No. 19-1696

United States Court of Appeals for the Eighth Circuit

BUSINESS LEADERS IN CHRIST,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF IOWA, ET AL.

Defendants-Appellees.

On Appeal from the U.S District Court for the Southern District of Iowa,
No. 3:17-cv-00080

Brief of Plaintiff-Appellant

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SUMMARY OF THE CASE

Business Leaders in Christ ("BLinC") was a registered religious student group at the University of Iowa until 2017, when it was deregistered because of its religious beliefs and its requirement that its leaders agree with those beliefs. Defendants justified the deregistration under the University's nondiscrimination policy. But Defendants had never before enforced the policy in that way, and they granted favored student groups—including a group with religious beliefs directly opposing those of BLinC—exemptions from their new interpretation.

BLinC sued under the First Amendment's protections for freedom of speech, association, religious exercise, and religious leadership selection. The district court granted two preliminary injunctions in BLinC's favor, finding that Defendants' selective enforcement likely violated the First Amendment. On cross-motions for summary judgment, the district court found that Defendants continued discriminating based on BLinC's religious viewpoint, violating the law of free speech, free association, and free exercise. But, despite this Court's similar ruling in *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017), the district court held that the law was not clearly established and granted Defendants qualified immunity. Defendants had extensive relevant experience enforcing First Amendment principles on campus and expressly admitted targeting BLinC because of its beliefs. BLinC thus appeals the ruling on qualified immunity.

BLinC requests 30 minutes for oral argument.

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JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Iowa had jurisdiction under 28 U.S.C. § 1331. A final judgment disposing of all parties' claims was entered on February 28, 2019, and the notice of appeal was timely filed on March 29, 2019. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Did the district court err in granting the individual Defendants qualified immunity against BLinC's First Amendment claims?

Apposite Cases

Free Speech Clause: *Healy v. James*, 408 U.S. 169 (1972); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010); *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017).

Free Association: *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557 (1995); *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000); *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000); *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006).

Free Exercise Clause: *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012).

Religion Clauses: *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015).

STATEMENT OF THE CASE

Student Groups at the University of Iowa

The University of Iowa is Iowa's oldest and one of its largest universities, with around 24,000 undergraduate students and 9,000 graduate students. JA 1665. Like most American universities, the University of Iowa boasts a robust extracurricular life for its students. Alongside Hawkeye athletics, the University offers top facilities for intramural events, club sports, and personal fitness programs. *See*, *e.g.*, JA 1957-60, JA 2463-64 ¶¶ 30-33. It provides a rich array of programming in music, art, film, dance, and theater. And it encourages students to form their own groups around any other interests they might wish to pursue. Currently, there are over 500 student groups registered with the University, where students can gather to pursue a wide range of interests such as celebrating distinct cultures, promoting political causes, pursuing unique hobbies, worshiping together, engaging in sports, dance, music, and art, serving in the community, and pursuing academic excellence. *See* JA 0670, 2554 ¶ 379; *see also* Center for Student Involvement and Leadership, *Pick One!*, https://csil.uiowa.edu/pickone.

Registered student organizations (RSOs) are "entitled to certain privileges and benefits." JA 0744. These include the ability to participate each semester in the student recruitment fair, where RSOs meet and recruit new students, and the right to reserve facilities for meetings and activities free of charge. JA 2485-86 ¶¶ 104-07. Other notable benefits include

the use of University communications services, access to funding from the mandatory fees paid by all students, use of University trademarks and publications, and access to certain speech fora that are available only to RSOs. JA 0744, 2383. The University promises that RSOs will have "equal opportunity" to access these benefits "without differentiation for reasons that violate the University [nondiscrimination policy] or inhibit the group's exercise of First Amendment rights of free expression and association." JA 0745; JA 2452-53 ¶ 8.

BLinC's Mission

BLinC is one of the hundreds of student groups registered at the University. It was started in the spring of 2014 by a freshman student, Hannah Thompson, and a few of her classmates from the University's Tippie College of Business. As Christians, Hannah and the other founding members wanted to think about how their beliefs should inform what they learned in the classroom and what it meant to be Christian in a competitive workplace. JA 2484-85 ¶ 99-103. They formed BLinC to help them "continually keep Christ first in the fast-paced business world" and to "network within the College and with business leaders who walk with Christ on a day-to-day basis." JA 1608. In pursuit of this mission, BLinC's members gather weekly to pray, study the Bible, and discuss their faith. JA 1608-09; JA 1586, 1675. Once a month they invite speakers from the local business community to share how they integrate their faith and

work. *Id.* Members seek to understand how Christian ethics should inform business decisions in a marketplace frequently rocked by accusations of sexual harassment, mismanagement of employees, and unfair business practices. JA 1590-91 ¶¶ 44-46.

BLinC welcomes all students as members. JA 1683, JA 2496 ¶ 144. But because its purpose is to promote a Christian message and Christian practice, BLinC requires its leaders to share its Christian beliefs. JA 2487 ¶ 114-15; JA 2491 ¶ 127. To that end, BLinC screens leadership candidates for religious alignment by interviewing them and asking if they affirm its religious beliefs. JA 2515 ¶ 211; JA 2505 ¶ 172. This is essential to BLinC's mission, because BLinC's leaders are expected to "provide spiritual leadership," "lead[] prayer and Bible study," "explain[] the content of BLinC's religious beliefs," and "minister[] to others." JA 2519 ¶ 223; *see also* JA 1586, 1675-76; JA 2487 ¶¶ 114-15.

The RSO policy and nondiscrimination clause

BLinC was registered by the University under its RSO policy. The policy "encourages the formation of student organizations around the areas of interest of its students" and anticipates that students will form groups with the purpose "to organize and associate with like-minded students." JA 2452 ¶ 5. Regarding membership standards, the policy specifically provides that "any individual *who subscribes to the goals and beliefs* of a student organization may participate in and become a member of the organization." JA 2453-54 ¶ 8 (emphasis added). As all parties agree, the

University did not have (and still does not have) an "all-comers" policy that would require all groups to admit all students into leadership and membership without qualification. JA 2449-51 ¶ 1-3.

When BLinC was first registered, the RSO policy included the following nondiscrimination clause:

> Membership and participation in the organization must be open to all students without regard to 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. The organization will guarantee that equal opportunity and equal access to membership, programming, facilities, and benefits shall be open to all persons.

JA 2454 ¶11.To be registered, all groups were expected to include this language in their constitutions. JA 0745. The University had never interpreted the language to prohibit a group from selecting leaders who agreed with the group's purpose. JA 2455-57 ¶¶ 15-18. BLinC thus included the nondiscrimination language verbatim in its constitution without hesitation. JA 2483 ¶¶ 95-96. The constitution was submitted to and accepted by the University, giving BLinC status as an RSO. *Id.*

The RSO policy makes clear that RSOs are "voluntary special interest group[s]" that are "separate legal entities" from the University. JA 2452 ¶ 5. And the University is emphatic that registration is not "an endorsement of [an RSO's] programs or purposes, but merely a charter to exist" on campus. *Id.* ¶ 6. Indeed, the University expressly "disavow[s]

ownership" of RSOs' purposes and speech and states that registration gives RSOs no authority to speak for the University. *Id.* ¶ 7.

The complaint against BLinC

In March 2016, a student named Marcus who had recently started attending BLinC's meetings inquired about becoming an officer for the next school year. JA 2486 ¶¶ 109-10. In a follow-up meeting with Hannah, Marcus confided that he was gay and uncertain about what that meant for how he should live as a Christian. JA 2486, 2489-90 ¶¶ 118-124. Hannah and Marcus spent two hours discussing the Bible and what it taught on the matter, eventually concluding by praying together. *Id.* When Hannah reported to BLinC's board about the leadership inquiry, all agreed that Marcus would be welcome as a leader if he sincerely agreed with, and intended to live by, BLinC's biblical beliefs on sin and repentance, including beliefs against sexual activity outside of marriage between a man and a woman. JA 2491 ¶¶ 127-129.

When Hannah next met with Marcus, he declined the leadership opportunity, explaining that he disagreed with BLinC's understanding of Christian teachings and that he had resolved to live openly as a gay man. JA 2494-95 ¶¶ 136-41. Hannah assured Marcus that he was welcome to continue participating in BLinC's activities, but concluded that leadership would not be a good fit for him since he rejected BLinC's religious beliefs. JA 2495 ¶ 142.

One month later, Marcus emailed Hannah to "encourage you all" as "[t]he work you are doing in advancing God's Kingdom is super cool." JA 1693. He argued, however, that BLinC's decision to deny him a leadership role because of his "revisionist view on the subject of marriage" was "unbiblical." *Id.* Arguing from Scripture, the student advanced a theological viewpoint about "leadership positions in the church" and how some of BLinC's policies were consistent with this viewpoint and some were not. *Id.* He said that he arrived at his views about marriage after "studying God's word intensely, coupled with historical analysis, Greek and Hebrew root analysis, and a whole lot of prayer." *Id.* He suggested that BLinC was playing the role of "hypocrite" and ought "first take the log out of your own eye, and then you will see clearly to take the speck out of your brother's." *Id.* Marcus ended by acknowledging "the difficulty in this situation," emphasizing that he was "in no way trying to discourage BLinC," and said he was "simply raising some potential concerns as we all seek to become more like Jesus." *Id.* at 1693-94.

Hannah responded in a personal email. JA 1692. She confirmed that BLinC's leadership decision was not based on Marcus's identification as gay, but rather his disagreement with BLinC's beliefs and his refusal to repent of conduct that BLinC believed to be sinful. *Id.* She also emphasized that she would "hold [her]self and the other [BLinC] executives to this exact standard, regardless of the specific sin." *Id.* Hannah ended by

affirming that she loved Marcus as his sister in Christ, that he was welcome to participate in BLinC, and that she wanted to support him. *Id.*

Six months later, Marcus filed a complaint accusing BLinC of violating the University's nondiscrimination policy and asking the University to "[e]ither force BLinC to . . . allow LGBTQ members to be leaders or take away their status of being a student organization." JA 2501 ¶ 158. He simultaneously filed another complaint against another Christian organization called 24-7, accusing them of the same alleged misconduct. JA 2524 ¶ 241.

The Investigation

The University initiated an investigation and asked Hannah to come in for an interview. JA 2524 ¶ 242. The interview was led by the University's investigator, Constance Cervantes, along with Defendant Thomas Baker, who was then the Associate Dean of Students. JA 2501-02 ¶¶ 160, 164; JA 2540 ¶ 317. Both Cervantes and Baker are lawyers. JA 2501-03 ¶¶ 161, 164, 167. During the interview, Hannah was "bull[ied]" for justifying BLinC's decision. JA 2503 ¶ 167. She repeatedly explained that Marcus was denied a leadership position only because he rejected BLinC's religious teachings. JA 2503-04 ¶ 168. But Cervantes and Baker kept accusing her of discriminating against him because of his sexual orientation. *Id.* Cervantes later agreed that she "had no reason to believe Hannah was lying . . . at any time," *Id.* ¶ 296, but her July 2017 report

nonetheless concluded that BLinC had denied the student a leadership position solely because of his sexual orientation. JA 2508.

That fall, Bill Nelson, who was then the University's Director of Student Life, asked Jake Estell, a rising senior who had replaced Hannah as BLinC's president, to meet with him to discuss sanctions. JA 0634-35; JA 2505 ¶ 171; JA 2511 ¶¶ 191-92. Baker, also attended the meeting, as did Jake's vice-president, Brett Eikenberry. JA 2511 ¶¶ 193-94. Baker opened the meeting by admitting the University could not force BLinC to select leaders who did not share its mission any more than it could force an environmentalist group to choose a "climate denier" as its leader. JA 2513 ¶ 204. He noted that, for years, the University had respected the right of religious groups to maintain religious standards for their leaders, despite accusations that those standards violated the University's non-discrimination policy. JA 2512 ¶ 199; *see also* JA 2468-83.

Jake and Brett emphasized that they only wanted student leaders who would agree with, and live by, BLinC's Christian beliefs, and that Marcus's rejection of those beliefs was what made him ineligible to be a leader, not his sexual orientation. JA 2515 ¶¶ 211-12. Baker and Nelson both agreed that this was fine in principle, but they refused to question the investigator's conclusion, claiming that their only job was to decide sanctions, not review the factual findings. JA 2515-16 ¶ 212; JA 2527

¶¶ 356-57.[1] But they agreed that, going forward, BLinC could continue to screen its leaders for religious affinity, so long as it did not discriminate solely on the basis of sexual orientation. JA 2517-18 ¶¶ 215-18.

In concluding the meeting, Nelson suggested that BLinC ought to specify its beliefs more clearly in its constitution so students would know in advance and not be hurt to later learn that rejecting BLinC's beliefs would leave them ineligible for leadership. JA 2516-18 ¶¶ 213-18. Jake and Brett agreed to update BLinC's constitution with more detailed beliefs, and the parties left seemingly having resolved any concerns. *Id*. Indeed, after leaving the room, Nelson turned back, and—looking Brett and Jake in the eyes—said something along the lines that, while the University has a lot of great students, "some of the best" are "sitting right here." JA 2518 ¶ 219.

Jake, Brett, and the other members of the executive board formally revised BLinC's constitution to expressly incorporate a "Statement of Faith" listing core Christian doctrines previously identified by Hannah. JA 2519 ¶¶ 222-23. At the end of the Statement of Faith, the board added a new paragraph under the heading "Doctrine of Personal Integrity," which included these three sentences:

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[1] Nelson claimed there was a separate appeal process to review the factual findings. JA 2549 ¶ 358. That was false. JA 2557-58 ¶ 393. And. Nelson had no hesitation later "find[ing] there [was] a preponderance of the evidence that BLinC violated the University [nondiscrimination] [p]olicy." JA 2550 ¶ 360.

> 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.

Id. ¶ 222. The board also clarified that leaders would be asked to sign the Statement of Faith, affirming that they would accept and strive to live according to BLinC's religious beliefs. *Id.* ¶ 223.

The University's accusations

After receiving BLinC's revised constitution, in an October 2017 letter from Nelson, the University did an about-face, stating that BLinC's Statement of Faith was unacceptable because it was discriminatory "on its face" and because it "would have the effect of disqualifying certain individuals from leadership positions based on sexual orientation or gender identity." JA 2520 ¶ 226-27. The letter further insisted that BLinC "make additional revisions to [its] Statement of Faith" and "submit an acceptable plan" for selecting leaders if it wanted to remain on campus. *Id.* ¶ 228.

BLinC appealed to the Dean of Students, Lyn Redington. JA 2521 ¶ 231. She echoed Nelson's conclusion that BLinC's Statement of Faith violated the nondiscrimination policy "on its face." *Id.* ¶ 233. Further, despite extensive evidence to the contrary, she accused BLinC of "claim[ing] for the first time" on appeal, that the complaining student "was not allowed to hold a leadership position because he 'confirmed that he intended to be sexually active in same-sex relationships.'" *Id.* ¶ 234. With

that, BLinC was officially deregistered and denied equal standing with other student organizations on campus. *Id.* ¶¶ 231-32.

Defendants' knowledge

Defendants were well aware that their action violated BLinC's First Amendment Rights. JA 2468-83. Indeed, they had long warned other University officials, including members of the student government, that discriminating against a campus organization because of its religious viewpoint could subject them to personal liability under the First Amendment. JA 2468-83.

The issue arose at least as early as 1999 with respect to another group on campus, the Christian Legal Society ("CLS"). CLS required both leaders and members to embrace traditional Christian beliefs, including those prohibiting "adultery, premarital sex, . . . and homosexual conduct." JA 2468-69 ¶¶ 36-40. CLS emphasized that a person's sexual orientation itself would not "disqualify [them] from participating in the life of [the] chapter"; rather, what mattered was whether the person shared CLS's religious beliefs on the issue. JA 2469 ¶ 40. Still, CLS sought assurance that these leadership and membership standards would not conflict with the University's policy prohibiting discrimination on the basis of sexual orientation. JA 2468-69 ¶¶ 36-41.

The issue resurfaced several times over the next decade in different contexts. Each time, the University's response was the same: the First

Amendment protected CLS's religious beliefs as long as it did not discriminate based on sexual orientation alone.

In 1999, a letter from the University's Office of General Counsel approved CLS's constitution, identifying no conflict with the nondiscrimination policy. JA 2470 ¶ 44.

In 2004, a letter to CLS from Baker and copying Nelson further detailed that

- the University's policy did "not prohibit student groups from establishing membership criteria";
- student religious groups were "entitled to require a statement of faith as a pre-condition for joining the group";
- "*[a]sking prospective members to sign the CLS statement of faith would not violate the UI Human Rights Policy*";
- although a religious group could not "reject prospective student members solely on the basis of race, gender, or sexual orientation," it "would not be required, and will not be required, to condone the behavior of student members—after they join your group—that is contrary to the purpose of your organization and its statement of faith"; and
- "[i]ndividuals who fail[ed] to observe the CLS statement of faith" could "be dismissed as members."

JA 2471-75 ¶¶ 52-61 (emphasis in original). A follow-up letter two months later in April reiterated that "[a]s long as prospective members are treated as individuals and not categorically barred from applying for membership, organizational leaders may require members to accept the CLS statement of faith as a condition for participation." JA 2475 ¶¶ 61-

62. And, in May, when the Student Senate still refused to recognize CLS, the University wrote a memo admonishing them that CLS was "entitled" under the United States Constitution "to ask its members to adhere to the group's statement of faith" and that the Student Senate was "oblig[ed] under the law and University policy to realize the group members' freedom to promote their beliefs through association." JA 2475-76 ¶¶ 63-67. Nelson was copied on this memo. JA 2476 ¶ 68.

In 2008, the student government denied CLS funding because some student leaders "were uncomfortable with [the] organization." *Id.* ¶ 69. The University again pushed back, reminding the student leaders in an October 2008 letter that CLS was a properly registered student organization and that "the United States Constitution" required funding requests to be "processed in a content neutral manner" and "without any consideration of the organization's viewpoint." JA 2477 ¶ 71. The University warned the student leaders that they were "agents of the University and the State of Iowa" and thus could "be subject to personal liability" if they violated CLS's "rights under the U.S. Constitution." *Id.* ¶ 72. One week later, a letter again copying Baker and Nelson instructed the student government leaders to "process [CLS's] request in a timely manner without consideration of membership rules as stated in the organization's constitution." JA 2478 ¶¶ 73-74. The student leaders were directed to contact Baker with any further questions. *Id.* ¶ 74.

Finally, in 2009, after four registered student organizations complained about CLS's presence on campus, the University repeated that its nondiscrimination policy did "not prohibit student groups from establishing membership criteria" and that the First Amendment protected religious student groups in "establish[ing] a statement of faith as a precondition for joining the group." *Id.* ¶ 76. The student government nevertheless proceeded to amend its bylaws to bar funding to "exclusive religious groups." JA 2479 ¶ 77. Once more, the University demanded that the student government reverse course, suspended the amended bylaws, and warned the student leaders that they were "state actors" who had to "protect student organization members' constitutional rights at all times." JA 2480 ¶ 84. Student leaders could be "subject to personal liability in court," the University threatened, even for "inadvertently" infringing the "constitutional rights of student organizations." JA 2480 ¶ 84. The University concluded by noting that, in the upcoming school year, training on these issues would be "presented by Tom Baker" and that student officials would be "required to attend." *Id.* ¶ 85. Nelson also was copied on this memo. *Id.* ¶ 86.

Thus, for a decade, Defendants themselves repeatedly affirmed that a religious student group has a constitutional right to require its leaders (and members) to share the group's faith. But with BLinC, Defendants set all that aside, revoking its RSO status and forcing it to seek judicial relief.

The first preliminary injunction

Even at this early state, the evidence was unrefuted that many other religious groups on campus required their leaders to sign statements of faith yet had never been challenged by Defendants. The most blatant example was Love Works, a religious group started by Marcus after he complained about BLinC. It is a gay-affirming, Christian organization that requires its leaders to sign *its* statement of faith. JA 2528 ¶¶ 262-63. Imam Mahdi, a Muslim student organization, also required its leaders to share its faith. JA 2456-57 ¶ 17. And many other religious organizations of diverse faith traditions also continued to maintain faith standards for their leaders. *Id.* Because Defendants deregistered BLinC for doing the same things they let other organizations do, BLinC sued and moved for a preliminary injunction to restore its registered status in time for the winter recruitment fair in January. JA 2562 ¶¶ 405-06.

The Court granted the motion, holding that Defendants had engaged in "selective enforcement" of the nondiscrimination policy. Add. 001; JA 2562 ¶¶ 406-07. The court pointed specifically to four organizations that demonstrated Defendants' discrimination against BLinC. Add. 027. First it noted that "student organizations like Students for Life, the Korean American Student Association, and the University of Iowa Feminist Majority Leadership Alliance" were "permitted to organize around their missions and beliefs," though BLinC was not. *Id.* In addition, Imam Mahdi's "requirement that only Shia Muslims [were] eligible for full membership"

was a "requirement based upon at least one protected classification—that of religion"—and it was not clear "why [it] ha[d] been able to maintain these requirements." Add. 028. In light of this "selective enforcement," the court found that BLinC had a "fair chance of prevailing on the merits of its claims under the Free Speech Clause."[2] The court emphasized that, once a "state university creates a limited public forum for speech, it may not 'discriminate against speech on the basis of its viewpoint.'" Add. 014 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) and *Gerlich v. Leath*, 861 F.3d 697, 704-05 (8th Cir. 2017)).

Leaving room for the possibility that Defendants simply may have been unaware of the discrepancies in their enforcement, the court ordered them to "restore BLinC to registered student organization status for ninety days." Add. 031. Following this ninety-day period, they could further "respond by detailing" whether they had made "any changes to the enforcement" of the University's policy. *Id.*

The University's "clean-up" and the second injunction

Defendants responded by initiating a review of the constitutions of all religious groups. First they identified those groups with religious standards for their leaders. JA 2564 ¶ 418. Then they led a second round of

[2] Because BLinC was entitled to a preliminary injunction under the Free Speech Clause, the court declined at this stage to address BLinC's claims under the Religion Clauses. Add. 028.

reviews to flag those groups whose leadership standards specifically addressed marriage, sexuality, or gender identity. *Id.* ¶ 419.

Later, the University reviewed the constitutions of all other student organizations, except fraternities and sororities. JA 2565 ¶ 420-21. In this round, reviewers were instructed to look for language in organizations' constitutions that might be deemed "contradictory" to the nondiscrimination policy. JA 2562-63 ¶¶ 408-12. This would include any language requiring group leaders or members to embrace "beliefs" or "purposes" related to the policy's protected categories. JA 2563 ¶ 414. Thus, for example, reviewers presumably were to tag political groups with views on "service in the U.S. military," feminist or religious groups with views on the meaning of "sex," social organizations with views on "sexual orientation" or "gender identity," and so forth with any of the policy's protected classifications. JA 2454 ¶ 12. Reviewers were told that groups could "still have purposes/mission statements" related to these classifications, but "membership or leadership" could not "be contingent on the agreement, disagreement, subscription to, etc., of stated beliefs/purposes which are covered in the [nondiscrimination] Clause." JA 2564 ¶ 415. Reviewers were instructed to "hold off," however, on reviewing the constitutions of fraternities and sororities, due to the "complexities" of their "national and international[]" affiliates. JA 2565 ¶¶ 421-22. Other nationally affiliated groups were not similarly exempted. *Id.*

While the review of student constitutions was ongoing, Defendants agreed to extend BLinC's 90-day injunction an additional two months. Court Order, Dkt. 46; *see also* JA 0164 ¶ 9. But as the review concluded, Defendants told BLinC that it would be again deregistered once the extended period expired, forcing BLinC to return to court for a second preliminary injunction. JA 0164 ¶ 10.

BLinC's second motion noted that litigation discovery thus far had revealed no enforcement action by Defendants against other student groups with leadership standards touching protected categories. JA 0163-64. Indeed, notes from Defendants' internal meetings indicated they would be interested in having an "all-comer's" policy but "not in [the] pure sense" that would interfere with "fraternities and sororities." JA 2503-04 ¶ 168. Defendants also thought it was "imp[ortant]" to have a "Men's Glee Club," "Women in Engineering," and a "Black Student Union," apparently wanting an all-comer's approach for BLinC only. JA 2504 ¶ 169. On these facts, the court remained concerned that "BLinC's viewpoint" was the real reason for the threatened deregistration. Add. 033. Hence, on June 28, 2018, the court extended the preliminary injunction through the conclusion of the lawsuit. Add. 034.

The evidence at summary judgment

A short time later, the University deregistered 38 other student groups, mainly because they had failed to timely resubmit their constitu-

tions with an updated version of the RSO policy's nondiscrimination language. JA 2569 ¶ 439. Many of them eventually updated the policy language and were reregistered. *Id.*; *see also* Add. 045. But some groups *were* targeted specifically for their religious leadership standards. InterVarsity Graduate Christian Fellowship, for example, was told it could not continue its 25-year policy of requiring its leaders to be Christian, nor even "encourage" them to be Christian. JA 2566-69 ¶¶ 429-38. It was deregistered for refusing to abandon that requirement. *Id.* After InterVarsity brought a separate lawsuit, the University agreed that all religious groups on campus would be treated as registered for the pendency of this lawsuit. *InterVarsity Christian Fellowship USA v. University of Iowa*, No. 18-cv-80 (S.D. Iowa), Dkt. 40-1 at 9 ¶ 15.[3]

No nonreligious groups were ever deregistered for leadership standards related to any categories covered by the nondiscrimination policy. Instead, the University went out of its way to protect such groups. It expressly amended the RSO policy so that groups that are "*exempt under Title IX*" would not have to comply with the policy's prohibition against discrimination on the basis of "sex." JA 2454 ¶ 12-13 (emphasis in origi-

[3] InterVarsity's lawsuit is nearing final judgment. Briefing on its motion for partial summary judgment, which seeks an injunction and actual damages based on the same claims as here, concluded on April 22, 2019. Briefing on Defendants' cross-motion for summary judgment concluded shortly thereafter on May 3. Both motions are ripe for resolution.

nal). This was intended to let fraternities and sororities continue discriminating on the basis of sex in both their leadership and membership requirements. JA 2565 ¶¶ 423-24. Student sports clubs were given an unwritten exception for "historical reasons." JA 2464 ¶¶ 27-28; JA 2566 ¶¶ 426-27. And Defendants indicated they would continue taking no action against political and ideological groups that screened their leaders for mission alignment. JA 2456-59 ¶¶ 17-19; JA 2569-71 ¶¶ 440-46; JA 2632-33. Even many religious groups were never questioned for their religious leadership requirements. JA 2456-57 ¶ 17; JA 2570 ¶ 444. Most remarkably, Love Works was granted preferential treatment despite requiring its leaders to sign a statement of faith embracing a gay-affirming understanding of Christianity. JA 2528 ¶¶ 263-66; JA 2570 ¶ 444; *see also* Add. 038-39, 045, 053-54.

In their summary judgment briefing, Defendants justified the exception for fraternities and sororities as consistent with Title IX. JA 2424; *see also* 20 U.S.C. § 1681.[4] They justified the exemptions for other organizations on the grounds that they support the University's "educational mission" and "provide safe spaces for minorities." JA 2424; *accord* Defs.' Reply at 6, Dkt. 88-1 (same); *see also* Add. 039 (court order noting University's position).

[4] Title IX also contains an exemption for religious organizations, 20 U.S.C. § 1681(a)(3), but Defendants did see fit to extend it to the religious student groups on campus.

On the eve of oral argument, Defendants finally produced a list confirming the status of all registered student organizations. All religious groups except Love Works had their status "suspended . . . pending the outcome of this litigation." Add. 045; JA 2609-24. Love Works retained its full status as a registered student organization. JA 2618. No secular groups were identified as having been deregistered or placed on suspension as a result of their leadership requirements. JA 2609-25.

Defendants were unapologetic about their religious viewpoint discrimination. Nelson admitted that if BLinC would just have deleted the three sentences concerning marriage and sexuality from its constitution, he never would have deregistered it. JA 2551 ¶ 365. He also admitted that nothing in the nondiscrimination policy prohibited BLinC from including these statements in the first place. *Id.* ¶¶366, 368, To the contrary, he acknowledged that compelling BLinC to remove the statements actually violated the University's nondiscrimination policy, as well as state and federal law. JA 2551-53 ¶¶ 367, 369-73, 376.

Baker agreed that nothing in the University's nondiscrimination policy prohibited BLinC's leadership standards, and he acknowledged they were analogous to the types of standards nonreligious groups imposed on their leaders. JA 2541-42 ¶¶ 322-24. He understood that the University's policy only prohibited status-based discrimination, not leadership selection based on beliefs or conduct. JA 2542-43 ¶¶ 325-331. Still, he thought

that a religious student group's right to require leaders to sign a statement of faith depended upon "what's in the Statement of Faith." JA 2545 ¶ 341. He was fine with a requirement prohibiting "sex outside of marriage," but not a requirement prohibiting sex "outside of marriage between a man and a woman," because "gay marriages are not considered" in the latter option. *Id.* He also admitted that if BLinC had just deleted the three statements about marriage and sexuality, "[it] would have reduced his concern about [BLinC's] constitution" and he "may have" at that point deemed the updated constitution "acceptable." JA 2546 ¶ 343.

Baker had been deeply involved with the earlier issues involving CLS. JA 2541 ¶ 319. And he "played a larger role than anyone," after Nelson and Redington, in the decision to deregister BLinC. JA 2544-45 ¶ 339; *see also* ¶¶ 333-38. He admitted that telling a religious group who to select as its leaders would "raise questions under the Free Speech Clause." JA 2547 ¶¶ 348-51. And he noted specifically that the investigation of BLinC "raise[d] First Amendment concerns in [his] mind." JA 2548 ¶¶ 353. He had alerted investigator Cervantes to the University's past application of the RSO policy with respect to CLS and told her that the earlier interpretation was "still current" as far as he knew. JA 2548. Yet he thought that Cervantes's role as the lead investigator would protect him from "allegations that [he] violated someone's free speech rights." *Id.* ¶¶ 353-54. It was also he who proposed to University counsel that BLinC be forced

to modify its Statement of Faith "in a way that would be acceptable." JA 2546 ¶ 344.

Redington also knew that Defendants' treatment of BLinC violated the Constitution. She testified it would not "ever be okay" for the University "to tell a religious student group that it cannot consider religion in selecting its leaders," because "that's their belief," which is "protected by the First Amendment." JA 2556 ¶ 388. And she agreed that BLinC's leadership standards were entirely acceptable under the University's nondiscrimination policy. JA 2558-60 ¶ 395, 397-98, 401. She thought it was important to understand what exactly happened between Hannah and Marcus because the situation "implicated religious liberty concerns . . . that could potentially expose the University to liability." JA 2558 ¶ 394. And she openly questioned, along with Nelson, whether the "different approach" they were taking with BLinC was appropriate. JA 2553 ¶¶ 374-75. Still, she "didn't ask to see any of the underlying documents that [the investigator had] considered," made no effort to understand the underlying facts, and relied almost exclusively on the investigator's findings. JA 2558-60 ¶¶ 394, 399-400. Ultimately, she agreed that her decision to uphold BLinC's deregistration was wrong and "was not supported by the factual evidence." JA 2557, 2560-61 ¶¶ 391, 402.

On February 6, 2019, the district court resolved the parties' cross-motions for summary judgment, concluding there was no material dispute over the foregoing facts. Add. 035-71. The court thus granted BLinC's

motion on its free speech, free association, and free exercise claims. Add. 054-61, 071. It denied the motion on BLinC's claims under the Religion Clauses that its religious leadership selection was protected from governmental interference. Add. 061-063, 071. The court also granted Defendants' motion of summary judgment on qualified immunity. Add. 065-70. This appeal followed.

After BLinC filed its notice of appeal, the State of Iowa further undermined Defendants' arguments by passing a law forbidding Iowa universities from punishing student groups for requiring their leaders to embrace and act in accordance with their missions. Iowa Code Ann. § 261H.3.

SUMMARY OF THE ARGUMENT

This may be one of the clearest cases of religious viewpoint discrimination this Court will see. Defendants punished BLinC for requiring its leaders to agree with its Christian faith, relying on a standard that Defendants had *never* enforced against any other student group and which they had repeatedly admitted (and even instructed students) would violate the First Amendment if it were imposed against a religious group. When Defendants were caught red-handed by the court below, they doubled down and attempted to enforce the standard against BLinC *again*, all while intentionally exempting not only a huge portion of secular student groups (particularly fraternities and sororities) but also a religious student group that held the exact opposite religious beliefs as BLinC. And

when Defendants were caught at that *yet again* (and enjoined yet again), they responded by (a) kicking out *more* religious groups for the offense of—like BLinC—having religious leadership standards, and then (b) summarily suspending the registered status of all religious groups (except for, once again, BLinC's religiously inverse doppelgänger, Love Works), all while (c) continuing to exempt fraternities and other secular groups from the standard it was imposing on BLinC.

These actions violated clearly established law. Indeed, as the United States described it in a brief filed below, the University has engaged in a "textbook violation" of BLinC's First Amendment rights. JA 2583. For decades, the controlling precedent of the Supreme Court and the Eighth Circuit has repeatedly confirmed that RSOs have a right to exercise their freedom of speech, association, and religion free from religious viewpoint discrimination. No court has *ever* held that a university may engage in religious viewpoint discrimination against a student organization. Indeed, Defendants' favorite case—*Christian Legal Society v. Martinez*—firmly *upheld* the rule against religious viewpoint discrimination. And courts applying *Martinez* have uniformly ruled that it does not allow universities to selectively enforce their policies against religious groups.

If anything, the law has only gotten clearer since *Martinez*, because the U.S. Supreme Court unanimously ruled in *Hosanna-Tabor v. EEOC* that government is uniquely disabled from interfering in a religious

group's selection of its religious leaders. Thus, while all student organizations are protected from viewpoint discrimination, and all religious student organizations are protected from religious discrimination, religious organizations' leadership selection is *particularly* safeguarded by the First Amendment.

This Court's 2017 decision in *Gerlich v. Leath* illustrates how blatant Defendants' violation was. There, this Court denied qualified immunity to university defendants for discriminating against the viewpoint of an RSO. But *Gerlich* was a much closer case. It didn't address the uniquely protected issue of religious leadership selection, and instead was focused only on one narrow category of RSO benefits that is particularly identifiable with a university: use of the university's trademarks. By contrast, not only does BLinC's case center on religious leadership selection, but the University had explicitly disclaimed any endorsement of or relationship to that selection. Moreover, the record here showing viewpoint discrimination against BLinC is much more stark. Since qualified immunity was inappropriate in *Gerlich*, it is *a fortiori* inappropriate here.

The district court's ruling made the necessary predicate findings for denying qualified immunity: that a violation of the law occurred and that the law was long established. The court found that Defendants had engaged in "blatant" religious viewpoint discrimination by penalizing BLinC for certain beliefs while commending Love Works for providing "safe space" for the opposite beliefs. Add. 054. And the court agreed that

the illegality of such discrimination has been "established for some time" and applies even in the context of "a nondiscrimination policy" in a "limited public forum." Add. 068-69. Yet the court still granted qualified immunity.

Allowing that qualified immunity ruling to stand would mean that public universities could act with impunity to single out religious speech for suppression at least one more time. And that would be one more time too many. After this Court's *Gerlich* decision, there should have been no need for the *BLinC* or *InterVarsity* cases. But now that Hannah Thompson, Jake Estell, Brett Eikenberry, and InterVarsity's leadership have all had to face years of negotiation and litigation just to vindicate their First Amendment rights, this Court should take care to warn universities against inflicting similar harm on others in the future. Because "[t]he protection of first amendment rights is central to guaranteeing our capacity for democratic self-government," this Court has an important role in communicating "to organized society that [those rights] be scrupulously observed." *Risdal v. Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000).

This Court should thus reverse the district court's grant of qualified immunity, reverse its categorical disregard for *Hosanna-Tabor*'s religious leadership protections, and remand for consideration of damages and attorney fees, along with instructions to enter a permanent injunction fully protecting BLinC.

ARGUMENT

This court reviews a grant of qualified immunity *de novo*. *Ross v. City of Jackson, Mo.*, 897 F.3d 916, 920 (8th Cir. 2018). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Here the balance weighs overwhelmingly on the need for accountability. Defendants were deeply-versed in their constitutional obligation to treat all student groups equally and, in fact, had helped enforce that obligation in other circumstances. Yet they deliberately targeted BLinC because they did not like its religious beliefs and stubbornly defended their approach even after the district court warned against, and twice enjoined, their discriminatory mistreatment. Government officials enjoy no immunity when (1) they perpetuate the "violation of a constitutional . . . right" that (2) was "clearly established" at the time of the unlawful conduct. *Gerlich*, 861 F.3d at 704. These elements are easily met here.

I. Defendants violated BLinC's First Amendment Rights.

The district court correctly concluded that Defendants' discrimination was indefensible, notwithstanding their effort to color it as an exercise in equal opportunity and nondiscrimination. Add. 035. The court agreed that nondiscrimination laws "are a familiar expression of society's values" that "reflect a broad consensus as to the evils of discrimination." *Id.*

But the court was nonetheless adamant against "portray[ing] this case as a fundamental conflict between nondiscrimination laws and religious liberty." *Id.* Even in the "noble" pursuit of promoting "equal opportunity," the government is "bound by the Constitution's protection of individual liberties." Add. 035. And even the "best-intentioned policies" must be pursued "in an even-handed manner." *Id.* "Particularly when free speech is involved, the uneven application of any policy risks the most exacting standard of judicial scrutiny." Add. 071. Defendants "failed to withstand" that review, and the court held that "the Constitution" simply would not "tolerate the way Defendants chose to enforce [the University's nondiscrimination] [p]olicy." *Id.*

On BLinC's freedom of speech and freedom of association claims, the court emphasized that the University had "admit[ted]" that it "deliberately exempted [some] groups" from its nondiscrimination policy. Add. 053. Further, the court noted "the undisputed evidence" that Defendants targeted BLinC because of its viewpoint:

> "The University allows Love Works to limit leadership to individuals who share its religious beliefs on homosexuality. But BLinC may not."
>
> "It allows groups, such as Hawkapellas and the Chinese Students and Scholars Association, to limit leadership based on protected traits in violation of the Human Rights Policy. But BLinC may not."
>
> "The University allows groups to speak about religion, homosexuality, and other protected traits through their leadership criteria; but BLinC may not express its views on these subjects."

Add. 053-54. "That," the court held, "is viewpoint discrimination." *Id.*

The court held that Defendants had infringed BLinC's religious exercise for similar reasons. It noted that the University "grants student groups secular exceptions" to its nondiscrimination policy and that, "in declining to grant BLinC an exception for its sincerely held religious beliefs," the University "made a value judgment" against BLinC's beliefs. Add. 058. In other words, Defendants' selective enforcement "reflected 'animus' . . . toward BLinC's religious beliefs." Add. 055.

The district court concluded that the Defendants' infringement of BLinC's First Amendment rights did not pass muster under strict scrutiny. Indeed, the court noted that the University failed even to "present in their briefs a position on strict scrutiny." Add. 059. Drawing from the University's other arguments, however, the Court believed that the University had a legitimate interest in "allow[ing] students to engage with other students who have similar interests" without having to "fear rejection . . . because of their membership in a protected class." Add. 060. But because there was "no appreciable difference in the potential harms caused by BLinC and those caused by the various RSOs that [were] permitted to limit leadership or membership based on protected characteristics," the compelling interest standard could not be justified. *Id.*; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (where law "leaves appreciable damage to [its] suppos-

edly vital interest[s] unprohibited," the law "cannot be regarded as protecting an interest of the highest order"). Moreover, the Court later noted that "Defendants have admitted that BLinC's Statement of Faith and leadership selection policies do not discriminate based on status" and "[t]hus, they do not, on their own, violate the Human Rights Policy." Add. 065.

Nor, the court concluded, was revoking BLinC's registration narrowly tailored to promote the University's interests. If deregistration truly sought to ensure no student was ever rejected based on a protected characteristic, Defendants "could adopt an 'all-comers' policy," a change which the court believed "would dramatically promote its goals of diversity and equal access to academic opportunity." Add. 061.

For all these reasons, the court granted BLinC's motion for summary judgment as to its claims under "free speech, expressive association, and free exercise of religion." *Id.* Defendants have not appealed these holdings, which is unsurprising considering their extensive, express admissions of discriminatory treatment,[5] and their extensive, express admissions that BLinC's religious beliefs and leadership standards were never

[5] *See* JA 2454-68 ¶¶ 12-35; JA 2520 ¶¶ 227-28; JA 2521-22 ¶¶ 232-35; JA 2528 ¶¶ 263-66; JA 2545-46 ¶¶ 340-44; JA 2547-48 ¶¶ 348-54; JA 2548-50 ¶¶ 356-57, 359; JA 2551 ¶¶ 365-66; JA 2556 ¶¶ 387-88; JA 2558 ¶ 394; JA 2563-64 ¶¶ 410-16; JA 2564-66 ¶¶ 417-427, JA 2569-71 ¶¶ 440-46.

in violation of the nondiscrimination policy in the first place.[6] This Court should thus affirm that Defendants violated BLinC's constitutional rights.

II. BLinC's rights were clearly established at the time of the violations.

This Court takes a "broad view of what constitutes 'clearly established law' for the purposes of the qualified immunity inquiry." *Bonner v. Outlaw*, 522 F.3d 673, 679 (8th Cir. 2009). A right is "clearly established" when its contours are "sufficiently clear so that a reasonable official would understand when his actions would violate the right." *Gerlich*, 861 F.3d at 708 (citation omitted). Rights can be clearly established even where there is no "case directly on point," *id.*, and "even in novel factual circumstances," *id.* at 711 (Kelly, J., concurring) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *see also Tlamka v. Serrell*, 244 F.3d 628, 634 (8th Cir. 2001) (courts can "look to all available decisional law, including decisions of state courts, other circuits and district courts" to determine clearly established law). And while Defendants argued below for a sliding-scale approach to civil liberties, there is no question that the standards equally apply to "university officials in cases involving the First Amendment." *Id.* at 710 (Kelly, J., concurring) (collecting Eighth Circuit

[6] *See* JA 2510-11 ¶¶ 187-90; JA 2512 ¶¶ 200-201; JA 2513 ¶ 205; JA 2514-16 ¶¶ 206-12; JA 2517 ¶¶ 215-17; JA 2527 ¶ 260; JA 2529-30 ¶¶ 269-74; JA 2532 ¶¶ 283-84; JA 2537-39 ¶¶ 302-308; JA 2541-43 ¶¶ 319-29; JA 2552-53 ¶¶ 370-376; JA 2554 ¶ 378; JA 2555 ¶ 382; JA 2555-56 ¶¶ 384-386; JA 2558-59 ¶¶ 395-97; JA 2560-61 ¶¶ 401-02.

cases). And here, the standards are easily satisfied. The factual circumstances are not novel and there is overwhelming amount of case law making abundantly clear that Defendants' religious discrimination against BLinC was unconstitutional.

A. BLinC's free speech rights were clearly established.

The district court's own analysis of the undisputed evidence compels a reversal of the grant of qualified immunity. The court acknowledged that "the individual defendants should have been aware that their actions implicated BLinC's First Amendment rights; and, indeed, the record shows that they were." Add. 070 (citing evidence). All three individual Defendants had real-time concerns that what they were doing was unconstitutional. *Id.* And Baker and Nelson had to ignore their own direct and repeated experiences enforcing CLS's First Amendment rights on campus to justify deregistering BLinC. JA 2468-81 ¶¶ 36-87. Further, the court acknowledged that it "has been established for some time" that "the selective application of a rule or policy can violate the First Amendment," Add. 068, and that it is "clear that a university may not illegally burden a student's free exercise rights," Add. 069. Finally, the court agreed that "the First Amendment's restrictions on viewpoint discrimination apply" even "to a limited public forum established by a university" and "even when the viewpoint implicates a nondiscrimination policy." Add. 068-69

(citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995)). On these points alone, the court should have denied Defendants the protections of qualified immunity.

1. The law against viewpoint discrimination is clearly established.

Decades of both Supreme Court and Eighth Circuit precedent overwhelmingly reinforce this conclusion. In *Healy v. James*, the Supreme Court held that a state college that allowed student groups to "place announcements . . . in the student newspaper," "us[e] various campus bulletin boards," and reserve "campus facilities for holding meetings" could not deny equal access to a student group that held "abhorrent" views and was reputed to have espoused "violent and disruptive activities" as a political tool. 408 U.S. 169, 176, 178, 187-88 (1972). In *Widmar v. Vincent*, the court extended that ruling to protect religious student organizations, concluding that a public university could not justify denying them equal treatment out of fear it would "confer [an] imprimatur of state approval" in violation of the Establishment Clause. 454 U.S. 263, 274 (1981). And in *Rosenberger v. Rector and Visitors of University of Virginia*, the Supreme Court held that, if a public university provides funding for secular student groups to speak on certain topics, it cannot deny funding to religious groups addressing the same topics from a religious perspective. 515 U.S. at 829, 831. Finally, in *Trinity Lutheran Church of Columbia, Inc.*

v. Comer, the Supreme Court reiterated that a government cannot withhold a "generally available benefit" on the basis of religious views or identity. 137 S. Ct. 2012, 2019 (2017). These cases alone are sufficient to overcome Defendants' claim for qualified immunity.

This Court's rulings are no less clear. Less than two years ago, in *Gerlich v. Leath*, this Court held that it has "long been recognized that if a university creates a limited public forum, it may not engage in viewpoint discrimination within that forum." 861 F.3d at 709. That applied even to students' use of Iowa State University's trademarks, which arguably implicated university interests far more than BLinC's participation at student fairs and reservation of space on campus for meetings.

Earlier cases have also established the point. In *Gay & Lesbian Students Association v. Gohn*, for example, this Court held that a public university engaged in viewpoint discrimination when it applied an abnormal funding standard to a gay and lesbian group and when certain of the decision makers "freely admitted that they voted against the group because of its views." 850 F.2d 361, 367 (9th Cir. 1988). And in *Gay Lib v. University of Missouri*, the Court emphasized that the same rule protected groups whose views may, to some, be "abhorrent, even sickening." 558 F.2d 848, 856 n.16 (8th Cir. 1977). Such abhorrence was "of no moment," since "[t]he stifling of advocacy [was] even more abhorrent, even more sickening," as it "rings the death knell of a free society." *Id.*

Defendants distinguished none of these cases, and the district court expressly agreed that it is long-established that public universities opening a limited public forum for student expression cannot discriminate on the basis of viewpoint. Add. 068-70. Nevertheless, the court ultimately deemed the line of Supreme Court and Eighth Circuit cases unpersuasive because they "only set out the general legal principles applicable to this case." Add. 069. In contrast, the court found that the cases "factually most like this matter"—*i.e.*, cases involving nondiscrimination policies—"fail to offer clear conclusions as to the selective application" of such policies. *Id*. Thus, the court deemed the issue a "close call" that justified protecting Defendants with qualified immunity Add. 070.

This reasoning is erroneous and should be reversed. There is nothing about enforcing a nondiscrimination policy that gives the government *carte blanche* to discriminate. In all of the analogous cases, the college or university found *some* justification for its discrimination, be it concern for public safety (*Healey*), fear of violating the Establishment Clause (*Widmar*; *Rosenberger*), or disapproval of a group's message (*Gerlich*; *Gohn*; *Gay Lib*). The fact that the University of Iowa seeks to justify its discrimination in terms of enforcing its nondiscrimination policy—while ironic—is, in the end, a difference without a distinction: strict scrutiny must still be met. Add. 049. Yet Defendants never even "present[ed] in their briefs a position on strict scrutiny." Add. 059. And the district court

held that the defense would have failed in any case, because the University's interests in promoting "diversity" and "equal access," while perhaps compelling, still had to be enforced evenly against all groups. Add. 060.

2. The cases the district court cited show that the law against viewpoint discrimination is clearly established.

The cases the district court relied on addressing enforcement of nondiscrimination policies are also unavailing. The court first cited *Christian Legal Society v. Martinez*, 561 U.S. 661, 683-84 (2010), as finding "no liability against the university or its officers" in a case concerning deregistration of a religious student group. Add. 069. But that finding turned on an alleged all-comers policy that, as the Supreme Court interpreted it, meant there was no discrimination by definition: *all* groups had to accept *all* comers. *Martinez*, 561 U.S. at 671, 678. Here, in contrast, it is entirely undisputed that Defendants did not and do not have an all-comers policy. JA 2449-51, 2482, 2631. And the Supreme Court, in fact, emphasized that—absent an all-comers' policy—"a public educational institution exceeds constitutional bounds . . . when it restricts speech or association simply because it finds the views expressed by a group to be abhorrent." *Martinez*, 561 U.S. at 683-84 (cleaned up).[7] Indeed, *Martinez* was the lead

[7] *See also Martinez*, 561 U.S. at 679 ("[T]he Court has permitted restrictions on access to a limited public forum . . . with this key caveat: Any access barrier must be reasonable and viewpoint neutral"); *id.* 685 (university must "respect the lawful boundaries it has itself set" and may not "discriminate against speech on the basis of . . . viewpoint" (cleaned up)).

case this Court relied upon in *Gerlich* to hold that "[i]t has long been recognized" that a university "may not engage in viewpoint discrimination within [a limited public] forum." *Gerlich*, 861 F.3d at 709 (citing *Martinez*, 561 U.S. at 667-68). The district court itself cited this same language to confirm that "the First Amendment's restrictions on viewpoint discrimination apply to a limited public forum established by a university." Add. 068. *Martinez* thus serves only to clarify that nondiscrimination policies cannot themselves be used to discriminate, at least not without satisfying strict scrutiny, which Defendants have indisputably failed to do here.

The Ninth Circuit's ruling in *Alpha Delta Chi-Delta Chapter v. Reed*, on which the district court next relied, Add. 052, is also not helpful for Defendants. There, the Ninth Circuit upheld a university's a nondiscrimination policy as "viewpoint neutral as written," even though it was not an all-comers policy. 648 F.3d 790, 803 (9th Cir. 2011). But regardless of whether that was correct, the court highlighted that the policy would "still be unconstitutional if not *applied* uniformly." *Id*. (emphasis added). That was precisely the problem here: "the University [did] not apply the [nondiscrimination] [p]olicy in a viewpoint-neutral manner. It applie[d] the policy selectively[.]" Add. 067.[8]

[8] The court in *Reed* remanded because "the record d[id] not adequately explain" why some student groups had membership requirements that appeared to "violate the school's nondiscrimination policy." *Reed*, 648

Finally, *Christian Legal Society v. Walker* held on a motion for injunction pending appeal that CLS was likely to prevail on its claim of viewpoint discrimination after the university in that case "applied its antidiscrimination policy to CLS alone, even though other student groups discriminate[d] in their membership requirements on grounds that [were] prohibited by the policy." 453 F.3d 853, 866 (7th Cir. 2006). But despite *Walker*'s similarity, the district court here held that "given the lack of factual record in that case, it is difficult to see *Walker* as clearly establishing the constitutional issues." Add. 069.

Not so. *Walker* carefully addressed and applied First Amendment law and shows that, at least as of 2006, it was exceedingly clear that nondiscrimination policies could not be used to discriminate against religious speech. Nor was *Walker*'s holding necessary to the district court's in the first place, given that the law was already clearly established under this Court's own and the U.S. Supreme Court's extensive precedent on the issue. In short, none of the cases that the district court cited provide any valid basis for granting Defendants qualified immunity.

F.3d at 804. The court surmised it was "possible that these groups were approved inadvertently because of administrative oversight" or because they had agreed, "despite the language in their applications . . . to abide by the nondiscrimination policy." *Id*. By contrast, the district court here held that Defendants "*deliberately* exempted other groups from the policy" and, moreover, had already "reviewed all RSO constitutions in 2018" to correct any administrative oversight, yet there still "remain[ed] groups that limit membership or leadership based on characteristics protected under the policy." Add. 053.

The district court implied that the parties agreed that this is a "close case" because BLinC described it as "unusual" and Defendants described it as "difficult." Add. 070. But BLinC called the case "unusual" only because Defendant's discrimination was so astonishingly blatant. *See* BLinC Br. at 1, Dkt. 74; *see also Lukumi*, 508 U.S. at 523 ("The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions."). Flagrant civil rights violations *ought* to be unusual. And Defendants' own self-serving characterization of the case as "difficult" can hardly shore up their right to qualified immunity considering their extensive, express admissions that BLinC's leadership selection policies did not violate the University's nondiscrimination policy and that they knew that targeting BLinC was unlawful. *See supra* nn. 5-6.

3. Defendants ignored a preliminary injunction warning them against continued viewpoint discrimination.

In any event, even if there had been some question at the time of BLinC's *original* deregistration that the First Amendment forbids religious viewpoint discrimination, that was no longer true by the time the University sought to *again* deregister BLinC in summer 2018. By then, the district court had granted a preliminary injunction that expressly forbade selective enforcement of University policy against BLinC. Add. 017, 028. The court explained that the injunction was an "extraordinary remedy" that BLinC obtained because it was likely to succeed on the merits

of its claims. Add. 011-12; *see also Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984) ("granting of preliminary injunctions is not favored unless the right to such relief is clearly established"). Defendants were thus keenly aware that the First Amendment specifically forbids selective enforcement of University policy against BLinC's religious leadership requirements. *See Burnham v. Ianni*, 119 F.3d 668, 677 n.15 (8th Cir. 1997) (*en banc*) (denying qualified immunity while noting university defendant's awareness that plaintiffs would have a "good case" against him). Yet the University refused to extend BLinC's preliminary injunction so it could instead proceed to deregister it, all while knowingly exempting fraternities, sororities, and numerous other favored student organizations. At a minimum, *that* was a violation of clearly established law, and this Court should so rule.

B. BLinC's free association rights were clearly established.

The Supreme Court's rulings regarding freedom of association and assembly have likewise "made it clear" that "antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint." *Walker*, 453 F.3d at 863. Thus, as the United States explained below, Defendants' suppression of the religious views around which BLinC associated constitutes a "textbook violation of BLinC's First Amendment rights to free association." JA 2583.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, a privately organized St. Patrick's Day parade subject to the state's nondiscrimination law excluded "descendants of the Irish immigrants" who wanted "to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." 515 U.S. at 561, 563-64. The U.S. Supreme Court found that the parade organizer's decision was protected as free association. First, the Court noted that the parade organizers—like BLinC here—had "disclaim[ed] any intent to exclude homosexuals as such." *Id.* at 572; *see also* JA 2494 ¶ 135; JA 2514 ¶¶ 207-08; JA 2515 ¶¶ 210-12. "Instead, the disagreement [went] to the admission of [the group] as its own parade unit carrying its own banner," which would have "alter[ed] the expressive content of the [organizer's] parade." *Id.* at 572-73. This was "fatal" to the group's claim against the parade organizers. *Id.* at 579. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.*

In *Boy Scouts of America v. Dale*, the Court further applied these principles to protect an organization's right to select its own leaders, notwithstanding application of a state nondiscrimination law. 530 U.S. 640 (2000). The Court held that "[t]he forced inclusion of an unwanted person

in a group" would "infringe[] the group's freedom of expressive association if the presence of that person in the group affect[ed] in a significant way the group's ability to advocate public or private viewpoints." *Id*. 648. The Court deemed it irrelevant that a group might not "trumpet its views from the housetops" or might "tolerate[] dissent within its ranks." *Id*. at 656. Rather, courts must "give deference" to an association's own view of "what would impair its expression." *Id*. at 653.

The Seventh Circuit's *Walker* decision applied *Hurley* and *Dale* to facts similar to those here. *Walker* enjoined a public university from using a nondiscrimination policy to force a Christian student group to admit members who disagreed with its faith regarding homosexual conduct. *Walker*, 453 F.3d at 863. The court recognized that membership selection was crucial to the student group's message, since it "would be difficult . . . to sincerely convey a message of disapproval of certain types of conduct if, at the same time, [the group] must accept members who engage in that conduct." *Id*. The Seventh Circuit further found that "the Supreme Court has made it clear that antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint." *Id*. The court concluded that such suppression was afoot and enjoined the university.

Here, it is undisputed that BLinC's ability to select its leaders is critical to its message, and the evidence is overwhelming that BLinC was

targeted for its leadership standards simply because Defendants disapproved of them. *Hurley*, *Dale*, and *Walker* thus reinforce that the illegality of Defendants' discrimination was clearly established, notwithstanding their efforts to couch it in terms of enforcing a nondiscrimination policy. *See also Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000) (finding that state nondiscrimination policy denying KKK from participating in Adopt-A-Highway program violated freedom of association).

C. BLinC's free exercise rights were clearly established.

BLinC's rights under the Free Exercise Clause were also clearly established. First, the "targeting [of] religious beliefs as such is *never* permissible." *Trinity Lutheran* at 2021 n.4 (quoting *Lukumi*, 508 U.S. at 533) (emphasis added). Defendants' threats that BLinC would be deregistered unless it deleted specific beliefs from its constitution thus violated clearly established law. *Accord* United States Br. 22, JA 2602. And Baker's statements that religious standards of sexual conduct were acceptable only so long as they accepted same-sex marriage, JA 2545-46, ¶¶ 341-43, also targeted BLinC because of its specific religious beliefs.

Second, it is also clearly established that restrictions on religion are subject to strict scrutiny unless they are both "neutral" and "generally applicable." *Trinity Lutheran*, 137 S. Ct. at 2021; *Lukumi*, 508 U.S. at 542-43; *accord Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 9 (Iowa 2012).

Neutrality. The "minimum requirement of neutrality" is that a law or policy "not discriminate on its face." *Lukumi*, 508 U.S. at 533. Yet Defendants here, after being sued by BLinC, amended their nondiscrimination policy to explicitly exempt fraternities and sororities from the prohibition against discrimination on the basis of sex, while denying a parallel exemption that would allow religious organizations to screen their leaders based on religious belief. JA 2454 ¶ 12. Ironically, Defendants justified the "Greek" exemption by citing Title IX. *Id.* And they denied BLinC a religious exemption by citing federal nondiscrimination laws and the Iowa Civil Rights Act. JA 2443 (claiming that accommodating BLinC would constitute "illegal discrimination" that "runs counter to both state and federal law"); *accord* JA 2439 (claiming that BLinC "violate[d] . . . civil rights laws"). Yet all of those laws include exemptions that protect the rights of religious organizations. *See* 20 U.S.C. § 1681(a)(3) (Title IX exemption for religious organizations); 42 U.S.C. §§ 2000e(j), 2000e-1(a) (Title VII exemption for religious organizations hiring individuals of a particular "religious observance," "practice," or "belief"); Iowa Code Ann. § 216.6(6)(d) (allowing "religious institution[s]" to discriminate on "religion, sexual orientation, or gender identity"). The presence of religious exemptions in these statutes underscores that Defendants' explicit exemption for fraternities, but not religious organizations, violates clearly established law, especially having been added directly in response to BLinC's lawsuit. Laws that "single out the religious" for disadvantages

"clear[ly] . . . impose[] a penalty on the free exercise of religion" and cannot claim neutrality. *Trinity Lutheran*, 137 S. Ct. at 2020-21.

Moreover, "[f]acial neutrality" is not the only clearly established requirement. *Lukumi*, 508 U.S. at 534. The Free Exercise Clause also forbids "covert suppression" of religion and "subtle departures from neutrality"; hostility that is "masked" as well as "overt." *Id.*; *Zimmerman*, 810 N.W.2d at 10 (same). Here, Defendants knowingly approved numerous other student group constitutions that made leadership distinctions based on protected characteristics before singling out BLinC as the first group ever to be deregistered for that supposed sin. JA 2455-60 ¶¶ 15-24. That marked "difference in treatment" between how the University has treated religious groups like BLinC and how it treats other organizations and programs showed that "requisite religious neutrality" was lacking. *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1730, 1732 (2018); *see also Rader v. Johnston*, 924 F. Supp. 2d 1540, 1554-55 (D. Neb. 1996) (though university's policy was "certainly neutral on its face," refusal to make a religious "exception[] to the policy" while "routinely" granting secular requests showed lack of neutrality). In sum, "[a] double standard is not a neutral standard." *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012).

General Applicability. Similarly, even absent Defendants' religious targeting, it is also clearly established that a law violates the "general applicability" requirement if it "grants exemptions . . . for one or more

secular reasons, but fails to grant the same exemption for religious reasons." United States Br. at 21, JA 2601 (citing *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.)); *accord Zimmerman*, 810 N.W.2d at 16 ("The underinclusion of the [law] undermines its general applicability" (citing *Lukumi*, 508 U.S. at 545)). Here, Defendants fell well below the standard of general applicability by providing several types of secular exceptions.

First, Defendants granted express categorical secular exemptions. It is well established that "categories of selection are of paramount concern" when a law burdens religious practice. *Lukumi*, 508 U.S. at 542; *accord Zimmerman*, 810 N.W.2d at 11 (same). For instance, in *Fraternal Order of Police*, then-Judge Alito explained that "categorical exemption for individuals with a secular objection [to a challenged policy] but not for individuals with a religious objection" triggered strict scrutiny. 170 F.3d at 365; *see also Zimmerman*, 810 N.W. 2d at 13 (noting that "in *Fraternal Order*, only a single narrow health exception was held to be sufficient to establish a violation of general applicability"); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004) (finding underinclusiveness as result of a single categorical exemption).

The most obvious categorical exemption here is the express exemption allowing sex-based discrimination by Greek groups, which covers fifty fraternities and sororities with a membership comprising almost 20% of the University's undergraduates. JA 2565 ¶ 420. That exemption blesses

a much more restrictive policy than BLinC's, since it allows Greek groups to exclude students from *both* leadership and membership. JA 2565 ¶¶ 423. By punishing BLinC for religious limitations on a few leadership positions while broadly exempting Greek groups that annually exclude *thousands* of students from membership positions, Defendants engaged in stark religious discrimination in violation of clearly established law. *Zimmerman*, 810 N.W.2d at 11; *Rader*, 924 F. Supp. at 1553 (university's broad secular exemptions to a residential housing requirement undermined general applicability when similar exemptions were not afforded for religious reasons); *accord* United States Br. at 21-22, JA 2601-02.

A similar general-applicability problem arises via underinclusiveness: when categories of "secular activities that equally threatened the purposes" of the policy are left unprohibited and are "therefore approved by silence[.]" *Zimmerman*, 810 N.W.2d at 11 (citing *Lukumi*, 508 U.S. at 543); *see also Cent. Rabbinical Congress v. New York City*, 763 F.3d 183, 197 (2d Cir. 2014) (law is "not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate [comparable] secular conduct"); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (same). This problem arose below through Defendants' decision to ban any "restriction[s] on leadership related to religious beliefs," while failing to ban any leadership restrictions based on *ideological* or *political* beliefs. JA 2567, 2552, 2457-59, 2570 ¶ 432, *id.* ¶¶ 18-19, 370-71, 441-42. Thus, political or ideological groups

could require leaders to hold beliefs on a variety of issues, but religious groups could not ask their leaders to affirm substantively identical beliefs if those beliefs were rooted in religious conviction. *Id.* That is an extreme form of underinclusiveness, one which constitutes the kind of "clear" religious discrimination that the Supreme Court has long condemned. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108-112 (2001) (rejecting idea that "reliance on Christian principles taints" the content of beliefs "in a way that other foundations for thought or viewpoints do not"). "[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Id.* (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) and *Rosenberger*).

Finally, it is also clearly established that a law is not generally applicable when it is not *enforced* equally. *Lukumi*, 508 U.S. at 545-46 (regulation that "society is prepared to impose upon [religious groups] but not upon itself'" is the "precise evil . . . the requirement of general applicability is designed to prevent"); *Tenafly Eruv Ass'n v. Borough of Tenalfy*, 309 F.3d 144, 167-68 (3d Cir. 2002) (rejecting "selective, discretionary application of [the law] against" religiously motivated conduct). This flaw manifested in Defendants' exceptions for RSOs that selected leaders based on race, sex, and veteran status. JA 2560, 2464-65, 2570-71 ¶¶ 24, 34, 445-46. Indeed, Defendants did not even enforce the policy equally against religious RSOs. JA 2570 ¶ 444; *Fowler v. Rhode Island*, 345 U.S.

67, 69 (1953) (enforcing law against Jehovah's Witnesses while exempting other religious groups violated Free Exercise Clause). Defendants likewise admitted that they did not evenly enforce the policy in the University's own programs. JA 2465-68, 2571 ¶¶ 35, 446; *see also* JA 2462-64, 2566 ¶¶ 27-33, 425-26 (sports teams, intramural sports leagues, and recreational programs); JA 2465-68, 2571 ¶¶ 35, 446 (scholarships, awards, and funds).

* * * * *

As a result of all three forms of discrimination—categorical exemptions, underinclusiveness, and nonenforcement—Defendants "devalue[d] religious reasons for [acting] by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537; *Zimmerman*, 810 N.W. 2d at 11 (same); *Tenafly*, 309 F.3d at 168 (same). It is well established that such governmental value judgments against religious motivations fall "well below the minimum standard" of general applicability, *Lukumi*, 508 U.S. at 543, and thus must face "the strictest scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2019.

D. *Hosanna-Tabor* further confirms that BLinC's free exercise rights were clearly established.

If there were any question that the law forbidding Defendants' actions was clearly established, it was removed by the Supreme Court's 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). There, the Supreme Court explained that,

under both the Free Exercise and Establishment Clauses, the government is categorically prohibited from interfering with a religious group's selection of its own religious leaders. This rule was already starting to take shape two years earlier in *Martinez*, where the Supreme Court recognized that leadership selection raises unique considerations. 561 U.S. at 692-93 (majority op.) (groups may choose not to elect those who "seek leadership" yet are "wholly at odds" with the groups' beliefs); *id.* at 706 (Kennedy, J., concurring) (religious student group would have a "substantial case" against policy used to "challenge [group] leadership"). In *Hosanna-Tabor*, a unanimous Court made clear that the First Amendment absolutely protects religious groups' selection of their religious leaders.

The Religion Clauses' protection applies where (1) a "religious group" (2) is selecting "one of the group's ministers," and (3) the government is "interfering" with that selection. *Hosanna-Tabor,* 565 U.S. at 176-77, 181; *accord Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 362 (8th Cir. 1991) (considering nature of the "institution," the "position," and governmental "entanglement"). All three factors are undisputedly met in this case. BLinC is a "religious group" because its "mission is marked by clear or obvious religious characteristics." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (citation omitted); *see* JA 2484-85 ¶ 99-103; JA 1590-91 ¶¶ 44-46 (identifying

BLinC's religious mission). BLinC's leaders undisputedly hold ministerial roles because they "minister to the faithful," "personify [BLinC's] beliefs," and "convey [BLinC's] message and carry[] out its mission." *Hosanna-Tabor*, 565 U.S. at 188-89, 192-195; *see* JA 2519 ¶ 223; *see also* JA 1586, 1675-76 (identifying BLinC's religious leadership roles). And it couldn't be clearer that the University is interfering with BLinC's freedom to select leaders who share its faith: there "can be *no clearer example* of an intrusion into the internal structure or affairs" of a religious student group than forcing it to accept leaders who do not share its faith. *Walker*, 453 F.3d at 861, 863 (protecting religious student group's leadership policy) (emphasis added).

But far from respecting the Religion Clauses' "special solicitude" for religious leadership decisions, *Hosanna-Tabor*, 565 U.S. at 189, the University subjected those decisions to a special burden, one that "would cause the group as it currently identifies itself to cease to exist." *Walker*, 453 F.3d at 863. Under its gerrymandered policy, the University allowed secular groups to select leaders who embody their message—but not religious groups. The University's disregard for this special solicitude violated well established law.

Instead of recognizing how the Religion Clauses made a clear case even clearer, the district court committed reversible error by finding that access to limited public forums—even ones that, as here, include actual churches, JA 2456-57, 2547—can be conditioned *sub silentio* on giving up

rights under the Religion Clauses. Add. 061-63. The district court cited no cases supporting this categorical holding, and none exist. To the contrary, the case law affirms that First Amendment rights cannot be purchased so cheaply, *Trinity Lutheran*, 137 S. Ct. at 2022; *accord Walker* 453 F.3d at 864, and that the government cannot in any event buy the ability to entangle itself in religion, *Scharon*, 929 F.2d at 363 ("[p]ersonnel decisions" by religious groups are "*per se* religious matters" protected from any governmental "second-guessing"); *accord InterVarsity*, 777 F.3d at 836 (Religion Clauses "categorically prohibit[] . . . governments from becoming involved in religious leadership disputes"). This is why, for instance, no one would think that public schools could condition churches' rental of their facilities for worship services on giving up the right to hire a pastor instead of a rabbi or imam. *Lamb's Chapel,* 508 U.S. at 390. So too here.

CONCLUSION

This is not a "close case." The law is clearly established that a state university may not target religious beliefs it abhors, discriminate against religious viewpoints, or entangle itself in internal religious affairs. This Court thus should reverse the district court's grant of qualified immunity, reject its categorical cabining of the Religion Clauses, and remand for consideration of damages and attorney fees, along with instructions to enter a permanent injunction that is consistent with this Court's opinion. To do otherwise would embolden more university officials to violate more

students' First Amendment rights and waste more judicial time correcting those violations.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It contains 12,848 words, excluding the parts of the brief exempted by Federal Rule 32(f).
2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook font.
3. This brief complies with the electronic filing requirements of Eighth Circuit Rule 28A(h). The latest version of Windows Defender has been run on the files containing the electronic version of this brief and the addendum and no virus has been detected.

Executed this 30th day of May, 2019.

/s/ Eric Baxter
Eric S. Baxter

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of the brief to the counsel of record for the parties. I further certify that all parties to this case are represented by counsel of record who are CM/ECF participants.

Executed this 30th day of May, 2019.

/s/ Eric Baxter
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