

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

<p>BUSINESS LEADERS IN CHRIST,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;">v.</p> <p>THE UNIVERSITY OF IOWA, <i>et al.</i>,</p> <p style="text-align: center;"><i>Defendants.</i></p>	<p>Civil Action No. 17-cv-00080-SMR-SBJ</p> <p style="text-align: center;">MOTION OF AGUDATH ISRAEL OF AMERICA FOR LEAVE TO PARTICIPATE AS <i>AMICUS CURIAE</i> IN SUPPORT OF PLAINTIFF</p>
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COMES NOW Agudath Israel of America (“Agudath Israel), and respectfully moves this Court for leave to participate in this action as *amici curiae*, and to file a brief in support of Plaintiff’s motion for preliminary injunction. In support of its motion, Agudath Israel states:

I. This Court Has Authority to Accept Amicus Briefs.

Federal district courts possess the inherent authority to accept *amicus* briefs. *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006) (“[D]istrict courts possess the inherent authority to appoint ‘friends of the court’ to assist in their proceedings.”); *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (2d Cir. 1982); *United States ex rel. Gudur v. Deloitte Consulting Llp*, 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007) (“The extent to which the court permits or denies amicus briefing lies solely within the court’s discretion.”). “No statute, rule, or controlling case defines a federal district court’s power to grant or deny leave to file an amicus brief, . . . and in the absence of controlling authority, district courts commonly refer to [Federal Rule of Appellate Procedure] 29 for guidance.” *Gudur*, 512 F. Supp. 2d at 927. “Factors relevant to the determination of whether amicus briefing should be allowed include whether the proffered information is ‘timely and useful’ or otherwise necessary to the administration of justice.” *Id.*

Amici's role is to assist the court “in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision.”

N.A.A.C.P. v. Town of Harrison, 940 F.2d 792, 808 (3d Cir. 1991). This authority supports the Court's exercise of its discretion to accept this *amicus* brief.

II. **Agudath Israel's Proposed Amicus Brief is Relevant and Will be Helpful to the Court.**

Agudath Israel of America (“Agudath Israel”) is a 94-year-old Orthodox Jewish organization, with members and constituent religious bodies – including a national network of some 40 Agudath Israel-affiliated synagogues – across the United States. Agudath Israel regularly intervenes at all levels and in all branches of government – federal, state and local; executive, legislative, administrative and judicial (including through the submission of, or participation in, *amicus curiae* briefs) – to advocate and protect the interests of the Orthodox Jewish community in the United States. Agudath Israel is particularly assiduous in seeking to prevent any governmental action that, inadvertently or otherwise, might restrict the ability of Orthodox Jews to practice our religion freely, or to participate fully and equally in the public life of our country.

Agudath Israel is supporting the Plaintiff in its effort to obtain injunctive relief. The University of Iowa's actions against the Plaintiff, if allowed to stand, are likely to adversely impact the ability of Jewish organizations that restrict their leadership to practicing Jews, which would substantially prejudice the ability of Orthodox Jews to practice our religion freely, and violate their rights under the Free Exercise Clause. Agudath Israel's brief may be of considerable help to the Court in showing that the University's conduct with the Plaintiff has implications far beyond a single religion or religious organization.

III. Consent of the Parties

Pursuant to LR. 7(k), the undersigned inquired of other counsel whether they consent to the motion. Counsel for the Plaintiff consents. Counsel for the Defendants has not responded to our request for his consent to our motion.

IV. Conclusion

Agudath Israel of America respectfully asks the Court to grant this motion, to allow them to participate as *amicus curiae*. Agudath Israel's proposed brief is filing contemporaneous with this motion.

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**Admission pro hac vice pending*

***Counsel for Proposed Amicus Curiae Agudath
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2018, I electronically filed a true and accurate copy of the foregoing document with the Clerk of Court using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Patrick D. Smith

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**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.

Civil Action No. 17-cv-00080-SMR-SBJ

**PROPOSED BRIEF OF
PROPOSED *AMICUS CURIAE*
AGUDATH ISRAEL OF
AMERICA
IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Agudath Israel of America (“Agudath Israel”), as *amicus curiae*, respectfully urges the Court to grant the Plaintiffs’ motion for a preliminary injunction. The actions of the defendants here, and the arguments of their counsel, the Attorney General of Iowa, pose a serious and substantial threat to the right of all Americans to free exercise of their religious beliefs, which is protected by the First and Fourteenth Amendments to the United States Constitution.

INTEREST OF THE *AMICUS CURIAE*

Agudath Israel is a 94-year-old Orthodox Jewish organization, with members and constituent religious bodies – including a national network of some 40 Agudath Israel-affiliated synagogues – across the United States. Agudath Israel regularly intervenes at all levels and in all branches of government – federal, state and local; executive, legislative, administrative and judicial (including through the submission of, or participation in, *amicus curiae* briefs) – to advocate and protect the interests of the Orthodox Jewish community in the United States. Agudath Israel is particularly assiduous in seeking to prevent any governmental action that, inadvertently or

otherwise, might restrict the ability of Orthodox Jews to practice our religion freely, or to participate fully and equally in the public life of our country.

We recognize that an Orthodox Jew could not be an officer of Plaintiff, because he or she could not subscribe to its Statement of Faith; we accept this as entirely reasonable, appropriate and lawful; and we would oppose any attempt by the State of Iowa to punish Plaintiff for refusing to allow an Orthodox Jew to be an officer of Plaintiff. By the same token, we would object to, and oppose, any attempt by the State of Iowa, or any other state, to punish a Jewish religious organization because it required that its leaders subscribe to Jewish law. The State of Iowa simply has no business trying to punish Plaintiff for not permitting anyone who does not subscribe to Plaintiff's Statement of Faith, for whatever reason, to be an officer of Plaintiff.

Agudath Israel, therefore, supports Plaintiff's effort to obtain preliminary injunctive relief. The University of Iowa's actions against the Plaintiff, if allowed to stand, are likely to adversely affect the ability of Jewish religious organizations to restrict their leadership to practicing Jews, which would substantially prejudice the ability of Orthodox Jews to practice our religion freely, and violate our rights under the Free Exercise Clause. Based upon the arguments of the Attorney General of Iowa, the State of Iowa could punish a Jewish religious group that limited its leadership to believing and practicing Jews. We urgently seek to persuade the Court not to countenance this.

FACTS

As we understand the salient facts, during Spring 2014, a small group of students at the University of Iowa's Tippie College of Business founded Business Leaders in Christ ("BLinC"), "as a religious organization to help seekers of Christ learn how to continually keep Christ first in the fast-paced business world." Doc. 7-5 at 2. BLinC's members meet weekly for prayer, Bible

study, and spiritual discussion led by the organization's leaders. The leaders also frequently invite prominent Iowa business leaders to visit campus and speak to students concerning how they integrate their faith and their careers. BLinC also organizes one or two service projects each semester, such as providing childcare at a local Saturday school program, and partnering with an after-school mentoring program for at-risk youth.

Any student may join BLinC. Under its Constitution, however, all officers are required to affirm that they accept and try to live in accordance with BLinC's religious beliefs as set forth in its Statement of Faith, which provides, *inter alia*:

All Christians are under obligation to follow the example of Christ in their own lives and in human society. In the spirit of Christ, Christians should oppose racism, every form of greed, selfishness, and vice, and all forms of sexual immorality, including pornography. 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. We should work to provide for the orphaned, the needy, the abused, the aged, the helpless, and the sick. We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death.

Doc. 7-4 at 30.

The University officially registered BLinC as a Student Organization in August 2014. This gave BLinC a number of benefits available to all registered Student Organizations, including eligibility to use campus meeting spaces and outdoor spaces, to participate in the biannual Student Organization Fair, to be listed on the University's website, to utilize campus communications systems, and to apply for funding from mandatory Student Activity Fees.

In March 2016, a very new member of BLinC expressed interest in joining its executive board. In conversation with an officer of BLinC, this student revealed that he was homosexual and desired to pursue same-sex relationships. BLinC concluded that because this student did not share the organization's religious beliefs, he could not be an officer of the organization. The

student complained to the University that he had been denied a leadership position in BLinC because he is “openly gay.”

The University ultimately concluded in November 2017 that BLinC violated the University’s Human Rights Policy, because its requirement that leaders affirm their commitment to the organization’s Statement of Faith “would have the effect of disqualifying certain individuals from leadership positions based on sexual orientation or gender identity.” Doc. 7-4 at 48. The University’s Human Rights Policy provides, in relevant part:

The University of Iowa brings together in common pursuit of its educational goals persons of many nations, races, and creeds. The University is guided by the precepts that in no aspect of its programs shall there be differences in the 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 consideration as an individual, and that equal opportunity and access to facilities shall be available to all. These principles are expected to be observed in the internal policies and practices of the University; specifically in the admission, housing, and education of students; in policies governing programs of extracurricular life and activities; and in the employment of faculty and staff personnel. Consistent with state and federal law, reasonable accommodations will be provided to persons with disabilities and to accommodate religious practices. The University shall work cooperatively with the community in furthering these principles.

Doc. 7-2 at 17. Based upon its conclusion that BLinC had violated this Policy, the University punished BLinC by revoking its registration. Doc. 7-4 at 47. This lawsuit ensued, with Plaintiff seeking a preliminary injunction ordering the University to reinstate BLinC as a registered Student Organization.

ARGUMENT

1. **THE STATE’S ARGUMENT IS FUNDAMENTALLY FLAWED,
BECAUSE IT IS HAS COMPARED APPLES AND ORANGES.**

The Attorney General asserts that, “the Court must carefully weigh the compelling interest of religious freedom on the one hand and the compelling interest of preventing discrimination on the other hand”, Doc. 18-1 at 16, and implicitly concludes that the compelling interest of preventing discrimination outweighs the compelling interest of religious freedom. This ignores the fundamental difference between Plaintiff’s members’ right to free exercise of their religion, and the complaining student’s purported right to be an officer of Plaintiff.

The First and Fourteenth Amendments to the United States Constitution provide that the State of Iowa, including the University of Iowa, “shall make no law . . . prohibiting the free exercise” of religion. Article 6, Section 2, further provides that, “This . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The State does not, and could not seriously, contend that the affected student has the right under the United States Constitution, or even under the Constitution or laws of Iowa, to be an officer of BLinC. The State contends that he has such a right under the Human Rights Policy voluntarily adopted by the University of Iowa. But any right created under a policy voluntarily adopted by a state agency are presumptively outweighed by rights guaranteed by the United States Constitution.

2. **BLINC REJECTED THE COMPLAINING STUDENT FOR
A LEADERSHIP POSITION BECAUSE OF HIS BELIEFS,
NOT BECAUSE OF HIS SEXUAL ORIENTATION OR GENDER IDENTITY.**

Defendants contend that BLinC was punished because its Statement of Faith inherently discriminates against certain students because of their sexual orientation or gender identity. This conclusion rests upon the false assumption that a person’s sexual orientation or gender identity

necessarily determines their religious beliefs. We would like to illuminate this fallacy through a brief explanation of relevant aspects of Jewish law.

Jewish law (in Hebrew, “*halacha*”; literally, “the way to go”) is a corpus that begins with, and is founded upon, a Written Law and an Oral Law that were revealed by God to the Jewish people at Mount Sinai and subsequently during our travel from Egypt to the Land of Israel. Jewish law does not limit itself to religious practices as that term is generally understood, but also governs every aspect of day-to-day life. For example, Jewish law includes tort law, contract law, other aspects of business law, and family law. It governs what Jews may and may not eat, how we may and may not dress, how to behave toward our spouses and raise our children, and every other aspect of our lives, in public and in private, at work, in the street, and in our homes, including in our bedrooms.

Jewish law recognizes that there are individuals who feel attracted sexually toward others of the same sex. Nonetheless, Jewish law unequivocally prohibits and condemns homosexual practices. *See C. Rapoport, Judaism and Homosexuality 1-5 (2017)*. Indeed, homosexual practices between men are condemned as an “abomination” (in Hebrew, “*to’eivah*”). Leviticus 18:22. Because of this, Jewish law requires that Jews who feel attracted sexually toward others of the same sex must not act upon these feelings by engaging in homosexual practices.

Jewish law in this area has been succinctly summarized by Rabbi Aharon Feldman, Rosh Yeshiva (Dean) of Yeshiva Ner Israel in Baltimore, Maryland, a member of the Council of Torah Sages of Agudath Israel, and one of the most highly and widely respected authorities on Jewish law in the United States or the world. In response to a letter he had received from a Jewish homosexual, Rabbi Feldman wrote:

I received your letter a few days ago and was very pained by the anguish you have undergone for so many years because of your homosexuality You

have asked me for a Torah [Jewish law] view on your problem. I hasten to answer you with the hope that what I write will help you in some way.

I believe that the course you have taken is correct: you refuse to deny your nature as a homosexual while at the same time refuse to deny your Jewishness. There is no contradiction between the two if they are viewed in their proper perspective.

Judaism looks negatively at homosexual activity, but not at the homosexual. Whatever the source of his nature, whether it is genetic or acquired (the Torah does not express any view on the matter), is immaterial. This nature in no way diminishes or affects the Jewishness of a homosexual. He is as beloved in God's eyes as any other Jew, and is as responsible as any Jew in all the *mitzvos* [requirements of Jewish law]. He is obligated to achieve life's goals by directing his life towards spiritual growth, sanctity and perfection of his character no less than is any other Jew. He will merit the same share in the world to come which every Jew merits, minimally by being the descendant of *Avraham Avinu* [Abraham, our Father] and maximally by totally devoting his life towards the service of God.

Past homosexual activity has no bearing on one's Jewishness. Although it is a serious sin, all humans by nature have spiritual shortcomings; this is why *teshuvah* [repentance] was given to us. *Teshuvah* has the capacity to return a person to a state even higher than that which he had before the sin.

Accordingly, a Jewish homosexual has to make a commitment to embark on a course through which he will ultimately rid himself of homosexual activity. It is not necessary that he change his sexual orientation (if this is at all possible), but that he cease this activity. It is obvious that for many people this will be difficult, and will have to be accomplished over a period of time. But it must be done and it can be done.

* * * *

Can a homosexual be expected to live as a celibate? I believe a Jewish homosexual can accomplish this if he decides that the Jewish people is his "wife and children." It is possible to do this if he throws his every spare moment into devotion to the welfare of his people. There are many areas where he can do this.

* * * *

Devotion of one's life to others is generally not considered an option in our modern world, since fulfillment of one's own desires and appetites is considered the major goal of life. This has caused the homosexual community to publicly flaunt their homosexual activity, as if to say to the rest of the world, "See, we can have just as much fun as you!" This is an understandable response to a culture which believes that without sexual satisfaction, life is a failure. But

this belief is both a total falsehood as well as a perversion of the nature of humanity.

The fact is that neither homosexual or heterosexual activity has the capacity to grant happiness to humans, as even a cursory glance at our unhappy world will demonstrate. The only activity which can give us happiness is striving towards reaching the true goals of life. Life is not meant to be an arena for material satisfaction. It is to be used to carry out God's Will by coming closer to Him and serving Him by keeping His commandments.

Sexual activity, by which the family unit can be built, is only one of the activities with which one can serve God. But someone who does not have this capacity still has a whole life and unlimited opportunities to serve God.

I have written at the outset that it is important for you to come to terms with your homosexuality. But to do so, it is vital to change your orientation away from the manner in which Western culture views life, and instead see sexuality in its proper perspective.

How does Judaism look at the reason for someone having been born or becoming a homosexual? Life is meant to be a set of challenges by which we continuously grow spiritually. Any physical defect curtails the enjoyment of life, but on the other hand, meeting the challenge inherent in such a defect can be the greatest source of joy and accomplishment. Challenges are what life is all about, and homosexuality is one of these challenges.

It is difficult for us to understand why certain people were given certain shortcomings as their challenge in life and others were not. We cannot fathom God's ways, but we can be sure that there is a beneficence behind these handicaps. When these shortcomings are met, they will grant us a greater satisfaction from our lives and a deeper devotion to God than if we were not given them.

A. Feldman, [A Personal Correspondence](https://jewishaction.com/life-ordeals/a-personal-correspondence/), <https://jewishaction.com/life-ordeals/a-personal-correspondence/> (accessed on January 16, 2018).

In short, Jewish law says that being homosexual does not deny one free will to accept that God does not want him to engage in homosexual activity, or to decide that he will not engage in such acts. And based upon the record here, we understand this to be the position of BLinC. By contrast, the State takes the position that a homosexual cannot believe that God does not want

him to engage in homosexual activity. There is absolutely no evidence in the record here to support the State's position.

If the complaining student had accepted that God does not want him to engage in homosexual activity, and otherwise accepted BLinC's Statement of Faith, he apparently could have become an officer of BLinC, notwithstanding his sexual orientation and gender identity. Thus, BLinC did not discriminate against him based on his sexual orientation or gender identity, but rather because of his religious beliefs, which is not prohibited by the University's Human Rights Policy.

3. ABSURD RESULTS THAT WOULD NECESSARILY
FLOW FROM THE STATE'S ARGUMENT HERE
EVINCE THE FUNDAMENTALLY FLAWED NATURE OF ITS ANALYSIS.

Both First Amendment law, including concerning the Free Exercise Clause, and non-discrimination law have reached incredible heights of legal formalism. And when the two intersect, like here, they perhaps reach the zenith of legal formalism. The courts, led by the Supreme Court, have constructed an almost incomprehensibly complex matrix for interpreting the First Amendment and non-discrimination law, involving a host of factors, such as neutrality, general application, strict scrutiny, reasonableness, etc. Counsel for BLinC have applied this matrix here, and argue that it leads to the conclusion that the defendants unlawfully interfered with BLinC's members' Free Exercise rights. The Attorney General, on the other hand, also has attempted to apply this matrix, and argues that it leads to the conclusion that the University acted permissibly.

We agree with Plaintiff's analysis and conclusion; and because we have no substance to add to Plaintiff's analysis, we will not burden the Court with a

repetition. If, however, the Court is inclined to agree with the State's argument and conclusion, we respectfully urge it to step back and look at the implications of such a conclusion from a broader perspective.

The University apparently was trying to force BLinC to amend its Statement of Faith by deleting three sentences:

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.

But according to the State's argument and conclusion in this Court, deleting these three sentences would not have cleared BLinC from further punishment for impermissible discrimination.

The University's Human Rights Policy also prohibits discrimination based on religion. Even if the BLinC Statement of Faith had been amended by deleting these three sentences, a practicing Jew could not have agreed, *inter alia*, that, "Jesus Christ . . . was God in human flesh." Doc. 7-4 at 30. Therefore, according to the State's position here, BLinC impermissibly discriminates against Jews based on religion, and should be punished for this. In fact, according to the State's position here, BLinC impermissibly discriminates against Christians who believe that abortion is permissible, and should be punished for this, because it insists that officers must accept, "the sanctity of all human life from conception to natural death." Indeed, there is no limit to the absurd results that necessarily flow from the State's argument here. For example, a Jewish religious organization could be punished by the State for insisting that its leaders *not* accept that Jesus Christ was God in human flesh – in other words, for insisting that its leaders not be Christians, -- because this would discriminate against Christians. A Muslim religious

organization could be punished by the State for insisting that its leaders accept that Mohammed was a prophet, because this would discriminate against Christians and Jews.

In each of these situations, if the University applied the same analysis as it applied to BLinC, the University would have to punish the religious organization for violating the University's Human Rights Policy, because, in the words of the University's conclusion concerning BLinC, such requirements for leadership positions "would have the effect of disqualifying certain individuals from leadership based on [religion]." Doc. 7-4 at 47.

We respectfully submit that it is patently absurd to conclude that the State may punish a Christian religious organization for not accepting Jews in its leadership, or may punish a Jewish religious organization for not accepting Christians in its leadership, or may punish a Muslim religious organization for not accepting Christians or Jews in its leadership. But as absurd as these conclusions are, they necessarily flow from the State's argument here.

When an argument necessarily leads to utterly absurd conclusions, the unavoidable consequence is that the argument is fundamentally flawed. The Attorney General's argument here is fundamentally, and fatally, flawed.

CONCLUSION

Agudath Israel of America respectfully submits that the Court should grant the preliminary injunction requested by Plaintiff.

Respectfully submitted on this Wednesday, January 17, 2018,

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**Admission pro hac vice pending*

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2018, I electronically filed a true and accurate copy of the foregoing document with the Clerk of Court using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Patrick D. Smith _____

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Attorney for Proposed Amicus Curiae

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