

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN**

**ROMAN CATHOLIC FOUNDATION,  
UW-MADISON, INC., et al.,**

Plaintiffs,

v.

The Regents of the University of Wisconsin  
System, **DAVID G. WALSH, et al.,**

Defendants.

Case No. 07-C-0505-S

Honorable John C. Shabaz

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF**  
**MOTION FOR PRELIMINARY INJUNCTION**

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## **INTRODUCTION**

Defendants (collectively referred to as the University) have previously demonstrated that they are incapable of complying with basic constitutional obligations. We now know they are also incapable of complying with clear contractual agreements. Continuing in a campaign of viewpoint discrimination, the University is steadfast in its assessment that religious speech does not deserve the same protection as other types of speech. And pursuant to this conclusion, the University persists in rigorously scrutinizing the student fee funding requests of the Plaintiff Roman Catholic Foundation (RCF) just because it is a religious organization.

Not even a month after the parties entered into a Release and Settlement Agreement (“Agreement”) on May 2, 2007, University officials began to violate its terms and scrutinize the viewpoint and purpose of each of RCF’s activities. As part of this quest, they refused to fund certain portions of Plaintiffs’ 2006–07 and 2007–08 General Student Services Fund (“GSSF”) budgets because students who attended the activities paid for with this budget may have possibly worshiped, proselytized, and/or prayed during those activities.

Plaintiffs RCF, Planton, and Czarnecki, respectfully request that this Court enjoin the Defendants from further violating their First Amendment rights and order them to specifically perform the terms of the parties’ Agreement.

## **STATEMENT OF PERTINENT HISTORY AND FACTS**

Ever since RCF first became eligible to apply for segregated student fees (GSSF eligibility), University officials at UW-Madison have subjected RCF’s budget requests to outrageous scrutiny because of its Catholic expression and beliefs. (Proposed Statement of Facts ¶ 31.)<sup>1</sup> When RCF applied for funding in 2003, the Student Services Finance Committee (“SSFC”) members for UW-Madison approved a mere seven percent (7%) of RCF’s budget

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<sup>1</sup> This document will hereinafter be referred to as “Prop. Stmt. Facts.”

request because the members objected to RCF’s religious identity and activities. (*Id.* ¶ 32.) Rather than correcting SSFC’s discriminatory activities and demanding a viewpoint neutral process, University officials mandated continued scrutiny and discrimination. (*Id.* ¶¶ 33–37.)

During the 2004 funding cycle, which determined GSSF funding for the 2005–06 academic year,<sup>2</sup> Dean Luoluo Hong warned SSFC not to allocate UW-Madison funds<sup>3</sup> to any “church-related activity.” (*Id.* ¶ 33.) UW System General Counsel, Patricia Brady, repeated a similar internal policy when she stated that University policy prohibited segregated fees from going to religious student groups. (*Id.*) As a result of the instruction by these University officials, only fourteen percent (14%) of RCF’s budget was funded for the 2005–06 academic year. (*Id.* ¶ 34.)

During the 2005 funding cycle (for academic year 2006–07), Defendant Berquam, who replaced Dean Hong at UW-Madison, told SSFC members that they must heed Dean Hong and Ms. Brady’s warnings about funding religious expression. (*Id.* ¶ 35.) Then during RCF’s 2005 budget hearing,<sup>4</sup> Defendant Crim, Defendant Wiley’s representative at the SSFC hearing, objected to RCF receiving any funds from SSFC. (*Id.* ¶ 36.) As a result, the SSFC eliminated funding for RCF’s religious activities. (*Id.* ¶ 37.) This cut included RCF’s Lenten booklet that was written by students to be distributed to students. (*Id.*) When RCF appealed SSFC’s decision and the Associated Students of Madison (ASM) Student Judiciary reversed the SSFC’s decision by approving a \$145,000.00 budget for RCF, Defendant Berquam protested ASM allocating any funding to RCF. (*Id.* ¶¶ 38–39.)

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<sup>2</sup> Student organization budgets are determined a year in advance at UW-Madison. Thus, the 2004 budget cycle and hearing process funds student organization budgets for the 2005–06 academic year.

<sup>3</sup> Dean Hong, like Defendants herein, mistakenly thought that segregated student fees are state funds.

<sup>4</sup> After a student organization submits a GSSF budget request, the SSFC holds a hearing to review the organization’s proposed budget. This is an opportunity for SSFC to ask questions about the budget and for the organization to present why it should receive full funding.

Defendant Wiley also objected to the 2006–07 budget ASM allocated to RCF because of the religious nature of RCF’s activities. (*Id.* ¶¶ 40–47.) In a letter to the chairs of the ASM and SSFC, he said that allocating State funds to a religious organization “potentially violate[s]” the Establishment Clause, and he enumerated the items that concerned him: RCF’s religious activities; personnel that support the “on-going operations of a religious organization”; and the costs for printing “weekly bulletins . . . and student-authored Lenten Booklets.” (*Id.* ¶ 42.) When the University’s Regents eventually approved RCF’s 2006–07 budget, Defendants Wiley, Berquam, Crim, and Fangmeyer decided to derecognize RCF as a registered student organization (RSO) for the 2007–08 academic years. (*Id.* ¶¶ 47–49.) This initially prevented RCF from seeking any funding for those academic years. (*Id.* ¶ 49.)

Defendants’ actions forced RCF to file a lawsuit to regain its RSO status and end the student fee discrimination. (*Id.* ¶ 50.) This Court enjoined enforcement of UW-Madison’s non-discrimination policy as applied to RCF as a violation of the First Amendment. (*Id.* ¶ 51.) After this, the parties entered into the Agreement on May 2, 2007. (*Id.* ¶¶ 52–55.) The Agreement not only required Defendants to recognize RCF as a student organization, it also required Defendants to approve RCF’s 2007–08 budget allocation and to consider RCF’s budget items “without reference to the religious viewpoint of the program or activity.” (*Id.* ¶¶ 52, 55.) In addition, it prohibited Defendants from imposing greater scrutiny on RCF’s budget requests than those of other student organizations. (*Id.* ¶ 55.) Under the Agreement, Defendants are obligated to review RCF’s requests “in the same manner as [they] review[] the budget request of other RSOs.” (*Id.*)

A month later, Defendant Wiley and University officials contacted the Most Reverend Robert C. Morlino, Bishop of the Diocese of Madison, who is not a member of RCF. (*Id.* ¶¶ 56–61.) The University tried to prevent RCF from obtaining reimbursement for portions of its

2006–07 budget, the same budget that Defendant Wiley and the University approved in the spring and summer of 2006. (*Id.*) Defendant Wiley noted the religious nature of RCF’s budget activities and sought the Bishop’s counsel on whether RCF could seek funding reimbursement for secular activities, like operating a food pantry. (*Id.*) Wiley then asked if he and the Bishop could meet to discuss RCF’s GSSF budget. (*Id.* ¶ 58.)

Once RCF student members heard about the forthcoming meeting between Wiley and Bishop Morlino, they attended to defend their right to viewpoint neutral access to student fees. (*Id.* ¶¶ 63–64.) During three separate meetings, Defendants Wiley and Crim and other University officials told RCF that segregated student fees are state funds and that UW-Madison would not fund RCF expression that included religious prayer, worship, or proselytizing. (*Id.* ¶¶ 65–88.) Defendants said that RCF should not receive segregated fees for rosary booklets, costs of RCF events put on for UW-Madison students, and an RCF event that trains its student leaders to be better leaders on campus and in society. (*Id.*) During the meetings, the University asked RCF detailed questions about the content and purpose of each activity in its budget. (*Id.* ¶¶ 78–80.) UW-Madison’s counsel stated that she would have to review each activity’s description to determine if UW-Madison could fund them through GSSF. (*Id.* ¶¶ 79–80.)

Defendants eventually decided to deny RCF student fee funding for the following:

<b>Budget Year</b>	<b>Denied Expenditure</b>	<b>Reason for Denial</b>
<b>2006–07</b>	A drum shield for Alpha-Omega events (a weekly gathering of students)	It is used for a prayer and worship band.
	The Evangelical Catholic Institute, which trains students how to be better leaders on campus and in society	It may contain worship or prayer.
	The Busy Persons Retreat, which brought speakers to campus	No specific reason was given for not reimbursing the speakers’ contracts.
<b>2007–08</b>	Evangelical Catholic Training Camps, which trains RCF’s students how to be better leaders on campus and in society	It may contain prayer and worship.

Evangelicum, a student acapella group	Defendants will fund this, unless (1) they perform in a church or (2) their music is used for prayer or worship.
Samuel Group, which helps students in vocational discernment	It may contain prayer and/or worship.
Theater Arts program, which performs ten plays or musicals each year.	Defendants will fund this, unless the students perform in a church event.
Small Groups, including speakers for Breakfast Club, Alpha-Omega, Mullet, Mustard Seed	Defendants will fund these, unless the meetings and speakers focus on worship or prayer.
Retreats	Defendants will fund these, unless they focus on worship or prayer.
Dorm Interns	Defendants will fund these unless they lead worship or prayer meetings.
Rosary booklets	Defendants will not fund these because of “Establishment Clause concerns”
Lenten booklets	Defendants will not fund these because of “Establishment Clause concerns”
Alpha-Omega, a weekly RCF meeting	Defendants will not fund this because it may include praise and worship.

(*Id.* ¶¶ 82–85, 87–88.) Defendants stated that they will not reimburse the foregoing activities in RCF’s 2006–07 budget, which the SSFC, Defendant Wiley, and the University Regents all previously approved. (*Id.* ¶ 83, 88.) Without reimbursement for the 2006–07 budget activities, RCF student members will be stuck paying the bills, most of which are already past due. (*Id.* ¶¶ 89–98.) The University also refuses to fund the foregoing activities in RCF’s 2007–08 budget, which they approved per the parties’ Agreement. (*Id.* ¶¶ 84, 88.) Accordingly, RCF has reduced their fall 2007 activities and cancelled previously planned activities for the spring 2008 semester. (*Id.* ¶¶ 94–98.) Without assurance of funding, RCF will have to cancel additional activities, and its student members will have to pay for the activities that already occurred this year. (*Id.* ¶¶ 89–98.)

### **ARGUMENT**

The University’s policies and actions defy controlling Supreme Court authority and Wisconsin common law. Defendants’ student organization funding decisions discriminate based

on viewpoint, violate Plaintiffs' First Amendment right to free expression, and breach the parties' Agreement. Plaintiffs are in need of and are entitled to receive a preliminary injunction enjoining the Defendants from refusing to fund RCF's GSSF budgets, and requiring them to perform their obligations under the Agreement until the Court ultimately decides the constitutional issues because (1) Plaintiffs are reasonably likely to succeed on the merits; (2) they have no adequate remedy at law; (3) they are suffering irreparable harm absent injunctive relief; and (4) the injunction will not harm the public interest. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 619 (7th Cir. 2004).

#### **I. PROBABILITY OF SUCCESS IS LIKELY.**

In a First Amendment case, likelihood of success on the merits is determinative. *Joelner*, 378 F.3d at 620. The University's policies and actions violate the United States Constitution and Wisconsin state law. Defendants are violating Plaintiffs' First Amendment rights because their funding decisions offend exactly what the Supreme Court prohibited in 1995 and 2000: allocating student activity fee funds in a viewpoint discriminatory manner. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221, 233–34 (2000); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995). Defendants are also violating the State of Wisconsin's common law by breaching the terms of the Agreement, refusing to fund Plaintiffs' religious activities, placing excessive scrutiny on Plaintiffs' expression, and treating RCF differently than other RSOs at UW-Madison.

##### **A. The University Invalidly Discriminates Against Religious Expression on the Basis of Viewpoint.**

For over twenty-five years, the Supreme Court has consistently declared that public universities must give religious student organizations viewpoint neutral access to campus

resources. Beginning in 1981, with *Widmar v. Vincent*, 454 U.S. 263, 265, 267, 277 (1981) (granting religious groups access to campus facilities), and continuing with *Rosenberger*, 515 U.S. at 831 (holding that a prohibition against funding “religious activities” with student fees constituted viewpoint discrimination), and *Southworth*, 529 U.S. at 221, 233–34 (holding that a mandatory student activity fee system is constitutional only if funds are distributed in a viewpoint neutral manner), the Supreme Court has made one principle abundantly clear: a student group cannot be discriminated against simply because it is religious. Religious student organizations must receive the same benefits and access to campus facilities (including student fee funding) as their secular counterparts.

When a public university opens a forum to fund private student organization activities through mandatory student activity fees, it must allocate the funds in a viewpoint neutral way. *Rosenberger*, 515 U.S. at 829. In *Rosenberger*, Wide Awake Productions, a student organization at the University of Virginia, applied for student activity fees to print a “magazine of philosophical and religious expression.” *Id.* at 825. The purpose of the magazine was “to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.” *Id.* at 826. University guidelines prohibited student activity fees from funding, *inter alia*, “religious activities.” *Id.* at 825. The student council denied Wide Awake’s request because the magazine was a “religious activity” under the guidelines. *Id.* at 827.

The Supreme Court held that the University of Virginia violated the First Amendment’s demand of viewpoint neutrality in government regulation of speech when it prohibited student activity funds from being used for “religious activities.” *Id.* at 837. “In the realm of private speech or expression, government regulation may not favor one speaker over another.” *Id.* at

828. The “government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.” *Id.* “[W]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” *Id.* at 829; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

Five years later, the Court reaffirmed the viewpoint neutrality principle in *Southworth*. In that case, the University of Wisconsin required students to pay segregated student activity fees (the same fees at issue here). *Southworth*, 529 U.S. at 222. The allocable portion of the fees funded student organization expression. *Id.* at 223. Several students sued the university claiming that the segregated fee system violated their constitutional rights because the fees went to groups that espoused messages with which the plaintiffs disagreed. *Id.* at 221. The Supreme Court disagreed and held that the university could require students to pay the fees so long as the fees were apportioned to student organizations in a viewpoint neutral manner. *Id.* at 233. “Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program’s operation once the funds have been collected.” *Id.* Seven years later, the integrity of the university’s program remains in question.

**1. The University’s student fee forum must comply with the Supreme Court’s demand for viewpoint neutrality.**

*Southworth* and *Rosenberger* clearly establish a fundamental principle: when a public university opens a forum for student expression and offers to fund the expression through student activity fees, it must allocate the fees on a viewpoint neutral basis. It cannot consider an activity’s perspective or ideology when determining whether to fund the activity. *See Southworth*, 529 U.S. at 233 (noting the university may not prefer some viewpoints to others); *Rosenberger*, 515 U.S. at 829 (“Once it has opened a limited forum, . . . the State must respect the lawful boundaries it has

itself set. The State may not . . . discriminate against speech on the basis of its viewpoint.”).

The University in this case continues to operate the same forum that formed the backdrop to *Southworth*. Its forum is open to students and provides funding for student expression through the allocation of segregated university fees. The constitutional principles that govern public fora also govern the University’s forum, and these principles forbid viewpoint discrimination. *Southworth*, 529 U.S. at 230; *Rosenberger*, 515 U.S. at 829–30; *Widmar*, 454 U.S. at 268 n.5.

The University’s student fee forum is open to any student organization that meets the GSSF eligibility criteria. When the University allocates segregated fees, it is funding private student expression, not government speech.<sup>5</sup> See *Rosenberger*, 515 U.S. at 833–34; *Widmar*, 454 U.S. at 276. In fact, like the University of Virginia in *Rosenberger*, Defendants require student organizations to place a disclaimer on all advertisements promoting student organization events. (Compl. Ex. 5 at 50.) Such a disclaimer reaffirms that segregated fees are funding private student speech and assuages any of the Defendants’ Establishment Clause concerns. Thus, following *Southworth* and *Rosenberger*, the University operates a public forum for students and must fund student expression on a viewpoint neutral basis.

**2. The University cannot refuse to fund religious student expression when it funds a wide variety of secular student expression on campus.**

The University funds a wide variety of student expression through the segregated university fees. The UW System policies encourage the funding of travel; educational, cultural, social, or recreational activities; advertising and promotional printing; student media, magazines, and publications; and salaries for staff; among other things. (Compl. Ex. 2 at 7–9.) SSFC gives GSSF funding to student organizations that advocate particular views on the environment, agriculture and life sciences, Jewish culture, homosexual issues, Chicano and Mexican issues,

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<sup>5</sup> As shown in more detail at *infra* Part I.A.6.a, the University is also not dispensing state funds when it allocates segregated university fees.

even safer sex practices. (See SSFC, GSSF Funded Groups, available at <http://www.asm.wisc.edu/cms/content/view/36/29/> (last visited December 4, 2007).) Like the Christian magazine in *Rosenberger*, RCF's expression does not exist in a vacuum, and these widely divergent viewpoints assure that none of these expressive activities is endorsed by the University. *Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring).

The religious viewpoint that makes RCF activities unique does not justify excluding RCF from the campus forum. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). There is no reasonable justification why RCF should not receive funding given the breadth of expression in Defendants' forum. Indeed, the University's forum is broader than the University of Virginia's, which funded only "student activities that are related to the educational purpose of the University." *Rosenberger*, 515 U.S. at 824 (quotation marks omitted). While the University's guidelines on funding student organization activities do not explicitly exclude religious activities, in practice the Defendants refuse—like the University of Virginia—to fund any RCF budget item that appears to include a religious viewpoint. *Id.* at 825.

If RCF were merely a civic organization created to enrich students' lives through educational, social, and cultural activities, Defendants would fund its events. Yet because RCF conducts these activities from a distinctly Catholic viewpoint, the University excludes it from the forum. When the government opens a forum for free expression, it must respect those boundaries and not discriminate based on viewpoint. See *Lamb's Chapel*, 508 U.S. at 391–93 (holding unconstitutional a school's decision to ban a church from using school facilities for social, civic, and recreational activities with a religious perspective).

### **3. The University offends viewpoint neutrality by probing RCF's religious expression.**

Ultimately, as in *Rosenberger*, "[v]ital First Amendment speech principles are at stake

here.” *Rosenberger*, 515 U.S. at 835. The University’s refusal to fund RCF’s activities—simply because they include religious expression—violates the core principle of viewpoint neutrality announced in *Rosenberger*. The Defendants trample Plaintiffs’ fundamental liberty to free expression by scouring each of RCF’s activities for a religious viewpoint and then classifying that religious expression for disfavored treatment.

If there ever was any doubt about the meaning of viewpoint discrimination in the student fee context, Defendants’ actions provide the textbook definition. Instead of evaluating RCF’s activities on viewpoint neutral criteria (like they do for non-religious student organizations), the University insists on knowing what kinds of religious expression each RCF activity *may* include. Defendants demanded multiple meetings with RCF this summer where they dissected the purpose and content of RCF’s activities. In so doing, they stepped well beyond merely approving SSFC’s viewpoint neutral evaluations of RSO budgets or evaluating RCF’s events. Rather, they are concerned about the religious content and viewpoint that RCF *might* espouse at those events.

Requiring RCF members to explain in great detail the religious content of each activity and how much worship, proselytizing or prayer the activities include is the very thing *Rosenberger* warned against. “It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger*, 515 U.S. at 828 (citing *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” *Id.* at 829.

The Constitution does not allow the University to impose special limitations and disadvantages on RCF just because RCF expresses religious messages during its activities. *R.A.V.*, 505 U.S. at 391. But that is exactly what the Defendants have done. During their

meetings with RCF this summer, the Defendants and their agents required RCF members to describe the purpose and content of each activity in their 2006–07 and 2007–08 GSSF budgets. Indeed, after the second meeting University personnel had to take time to think about whether the content of each RCF event—which *may* include worship, proselytizing and/or prayer—complied with their notions of what RSOs can and cannot say when they receive segregated fees. And the University needed a third meeting to state with particularity why some events with overtly religious expression could not be funded with segregated fees, while other events that may contain religious expression (just not as much) could.

The mere act of raising the religious nature of RCF’s activities as something upon which the University evaluates the allocation of student fees is not permissible under viewpoint neutrality. In *Lamb’s Chapel*, the Supreme Court warned that when the government refuses to give a religious organization access to facilities and equal treatment merely because the message it intends to express is religious, the government’s actions are unconstitutional. *Lamb’s Chapel*, 508 U.S. at 391. Defendants’ actions and policies that permit them to inquire into the religious expression of RCF violate viewpoint neutrality and must be enjoined.

**4. The University offends viewpoint neutrality by refusing to fund any RCF activity that *may* involve prayer, worship, or proselytizing.**

Beyond just taking exception with RCF’s religious expression, the University specifically refuses to fund any activity that may include prayer, worship, or proselytizing. But the First Amendment demands that this type of religious speech—arguably the most fundamental and vital forms of religious speech—receive the same opportunities to flourish on campus. Relegating student prayer, worship, and proselytizing to second class status on campus violates *Widmar*, *Rosenberger*, and *Southworth*. There is no excuse for Defendants’ brazen discrimination against RCF’s activities that include fundamental forms of religious expression.

In the same way that searching budget activities for evidence of religious expression violates viewpoint neutrality, searching for student prayer, worship, or proselytizing that could be included in student organization activities violates *Rosenberger*. In *Rosenberger*, Wide Awake Production's magazine was directly **proselytizing** university students, and the Supreme Court still required the university to fund it. Indeed, as Justice Souter noted:

[Wide Awake's] writing is no merely descriptive examination of religious doctrine or even of ideal Christian practice in confronting life's social and personal problems, . . . ***It is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ***, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ. . . . The subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the word. . . .

*Rosenberger*, 515 U.S. at 867–68 (Souter, J., dissenting). The magazine's very nature, purpose, and content included proselytizing, but the Court found nothing wrong with Wide Awake Productions receiving student fees to carry out its mission. Indeed, any policies that prevented it from receiving funds due to its perspective violated the Constitution. *Id.* at 836–73, 845–46.

Because some of RCF's 2006–07 GSSF activities included prayer, worship, or proselytizing, Defendants refuse to reimburse RCF for these activities. Similarly, when Defendants noticed that RCF's 2007–08 budget contained similar activities to those funded in 2006–07, Defendants reviewed each activity in the budget proposal in painstaking detail, carefully parsing each activity description for religious expression and for any hint of student prayer, worship, or proselytizing. Then Defendants told RCF that it would no longer receive funding for any activity that contained too much prayer, worship, or proselytizing, but Defendants could not tell RCF how much prayer, worship and proselytizing is too much.

Irrespective of the University's "too much" standard, *any* student-initiated prayer, worship, and/or proselytizing is completely fundable under Supreme Court precedent. Defendants' actions in censoring these forms of expression are no different than a school

excluding a church from using its facilities because it did not want Christian views expressed in its facilities, *Lamb's Chapel*, 508 U.S. at 389, or a university excluding from student fee funding a Christian magazine that called students to faith in Christ. *Rosenberger*, 515 U.S. at 832. Defendants' inquiry into RCF's activities offends the very core of viewpoint neutrality. The University operates under the mistaken assumption that by inquiring into the detail of each RCF budget item, it will avoid any Establishment Clause concerns (concerns which the Supreme Court dismissed in *Rosenberger* and *Southworth*). (See *infra* Part I.A.6.) But in doing so, the Defendants violate viewpoint neutrality. Singling out certain RCF activities because they may include prayer, worship, proselytizing, or a religious perspective *is* viewpoint discrimination.

RCF's budgets include funding for student expression, travel, supplies, speakers, and the like. Many of these activities may involve students praying, worshiping, or proselytizing. But the fact that students pray, worship, or share the Gospel of Jesus Christ during student group events does not render the activities unfundable. Supreme Court precedent requires the state to give equal access and benefits to students who want to use state facilities or student fees for religious expression. See generally *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that the University of Missouri had to provide equal access to its facilities for religious and non-religious student groups). Defendants cannot inquire into every event that may include prayer, worship, and proselytizing. To do so offends viewpoint neutrality.

In addition, it is vital to note that RCF's rejected budget items do not actually seek funding for "prayer," "worship," or "proselytizing." Instead, Defendants are balking at funding materials or resources for events *where prayer, worship, or proselytizing occurs*. That is, otherwise fundable activities are jeopardized by the mere presence of "too much" prayer or "too much" worship before or after the event itself.

## **5. The University's viewpoint discrimination chills student expression.**

Defendants' actions also chill student expression. RCF applied for and the University approved RCF's GSSF budget for the 2006–07 and 2007–08 academic years. In reliance on Defendants' promise to reimburse its expenses, RCF held the programs it described in the 2006–07 budget, is refraining from holding some of those activities described in its 2007–08 budget. (Defendants even reiterated their promise to reimburse these events in the Agreement.) Now RCF has submitted reimbursements for activities in the 2006–07 and 2007–08 budgets, and the University refuses to pay. Vendors who supplied RCF and contractors RCF hired for its activities want their money, and they will seek it from the individual student members of RCF if the University does not pay the invoices. Indeed, in the most telling example of a chilling effect, the University's actions have caused RCF to cancel previously planned expressive activities during the 2008 semester, activities that were approved in RCF's 2007–08 budget. (*See Prop. Stmt. Facts* ¶¶ 52–98.)

Defendants' actions chill student speech activities as RCF's student members—who already have little money and may even be surviving entirely off of student loans—will bear personal financial responsibility for RCF's activities if the University continues to refuse reimbursement. Students will be stuck paying the bills and risk incurring bad credit because they contracted for goods and services for which they cannot now pay without GSSF funding. The University cannot require students to pay a mandatory student activity fee, promise to fund certain activities, and then later renege on that promise due to the activities' viewpoint. *Southworth*, 529 U.S. at 233–34. This prospect only encourages RCF to limit its activities to limit its members' potential financial exposure. Thus, Defendants' broken promises chill RCF's free speech.

## **6. The University's unconstitutional actions rest on two grossly mistaken assumptions about student activity fees and the Establishment Clause.**

Defendants' decision to defy controlling precedent and withhold student fee funding from

Plaintiffs rests primarily on two grounds that *Southworth* and *Rosenberger* dismiss. First, Defendants wrongly believe that student fee funds are “state funds” as opposed to a fund that belongs to the students. Second, Defendants incorrectly think that allocating student fee funds to expression that directly and purposefully advocates a religion or religious position violates the Establishment Clause. They cannot be permitted to persist in misreading the applicable law.

**a. The University mistakenly assumes that student activity fees are state funds.**

Defendant Wiley and other University officials continue to insist that segregated student fees are state funds. The Supreme Court dispelled this notion in *Rosenberger* and *Southworth*. Student activity fees are not taxes paid each semester by students to raise revenue for the University. *Rosenberger*, 515 U.S. at 841. The student fee money goes into a special fund from which any group can apply to receive money for a particular activity on campus. “[W]ithdrawal is permitted to cover the whole spectrum of speech, whether it manifests a religious view, an antireligious view, or neither.” *Id.* at 841.

A student activity fee system does not implicate the public university’s “right . . . to use its own funds to advance a particular message” because the “whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors.” *Southworth*, 529 U.S. at 229. “[T]he speech is not that of the University or its agents.” *Id.* at 235. The allocable portion of the University’s segregated student fees are not state funds, but are student funds that students may allocate and use in any viewpoint neutral manner that complies with state and federal laws. *See id.*; *Rosenberger*, 515 U.S. at 851–52 (O’Connor, J., concurring) (noting that student activity fees administered by students and kept separate from state treasury are not government resources).

Wisconsin state law and the University’s policies give students the responsibility of

distributing the allocable portion of segregated fees. *See Southworth*, 529 U.S. at 229; Compl. Ex. 1. Thus, both Supreme Court precedent and Wisconsin state law foreclose the notion that student fees are “state funds” because the “University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students.” *Southworth*, 529 U.S. at 229; *see also Schiff v. Williams*, 519 F.2d 257, 262 & n.2 (5th Cir. 1975) (holding student activity fees not to be state funds when they were segregated from university funds).

**b. The University mistakenly assumes that funding religious expression may violate the Establishment Clause**

Further, during meetings with RCF, University officials (including, Defendant Wiley) claimed that funding RCF’s religious expression would violate the Establishment Clause of the First Amendment. But this notion was debunked in *Rosenberger*. The “guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Rosenberger*, 515 U.S. at 839; *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 487–88 (1986); *Widmar*, 454 U.S. at 274–75. Indeed, the Court has repeatedly rejected the argument that the Establishment Clause justifies withholding equal free speech rights to religious speakers who participate in broad-reaching government programs. *See Rosenberger*, 515 U.S. at 839; *Lamb’s Chapel*, 508 U.S. at 393–94; *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248, 252 (1990); *Widmar*, 454 U.S. at 274–75.

Wisconsin law and the University’s policies even take measures to disassociate themselves from the private student speech funded by the segregated fees. The students are charged with allocating the student fees to groups who want to use it for expressive purposes.

Defendant Wiley and University officials then review what the student government has already allocated. Finally, ASM requires RSOs to place disclaimers on all activities advertisements, stating that ASM does not necessarily endorse the activity. *See generally Southworth*, 529 U.S. at 229.

Ironically enough, Defendant Wiley is the one who entangled the University with the church by trying to negotiate RCF's budget with Bishop Morlino, who is not a student at the University and who is not even a member of RCF. Because the segregated fees are not state funds, which are apportioned by students to student groups, and because the Supreme Court has said that public universities do not violate the Establishment Clause when funding religious student organizations through a mandatory student activity fee, Defendants' concerns carry no weight.

**B. Defendants Breached the Settlement Agreement by Refusing to Fund RCF's Religious Activities and Subjecting RCF to Excessive Scrutiny.**

Defendants also breached their obligations under the Agreement when they refused to fund certain activities in RCF's 2006–07 and 2007–08 budgets, scrutinized every detail of those budgets, and treated RCF differently than other student organizations on campus. “To state a claim for breach of contract, plaintiff must allege (1) the existence of a contract creating obligations flowing from defendant to plaintiff; (2) a breach of those obligations; and (3) damages from the breach.” *Uebelacker v. Paula Allen Holdings, Inc.*, 464 F. Supp. 2d 791, 801 (W.D. Wis. 2006) (citing *Nw. Motor Car, Inc. v. Pope*, 187 N.W.2d 200, 203 (Wis. 1971)). A contract is enforceable when the obligations arising from the contract are definite or reasonably certain. *Farnsworth, McKoane & Co. v. N. Shore Sav. & Loan Ass'n*, 504 F. Supp. 673, 675–76 (E.D. Wis. 1981). “The plaintiff is entitled to all damages that are the natural and probable result of the breach of a contractual obligation.” *Uebelacker*, 464 F. Supp. 2d at 801 (citing *Knapp v. Smiljanic*, 847 F.

Supp. 1428, 1434 (W.D. Wis. 1994)). That is, a plaintiff can only recover foreseeable damages. *Id.* Here, Defendants' breach has caused RCF's activity receipts and invoices to go unpaid.

**1. RCF and the University entered into a valid, precise, and binding contract.**

On May 2, 2007, RCF and Ms. Planton entered into a Release and Settlement Agreement with Defendants in case number 06-C-0649-S. (Prop. Stmt. Facts ¶ 52.) During that case, RCF and its co-plaintiffs (including Ms. Planton) offered to settle RCF's claims regarding discriminatory student fee funding. The University eventually accepted RCF's settlement offer. Both parties approved the Agreement. As consideration for the Agreement, RCF agreed to create a separate legal entity, St. Paul's University Catholic Foundation, to support the St. Paul's University Catholic Parish, and drop all its remaining claims against Defendants in case number 06-C-0649-S. RCF also assumed the obligation to "not seek funding for masses, weddings, funerals, or other sacramental acts requiring the direct control of ordained clergy" as this was never part of RCF's purpose. (*Id.* ¶ 53.)

In return, as consideration for the Agreement, the University agreed to recognize RCF as an RSO for the remainder of the 2006–07 academic year and to approve RCF's segregated fee budget recommended by SSFC for the 2007–08 academic year in the amount of \$253,273.88. (*Id.* ¶ 54.) The University also assumed the obligations to review RCF's future budgets "without reference to the religious viewpoint of the program or activity" and to "review RCF-UWM's budget requests in the same manner as it reviews the budget requests of other RSOs." (*Id.* ¶ 55.) Thus, all contract elements are present in the Agreement: RCF's offer, Defendants' acceptance, and consideration from both parties. (*See id.*)

**2. The University breached its obligations under the contract.**

Defendants breached their obligations under the contract when they refused to fund particular activities in RCF's 2006–07 and 2007–08 budgets based on the religious content of

those activities. (*Id.* ¶¶ 56–68.) The Agreement states that Defendants will approve RCF’s 2007–08 budget. (*Id.* ¶ 54.) But as stated above, Defendants have refused to fund the following activities in RCF’s 2007–08 budget: the Evangelical Catholic Training Camp, Samuel Group, rosary booklets, Lenten booklets, Evangelical Catholic Institute, and Mentoring for Busy Students. Further, Defendants and their agents have noted that they will reject future reimbursement requests for Evangelicum, the Theater Arts program, small groups, retreats, and dorm interns if Defendants believe these events involve too much worship or prayer. (*Id.* ¶¶ 69–73.) The University knew about the identity and nature of each of these programs when it executed the Agreement. Thus, Defendants violated the Agreement by refusing to approve material elements of RCF’s 2007–08 budget.

In addition, the Agreement requires the University to review RCF’s budgets “without reference to the religious viewpoint of the program or activity.” (*Id.* ¶ 54.) At the July and August 2007 meetings between RCF and Defendants, Defendants asked detailed questions about each RCF activity in its 2006–07 and 2007–08 budgets. (*Id.* ¶¶ 64–68, 74–88.) Defendants refuse to fund those budget items that they believe will contain or may contain religious worship, prayer and/or proselytizing by the students. (*Id.*) Thus, the University is reviewing RCF’s budgets by referencing the religious viewpoint of the activities. (*Id.*)

Further, the Agreement also requires Defendants to “review RCF-UWM’s budget requests in the same manner as it reviews the budget requests of other RSOs.” (*Id.* ¶ 54.) Since signing the May 2<sup>nd</sup> Agreement, the University has met with RCF leaders three times to discuss in great detail all of RCF’s activities. (*Id.* ¶¶ 64–68, 74–88.) Most of these meetings lasted several hours each and were attended by various University officials. After two of the meetings, University Legal Counsel Nancy Lynch told RCF that she would have to return to her office and

consider whether the University can fund RCF's activities. (*Id.*) But there would be no need for extensive consideration if the SUF system was truly viewpoint neutral. Defendants' actions place RCF under heightened scrutiny—in direct violation of the agreement.

### **3. RCF incurred damages because of the University's breach.**

Defendants' failure to fulfill their obligations under the Agreement has resulted in Plaintiffs incurring damages. The University refuses to reimburse the following expenses from RCF's 2006–07 budget: \$3,713.33 for the Evangelical Catholic Institute, \$356.15 for the Alpha-Omega drum shield, and \$1,819.88 for the Busy Persons Retreat. (*Id.* ¶ 83.) The University also refuses to reimburse the \$6,300.00 in expenses RCF incurred for the Evangelical Catholic Summer Training Camp and \$1,000.00 in expenses from Alpha-Omega speaker honoraria in its 2007–08 budget. (*Id.* ¶ 84.) Further, Defendants' counsel told RCF that they would not fund the following activities in RCF's 2007–08 budget: Samuel Group, rosary pamphlets, Lenten booklets, the Evangelical Catholic Institute, and the Mentoring for Busy Students program. (*Id.*)

Defendants already owe Plaintiffs nearly \$6,000 in reimbursements for RCF's 2006–07 budget. (*Id.* ¶ 91.) And their refusal to fund certain expression in RCF 2007–08 budget places RCF in the position of choosing to continue its expressive activities on campus and risk footing the entire bill for these activities (which the individual student members cannot afford), or cease engaging in expression for fear of incurring expenses that Defendants will not reimburse. (*Id.* ¶¶ 92, 94–97.) Defendants must be held accountable to their obligations under the Agreement. Monetary damages will not fully compensate Plaintiffs' injury; it will only lead to further litigation when Defendants deny future funding. Specific performance of the Agreement is the proper remedy to cure Defendants' breach. *See EQ Ne., Inc. v. First Am. Engineered Solutions, L.L.C.*, No. 07-C-0027, 2007 WL 129064, at \*1–2 (E.D. Wis. Jan. 12, 2007) (ordering specific performance of settlement agreement).

**4. Injustice would result if the 2006–07 GSSF Budget Agreement between RCF and the University is not enforced.**

Injustice will result if Defendants’ promise to fund RCF’s 2006–07 GSSF budget is not enforced. In Wisconsin, enforcement is accomplished by the doctrine of promissory estoppel. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 694–96 (Wis. 1965). “The purpose of promissory estoppel is to enforce promises where the failure to do so is unjust.” *Skebba v. Kasch*, 724 N.W.2d 408, 410 (Wis. Ct. App. 2006); *U.S. Oil Co., Inc. v. Midwest Auto Care Servs.*, 440 N.W.2d 825 (Wis. Ct. App. 1989). Thus, a promise is enforced when (1) there is a promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) the promise induced such action or forbearance; and (3) injustice can only be avoided by enforcement of the promise. *Hoffman*, 133 N.W.2d at 275; *Skebba*, 724 N.W.2d at 410. If these elements are met, the court must restore the promisee to where he would be if the promisor had fulfilled the promise. *Skebba*, 724 N.W.2d at 412. This is accomplished through specific performance. *Id.* at 413. This Court should enforce the promise Defendants made to RCF to fund its 2006–07 GSSF budget because failure to do so is unjust.

RCF applied for a GSSF budget for the 2006–07 academic years. (Compl. ¶¶ 77–78.) The University Regents eventually approved RCF’s budget request, albeit after UW-Madison officials momentarily stopped discriminating against RCF on the basis of its religious viewpoint. (*Id.* ¶ 94.) In receiving the University Regents approval, it is no stretch of the imagination that RCF believed their approval would result in RCF’s activities being funded. Defendants promised to fund RCF’s 2006–07 GSSF budget, which they should realize would induce RCF to rely on receiving funding from the GSSF budget. This was not a one time promise by Defendants, but a process that the University goes through every year in funding student

organizations.

Thus, it goes without saying that RCF relied on the University's promise. *Hoffman*, 133 N.W.2d at 275. Each year student organizations use the segregated fee process to request and obtain funding to carry out their expression on campus. (Compl. ¶ 44.) Even though Defendants have limited RCF's funding because of its viewpoint, they have not refused to reimburse activities—until the 2006–07 budget. RCF conducted its expressive activities on campus in reliance that the University would reimburse those activities.

When RCF submitted reimbursement requests for Alpha-Omega's drum shield, the Mentoring for Busy Students program, and the Evangelical Catholic Institute, Defendants refused to pay. (*Id.* ¶¶ 126–29; Compl. Ex. 26.) Injustice can only be avoided if the University reimburses RCF according to the 2006–07 GSSF budget for the expenses RCF incurred in conducting these events. Defendants' action "compels specific performance of the promise because otherwise [Defendants] will enjoy all the benefits of induced reliance while [RCF] will be deprived of that which [it] was promised, with no other available remedy to substitute fairly for the promised reward." *Skebba*, 724 N.W.2d at 411. Plaintiffs request that the Court order Defendants to reimburse RCF's expenses in its 2006–07 GSSF budget.

## **II. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW.**

Defendants have violated Plaintiffs' First Amendment rights. Nothing but injunctive and declaratory relief will restore the loss of Plaintiffs' rights. *Joelner*, 378 F.3d at 620; *see Nat'l People's Action v. Vill. of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990) (noting that injunctions are appropriate in First Amendment cases). Further, specific performance of an unambiguous contract is the proper remedy when a party breaches that contract. *See State v. Scott*, 602 N.W.2d 296, 301–02 (Wis. Ct. App. 1999) (citing Restatement (Second) of Contracts § 235(2) (1981)) ("It is a fundamental precept of contract law that when performance of a duty under a

contract is due, any nonperformance is a breach, and an aggrieved party may sue for specific performance.”); accord *Edlin v. Soderstrom*, 264 N.W.2d 275, 281 (Wis. 1978). Thus, Plaintiffs have no adequate remedy at law.

### **III. PLAINTIFFS ARE SUFFERING IRREPARABLE INJURY THAT OUTWEIGHS ANY HARM TO THE DEFENDANTS.**

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Walker*, 453 F.3d at 859; *Joelner*, 378 F.3d at 620. Plaintiffs have shown that Defendants are violating their First Amendment right to free expression and their rights under the Agreement. RCF has been forced to cancel expressive activities because of Defendants’ actions. These violations will continue as long as the University’s student activity fee policies remain in effect. Defendants lack a compelling interest to restrict RCF’s freedoms. Their policies violate the First Amendment in so many ways that the requested injunction will not impose any irreparable harm on them. *Joelner*, 378 F.3d at 620 (“[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute. . . .”). Hence, Plaintiffs are suffering irreparable harm that outweighs any possible harm an injunction might impose on Defendants.

### **IV. AN INJUNCTION WOULD SERVE THE PUBLIC INTEREST.**

“[I]njunctions protecting First Amendment freedoms are always in the public interest.” *Walker*, 453 F.3d at 859 (citing *Joelner*, 378 F.3d at 620). Because Defendants’ policies and actions violate Plaintiffs’ rights to free expression and Wisconsin common law the requested injunction would serve the public interest. By enjoining the University’s policies and actions and ordering specific performance of the Agreement, this Court will restore the “marketplace of ideas” on campus. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). Intellectual inquiry presupposes the freedom to differ from the prevailing wisdom of the day. “But

freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.” *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). Defendants’ policies have “prescribe[d] what shall be orthodox in . . . religion” and “force[d] citizens to confess by word or act their faith therein.” *Id.* Thus, Plaintiffs’ requested injunction serves the public interest.

### **CONCLUSION**

Defendants actions and policies violate the Supreme Court’s demand for viewpoint neutrality when allocating student activity fees. Defendants’ scrutiny of every detail of Plaintiffs’ expressive activities demonstrates that they have no interest in abiding by the Constitution or their contractual agreements. Absent injunctive relief, the University will continue its unconstitutional actions, and Plaintiffs will incur debts they did not bargain for. Plaintiffs respectfully request that the Court prohibit Defendants from discriminating on the basis of religious viewpoint in the student fee allocation process, order Defendants to perform their obligations under the Release and Settlement Agreement of May 2, 2007, and order Defendants to reimburse RCF’s activities from its 2006–07 and 2007–08 GSSF budgets.

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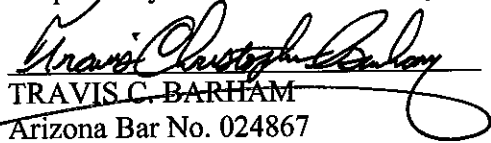
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Respectfully submitted this 8th day of December, 2007,

  
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