No. 24-655

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, et al.,
Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Reasons for Denying the Petition

Petitioners Viewpoint Neutrality Now!, Evan Smith, and Isaac Smith assert that this case is ripe for review by this Court because the U.S. Court of Appeals for the Eighth Circuit purportedly decided an important issue of federal law and created a circuit split with its opinion in *Viewpoint Neutrality Now!, et al. v. Board of Regents of the University of Minnesota, et al.*, 109 F.4th 1033 (8th Cir. 2024). Neither assertion supports this Court's grant of certiorari.

First, Petitioners assert that the Eighth Circuit, in its decision, interpreted this Court's decision in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), as giving rise to two different kinds of claims under the First Amendment: a claim for viewpoint discrimination and a claim for status discrimination. (Petition at 30.) A review of the Eighth Circuit's opinion makes clear that it did no such thing.

Notably, the opinion is silent as to the existence of a claim for status discrimination, which is to be expected as Petitioners did not assert such a claim. The court cited *Perry* for the settled proposition that the University of Minnesota, just like any other property owner, has the right to determine how its property is used, which here includes the right to establish a limited public forum based on "distinctions in access on the basis of subject matter and speaker identity." (*Id.* at A-12.) The court did nothing more than reassert this Court's definition of a limited public forum in

response to Petitioners' assertion that the University engaged in viewpoint discrimination when it allocated space in the student union to nine student cultural centers.

Instead, the Eighth Circuit affirmed the district court's grant of summary judgment to the University and its officials because "no reasonable jury could find that the University engaged in viewpoint discrimination" based on the factual record in this case. (*Id.* at A-13–A-14.) Specifically, the court asked Petitioners "twice at oral argument to point . . . to evidence that the University chose the nine [cultural centers] because of their viewpoints," and Petitioners pointed only to the fact that the nine cultural centers have occupied the space for many years. (*Id.* at A-13 n.5.) It is the wholesale lack of evidence that the University's space allocation decision was influenced by viewpoint that is dispositive here; nothing in the Eighth Circuit's opinion recognized a cause of action for status-based discrimination.

Second, Petitioners assert that the Eighth Circuit's decision in this case creates a split with the U.S. Court of Appeals for the Fourth Circuit. This is not the case. Petitioners point to *Speech First, Inc. v. Sands*, 69 F.4th 184, 189–90 (4th Cir. 2023), *vacated on other grounds*, 144 S. Ct. 675 (U.S. Mar. 4, 2024). *Speech First* concerned a policy at Virginia Tech that required the distribution of literature on campus to be sponsored by a university-affiliated organization. Speech First challenged the policy as an unconstitutional "speaker-based restriction" and cited the Eighth Circuit's decision in *Turning Point*

USA at Arkansas State University v. Rhodes, 973 F.3d 868 (8th Cir. 2020), for support. In affirming the district court's denial of Speech First's motion to enjoin the policy, the Fourth Circuit did not split from the Eighth Circuit but instead held that it was too early to determine if the policy violated the First Amendment because the record in the case lacked "information about the demands on reservable spaces . . . and the availability of alternatives for students who are not members" of university-affiliated organizations. *Speech First*, 69 F.4th at 201. Put another way, the Fourth Circuit did not opine on the holding in *Turning Point*, let alone split from it.

Nor does this case give rise to a circuit split with the decision of the U.S. Court of Appeals for the Seventh Circuit in *Southworth v. Board of Regents of the University of Wisconsin System*, 376 F.3d 757, 769 (7th Cir. 2004). *Southworth* held that it was impermissible for a University to consider the length of time a student organization has existed when allocating funds to the organization because doing so perpetuated "a prior system which lacked the constitutional safeguards of viewpoint neutrality." Here, there is no evidence in the record that the length of time a group has existed affected the University's space allocation decisions, and, more importantly, there has been no finding that the University's prior space allocation process "lacked the constitutional safeguards of viewpoint neutrality." *Southworth* is simply inapposite.

In sum, the petition does not present the compelling reasons this Court looks for when

considering whether to grant a writ of certiorari. Sup. Ct. R. 10. It should therefore be denied.

Dated: March 5, 2025

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Certificate of Compliance

I hereby certify that this brief conforms to the requirements of Supreme Court Rule 31.1(h). The length of the brief is 781 words and was prepared using Microsoft Word software.

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