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

REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Plaintiffs, InterVarsity Christian Fellowship/USA, and InterVarsity Graduate Christian Fellowship (collectively "InterVarsity") completely misstate the fundamental issue before the Court. The issue is whether the individual defendants are entitled to qualified immunity. The answer is they are under controlling precedent and the particular facts of this case.

ARGUMENT

I. THE ISSUE BEFORE THE COURT IS QUALIFIED IMMUNITY

The District Court denied the individual defendants qualified immunity essentially on the Court's ruling in a separate case, *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 (*BLinC)*. The Court made the following statement on this case based on the Court's ruling in *BLinC*:

> "In its January 2018 preliminary injunction order in the *BLinC Case*, the Court found the University likely violated a student group's free speech rights by selectively enforcing the Human Rights Policy. The Court would never have expected the University to respond to that order by homing in on religious groups' compliance with the policy while at the same time carving out explicit exemptions for other groups. But here we are."

Add. 40-41.

The standard for qualified immunity is whether a reasonable public official under the particular facts presented would have known or should have known they were violating the constitutional rights of others. The fact of the matter is that the Court's ruling in *BLinC* is not controlling.

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 *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).

The District Court also failed to completely acknowledge the tension between civil rights laws and viewpoint discrimination. Because the District Court essentially adopted the *BLinC* ruling references to the Court's statements in *BLinC* are relevant. The District Court cites the Iowa Civil Rights Act – Chapter 216 of the Iowa Code. App. 24. The Iowa Civil Rights Act includes certain forms of "discrimination", in housing, sports, and extracurricular activities. Iowa Code § 216.9. The District Court also stated:

> "The Court concludes that the policy is reasonable in light of the intended purpose of the forum. The University created a forum for like-minded students to engage with one another and develop their leadership skills with the overall purpose of enhancing student's educational experiences. It also clearly wanted to ensure that every student received individual consideration from the organizations he or she sought to join. Thus, the requirement that student organizations comply with the Human Rights Policy to receive the benefits of registration is reasonable in light of the forum's purpose."

App. 24. The District Court also acknowledges the Title IX exemptions. Add. 04. The Court at the same in this case ignored the absolute tension between the separate legal doctrines. For example, different student groups were viewed at different times to first and foremost comply with the ruling in *BLinC*. Accordingly, the acknowledged religious groups were identified by the University and their policy compliance was reviewed. The District Court, however, viewed this as targeting. The religious groups came into compliance with the University's civil rights policies with the

exception of a few – including InterVarsity. All other groups either complied or deregistered.

InterVarsity also cites other groups not in compliance with the University policies – fraternity and sororities, sports teams and other extracurricular activities. Significantly, each cited activity is readily explained. Fraternities and sororities have exemptions under State and Federal law. 20 U.S. Code § 1681.6(a)(6)(A). Sports are segregated based on gender under Title IX. 20 U.S. Code § 1681, et seq. The last Groups cited by InterVarsity are extracurricular such as singing groups. The groups have complied with the University human rights policies and no complaints have been made of discrimination.

II. THE VERY PURPOSE OF QUALIFIED IMMUNITY HAS BEEN DEFEATED IN THIS CASE.

Although the doctrine of qualified immunity has many factors, one stands out the most prominently – taking public officials away from "pressing public issues." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). At this point in time, nothing could be more true. The University of Iowa is essentially closed and officials are working to resolve many issues in all aspects of the University. The individual Defendants are trying to make difficult decisions campus wide, including safety of all at the University of Iowa. Students have been moved out of residential halls and now are

taking classes online and continue to request guidance from student services.

Although the Court ruling predates the current dangerous situation, it does not predate issues that public officials must address without the concern of being sued personally. At the end of the day the University of Iowa will comply with all Court orders, but the individual defendants fit squarely within the doctrine of being granted qualified immunity.

III. CONCLUSION

For the reasons set forth above and its initial brief, Defendants request the Court to reverse the District Court ruling 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

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It contains 1085 words, excluding the parts of the brief exempted by Federal Rule 32(f).

2. This brief complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Georgia font.

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

THOMAS J. MILLER
Attorney General of Iowa

/s/ George A. Carroll
Assistant Attorney General of Iowa
Hoover Building, Second Floor
1305 E. Walnut
Des Moines, Iowa 50319
PHONE: (515) 281-8583
FAX: (515) 281-7219
E-MAIL: George.carroll@ag.iowa.gov
ATTORNEYS FOR
DEFENDANTS/APPELLANTS

CERTIFICATE OF SERVICE

I certify that on April 28, 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/ George A. Carroll
Assistant Attorney General of Iowa

CERTIFICATE OF SERVICE

The undersigned certifies that on the 28th day of April, 2020, one (1) copy of the Reply Brief of Appellees attached to this certificate was served on the following by emailing, pursuant to the March 20, 2020, National Emergency Order of the Eighth Circuit to:

Eric S. Baxter
Daniel H. Blomberg
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Avenue NW, Suite 700
Washington, D.C. 20036
Phone: 202-349-7221
ATTORNEYS FOR APPELLEES

Mr. Travis C. Barham
Mr. Brett J. Beattie
Mr. John J. Bursch
Mr. James A. Campbell
Ms. Kimberlee Wood Colby

Mr. David Andrew Cortman
Mr. Josh Dixon
Mr. Parker Douglas
Mr. Vince Eisinger
Mr. Blaine H. Evanson
Mr. Christopher D. Hagenow
Mr. Tyson C. Langhofer
Mr. Michael J. Lockerby
Mr. Michael R. Ross
Mr. Clyde Taylor
Ms. Sally R. Wagenmaker
Ms. Kristen Waggoner

/s/ George A. Carroll
Assistant Attorney General of Iowa

COST CERTIFICATE

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

/s/ George A. Carroll
Assistant Attorney General of Iowa