Appeal No. 19-3389

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

INTERVARSITY CHRISTIAN FELLOWSHIP/USA, AND INTERVARSITY GRADUATE CHRISTIAN FELLOWSHIP,
Plaintiffs/Appellees,
V.
THE UNIVERSITY OF IOWA, ET AL.,
Defendants/Appellants.

On Appeal from the United States District Court for the

Southern District of Iowa,

No. 3:18-cv-00080

Hon. Stephanie Rose

BRIEF OF DEFENDANTS-APPELLANTS

THOMAS J. MILLER
Attorney General of Iowa

Jeffrey S. Thompson
Solicitor General
1305 East Walnut Street
Des Moines, Iowa 50319
(T) 515/281-4419
jeffrey.thompson@ag.iowa.gov

George A. Carroll
Assistant Attorney General
1305 East Walnut Street
Des Moines, Iowa 50319
(T) 515/281-8583
george.carroll@ag.iowa.gov

ATTORNEYS FOR DEFENDANTS/APPELLANTS

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiffs, InterVarsity Christian Fellowship/USA, and InterVarsity Graduate Christian Fellowship (collectively "InterVarsity") sued Defendants—the University of Iowa (the "University"), Bruce Harreld, President of the University; Melissa Shivers, the University's Vice President for Student Life; William Nelson, the University's Associate Dean of Student Organizations; Andrew Kutcher, Coordinator for Student Development at the University; and Thomas Baker, the University's Student Misconduct and Title IX Investigator ("Defendants") for violation of their constitutional rights alleging religious discrimination. Defendants moved for partial summary judgment as to several of Plaintiffs' claims on the grounds of qualified immunity.

The District Court denied Defendants' motion on the issue of qualified immunity with respect to Defendants Shivers, Nelson and Kutcher. The Court did not rule on the issue of qualified immunity with respect to Harreld and Baker.

Defendants have taken this Interlocutory Appeal on the denial of qualified immunity.

Defendants request 20 minutes for oral argument on this matter.

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JURISDICTIONAL STATEMENT

Plaintiffs bring claims under 42 U.S.C. § 1983. The District Court has jurisdiction under 28 U.S.C. § 1331. The District Court entered partial judgment on September 27, 2019. Defendants filed a timely notice of appeal on October 25, 2019. This Court has jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED IN DENYING THE INDIVIDUAL DEFENDANTS QUALIFIED IMMUNITY.

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

I. The Parties

Plaintiffs, InterVarsity Christian Fellowship/USA, and InterVarsity Graduate Christian Fellowship (collectively "InterVarsity") sued Defendants—the University of Iowa (the "University"), Bruce Harreld, President of the University; Melissa Shivers, the University's Vice President for Student Life; William Nelson, the University's Associate Dean of Student Organizations; Andrew Kutcher, Coordinator for Student Development at the University; and Thomas Baker, the University's Student Misconduct and Title IX Investigator ("Defendants").

II. Factual Background

As a result of litigation stemming from the administration of its Human Rights Policy[1], the University, through its Center for Student Involvement and Leadership ("CSIL"), undertook an extensive review of 513 Registered Student Organization ("RSOs") Constitutions in late January and early February of 2018.[2] App. 167 at ¶ 46. CSIL's review

[1] In *Business Leaders in Christ v. The University of Iowa, et al.*, Plaintiff challenged the University's application of its Human Rights Policy. The District Court granted Plaintiff an injunction ordering the University to not enforce the policy against Plaintiff. The District Court also ruled that the Human Rights Policy could be enforced in an even manner. App. 03-33, 62-64.

[2] The University did not review sorority and fraternity constitutions at that time, because campus Greek organizations are under the Fraternity and

revealed that 157 RSOs had correctly included the complete Human Rights Policy in their constitutions. App. 167 at ¶ 47. However, 356 RSOs were out of compliance. *Id*. On February 7, 2018, CSIL restricted access to the student organization website, OrgSync, in order to ensure that CSIL staff would have the opportunity to review every constitution prior to uploading it to the RSO's website. *Id*.

On April 20, 2018, CSIL staff sent an email to each RSO which had failed to include the full and correct Human Rights Policy in its group constitution. App. 167-168 at ¶ 48. CSIL requested that RSOs resubmit their updated or corrected constitutions by May 3, 2018. *Id*. By the May 3, 2018 deadline, CSIL had received 201 updated submissions. App. 168 at ¶ 49. On May 4, 2018, CSIL staff began its review of the submissions it had received. *Id*. Throughout the rest of that month, CSIL staff worked closely with RSO leaders to ensure that each group could successfully include the full Human Rights Policy in its constitution. App. 168 at ¶ 50.

On June 1, 2018, CSIL staff sent a follow-up email to the RSOs which had not yet submitted an updated constitution. App. 168 at ¶ 51. CSIL indicated that if constitutions were not submitted and approved by June 15,

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Sorority Life ("FSL") umbrella and are not regulated by the Center for Student Involvement and Leadership ("CSIL"). FSL began a review of sorority and fraternity constitutions in fall of 2018.

2018, the RSOs failing to submit constitutions would be deregistered. *Id*. CSIL indicated, however, that RSOs would be automatically reregistered once their constitutions had been submitted and approved. *Id*. The follow-up email reminded students that language contradicting the University's Human Rights policy would have to be removed. *Id*.

On June 12, 2018, CSIL staff, Laurynn King, emailed two former InterVarsity leaders, asking them to submit updated governing documents. App. 168 at ¶ 52. Ms. King indicated that CSIL had attempted to contact InterVarsity's leaders multiple times, but that no one from the group had responded. *Id*. Ms. King told the InterVarsity leaders that they had only one more day prior to the deadline to submit their updated constitution and bylaws to CSIL for review. *Id*. Katrina Schrock, current President of the InterVarsity Graduate Christian Fellowship at the University of Iowa, responded to Ms. King's email, indicating that the group's documents had already been submitted through OrgSync. App. 169 at ¶ 54. Andrew Kutcher responded, indicating that he had not received the documents. App. 169 at ¶ 55. Ms. Schrock resubmitted the documents, and Mr. Kutcher reviewed them. App. 169 at ¶¶ 55–56. After his review of InterVarsity's constitution, Mr. Kutcher emailed Ms. Schrock to inform her that he found some of the provisions of the constitution to be in conflict with the

University's Human Rights Policy. App. 155-158, 169 at ¶ 56. Specifically, Mr. Kutcher felt that Articles II, III, IV, and VII were problematic. *Id*. Each of the referenced articles contained some statement regarding the requirement that prospective InterVarsity leaders affirm the group's statement of faith. App. 169-170 at ¶¶ 56–61.

As a result of its refusal to comply with the University's Human Rights Policy, InterVarsity was deregistered. App. 112, 149 at ¶¶ 13, 201. However, it was not the only group deregistered as a part of the "RSO clean-up" process. *Id*. at ¶¶ 14, 202. On July 18, 2018, thirty-eight other noncompliant groups were also deregistered. App. 170 at ¶ 62. The great majority of the campus groups deregistered in the summer of 2018 were not religiously affiliated. *Id*.

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 conflict between civil rights laws and the beliefs of a student organization is not. InterVarsity 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).

InterVarsity 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. 20174, 20185 (2011); *Ward v. San Diego Cnty.*, 791 F.2d 1329, 1332 (9th Cir. 1986).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED THE INDIVIDUAL DEFENDANTS QUALIFIED IMMUNITY

A. Standard of Review

The Eighth Circuit reviews a denial of summary judgment on the basis of qualified immunity *de novo*. *Peterson v. Knopp*, 754 F.3d 594, 598 (8th Cir. 2014).

B. Procedure for Analyzing Defendants' Qualified Immunity Defense.

Although the Court denied qualified immunity with respect to Defendants Shivers, Nelson, and Kutcher, the Court did not rule on the issue of qualified immunity with respect to Harreld and Baker. However, the Court stated:

> Further, although the Court found the record is insufficient to establish the liability of Baker and Harreld, the same analysis and conclusions above would apply to their qualified immunity defense if Plaintiffs can establish their liability at trial. Accordingly, the Court DENIES Defendants' Motion for Partial Summary Judgment on qualified immunity grounds as to Baker and Harreld with respect to Counts VII and VIII of the Complaint.

For purposes of the appeal Defendants Harreld and Baker request the Court to assume that qualified immunity is denied in full and the following analysis applies to all individual Defendants.

Under the doctrine of qualified immunity, government officials whose conduct has not "violated clearly established statutory or constitutional rights of which a reasonable person would have known" are not liable for civil damages. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity balances the need to hold public officials accountable for their conduct with the need to shield public servants from harassment, distraction, and liability when their conduct has been reasonable. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Government officials who meet the above criteria are protected by qualified immunity whether the alleged error in conduct is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 555 U.S. at 231, citing *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (KENNEDY, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 507 (1978), for the proposition that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law"). Further, a qualified immunity defense "may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the

defendant's subjective intent is simply irrelevant to that defense." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998).

Lower courts were once required to engage in a rigid two-step analysis to determine whether defendants were entitled to qualified immunity—first, analyzing the facts to decide whether a case could be made for a constitutional violation, and then determining whether, at the time of defendant's alleged misconduct, the constitutional right at issue was "clearly established." *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). However, in *Pearson v. Callahan*, the United States Supreme Court did away with the rigid framework set forth in *Saucier* and determined that requiring courts to determine difficult constitutional questions in cases in which, for example, "it is plain that a constitutional right is not clearly established, but far from obvious whether in fact there is such a right" was an unwise use of scarce judicial resources. 555 U.S. at 236–37. Under *Pearson*, the procedure set forth in *Saucier* is no longer mandatory, and district court judges are encouraged to decide which prong of the test to address first in order to make a "fair and efficient disposition of each case." *Id.* at 236–42. A fair and efficient analysis of the case at hand will not require this court to determine whether there has been a violation of Plaintiff's constitutional rights.

The more expedient analysis will be under the second prong of the *Saucier* test: whether the rights that Plaintiffs claim were violated were "clearly established" such that a reasonable government official would have known that the rights would be violated by his or her conduct.

C. The Constitutional Rights Plaintiffs Claim Were Violated Were Not Clearly Established at The Time of Defendants' Alleged Misconduct.

1. What is the question before the court?

Plaintiffs allege that Defendants' requirement that InterVarsity adhere to the University of Iowa's Human Rights policy in its organization's constitution and in its selection of campus group leaders, violates its First Amendment Rights under the United States Constitution. App. 71-108. The University argues that it may regulate the speech and conduct of registered student groups which operate within the limited public forum it has created on campus by requiring student groups to comply with its Human Rights Policy.

The question before the court is whether clearly established law exists which sets forth the course a University official should take in protecting the First Amendment and civil rights of protected groups when those rights come into direct conflict with one another, such that the official could be said to be reasonably apprised of the law at the time of the alleged violations. More specifically: does a university's requirement that a student

group adhere to its nondiscrimination and equal opportunity policies in order to receive state funding, recognition, and other peripheral benefits, violate that group's First Amendment Rights when that group's sincerely held religious beliefs are in direct conflict with state and federal civil rights law? This is a difficult question, and as Defendants will demonstrate, the law is hardly "clearly established."

2. Standard for determining whether a right was "clearly established" at the time of Defendants' alleged misconduct.

On appeal, the Court may determine not only the law that is currently in effect, but also whether that law was clearly established at the time of the alleged violation of Plaintiffs' rights. *Harlow*, 457 U.S. at 818. If the law was not clearly established at the time the alleged violation occurred, a government actor cannot be expected to "anticipate subsequent legal developments" or "'know' that the law forbade conduct not previously identified as unlawful." *Id.*

Whether a right is clearly established "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

> [T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is

> doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (internal citation omitted). Put differently: "'We do not require a case directly on point' before concluding that the law is clearly established, 'but existing precedent must have placed the statutory or constitutional question beyond debate.'" *Stanton v. Sims*, 571 U.S. 3, 5 (2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)); see also *Morgan v. Swanson*, 755 F.3d 757, 760 (5th Cir. 2014) ("educators are rarely denied immunity from liability arising out of First-Amendment disputes. The rare exceptions involve scenarios in which a factually analogous precedent clearly established the disputed conduct as unconstitutional[.]"); *Keefe v. Adams*, 840 F.3d 523, 541 (8th Cir. 2016) (Kelly, J. concurring).

This requirement of "apparent unlawfulness" is well-reasoned, particularly in the rapidly-developing area of First Amendment rights. It is unreasonable to expect Defendants to predict the outcome of complicated and previously undecided First Amendment issues. *See Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006) ("Many aspects of students' speech...are difficult to understand and apply[.] Public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved."). As such, qualified immunity

remains an important protection for government actors. As the United States Supreme Court recently reiterated:

> In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. See, *e.g.*, *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3, 191 L.Ed.2d 856 (2015) (collecting cases). The Court has found this necessary both because qualified immunity is important to "society as a whole," *ibid.*, and because as "an immunity from suit," qualified immunity "is effectively lost if a case is erroneously permitted to go to trial." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L.Ed.2d 565 (2009).
>
> Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." *Ashcroft v. al–Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L.Ed.2d 1149 (2011). As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*, at 639, 107 S. Ct. 3034.

White v. Pauly, 137 S. Ct. 548, 551–52 (2017); *see also Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006). Here, Defendants are stuck between protecting the rights of religious groups to freely speak and assemble and protecting the rights of students to be free from discrimination by a Registered Student Organization on the basis of a protected class. Established law does not illuminate the path for

University officials on these difficult issues, in spite of their best efforts to seek legal review and make reasonable and fair decisions.

Additionally, as the U.S. District Court noted in ruling on the University's motion for partial summary judgment on qualified immunity, the doctrine is important to society as a whole. App. 172-223. As the Court noted, the social costs of claims brought against public officials "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.*, citing *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

3. Basic precepts of First Amendment law were established at the time of the events at issue in the Complaint, but the law in regard to a direct conflict between civil rights laws and First Amendment protections was not "clearly established."

The majority of the events at issue in Plaintiffs' Complaint occurred in the summer of 2018. In the last ten years, courts' treatment of various First Amendment issues on university campuses—particularly as they related to religious groups— has evolved and continues to evolve. The issues at hand have not been discussed squarely by the Supreme Court or the Eighth Circuit Court of Appeals. As such, the Court must look to decisions on similar issues and the decisions of other Circuit Courts for guidance.

i. Public universities may limit access to the limited public forums they have created.

The student groups supported by public funding and public resources at the University of Iowa exist within a government-created limited public forum, and a significant body of case law exists which discusses such forums in-depth. *See Gerlich v. Leath*, 861 F.3d 697, 704–05 (8th Cir. 2017), quoting *Martinez*, 561 U.S. 661, 679 (2010) ("A university 'establish[es] limited public forums by opening property limited to use by certain groups or dedicated solely to the discussion of certain subjects.'") (hereinafter "*Martinez*"). In a limited public forum, a government actor may impose restrictions on speech that are 1) reasonable in light of the purposes of the forum and 2) viewpoint neutral. *Martinez*, 561 U.S. at 679, citing *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995). "A university's student activity fund is an example of a limited public forum." *Gerlich*, 861 F.3d at 705, citing *Rosenberger*, 515 U.S. at 823–27. A state has the right "to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985).

First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Id.*, quoting *Widmar v. Vincent*, 454 U.S. 263, 268 (1981). Public universities enjoy "a significant measure of

authority over the type of officially recognized activities in which their students participate," though the Court makes the final decision regarding whether a public university has exceeded constitutional constraints. *See Martinez*, 561 U.S. at 685–86; *Bd. of Educ. of Westside Community Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 240 (1990). "The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances. *Cornelius*, 473 U.S. at 809. A prime example of the power of a government entity to exclude speakers is its ability to "limit official student-group recognition to organizations comprising only students—even if those groups wish to associate with nonstudents." *Martinez*, 561 U.S. at 681. A State's restriction of access to the limited public forum it has created "need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808.

ii. This Court should distinguish between policies which compel a party to act, and those which merely withhold benefits.

In evaluating First Amendment claims, Courts distinguish between policies which compel action, and those which merely withhold benefits. *See, e.g., Grove City College v. Bell*, 465 U.S. 555, 575–576 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574, 602–604 (1983). Here, the University of Iowa is not compelling InterVarsity to include non-Christians

in its leadership team, but rather, has withheld the benefits of recognition as an official student group on the basis of InterVarsity's unwillingness to comply with the University's Human Rights policy. Defendants urge the Court to consider that the University has not expelled InterVarsity from campus—InterVarsity may still "speak." However, the citizens of the State of Iowa need not fund a group which seeks to exclude from its membership ranks students who are not Christian. "[T]hat the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." *Norwood v. Harrison*, 413 U.S. 455, 463 (1973).

iii. Viewpoint neutral regulations in an educational forum are subject to a lower standard of review.

Defendants acknowledge that laws and regulations which constrain associational freedom are typically subject to "close scrutiny," and survive only if they "serve 'compelling state interests' that are 'unrelated to the suppression of ideas'—interests that cannot be advanced through . . . significantly less restrictive [means]." *Martinez*, 561 U.S. at 680. However, as the Court explained in *Martinez*, the Court should apply a less restrictive level of scrutiny to speech in limited public forums where the regulation is viewpoint neutral, as opposed to other environments, given the state's interest in regulating the property in its charge and ability to reserve it for

certain groups. *See id.* at 679–80; *see also Cornelius*, 473 U.S. at 806 ("[A] speaker may be excluded from" a limited public forum "if he is not a member of the class of speakers for whose special benefit the forum was created.").

Defendants' Human Rights and Equal Opportunity Policies are viewpoint neutral. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Martinez*, 561 U.S. at 696, quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992) ("Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, '[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.'").

iv. First Amendment law relating to student groups seeking special dispensation in order to discriminate based on their religious perspective on university campuses is not well-settled and continues to develop.

Over the past forty years, the United States Supreme Court has considered multiple cases between public universities and student groups seeking public funding and the attendant benefits of official recognition. However, the United States Supreme Court has never squarely addressed

the interplay between a university's nondiscrimination policy and a religious group's First Amendment rights. Though not an exhaustive overview, the following cases provide a summary of the law in this area as it has developed since the 1970s.

In *Healy v. James*, a state college denied official recognition to an activist student group which the college believed to be capable of violent action. 408 U.S. 169 (1972). The Supreme Court held that a public university may require a student group to affirm its willingness to adhere to campus laws, but 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 187–88.

In *Widmar v. Vincent*, a public university denied a registered student group the use of university space for religious worship. 454 U.S. 263 (1981). The Supreme Court held that because the university had singled out religious organizations for disadvantageous treatment, its actions must be subjected to strict scrutiny. *Id.* at 269–70. The Court held that the school's interest in maintaining a separation of church and state was not sufficiently compelling to justify the restrictions on the students' speech. *Id.* at 270.

In *Rosenberger v. Rector*, the Supreme Court reaffirmed that a university typically may not engage in viewpoint discrimination and withhold benefits from student groups on the basis of religion. 515 U.S. 819, 830–31 (1995).

In *Christian Legal Society Chapter of University of California, Hastings College of the Law v. Kane*, which eventually became *Martinez*, CLS refused to include the University's Nondiscrimination Policy in its constitution and bylaws, and required voting members of its group to sign a "Statement of Faith" espousing Christian beliefs. No. C 04-04484 JSW, 2006 WL 997217, at *1–4 (N.D. Cal. May 19, 2006). CLS brought claims against the University for violation of its free speech, expressive association, free exercise, and equal protection rights. *Id.* at 4. The U.S. District Court for the Northern District of California granted the University's motion for summary judgment on all of CLS's claims, upholding the University's right to require student groups which received state funding and the attendant benefits of official recognition to abide by the nondiscrimination policy. *Id.* at *1–*27. The court also held that the University's policy regulated speech rather than conduct, that the University's regulation of the group's conduct did not unconstitutionally infringe on CLS's freedom of speech, and that the University's policy was

viewpoint neutral and reasonable under a limited public forum analysis. *Id.* While analyzing CLS's free association claims, the court made the important distinction between forced inclusion and withholding benefits, and refused to apply the *Dale* and *Roberts* line of forced-association cases. *Id.*

In *Christian Legal Society v. Walker*, CLS sued Southern Illinois University School of Law 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 853, 857 (2006). CLS brought suit after the dean of the law school revoked the group's "official" status upon determination that its membership policies violated the law school's nondiscrimination policies. *Id.* At that time, CLS precluded voting membership and leadership in the group for those who "engage in or affirm homosexual conduct" and disapproved of "active homosexuality." *Id.* at 857–58. The Seventh Circuit Court of Appeals reversed the district court's finding that CLS had not suffered irreparable harm as a result of the law school's regulations, as it still existed but did so without official student organization recognition and the attendant benefits. *Id.* at 859. The Seventh Circuit found that CLS had a "reasonable likelihood of success on the merits" of its claims, holding that the group

should have been granted an injunction because the loss of First Amendment freedoms "even for minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 859, quoting *Elrod v. Burns*, 427 U.S. 437, 373 (1976). In its opinion, the Court noted that it doubted that CLS had violated the law school's nondiscrimination policies, and distinguished between groups which discriminate on the basis of *conduct* rather than *status*. *Id.* at 860.

In *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, the Second Circuit Court of Appeals reversed the district court's grant of a preliminary injunction upon finding that the University was entitled to enforce its nondiscrimination policy against the fraternity. *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York*, 502 F.3d 136, 138–39 (2007). *Chi Iota* involved a fraternity which sought recognition as an official student group. *Id.* at 139–142. The University refused to grant the group's request unless the fraternity would consent to abide by the University's nondiscrimination policy and to permit women to join. *Id.* Rather than comply, the Fraternity sued, bringing various claims that the university had violated its rights under the First and Fourteenth Amendments. *Id.* at 142. The Court analyzed the Fraternity's associational interest and balanced that interest against the state's interest in stamping

out gender discrimination. *Id.* at 144–49. The Court ultimately determined that the University's regulation was constitutional. *Id.* The University had a compelling interest in eradicating gender discrimination and had crafted a narrowly tailored regulation in order to achieve its goals. *Id.*

In *Every Nation Campus Ministries at San Diego State University v. Achtenberg*, four student organizations sought injunctive relief against the California State University (CSU) which had required the various student groups to comply with CSU's nondiscrimination policy by opening their membership to non-Christians and unapologetic homosexuals in order to receive recognition as an official student group and the attendant benefits of that recognition. 597 F. Supp. 2d 1075 (S.D. Cal. 2009). Every Nation Campus Ministries ("ENCM-SDSU") brought a lawsuit against the university, claiming various violations of its First Amendment rights of free speech, freedom of religion, and freedom of expressive association. *Id.* at 1078–79. Deciding that the university's regulation of the plaintiffs' speech was both reasonable and viewpoint neutral in a limited public forum, the U.S. District Court for the Southern District of California granted the defendant University's motion for summary judgment. *Id.* at 1079–100.

In June of 2010, the United States Supreme Court decided the seminal case in this area. In *Christian Legal Society Chapter of the*

University of California, Hastings College of the Law v. Martinez, the Supreme Court held that a law school which required officially recognized student groups to accept "all-comers" into their membership did not violate a religious group's First Amendment rights to free association. 561 U.S. 661, 697 (2010). In its decision, the court determined that the school had several legitimate reasons for implementing its viewpoint-neutral "all-comers" policy, including the ability of all students to access all of the programs and groups to which his or her tuition money provides funds, bringing together students of diverse backgrounds and encouraging tolerance, permitting the school to more easily police the terms of its Nondiscrimination Policy, and generally declining to "subsidize with public monies and benefits conduct which the people of California disapprove." *Id.* at 687–90. Though CLS would ultimately not be able to take advantage of several benefits of official recognition—such as state funding and the school's mass e-mail system—the court determined that its ability to exist on campus without official recognition was relatively unhindered. *Id.* at 691. The Court pointed out that sororities and fraternities exist without official school affiliations, and the existence of the internet and prolific social media use by students made use of the school's mass email system less necessary. *Id.*

Importantly, the Court rejected CLS's request that the school permit exclusion based on *belief* rather than *status*, holding that making a distinction between the two is effectively impossible. *See id.* at 688. Citing *Lawrence v. Texas*, the Court explained that it has declined to distinguish between belief and status (or conduct) in this way. *Id.* citing 539 U.S. 558, 575 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination); *id.* at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

v. What's left unsettled after Martinez?

Though *CLS* provided significant guidance to public universities which had adopted an "all-comers" policy in managing their student organizations and activity funds, it did not specifically address the issue in this case, which is: may a University require student groups to comply with a nondiscrimination policy which forbids groups from excluding students from their membership ranks on the basis of protected class or characteristic? Should religious groups get a "pass" to discriminate against

their peers who belong to other protected groups? And how do these issues play out in the context of a restriction based on a non-discrimination policy informed by a public university's mission, rather than an "all-comers" policy? As an unsettled area of law, this topic has been the subject of much academic debate.[3]

One case involving a student group seeking official recognition by an educational institution has reached the U.S. Courts of Appeals since *CLS v. Martinez*. In *Alpha Delta Chi-Delta Chapter v. Reed*, the Ninth Circuit

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[3] *See generally*, Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006); Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 515 (2010); David Brown, *Hey! Universities! Leave Them Kids Alone!: Christian Legal Society v. Martinez and Conditioning Equal Access to a University's Student-Organization Forum*, 116 PENN ST. L. REV. 163 (2011); Erica Goldberg, *Amending Christian Legal Society v. Martinez: Protecting Expressive Association as an Independent Right in a Limited Public Forum*, 16 TEX. J. ON C.L. & C.R. 129 (2011); Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 REGENT U. L. REV. 283 (2011); Andrew D. Brown, *Do As I Say, Not As I Do: The Myth of Neutrality in Nondiscrimination Policies at Public Universities*, 91 N.C. L. REV. 280 *(2012);* Blake Lawrence, *The First Amendment in the Multicultural Climate of Colleges and Universities: A Story Ending with Christian Legal Society v. Martinez*, 39 HASTINGS CONST. L.Q. 629 (2012); Andrew Seif, *The University Marketplace of Ideas Under Threat: Why Religious Student Groups on California's Public University Campuses Need to Follow the Rules*, 40 W. ST. U. L. REV. 105 (2012); Timothy Tracey, *Christian Legal Society v. Martinez: In Hindsight*, 34 U. HAW. L. REV. 71 (2012); Melanie Crouch, *The Public University's Right to Prohibit Discrimination*, 53 HOUS. L. REV. 1369 (2016).

Court of Appeals heard another case involving campus a Christian sorority and a Christian fraternity, each which had its own religious requirements for members, including "personal acceptance of Jesus Christ as Savior and Lord," among other requirements. 648 F.3d 790, 795 (2011). San Diego State repeatedly refused to approve plaintiffs' applications for official recognition, "because of Plaintiffs' requirement that their members and officers profess a specific religious belief, namely, Christianity." *Id.* at 796. The University indicated that the plaintiffs' membership requirements violated San Diego State's nondiscrimination policy. *Id.* at 796. Interestingly, the Ninth Circuit noted that the Supreme Court decision in *CLS v. Martinez* did not provide specific guidance on its decision, stating:

> The Supreme Court held in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez* that a public law school does not violate the Constitution when it "condition[s] its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students. The Court referred to the open membership requirement as an "all-comers policy" and concluded that such a policy was a "reasonable, viewpoint-neutral condition on access to the student-organization forum." The Court further held that the all-comers policy did not violate the Free Exercise Clause of the First Amendment.
>
> The Court expressly declined to address whether these holdings would extend to a narrower nondiscrimination policy that, instead of prohibiting *all* membership restrictions, prohibited membership restrictions only on certain specified bases, for example, race, gender, religion, and sexual orientation. The

> constitutionality of such a policy is the issue before us in this case. We conclude that the narrower policy is constitutional.

Id. at 795 (internal citations omitted, emphasis added). The court, determining that it could "see no material distinction between San Diego State's student organization program and the student organization program discussed in *Christian Legal Society*" ultimately found that the narrower policy was constitutional in a limited-public forum analysis, but held that the plaintiffs had raised a fact issue for trial on whether the policy had been applied in a discriminatory fashion. *Id.* at 800. Whether the plaintiff's free exercise and equal protection rights had been violated was also a triable issue of fact. *Id.* at 804. Alpha Delta Chi petitioned for a writ of certiorari, but the Supreme Court declined to hear the case. *Alpha Delta Chi-Delta Chapter v. Reed*, 565 U.S. 1260 (2012).

The District Court's ruling in previous litigation does not provide clearly established law on the constitutional issue presented to this Court.

D. The District Court Erred When it Relied on a Previous District Court Decision.[4]

The Court in this case stated in part:

> In the *BLinC Case*, the Court found the individual defendants were entitled to qualified immunity. The Court reasoned that the University's compelling interests in the Human Rights Policy, along with the university setting, potentially complicated the case, and *Martinez*, *Reed*, and *Walker* did not offer clear conclusions as to the selective application of a nondiscrimination policy. Summ. J. Order at 34-35, *BLinC Case*. But what the individual defendants in the *BLinC Case* did not have with BLinC's constitutional rights were violated in 2017, and what the individual Defendants in this case *did* have by June 2018, was an order that squarely applied *Martinez*, *Reed*, and *Walker* to a case involving the selective application of the Human Rights Policy to a religious group's leadership requirements.
>
> The Court is referring to its January 2018 order in the *BLinC Case* granting the plaintiff's motion for a preliminary injunction. The Court has summarized that order elsewhere in this opinion, and a labored account of it here is unnecessary. It is enough to note that the Court identified the University's RSO program as a limited public forum after applying *Martinez* and other cases; recognized that the record showed at least one other RSO was permitted to require its leaders to share its faith in apparent violation of the Human Rights Policy; and applying *Reed* and *Walker*, concluded that "[i]n light of this selective enforcement [of the Human Rights Policy]. . . BLinC has established the requisite fair chance of prevailing on the merits of its claims

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[4] The Court references *BLinC v. The University of Iowa; Lyn Redington; Thomas Baker; and William Nelson*. In that case the District Court granted qualified immunity to Defendants Redington, Baker and Nelson, employed by the University of Iowa, enforcing the very same Human Rights Policy at issue in this case. That matter is currently on appeal before this Court – *Business Leaders in Christ v. The University of Iowa, et al*, Appeal No. 19-1696, on appeal from the United States District Court for the Southern District of Iowa, No. 3:17-cv-00080.

> under the Free Speech Clause." Order on P's Mot. For Prelim. Inj. At 28, *BLinC Case*.
>
> The Court acknowledges that a finding of likelihood of success on the merits is not the same as a final determination that a constitutional violation has occurred. Still, a case need not be "directly on point," so long as it "place[s] the statutory or constitutional question beyond debate." *White*, 137 S. Ct. at 551 (citations omitted). Even if the Court's preliminary injunction order is not "directly on point," any ambiguity as to whether the University could selectively enforces its Human Rights Policy against a religious student group should have been firmly resolved when that order was filed on January 2018. And although not dispositive, the record is clear Shivers, Nelson, and Kutcher each understood the preliminary injunction order to mean that the University could not selectively enforce the Human Rights Policy against some RSOs and not others. *See* [ECF No. 57 ¶ 340] (Shivers); *id* ¶ 251 (Kutcher); [ECF No. 21-3 at 37-38] (Nelson).
>
> Yet, despite their (accurate) interpretation of that order, Shivers, Nelson, Kutcher, and others who are not involved in this lawsuit proceeded to broaden enforcement of the Human Rights Policy in the name of uniformity – applying extra scrutiny to religious groups in the process – while at the same time continuing to allow some groups to operate in violation of the policy and formalizing an exemption for fraternities and sororities. The Court does not know how a reasonable person could have concluded this was acceptable, as it plainly constitutes the same selective application of the Human Rights Policy that the Court found constitutionally infirm in the preliminary injunction order.

The error of the District Court lies in its reliance of previous litigation to find clearly established law. In *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) the Court directly addressed the issue of when law is clearly established in the context of lower court decisions. *al-Kidd* alleged constitutional

violations related to his arrest and detention after the September 11, 2011 terrorist attacks on America. Defendant, John Ashcroft, former United States Attorney General, allegedly ordered al-Kidd to be arrested under federal law.

The Supreme Court held that Ashcroft was entitled to qualified immunity. Noting that a previous lower court decision would neither give a public official notice of clearly established law nor be controlling. Although the Court noted the national office of the U.S. Attorney, the Court held that a District Court decision does not create clearly established law, stating:

> Even a district judge's *ipse dixit* of holding is not "controlling authority" in any jurisdiction, much less in the entire United States; and his *ipse dixit* of a footnoted dictum falls far short of what is necessary absent controlling authority: a robust "consensus of cases of persuasive authority."

Ashcroft v. al-Kidd, 563 U.S. 731, 741-742 (2011) (emphasis in original, citations omitted).

In this case the District Court relied on its ruling in *BLinC* to create clearly established law regarding the individual defendants. Although the record is clear the individual defendants were aware of the prior Court ruling, that does not make the law clearly established.

> As we have explained, qualified immunity is lost when plaintiffs point either to "cases of controlling authority in their jurisdiction at the time of the incident" or to "a consensus of cases of persuasive authority such that a reasonable officer could not

> have believed that his actions were lawful." These standards ensure the officer has "fair and clear warning" of what the Constitution requires.

Ashcroft, at 746 (internal citations omitted).

Clearly there is not a consensus on the issue presented to the Court. Accordingly, the question becomes whether the District Court's prior ruling in BLinC makes the law clearly established. The answer is no.

In *Camreta v. Greene*, 563 U.S. 692 (2011) the Court squarely stated:

> We note, however, that the considerations persuading us to permit review of petitions in this posture may not have the same force as applied to a district court decision. A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a difference case. Many Courts of appeals therefore decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity. Otherwise said, district court decisions—unlike those from courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity.

Camreta, at 709, n. 7 (internal quotations and citations omitted).

In *Hayes v. R. Long et. al.*, 72 F.3d 70 (8th Cir. 1996) this Court held that a District Court decision in the same Federal District Court involving the same institutional defendant—the Arkansas Department of Corrections—created clearly established law. *Id*. at 74. *Hayes* is distinguished from this case in that *Hayes* predates the Supreme Court decisions in *Ashcroft* and *Camreta*, and is no longer controlling. *Hayes* is

also distinguishable because the District Court decision cited in *Hayes* was affirmed by the 8th Circuit Court of Appeals and the United States Supreme Court. *Finney v. Hutto*, 410 F.Supp. 251, 270 (E.D.Ark.1976) (*Finney*), *aff'd on other grounds*, 548 F.2d 740 (8th Cir.1977), *aff'd*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978).

CONCLUSION

Under the doctrine of qualified immunity, the individual Defendants may not be held liable for money damages if, at the time of Defendants' alleged misconduct, the constitutional right at issue was not "clearly established." The individual Defendants request the Court to reverse the District Court on the issue of qualified immunity.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

/s/ Jeffrey S. Thompson
Solicitor General of Iowa

/s/ George A. Carroll
GEORGE A. CARROLL
Assistant Attorney General
Hoover Building, Second Floor
1305 E. Walnut
Des Moines, Iowa 50319
PHONE: (515) 281-8583
FAX: (515) 281-7219
E-MAIL: jeffrey.thompson@ag.iowa.gov

george.carroll@ag.iowa.gov
ATTORNEYS FOR
DEFENDANTS/APPELLANTS

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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.

THOMAS J. MILLER
Attorney General of Iowa

/s/ Jeffrey S. Thompson
Solicitor General of Iowa
Hoover Building, Second Floor
1305 E. Walnut
Des Moines, Iowa 50319
PHONE: (515) 281-8583
FAX: (515) 281-7219
E-MAIL: jeffrey.thompson@ag.iowa.gov
ATTORNEYS FOR
DEFENDANTS/APPELLANTS

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I certify that on January 9, 2020, 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.

/s/ Jeffrey S. Thompson
Solicitor General of Iowa

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Phone: 202-349-7221
ATTORNEYS FOR APPELLEES

/s/ Jeffrey S. Thompson
Solicitor General of Iowa

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I, Jeffrey S. Thompson, attorney for Defendants/Appellants, hereby certify that the actual costs associated with copying the foregoing Brief is the sum of $_____.

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