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

APPELLANT'S REPLY BRIEF

CHRISTOPHER C. HAGENOW
WILLIAM R. GUSTOFF
Hagenow & Gustoff, LLP
600 Oakland Rd. NE
Cedar Rapids, IA 52402
(319) 849-8390 phone
(888) 689-1995 fax
chagenow@whgllp.com

ERIC S. BAXTER
DANIEL H. BLOMBERG
ERIC C. RASSBACH
The Becket Fund for
Religious Liberty
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
ebaxter@becketlaw.org

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The case law governing the outcome of this case is all on one side. The Supreme Court's rulings in *Healy*, *Widmar*, *Rosenberger*, *Lukumi*, *Trinity Lutheran*, and *Hosanna-Tabor*, plus this Court's rulings in *Gerlich*, *Gohn*, and *Gay Lib*, all lead to the same conclusion: religious viewpoint discrimination is unjustifiable. Defendants' dogged insistence on ignoring the obvious is perhaps best manifest in their argument that *Gerlich*—which alone resolves this appeal—"comes precariously close" to getting the law of qualified immunity wrong. Resp. 43. The Court errs, Defendants claim, in closing the door to viewpoint discrimination, an option they want left available to university officials like themselves. *Id.* But even if religious viewpoint discrimination, in some extreme circumstance, might somehow be justified, Defendants cannot make the case here.

That is because the evidence of blatant viewpoint discrimination and intentional religious targeting is abundant and unmistakable. In response, Defendants ignore—no acknowledgement, much less explanation—the extensive, undisputed evidence of wrongdoing. Their silence is thunderous. The mistreatment of Business Leaders in Christ ("BLinC") is such an egregious violation of clearly established constitutional rights that it violated the training Defendants themselves had developed, raised "red flags" in their own minds, generated discussion amongst themselves about the potential consequences, and

now defies any explanation on appeal. Perhaps most telling is Defendants' complete silence on their deregistration of BLinC at the same time they approved Love Works, a student group with mirror-opposite theological beliefs. A more overt form of religious viewpoint discrimination is hard to imagine. Yet Love Works does not appear even once in their brief.

In fairness, Defendants' selective silence is, perhaps, the only approach available to them. The relevant cases are so on point that the law and the facts here cannot coexist in the same memorandum without compelling the result Defendants resist: a ruling that the district court erred in granting them qualified immunity.

ARGUMENT

Qualified immunity is not available to government officials who (1) perpetuate the "violation of a constitutional . . . right" that (2) was "clearly established" at the time of the unlawful conduct. *Gerlich v. Leath*, 861 F.3d 697, 704 (8th Cir. 2017). Both elements are met easily here.

I. Defendants violated BLinC's First Amendment rights.

The evidence Defendants avoid speaks for itself, leaving no doubt that Defendants violated BLinC's First Amendment rights. Under the Free Speech Clause, a public university that creates a limited public forum for registered student organizations (RSOs) must—above all else—avoid "discriminat[ing] on the basis of . . . viewpoint." *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 685 (2010) (citation omitted). Likewise, freedom

of association requires that "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 309 (2012). And the Free Exercise Clause further "'protect[s] religious observers against unequal treatment'" by subjecting laws that disfavor religion "to the strictest scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). Finally, the Free Exercise and Establishment Clauses together protect religious groups' religious leadership selection. *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 176-77 (2012). Defendants' response brief makes no effort to contest the facts showing that they violated these rights.

A. Defendants targeted BLinC's religious viewpoint, punishing BLinC for its religious beliefs and leadership selection.

Defendants say nothing about having penalized BLinC for obeying their instruction to revise its constitution to detail its religious beliefs. Even before this lawsuit commenced, Defendants had acknowledged that, under the University's own policies, they could not interfere with BLinC's selection of religious leaders any more than they could force an environmental group to elect a "climate denier" as its leader. JA 2513 ¶ 204. They acknowledged there was nothing wrong with BLinC's specific religious standards for leaders. JA 2512-13 ¶¶ 200-05. And they *pressured* BLinC to detail its views concerning marriage and sexuality in its constitution so that students would know what BLinC believed before

they joined. JA 2516 ¶ 213. But after BLinC complied, Defendants deregistered it, because—in Defendants' own words—the updated Statement of Faith was discriminatory "on its face." JA 2520 ¶ 227. And it was then that Defendants told BLinC that, to remain on campus, it had to "make additional revisions to [its] Statement of Faith." JA 2520 ¶ 228. In their response, Defendants do not even mention, let alone try to justify, this targeting of BLinC's "religious beliefs as such." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-43 (1993).

Defendants also say nothing about their *de facto*, categorical favoritism for the largest groups on campus, fraternities and sororities. After BLinC sued for discrimination, Defendants amended their nondiscrimination policy to create a categorical exemption, explicitly allowing fraternities and sororities to continue discriminating based on sex in selecting both leaders *and* members. JA 2545 ¶ 12. Yet the words "fraternity" and "sorority" appear only once in Defendants' brief and for unrelated reasons. Resp. 31. Nor do Defendants ever explain why they exempt all political and ideological groups from the standard they impose on BLinC. Br. 22, 50-51. Defendants' failure to address this discrimination leads to only one conclusion: Defendants violated BLinC's constitutional rights.

Defendants also say nothing about the district court's findings that the University has registered numerous RSOs that explicitly restrict access to leadership and membership based on protected characteristics such as

sex ("Hawkapellas"); sexual orientation and gender identity ("House of Lorde"); and national origin ("Chinese Students and Scholars Association"). Add. 038-39, 045. And the University separately admitted numerous other examples of RSOs and university programs that discriminate based on race, sex, sexual orientation, gender identity, status as a U.S. veteran, and disability. JA 2464-65 ¶¶ 34-35.

Defendants likewise fail to acknowledge they also discriminated *among* religious organizations, favoring certain religious beliefs over others. Specifically, the student group Love Works is conspicuously absent from Defendants' brief. Love Works was formed by Marcus Miller, the same individual who rejected BLinC's religious beliefs. JA 2528 ¶ 262. He identified gay-affirming Christian beliefs in Love Works' constitution and included a requirement for Love Works' leaders to affirm them. JA 2528 ¶¶ 264-65. Defendants' approval of Love Works thus showed they were treating one kind of Christianity better than another. Yet Defendants ignore the district court's finding that this constituted "blatant" "viewpoint discrimination. Add. 054.

B. Defendants knew that their actions were unconstitutional.

Also conspicuously absent from Defendants' brief is any discussion of their admissions in the district court that they knew their conduct violated the First Amendment. For example, there is no mention of the Christian Legal Society (CLS) controversies that Defendants themselves had previously worked to resolve. At that time, they wrote memoranda

assuring that simply "asking prospective members to sign [a] statement of faith would not violate the UI Human Rights Policy." Br. 14; JA 2474 ¶ 57. They confirmed that student groups were "entitled" under the United States Constitution to require leaders and members "to adhere to [their] statement of faith. Br. 15; JA 2475-76 ¶¶ 65-66. They not only *allowed* CLS to register with religious leadership standards in its constitution, but *repeatedly* warned student government officials that treating CLS differently due to its statement of faith would expose them to personal liability for violating the Constitution. JA 2477 ¶ 72. When the same issue later arose with BLinC, Defendants conceded that the University's policy had not changed, JA 2548 ¶ 354; JA 2558-60 ¶¶ 395, 397-98, 401; that there were First Amendment "red flags" and "concerns" surrounding BLinC's deregistration, JA 2547 ¶¶ 348-51; JA 2548 ¶ 353; JA 2556 ¶ 388; JA 2558 ¶ 394; and that they understood that penalizing BLinC because of its religious beliefs was unlawful, JA 2553 ¶¶ 374-75; JA 2479-80 ¶¶ 81-84, 86. In light of this evidence, Defendants' new claim that they "acted in good faith," Resp. 14, rings false.

What is more, Defendants persisted in discriminating against BLinC even after the district court twice warned they were violating the Constitution. The court's January 2018 preliminary injunction concluded—on limited pre-discovery evidence—that Defendants had engaged in unconstitutional selective enforcement by deregistering BLinC while allowing a Muslim student group to maintain religious

leadership requirements and by allowing "other student organizations like Students for Life, the Korean American Student Association, and the University of Iowa Feminist Majority Leadership Alliance . . . to organize around their missions and beliefs." Add. 001, 027-28.

At that early stage in the case, the district court was willing to consider that the discrepancy might have resulted from "administrative oversight" and thus limited its injunction to 90 days in case Defendants just needed time to clean up their enforcement practices. Add. 028, 031. But the Court warned that Defendants' "selective enforcement" could indicate that BLinC's religious "viewpoint was the reason it was not allowed to operate with [its] membership requirements." Add. 028. Yet less than six months later, with no change in their enforcement practices, Defendants again sought to revoke BLinC's registered status, forcing it to file a motion to extend the temporary injunctive relief.

Defendants opposed the motion, arguing that BLinC should not be allowed "to accept state funds yet fail to abide by valid state rules and regulations." Dkt. 52 at 2, 6. They again justified their special "treatment of sports teams and social fraternities," which continued to discriminate based on sex with impunity, on the ground that "[f]ederal and state law allow the segregation BLinC argues is unequal enforcement." *Id.* at 4. But the district court was unpersuaded and granted the injunction. It concluded that "a large number" of student groups were "in violation" of the University's nondiscrimination policy and that "the University

[could] not reconcile that fact with how the proceedings against BLinC were carried out." Add. 033.[1]

Despite these repeated warnings against selective enforcement, Defendants *still* persisted in discriminating, arguing at summary judgment that BLinC should be deregistered because it "openly discriminates . . . on the basis of sexual orientation and gender," "wishes to discriminate against LGBT+ students," and wants "special dispensations to discriminate." JA 2411-12, 2420-21. But at the same time, fraternities, sororities, Love Works, political and ideological groups, and other favored student groups were permitted to discriminate because their discrimination was said to "support the University's educational mission" and "provide safe spaces for minorities." JA 2424; *see also* Br. 22. Worse, Defendants then proceeded to target *yet another* religious group, InterVarsity Graduate Christian Fellowship, mandating that it could not "encourage" its leaders to hold "Christian beliefs" and instructing it to remove sections from its constitution that "simply require [its] leaders to be Christian." JA 2566-68 ¶¶ 429-34; *see also* JA 2569-70 ¶¶ 441-44 (admitting other groups were allowed to discriminate against protected classes); Add. 045 (same).

[1] BLinC does not suggest that Defendants "should have simply ceased to defend themselves and conceded to every demand made by BLinC." Resp. 54. It would have sufficed for Defendants to stop discriminating.

C. Defendants' accusations that BLinC engaged in invidious status-based discrimination are false and irrelevant.

Unable to contest, and thus ignoring, the overwhelming evidence of viewpoint discrimination and religious targeting, Defendants have instead renewed their false accusations that BLinC discriminated against Marcus Miller because of his sexual orientation. But the district court rejected that charge as lacking evidentiary support, Add. 044, and Defendants provide no reason to question that finding here. As BLinC testified, it declined Miller's leadership request only because his religious beliefs conflicted with those of the group he wanted to lead, an account "Defendants have not challenged." Add. 040 & n.3 (citing Defendants' admissions at JA 2489-92 ¶¶ 117-32 and JA 2494-96 ¶¶ 136-45).

Defendants cannot now argue otherwise. They "admitted that BLinC's Statement of Faith and leadership selection policies do not discriminate based on status." Add. 065. They "admitted that a student could identify as being gay and still hold a leadership position in BLinC." Add. 044. And they admitted that they "do not view BLinC's restrictions on leadership as being based on status." Add. 044 & n.5. Indeed, Defendants admitted all that before the start of the case, which is why they first agreed that BLinC would remain registered if it detailed its religious beliefs in its constitution. JA 2516-17 ¶¶ 213-16. Defendants' about-face, just weeks later, to accuse BLinC of invidious discrimination, while literally ignoring extensive, undisputed evidence to the contrary, only

underscores Defendants' viewpoint discrimination and religious targeting.[2]

In any case, Defendants' argument is irrelevant. As the district court held, BLinC's motives concerning Miller were "not material," because this case involves only whether BLinC has the right going forward to require its leaders to embrace its Statement of Faith. Add. 040.

* * * *

While Defendants may choose to ignore the evidence, the law cannot. Defendants' admissions, whether they acknowledge them or not, are conclusive proof that Defendants violated BLinC's constitutional rights.

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

Defendants' egregious misconduct goes well beyond the qualified immunity standard. Defendants stress that clearly established law must be "particularized to the facts of the case," "beyond debate," and the subject of "controlling authority or a robust consensus of cases," such that "every reasonable official" would understand the law "to establish the particular rule the plaintiff seeks to apply." Resp. 17-18 (cleaned up). But these standards are easily met here.

---

[2] Defendants try to claw back their district court admissions in an evidence-free footnote that now asserts that BLinC *did* discriminate based on status. Resp. 37 & n.11. But self-serving assertions cannot gainsay binding admissions. *Martinez*, 561 U.S. at 678 ("a judicial admission . . . is conclusive in the case").

A. The law against religious viewpoint discrimination by state universities is clearly established.

The Supreme Court's decisions in *Healy* (1972), *Widmar* (1981), and *Rosenberger* (1995) all make clear that student groups on public campuses are entitled to equal treatment. Br. 36-37. The Supreme Court's reliance on these cases in *Trinity Lutheran* served only to underscore this point. 137 S. Ct. at 2021 (government is "prohibited . . . from discriminating" on basis of "religious status"). And to the extent Defendants want "a high[er] degree of specificity," Resp. 17-18, than that found in the treatment of student groups generally (*Healy*) and of *religious* student groups specifically (*Widmar* and *Rosenberger*), the Supreme Court in *Martinez* has also already addressed a religious student group *with the same religious standards as BLinC*. 561 U.S. at 672. It's hard to find more "specificity" than that. And in *Martinez*, the Court still stressed—repeatedly—that "[a]ny access barrier must be . . . viewpoint neutral," *Id.* at 679; that a public university may not "discriminate against speech on the basis of . . . viewpoint," *id.* at 685; and that "a public educational institution exceeds constitutional bounds . . . when it 'restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent,'" *id.* at 683-84 (citation omitted).

This Court's decisions in *Gay Lib* (1977), *Gohn* (1988), and *Gerlich* (2017) are similarly on point, Resp. 37-38, with *Gerlich* expressly having

relied on *Martinez* 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).

In asking the Court to uphold qualified immunity, Defendants stretch the legal standard far beyond its limits. Few cases have more "controlling authority," "particularized to the facts of the case," with the "high degree of specificity" found here. Hence the Department of Justice's recognition that Defendants' actions were a "textbook violation" of the First Amendment. JA 2583. Despite Defendants' suggestions to the contrary, the Supreme Court "does not require a case directly on point for a right to be clearly established." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (citation omitted). "[G]eneral statements of the law" are well capable "of giving fair and clear warning to officers." *Id.* at 1153 (citation omitted); *accord Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" (citation omitted)). And the applicable caselaw here goes well beyond mere "general statements."[3]

[3] The potential tension in the Supreme Court's standards requiring a "high degree of specificity," *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018), but *not* requiring "a case directly on point," *Kisela*, 138 S. Ct.

Defendants' reliance on the Fifth Circuit's ruling in *Morgan v. Swanson*, 755 F.3d 757 (5th Cir. 2014), is unavailing. Resp. 19-21. There, an elementary school principal barred a parent from distributing candy canes with religious messages "to other adults at his son's in-class winter party." 755 F.3d at 758-59. The court granted the principal qualified immunity, because the plaintiff offered only one case to support his arguments, a case the court deemed "inapposite." *Id.* at 761. The earlier case had upheld the free speech rights of an individual "contribut[ing] relevant materials to a public forum dedicated to adult dialogue," which the Fifth Circuit concluded gave no real guidance for the principal's situation in *Morgan*, with the parent trying to "distribute religious material during a school-day activity for children." *Id.*

The distinguishing factors in those cases are a far cry from the situation here, with more than a half dozen Supreme Court and Eighth Circuit cases, plus multiple cases from other circuits, all excoriating viewpoint discrimination by public universities against student groups in a limited public forum. And that is not even counting the additional cases establishing that Defendants' conduct also violated the First

---

at 1152, is easily reconciled when understood in context. For instance, *Kisela* involved excessive force by police officers and clarified that "[s]pecificity is especially important in the Fourth Amendment context" and that "[u]se of excessive force is an area of the law in which the result depends very much on the facts of each case" but distinguished other circumstances as potentially requiring less specificity. 138 S. Ct. at 1152-53 (citations omitted).

Amendment's protections for free association, Br. 44-45 (citing *Dale* and *Hurley*), and free exercise of religion, Br. 46-54 (citing *Lukumi*, *Trinity Lutheran*, and *Hosanna-Tabor*).

In contrast, Defendants have not cited a single case to cast even the slightest doubt on their having engaged in religious viewpoint discrimination. Nor do they dispute that they selectively enforced their nondiscrimination policy to protect favored groups. Resp. 35, 41, 59, 60 (failing to contest that policy was "selectively" or "uneven[ly]" enforced); *see also* Br. 22 (listing favored groups). Defendants have offered nothing to challenge the conclusion that the law on these facts is clearly established.

Defendants suggest in passing that viewpoint discrimination might be permissible where it is not motivated by governmental hostility to the disfavored viewpoint. Resp. 33-34. That is both wrong and irrelevant. Wrong because innocent motives do not absolve speech restrictions. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227-28 (2015); JA 2598 (Department of Justice brief). And irrelevant because Defendants' hostility to BLinC's religious beliefs is amply demonstrated here.

B. It is clearly established that selective enforcement of a nondiscrimination policy against religious viewpoints cannot survive strict scrutiny.

Against this backdrop of precedent, conceded viewpoint discrimination, and a missing strict scrutiny defense, Defendants still attempt to show that the caselaw is not clearly established because "the

issue of uneven enforcement of a nondiscrimination policy against a publicly-funded student group ha[s] not yet been addressed by any court." Resp. 35. This is manifestly false. *Martinez*, *Walker*, and *Reed* all emphasized the "no viewpoint discrimination" principle in the context of nondiscrimination policies. Br. 39-41. What Defendants seem to be arguing is that strict scrutiny analysis itself makes it impossible for the law in question to be clearly established unless the asserted governmental interest has an exact factual parallel in prior cases. But that approach would inherently disadvantage all sensitive constitutional rights protected by strict scrutiny.

That explains why this Court has explicitly rejected Defendants' argument. In *Burnham v. Ianni* a university tried defending viewpoint discrimination by arguing that the issue of "which restrictions are acceptable in a given situation is never clearly established" because "First Amendment rights [are] subject to [a] fact-intensive . . . balancing test." 119 F.3d 668, 674 (8th Cir. 1997) (citations omitted). *Burnham* rejected that argument, explaining that "[a]lthough the right of free speech is not absolute, the First Amendment generally prevents the government from proscribing speech of any kind simply because of disapproval of the ideas expressed." *Id.* at 674. The Court emphasized and this principle was already clearly established as "[t]he Supreme Court and this court have both clearly and directly spoken on the subject [of viewpoint discrimination] on numerous occasions." *Id.* at 677.

That alone is sufficient to reject Defendants' argument. But there are also four more reasons.

1. Defendants failed below to make any attempt to meet their strict scrutiny burden.

First, Defendants bear their burden of establishing a compelling government interest sufficient to justify violating BLinC's First Amendment rights. *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014). Yet below, they "never present[ed] in their briefs a position on strict scrutiny." Add. 059. Defendants should not be allowed to argue that unspecified interests they never raised below have somehow clouded otherwise clear First Amendment law. Ruling otherwise would encourage gamesmanship where governmental defendants would abdicate their strict scrutiny affirmative defense at the district court, and then on appeal complain that a strict scrutiny affirmative defense *might* have survived and thus qualified immunity must be granted. Respect for both judicial efficiency and sensitive First Amendment rights demands more.

In any event, it is especially audacious for Defendants to claim that their interests should override BLinC's constitutional rights when they were previously adamant they had no such interests. In 2008, when the University's student government denied CLS funding because some members were "uncomfortable with [the] organization," the University instructed the student government to fund CLS anyway, because—"as agents of the state"—they could "be subject to personal liability" if they

violated CLS's "rights under the U.S. constitution." JA 2476 ¶ 69, JA 2477-78 ¶¶ 72-74. It is a bold stretch for Defendants to now claim they have interests that would justify trampling those same rights.

2. Defendants' religious viewpoint discrimination is presumptively invalid.

Second, it is extremely rare, if not impossible, to identify a government interest sufficient to justify viewpoint discrimination or religious targeting. Religious viewpoint discrimination is a "blatant" and "egregious" restriction on First Amendment rights that is "presumed impermissible." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Indeed, the Supreme Court's "precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf." *Matal v. Tam*, 137 S. Ct. 1744, 1768 (2017) (Kennedy, J., concurring in part and concurring in the judgment). And that narrow situation is not the one here.

Moreover, the Court's most recent opinion on viewpoint discrimination did not engage in strict-scrutiny balancing at all. The finding of viewpoint discrimination alone "doomed" the government's case. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). Defendants can cite no case where suppressing one viewpoint, while allowing expression of the "ideological inverse" viewpoint, Add. 045, has survived strict scrutiny.

Similarly, under the Free Exercise Clause, "targeting religious beliefs as such is *never* permissible." *Trinity Lutheran*, 137 S. Ct. at 2024 n.4 (quoting *Lukumi*, 508 U.S. at 533) (emphasis added). Thus no government interest could justify deregistering BLinC for refusing to make "revisions to [its] Statement of Faith," JA 2520 ¶ 228; for expressing religious beliefs on marriage and sexuality, JA 2551 ¶ 365, JA 2545-46 ¶¶ 342-43; or for endorsing religious views that favor heterosexual marriage over same-sex marriage, JA 2545 ¶ 341. In these circumstances, strict-scrutiny balancing simply does not apply.

3. Defendants' religious viewpoint discrimination fails strict scrutiny.

Third, even assuming that strict-scrutiny balancing applies and that Defendants had argued it, they flunk the test. To start, this Court and the Supreme Court have repeatedly emphasized in factually similar cases the near impossibility of surviving strict scrutiny when university administrators engage in viewpoint discrimination. *See Healy v. James*, 408 U.S. 169, 187-88 (1972) (state college could not deny official recognition to student group with supposedly "abhorrent" views); *Rosenberger*, 525 U.S. 819 (state university could not deny funding to religious group to speak on certain topics when simultaneously funding secular groups speaking on same topics); *Gerlich,* 861 F.3d 697 (state university could not deny student group use of university trademark for fear of appearing to support the group). In each of these cases, the same

strict scrutiny principles applicable here led the courts to hold that each university's interests in denying student groups' First Amendment rights could not survive strict scrutiny.

The Supreme Court and other circuits have also made clear that the particular act of applying a nondiscrimination policy unevenly cannot survive strict scrutiny. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (student group likely to prevail on claim of viewpoint discrimination because university selectively applied nondiscrimination policy); *Martinez*, 561 U.S. at 683-84, 695 (upholding all-comers' nondiscrimination policy because it was "viewpoint neutral," but emphasizing that, absent an all-comers' policy, "a public educational institution exceeds constitutional bounds . . . when it restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent" (citation omitted)); *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 803 (9th Cir. 2011) ("A nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly"); *Ward v. Polite*, 667 F.3d 727, 731 (6th Cir. 2012) (Sutton, J.) ("What poses a problem is not the adoption of an anti-discrimination policy, it is the implementation of the policy, permitting secular exemptions but not religious ones.").

Further, the possible compelling interests inferred from Defendants' briefing are nonstarters. The district court drew from arguments Defendants raised under "different issues" to surmise they might have

compelling interests in "developing student leadership and providing a quality campus environment," "ensuring academic growth," "promoting diversity," and granting all students "equal access to educational opportunities." Add. 058-059 (cleaned up; citations omitted). But the law is already clearly established that interests like these cannot justify viewpoint discrimination. Indeed, citing governing law from *Lukumi*, the district court itself noted that "'where the government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.'" Add. 060 (quoting *Lukumi*, 508 U.S. at 546-47).

Moreover, these are essentially the same interests that were raised in *Martinez*, 561 U.S. at 687-88, ("leadership, educational, and social opportunities"); *Reed*, 648 F.3d at 799, ("diversity and nondiscrimination"); and *Walker*, 453 F.3d at 860 ("nondiscrimination and equal opportunity"). And in all three cases, the courts were clear that such purposes could not justify viewpoint discrimination. *Martinez*, 561 U.S. at 667-68, 694-95 (First Amendment "precludes . . . denying student organizations access to school-sponsored forums because of the groups' viewpoints"); *id.* at 679 ("Any access barrier must be . . . viewpoint neutral"); *id.* at 690 (noting difficulty of "cur[ing] the constitutional shortcoming" of "viewpoint discriminat[ion]"); *id.* at 669, 697 (rejecting First Amendment claims only because the "all-comers," "open-access"

policy was "viewpoint neutral"); *Reed,* 648 F.3d at 803 ("nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly"); *Walker,* 453 F.3d at 866 (granting preliminary injunction to student group where policy that was "viewpoint neutral on its face" had "not been applied in a viewpoint neutral way"). Defendants have cited no cases to the contrary, and there are none.

The district court also suggested that Defendants might have an interest in providing "safe spaces for minorities" or "a safe environment" generally. Add. 058, 060. But the district court—again citing controlling precedent in *Lukumi*—concluded there could be no compelling interest in restricting First Amendment freedoms where the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." Add. 060 (citation omitted). Specifically, the district court found "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." *Id.*

This principle is clearly established. In *Brown v. Entertainment Merchants Association*, California had passed a law to protect children by regulating violent video games. 564 U.S. 786 (2011). Although the Court agreed that states "no doubt[] possess legitimate power to protect children from harm," it struck the law under strict scrutiny for several

reasons. *Id.* at 794. The state had failed to "show a direct causal link between violent video games and harm to minors." *Id.* at 799. Without "an 'actual problem' in need of solving" and proof that "curtailment of free speech [was] actually necessary to the solution," there could be no compelling interest. *Id.* Also, even assuming there were some harm, it was "both small and indistinguishable from effects produced by other media," which the state had "declined to restrict." *Id.* at 800-02. Because the law was so "seriously underinclusive," it failed strict scrutiny. *Id.* at 805.

Numerous other cases confirm that vague assertions of harm do not give rise to a compelling government interest. In *Healy*, a student group's adherence to "a philosophy of violence and disruption" was insufficient to strip its status as registered student organization. 408 U.S. at 187. In *Burnham*, "an atmosphere of anxiety due to earlier threats" of "kidnapping" and "death" were insufficient to shut down an on-campus display of images depicting "faculty members with weapons." 119 F.3d at 672 & n.5. And in *Ward*, a university policy against "discrimination based on . . . sexual orientation" was insufficient to expel a student who insisted on referring to other counselors any clients who wanted gay-affirming counseling. 667 F.3d at 731.

Finally, even if Defendants could show a compelling government interest, they could come nowhere close to showing that their infringement on BLinC's rights was the least restrictive means of serving

that interest. First, because Defendants failed to pursue their alleged interests "with respect to analogous non-religious conduct" (not to mention the analogous *religious* conduct of Love Works), that shows that those interests "could be achieved by narrower [means]" than the ones employed against BLinC. *Lukumi*, 508 U.S. at 546. That underinclusiveness alone "suffices to establish the invalidity" of Defendants' actions. *Id.*

Likewise, the government cannot meet its burden "unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 751-52 (8th Cir. 2014). But Defendants have provided no such evidence, nor explained why the successful leadership-selection exemption policies at universities like Iowa State University are unworkable. Campus Groups Amicus Br. 20-21. Defendants instead rely on suppositions about what might have been, which is not enough. *281 Care Comm.*, 766 F.3d at 787 (test requires proving that policy "is necessary" and "could be replaced by no other regulation").

In short, the lesson from the case law is clear: "It is rare that a regulation restricting speech because of its content will ever be permissible," *Brown*, 564 U.S. at 800 (citation omitted), and Defendants certainly have not made a case for that to happen here.

4. State and federal laws condemn, not excuse, Defendants' religious viewpoint discrimination.

Finally, Defendants imply they have an interest in protecting rights guaranteed by the Fourteenth Amendment and federal and state civil rights laws, arguing that the law is not clearly established because there is "no case" in which the government "offer[ed] up an attempt to defend another student's civil rights." Resp. 45. This is manifestly false. The universities in *Martinez*, *Reed*, *Walker*, and *Ward* all relied on civil-rights nondiscrimination policies to justify their actions. And in all four cases, the courts held they could not justify viewpoint discrimination.

The Supreme Court has also found nondiscrimination principles inadequate to restrict First Amendment freedoms in other contexts. In *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, the Supreme Court applied strict scrutiny to uphold a private parade's decision to exclude a gay pride group from its parade despite a state law prohibiting sexual orientation discrimination. 515 U.S. 557 (1995). The Court emphasized that nondiscrimination laws may not be applied "to expressive activity" in ways that would force expressive groups "to modify the content of their expression." *Id.* at 578; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (same). Again, Defendants have cited no law or evidence to show that a religious group like BLinC is somehow infringing the Fourteenth Amendment or even the University's own policies by

asking its leaders to embrace its religious beliefs. There is no reason Defendants could have been confused about the clearly established law.

Defendants' reliance on federal and state civil rights statutes is similarly unserious. Resp. 40, 45, 59. It is not even clear precisely what federal and state laws Defendants are relying on. The only law prohibiting sexual orientation discrimination that could possibly apply to BLinC is the Iowa Civil Rights Act. But it specifically exempts religious organizations from this prohibition. Iowa Code Ann. §§ 216.6(6)(d), 216.7(2)(a). Title VII prohibits discrimination on the bases of sex and religion in employment, but also includes a religious exemption for hiring individuals of a particular religious observance, practice, or belief. 42 U.S.C. § 2000e(j); § 2000e-1(a). And Title IX's prohibition against sex discrimination in education also includes an exemption to the extent its requirements would conflict with the religious tenets of a religious organization. 20 U.S.C. § 1681(a)(3). Defendants have made no showing that any of these laws apply to BLinC in the first place, or that BLinC's use of religious standards to select its religious leaders would violate their prohibitions even if they did apply. With no such showing, no reasonable public official could have thought that religious viewpoint discrimination against BLinC was necessary to enforce these federal or state civil rights laws.

The Supreme Court's decision in *Hosanna-Tabor* further removed any doubt, holding that the Free Exercise and Establishment Clauses work

together to categorically prohibit the government from relying on nondiscrimination laws to interfere with a religious group's selection of its own religious leaders. 565 U.S. 171 (2012); *see also Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 826 (6th Cir. 2015) (applying categorical structural prohibition on religious leadership entanglement). Defendants contend that "[t]he facts of *Hosanna-Tabor* are too dissimilar to have offered the individual Defendants any guidance regarding the action they should or should not have taken with regard to BLinC." Resp. 61. But *Hosanna-Tabor* is quite clear that the government must avoid interfering with internal religious leadership affairs, and courts have long recognized that there "can be no clearer example of an intrusion into the internal structure or affairs" of a religious student group than depriving it of its religious leaders. *Walker*, 453 F.3d at 861; Br. 53-55. But more importantly, for purposes of qualified immunity, *Hosanna-Tabor* served to further put Defendants on notice that clearly established law prohibited them from interfering in BLinC's religious leadership selection—especially since their selective enforcement shows that such interference was unnecessary.[4]

---

[4] Defendants insist that this Court go further and rule that the Religion Clauses' protection remains clearly *un*established. Resp. 62. This Court should reject their attempt to allow future state interference with religious student groups' leadership decisions. *See*, *e.g.*, FIRE Amicus Br. 17 (noting the "disproportionate harm on student populations" suffered by "excessively narrow reading of precedent" to foil "civil rights suits");

* * * *

Defendants have not provided a single reason why their mistreatment of BLinC should be the first incidence of viewpoint discrimination and religious targeting ever to survive strict scrutiny. Nor was the mistreatment in any way necessary: for decades, Defendants have permitted religious organizations to impose religious standards on their leaders, defended such conduct as a First Amendment right, and threatened other university officers with personal liability if they did not respect that right. Yet to this day, they continue accusing BLinC of bigotry based on its religious beliefs and religious leadership selection while granting massive exemptions to favored student groups. Under such circumstances, qualified immunity is unavailable.

Campus Groups Amicus Br. 22-24 (noting widespread state discrimination against religious student groups).

CONCLUSION

For all the foregoing reasons, this Court should reverse the district court's holding on qualified immunity, reject its reading of *Hosanna-Tabor* and the Religion Clauses, and remand for consideration of damages and attorney fees, along with instructions to enter a permanent injunction consistent with this Court's opinion.

Dated: July 26, 2019

Respectfully submitted,

/s/ Eric S. Baxter

ERIC S. BAXTER
DANIEL H. BLOMBERG
ERIC C. RASSBACH
The Becket Fund for
Religious Liberty
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
ebaxter@becketlaw.org

CHRISTOPHER C. HAGENOW
WILLIAM R. GUSTOFF
Hagenow & Gustoff, LLP
600 Oakland Rd. NE
Cedar Rapids, IA 52402
(319) 849-8390 phone
(888) 689-1995 fax
chagenow@whgllp.com

Counsel for Plaintiff-Appellant

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 6158 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 26th day of July, 2019.

/s/ Eric S. 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 26th day of July, 2019.

/s/ Eric S. Baxter
Eric S. Baxter