UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-1346

Viewpoint Neutrality Now!; Evan Smith; Isaac Smith,

Plaintiffs – Appellants,

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 Dean of Students in his respective official capacity

Defendants – Appellees.

Appeal from United States District Court
for the District of Minnesota

Submitted: March 14, 2024
Filed: July 25, 2024

Before GRUENDER, SHEPHERD, and GRASZ, Circuit Judges.

SHEPHERD, Circuit Judge.

In 2020, Viewpoint Neutrality Now!, a student organization at the University of Minnesota-Twin Cities Campus, and Evan and Isaac Smith, two students (collectively, "VNN") sued the University for five alleged violations of the First and Fourteenth Amendments. Only two claims survived the University's motion to dismiss, and the district court[1] subsequently entered summary judgment for the University on those remaining claims. VNN appeals the adverse grant of summary judgment on just one of its claims. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

Each year, the University of Minnesota charges students a mandatory student activity fee which is used, in part, to fund registered student organizations (RSOs) and subsidize the operations of the Coffman

[1] The Honorable Patrick J. Schiltz, Chief Judge, United States District Court for the District of Minnesota.

Memorial Union, the Twin City campus's student union.[2] Coffman's second floor is a space reserved for use by RSOs. The space has been renovated several times since the building opened, and the instant case involves its most recent renovation. In 2013, Coffman's second floor was renovated and reorganized to include several lounges, leased each year to various RSOs, and a mixed-use area available for all RSOs to reserve for events and meetings. The University assigned the lounge spaces following the renovation to thirteen RSOs—the three student government organizations, the University-administered commuter-student RSO, and nine "cultural centers": 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, and Al-Madinah Cultural Center. Before the renovation, these nine cultural centers each occupied offices on Coffman's second floor and were granted lounge space after the renovation as part of the University's plan to find a more permanent solution to the space allocation issue that had plagued Coffman's second floor since its opening in 1940. The University conducted research to determine how other institutions dealt with similar issues and elicited feedback from a student survey and several public

[2] We note that the individual plaintiffs object to their student fees subsidizing the lounge allocation, but VNN, despite calling attention to several RSOs that have inquired about lounge space over the years, has never similarly inquired. VNN has also never applied for—and does not intend to apply for—funding from the student activity fees, as many other RSOs do.

forums. This process led the Board of Governors—a student-led group that was charged with making recommendations for allocation of the renovated space—to conclude that most students wanted these nine cultural centers to have designated space in Coffman and recommend the space allocation that was ultimately adopted by the University. Accordingly, the University allocated lounge space to the nine cultural centers, and the student government and commuter RSOs and retained a mixed-use area for use by any RSO. There are also other spaces in Coffman and around the campus available for RSOs to reserve for temporary use. The RSOs moved into the renovated space in 2013 and have occupied the lounge space ever since.

After the renovation, the University adopted a procedure for monitoring space usage on Coffman's second floor. This procedure requires all RSOs occupying lounge space to undergo a renewal evaluation every other year, which requires compliance with certain criteria.[3] Should the RSO fail

[3] 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 . . . . 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

to comply with the criteria for two consecutive years after being evaluated, the procedure provides that the RSO must vacate the lounge at the end of the current lease term. We note that this reevaluation process is not a mirror image of the process used in 2011 to choose the RSOs that would occupy the lounges; put otherwise, the University does not regularly reevaluate whether some other RSO would be better suited to occupy the lounge. Rather, the current tenants may continue occupying the lounge space so long as they comply with the renewal criteria, and only should a vacancy occur will the University open the space to other RSOs. Since 2013, none of the RSOs occupying lounge space has failed to comply with the requisite criteria for more than one year, so no vacancy has occurred.

VNN sued the University, claiming, as relevant to this appeal, that the University's exclusive provision of the lounge space in Coffman to the nine cultural centers violates the First Amendment; it lodged no complaint about the lounge spaces occupied by the commuter RSO or the student government RSOs. VNN first claimed that the University engaged in viewpoint discrimination by providing lounge space to the cultural centers at the expense of other RSOs. It also argued that the University's process for allocating Coffman's lounge space gave unbridled discretion to University officials, rendering the process unconstitutional.

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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.

On the parties' cross-motions for summary judgment, the district court ruled in the University's favor because it found (1) no evidence in the record that the allocation of lounge space was motivated by viewpoint discrimination and (2) that the unbridled discretion doctrine was inapplicable to the past allocation decision. After acknowledging that the disputed space was a limited public forum, the district court explained that VNN's argument that the mere provision of space to the cultural centers at the expense of other RSOs was itself viewpoint discrimination conflated content and viewpoint discrimination; in the district court's view, this argument was fundamentally flawed because "it could be made to *any* limited forum, as *every* limited forum includes some participants and excludes others." Moreover, the district court explained that even if the University were motivated by a belief that supporting cultural centers is a worthwhile goal, that still does not amount to viewpoint discrimination. Since there is no evidence that the decision was based on any groups' viewpoint, the district court concluded that no reasonable jury could find that viewpoint discrimination occurred. The district court also rejected VNN's claim that the University exercised unbridled discretion in deciding how to allocate Coffman's lounge space. Specifically, the district court found that, because VNN did not challenge "an ongoing process or policy," but rather, "a one-time decision that was made long before they enrolled at the University," the unbridled discretion doctrine was inapposite, as VNN had not cited—and the district court had not found—any case applying that doctrine to a past decision. VNN now appeals, contending that the district court erred in granting summary judgment to the University.

II.

"We review a district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party." Marlow v. City of Clarendon, 78 F.4th 410, 417 (8th Cir. 2023). The University "can satisfy its [summary judgment] burden in either of two ways: it can produce evidence negating an essential element of [VNN's] case, or it can show that [VNN] does not have enough evidence of an essential element of its claim to carry its ultimate burden of persuasion at trial." Bedford v. Doe, 880 F.3d 993, 996 (8th Cir. 2018). Summary judgment is appropriate unless "the nonmoving party . . . come[s] forward with specific facts showing that there is a genuine issue for trial." Marlow, 78 F.4th at 417 (citation omitted).

> A plaintiff may not merely point to unsupported self-serving allegations, but must substantiate allegations with sufficient probative evidence that would permit a finding in the plaintiff's favor. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."

Davidson & Assocs. v. Jung, 422 F.3d 630, 638 (8th Cir. 2005) (citations omitted); see also Bedford, 880 F.3d at 996 ("A principal purpose of the summary-judgment procedure 'is to isolate and dispose of factually unsupported claims or defenses' . . . ." (citation omitted)). VNN advances the same two arguments on appeal that it brought before the

district court. We address each in turn.

A.

We first address VNN's viewpoint discrimination argument. VNN specifically argues that the provision of space to some minority RSOs at the expense of others means the University affirmatively prefers the views expressed by those chosen RSOs; therefore, the logic goes, the University is engaging in viewpoint discrimination by providing the lounge space to these RSOs each year instead of opening up the space to every RSO to apply.

The University, "like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (citation omitted). "[T]he legality of speech restrictions on state property 'turns on the nature of the property involved and the restrictions imposed.'" Turning Point USA at Ark. State Univ. v. Rhodes, 973 F.3d 868, 875 (8th Cir. 2020) (citation omitted). This requires an analysis of the type of public forum involved because the type of forum frames the level of scrutiny with which we examine any restrictions in access placed on the forum. See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).

Neither party disputes that the space in Coffman is a limited public forum, and we agree. A "limited public forum is a subset of the designated public forum [that] arises 'where the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the

discussion of certain subjects.'" Bowman v. White, 444 F.3d 967, 976 (8th Cir. 2006) (citations omitted); see, e.g., Turning Point, 973 F.3d at 873-74, 876 (finding that a student union patio was a limited public forum because the university had "an unwritten policy restricting tabling at the Union Patio to registered student organizations and University departments"). A limited public forum allows the government to control access to the forum "based on the subject matter of the speech, on the identity or status of the speaker, or on the practical need to restrict access for reasons of manageability or the lack of resources to meet total demand." Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist., 640 F.3d 329, 335 (8th Cir. 2011). The government has "more flexibility to regulate speech in limited public forums to facilitate the intended purposes of those forums." Powell v. Noble, 798 F.3d 690, 699 (8th Cir. 2015). When the government opens a limited public forum, it may employ content-based restrictions to the use of that forum, but they must be both viewpoint neutral and reasonable in light of the forum's purpose. Turning Point, 973 F.3d at 876.

Here, the University opened Coffman's second floor for expressive activities by RSOs, and the disputed lounge spaces in particular were "limited to use by certain groups," namely, the nine cultural centers. See Bus. Leaders in Christ v. Univ. of Iowa, 991 F 3d. 969, 981 (8th Cir. 2021) (quoting Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 n.11 (2010)); Martinez, 561 U.S. at 681 (noting that "a defining characteristic of limited public forums [is that] the State may 'reserv[e] [them] for certain groups" (second and third alteration in original) (quoting Rosenberger,

515 U.S. at 829)). Recognizing that the renovation would limit the number of lounge spaces, the University had to make a choice as to how to apportion those spaces. After an extensive process, it settled on the provision of semi-permanent space to the student government RSOs, commuter-student RSO, and the nine cultural center RSOs, as well as the designation of the remaining square footage on Coffman's second floor as a mixed-use area reservable by any RSO. And while a public university "cannot justify viewpoint discrimination . . . on the economic fact of scarcity" but must "allocate the scarce resources on some acceptable neutral principle," Rosenberger, 515 U.S. at 835, the record here indicates that the University's process in choosing the nine cultural centers as part of the thirteen was viewpoint neutral. VNN fails to point to evidence in the record indicating otherwise. Moreover, VNN does not object to the allocation of lounge space to the student government and commuter student RSOs, which hardly bolsters the contention that the process employed by the University was somehow discriminatory with respect to viewpoints.

In the context of the University's lounge allocation, proving viewpoint discrimination requires showing that, in choosing which RSOs would occupy the disputed space, the University has targeted "particular views taken by speakers on a subject," not merely the subject matter. Id. at 829. We acknowledge that, at times, whether the government has engaged in content-based discrimination or viewpoint- based discrimination may be a fine distinction. See Iancu v. Brunetti, 588 U.S. 388, 418 (2019) (Sotomayor, J., concurring in part, dissenting in part) ("[T]he line between viewpoint-based and viewpoint-neutral

content discrimination can be 'slippery' . . . ." (citation omitted)). But here, nothing indicates that the University chose the nine cultural centers (or excluded other RSOs) based on their "specific motivating ideolog[ies] or the[ir] opinion or perspective." Reed v. Town of Gilbert, 576 U.S. 155, 168 (2015) (quoting Rosenberger, 515 U.S. at 829).

As evidence of viewpoint discrimination, VNN points to two facts: (1) that the cultural centers have each engaged in expressive activity, advocating for various issues, at several protests and events; and (2) that, each year, the University allows the nine incumbent cultural centers to occupy the lounge space without giving other RSOs an opportunity to apply.[4]

With respect to the first point, VNN fails to tether this fact to the University's space allocation decision. VNN is correct that the cultural centers engage in expressive activity; but it does not point to any record evidence suggesting that the University chose the cultural centers *because* of the centers' positions on particular topics. See Victory Through Jesus, 640 F.3d at 336 (explaining that, while a group excluded from a school flyer program was religiously affiliated, the record established that the school's denial of the group's flyers was not based upon or influenced by the group's religious affiliation or by a

[4] At times, VNN frames this second point a bit differently. Instead of claiming that the University provides no application process for other RSOs, it instead claims that the University invites applications each year but always rejects the other applicants in favor of the nine incumbents. The evidence VNN cites for this proposition outlines the University's space allocation process *before* the most recent renovation. However, we find nothing in the record to suggest that, since the 2011 decision, the University has a yearly application process inviting all RSOs to apply.

school official's agreement or disagreement with the group's views). The absence of such evidence is fatal to VNN's claim.

And the second fact to which VNN points fares no better. 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 (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) (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").

Here, the University has limited the forum to the cultural centers—RSOs which both parties agree represent cultural minorities. This is a status-based distinction rather than a viewpoint-based distinction. VNN's argument that the decision to provide lounge space to RSOs representing cultural minorities is a viewpoint-based distinction necessarily implies that a particular minority group holds a specific viewpoint. We are unconvinced. This implication that all members of each RSO share a singular, unified viewpoint such that the University's provision of space to cultural centers was a viewpoint-based distinction is unsubstantiated by any record evidence. We need not blindly accept VNN's characterization of the groups as "obviously ideologically from the left," but even if we did, the University's forum limitation is

not viewpoint discriminatory "simply because it has an 'incidental effect' on a certain subset of views." Iancu, 588 U.S. at 418 (Sotomayor, J., concurring in part, dissenting in part) (citation omitted). These RSOs participate in a host of expressive activities, and certainly within each RSO, viewpoints of individual members are bound to differ. Thus, the fact that the University chose to provide lounge space to the cultural centers is insufficient evidence of viewpoint discrimination.

Moreover, the University's refusal to open the lounge space for other RSOs to apply absent a vacancy, i.e., reevaluate the forum's purpose, is permissible because it "may legally preserve the property under its control for the use to which it is dedicated." See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist, 508 U.S. 384, 390 (1993). VNN has not pointed to any precedent suggesting the University is required to entertain yearly applications from RSOs seeking to obtain lounge space on the second floor. The refusal to provide an avenue for other RSOs to obtain lounge space, without more, does not support the conclusion that the University has engaged in viewpoint discrimination.[5] We therefore hold that no

[5] 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

reasonable jury could find that the University engaged in viewpoint discrimination.

Having found that the University's allocation of Coffman's lounge space is viewpoint neutral, we also recognize that it must be reasonable. VNN contends 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." VNN's first point is a nonstarter because it is factually inaccurate; as we have previously explained, there is nothing in the record suggesting that the University has a yearly application process in which any RSO may apply for lounge space. And to the extent that VNN does not mean to suggest that the University employs a yearly application process but is instead arguing that the University's refusal to employ a yearly application process is unreasonable, this is equivalent to VNN's second point. And VNN's second point fails because the reasonableness inquiry does not require a restriction to "be the most reasonable or the only reasonable limitation." Victory Through Jesus, 640 F.3d at 335 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808 (1985)). It must only be "reasonable in light of the purpose which the forum at issue serves,"—here, the purpose being the provision of space for cultural centers—and "[t]he reasonableness of a restriction on access is supported when 'substantial alternative channels' remain open for the restricted communication." Id. (quoting Perry, 460 U.S. at 49, 53).

VNN could very well be correct that a space allocation process in which various RSOs may "cycle through" the lounge spaces more frequently would be

disputes to gild a party's arguments.").

a more reasonable way to allocate Coffman's limited lounge space. But the reasonableness of VNN's proposed alternative does not render the University's solution unreasonable, particularly where, as here, there are ample alternative channels for communication, including use of the second floor's mixed-use space, reservable space on Coffman's ground floor, and reservable classroom meeting space around campus. See Martinez, 561 U.S. at 690 (explaining that "when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers" and collecting cases). We therefore find the University's limitation of Coffman's lounge space to be reasonable. See Victory Through Jesus, 640 F.3d at 336 (finding that an alternative communication channel, "without more" made a restriction on access to a limited public forum reasonable).

B.

VNN also argues that, even if the University did not engage in viewpoint discrimination in its allocation of lounge space, its process impermissibly vests unbridled discretion in University officials to choose which RSOs receive space. See Forsyth Cnty v. Nationalist Movement, 505 U.S. 123, 133 (1992) ("The First Amendment prohibits the vesting of . . . unbridled discretion in a government official."). The district court rejected this argument based on its characterization of the University's space allocation as being a one-time decision rather than an ongoing practice. In the district court's view, the unbridled discretion doctrine applies to concerns about restraints on future speech and is therefore

inapposite. We agree.

"[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." Jake's, Ltd., Inc. v. City of Coates, 284 F.3d 884, 889-90 (8th Cir. 2002) (alteration in original) (quoting City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988)); see also FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225-26 (1990) ("Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.'" (citation omitted)); Victory Through Jesus, 640 F.3d at 337 ("The grant of unbridled discretion in a licensing statute is suspect because it 'constitutes a prior restraint and may result in censorship.'" (citation omitted)); Advantage Media, L.L.C. v. City of Eden Prairie, 456 F.3d 793, 803-04 (8th Cir. 2006) ("[Licensing schemes] may not vest 'unbridled discretion' in individual officials to permit or deny expressive activity." (citation omitted)); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969) ("It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." (citation omitted)).

And prior restraints, by definition, suppress *future* speech. See Alexander v. United States, 509 U.S. 544, 550 (1993) ("The term 'prior restraint' is used 'to describe administrative and judicial orders forbidding certain communications when issued *in advance* of the time that such communications are to occur.'" (emphasis added) (citation omitted)); see also Citizens United v. Schneiderman, 882 F.3d 374, 386 (2d Cir. 2018) (defining "a prior restraint as 'a law, regulation, or judicial order that suppresses speech—or provides for its suppression at the discretion of government officials—on the basis of the speech's content and *in advance of its actual expression*" (emphasis added) (citation omitted)); Rodney A. Smolla, 2 Smolla & Nimmer on Freedom of Speech § 15:1 (April 2024 update) ("The phrase 'prior restraint' . . . is a term of art referring to judicial orders or administrative rules that operate to forbid expression *before it takes place*." (emphasis added)).

VNN claims that the district court mischaracterized its challenge as one to a one-time decision; in VNN's view, its challenge is to the annual "renewal of the lease agreements with the nine existing cultural centers." But while VNN characterizes its challenge as one to the renewal process, it is clear from VNN's argument that it does not seriously challenge the yearly lease renewal procedure or even the biannual review of the space-occupying RSOs; rather, it tailors its arguments to the University's 2011 allocation decision. For example, VNN's claim that there is "a standardless nature" to the University's renewal process and "nearly limitless discretion" as to which RSOs receive lounge space is belied by the record which shows a set of criteria used for the biannual evaluation—VNN does not even

mention these renewal criteria in its brief. This demonstrates that VNN's complaint is squarely with the prior decision, not with the current process used to regularly evaluate the RSOs' use of the space; we suspect that a party challenging the renewal process as vesting unbridled discretion into the hands of a government official would articulate in its brief what that process entails.

VNN attempts to circumvent the fact that it challenges the 2011 decision by arguing that "the constitutional violations occur with every annual lease renewal . . . for the same nine cultural centers." But the record is clear that the University does not wholly reevaluate which groups should occupy lounge space each year; the very purpose of the prior decision was to find a more permanent solution to Coffman's second floor space issues. Rather, the yearly lease renewal process and the biannual review allow the chosen RSOs to continue leasing lounge space—in theory, in perpetuity—so long as they continue to meet certain criteria which VNN does not challenge. We therefore agree with the district court's characterization of VNN's challenge as one to the 2011 decision, not the continuing lease renewal or biannual review process. And because VNN does not challenge an ongoing policy or process, the unbridled discretion doctrine is inapplicable. See Victory Through Jesus, 640 F.3d at 337. Accordingly, we reject their argument on this point.

III.

Having rejected both of VNN's arguments claiming that the University's allocation of lounge space in Coffman violates the First Amendment, we affirm the district court's summary judgment order.

GRASZ, Circuit Judge, concurring.

As a court of appeals, we deal with the record as the parties have presented it and the arguments as the parties have developed them. I join the court's opinion because VNN, as the party resisting summary judgment, failed to identify any genuine disputes of material fact. *See* Fed. R. Civ. P. 56(a); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). I write separately to note that viewpoint discrimination may have been lurking, undeveloped, in the record.

A public university may create a limited public forum by means of a viewpoint-neutral, content-based limitation—that is, a university may open space up to one class of speakers or certain subjects while excluding others, so long as the limitation is "reasonable" and does not discriminate based on the speakers' viewpoints. *See Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 876 & n.5 (8th Cir. 2020). It stands to reason that when space allocation is an ongoing concern, the university must "preserve the property under its control for the use *to which it is dedicated*." *Cf. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) (emphasis added). Here, the University purported to limit the forum to "cultural centers," granting space to RSOs representing "cultural minorities." In maintaining a forum for these cultural centers, subject to periodic renewal, the University must therefore preserve the forum's purpose. And yet, the record suggests the University may have allocated space to an RSO that is *ideological*, rather than cultural.

When the University first allocated the Coffman cultural spaces, it granted one of the nine coveted spots to the Women's Student Activist Collective. Now, an RSO that calls itself an "Activist Collective" sounds like an ideological group, not an RSO that represents the "cultural minority" of women writ large. But it had "Women" in its name, so at least it could claim to represent a cultural identity. Then in 2015, the RSO jettisoned "Women" from its name altogether, changing to the *Feminist* Student Activist Collective in an effort "to become more inclusive."

If names are anything to go by, the Feminist Student Activist Collective may very well *not* be an RSO based around a cultural identity, but instead ideology.[6] Indeed, it declares itself a "Feminist organization," its collective structure is "based in feminist theory," it centers all of its programming "around intersectional feminism, a feminist theory which states that all oppression is intertwined," and it "use[s] an intersectional lens to work towards eliminating interrelated inequalities that produce oppression, with a focus on gender and sexuality." This sounds like an RSO dedicated to advancing an

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[6] *See generally Fatin v. I.N.S.*, 12 F.3d 1233, 1242 (3d Cir. 1993) (Alito, J.) ("[W]e have little doubt that feminism qualifies as a political opinion "); *Rodriguez Tornes v. Garland*, 993 F.3d 743, 752 & n.5 (9th Cir. 2021) (same); Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 13 (1988) (discussing feminism as a social theory); Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 833 (1990) (quoting Linda Gordon, *What's New in Women's History*, *in* Feminist Studies/Critical Studies 20, 30 (T. de Lauretis ed., 1986)) ("Being feminist is a political choice about one's positions on a variety of contestable social issues. 'feminism is not a natural excretion of woman's experience but a controversial political interpretation and struggle, by no means universal to women.'" (cleaned up)).

ideological *viewpoint*; a viewpoint the University has favored by granting it a much-coveted, semi-permanent, rent-free office space, to the exclusion of other RSOs and their viewpoints.

One might suspect an RSO centered around the viewpoint of "intersectional feminism" is, in contrast to cultural RSOs, one in which, by its nature, "all members of [the] RSO share a singular, unified viewpoint [i.e., intersectional feminism] such that the University's provision of space to [it is] a viewpoint-based distinction." *Ante*, at 10. Granted, an RSO's name and mission statement may not mean much on their own. But had a record been developed around this issue, it might have revealed the University has abandoned the limited public forum's original purpose. Here, though, VNN did not argue the Feminist Student Activist Collective failed to comport with the forum's limited purpose. Instead, VNN contended the University, in selecting some RSOs to have cultural centers but not others, engaged in viewpoint discrimination because it favored certain RSOs' views more than others: a contention VNN failed to support with record evidence.

Today's opinion should not be read as standing for the proposition that public universities may escape legal scrutiny by cloaking viewpoint discrimination in the guise of a permissible content-based limitation. Rather, this case is resolved on VNN's failure to identify a genuine dispute of material fact to survive summary judgment. On that basis, I concur.

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Defendants – Appellees.

Appeal from U.S. District Court
for the District of Minnesota (0:20-cv-01055-PJS)

JUDGMENT

Before GRUENDER, SHEPHERD, and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 25, 2024

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-1346

Viewpoint Neutrality Now!, et al.,

Appellants,

v.

Board of Regents of the University of Minnesota, et al.,

Appellees.

Appeal from U.S. District Court for the District of Minnesota (0:20-cv-01055-PJS)

MANDATE

In accordance with the opinion and judgment of July 25, 2024, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

August 16, 2024

Acting Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs,

v.

KENDALL J. POWELL, Regent Chair, in her official capacity; STEVEN A. SVIGGUM, Regent Vice Chair, in his official capacity; MARY A. DAVENPORT; JAMES T. FARNSWORTH; KAO LY ILEAN HER; DOUGLAS A. HUEBSCH; RUTH E. JOHNSON; MIKE O. KENYANYA; JANIE S. MAYERON; DAVID J. MCMILLAN; DARRIN M. ROSHA; KODI J. VERHALEN, Regents, in their respective official capacities; JOAN T.A. GABEL, President of the University of Minnesota, in her official capacity; and CALVIN D. PHILLIPS, Vice President for Student Affairs and Dean of Students, in his official capacity,

Defendants.

Case No. 20-CV-1055 (PJS/JFD)

ORDER

Erick G. Kaardal and William F. Mohrman, MOHRMAN, KAARDAL & ERICKSON, P.A., for plaintiffs.

Carrie Ryan Gallia, UNIVERSITY OF MINNESOTA OFFICE OF THE GENERAL COUNSEL, for defendants.

Defendant University of Minnesota–Twin Cities (the "University")[1] collects a mandatory student-services fee that is used to fund registered student organizations ("RSOs"), media groups, and administrative units; support student health and wellness services; and subsidize the student union, known as Coffman Memorial Union ("Coffman"). Plaintiffs Evan Smith and Isaac Smith are University students who are required to pay the student-services fee. Plaintiff Viewpoint Neutrality Now! is an unregistered student organization at the University. Plaintiffs brought this lawsuit to challenge the manner in which the University distributes the student-services fee, arguing that it violates the First Amendment.

In February 2021, the Court granted in part and denied in part the University's motion to dismiss. *Viewpoint Neutrality Now! v. Regents of Univ. of Minn.* ("*Viewpoint Neutrality Now! I*"), 516 F. Supp. 3d 904 (D. Minn. 2021). Only two of plaintiffs' claims remain. First, plaintiffs challenge the University's process for determining which student groups may apply for funds that are restricted to media groups. Second, plaintiffs challenge the University's decision to allocate lounge space in Coffman to nine student cultural centers.

This matter is before the Court on the parties' cross-motions for summary judgment. For the reasons that follow, the Court grants the University's

[1] Although plaintiffs' complaint pleads facts about other University of Minnesota campuses, plaintiffs have clarified that they are challenging only the actions of the Twin Cities campus. Pl. Memo. Opp. Mot. Dismiss at 26 [ECF No. 14].

motion and denies plaintiffs' motion.

I. BACKGROUND

In its ruling on the University's motion to dismiss, the Court thoroughly described the facts underlying this lawsuit. *See Viewpoint Neutrality Now! I*, 516 F. Supp. 3d at 909–14. The Court provides only a summary here.

A. Student-Services Fee

Each semester, all University students who are enrolled in at least six credits must pay a mandatory student-services fee to fund "student programs, activities, and services on each campus." Carvell Decl. Ex. 1 at 1[2] [ECF No. 58-1]. The fee is comprised of three components: a student life, health, and wellbeing fee; a media fee; and a student-activity fee. Carvell Decl. ¶ 4 [ECF No. 58]. Plaintiffs' two remaining claims relate to the media fee (which funds media-related student groups) and the student life, health, and wellbeing fee (which supports Coffman and the other operations and facilities of Student Unions and Activities ("SUA")). *Id.*

A Board of Regents policy governs the student-services fee and establishes four guiding principles related to the fee:

> (a) Fee-supported programs, activities, and services shall be available to all students assessed the fee.
>
> (b) All persons involved in the development of

[2] Citations to exhibits use the internal page numbers of the documents, unless otherwise noted.

the student services fee shall recognize the relationship of the student services fee to the total tuition and other costs of education for students.

(c) The University's educational mission is well served when students have the means to engage in dynamic discussions of diverse topics in their extracurricular campus life.

(d) Decisions regarding the allocation of fees among student groups shall be made in a viewpoint-neutral manner.

Carvell Decl. Ex. 1 at 1–2. The Board of Regents policy (including these principles) is implemented through three handbooks that govern the allocation of the student- services fee: the Student Services Fee Request Handbook for Media Groups ("media- groups handbook"), the Student Services Fee Request Handbook for [Registered] Student Organizations ("RSO handbook"), and the Student Services Fee Request Handbook for Administrative Units ("administrative-units handbook"). *See* Compl. Exs. D, E, F [ECF No. 1-1].

B. Media Groups

1. 2019–2020 and 2020–2021 Process

As noted, student media groups are funded through the media-fee component of the student-services fee. Carvell Decl. ¶ 4. During the 2019–2020 and 2020–2021 academic years, a group that wished to apply for media funding was required to meet four

criteria:

1. Have a mission that indicates that the group's primary focus is to provide a media-related service (not exclusive to social media) to campus

2. Be a University Unit, Registered Student Organization (RSO), or Campus Life Program (CLP) currently registered and in good standing with Student Unions and Activities

3. Meet all minimum requirements for applying for Student Services Fee Funding[3] . . .

4. Gain approval from the VPSA/DoS [Vice Provost for Student Affairs/Dean of Students] [hereafter

[3] These requirements include that the applicant must: (1) be an administrative unit, RSO, or campus-life program registered and in good standing with SUA; (2) not receive pass-through funding from special-assessment groups; (3) provide financial documents for the 12 consecutive months prior to applying; (4) comply with Student Activities Financial Policies for RSOs (if it is an RSO); (5) complete the Student Services Fee Canvas Course; (6) operate as a non-profit; (7) not be a partisan political organization; (8) have students participate in applying for and spending fees; (9) demonstrate expenditures in compliance with the budget; (10) make all budgets and financial records available upon request; (11) meet audit requirements; (12) comply with the University's Equal Opportunity Statement; (13) adhere to approved accounting procedures; and (14) indicate "SSF Funded" on all marketing for events funded with SSF funds. Carvell Decl. Ex. 2 at 10–11. In 2019–2020, applicants were also required to complete a Financial Management Workshop. Compl. Ex. D at 10.

> "VPSA"] (or designee) to apply for SSF [student-services fee] funds as a Media Group. The VPSA/DoS shall have the exclusive authority to determine which applicants may apply to a SSF committee

Carvell Decl. Ex. 2 at 15 [ECF No. 58-2].[4]

If an applicant group met the four minimum criteria, the group could apply for funds to cover operational, event, and project costs. *Id*. at 16–17. A recommendation to grant or deny the applied-for funding was initially made by a SSF committee, after which the broader University community had the opportunity to give feedback. *Id*. at 19–21. If a group was dissatisfied with the committee's recommendation, and if the group could provide evidence that the committee "violated its own rules," "exhibited bias against an organization," or "did not make a decision in a viewpoint-neutral manner," the group had the opportunity to appeal the committee's recommendation to the VPSA, who made the ultimate decision on any appeal. *Id*. at 21–22.

2. 2021–2022 and 2022–2023 Processes

After the Court issued its ruling on the University's motion to dismiss, the University responded by revising the media-groups handbook for the 2021–2022 academic year. Like the earlier handbooks, the 2021–2022 handbook requires any group applying for media-group funding to have a

[4] The Court cites to the 2020–2021 handbook in describing the University's prior media-group-funding application process because the 2020-2021 process was largely unchanged from the 2019–2020 process. *See* Compl. Ex. D.

media-related primary focus; be a registered University Unit, RSO, or CLP in good standing with SUA; meet all of the general requirements for applying for Student Services Fee Funding; and gain approval from the VPSA.[5] Carvell Decl. Ex. 3 at 16 [ECF No. 58-3]. The new handbook also requires an applicant group to "have applied for and received SSF operations funds through the student groups SSF Process . . . for the past three consecutive academic years," provide evidence that the group has fulfilled all reporting requirements to the University during the past three years, and "[j]ustify a budget request that exceeds the parameters of the operations guidelines for student groups." *Id.*

In contrast to prior versions of the handbooks, the 2021–2022 media-groups handbook eliminates the requirement that "[t]he VPSA/DoS shall have the exclusive authority to determine which applicants may apply to a SSF committee." *Compare* Carvell Decl. Ex. 2 at 15, *with* Carvell Decl. Ex. 3 at 16. The new handbook also establishes a new application process for groups to follow after they meet the minimum funding requirements. Under the updated process, an applicant group must meet with the SSF advisor and present its petition to a group of University stakeholders. Following that presentation, the Student Affairs Senior Finance Manager, the leadership team of the Student Groups SSF committee (minus the appeals chair), and the Chair of the Media Groups SSF committee deliberate

[5] During the hearing on this motion, the University's attorney represented to the Court that the requirement that an applicant group gain approval from the VPSA was not intended to operate as a pre-approval requirement or serve a gate-keeping function to apply for funding. If that is true, the Court recommends that the University amend the text of the policy so that it is consistent with the representations of the University's attorney.

and provide a recommendation to the VPSA. After receiving and reviewing the recommendation, the VPSA informs the applicant group of her decision. If the group disagrees with the VPSA's decision, the group may appeal the VPSA's decision to the VPSA (i.e., the group may ask the VPSA to reconsider her decision). The VPSA must then consult with the Student Groups SSF committee appeals chair, the SSF advisor, and the Student Affairs Senior Finance Manager before reaching a final decision. *Id.* at 16–17.

The University amended the media-group handbook again for the 2022–2023 academic year. The 2022–2023 media-group funding application process is nearly identical to the 2021–2022 process, with the exception that the Senior Assistant to the VPSA, in consultation with the Senior Associate Vice President for Student Affairs, makes initial funding decisions. If a group appeals the decision, the VPSA rules on the appeal. *See* Carvell 2nd Decl. Ex. 4 at 14 [ECF No. 65-1]. The 2022–2023 media-group-funding process thus eliminates one of the more troublesome aspects of the 2021–2022 process, which required the VPSA to rule on appeals of her own decisions. Under the 2022–2023 process, the person who makes the initial decision is no longer the same as the person who rules on an appeal of that decision.

C. Space in Coffman

A portion of the student-services fee is also used to subsidize the Coffman Memorial Union. Carvell Decl. ¶ 4. Several student groups have dedicated space in Coffman, including nine student cultural centers: American Indian Student Cultural Center, Al-Madinah Cultural Center ("AMCC"),

Asian-American Student Union, Black Student Union ("BSU"), Disabled Student Cultural Center, Feminist Student Activist Collective ("FSAC"), Mi Gente Latinx Student Cultural Center (formerly "La Raza"), Minnesota International Student Association, and Queer Student Cultural Center ("QSCC") (collectively, the "cultural centers"). Towle Decl. ¶ 8 [ECF No. 57].

These cultural centers were allocated their current space in Coffman in 2011, following a renovation of the Union. *Id.* ¶¶ 10, 12–13. The then-VPSA used the occasion of Coffman's renovation to seek a long-term solution to the challenge of allocating student-group space in the Union, *id.* ¶ 10, which had been an "ongoing issue" since 1940, Towle Decl. Ex. B [ECF No. 57-2], because the demand for student- group office space always surpassed the space available, Kaardal Decl. Ex. 26 [ECF No. 50-3 at 9–11].

The VPSA asked the Board of Governors to propose a solution to the space- allocation problem. Towle Decl. Ex. B. The Board "researched office space allocation practices of comparable schools nationally, conducted a survey, formed an ad-hoc committee and held three public forums." *Id.* On April 7, 2011, the Board issued its recommendation to the VPSA. *Id.* The Board recommended that the cultural centers be allocated "68% of the assignable square feet of [the] second floor" in Coffman, which is the amount of space the centers had been using prior to the renovation. *Id.* After reviewing the Board's findings and recommendations and meeting with a group of concerned students, the VPSA approved the Board's plan on May 16, 2011, finding that it was "reasonable and appropriate." Towle Decl. Ex. C [ECF No. 57-3].

The cultural centers moved into their dedicated space in Coffman following completion of the renovation on August 26, 2013, and have remained there since. Kaardal Decl. Ex. 27 [ECF No. 50-3 at 17]; Towle Decl. ¶ 13. The cultural centers hold their spaces on a "semi-permanent basis subject to periodic renewal." Towle Decl. ¶ 13; Kaardal Decl. Ex. 9 [ECF No. 50-1 at 67–71].

Other than the cultural centers, the only student groups with dedicated space in Coffman are Commuter Connection ("a campus life program of SUA that serves commuter students"), Towle Decl. ¶ 6, and the University's registered student governance associations (the Minnesota Students Association, the Council of Graduate Students, and the Professional Student Government), *id.* ¶ 7. Other RSOs do not have permanent space in Coffman, but they are able to use "multi-use space that is designed for all student groups" and reserve small rooms for short-term needs (such as event- planning meetings). Kaardal Decl. Ex. 14 [ECF No. 50-2 at 14].

II. LEGAL STANDARDS

A. Standard of Review

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute over a fact is "material" only if its resolution might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the

nonmoving party." *Id.*

B. First Amendment Framework[6]

"In defining the parameters of a speaker's First Amendment right of access to public property, the Supreme Court looks first to the nature of the forum the public entity is providing." *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 334 (8th Cir. 2011). It is now well-established that the "metaphysical" forum created by a student-services-fee fund is a limited public forum. *See Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth ("Southworth I")*, 529 U.S. 217, 233 (2000)*; Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995); *Gerlich v. Leath*, 861 F.3d 697, 705 (8th Cir. 2017); *Viewpoint Neutrality Now! I*, 516 F. Supp. 3d at 918. Accordingly, the Court looks to the First Amendment standards applicable to limited public forums in analyzing plaintiffs' challenges to the University policies at issue here. *Viewpoint Neutrality Now! I*, 516 F. Supp. 3d at 919–22. The Court previously summarized those standards as follows:

> [I]n order to pass constitutional muster, [1] the University's process for allocating student-services fees must be viewpoint neutral, [2] the University's restrictions on any limited public forum created by those fees must be reasonable, and [3] the University must

[6] The Court discussed the applicable legal standards at great length in its prior order on the University's motion to dismiss. *See Viewpoint Neutrality Now! I*, 516 F. Supp. 3d at 917–22. The Court provides only a brief summary here.

> not vest unbridled discretion in the decision-makers responsible for enforcing those restrictions.

Viewpoint Neutrality Now! I, 516 F. Supp. 3d at 922.

1. Viewpoint Neutral

The government may restrict a limited public forum "to the limited and legitimate purposes for which it was created" without running afoul of the First Amendment, as long as the government does not engage in viewpoint discrimination. *Rosenberger*, 515 U.S. at 829–30. Viewpoint discrimination occurs when the government targets "particular views taken by speakers on a subject," *id.* at 829, or "when the rationale for its regulation of speech is 'the specific motivating ideology or the opinion or perspective of the speaker.'" *Gerlich*, 861 F.3d at 705 (quoting *Rosenberger*, 515 U.S. at 829).

As this Court previously explained,

> [O]nce a university chooses to create a limited public forum and restrict it to a particular type of speaker (e.g., RSOs) or a particular subject (e.g., abortion), the university cannot then exclude speakers based on their ideology (e.g., conservative or liberal) or based on their viewpoint (e.g., pro-life or pro-choice). For example, a university would engage in viewpoint discrimination if it allowed "a group of Republicans or Presbyterians to [speak on campus] while denying

> Democrats or Mormons the same privilege." *Widmar v. Vincent*, 454 U.S. 263, 281 (1981) (Stevens, J., concurring); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (school's denial of after-school meeting space to club that wanted to discuss permissible topics, like child rearing, from a religious perspective was not viewpoint neutral); *Rosenberger*, 515 U.S. at 837 (university's refusal to pay printing fees for student newspaper publishing on permissible topics from a religious perspective was viewpoint discriminatory); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school's denial of after-school meeting space to church to screen films with religious views on permissible topics, like family values, violated viewpoint neutrality).

Viewpoint Neutrality Now! I, 516 F. Supp. 3d at 919.

2. Reasonable

In addition to being viewpoint neutral, restrictions on access to a limited public forum must be reasonable—although they do not need to be the "most reasonable or the only reasonable limitation[s]." *Cornelius v. NAACP Legal Def. & Educ. Fund., Inc.*, 473 U.S. 788, 808 (1985). Factors relevant to the reasonableness of restrictions include "(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." *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 876 (8th Cir. 2020).

3. Unbridled-Discretion Doctrine

The unbridled-discretion doctrine grew out of Supreme Court decisions addressing the licensing of public forums—and, in particular, out of concerns that licensing decisions can operate as prior restraints on protected speech. *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) ("[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."). The doctrine addresses two primary concerns: "(1) the risk that the potential licensees [or applicants] will engage in self-censorship so as to avoid governmental censorship (i.e., being denied a license [or access to the forum]); and (2) the risk that the decision-maker will engage in undetectable viewpoint discrimination." *Viewpoint Neutrality Now! I*, 516 F. Supp. 3d at 920 (citing *Southworth v. Bd. of Regents of Univ. of Wis. Sys.* ("*Southworth II*"), 307 F.3d 566, 579 (7th Cir. 2002), and *City of Lakewood*, 486 U.S. at 759).

The Supreme Court has never applied the unbridled-discretion doctrine to a limited public forum, but this Court previously predicted that "if the Eighth Circuit were directly confronted with the question," the court would find that the unbridled-discretion doctrine applies in cases such as this, in which a public university funds private student speech through a mandatory student-services fee.

Viewpoint Neutrality Now! I, 516 F. Supp. 3d at 922. Accordingly, the Court held that "the University must not vest unbridled discretion in the decision-makers responsible for enforcing [the restrictions on the limited public forum created by the student-services-fee fund]." *Id.*

III. ANALYSIS

With these First Amendment principles in mind, the Court turns to plaintiffs' remaining claims.

A. Media-Group Claim

Plaintiffs argue that the University's media-group-funding process is unconstitutional because "[t]he Vice-Provost for Student Affairs and Dean of Students [VPSA] has unbridled discretion as to whom may apply for media-group funding violating viewpoint neutrality principles." Pl. Memo. Supp. Summ. J. ("Pl. Memo.") at 27 [ECF No. 49]. The University does not deny that the media-group-funding process challenged in plaintiffs' complaint was unconstitutional for this reason. But the University points out that the process challenged in plaintiffs' complaint is no longer in effect, and plaintiffs have not moved to amend their complaint to challenge the current process. According to the University, this moots the case.

The jurisdiction of federal courts is limited to "actual, ongoing cases and controversies." *Young Am.'s Found. v. Kaler*, 14 F.4th 879, 886 (8th Cir. 2021) (quoting *Ali v. Cangemi*, 419 F.3d 722, 723 (8th Cir. 2005) (en banc)). "A case is considered moot when, during the course of litigation, the issues presented in a case lose their life because of the

passage of time or a change in circumstances and a federal court can no longer grant effective relief." *Id.* (quoting *Ali*, 419 F.3d at 723) (alterations omitted).

There are limited exceptions to the mootness doctrine. For example, a case is not moot when a "defendant attempts to avoid appellate review by voluntarily ceasing allegedly illegal conduct" or when a case is "capable of repetition, yet evading review." *Iowa Prot. & Advoc. Servs. v. Tanager, Inc.*, 427 F.3d 541, 543–44 (8th Cir. 2005). Here, plaintiffs argue that their challenge to the University's media-group-funding process is not moot because "[i]t is only on the eve of the VNN's summary judgment motion that the University makes cosmetic changes to the [challenged] policy." Pl. Summ. J. Resp. & Reply ("Pl. Resp. & Reply") at 7 [ECF No. 61].

Plaintiffs' argument relies on the Supreme Court's opinion in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), and particularly on the Court's assertion that "[a] case can become moot by the defendant's voluntary cessation only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Pl. Resp. & Reply at 5 (quoting *Laidlaw*, 528 U.S. at 190). But plaintiffs ignore more recent cases that clarify that the mootness analysis differs when the defendant is a government entity and the allegedly wrongful behavior is a government policy. Just last year, the Eighth Circuit explained that an allegedly unlawful government policy that has been revoked or superseded

> is not "capable of repetition yet evading review" merely because the governing body has the power to reenact the policy after the lawsuit is dismissed. Instead,

> "the exceptions are rare and typically involve situations where it is virtually certain that the repealed policy will be reenacted."

Kaler, 14 F.4th at 886 (alterations omitted) (quoting *Teague v. Cooper*, 720 F.3d 973, 977 (8th Cir. 2013)).

In *Kaler*, the court considered whether a student group's constitutional challenge to a University of Minnesota events policy was mooted because the University had changed the policy after the student group's lawsuit had been filed. The court noted that "[t]he University did not merely repackage the [old policy] under a new banner but instead amended the substance of the policy seemingly to address [plaintiffs'] concerns." *Id*. The court also concluded that the plaintiffs had "not shown that it is 'virtually certain' that the [policy] will be reenacted." *Id.* at 887. In light of these two facts, the court concluded the student group's claim was moot.

For the same reasons, plaintiffs' challenge to the University's media-group- funding process is moot. Plaintiffs' complaint refers only to the University's media-group-funding process for the 2019–2020 academic year. *See* Compl. Ex. D. However, the University changed the process for the 2021–2022 and 2022–2023 academic years. Despite making arguments about the new process in their briefs, plaintiffs have not made any effort to amend their complaint to explicitly challenge the new process.

Like the policy at issue in *Kaler*, the new media-group-funding process is not a mere repackaging of the old process; instead, the University amended the process to address plaintiffs'

First Amendment concerns.[7] For instance, the University omitted the policy language vesting the VPSA with the "exclusive authority" to decide who may apply for media-group funding. *Compare* Carvell Decl. Ex. 3 at 16–17, *with* Compl. Ex. D at 15. The new process also clarifies that before a funding request reaches the VPSA, the request will be evaluated by a separate committee, and that committee will give the VPSA a recommendation as to the request. And the new process sets forth a clearer mechanism by which a group whose funding request is denied may appeal the decision. Carvell Decl. Ex. 3 at 17. These changes are clearly meant to address plaintiffs' concerns about the unbridled discretion previously granted to the VPSA.

Not only has the University made substantive changes to the media-group- funding process, but plaintiffs have not cited any evidence that it is "virtually certain" that the University will revert to the old process in the future. *Cf. Kaler*, 14 F.4th at 887. Instead, plaintiffs repeatedly cite to case law applying a different, inapplicable standard for determining whether their claim is moot.

To be clear: The Court has found only that plaintiffs' media-groups claim is moot. The Court has not held that the University's new media-group-funding process is constitutional. That issue is not

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[7] Plaintiffs argue that the fact that the University changed its policy in response to this litigation and the Court's prior order should cause the Court to doubt that the changes are permanent and weigh *against* a finding of mootness. *See* Pl. Resp. & Reply at 5–7. This argument is inconsistent with *Kaler*, in which the Eighth Circuit treated the fact that the University responded to constitutional concerns raised by the litigation as a reason to *dismiss* the claims as moot. 14 F.4th at 887. This Court does likewise. The University deserves credit for voluntarily addressing the constitutional concerns identified by this Court.

before the Court, as the new process is not mentioned in the complaint. For present purposes, the fact that the new process (especially the 2022–2023 process) appears to address the concerns that this Court expressed about the old process is relevant only to show that the University did more than repackage the old process.[8]

In sum, plaintiffs' constitutional attack on the process by which groups apply for media-specific funding is moot because the University has substantively changed the process since plaintiffs filed their complaint and there is no evidence that the University is certain (or even likely) to resurrect the old process in the future. The Court therefore dismisses plaintiffs' media-group claim as moot.

B. Coffman-Space Claim

Plaintiffs' other remaining claim is that the University violated the First Amendment when it allocated space in Coffman to the nine student cultural centers. Plaintiffs acknowledge that the University was permitted to allocate space in Coffman to some groups but not to others because the space is a limited public forum. Nevertheless, plaintiffs allege that the University engaged in viewpoint discrimination by allocating space to the nine cultural centers at the exclusion of "other minority groups [and] ideological cultural groups."

[8] If the new process operates as the University represented to the Court during oral argument, the new process may pass constitutional muster. Counsel for the University acknowledged, however, that much of her understanding of how the new process works relies upon assumptions that are not explicitly spelled out in the media- groups handbook. The University might avoid a lawsuit by incorporating counsel's assumptions into its written policy.

Pl. Memo. at 24. According to plaintiffs, the University impermissibly "embraced the ideology of the nine historical cultural centers as sole representatives of the 'minoritized identities' of the college community." Pl. Resp. & Reply at 10. In addition, plaintiffs allege that, in deciding to allocate the space in Coffman, University officials exercised discretion that was unbridled and hence unconstitutional.

1. There Is No Evidence of Viewpoint Discrimination

The record does not support plaintiffs' contention that the University's decisions regarding the allocation of Coffman space were motivated by viewpoint discrimination. Indeed, the only viewpoint plaintiffs have identified is that the University intended "to promote one student organization over that of another with preferential treatment by providing Coffman space." Pl. Memo. at 26. They argue that while the University is permitted to limit a forum to certain groups, *see id.* at 21–22, it cannot endorse the "viewpoint" that the groups to which it limits the forum are a "good thing," *id*. at 26.

Plaintiffs' argument conflates content and viewpoint discrimination. As this Court previously explained:

> A limited public forum is *limited*—and thus it follows that the government may confine the forum "to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829. In placing limits on the forum, the government cannot engage in

> viewpoint discrimination, but it can engage in content discrimination to preserve "the purposes of that limited forum." *Id.* at 829–30. The difference between viewpoint discrimination and content discrimination is, at times, "'slippery.'" *Iancu v. Brunetti*, 139 S. Ct. 2294, 2313 (2019) (Sotomayor, J., concurring in part). "Content discrimination occurs whenever a government regulates 'particular speech because of the topic discussed or the idea or message expressed.'" *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). Viewpoint discrimination occurs whenever a government targets "particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829. At its core, then, viewpoint discrimination is "an egregious form of content discrimination." *Id.*

Viewpoint Neutrality Now! I, 516 F. Supp. 3d at 919.

The problem with plaintiffs' challenge is that it could be made to *any* limited forum, as *every* limited forum includes some participants and excludes others.[9] It may be true that the University's

[9] By way of example, suppose that the University had limited the space in Coffman to music groups—that is, to groups that are interested in playing music. That decision would be classic (and permissible) content discrimination. *See Brunetti*, 139 S. Ct. at 2313 (Sotomayor, J., concurring) (describing content discrimination). An opponent of the University's decision might argue that the University has endorsed the "viewpoint" that

allocation of space was motivated by its belief that supporting cultural centers is a worthwhile goal, but that is not viewpoint discrimination. It 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.[10] *See Gerlich*, 861 F.3d at 705 ("The state engages in viewpoint discrimination when the rationale for its regulation of speech is 'the specific motivating ideology or the opinion or perspective of the speaker.'" (quoting *Rosenberger*, 515 U.S. at 829)); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 694–95 (2010) (policy that draws "draws no distinction between groups based on their message or perspective" is "textbook viewpoint neutral").

The record does not provide evidence of viewpoint discrimination. Instead, the record shows that the cultural centers engage in a wide range of expressive activity that is untethered to any specific issue, let alone to any specific viewpoint. *See* Pl.

"music groups are good." If such an argument were successful, then no limited forum would be constitutional, as an opponent of the forum could always argue that, by including *x* and excluding *not x*, the University had endorsed the "viewpoint" that "*x* is good."

[10] And thus, if the University did limit space in Coffman to only music groups, the University could favor certain music groups over others based on content (*e.g.*, the University could favor groups that play string instruments over those that do not), but the University could not favor certain music groups over others based on viewpoint (e.g., the University could not favor groups that played "patriotic" music over those that do not).

Memo. at 12–15 (describing examples of expressive activity undertaken by the cultural centers, including La Raza's advocacy to make the University a "sanctuary campus," the QSCC's sponsorship of "Kinky U" meetings, the FSAC's sponsorship of pro-choice events, the BSU's organization of a protest related to policing, and AMCC's organization of events for Ramadan). Moreover, plaintiffs have not cited any evidence that the student groups who do not have dedicated space allocated to them in Coffman are denied such access because of their viewpoints. *Cf. id.* at 26 (arguing that "the University has preferred the [cultural centers] over others . . . that may be different or opposed to the historical cultural ideologies the University has aligned itself," without explaining what these different or opposite ideologies might be and without citing to anything in the record that would support the claim).

Plaintiffs' argument boils down to this: Plaintiffs want the University to adopt a different allocation of space in Coffman than the one the University implemented when it renovated the Union in 2011. Plaintiffs believe that their preferred allocation would serve the University's goals better than the University's allocation. *See* Pl. Resp. & Reply at 4 (arguing that the University should "rotat[e] other student groups with 'minoritized identities' (as well as other groups) through Coffman's student lounges"). But disagreement with the University over how its goals can best be achieved does not make a constitutional claim. *Cf. Cornelius*, 473 U.S. at 808 ("The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the *most* reasonable or the *only* reasonable limitation."

(emphasis added)).[11]

Plaintiffs cannot survive the University's motion for summary judgment without pointing the Court to *any* record evidence that supports their claim. *See Bedford v. Doe*, 880 F.3d 993, 996 (8th Cir. 2018) ("A principal purpose of the summary-judgment procedure 'is to isolate and dispose of factually unsupported claims or defenses' . . . .[A] movant will be entitled to summary judgment 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24, 327 (1986))). On this record, a reasonable jury could not find that viewpoint discrimination occurred, and thus the University is entitled to summary judgment.

2. Plaintiffs Cannot Prevail on Their Unbridled-Discretion Theory

Plaintiffs also argue that the University's decision about how to allocate space in Coffman should be invalidated because when the VPSA made that decision in 2011, the VPSA's discretion was "unbridled." Pl. Resp. & Reply at 11.

A policy providing unbridled discretion to a decision-maker is most concerning when future speech might be chilled by the policy, *see, e.g., City of*

[11] Plaintiffs did not explicitly allege that the University's space-allocation decision was unreasonable. Even if they had, however, the Court would find that the University's decision was reasonable in light of the University's expertise in creating policies that benefit the campus community, the purposes served by Coffman, and the alternative channels of communication and spaces available to RSOs. *See Rhodes*, 973 F.3d at 876.

Lakewood, 486 U.S. at 757 ("[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."); *Victory Through Jesus*, 640 F.3d at 337 (same); *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992) (explaining that First Amendment facial challenges present an "exception from general standing rules" because of the risk that expressive activity will be chilled), and when it would be difficult for a court to detect impermissible viewpoint discrimination, *Viewpoint Neutrality Now!*, 516 F. Supp. 3d at 920 (citing *City of Lakewood*, 486 U.S. at 759). As explained in the Court's prior order, the unbridled-discretion doctrine developed out of Supreme Court jurisprudence "evaluating the adequacy of safeguards in schemes that license access to public forums." *Id.* (collecting cases). Facial unbridled-discretion challenges are most often raised by plaintiffs who are concerned about the chilling of future speech.

Such concerns are not present in this case. Plaintiffs do not challenge an ongoing process or policy. Instead, they challenge a one-time decision that was made long before they enrolled at the University. *See* Towle Decl. ¶ 10 (University's allocation of space was intended to be a "long-term solution"); *id.* ¶ 13 (cultural centers hold space in Coffman on a "semi-permanent basis," subject only to "periodic renewal"). That decision could not possibly chill plaintiffs' speech. Moreover, the Court has just found that the University's decision was untainted by viewpoint discrimination, so any concern about undetectable discrimination is greatly diminished.

Plaintiffs have not cited—and the Court has not found—any case that suggests that a plaintiff

may overturn a *past* decision based on the "unbridled discretion" that was enjoyed by the decision-maker at the time that the decision was made, particularly when the Court has determined that the past decision was not motivated by viewpoint discrimination. In fact, the Supreme Court appeared to have rejected just such a challenge in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). In *Forbes*, the Court upheld a broadcaster's decision to exclude a political candidate from a televised debate because there was no evidence linking the candidate's exclusion to his viewpoints. The Court upheld the decision notwithstanding the dissent's complaints about the "ad hoc" and "standardless" nature of the decision and the "nearly limitless discretion" of the broadcaster. *Id*. at 682–86.

In the same way, this Court finds no reason to invalidate the University's decision to allocate space in Coffman to the cultural centers, even if the decision was not limited by a clearly articulated set of standards.[12] The decision was "a reasonable,

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[12] The Eighth Circuit relied on similar reasoning when it rejected a facial challenge to a school district's procedure for granting access to a "Backpack Flyers for Students" program, despite the plaintiff organization's argument that the procedure granted a school official unbridled discretion to grant access to the program. *See Victory for Jesus*, 640 F.3d at 337. In explaining its decision, the court noted: "Neither the Supreme Court nor this court has ever applied a stringent, facial standard of judicial oversight to the discretionary decisions of school officials administering a nonpublic educational forum. In our view, Victory's contrary contention cannot be squared with the Supreme Court's decision in *Forbes*, which upheld a public broadcaster's *ad hoc* but reasonable exclusion of a qualified candidate from a campaign debate over a dissent that objected to the exercise of 'nearly limitless discretion' in controlling a nonpublic forum for *political* speech." *Id.* (citation omitted)

viewpoint-neutral exercise of . . . discretion," *see id.* at 683, which is all that the Constitution requires.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' motion for summary judgment [ECF No. 47] is DENIED.

2. Defendants' motion for summary judgment [ECF No. 54] is GRANTED.

3. Plaintiffs' complaint [ECF No. 1] is DISMISSED WITH PREJUDICE AND ON THE MERITS.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 30, 2023

s/Patrick J. Schiltz
Patrick J. Schiltz, Chief Judge
United States District Court

(emphasis in original).

UNITED STATES DISTRICT COURT
District of Minnesota

Viewpoint Neutrality Now!, Evan Smith, Isaac Smith,

Plaintiffs,

v.

Kendall J. Powell, Steven A. Sviggum, Mary A. Davenport, Kao Ly Ilean Her, Mike O. Kenyanya, Janie S. Mayeron, David J. McMillan, Darrin M. Rosha, Joan T.A. Gabel, James T. Farnsworth, Douglas A. Huebsch, Ruth E. Johnson, Kodi J. Verhalen, Calvin D. Phillips,

Defendants.

AMENDED JUDGMENT IN A CIVIL CASE

Case Number: 20-cv-1055 PJS/JFD

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiffs' motion for summary judgment [ECF No. 47] is DENIED.

2. Defendants' motion for summary judgment [ECF No. 54] is GRANTED.

3. Plaintiffs' complaint [ECF No. 1] is DISMISSED WITH PREJUDICE AND ON THE MERITS.

Date: 2/1/2023 KATE M. FOGARTY, CLERK

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

October 21, 2024

Scott S. Harris
Clerk of the Court
(202) 479-3011

Mr. Erick G. Kaardal
Mohrman, Kaardal & Erickson P.A.
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402

Re: Viewpoint Neutrality Now!, et al.
v. Board of Regents of the University
of Minnesota, et al.
Application No. 24A378

Dear Mr. Kaardal:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kavanaugh, who on October 21, 2024, extended the time to and including December 12, 2024.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk
by s/
Rashonda Garner
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

NOTIFICATION LIST

Scott S. Harris
Clerk of the Court
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Mr. Erick G. Kaardal
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