Appeal 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 United States District Court for the

Southern District of Iowa,

No. 3:17-cv-00080

Hon. Stephanie Rose

BRIEF OF DEFENDANTS-APPELLEES

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SUMMARY OF THE CASE

The Court granted, in part, Defendants request for qualified immunity. [Add. 36] BLinC later agreed to allow the Court to grant qualified immunity on all counts. [Add. 75].

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DID THE DISTRICT COURT ERR IN GRANTING THE INDIVIDUAL DEFENDANTS QUALIFIED IMMUNITY UNDER EXISTING LAW?

Apposite Cases

- *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011)
- *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661 (2010)
- *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006)

STATEMENT OF THE CASE

Statement of background and facts?

Miller was an active member in BLinC, and decided to contact the group's then-president, Hannah Thompson, about how he might become more involved in the organization and mentioned that he was interested in taking a leadership role. [JA 2388]. Miller met with Hannah and the two discussed their theological beliefs and whether Miller would be a good fit. [JA 2388]. During the course of that conversation, Miller revealed to Hannah that he is gay. [JA 2389]. Hannah and her colleagues discussed Miller's sexuality at length, and decided that they would not extend an officer-level position to him because of his identification as a gay man. [JA 2389]. In her deposition, Hannah admitted that aside from being gay, Miller was otherwise qualified to hold a leadership position in BLinC. [JA 2390]. Hannah met with Miller again to discuss the group's decision not to offer him a leadership position, and left him with the distinct impression that his sexual orientation was the governing factor in her decision. [JA 2390].

As a result of his conversation with Hannah, Miller made a complaint about the discrimination that he had faced with the University of Iowa's

Office of Equal Opportunity and Diversity ("EOD"). [JA 2392]. Miller reported that BLinC, a Registered Student Organization ("RSO"), had violated the University's Human Rights Policy by denying him a leadership position because he is "openly gay." [JA 2392]. Applying the required legal standard, Iowa concluded that BLinC had violated the University's Human Rights Policy by excluding Miller from a leadership role on the basis of his sexual orientation. [JA 2393–95].

BLinC submitted a revised constitution to Dr. Nelson, including a "Statement of Faith" which the group's leadership would be required to sign. [JA 2401]. The constitution contained a clause which stated:

> 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.

[JA 2519]. Upon review, Dr. Nelson and Dean Baker found that the newly-added provisions of BLinC's constitution were facially discriminatory and would serve to exclude lesbian, gay, bisexual, and transgender students from the group. [JA 2520]. Dr. Nelson rejected the changes and gave BLinC an additional ten days to comply with the requirements set forth in his sanctions letter. [JA 2402–03].

BLinC indicated that it was unable to remove the offending provisions from its constitution, as it reflected BLinC's members' sincerely held religious beliefs. [JA 2521]. The group appealed Dr. Nelson's decision to Dean of Students, Dr. Lyn Redington, per the University's appeal procedures. [JA 2521]. Dr. Redington affirmed Dr. Nelson's decision to reject BLinC's new constitution, and explained to BLinC that the new language "would have the effect of disqualifying certain individuals from leadership positions based on sexual orientation or gender identity, both of which are protected classifications under Chapter 216 of the Iowa Code (the Iowa Civil Rights Act) and the University of Iowa Human Rights Policy." [JA 2521]. As a result of its refusal to comply with the terms of the University's Human Rights Policy, BLinC was deregistered. BLinC subsequently filed this lawsuit. [JA 2521].

SUMMARY OF ARGUMENT

That a government entity should generally refrain from engaging in viewpoint discrimination is well-settled law. That a public university should decline to enforce the terms of its nondiscrimination policy against a publicly-funded student organization when faced with resolving a gay student's civil rights complaint is not. BLinC urges this Court to view this case through the broadest lens possible: the existence of viewpoint discrimination precludes qualified immunity. The individual Defendants urge the Court to follow a more cautious path: review the case at hand through the lens of the "particularized facts" and avoid defining the law at a "high level of generality." *See White v. Pauly*, 137 S. Ct. 548, 552 (2017).

BLinC has not cited a single case which definitively answers the question at issue here. It cannot, because a case containing such an explanation does not exist. In the absence of such a case, this Court must determine whether any reasonable public official in the individual Defendants' place—such public official being an objectively reasonable person who must know the law, but is not required to be a constitutional scholar—could have acted as the individual Defendants did without knowingly violating the law or being guilty of abject incompetence. *Ashcroft*

v. al-Kidd, 131 S. Ct. 2074, 2085 (2011); *Ward v. San Diego County*, 791 F.2d 1329, 1332 (9th Cir. 1986).

BLinC warns that "[a]llowing [the district court's] 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." [Plf. Brief, p. 29.] Not so. A ruling upholding the district court's decision would result in nothing more than freedom from financial liability for three University administrators who acted in good faith as they attempted to navigate the complicated interplay between the First and Fourteenth Amendments. The district court has ruled against Defendants on BLinC's free speech, free association, and free expression claims, and entered a permanent injunction "prohibiting enforcement of the University's Human Rights Policy against BLinC" and awarding nominal damages. [Add. 063]. There is no ongoing harm to BLinC and Defendants have not appealed the district court's decision. Furthermore, an affirmation of the district court's ruling would fulfill the purposes for which the doctrine of qualified immunity was developed and ensure that public officials are protected in making difficult decisions where the path forward may not be entirely clear.

For all the reasons set forth below, the individual Defendants urge this Court to uphold the district court and rule that they are immune from

suit on the basis that the law governing the case at the time of the alleged violations was not "clearly established." [Add. 066].

ARGUMENT

I. Standard of Review

The Eighth Circuit reviews a grant of summary judgment on the basis of qualified immunity *de novo* and evaluates the evidence in the light most favorable to the nonmoving party by "drawing all reasonable inferences in that party's favor." *Peterson v. Knopp*, 754 F.3d 594, 598 (8th Cir. 2014).

II. Framework for Analysis

A. Two-Part Inquiry

In deciding questions of qualified immunity, courts consider two factors: 1) whether a constitutional violation was committed; and 2) whether, at the time of the alleged violation, the constitutional right at issue was "clearly established." *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). Courts are no longer required to analyze both prongs of the test and may prioritize whichever question will make a "fair and efficient disposition of the case." *Pearson v. Callahan*, 555 U.S. 223, 236–37 (2001). The individual Defendants' arguments will focus exclusively on the second prong of the test: whether the law governing this case was "clearly established" at the time of the alleged constitutional violations.

B. The "Reasonable Public Official" Standard

Qualified immunity shields a public official from liability where the official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal quotations omitted). This inquiry "turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Pearson v. Callahan*, 555 U.S. 223, 244 (2009), citing *Wilson v. Layne*, 526 U.S. 603, 614 (1999). The doctrine ensures that "before they are subjected to suit, officers [public officials] are on notice that their conduct is unlawful[.]" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). While the question of whether the law was clearly established at the time of the alleged constitutional violations will turn on the particular facts of the case, the inquiry is properly framed to determine whether a reasonable public official would have been on notice that his or her actions were unconstitutional. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002). While public officials are required to have a general knowledge of the law, courts do not "require of most government officials the kind of legal scholarship normally associated with law professors and academicians. A reasonable

person standard adheres at all times." *Ward v. San Diego County*, 791 F.2d 1329, 1332 (9th Cir. 1986).

C. Level of Generality: A High Degree of Specificity

The Supreme Court has repeatedly reiterated the "longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 137 S. Ct. 548, 552 (2017), citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *City and County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, fn. 3 (2015) (citing five cases wherein the Supreme Court "correct[ed] lower courts when they wrongly subjected individual officers to liability"). Law which is clearly established "must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017), citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "The dispositive question is 'whether the violative nature of a *particular* conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (emphasis in original).

While the Supreme Court's precedents do not require a case "directly on point" in order to determine whether a right has been clearly established, "existing precedent must have placed the statutory or constitutional question *beyond debate*." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (emphasis added), citing *Mullenix v. Luna*, 135 S. Ct. 305, 308

(2015) (internal quotations omitted). Clearly established law must be "settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018) (internal quotations omitted). It is insufficient "that the rule is suggested by then-existing precedent," but rather, "the precedent must be clear enough that *every reasonable official* would interpret it to establish the particular rule the plaintiff seeks to apply." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (emphasis added). This analysis requires "a high degree of specificity." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (internal quotations omitted), citing *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015).

If the law at the time of the alleged constitutional violations was not clearly established, "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To allow otherwise would be to grant plaintiffs *carte blanche* to "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *White v. Pauly*, 137 S. Ct. 548, 552 (2017), citing *Anderson*, 483 U.S. at 639.

D. Qualified Immunity and the First Amendment

At least one federal court of appeals has addressed the difficulties inherent in applying the doctrine of qualified immunity in a First Amendment case. *See Morgan v. Swanson*, 755 F.3d 757 (5th Cir. 2014). *Swanson* was an appeal from a grant of qualified immunity to a school principal who had prohibited a father and his son from distributing religious materials during a class party. *Id.* at 759. In outlining the standard for qualified immunity, the Fifth Circuit notes that "[w]here there are no allegations of malice, there exists 'a presumption in favor of qualified immunity' for officials in general, and for educators in particular." *Id.* at 760, citing *Schalk v. Gallemore*, 906 F.2d 491, 499 (10th Cir. 1990); *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364, 377 (2009). The Court finds that its "review of existing law reveals that educators are rarely denied immunity from liability arising out of First Amendment disputes," and notes that the "rare exceptions involve scenarios in which a factually analogous precedent clearly established the disputed conduct as unconstitutional." *Id.* at 760. The court cites a related case, describing the challenges faced by school administrators when navigating First Amendment issues:

> When educators encounter student religious speech in schools, they must balance broad constitutional imperatives from three

> areas of First Amendment jurisprudence: the Supreme Court's school-speech precedents, the general prohibition on viewpoint discrimination, and the murky waters of the Establishment Clause. They must maintain the delicate constitutional balance between students' free-speech rights and the Establishment Clause imperative to avoid endorsing religion. "The many cases and the large body of literature on this set of issues" demonstrate a "lack of adequate guidance," which is why no federal court of appeals has ever denied qualified immunity to an educator in this area. We decline the plaintiffs' request to become the first.

Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011), citing *Pounds v. Katy Indep. Sch. Dist.*, 730 F.Supp.2d 636, 638 (S.D. Tex. 2010); *Nurre v. Whitehead*, 580 F.3d 1087, 1090 (9th Cir. 2009).

In *Morgan*, the plaintiff makes an argument identical to the one set forth by BLinC here: "regardless of forum, viewpoint discrimination regarding private speech is unconstitutional." *Morgan*, 755 F.3d at 761 (5th Cir. 2014). The *Morgan* court agrees that plaintiffs' blanket statement "is generally true," but correctly holds that:

> Morgan argues that his right to distribute religious material is clearly established because "regardless of forum, viewpoint discrimination regarding private speech is unconstitutional." This assertion is generally true. Yet such a broad generalization is exactly the kind of proposition that will not suffice for the purposes of qualified immunity analysis, as it simply does not provide the official with any sense of what is permissible under a certain set of facts. For example, the nearly universal prohibition against viewpoint discrimination does not inform an official as to what, precisely, constitutes viewpoint discrimination. Nor does it enlighten a teacher as to the permissible extent of content restriction in a classroom setting.

> For these reasons, this Court has already rejected the viewpoint discrimination principle as "far too general" to have clearly established, at the time of the incident, Swanson's constitutional obligations vis-à-vis the holiday party.

Morgan, 659 F.3d at 378. (internal citations omitted). The court grants qualified immunity to the teacher, holding that "[w]here there is no authority recognizing an asserted right, and where the area of law is as 'abstruse' and 'complicated' as First Amendment jurisprudence, that right cannot be clearly established for the purposes of qualified immunity analysis." *Id.*, citing *Morgan*, 659 F.3d at 382; *see also*, *Morgan*, 755 F.3d 757 (2014). The individual Defendants urge this Court to make the same determination: the viewpoint discrimination principle is far too general to form the basis of "clearly established law" as it applies to this case.

E. The Specific Context of this Case

Marcus Miller filed his civil rights complaint against BLinC in February 2017. [JA 2392]. At that time, the appellate cases which most squarely addressed the issue of the enforcement of University nondiscrimination policies against publicly-funded student organizations were *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006); *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661 (2010); and *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 795 (9th Cir. 2011). Each of these

opinions discussed a public university's enforcement of its nondiscrimination policy against a student group which, like BLinC, wanted to exclude other students on the basis of sexual orientation, gender identity, or other religious belief, while obtaining public monies and benefits. *See Id.* In each case, a student group sued a University for various alleged violations of its rights under the First Amendment. *See Id.* Each of these factually-similar cases failed to offer conclusive guidance regarding whether the underlying rational for unequal enforcement of a nondiscrimination policy might be sufficiently compelling to survive strict scrutiny. *See Id.*

1. *CLS v. Walker*

In *Christian Legal Society v. Walker*, the Christian Legal Society ("CLS") sued Southern Illinois University School of Law ("SIU") for violations of its First Amendment rights to free speech, expressive association, free exercise, and its Fourteenth Amendment equal protection and due process rights. 453 F.3d at 857. CLS brought suit after the dean of the law school revoked the group's "official" status upon determining that its membership policies violated the law school's nondiscrimination policies. *Id*. At that time, CLS precluded voting membership and leadership for those who "engage in or affirm homosexual conduct" and

generally disapproved of fornication, adultery, and "active" homosexuality. *Id.* at 857–58. SIU eventually learned that CLS's membership requirements precluded gay and lesbian students from becoming voting members or officers in the group and revoked the group's "official" status. *Id.* at 858. SIU cited CLS's violation of the Law School's "Affirmative Action/Equal Employment Opportunity Policy" as its reason for the revocation. *Id.*

The case came before the Seventh Circuit Court of Appeals on appeal from the district court's denial of CLS's motion for a preliminary injunction. *Id.* at 857. The Seventh Circuit finds that CLS had a "reasonable likelihood of success on the merits" of its claims and reverses the district court. *Id.* at 859. The court indicates that CLS was likely to succeed on the merits because it was "doubtful" that CLS had violated the law school's nondiscrimination policies, given that it discriminated on the basis of *conduct* rather than *status*[1] in selecting its leaders and members.[2] *Id.* at 860.

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[1] The lone dissenting judge in *Walker* shares Defendants' concern with the distinction made between discriminating on the basis of sexual orientation and sexual conduct. *See Id.* at 872–875.

[2] The court also noted that the general purpose of SIU's Affirmative Action/EEO policy was govern the law school's conduct directed at

The court also evaluates CLS's expressive association claims. *Id.* at 862. In doing so, the court holds that CLS is an expressive association and determines that by requiring CLS to include those who engage in conduct contrary to the groups "Biblical standards for sexual morality" in its membership ranks, SIU would "burden CLS's ability to express its ideas." *Id.* at 863. Finally, the court weighs SIU's interest in preventing "discrimination against homosexuals" against "CLS's interest in expressing its disapproval of homosexual activity[.]" *Id.* at 863. In doing so, the court analyzes whether SIU's policy serves a compelling interest "that is not related to the suppression of ideas and that cannot be achieved through a less restrictive means." *Id.* Importantly, the court holds that "the state has an interest in eliminating discriminatory conduct and providing for equal access to opportunities" but indicates that "antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint." *Id.*

The court goes on to analyze CLS's free speech claims. Without actually determining that SIU had created a limited public forum, the court opines that "even assuming at this stage of the litigation that SIU's student organization forum is a nonpublic forum—making the lowest level of

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employees and that CLS was not an employer and thus did not need to comply with the policy. *Id.*

scrutiny applicable—we believe CLS has the better of the argument." *Id. at* 866. The court finds that though the Affirmative Action/EEO policy was "viewpoint neutral on its face," there was strong evidence that the policy had been applied unequally. *Id.*

The *Walker* court is unable to determine on the existing record why the policy had been applied unequally, but notes that its conclusion that the policy had been applied unequally was sufficient for the purposes of the court's review of the preliminary injunction. *Id.* Interestingly, the court indicates that the harm described by SIU resulting from having an injunction issued against it—"the hardship associated with being required to recognize a student organization it believes is violating the university's antidiscrimination policy"—is "no harm at all." *Id.* at 867. In sum, the court reverses the district court and holds that CLS would be likely to succeed on the merits of its claim because 1) CLS may not have violated the policy in the first place; 2) SIU may have infringed on CLS's right to expressive association; and 3) SIU may have violated CLS's free speech rights.

A long dissenting opinion is filed alongside *Walker*. In her dissent, Judge Wood eloquently describes the interests—shared by the University of

Iowa and individual Defendants in the instant case—that SIU has in enforcing its nondiscrimination policy:

> Here, the State of Illinois, through its universities, has a strong countervailing interest—indeed, in many instances, a compelling constitutional duty—in giving equal treatment to all of its citizens. If CLS wanted to forbid membership to all African-Americans, or to mixed-raced wedded couples, or to persons of Arabic heritage, surely SIU would be entitled at a minimum to say that such an organization would have to sustain itself without any state support—even if it could root such a membership policy in a religious text. Furthermore, while the direct impact of CLS's membership policy might be to exclude certain people from that student group, the direct impact of CLS's recognition of a student group maintaining such a policy is that SIU, intentionally or not, may be seen as tolerating such discrimination. Given that universities have a compelling interest in obtaining diverse student bodies, requiring a university to include exclusionary groups might undermine their ability to attain such diversity.
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> . . .
>
> Thus, even if SIU's AA/EEO policy somehow infringes upon a First Amendment right of CLS or its members that infringement may be justified if it is in furtherance of a compelling state interest, or, at the least, must be balanced against the harm to SIU from being forced to accept into its expressive association a group that undermines its message of nondiscrimination and diversity. To take away SIU's ability to enforce its nondiscrimination policy may undermine "[t]he freedom of a university to make its own judgments as to education."

Id. at 875–76. This case provides some insight into the analysis that one appeals court might take in evaluating the clash between the First Amendment and a public university's nondiscrimination policy, but ultimately, as noted by the district court in its Order on Cross-

Motions for Summary Judgment, "it is difficult to view *Walker* as clearly establishing the constitutional issues here" as "the court was only considering the district court's denial of a preliminary injunction." [Add. 069].

2. *CLS v. Martinez*

The United States Supreme Court heard *Martinez* on appeal from the Ninth Circuit. 561 U.S. at 674. The case arose from a conflict between the Christian Legal Society ("CLS") and Hastings College of Law ("Hastings")—a publicly-funded law school in California. *Id.* Hastings required students to abide by a nondiscrimination policy which is very similar to the one at issue in this case.[3] However, unlike the policy adopted by the University of Iowa, Hastings' policy was enforced as an "all-comers" policy. *Id.* at 671. Under the all-comers policy, "[s]chool-approved groups must 'allow any

[3] "[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings] are governed by this policy of nondiscrimination. [Hastings'] policy on nondiscrimination is to comply fully with applicable law.

[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities." *Id.* at 670.

student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or belief.'" *Id.*

In 2004, CLS asked Hastings for a formal exemption from compliance with the policy. *Id.* at 672. The group wanted to require members and officers of the group to sign a Statement of Faith by which they would pledge to live their lives according to certain Christian principles. *Id.* The requirement would exclude from affiliation students who engage in "unrepentant homosexual conduct" or students who hold religious convictions contrary to those outlined in the group's Statement of Faith. *Id.* Hastings refused to grant CLS such an exemption, indicating that in order to maintain "official" status on campus the group must comply with the policy and "open its membership to all students irrespective of their religious beliefs or sexual orientation." *Id.* at 673.

CLS filed suit. *Id.* The U.S. District Court for the Northern District of California ruled in favor of Hastings on the parties' cross-motions for summary judgment and the Ninth Circuit affirmed the District Court's ruling. *Id.* at 674. In its opinion affirming the Ninth Circuit, the Supreme Court analyzes CLS's claims that Hastings' policy violated its First

Amendment rights to free speech and expressive association.[4] The Court reviews both claims under its limited-public-forum precedents. *Id.* at 683. In doing so, the Court cites *Healy v. James*,[5] *Widmar v. Vincent*,[6] and *Rosenberger v. Rector and Visitors of the University of Virginia*[7] to construct the backdrop for analysis of CLS's claims. *Id.* at 685. Importantly, the Court notes the special environment that exists on college campuses and the regard afforded school administrators and their judgment, explaining that "First Amendment rights . . . must be analyzed in light of the special characteristics of the school environment." *Id.* at 686, citing *Widmar*, 454 U.S. at 268, n. 5. "A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process." *Martinez*, 561 U.S. at 686.

The Court easily finds that Hastings' policy is viewpoint neutral both as-written and as-applied. *Id.* at 695. In its discussion of whether

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[4] The Court reviewed CLS's free speech and expressive association rights together, explaining that the claims "merge: *Who* speaks on its behalf . . . colors *what* concept is conveyed." *Id.* at 680.

[5] 408 U.S. 169, 184 (1972).

[6] 454 U.S. 263, 274 (1981).

[7] 515 U.S. 819, 837 (1995).

Hastings' policy is reasonable, the Court highlights several important interests set forth by the law school as bases supporting its policy: "ensur[ing] that no Hastings student is forced to fund a group that would reject her as a member"; simplifying the analysis involved so that the law school would not stand judge of whether a person was excluded from the group on the basis of status or conduct;[8] "ensur[ing] that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students"; "[b]ringing together individuals with diverse backgrounds and beliefs," and, importantly, "[d]eclin[ing] to subsidize with public monies and benefits conduct of which the people of California disapprove." *Id.* at 687–90. In the Court's view, these important interests demonstrate that Hastings' justifications for its policy are reasonable in light of the purposes of its limited public forum. *Id.* at 690. Having found that the policy is both viewpoint neutral and reasonably related to the purposes of the forum, the Court rejects CLS's free speech and expressive association claims. *Id.* at 697.

Significantly, the *Martinez* Court specifically declines to address CLS's contention that Hastings selectively applied its policy, indicating that "this Court is not the proper forum to air the issue in the first instance." *Id.*

[8] The court declines to distinguish between "status" and "conduct" in this context. *Id.* citing *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

at 697–98. While *Martinez* provides important guidance regarding the analysis which should be applied to nondiscrimination policies constructed as "all-comers" policies and provides some examples of forum purposes which are considered "reasonable" in light of the purposes of a college's limited public forum for student organization speech, it is silent on whether those purposes would be sufficient to overcome strict scrutiny. *Id.* at 667–95.

3. *Alpha Delta Chi-Delta Chapter v. Reed*

The most recent appellate case on this topic is *Alpha Delta Chi-Delta Chapter v. Reed*, which came before the Ninth Circuit Court of Appeals from the U.S. District Court for the Southern District of California's grant of summary judgment on behalf of the defendant university. 648 F.3d at 795. Plaintiffs were a Christian sorority, a Christian fraternity, and several of their individual officers. *Id.* at 796. The organizations and their representatives sued San Diego State, claiming violations of their free speech, freedom of association, free exercise, and equal protection rights, after the University repeatedly refused them "official" student group status because of their requirement that their members profess Christian beliefs.

Id. San Diego State pointed to its nondiscrimination policy as justification for its refusal to grant official status to the organizations.[9]

In analyzing plaintiffs' claims, the court concludes that San Diego State's student organization program exists within a limited public forum and analyzes their free speech and expressive association claims together. *Id.* at 798. In determining whether San Diego State's nondiscrimination policy was reasonable in light of the purpose of the forum, the court reviews the student organization program's constitution. *Id.* In its constitution, San Diego State cites various purposes for the forum, including "developing good citizenship, promoting harmonious relationships, facilitating student and faculty expression, and encouraging students to obey, honor, and sustain state and local laws and school rules." *Id.* The court indicates that these stated purposes were evidence that the student organization program was created to "advance the school's basic pedagogical goals" and that the nondiscrimination policy was therefore a "reasonable limitation in light of the purpose of the student forum." *Id.* (internal quotations omitted). The

[9] San Diego State's nondiscrimination policy reads: "On-campus status will not be granted to any student organization whose application is incomplete or restricts membership or eligibility to hold appointed or elected student officer positions in the campus-recognized chapter or group on the basis of race, sex, color, age, religion, national origin, marital status, sexual orientation, physical or mental handicap, ancestry, or medical condition, except as explicitly exempted under federal law." *Id.*

court also finds that San Diego State explicitly states goals which include promoting diversity and nondiscrimination, which further bolster the court's determination that its policy was reasonable. *Id.*

The court holds that San Diego State's nondiscrimination policy is neutral as written, but that there are "triable issues of fact" as to whether San Diego State selectively enforced its nondiscrimination policy. *Id.* at 800. Though the policy is neutral as written, some student groups at the university "restrict membership to those who believe in the group's purpose, or 'agree with the particular ideology, belief, or philosophy the group seeks to promote'" without being denied official recognition. *Id.*

Interestingly, the court explains that plaintiffs' description of the unequal application of the policy was "insufficient to prove viewpoint discrimination, because Plaintiffs have put forth no evidence that San Diego State implemented its nondiscrimination policy for the *purpose* of suppressing Plaintiff's viewpoint, or indeed of restricting any sort of expression at all." *Id.* at 801. The court notes that "antidiscrimination laws intended to ensure equal access to the benefits of society serve goals 'unrelated to the suppression of expression' and are neutral as to both content and viewpoint." *Id.* citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of*

Boston, 515 U.S. 557, 572 (1995). "Like the laws challenged in *Roberts* and *Hurley*," the court explains, San Diego State's nondiscrimination policy does not 'target speech or discriminate on the basis of its content,' but instead serves to remove access barriers imposed against groups that have historically been excluded." *Id.* The court rejects plaintiffs' forced-inclusion arguments, distinguishing the case from *Boy Scouts of America v. Dale*, and *Hurley*. *Id.* at 802, citing *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000); *Hurley*, 515 U.S. at 572–73. With the understanding that San Diego State's policy is neutral as written, even if it had an "incidental effect on some speakers or messages but not others," the court holds that the nondiscrimination policy was "not materially different from the content-neutral all-comers policy approved in *Christian Legal Society* and must be upheld." *Id.* at 803.

In analyzing the nondiscrimination policy as-applied, the court determines that since the record was devoid of reasoning for the exemptions from compliance provided to some groups, a triable issue of fact had been raised. *Id.* at 803. The court reverses the district court's summary judgment decision and "remand[s] for further proceedings on this limited issue." *Id.* The court notes that it cannot make a determination of the reasons for the apparently unequal application of the policy, as "it is

possible that these groups were approved inadvertently because of administrative oversight, or that these groups have, despite the language in their applications, agreed to abide by the nondiscrimination policy." *Id.* The court seems to imply that the unequal application of the policy could potentially be excused in certain circumstances.

Finally, the court quickly disposes of plaintiffs' free exercise and equal protection claims, holding that San Diego State's policy, as written, is a "rule of general application" and remands for further findings as to whether the university exempted other student groups from the nondiscrimination policy, "but refused to exempt Plaintiffs because of their religious beliefs." *Id.* at 805. As the district court notes in its ruling on the parties cross-motions for summary judgment in the instant case, *Reed* was voluntarily dismissed without resolution of the fact issues outlined by the court. [Add. 069]. Joint Motion to Dismiss, *Alpha Delta Chi-Delta Chapter v. Reed*, 3:05-CV-02186-LAB-WMC (S.D. Cal. March 19, 2013), ECF No. 143.

Given the environment in which the individual Defendants acted and the fact that the issue of uneven enforcement of a nondiscrimination policy against a publicly-funded student group had not yet been addressed by any court, it is impossible to categorize the actions of these individual Defendants as "plainly incompetent" or "knowingly violating the law."

F. BLinC Defines Its Established Rights at a "High Level of Generality"

BLinC argues that its rights were clearly established in the following areas at the time of the alleged constitutional violations: 1) free speech, 2) free association, 3) free exercise, and 4) free exercise by way of the "ministerial exception." [*See* Plf. Brief, pgs. 35–55].

1. Free Speech and Free Association[10]

BLinC makes a sweeping argument that can be more succinctly put: because it is well-settled that governments should not engage in viewpoint discrimination, the individual Defendants should be denied qualified immunity. [Plf. Brief, pgs. 35–42]. In so arguing, BLinC ignores decades of Supreme Court precedent admonishing lower courts that the particular factual circumstances of each case must be considered in analyzing whether the law was clearly established at the time of the alleged constitutional violations. The rights to free speech and association BLinC claims are that the sincerely held religious beliefs of its members entitle it to exclude gay, lesbian, bisexual, and transgender students from the leadership ranks of

[10] Though BLinC continues to address them separately, its free speech and free association claims merge. Like CLS in *Martinez*, BLinC is arguing that "*Who* speaks on its behalf . . . colors *what* concept is conveyed. . . . It therefore makes little sense to treat CLS's speech and association claims as discrete." *Martinez*, 561 U.S. at 680. Defendants will address both claims together.

the group on the basis of their protected status, while continuing to receive public money and benefits, and that such speech may never be regulated by the University.[11]

In support of its argument, BLinC cites multiple Supreme Court cases involving First Amendment issues with student groups on university campuses, such as *Healy*, *Widmar*, and *Rosenberger*, which provide the general parameters of the law. *See generally*, *Healy*, 408 U.S. 169 (1972); *Widmar*, 454 U.S. 263 (1981); *Rosenberger*, 515 U.S. 819, 828 (1995). BLinC also cites some U.S. Court of Appeals precedents, including *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017); *Gay & Lesbian Students Association v. Gohn*, 850 F.2d 361 (9th Cir. 1988); and *Gay Lib. v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977). Defendants agree that government entities which discriminate on the basis of viewpoint will, as a general rule, be subjected to strict scrutiny and see no need to belabor that point.

However, there are two problems with BLinC's analysis. First, the cases BLinC cites set forth only an overview of First Amendment law as it

[11] The parties disagree as to whether BLinC excludes individuals on the basis of their *status* or their *conduct*. Defendants have admitted that conduct-based restrictions (for example, that leaders should agree to refrain from swearing or drinking alcohol) have been permissible in the past, but have concerns about the extent to which the line between an LGBTQ person's "conduct" can be targeted without also targeting their status as a gay or lesbian person.

relates to student groups operating on public university campuses and do not address the particularized facts at hand in this case, thus failing to establish that the law was "clearly established" at the time of the alleged violations. None of the cases cited involves the enforcement of a nondiscrimination policy—whether selectively enforced or not—or the question of whether a University's interest in enforcing civil rights laws outweighs a registered student organization's rights to freely speak and associate. *See Id.*

i. BLinC Defines the Law at a "High Level of Generality"

In *Healy*, the state unsuccessfully asserted multiple justifications for its refusal to recognize the plaintiff student group, including the student group's association with an unpopular organization, the group's adherence to an "abhorrent philosophy," a belief that the group would a "disruptive influence" on campus, and finally the group's unwillingness to be bound by the school's rules. *Healy v. James*, 408 U.S. 169, 185–89 (1972). *Healy* did not present the issue of unequal application or analysis on that issue, nor did it address the enforcement of a nondiscrimination policy against the student group. *See Id.* at 169–203. The justifications set forth by the government had nothing to do with protecting the civil rights of other students and the court ultimately remanded the case for further

development and consideration of the facts. *Id.* Ultimately, the case offers little guidance for the individual Defendants in the instant case.

Also unhelpful, *Widmar v. Vincent* involved a constitutional challenge by a religious group against the University of Missouri at Kansas City, after the religious group was refused access to the University's facilities. 454 U.S. 263, 265 (1981). As justification for its refusal of access to campus, the state unsuccessfully asserted an interest in complying with the Establishment Clause of the United States Constitution.[12] *Id.* at 266. The Supreme Court determined that the University had excluded the group's intended speech on the basis of content and that it must therefore undergo a strict scrutiny analysis. *Id.* at 270. The Court ultimately determined that while the University's interest in complying with its constitutional obligations may be compelling, the Establishment Clause would suffer no violation where religious groups are permitted to use government resources to the same degree as secular organizations. *Id.* at 271–274. Again, while *Widmar* offers some discussion of "content-based" regulations, the thrust of the analysis goes to the Establishment Clause issue and ends in the holding that the state's interest "in achieving greater separation of church and State than is already ensured under the

[12] The University makes a similar argument under the Missouri Constitution. *Id.* at 275.

Establishment Clause of the Federal Constitution" was not "sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.* at 276. The *Widmar* Court offers no guidance on how it might analyze the enforcement of a nondiscrimination policy or whether a state's interest in enforcing civil rights laws on campus would be sufficiently compelling to survive a strict scrutiny analysis. *See Id.* at 236–89.

Rosenberger v. Rector and Visitors of University of Virginia, the third landmark case cited by BLinC, involved a formally recognized student group which sued the University of Virginia after the University refused to pay printing expenses for the group's religious-perspective newspaper. 515 U.S. 819, 823–28 (1995). The Court found that the University had engaged in viewpoint discrimination and went on to analyze whether the University's claim that it had a compelling interest in compliance with the Establishment Clause justified its failure to fund the group. *Id.* 838. The Court held that "[i]t does not violate the Establishment clause for a public university to grant access to its facilities on a religion-neutral basis . . . including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises." *Id.* at 843. Again, this case does not discuss the topics at issue in the instant case, such as the

application (uneven or not) of a nondiscrimination policy or the conflict between the First Amendment and students' civil rights. It does, however, demonstrate that where a finding of viewpoint discrimination is made, the analysis does not stop, but rather, continues to an evaluation of the government's justification for the regulation. *Id.* at 837 ("It remains to be considered whether the violation following from the University's action is excused by the necessity of complying with the Constitution's prohibition against state establishment of religion.").[13]

BLinC next discusses *Gerlich v. Leath*, a recent decision of this Court involving speech by a registered student organization at Iowa State University. 861 F.3d 697 (8th Cir. 2017). In *Gerlich*, a student group ("NORML") which had the purpose of advocating for the reform marijuana laws in the United States applied to the University for several trademark licenses. *Id.* at 701. The University had a practice of permitting the use of its trademarks by student groups, if the uses proposed by the student groups complied with the University's Guidelines for Trademark Use. *Id.* NORML submitted a t-shirt design which featured the University's mascot

[13] BLinC also cites *Trinity Lutheran Church of Columbia, Inc. v. Comer* for the proposition that the government may not withhold a "generally available benefit" on the basis of religious identity, but that case is best discussed in the "Free Exercise" portion of this brief. Plf. Brief, p. 36, citing 137 S. Ct. 2012, 2019–20 (2017).

and also a marijuana leaf. *Id.* The design was initially approved. *Id.* Not long after the approval of the design, a member of NORML represented to the media that the University "supported" NORML's cause, citing the University's approval of the group's t-shirt design and use of its trademarks. *Id.* The University suffered some negative consequences as a result of the interview, and subsequently denied the group's request to print another order of t-shirts using the same, previously-approved, design. *Id.* at 702. The University also revised its Trademark Guidelines and in doing so prohibited the use of any designs that promote "dangerous, illegal or unhealthy production, actions or behaviors . . . [or] drugs and drug paraphernalia that are illegal or unhealthful." *Id.* With the new Trademark Guidelines in place, the University rejected all of NORML's subsequent designs which included an image of a cannabis leaf. *Id.* at 703. NORML's president sued the University. *Id.* at 703.

The University defended the lawsuit by arguing that "the administration of the trademark licensing regime should be considered government speech." *Id.* at 707. This Court found that the government speech doctrine does not apply where a government entity has created a limited public forum and determined that even if no limited public forum existed, the University could not claim that it was speaking through

NORML. *Id.* This Court also held that NORML's free speech rights were clearly established at the time of the alleged violations because 1) the University had created a limited public forum and 2) the facts of the case were similar enough to the student activity fund in *Rosenberger* to determine that the law regarding the group's speech was clearly established. *Id.* at 708–09.

The Court determined that it is "clearly established that a university may not discriminate on the basis of viewpoint in a limited public forum." *Id.* at 709. Citing *Martinez, Rosenberger*, *Widmar*, and *Healey*, the Court held that public universities are "generally preclud[ed]" from denying student organizations the benefits of school-sponsored forums because of the groups' viewpoints. *Id.* With that determination, the Court found that the district court had not erred in denying qualified immunity to defendants. *Id.*

Though this Court made its ruling in *Gerlich* in the context of the government speech doctrine—a defense that has not been asserted in this case—its ruling comes precariously close to defining the caselaw at issue at "a high level of generality" rather than in particularized terms as required under the test for qualified immunity. To declare that a University may never, in any instance, deny recognition to a student group on the basis of

viewpoint is too broad a prohibition. As outlined above, a determination that a government has engaged in viewpoint discrimination is not the end of the analysis. *See Healy*, 408 U.S. 169, 184 (1972) (the U.S. Supreme Court reversing the district court on the basis of "fundamental errors" in its analysis, such as "discounting the existence of a cognizable First Amendment interest and misplacing the burden of proof," but declaring that it is "unable to conclude that no basis exists upon which nonrecognition might be appropriate" and acknowledging that "there appears to be at least one potentially acceptable ground for a denial of recognition"); *Widmar*, 454 U.S. 263, 274 (1981) (the U.S. Supreme Court instructing not that viewpoint discrimination is a *per se* violation of the constitution, but rather, that in order for a government to justify "discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must . . . satisfy the standard of review appropriate to content-based exclusions" and must therefore "show that its regulation is *necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end*."); *Rosenberger*, 515 U.S. 819, 837 (1995) (the U.S. Supreme Court holding that the University's action was a violation of the group's First Amendment Rights, but continuing the analysis to determine whether "the University's action is

excused by the necessity of complying with the Constitution's prohibition against state establishment of religion.").

Here, as the district court pointed out in its ruling, the authorities BLinC cited "only set out the general legal principles applicable to the case." [Add. 069]. As noted above, "'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 137 S. Ct. 548, 552 (2017). While the cases cited by BLinC offer a framework for the initial analysis regarding whether a constitutional violation occurred, they fail to take into account the special circumstances in this case which blurred the line between constitutional and unconstitutional behavior. None of the cases cited by BLinC involve the enforcement of a nondiscrimination policy by a public university—something that BLinC itself appears to concede is a compelling interest. [*See* Plf. Brief, p. 38–39]. In each of the landmark cases BLinC cites, the government provides some justification for its selective application of a policy. But in no case does the government offer up an attempt to defend another student's civil rights as protected by state and federal nondiscrimination laws, as well as the Fourteenth Amendment to the Constitution of the United States. [*See* Plf. Brief, p. 38 (noting that "[I]n all of the analogous cases, the college or university found *some* justification for its discrimination, be it concern for public safety (*Healy*),

fear of violating the Establishment Clause (*Widmar; Rosenberger*), or disapproval of a group's message (*Gerlich*; *Gohn; Gay Lib.*)"].

In another case BLinC cites, *Gay & Lesbian Students Association v. Gohn*, the Gay and Lesbian Students Association sued the University of Arkansas after the University denied its funding request. 850 F.2d 361, 362 (8th Cir. 1988). In reviewing *Gohn*, this Court discussed the district court's finding of viewpoint discrimination and its subsequent strict scrutiny analysis. *Id.* Ultimately, the Court found the University's explanation of its "valid reasons" for denial of funding to be unconvincing and determined that there was not "a compelling state interest justifying the . . . denial of funds." *Id.* at 367–68. This case lacks the specific factual similarities which would make it useful in evaluating the case at hand, but does affirm that a finding of viewpoint discrimination does not result in a *per se* violation of the Constitution. *Id.*

In *Gay Lib. v. University of Missouri*¸ the student group "Gay Lib" sued the University of Missouri after it was denied formal recognition. 558 F.2d 848, 850 (8th Cir. 1977). The appeal came before this Court after the district court denied plaintiffs' request for injunctive relief. *Id.* The University's justification for denying recognition to the group was that "recognition of Gay Lib would probably result in the commission of

felonious acts of sodomy in violation of Missouri law." *Id.* This Court found that there was no evidence that Gay Lib would "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education" and remanded the case for entry of appropriate injunctive relief. *Id.* at 856–57. As with the other cases BLinC cites, *Gay Lib* offers little guidance on the issues of the enforcement of a nondiscrimination policy or the enforcement of civil rights on campus.

In support of its free association claims, BLinC cites *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* and *Boy Scouts of America v. Dale*. [Plf. Brief, pgs. 44–46, citing *Hurley*, 515 U.S. 557 (1995); *Dale*, 530 U.S. 640 (2000)]. *Hurley* involved a group of gay, lesbian, and bisexual individuals of Irish heritage ("GLIB") who wished to participate in a St. Patrick's Day paraded organized by a group of private citizens in Boston, Massachusetts ("the Council"). *Hurley*, 515 U.S. at 559–66. When GLIB's petition to participate in the parade was repeatedly rejected by the Council, it sued under the State and Federal Constitutions and the state public accommodations law. *Id.* at 562. The Supreme Court held that the Council's decision to exclude GLIB from the parade was protected under its First Amendment rights to free speech and expressive association. *Id.* at

572–81. Though BLinC emphasizes in its briefing the expressive nature of the Council's speech, it is silent on the Supreme Court's repeated emphasis on the fact that the Council members were "private organizers" and "private speaker[s]." *See Id.* at 559, 566, 569, 572–74, 579.

Hurley ultimately stands for the proposition that "[d]isapproval of a private speaker's statement does not legitimize use of the [government's] power to compel the speaker to alter the message by including one more acceptable to others." *Id.* at 581. While an important principle, it applies to a lesser degree in a limited public forum, where "[s]chools . . . enjoy 'a significant measure of authority over the type of officially recognized activities in which their students participate." *Martinez*, 561 U.S. at 686. Furthermore, as the Court instructed in *Widmar*:

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

Widmar, 454 U.S. at fn. 5. The Court's may have decided *Hurley* differently had the case been set in a limited public forum like a college campus.

BLinC's citation to *Boy Scouts of America v. Dale* is similarly unhelpful. *Dale* involved a man, James Dale, whose "adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights advocate." 530 U.S. at 643. Dale sued the Boy Scouts under New Jersey's public accommodations law and the case made its way to the U.S. Supreme Court. *Id.* at 644. The Court determined first that the Boy Scouts is an expressive association and then held that the State was prohibited from intruding on the Boy Scouts' rights to freedom and expressive association "through the application of its public accommodations law." *Id.* at 660. BLinC argues that the Court's decision "protect[ed] an organization's right to select its own leaders, notwithstanding the application of a state nondiscrimination law" and that courts must "five deference to an association's own view of what would impair its expression." [Plf. Brief, pgs. 44–45 (internal quotations omitted)]. As with *Hurley*, the court's analysis would have been different had the case been set in a limited public forum. The Boy Scouts is a private organization, and the government's power to regulate its speech is necessarily limited by that fact. BLinC has not cited a case which clearly establishes the analysis a court should undergo in evaluating an expressive association claim in a limited public forum.

BLinC goes on to cite *Cuffley v. Mickes*, an Eighth Circuit case which involved a conflict between the Ku Klux Klan and Missouri's Adopt-A-Highway program. 208 F.3d 702 (8th Cir. 2000). In *Cuffley*, the Unit Recruiter for the Knights of the Ku Klux Klan, Realm of Missouri ("the Klan"), sued the State of Missouri asking for injunctive and declaratory relief after the State denied its application to join the State's Adopt-A-Highway program. *Id.* at 704. In reviewing the district court's grant of summary judgment to the Klan, this Court held that "the undisputed facts conclusively demonstrate that the State unconstitutionally denied the Klan's application based on the Klan's views." *Id.* at 705–06. This Court reached its decision in part by determining that as a private organization, nondiscrimination laws do not apply to the Klan's membership selection polices. *Id.* at 708. Even if such a law existed, purporting to determine the Klan's membership policies, that law would "violate the Klan's freedom of political association." *Id.* Importantly, the Court stressed this idea again in addressing the State's other arguments, indicating that the State should not fear losing federal funding under Title VI of the Civil Rights Act of 1964, because:

> Title VI clearly does not apply directly to prohibit the Klan's discriminatory membership criteria. The Klan is not a direct recipient of federal funds nor are federal funds earmarked for the Klan. . . . The Klan thus is not subject to Title VI.

Id. at 710. Unlike the Klan in *Cuffley*, BLinC *is* the recipient of public money and benefits and as the recipient of such benefits, is subject to varying degrees of regulation on its speech by the University. *Cuffley* is not analogous and offers little guidance for the individual Defendants.

The district court, in discussing the instant case, correctly acknowledges that the unique facts complicate the analysis. [Add. 068]. General precepts of First Amendment law not outlined by BLinC are complicating in themselves. For example, University campuses are not public forums and "First Amendment rights . . . must be analyzed in light of the special characteristics of the school environment." [Add. 068, citing *Martinez*, 561 U.S. at 685–86]. Universities have some control over the types of activities to which they must give official recognition. [Add. 068]. Most importantly, the "cases that are factually most like this matter fail to offer clear conclusions as to the selective application of the nondiscrimination policy." [Add. 069].

BLinC challenges the cases relied on by the district court and by Defendants[14] by again citing general principles of First Amendment law or by criticizing the decisions themselves. (*See* Plf. Brief, pgs. 39–40). That

[14] *See supra*, Section D.

BLinC generally disagrees with the various courts' analysis in these cases does not satisfy the standard at issue here: whether the law was so clearly established that only a public official who was incompetent or clearly in violation of the law could have committed the acts at issue.

ii. BLinC Argues, In Effect, That Defendants Committed a Per Se *Constitutional Violation.*

Second, BLinC argues that since the University discriminated based on BLinC's viewpoint, they have committed a *per se* violation of the Constitution. However, the analysis does not end with a determination that viewpoint discrimination occurred. *See McCullen v.Coakley*, 573 U.S. 464, 478 (2014) (instructing that if a government regulation is either content-based or favors one viewpoint over another, it must 'satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest.") A finding of viewpoint discrimination merely converts the default rational basis analysis used in limited public forum cases into a strict scrutiny analysis. *Id.* Even if Defendants discriminated on the basis of viewpoint, their actions may have been narrowly tailored to achieve a compelling government interest. *See Id.*

There are circumstances under which a University's interest may be sufficiently compelling to withstand the Court's strict scrutiny analysis.

See, e.g., Grutter v. Bollinger, 539 U.S. 306 (2003) (the U.S. Supreme Court finding that a law school's interest in obtaining a diverse student body was sufficiently compelling and its regulation narrowly tailored enough to survive strict scrutiny). The individual Defendants offer that the circumstances presented by this case—the enforcement of a nondiscrimination policy and protection of the civil rights of students—may be sufficiently compelling. Indeed, the individual Defendants submit that they believed it to be one of the most compelling and important interests held by the University. Yet, the subjective beliefs of the individual Defendants or the question of whether or not the University of Iowa's policy could actually withstand strict scrutiny is not currently before the Court. The only question before this Court is whether the law was clearly established such that a reasonable public official would be put on notice that his or her conduct was unconstitutional. The answer must be that it was not.

iii. Preliminary Injunction

BLinC argues, without citation to the record, that "the University refused to extend BLinC's preliminary injunction so it could instead proceed to deregister it" and claims that "[a]t a minimum, *that* was a violation of clearly established law, and this Court should so rule." *Id.*

BLinC appears to be arguing that since it made various accusations against Defendants, they should have simply ceased to defend themselves and conceded to every demand made by BLinC. It is unclear what constitutional violation BLinC describes, given that the parties filed a *Joint Motion to Extend Preliminary Injunction* on March 17, 2018, in which they voluntarily and jointly extended the preliminary injunction through June 30, 2018. [ECF No. 44]. Then, on June 28, 2018, the district court entered an Order extending the preliminary injunction through the remainder of this litigation. [EFC No. 55]. There was no gap in injunctive relief and BLinC has not been harmed. Further, the time period at issue for the purposes of this appeal do not and cannot include any actions by the individual Defendants after the preliminary injunction was entered on January 23, 2018. [ECF No. 36]. The individual Defendants are not aware of any claims made against them in the month and a half between the time BLinC filed its Complaint and the time the Preliminary Injunction was entered. [*See* ECF Nos. 1, 36].

2. Free Exercise

BLinC argues that its free exercise rights were clearly established at the time of the alleged constitutional violations and attempts to relitigate the issue of whether Defendants violated BLinC's constitutional rights

through the application of its nondiscrimination policy. The district court has already ruled on this issue, finding that the University's reasons for excepting some student groups from the policy while not excepting others "necessitate the type of value judgment that carries heightened scrutiny." [Add. 058]. In so holding, the court points out "[t]his is not to say that the University has violated BLinC's free exercise rights *per se*, but to pass constitutional muster, the University's actions must withstand strict scrutiny." [Add. 058–59]. The individual Defendants see no reason to argue again over the particulars of whether the University's policy was neutral or generally applicable, but rather, urge the Court to keep the applicable standard front of mind: whether "the precedent [is] clear enough that *every reasonable official* would interpret it to establish the particular rule the plaintiff seeks to apply." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (emphasis added).

BLinC cites cases, arguing that its free exercise rights were "clearly established" at the time of the alleged constitutional violations. [*See* Plf. Brief, pgs. 46–52]. While the cases BLinC cites arguably set forth the general parameters of First Amendment law as it pertains to the right to free exercise, not a single case BLinC cites involves the enforcement of a University's nondiscrimination policy against a publicly-funded student

group. *See Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (the U.S. Supreme Court holding that a private baker and business owner's free exercise rights were infringed by the application of the State's Anti-Discrimination Act, because the artistic nature of the baker's work was a religious expression protected by the Free Exercise Clause); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (the U.S. Supreme Court holding that a State may not withhold benefits from a church—here, a church-affiliated preschool—on the basis that it is religiously-affiliated where the state provides identical benefits to secular groups); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (the U.S. Supreme Court holding that a school's refusal to allow a religious club to use its facilities for after-school meetings on the grounds that the club was religious in nature was not reasonable in light of the purposes of its limited public forum); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (the U.S. Supreme Court holding that a school district violated a church's constitutional rights by refusing to let it use school facilities on the basis of its status as a religious organization and the religious nature of its activity); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (the Supreme Court ruling that a government ordinance violated the free exercise rights of a church which

had the practice of engaging in ritualistic animal sacrifices); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (the U.S. Supreme Court ruling that a city violated the rights of a group of Jehovah's Witnesses when it prohibited the group from conducting its religious services in a public park, thus treating the group differently than other religious groups); *Cent. Rabbinical Congress v. New York City*, 763 F.3d 183 (2d Cir. 2014) (the Second Circuit Court of Appeals ruling that a regulation promulgated by the New York Department of Health which required a signed parental consent form prior to the performance of *metzitzah b'peh* on infants was not neutral and perhaps not generally applicable, and remanding for strict scrutiny analysis by the district court advising that "the conclusion that the Regulation is subject to strict scrutiny does not mean that [it] is constitutionally deficient, for strict scrutiny is not invariably fatal in the context of free exercise claims."); *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (the Sixth Circuit reversing a grant of summary judgment to a university that ejected a graduate student who refused to counsel a gay client on the basis of her sincerely held religious beliefs, holding "Ward's free-speech claim deserves to go to a jury" on the question of whether the university dismissed her to punish her for her religious views or because her conduct violated the ethical codes governing her profession); *Blackhawk v. Pennsylvania*, 381

F.3d 202 (3d Cir. 2004) (the Third Circuit holding that the government's regulation requiring citizens to obtain permits in order to keep wildlife in captivity violated the First Amendment Rights of the plaintiff who kept black bears for religious and cultural reasons could not survive strict scrutiny, because its interests were not compelling or narrowly tailored, but granting the individual defendants qualified immunity because "the governing precedents were complex and developing"); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (finding that a city's zoning ordinance violated RLUIPA); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) (the Third Circuit, holding that plaintiffs were likely to be successful in showing that the city violated the Free Exercise Clause when it removed *eruvs* placed on telephone poles by a group of Orthodox Jews as symbols of demarcation of a religious zone); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999) (the Third Circuit holding that the City of Newark violated the free exercise rights of police officers who refused to shave their beards for religious reasons); *Rader v. Johnston*, 924 F. Supp. 2d 1540 (D. Neb. 1996) (the U.S. District Court for the District of Nebraska holding that a university's rule requiring on-campus housing for freshmen students violated the free exercise clause and could not withstand strict scrutiny); *Mitchell Cty. v.*

Zimmerman, 810 N.W.2d 1 (Iowa 2012) (the Iowa Supreme Court holding that a county's ordinance forbidding the use of steel-cleated wheels on hard surfaced roadways was not generally applicable and could not survive a strict scrutiny analysis).

These cases do nothing more than set forth the general principles of First Amendment law and provide no guidance on the issue of whether a university's compelling interests in enforcing civil rights laws on its campus—unevenly or not—might withstand a strict scrutiny analysis. Indeed, long-settled Supreme Court precedent instructs that a State's interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services"—a goal which is unrelated to the suppression or promotion of speech—"plainly serves compelling state interests of the highest order." *Roberts v. Jaycees*, 468 U.S. 609, 624 (1984).

As noted by the district court in its ruling, none of the decisions which are factually similar to the instant case took up plaintiffs' free exercise claims. [*See* Add. 35, citing *Martinez*, 561 U.S. at 697 n. 27 (rejecting the free exercise claim, and noting that CLS sought "preferential, not equal treatment"); *Reed*, 648 F.3d at 805–06 (remanding to the district court for additional findings on whether the school discriminated against other

student groups based on their religious views); *Walker*, 453 F.3d at 860 n. 1 (declining to address plaintiff's free exercise claims)]. BLinC cites no case which definitely decides the issue of the uneven enforcement of a nondiscrimination policy against registered student organizations on a university campus. [*See* Plf. Brief, pgs. 46–52]. The law as it related to the situation faced by the individual Defendants—who are not constitutional scholars—was not clearly established such that they could only have acted as they did being incompetent or in clear violation of the law. *See Ward v. San Diego County*, 791 F.2d 1329, 1332 (9th Cir. 1986); *Ashcroft*, 131 S. Ct. at 2085.

3. Religion Clauses (Ministerial Exception)

BLinC argues that the law was clearly established on the issue of whether the ministerial exception precluded Defendants from "interfering with a religious group's selection of its leaders." [Plf. Brief, pgs. 52–55, citing *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 362 (8th Cir. 1991)]. *Hosanna-Tabor* was an employment discrimination lawsuit brought by a "called teacher" at a religious school who believed that she was being discriminated against by her employer on the basis of disability. *Hosanna-Tabor*, 565 U.S. at 180–81. In deciding

Hosanna-Tabor, the Supreme Court held that the Religion Clauses of the First Amendment "bar the government from interfering with the decision of a religious group to fire one of its ministers." *Id.* at 181.

The facts of *Hosanna-Tabor* are too dissimilar to have offered the individual Defendants any guidance regarding the actions they should or should not have taken with regard to BLinC. The church in *Hosanna-Tabor* did not receive public money and did not exist in a limited public forum on a college campus. It was for this very reason that the district court refused to grant BLinC's motion for summary judgment on this issue. [Add. 063, holding that "BLinC does not cite any cases that apply the ministerial exception in the manner it seeks here.")]. Though BLinC attacks the district court's decision denying its motion for summary judgment on its "ministerial exception" claims, the district court properly held that "the ministerial exception has traditionally been used as a defense to claims asserted against a religious organization, not as its own cause of action" and noted the Supreme Court's "efforts in *Hosanna-Tabor* to constrain the reach of its holding." [Add. 063, citing *Hosanna-Tabor*, 565 U.S. at 17–79; *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 361 (8th Cir. 1991) (sex discrimination action brought by a chaplain against her employer); *Lee v. Sixth Mount Zion Baptist Church of*

Pittsburgh, 903 F.3d 113, 117–18 (3d Cir. 2018) (employment action brought by a pastor against his church employer); *Penn v. N.Y. Methodist Hospital*, 884 F.3d 416, 418 (2d Cir. 2018) (employment action brought by hospital chaplain against her employer and supervisor)]. It strains credibility for BLinC to now insist that *Hosanna-Tabor* is proof that the law regarding the ministerial exception was clearly established at the time of the alleged constitutional violations, when it has not cited a single case which applies the ministerial exception in the way it is used here. This Court should rule that the law underlying BLinC's ministerial exceptions claims was not clearly established at the time of the alleged constitutional violations and is not clearly established now.

CONCLUSION

This case cannot be painted in broad strokes of black and white, as BLinC suggests, and the consequences of a decision in the individual Defendants' favor are not so dire. This Court's careful review of the issues will reveal that the law in this area was at the time of the alleged violations, and still is, rapidly developing and unsettled. Not a single case has come before any Court of Appeals which answers the particular question at issue here, and to deny the individual Defendants qualified immunity in this difficult case would be to "'dampen the ardor of all but the most resolute, or

the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949), *cert denied*, 339 U.S. 949 (1950). In light of this important interest, the individual Defendants urge this Court to uphold the district court's grant of immunity.

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B(i). It contains 11,950 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 of Appellate Procedure 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Georgia font.

3. This brief complies with the electronic filing requirements of Eighth Circuit Rule 28A(h). The latest version of System Center Endpoint Protection has been run on the file containing the electronic version of this brief and no virus has been detected.

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I certify that on July 3, 2019, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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I, George A. Carroll, attorney for Defendants/Appellees, hereby certify that the actual costs associated with copying the foregoing Brief is the sum of $_____.

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