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

BUSINESS LEADERS IN CHRIST, *Plaintiff*, v. THE UNIVERSITY OF IOWA, *et al.*, *Defendants*.	Case No.: 3:17-cv-00080-SMR-SBJ **DEFENDANTS' RESISTANCE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

BLinC v. The University of Iowa is a difficult case. In its briefing, Plaintiff Business Leaders in Christ ("BLinC") exhaustively discusses tangential issues such as the University's Title IX programs, various scholarship programs and groups maintained in the spirit of inclusion and affirmative action, and the Christian Legal Society conflict which took place over a decade ago. The immensely important constitutional question before the court: which pillar of our democracy will prevail when First Amendment freedoms conflict with civil rights laws?

This case involves a rapidly-developing and unsettled area of law and is certainly not, as Plaintiff suggests, "open and shut." Throughout its briefing, Plaintiff imputes significant ill will to the Defendant University and its Administrators and claims that it engaged in viewpoint discrimination and otherwise violated Plaintiff's First Amendment rights in its attempts to enforce its long-standing Human Rights Policy. In the same breath, Plaintiff rightfully praises the University's historic tradition of inclusion and the high value it places on religious diversity. At the heart of this matter lies the fact that the Defendant University and its administrators did the best they could to apply the University's Human Rights policy in a viewpoint-neutral way, and to fairly respond to a legitimate student complaint. Defendants attempted to resolve a seemingly unresolvable conflict in order to protect the University's mission and compelling interests in securing the civil rights of minority students and upholding the First and Fourteenth Amendments, while continuing to value discourse, education, and the marketplace of ideas.

Though this is a difficult case and a developing area of law, the University asserts that it cannot fund, with taxpayer money, a group which openly discriminates against members of a protected class by excluding them from the ranks of its leadership on the basis of sexual orientation and gender. To do so would contravene the public's will to have civil rights laws in

place, and would violate the Constitutional rights of students from minority groups. BLinC argues that without official student recognition, it simply could not survive on campus, and that as a religious group it has protected rights to "equally access" public funds. BLinC also contends that the University engaged in viewpoint discrimination by failing to apply its Human Rights Policy consistently. However, as a government actor, the University has both the right and the heavy responsibility to regulate BLinC's speech within its limited public forum in order to protect the rights of minority students to equally access their publicly-funded educational opportunities. BLinC has not been silenced by this deregistration. It may continue its activities and speech as before, and even as an unregistered student organization may access a significant number of University resources. If BLinC wishes to discriminate against LGBT+ students, it may do so, but it may not fund its efforts with dollars provided by the State of Iowa.

FACTUAL BACKGROUND

This case begins with a young, evangelical Christian man named Marcus Miller. At the time of the events at issue in the Petition, Miller was engaging with several Christian student groups on campus. Defendants' Statement of Undisputed Material Facts ("DSUMF") ¶ 4; Defendants' Objections to Plaintiff's Statement of Undisputed Material Facts ("DOSUMF") ¶ 153. He held many evangelical Christian views, and felt that the Christian groups on campus were doing good work. *Id.* However, Miller began to struggle with his sexuality, and eventually came to the realization that he is gay. DSUMF ¶ ¶ 4, 50, 51. After attending BLinC meetings for some time, Miller contacted the group's then-president, Hannah Thompson, about how he might become more involved in the organization, and mentioned that he was interested in taking a leadership role. DSUMF ¶ 51. Miller met with Hannah, and the two discussed their theological beliefs and whether Miller would be a good fit. DSUMF ¶ 52. During the course of that

conversation, Miller revealed to Hannah that he is gay. DSUMF ¶ 53. Hannah indicated that Miller's sexual orientation might be a problem, and told him that she would need to discuss the matter with the other leaders of BLinC. DSUMF ¶ 54. Hannah and her colleagues discussed Miller's sexuality at length, and decided that they would not extend an officer-level position to him because of his identification as a gay man. DSUMF ¶ 55–57. In her deposition, Hannah admitted that aside from being gay, Miller was otherwise qualified to hold a leadership position in BLinC. DSUMF ¶ 58. Hannah met with Miller again to discuss the group's decision not to offer him a leadership position, and left him with the distinct impression that his sexual orientation was the governing factor in her decision. DSUMF ¶ 59–61.

As a result of his conversation with Hannah, Miller made a complaint about the discrimination that he had faced with the University of Iowa's Office of Equal Opportunity and Diversity ("EOD"). DSUMF ¶ 67. Miller reported that BLinC, a Registered Student Organization ("RSO"), had violated the University's Human Rights Policy by denying him a leadership position because he is "openly gay." DSUMF ¶ 68. Constance Shriver Cervantes, an experienced attorney with the EOD, was asked to investigate the case. DSUMF ¶ 69. Thomas Baker, another experienced attorney who was, at that time, the Associate Dean of Students for the University, also participated in the interviews and assisted with the investigation. DSUMF ¶ 77. Schriver Cervantes looked at all of the evidence provided by the students, conducted interviews with both Hannah and Miller, and made credibility determinations based on her experience and training.[1] DSUMF ¶ 70–76. Applying the required legal standard, Schriver

[1] The University of Iowa's Human Rights Policy provides:

> [I]n no aspect of [the University's] programs shall there be differences in treatment of persons because of race, creed, color, religion, national origin, age, sex, pregnancy, disability, genetic information, status as a U.S. veteran, service in the U.S. military, sexual orientation, gender identity, associational preferences, or any other classification that deprives the person of

Cervantes decided that BLinC had violated the University's Human Rights Policy by excluding Miller from a leadership role on the basis of his sexual orientation. DSUMF ¶ 70–76, 82–84.

BLinC's new leaders, Jacob Estell and Brett Eikenberry, met with Dr. Bill Nelson, Associate Dean of Students and Executive Director of the Iowa Memorial Union, as part of the next step in the University's disciplinary process. DSUMF ¶ 86. Dean Baker was also present at the meeting. DOSUMF ¶ 194. The purpose of the meeting was to provide additional context and to permit the students to ask any questions they may have. DSUMF ¶ 93–97. Dr. Nelson used this meeting with the students to determine what sanctions would be appropriate given the severity of the Human Rights Policy violation. DSUMF ¶ 97. Dr. Nelson and Dean Baker explained the Human Rights Policy, and asked the students to make alterations to BLinC's constitution so that it would more clearly express their religious views. DOSUMF ¶ 213. BLinC agreed to detail its religious beliefs in its constitution. DOSUMF ¶ 215. After the meeting, Dr. Nelson issued a letter sanctioning BLinC for its violation of the Human Rights Policy and outlined three conditions that BLinC would need to meet in order to remain a registered student organization. DSUMF ¶ 106. Dr. Nelson instructed that BLinC should commit to future compliance with the Human Rights Policy, submit a list of qualifications for leaders which protected the rights of non-heterosexuals, and submit a plan for interviewing leaders which would not violate the Human Rights Policy. DSUMF ¶ 106.

BLinC submitted a revised constitution to Dr. Nelson, including a "Statement of Faith" which the group's leadership would be required to sign. DSUMF ¶ 107–08. The constitution contained a clause which stated:

> consideration as an individual and that equal opportunity and access to facilities shall be available to all.

DSUMF ¶ 9.

> We believe God's intention for a sexual relationship is to be between a husband and a wife in the lifelong covenant of marriage. Every other sexual relationship beyond this is outside of God's design and is not in keeping with God's original plan for humanity. We believe that every person should embrace, not reject, their God-given sex.

DOSUMF ¶ 222. Upon review, Dr. Nelson and Dean Baker found that the newly-added provisions of BLinC's constitution were facially discriminatory and would serve to exclude lesbian, gay, bisexual, and transgender students from the group. DOSUMF ¶ 227. Dr. Nelson rejected the changes and gave BLinC an additional ten days to comply with the requirements set forth in his sanctions letter. DSUMF ¶ 111.

BLinC indicated that it was unable to remove the offending provisions from its constitution, as it reflected BLinC's members' sincerely held religious beliefs. DOSUMF ¶ 230. The group appealed Dr. Nelson's decision to Dean of Students, Dr. Lyn Redington, per the University's appeal procedures. DOSUMF ¶ 231. Dr. Redington affirmed Dr. Nelson's decision to reject BLinC's new constitution, and explained to BLinC that the new language "would have the effect of disqualifying certain individuals from leadership positions based on sexual orientation or gender identity, both of which are protected classifications under Chapter 216 of the Iowa Code (the Iowa Civil Rights Act) and the University of Iowa Human Rights Policy." DOSUMF ¶ 232. As a result of its refusal to comply with the terms of the University's Human Rights Policy, BLinC was deregistered. BLinC subsequently filed this lawsuit. DOSUMF ¶ 233.

SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is only appropriate if "the movant shows that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex v. Catrett*, 477 U.S. 317, 321 (1986). In considering a motion for summary judgment, the court

must view the evidence in a light most favorable to the nonmoving party. *Naucke v. City of Park Hills*, 284 F.3d 923, 927 (8th Cir. 2002). The nonmoving party may not rely on mere allegations or denials, but must demonstrate the existence of specific facts that create a genuine issue for trial. *Mann v. Yarnell*, 497 F.3d 822, 825 (8th Cir. 2007). A nonmoving party's assertion that a fact is genuinely disputed must be supported by materials in the record such as "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials . . .." Fed. R. Civ. P. 56(c)(1)(A). A party may also show that a fact is disputed by demonstrating that the "materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B). A dispute is considered to be "genuine" if the evidence presented could cause a reasonable jury to return a verdict for either party. *Othman v. City of Country Club Hills*, 671 F.3d 672, 675 (8th Cir. 2012). A fact is material if its resolution affects the outcome of the case. *Id.* "Disputes that are not 'genuine,' or that are about facts that are not 'material,' will not preclude summary judgment." *Sitzes v. City of West Memphis, Ark.*, 606 F.3d 461, 465 (8th Cir. 2010).

LEGAL ARGUMENT

BLinC moves for summary judgment on its federal claims for Free Speech (Counts VII-VIII), Free Association (Count VI), Free Exercise (Counts III-IV), and its Religious Clause Claims (Counts I-II), and asks this Court to award nominal damages and to enter a permanent injunction against the University of Iowa. Defendants resist BLinC's motion on all counts as set forth below. BLinC's Free Speech and Free Association claims merge, and as such Defendants will address them together for brevity. *Christian Legal Soc. Chapter of the Univ. of Cal.,*

Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 680 (2010) ("CLS would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge: *Who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed. . . . It therefore makes little sense to treat CLS's speech and association claims as discrete.")

I. This Court Can and Should Use *Martinez* as Its Guide in Deciding Plaintiff's Summary Judgment Motion

Plaintiff argues that *Martinez* does not apply here because 1) it believes the Supreme Court expressly limited its decision to situations involving an "all-comers" policy; 2) *Martinez* cannot be applied to religious student groups' selection of their leaders because such a scenario would "raise unique constitutional problems;" and 3) because it claims the University's actions are unreasonable and viewpoint discriminatory. Defendants urge this Court to reject Plaintiff's arguments and to proceed with an analysis based on the framework set forth in *Martinez. See* 561 U.S. 661 (2010).

A. This Court May Apply *Martinez* Because the University's Policy is Substantially Similar to the Policy Set Forth by Hastings College of Law

Defendants admit that the University does not require its student groups to comply with an "all-comers" policy. DOSUMF ¶ 1. Defendants also admit that in *Martinez*, the landmark case in which the Supreme Court upheld a public law school's policy which "condition[ed] its official recognition of a student group—and the attended use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students," the Supreme Court declined to address whether its holdings would extend to a narrower nondiscrimination policy. *Martinez*, 561 U.S. at 668, 698 (Stevens, J., concurring "The Court correctly confines its discussion to the narrow issue presented by the record . . . and correctly upholds the all-comers

policy."). However, should this Court decline to grant Defendants qualified immunity in this case, Defendants urge it to apply the use the framework set forth in *Martinez* as a guide in analyzing Plaintiff's Motion for Summary Judgment.

In *Alpha Delta Chi-Delta Chapter v. Reed*, one of the few U.S. Circuit Court cases to address the issue, the Ninth Circuit Court of Appeals heard a case very similar to this one. 648 F.3d 790 (9th Cir. 2011). In *Reed*, the plaintiffs, a Christian sorority and Christian fraternity, were denied official recognition by defendant San Diego State because plaintiffs required their members and officers to profess specific religious beliefs in violation of the school's nondiscrimination policy. San Diego State's nondiscrimination policy is nearly identical to the one maintained by the University of Iowa here, and states:

> No campus shall recognize any fraternity, sorority, living group, honor society, or other student organization which discriminates on the basis of race, religion, national origin, ethnicity, color, age, gender, marital status, citizenship, sexual orientation, or disability. The prohibition on membership policies that discriminate on the basis of gender does not apply to social fraternities or sororities or to other university living groups.

Id. at 796. Upon review of the evidence, the Ninth Circuit determined that it could "see no material distinction between San Diego State's student organization program and the student organization program discussed in *Christian Legal Society*, and therefore, conclude[d] that San Diego State's program is a limited public forum." *Id.* at 797. The Court held that the program governed by the "all-comers' policy from *Martinez* and the program governed by the basic nondiscrimination policy in *Reed* were substantially similar, because both programs provided benefits to student groups in exchange for an agreement by the student groups to "abide by certain conditions, including an approval process and the school's nondiscrimination policy." *Id.* at 798. As such, neither program

was "open for indiscriminate public use." *Id.*, citing *Lamb's Chapel v. Center Mirches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993). As such, the *Reed* court applied *Martinez*, and engaged in a limited public forum analysis of plaintiffs' free speech and expressive association claims. *Reed*, 648 F.2d at 798.

Like San Diego State and Hastings College of Law, the University of Iowa maintains an RSO program under which the University provides benefits to student groups in exchange for their agreement to abide by the terms of the Human Rights Policy. DSUMF ¶¶ 9–41; DOSUMF ¶ 237. As such, this Court should apply the limited public forum analysis set forth in *Martinez* in analyzing Plaintiff's Motion for Summary Judgment.

B. This Court May Apply *Martinez* in Evaluating Plaintiff's Free Speech and Free Association Claims

Plaintiff claims that the Court may not apply *Martinez* because "it cannot be applied to religious student groups' selection of their leaders." Plaintiff's Memo, p.26. Plaintiff argues that "limits on leadership selection [for religious groups] raise unique constitutional problems"—an issue purportedly acknowledged by Justice Kennedy in his concurrence. Plaintiff's Memo, p. 26–27. However, what Justice Kennedy actually stated was that *if* it "could be demonstrated that a school has adopted or enforced its policy with the intent or purpose of discriminating or disadvantaging a group on account of its views, petitioner also would have a substantial case on the merits if it were shown that the all-comers policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views." *Martinez*, 561 U.S. at 706 (Kennedy, J., concurring). No evidence exists that the University intended to discriminate or

disadvantage BLinC on the basis of its views. At most, there is a triable question of fact on that issue. Justice Kennedy's statement is hardly an admonition that a limited public forum analysis may not be applied to regulations which incidentally affect a religious group's ability to select its leaders.

a. Plaintiff's Ministerial Exception Claim Must Fail

Plaintiff goes on to cite *Hosanna-Tabor Evangelical Lutheran School v. EEOC*, for the proposition that the government may not restrict religious groups' selection of religious leaders. *See* 565 U.S. 171 (2012). In *Hosanna-Tabor*, the U.S. Supreme Court held that the First Amendment bars lawsuits brought by ministers against their churches for violations of employment discrimination laws. *Id.* Unlike the case at hand, *Hosanna-Tabor* involved private religious groups which were not the recipients of any sort of state funding or benefits. *See id.* The case involved a conflict over a church employee who believed she had been discriminated against on the basis of disability. *Id.* at 180–81. The Court ultimately determined that the Religion Clauses of the First Amendment "bar the government from interfering with the decision of a religious group to fire one of its ministers." *Id.* at 181. This case is easily distinguishable from the case at hand, as the church involved was not receiving public money and did not exist in a limited public forum. As such, the government had less interest in regulating the group's speech and less authority to do so. As Justice Stevens pointed out in *Martinez*, [a]lthough the First Amendment may protect [a religious group's] discriminatory practices off campus, it does not require a public university to validate or support them." *Martinez,* 561 U.S. 699. Though a religious group's right to select its leaders is undoubtedly protected by the First Amendment in a public forum, BLinC should not receive special dispensations to

discriminate due to its status as a religious group, since has chosen to exist within the "special characteristics of the school environment." *Id.*, quoting *Widmar v. Vincent*, 454 U.S. 263, 268 (1981). Other cases cited by Plaintiff in support of its argument for the ministerial exception likewise involve employment disputes within private churches not being subsidized with public funds, and do not apply. *See Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113 (3d Cir. 2018).

II. The University of Iowa Was Justified in Regulating BLinC's Speech in Its Limited-Public Forum

Plaintiff has not demonstrated that this Court should apply any other standard than the one set forth in *Martinez. See* 561 U.S. 661 (2010). As such, Defendants continue below with a discussion of the many disputed material facts ripe for decision by the factfinder, as they would be encountered under a limited public forum analysis of Plaintiff's First Amendment claims.

A. The Limited Public Forum

The parties agree that the University has created a limited public forum for the speech of student groups. *See Martinez*, 561 U.S. at 679 n.11 (2010), quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). As such, the University may regulate speech within the forum it has created, as long as the regulations are 1) viewpoint neutral and 2) reasonable. *Id.* The First Amendment rights BLinC asserts must be analyzed "in light of the special characteristics of the school environment." *Id.*, quoting *Widmar v. Vincent*, 454 U.S. 263, 268 (1981).

1. The University's Policy is Facially-Neutral.

The University 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.'" *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017), citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Here, the rationale behind the University's regulation of speech by student groups is to protect the civil rights of University of Iowa students, not to silence a particular group or ban a particular point of view. DSUMF ¶¶ 9–29. The University's Policy is viewpoint neutral on its face—a point that BLinC does not appear to contest. *See* DSUMF ¶ 9. As the Court stated in its January 23, 2018 Ruling, "the [University's] policy is clearly not aimed at any particular view, ideology, or opinion. The language is familiar, essentially boilerplate language repeated in similar terms in civil and human rights codes nationwide, including the Iowa Civil Rights Act and the Iowa City Human Rights Code." Ruling, 01/23/18, p. 24. Even if the University's facially neutral policy had a disparate impact on religious groups, as alleged by Plaintiff, that impact would not preclude a finding that the policy is viewpoint neutral as written. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As such, this Court should find that the University's Human Rights Policy is facially neutral.

2. The University's Policy is Neutral As-Applied.

A determinative factor in this case in regard to many of Plaintiff's claims is whether the University applied its Human Rights Policy in a view-point neutral way. "A nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly." *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 803 (9th Cir. 2011). Here, the University has engaged in a uniform application of its policy to

all student groups which have been the recipients of formal complaints of discrimination. DSUMF ¶¶ 9–16, 42–44; DOSUMF ¶ 15. The University has not engaged in viewpoint discrimination in its application of the policy to other campus organizations and programs, but has allowed some exceptions for compelling reasons which support the educational and social purposes of the forum. DOSUMF ¶¶ 16–33.

That the University's Human Rights policy has not been applied identically to each campus group through review of group constitutions, or to each scholarship or other program, is not dispositive of Plaintiff's claims. The different application and many exceptions allowed by the University merely provide an issue of material fact to be decided by the factfinder. Plaintiff claims, without evidence, that Defendant engaged in view point discrimination, while Defendant claims, pointing to the wide variety of viewpoints displayed by RSOs (including some identical to Plaintiff's) that it has *not* engaged in viewpoint discrimination. DOSUMF ¶¶ 16–33. In *Reed*, one of a handful of cases addressing a university's application of its nondiscrimination policy in the First Amendment arena since the United States Supreme Court decided *CLS v. Martinez*, the plaintiff religious group argued that the defendant university had granted official recognition to some student groups in apparent contravention to the university's nondiscrimination policy, while failing to grant official recognition to plaintiff. *Id.* The Ninth Circuit Court of Appeals, upon review of the evidence regarding the application of the policy to other student groups, determined that "the evidence that some student groups have been granted an exemption from the nondiscrimination policy raises a triable issue of fact." *Id.* at 804, citing *Truth v. Kent School Dist.*, 542 F.3d 634, 650 (9th Cir. 2008). The Ninth Circuit opined that the plaintiff's claims that the defendant university

had engaged in discrimination against it may not have been correct, and that the defendant university might simply have approved the groups at issue "because of administrative oversight," or because the groups had agreed to abide by the nondiscrimination policy "despite the language in their applications," and remanded the issue to the district court for consideration. *Reed*, 648 F.3d at 804.

Here, Plaintiff has accused Defendant of engaging in viewpoint discrimination, and exhaustively lists the various clubs, sports teams, and even scholarship programs which it views to be in violation of the University's Human Rights Policy. *See* DOSUMF ¶¶ 16–35. These groups have been permitted to continue to exist as RSOs in spite of their apparent violations of the Policy for a variety of reasons—including administrative oversight by the University—but also for reasons which support the University's educational mission. *Id.* For example, multiple groups provide safe spaces for minorities which have historically been the victims of discrimination, and many of the groups with which Plaintiff takes issue exist in compliance with federal laws like Title IX, which permits separate sports teams and housing options for men and women. *Id.*, *see also* 34 C.F.R. § 106.32 (permitting sex-segregated housing); 34 C.F.R. § 106.41 (permitting sex-segregated sports teams); 20 USC § 1681 (excepting tax exempt social fraternities or social sororities and various clubs and youth service organizations which have traditionally been limited to persons of one sex); Iowa Code Ch. 216.9 (exempting separate "toilet facilities, locker rooms, or living facilities for the different sexes so long as comparable facilities are provided"). Interestingly, BLinC's former president, Hannah Thompson, does not take issue with sports teams—both collegiate and club—being segregated by sex. DSAMF ¶ 137. (Q: "You don't see a problem with the University of Iowa

separating those teams by sex, do you?" A: "I do not."). BLinC claims that it is being singled out for its sincerely held religious beliefs regarding sexual orientation and gender identity, while the University permits student organizations from every part of the political, cultural, and religious spectrum to register as official student groups on campus, as long as they agree not to violate the University's Human Rights Policy. It is illogical for BLinC to make a claim of viewpoint discrimination while simultaneously pointing to groups which set forth identical conservative Christian views on homosexuality and yet have *not* been deregistered due to their willingness to comply with the Human Rights Policy. *See* DOSUMF ¶ 17. There is a triable issue of material fact regarding Plaintiff's claim that the University discriminated and the University's claim that the differences in application of the policy were a mixture of administrative oversight and justified exceptions to the policy.

Additionally, Defendants urge the Court to consider that despite a somewhat inconsistent practice of reviewing student constitutions, the "application" of the Human Rights Policy is not confined only to the insistence that student groups include the Policy language in their group constitutions. A major part of the "application" of the Policy consists of the investigation and enforcement mechanisms which support the Policy and its goals. DSUMF ¶¶ 9–16. Still, student group constitutions are supposed to be reviewed by University staff to verify that they contain the required Policy language when the group goes through the process to obtain official recognition by the University. DSAMF ¶¶ 123–28. This review ensures that students are aware that they must conduct their groups in compliance with the Human Rights Policy, and provides student leaders some familiarity with that language and University's expectations. The fact that such a review

procedure exists does not mean that there are never oversights, as evidenced here. However, the part of the process which emphasizes enforcement of the terms of the Human Rights Policy and the spirit behind the policy—which is to protect students' civil rights—is the discrimination complaint process through the EOD.

Though this Court has not been satisfied with Defendants' argument that its process is complaint-driven, that is the reality of the University's system. As is the case with government agencies charged with investigating violations of civil rights laws, such as the Iowa Civil Rights Commission and the Equal Employment Opportunity Commission, the University disseminates information about its Human Rights Policy and attempts to ensure that the framework is in place to prevent discrimination from happening. Unfortunately, given the large number of student organizations and students on campus, the University simply cannot monitor every act by every individual in every group. By necessity, the University's investigations are limited to instances in which students formally complain of discrimination.

If a student feels that he or she has been discriminated against by a registered student organization (which can happen whether or not a student group sets forth discriminatory language in its founding documents), the student has the option to make a formal complaint with the EOD. DSUMF ¶¶ 9–16. A student's submission of a formal complaint triggers an investigation into the problem. DSUMF ¶¶ 9–16. The University does not have a practice of spontaneously digging into the activities of religious student groups in an attempt to unearth a sanction-worthy violation, and the review of BLinC's constitution was triggered by the complaint process—not by any focused campaign against religious groups.

The question at issue here is not whether the University ensured that every organization's constitution was in perfect compliance with its policies governing RSOs, but rather, whether the enforcement mechanisms and policies requiring that sanctions be issued against a particular group would have been neutrally-applied after a complaint had been made. The University has only investigated three such formal complaints against registered student organizations in the past. DSUMF ¶¶ 42–44, 99–100; DOSUMF ¶ 15. One complaint was against a Christian student group which espoused similar beliefs to BLinC in regard to sexual orientation. DSUMF ¶¶ 42–44, 99–100; DOSUMF ¶ 15, 241–250. That complaint was determined to be unfounded and that groups was not sanctioned. DOSUMF ¶ 250. Another complaint was made against the UI Feminist Union by a male member of that group. DSUMF ¶ 43. That complaint was determined to be founded, and sanctions were issued against the group, though it was not an RSO at the time. DSUMF ¶ 43. BLinC also received sanctions as a result of its discriminatory behavior. DSUMF ¶ 106.

Universities engage in viewpoint discrimination when their action is the result of the "ideology or the opinion or the perspective of the speaker." 861 F.3d 697, 705 (8th Cir. 2017), quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995). Here, Plaintiff simply has not shown, despite its 446 statements of "fact," that any of the University's actions were taken as a result of animus toward religious groups or toward BLinC's particular beliefs about gay and transgender students. *See* DOSUMF ¶¶ 1–446. BLinC cannot show that the University treated the other student groups which had received Human Rights complaints differently than it treated BLinC. BLinC cannot point to any testimony by any University official which might indicate that he or she held

a view counter to BLinC's or had some devious motivation to harm BLinC, or even that he or she engaged in any ideological discrimination or favoritism. *Lamb's Chapel v. Center Mirches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."). The record is devoid of such evidence, because it simply does not exist. In fact, at a meeting to discuss sanctions, a University administrator praised the student leaders of BLinC for being excellent representatives of the University community. DOSUMF ¶ 219. BLinC has been treated identically to other groups which have received student complaints of discrimination. That the University failed to thoroughly review the constitutions of groups spanning the political, social, and religious spectrum—including groups espousing beliefs very similar to those held by BLinC—does not indicate discriminatory intent.

The University freely admits that its review process for student constitutions is inconsistent, and it has taken steps to resolve that issue—though with such a large number of student organizations and multiple staff members, the University has not been able to solve the problem overnight. BLinC is sharply critical of the University's efforts thus far to correct that process. *See* DOSUMF ¶¶ 406–446. That does not, however, impact the diligence with which the University has investigated student complaints of discrimination, or the repeated statements by its administrators demonstrating their intent to apply the policy in a viewpoint-neutral fashion. DSAMF ¶ 129.

B. The University's Policy is Reasonable in Light of the Purposes of the Forum

Educational institutions may "legally preserve the property under [their] control for the use to which it is dedicated." *Lamb's Chapel v. Ctr. Moriches Union Free Sch.*

Dist., 508 U.S. 384, 390 (1993). A university may restrict access to the public forum it has created, as long as the restrictions are "reasonable in light of the purpose served by the forum." *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995), quoting *Cornelis v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 809 (1985). Public universities enjoy "a significant measure of authority over the type of officially recognized activities in which their students participate," though the Court makes the final decision regarding whether a public university has exceeded constitutional constraints. *See Christian Legal Soc. Chapter of the University of California, Hastings College of the Law*, 561 U.S. 661, 685–86 (2010).

1. Purposes of the Forum

"A college's commission—and its concomitant license to choose among pedagogical approaches, is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process." *Martinez*, 561 U.S. at 686. Plaintiff takes a rather narrow view of the University's purposes for creating the limited public forum at issue in this case. Plaintiff indicates that the singular purpose of the forum is to "let[] students associate based on shared beliefs and interests" and to grant the groups freedom to organize and associate with like-minded students. Plaintiff's Memo, p. 19. These are undoubtedly purposes of the forum, however there are many others which Plaintiff does not acknowledge. The University sets forth some of its goals for the forum in its "Registration of Student Organizations" document:

> Student organizations are important links in the co-curricular activities of the University of Iowa. They play an important role in developing student leadership and providing a quality campus environment. As such, the University encourages the formation of student organizations around the

> areas of interests of its students, within the limits necessary to accommodate academic needs and ensure public safety.

DSAMF ¶¶ 130–31. Ensuring academic growth and access to educational opportunities, and a safe environment in which to do so, are also purposes of the forum. DSAMF ¶¶ 130–34. Further, the University requires each student organization to abide by the mission of the University, its supporting strategic plan, policies, and procedures. DSAMF ¶ 132. The RSO document specifically incorporates the Human Rights Policy, by which the University strives to promote diversity and to ensure that all students are granted equal access to educational opportunities within the forum. DSAMF ¶ 133. The University expects that participation in student organizations will "enhance a student's educational experience . . . " as opposed to providing a social scene for students. DSAMF ¶ 134. As the Court correctly stated in its January 23, 2018 Ruling,

> These statements show that the intended purpose of the student organization registration program is to allow students to engage with other students who have similar interests and in doing so, students should only fear rejection on the basis of their own merits, not because of their membership in a protected class.

Ruling, 01/23/2018, p. 21. Much like the policy developed by Hastings College of Law in *Martinez*, the University of Iowa's Human Rights Policy "conveys [the University's] decision to decline to subsidize with public monies and benefits conduct of which the people of [Iowa] disapprove. *See* Ruling, 01/23/18 citing *Martinez*, 561 U.S. at 689–90.

2. The University's Policy is Reasonable

Defendant argues that the University's viewpoint-neutral Human Rights policy is a reasonable regulation on the limited public forum it created for the purpose of fostering academic growth for students, as well as providing them access to educational programs

and a safe environment in which to engage with their peers. In *Martinez*, the Supreme Court provided some guidance regarding what types of factors would weigh on whether a University's regulation of speech by student groups was reasonable in light of the purposes of the forum. The court indicated that Hastings' all-comers policy was undoubtedly reasonable, because it allows all students to access the "leadership, educational, and social opportunities afforded by [RSOs] . . .." *Martinez*, 561 U.S. 687–88. "Hastings does not allow its professors to host classes open only to those students with a certain status or belief, so the Law School may decide, reasonably in our view, that the . . . educational experience is best promoted when all participants in the forum must provide equal access to all students." *Id.* (internal quotations omitted). The University of Iowa shares this goal in governing its forum for student groups, as demonstrated by its application of a nondiscrimination policy which is set forth to protect students from discrimination on the basis of protected characteristic. DSAMF ¶¶ 130–34. Importantly, The Supreme Court also noted that the Law School's goal of bringing "together individuals with diverse backgrounds and beliefs, 'encourages tolerance, cooperation, and learning among students" was reasonable. The University of Iowa also shares this goal as evidenced by its support for nearly 500 student groups which span the religious, social, and political spectrum. Finally, the fact that the Law School's policy subsumes state nondiscrimination laws was reasonable and reflective of the decision "to decline to subsidize with public monies and benefits conduct of which the people of California disapprove." *Id.* at 689–90. The University of Iowa's policy also promotes this reasonable goal, as it subsumes state and federal nondiscrimination law. *See* Iowa Code Ch. 216. Likewise, the Ninth Circuit Court of Appeals determined that the policy at issue

in *Reed* was a reasonable regulation on the defendant San Diego State's forum. Like the Court in *Martinez*, the Ninth Circuit highlighted the desire to promote diversity and nondiscrimination.

Interestingly, the Supreme Court further determined that Hastings' policy was "creditworthy" due to the "substantial alternative channels for [CLS-student] communication to take place." *Martinez*, 561 U.S. at 690. Since the Court had determined that the regulations set forth by Hastings were viewpoint neutral, and methods for communication by unrecognized student groups were abundant, Hastings' regulation was reasonable. The Ninth Circuit made a similar determination regarding San Diego State's policy in *Reed*, 648 F.3d at 799. Here, the University of Iowa provides ample avenues for unregistered student organizations to communicate with its student body, and as such, its policy is similarly "creditworthy." DSUMF ¶¶ 23, 36–41.

Plaintiff argues that the University's application of its policy, as demonstrated by its decision to deregister BLinC, was unreasonable for two reasons: 1) the University determined that the language BLinC included in its constitution was facially discriminatory; and 2) the University refused to allow BLinC to select "leaders who shared its beliefs." Plaintiff's Memo, p. 19. The University asserts that deregistering BLinC after it refused to revise its constitution to comply with the University's Human Rights policy was abundantly reasonable. Further, the University informed BLinC that its constitution did not comply with the University's requirements, and gave BLinC additional time to remove the offending language. DSUMF ¶ 111. BLinC appealed the matter, and Dr. Redington upheld Dr. Nelson's decision to deregister BLinC. DSUMF ¶¶

115–120. Both the University's policy and its application of the policy were reasonable in this regard.

BLinC also indicates that the University acted unreasonably because it failed to allow BLinC to select the leaders of its group without interference. However, the "interference" with a group's ability to select its members and leaders is the very situation discussed in *Martinez* and *Reed*. *Martinez*¸ 561 U.S. at 687–91; *Reed*, 648 F.3d at 799. In a limited public forum, the University may regulate some speech. In *Martinez*, the Supreme Court upheld a policy which permitted the University to interfere with student groups' exclusion of potential members and leaders, while determining that the policy was a reasonable regulation on the forum.

Plaintiff complains that the "University has not even alleged, for example, that BLinC's mission conflicts with the 'academic needs' of the University or its students or somehow threatens "public safety" and claims that there is "*overwhelming* evidence that BLinC never violated the Policy and *undisputed* evidence that it has agreed not to violate the policy going forward." Plaintiff's Memo, p. 20. Plaintiff then goes on to outline several disputed material facts—such as Ms. Shriver Cervantes' testimony regarding Miller Miller's claim that BLinC acted in violation of the Human Rights Policy. Plaintiff's Memo, p. 20; DOSUMF ¶¶ 133, 295, 301, 390. Importantly, the University does contend that the language included in BLinC's group constitution does not comport with the purposes of the forum—that is why the group was deregistered. Such a blatant rejection of gay and transgender students on the basis of protected characteristic cannot advance the University's goals for inclusion and does not provide those students with equal access to the groups that their student activity fees fund.

III. This Court Must Deny Plaintiff's Motion for Summary Judgment on Its Free Exercise Claim

The First Amendment to the United States Constitution, in its Free Exercise Clause, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Cost. Amend. 1. Plaintiff argues that "the University targeted the content of BLinC's religious beliefs and its attempt to communicate those beliefs to potential leaders via its Statement of Faith . . .." Plaintiff's Memo, p. 30. It is well-established that a government may regulate the conduct of religious groups—even when the behavior is prescribed by the individual's religion, as long as the regulation is a "neutral law of general application." *See Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990), superseded by statute as stated in *Holt v. Hobbs*, 135 S. Ct. 853, 859–60 (2015).[2] "A law is one of neutrality and general applicability if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief[.]'" *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1030 (9th Cir. 2004), quoting *Lukumi Babalu Aye,* 508 U.S. 520, 543 (1993). Further, even when the burden on religious practice by a neutral law of general applicability is substantial, the government need not demonstrate a compelling interest. *San Jose Christian College*, 360 F.3d at 1030. If a

[2] In *Holt*, the Supreme Court outlined the requirements of the Religious Freedom Restoration Act ("RFRA"), which Congress enacted relying on Section 5 of the Fourteenth Amendment for authority, requires that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, unless the government demonstrates that the application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.*, citing 42 U.S.C. §§ 2000bb-1(a), (b). The Court held that RFRA exceeded Congress' powers under that provision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). As a response to *City of Boerne*, Congress enacted RLUIPA, which limits government regulation of religious exercise by institutionalized persons. *See Holt*, 135 S. Ct. at 859–60. As such, the standard which applies in this case is the standard which permits government regulation of religious exercise by a neutral law of general applicability. *See Smith*, 494 U.S. at 878–82.

law is not neutral—here, if it discriminates against religiously motivated conduct—or is not generally applicable, strict scrutiny applies and the government interest must be narrowly tailored to advance a compelling government interest in order to survive. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

In *Smith*, the Supreme Court outlined the many cases in which plaintiff religious groups have attempted to justify their violation of the law by pointing to their sincerely held religious beliefs. *See Smith*, 494 U.S. at 878–82. The *Smith* Court held that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." *Id.*, citing *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (nonpayment of taxes); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (failure to comply with labor laws); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday-closing laws); *Gillette v. United States*, 401 U.S. 437, 461 (1971) (conscription of individuals opposed to a particular war on religious grounds). The Court noted that

> [t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections such as freedom of speech and of the press . . . or the rights of parents. . . . Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion . . ..

Smith, 494 U.S. at 881–82, citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia Bd. of Education v.*

Barnette, 319 U.S. 624 (1943). Notably, none of the cases cited by the Court in which a successful religious exercise claim has been brought include as plaintiff a religious student group which has chosen to register on campus in order to receive money and other benefits from a public University.

In *Christian Legal Soc. Chapter of University of California v. Kane*, the U.S. District Court for the Northern District of California rejected plaintiff CLS's Free Exercise claim and its assertion that strict scrutiny should be applied in analyzing the nondiscrimination policy, on the defendant Hastings' summary judgment motion, holding that the policy "does not target or single out religious beliefs, but rather, is a policy that is neutral and of general applicability." *Christian Legal Soc. Chapter of University of California v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at *1–4 (N.D. Cal. May 19, 2006). The Hastings' policy, like the policy maintained by the University of Iowa, "prohibits discrimination on the basis of protected categories, including religion and sexual orientation." *Id.* at *24. Importantly, the Court held that

> Contrary to CLS's contention, regulating the conduct of discrimination on the basis, *inter alia*, of religion is not equivalent to regulating religious beliefs. CLS may be motivated by its religious beliefs to exclude students based on their religion or sexual orientation, but that does not convert the reason for Hastings' policy prohibiting the discrimination to be one that is religiously-based.

Id. Like CLS, BLinC has failed to submit any evidence of the University's discriminatory intent in this case, instead focusing almost exclusively on the University's failure to police its review of student group constitutions for inclusion of the Human Rights policy and the University's decision to permit fraternities, sororities, sports teams, and groups and programs meant to assist historically groups which have been historically discriminated against to exist on campus. *See id.* at 27 ("CLS also argues that the

treatment of CLS was intentional and argues that CLS may rely on evidence of the circumstances surrounding the passage of the policy to demonstrate intentional discrimination against it. Yet, CLS does not submit any evidence with respect to the passage of the Nondiscrimination Policy. Nor does CLS present any other evidence demonstrating any discriminatory intent by Hastings.").

Defendants must demonstrate that its Policy is both neutral and generally applicable. Here, Plaintiff provides three reasons why the University's Policy is not generally applicable: 1) it was not enforced equally by the University; 2) the University has "categorically exempted a huge swath of student organizations from the reach of the policy"; and 3) it "silently approves" secular discrimination by banning "restriction[s] on leadership related to religious beliefs while allowing groups to restrict leadership around all sorts of other ideological and political beliefs." Plaintiff's Memo, p. 31–34.

Defendant sees no real difference between Plaintiff's first and second points. BLinC takes issue with the fact that the University has exempted sororities, fraternities, and sports teams from enforcement of the "gender" provision of the Policy. However, BLinC fails to show any discriminatory animus toward religious groups or its particular religious views, given that other religious groups which maintain identical views remained registered. The difference between BLinC and those other groups is that based upon its interactions with a member, BLinC received a complaint of discrimination and violation of the Human Rights Policy. DSUMF ¶ 68. Once the complaint had been made, BLinC was treated no differently than any other group against which a complaint was filed. DSUMF ¶¶ 10–16.

Plaintiff attacks the University's description of its process as complaint-driven, arguing that a complaint-driven enforcement of the Policy "would only drive home the harm of selective enforcement since complaints are far more likely to be filed against unpopular or minority viewpoints on campus." Plaintiff's Memo, p. 32. However, Plaintiff has not shown that its contention has any basis in fact. Each of the University administrators testified that Human Rights Complaints are a relatively rare occurrence, and each could only remember three complaints during their time with the University. DSUMF ¶¶ 72, 99. Nor has Plaintiff demonstrated that its viewpoint is a "minority" viewpoint—though it may well be in the minority of organizations whose disapproval of homosexual conduct is strong enough to include a statement of it alongside its core beliefs and principles.

Plaintiff goes on to cite several cases for the proposition that the University may not engage in "selective enforcement" of its Policy against BLinC. In *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, a group of Orthodox Jews sued the Borough of Tenefly after Borough officials refused to grant it a religious exemption to create an unobtrusive *eruv* in the neighborhood by attaching black tubing to Borough telephone poles. 309 F.3d 144 (2002). The Third Circuit Court of Appeals held that the Borough government had violated the Free Exercise of the First Amendment in selectively enforcing its ordinance. *Id.* at 177–78. However, the *Tenefly* decision did not turn on the fact that neighbors had complained about the Orthodox Jews' construction of an *eruv*, as Plaintiff suggests, but rather on the fact that the Borough permitted nearly every other type of speech on its property but had refused to allow the *eruv* materials which were objectively less obtrusive than some of the other items placed on the telephone poles by the public. *Id.* at

167 ("[f]rom the drab house numbers and lost animal signs to the more obtrusive holiday displays, church directional signs, and orange ribbons . . . the Borough has allowed private citizens to affix various materials to its utility poles"). Burough representatives and community members had also allegedly made discriminatory comments about the Orthodox Jewish community, and had failed to inform them of the existence of the ordinance in question when first asked about the possibility of installing an *eruv* in the neighborhood. *Id.* at 151–56. *Tenefly* is hardly analogous to the case at hand. The Orthodox Jews' practice presumably did not violate any civil rights laws. *See id.* The *eruv* was not publicly funded and was installed and maintained by a private company. *Id.* at 153. Unlike the fact pattern at issue in its case, the Borough's clear concern that it would be "overrun" by Orthodox Jews demonstrates clear viewpoint discrimination. *Id.* ("A Council member whom the District Court was unable to identify noted 'a concern that the Orthodoxy would take over' Tenafly. Once Council member voiced his 'serious concern' that 'Ultra-Orthodox' Jews might 'stone [] cars hat drive down the streets on the Sabbath.'"). *Id.*

Similarly, the *Burnham v. Ianni* case cited by Plaintiff does not stand for the proposition that a complaint-driven process is inherently unconstitutional. 119 F.3d 668 (8th Cir. 1997). In *Burnham*, a group of students put together a display of several photographs of their professors wearing costumes which depicted their particular areas of focus and interest. *Id.* at 670–73. Two of the professors chose to wear historic weapons as part of their costumes. *Id.* The University's affirmative action officer complained about the photographs, calling them "offensive" and alleging that they were evidence of "sexual harassment." *Id.* Eventually, the University removed the two offending

photographs from the display, citing a desire to "stop the disruption caused by the display and to prevent aggravation of the atmosphere of fear" on campus. *Id.* The Eighth Circuit determined that the University's actions constituted viewpoint discrimination—not because the review of the photographs had been instigated by a complaint made by a professor, but rather, because the action taken by the University was intended to silence the plaintiffs' view that "the study of history necessarily involves a study of military history, including the use of military weapons. *Id.* at 676. The criticism directed at the University was not based in the complaint-driven analysis, but on the University's decision to cave to complaining voices rather than to objectively evaluate the problem at hand and to come to a situation which would not violate the speakers' constitutional rights. *Id.* ("Freedom of expression, even in a nonpublic forum, may be regulated only for a constitutionally valid reason; there was no such reason in this case.").

Finally, Plaintiff cites *City of Cleburne, Texas v. Cleburne Living Center*, and states that *Cleburne* enforced an ordinance "in response to 'negative attitudes' and 'fear' of neighbors." Plaintiff's Memo, citing 473 U.S. 432 (1985). In this landmark case, the United States Supreme Court invalidated the City of Cleburne's enforcement of an ordinance which required a special use permit for the operation of a group home for individuals with intellectual disabilities, where no such permit should have been necessary. *Id.* at 435. The District Court found that the City Council's insistence on the special use permit was based partly in its concern for the "negative attitude of the majority of property owners." *Id.* at 448. The Court determined that such factors "are not permissible bases for treating [the group home] differently from apartment houses, multiple dwellings, and the like." *Id.* This case, like *Tenafly* and *Burnham*, is not helpful

in analyzing the case at hand. The rationale behind the enforcement of the ordinance in *Cleburne* was nothing more than "an irrational prejudice" against those with intellectual disabilities—not a legitimate complaint by a community member that some facet of his or her civil rights would be violated by approval of the facility. *See id.*at 450. The complaint-driven process was not the point. *See id.*

Plaintiff cites no cases which actually support its contention that Defendants' complaint-driven enforcement mechanisms foster an environment where "forms of discrimination that are technically forbidden by the Policy but acceptable to the University culture, such as in the context of sports and Greek groups, get a pass." Plaintiff's Memo, p. 32. Contrary to Plaintiff's point, with a complaint-driven policy any student who felt that their civil rights were being trampled could make a Human Rights Complaint about any student organization at any time. Groups do not receive favorable treatment based on viewpoint. DSUMF ¶¶ 10–16. Students drive the complaint process, and students from both majority and minority groups have equal access and equal opportunity to make a complaint if their rights are infringed by an RSO. *Id.* RSOs which choose to discriminate on the basis of protected characteristic—despite having agreed to refrain from doing so—increase their chances of having a complaint made against them.

Finally, Plaintiff argues that the University's policy is not generally applicable because the University allegedly approves secular activities "that equally threaten[] the purposes of the policy but [a]re not prohibited (and therefore approved by silence)." Plaintiff's Memo, p. 33, citing *Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012). In *Zimmerman*, the Iowa Supreme Court, interpreting *Lukumi*, held that a county ordinance prohibiting the use of steel-wheeled tractor tires on county roads by members

of the Old Order Groffdale Conference Mennonite Church was under-inclusive, because it "accommodates secular interests while denying accommodation for comparable religious interests." *Id.* at 12. The court outlined an analysis to evaluate the "potential underinclusiveness or nongenerality of the challenged ordinance." *Id.* citing *Fraternal Order of Police Newark Lodge v. City of Newark*,170 F.3d 359 (3d Cir. 1999). Under *Fraternal Order*, the court must first identify the purposes the ordinance is designed to protect, and then ask whether the ordinance "exempted or left unregulated any type of secular conduct that threatened those purposes as much as the religious conduct that had been prohibited." *Id.* If a law allows secular conduct which undermines the purposes of the law, then it "could not forbid religiously motivated conduct that did the same because this would amount to an unconstitutional 'value judgment in favor of secular motivations, but [against] religious motivations.'" *Id.* However, if the exempted secular conduct was "sufficiently different in terms of its impact on the purpose of the law, the exemption would not render the law underinclusive." *Id.* Importantly, the Iowa Supreme Court noted that "*Fraternal Order* makes it clear that not every secular exemption automatically requires a corresponding religious accommodation." *Id.* The key question is whether secular exemptions threaten the purposes of a regulation to a greater or lesser degree than a religious exemption. *Id.* at 12–13.

To the extent that Plaintiff's argument that Defendants' regulation is underinclusive applies in a higher education limited public forum case, Defendants assert that the exemptions it has provided to campus groups including sports teams, fraternities, and sororities—which are distinct from the groups which have been unregulated as a result of administrative oversight—are a lesser burden on the purposes of the forum than

BLinC's exclusion of gay and transgender students. The University's exemption from the gender provision of its Human Rights Policy is supported by federal law, which it has a responsibility as a government actor to uphold, while BLinC's exclusion of gay and transgender students runs counter to both state and federal law. *See* Iowa Code Ch. 216; 20 U.S.C. §§ 1681–1688. Clearly, BLinC's desire to participate in illegal discrimination as a recipient of public money is a harmful to the stated purposes of the University's public forum, which include promoting diversity, inclusion, and providing a safe space in which students have equal access to educational opportunities.

Plaintiff goes on to argue that the University's Policy is not neutral. Plaintiff argues that "facial neutrality" is not enough, and states that the Free Exercise Clause forbids "covert suppression" of religion. Plaintiff's Memo, p. 34. Plaintiff claims that "there is nothing subtle or masked about the University's specific hostility to BLinC's statement of faith. *Id.* Then Plaintiff goes on to make the radical claim that because the University's nondiscrimination policy takes a position opposite to the one espoused by BLinC—namely, forbidding campus organizations to discriminate against gay and transgender students while simultaneously receiving public money and resources—that the University is openly hostile to BLinC. This claim is somewhat absurd, given that the University's policies, and the State of Iowa's civil rights laws, were in place long before BLinC came into being. DSAMF ¶ 122. BLinC then goes on to complain that it was the first and only student group to be deregistered based on its violation of the Human Rights policy. Plaintiff's Memo, p. 35. While BLinC's claim is true, the deregistration was not based in BLinC's religions exercise, but rather, in its refusal to comply with the Human Rights Policy, which was a prerequisite for continuing to receive benefits through the

State of Iowa. DSUMF ¶¶ 118–119. That BLinC was one of only three groups to receive a human rights complaint is hardly evidence that the University engaged in viewpoint discrimination against BLinC, when many other campus groups share its views on homosexuality and transgender students and remain active on campus.

CONCLUSION

Through its extensive briefing on its Motion for Summary Judgment and Permanent Injunctive Relief and exhaustive Statement of Facts, Plaintiff has highlighted the extent to which genuine material facts are at issue in every claim it makes. This is not a suitable case for dismissal on summary judgment motion. Defendants urge this Court to deny Plaintiff's Motion and to allow this case to proceed to trial.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on November 5, 2018:

- ☐ U.S. Mail
- ☐ FAX
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☐ Federal Express
- ☐ Other
- ☒ ECF System Participant (Electronic Service)

Signature: /s/Betty Christensen