thus, does not promote the diversity of viewpoints among registered student organizations. The university's policy purposefully advantages one set of speakers over others by denying access to the forum to its critics preventing the promotion of the diversity of viewpoints among RSOs in an expected student viewpoint neutral system.

In this case, if a government entity's rationale for limiting the forum is to be inferred from the contours of the limits to the forum itself, should a court defer to a university, as an educational institution, to decide the meaning of the First Amendment? Under the context of "status discrimination" and allowing *any* minimally rationally related governmental goal to limit the forum, allows the institution to define the meaning of the First Amendment, not the courts. Thus, status discrimination, as it works now, eviscerates the principles of viewpoint neutrality for limited public forums.

## IV. The Eighth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court: whether status discrimination claims are separate and different than viewpoint discrimination claims.

A central question is whether the *Perry* dicta creates a status discrimination claim separate and apart from a viewpoint discrimination claim. Accordingly, has the Eighth Circuit, in affirming summary judgment for the university, correctly interpreted this Court's dicta in *Perry Educ. Ass'n v.*

*Perry Local Educators' Ass'n,* 460 U.S. 37, 48–49 (U.S. 1983) that a status discrimination claim, as distinguished from a viewpoint discrimination claim, exists to sue the university for violation of First Amendment Free Speech Clause viewpoint neutrality requirements? The Court should answer this question.

**The fact that the same nine cultural centers have occupied the space for decades is sufficient evidence of unreasonable discrimination—status discrimination or viewpoint discrimination.**

The Eighth Circuit notes a disagreement between VNN! and the Court on the meaning of all other university-recognized student organizations being excluded from the space used by the nine cultural centers:

> VNN was asked twice at oral argument to point this Court to evidence that the University chose the nine RSOs because of their viewpoints. In response, VNN simply reiterated its position that the fact that the same nine cultural centers have occupied the space is sufficient evidence of viewpoint discrimination, suggesting that their continued presence reflects the University's preference for their viewpoints. Having concluded that fact is insufficient to show viewpoint discrimination, we emphasize that VNN has not identified any other evidence suggesting that the University's lounge allocation decisions consider any RSOs'

> viewpoints. See Rodgers v. City of Des Moines, 435 F.3d 904, 908 (8th Cir. 2006) ("Without some guidance, we will not mine a summary judgment record searching for nuggets of factual disputes to gild a party's arguments.").

A-13. VNN!'s position is similar to the Fourth Circuit's dissenting judge's position, "Even the most cursory consideration of these factors reveals Virginia Tech's policy is unreasonable." Similarly, VNN! believes the "most cursory consideration" of the University of Minnesota's policy authorizing the same nine cultural centers to perennially occupy the space is unreasonable discrimination. *Speech First, Inc.*, 69 F.4th at 215.

VNN!'s record evidence supports summary judgment on a discrimination claim of either variety—status or viewpoint. The Eighth Circuit acknowledged that there is no record evidence of a yearly application process for recognized student organizations to apply for the leases that the nine cultural centers enjoy:

> [W]e find nothing in the record to suggest that, since the 2011 decision, the University has a yearly application process inviting all RSOs to apply.

A-11, n.4.

Meanwhile, other University registered student organizations have applied for space but to no avail.[78] Such student groups include, the International Buddy Program, Period, Hillel, Friendship Association of Chinese Students and Scholars, Latino International Student Center, Bharat and 180 Degrees Consulting.[79] Viewpoint Neutral Now! is an association of University of Minnesota students who pay student services fees.[80] Viewpoint Neutrality Now! was formed to support and advocate for viewpoint neutrality and other reforms at the University and is a registered student organization.[81] But, any Viewpoint Neutrality Now! application for office space at Coffman Memorial Union is futile because no student organization other than the nine deemed cultural centers can apply.[82] Therefore, the record evidence supports a summary judgment on illegal discrimination—either status discrimination or viewpoint discrimination. The Court should grant the petition and choose which one.

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[78] D. Ct. Doc. No. 50-2, at 9–11, Kaardal Decl. Ex. 12 ("Groups who have applied and did not receive office space in Coffman Memorial Union.").

[79] *See* D. Ct. Doc. No. 50-2, at 14, 17, 22, 23, 28, 29, 35, 29, 45. Kaardal Decl. Exs. 14, 15, 16, 17, 19, 20, 21, 22, 23 (Emails stating no openings available on the second floor at Coffman.).

[80] D. Ct. Doc. No. 1, at 3, Compl. ¶ 2.

[81] *Id.* At the time of the filing of the complaint in April 2020, the student group was not a student registered organization but, is now.

[82] *See e.g.,* D. Ct. Doc. No. 1, at 31, Compl. ¶ 161.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 12, 2024

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