CASE NO. 19-3389

In the 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

BRIEF IN SUPPORT OF APPELLEES OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

Michael J. Lockerby
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D.C. 20007
202.672.5300
mlockerby@foley.com

Robert F. Johnson III
John Sepehri
FOLEY & LARDNER LLP
One American Center
600 Congress Avenue, Suite 3000
Austin, Texas 78701
512.542.7000
rjohnson@foley.com
jsepehri@foley.com

Brandon C. Marx
FOLEY & LARDNER LLP
2021 McKinney Avenue, Suite 1600
Dallas, Texas 75201
214.999.3000
bmarx@foley.com

Michael A. Donadio
Adam J. Kleinfeld
FOLEY & LARDNER LLP
111 Huntington Avenue, Suite 2600
Boston, Massachusetts 02199
617.342.4000
mdonadio@foley.com
akleinfeld@foley.com

Counsel for *Amicus Curiae* Foundation for Individual Rights in Education

March 16, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, *Amicus Curiae* states that it has no parent corporations, nor does it issue stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF AMICUS CURIAE

The Foundation for Individual Rights in Education ("FIRE") submits this brief in support of Appellees, InterVarsity Christian Fellowship/USA and InterVarsity Graduate Christian Fellowship (collectively, "InterVarsity"), to bring to the fore the unfortunately commonplace infringement of students' First Amendment rights on college and university campuses across the United States and to urge the Court to deny qualified immunity to university administrators who violate the clearly established rights of their students.[1]

FIRE is a non-partisan, non-profit organization. The mission of FIRE since its inception has been to promote and defend the individual rights of students at our nation's institutions of higher education. Since 1999, FIRE has worked to protect student First Amendment rights at college campuses nationwide. FIRE believes that students will best achieve success in our democratic system of government only if the law remains unequivocally on the side of robust campus free speech rights. FIRE coordinates and engages in targeted litigation and authors *amicus* briefs to ensure

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amicus Curiae* FIRE states that no party's counsel has authored this brief in whole or in part; no party or party's counsel has contributed money that was intended to fund the preparation or submission of this brief; and no person other than *Amicus Curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

Appellees and Appellants have both consented to the filing of this Brief.

the vindication of student First Amendment rights when violated at public institutions like Appellants, the University of Iowa (the "University") and by the various administrators named as defendants (the "Individual Defendants"). The students whom FIRE defends rely on access to the federal court system to secure meaningful and lasting legal remedies to the significant harm posed by censorship, a practice antithetical to a core purpose of the First Amendment to the Constitution, namely to enable the citizenry to engage in the "marketplace of ideas."[2] In this case, FIRE seeks to have the District Court's ruling affirmed so as to vindicate the rights of free speech, freedom of association, and freedom of religion of students at the University of Iowa.

SUMMARY OF ARGUMENT

By its own admission, the University has enforced its Human Rights Policy ("Policy") selectively against religious organizations such as InterVarsity. This admission alone establishes viewpoint discrimination prohibited by *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017). It also establishes that the Individual Defendants' claim of qualified immunity is without merit.

[2] *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market…That at any rate is the theory of our Constitution.").

In this case, however, Appellants' claim that the law in this area was somehow "unsettled" is—in a word—unsettling. The same district court had already told the same university that its enforcement of the same policy against religious organizations was unconstitutional. Rather than follow the District Court's ruling, the University openly defied it by engaging in the same viewpoint discrimination against other religious organizations, including InterVarsity. Under this Court's precedents, prior rulings need not be directly on point and need not involve similar factual circumstances for the law to be "clearly established." All that is required is that a "reasonable" official would understand that the conduct at issue is unconstitutional. In this case, no "reasonable" administrator (or counsel) at the University of Iowa could have possibly thought that this Court's decision in *Gerlich* permitted rather than prohibited viewpoint discrimination—especially after the District Court had already told Appellants otherwise. The cases cited by Appellants to try to distinguish *Gerlich* are inapposite, and the University cannot disregard the District Court's prior decision in *Business Leaders in Christ v. University of Iowa*, 360 F. Supp. 885 (S.D. Iowa 2019) ("*BLinC*") simply because it was a district court rather than appellate court decision.

Unable to distinguish either *Gerlich* or *BLinC*, Appellants take great liberties with the record below by arguing that the Individual Defendants were presented with a Hobson's choice between discriminating against religious organizations such as

InterVarsity and allowing such religious organizations to discriminate against others. This assertion finds no support in—and indeed is contrary to—what indisputably occurred. InterVarsity was deregistered simply because its constitution did not recite, verbatim, the Policy drafted by the University. Compelling the leadership and members of InterVarsity to recite the University's verbiage and discriminating against them for failing to do so cannot be squared with the First Amendment. Nor is it defensible for the University to favor some religious organizations over others simply because the favored organizations agree with the University's point of view on particular issues.

Under these circumstances, both the facts and the law compel but one conclusion: the decision of the District Court should be affirmed.

ARGUMENT

I. Appellants Do Not Dispute That Their Selective Enforcement of the Policy Constitutes Viewpoint Discrimination Prohibited By *Gerlich.*

In *Gerlich v. Leath*, this Court held that "[i]f a state university creates a limited public forum for speech, it may not 'discriminate against speech on the basis of its viewpoint.'" 861 F.3d 697, 704-05 (8th Cir. 2017) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Viewpoint discrimination occurs "when the rationale for its regulation of speech is 'the specific motivating ideology or the opinion or perspective of the speaker.'" *Id*. at 705 (citing *Rosenberger*, 515 U.S. at 829).

While effectively conceding that their enforcement of the Policy violates "the rights of religious groups to freely speak and assemble," Appellants nevertheless claim to be "stuck" because they must also protect "the rights of students to be free from discrimination by a Registered Student Organization on the basis of a protected class." (Appellant Br. at 20.) In this case, however the Scylla and Charybdis dilemma that Appellants claim to have faced has already been resolved for them by the District Court's decision in *BLinC.* As a result, the qualified immunity that the individual Appellants claim provides no defense whatsoever.

II. The District Court's Prior *BLinC* Decision Was Itself Sufficient to Demonstrate That the Law in This Area Was "Clearly Established."

As the District Court noted in its opinion, "what the individual Defendants in this case [had] by June 2018, was an order that squarely applied *Martinez,*[3] *Reed,*[4] and *Walker*[5] to a case involving the selective application of the Human Rights Policy to a religious group's leadership requirements." *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F.Supp.3d 960, 992 (S.D. Iowa 2019). The District Court, citing its prior grant of preliminary injunctive relief in *BLinC,* noted that it had previously:

---

[3] *Hastings Coll. of the Law v. Martinez,* 561 U.S. 661 (2010).

[4] *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011).

[5] *Christian Legal Soc'y Chapter of the Univ. of California v. Walker*, 453 F.3d 853 (7th Cir. 2006).

> 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]. . . [the Plaintiff] has established the requisite fair chance of prevailing on the merits of its claims under the Free Speech Clause.

Id. In other words, the District Court had previously addressed the ***exact same*** policy at the ***exact same*** university under circumstances that were functionally ***indistinguishable***.

As a result, the District Court concluded there was no "ambiguity as to whether the University could selectively enforce its Human Rights Policy against a religious student group" as of the entry of its order in the *BLinC* case. *Id*. at 993. Moreover, the District Court also noted that the record clearly reflected that the individual Appellants "understood the preliminary injunction order to mean that the University could not selectively enforce the Human Rights Policy against some RSOs and not others." *Id*. Despite all of this, Appellants insist that their continued discriminatory application of the University's Policy in direct contravention of the District Court's admonitions deserves the shield of qualified immunity—to the point where the trial judge called their arguments "incredibly baffling." (Tr.26). As the District Court noted, it had already told the University in the *BLinC* case "not to do

X" (*i.e.*, selectively enforce its Policy), and "the next thing [the University] did was double X." (Tr.24).

Indeed, by the time that InterVarsity was forced to sue, the District Court had "twice granted preliminary injunctions that expressly forbade selective enforcement of the [Human Rights] Policy against a religious student group." (Appellee Br. at 63). Of critical importance—as noted in InterVarsity's brief—the District Court described the injunctions as an "extraordinary remedy" issued because the University was likely to lose on the merits. (*Id.*). Furthermore, as this Court has indicated, the "granting of preliminary injunctions is not favored unless the right to such relief is clearly established." *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984) (citing 11 C. Wright and A. Miller, Federal Practice & Procedure § 2942, at 368); *see also Burnham v. Ianni*, 119 F.3d 668, 677 n.15 (8th Cir. 1997) (in denying qualified immunity, noting university defendant's awareness that plaintiffs "might have a good case" against him).

A. This Court's Precedents Do Not Require a Prior Decision to Be Directly on Point for Law to Be "Clearly Established."

Appellants ignore not only the very direct and clear nature of the District Court's prior admonitions but this Court's "broad view of what constitutes 'clearly established law' for the purposes of the qualified immunity inquiry." *Bonner v. Outlaw*, 552 F.3d 673, 679 (8th Cir. 2009) (citations omitted). In this Circuit, a constitutional right is "clearly established" if its scope is "sufficiently clear so that a

reasonable official would understand when his actions would violate the right." *Gerlich*, 861 F.3d at 708 (citation omitted). Rights can be clearly established even where there is no "case directly on point" (*id*.) and "even in novel factual circumstances." *Id*. at 711 (Kelly, J., concurring) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). Moreover, even if binding precedent were absent, courts can "look to all available decisional law, including decisions of state courts, other circuits and district courts." *Tlamka v. Serrell*, 244 F.3d 628, 634 (8th Cir. 2001) (citation omitted). And as Appellees have noted, there is no question that the standards equally apply to "university officials" where the case "involve[s] the First Amendment." *Gerlich*, 861 F.3d at 710 (Kelly, J., concurring) (collecting Eighth Circuit precedent).

B. The Cases Cited By Appellants to Try to Distinguish *Gerlich* and Other Precedents of This Court Are All Inapposite.

Notwithstanding *Gerlich* and other Eighth Circuit precedents that are not helpful to their cause, Appellants cite cases that they say support finding qualified immunity for the individual defendants in this case. Upon closer examination, however, each of these cases is distinguishable. In an effort to get around the fact that the *BLinC* case clearly put the University on notice that it could not enforce the Policy selectively against religious organizations, Appellants cite the following passage from *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011) for the following proposition:

> 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."

(citation omitted). In fact, the Supreme Court emphasized and focused on the fact that the *Ashcroft* case involved a "footnote dictum devoid of supporting citation" calling out Attorney General John Ashcroft by name for violating the plaintiff's constitutional rights. *See Ashcroft*, 563 U.S. at 741–43 (citation omitted). However, the District Court's prior injunction order was not a dogmatic or unproven statement (*ipse dixit*),[6] let alone *ipse dixit* of dictum relegated to a footnote. Rather, it was a lengthy and specific finding regarding the same Policy by the same University applied in functionally identical circumstances. "When properly applied, [qualified immunity] protects 'all but the plainly incompetent or those who knowingly violate the law." *See id*. at 743 (citation omitted). In this case, Appellants deliberately ignored the District Court's directly applicable prior order, even acknowledging they were aware of that order while they proceeded to discriminatorily apply the University's Human Rights Policy. Accordingly, if behaving reasonably and in good faith, the Individual Defendants should have understood they were engaging in clearly prohibited conduct. Notably, the Supreme Court also observed that eight

[6] *See* Merriam-Webster's online dictionary for the definition of "*ipse dixit*" in law at https://www.merriam-webster.com/dictionary/ipse%20dixit.

court of appeals judges agreed with the Attorney General's judgment "in a case of first impression." *See Ashcroft*, 563 U.S. at 743.

Moreover, Appellants attach too much significance to a footnote in *Camreta v. Greene*, 563 U.S. 692, 709 n. 7 (2011). In the footnote cited by Appellants, the Supreme Court stated that "district court decisions—unlike those from courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity." As a result, the Supreme Court noted, courts of appeal sometimes "decline to consider district court precedent when determining if constitutional rights are clearly established." *Id.* Such a general statement in a footnote does not necessarily mean that officials would not and should not clearly understand that behavior violates constitutional rights when the same district court has specifically and previously instructed their institution that such behavior is unconstitutional under nearly identical circumstances before them. To the contrary, this Court itself has considered district court precedent in deciding qualified immunity cases. *See, e.g., Morris v. Clifford*, 903 F.2d 574, 578-79 (8th Cir. 1990) (citing *Suarez v. Illinois Valley Community College*, 688 F. Supp. 376, 381-82, 385 (N.D. Ill. 1988) (holding that, when evidence of intent is required to show a constitutional violation, summary judgment is inappropriate)).

Recognizing this fact, Appellants claim that this Court's opinion in *Hayes v. R. Long*, 72 F.3d 70 (8th Cir. 1995) does not control. In *Hayes*, this Court held that

a decision in the same U.S. District Court involving the same institutional defendant—in that case, the Arkansas Department of Corrections—created clearly established law. *See id*. at 74 ("In light of the fact that Finney was decided by the Eastern District of Arkansas, the jurisdiction in which the present case arose, and involved the Arkansas Department of Corrections, it seems particularly unreasonable that defendants were unaware of [the] right [at issue]."). Appellants claim that *Hayes* is not controlling because it was decided before *Ashcroft* and *Camreta*. *Hayes* has never been expressly overruled, however, by either this Court or the Supreme Court. Nor can *Hayes* be disregarded by the simple expedient of quoting random snippets from *Ashcroft* and *Camreta*. The proper touchstone is whether a right is "sufficiently clear so that a reasonable official would understand when his actions would violate the right." *Gerlich*, 861 F.3d at 708. In this case, the conduct at issue "plainly constitute[d] the same selective application of the Human Rights Policy that the [District Court] found constitutionally infirm." *InterVarsity*, 408 F.Supp.3d at 992. Therefore, any reasonable official would have understood that the First Amendment clearly prohibits the same selective application of that same policy. As a result, the Individual Defendants cannot claim the shield of qualified immunity.

III. The Constitutional Rights At Issue Here Were "Clearly Established," Making the Qualified Immunity Claimed By Appellants Unavailable.

For their viewpoint discrimination to be protected by qualified immunity,

Appellants must establish that InterVarsity's constitutional rights were not "clearly established." *Gerlich*, 861 F.3d at 709. Appellants are unable to make such a showing for the reasons identified by the District Court.

Unpersuaded by the District Court's opinion, Appellants seek to justify their admitted viewpoint discrimination as being necessary to avoid "direct conflict with state and federal civil rights law." (Appellant Br. at 18). Appellants lament the alleged lack of any "[e]stablished law . . . [to] illuminate the path for University officials" to make decisions on these "difficult issues." (*Id*. at 20-21). In reality, there ***is*** established law. Appellants simply chose to ignore it. The District Court properly rejected their arguments.

As the District Court observed, Appellants simply ignored their "disparate application of the Human Rights Policy." *InterVarsity*, 408 F. Supp. 3d at 991. The actual issue in this case is "whether a university violates a student group's right to free speech in a limited public forum when it enforces its nondiscrimination policy to limit the group's ability to choose its leaders, but allows other groups to restrict membership or leadership in a manner that would similarly violate the policy." *Id*. Under *Gerlich*, InterVarsity's rights were "clearly established."

A right is "clearly established" if "its contours [are] sufficiently clear so that a reasonable official would understand when his actions would violate the right." *Gerlich*, 861 F.3d at 708. "There need not be 'a case directly on point, but existing

precedent must have placed the statutory or constitutional question beyond debate.'" *Id.* (citing *Ashcroft*, 563 U.S. at 741).

As this Court held in *Gerlich*: "It has long been recognized that if a university creates a limited public forum, it may not engage in viewpoint discrimination within that forum." 861 F.3d at 709 (citing *Martinez*, 561 U.S. at 667–68, and *Rosenberger*, 515 U.S. at 829–30). As the District Court held, a "reasonable person" could not have concluded that "applying extra scrutiny to religious groups" to "broaden enforcement of the Human Rights Policy in the name of uniformity" "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" is "acceptable" behavior. *InterVarsity*, 408 F.Supp.3d at 993. It is a distinction without a difference whether such efforts are instituted through affirmative actions to compel as opposed to "with[holding] the benefits of recognition" (*i.e.*, ostracism and exclusion). *Compare* Appellant Brief at 23–24 *with Gerlich*, 861 F.3d at 709 (denying qualified immunity when educational institution withheld approval for student group's use of institution's trademark because of student group's view on legalization of marijuana). It is clearly established that Appellants may not enforce provisions of a policy against one group while turning a blind eye toward others.

In support of their argument that the law is sufficiently unsettled to justify application of qualified immunity, the Individual Defendants take far too narrow a

view of the constitutional issue in question. Appellants contend that the unanswered legal question centers on a "direct conflict" between civil rights and the First Amendment. (Appellant Br. at 17). This case does not involve any such direct conflict, however, because there is no allegation that any individual's civil rights were infringed. This case solely involves the First Amendment rights of freedom of speech, freedom of association, and freedom of religion—rights that the University has undeniably infringed.

This is not a case in which the University and its administrators were asked to enforce the Policy because of some alleged discriminatory conduct on the part of InterVarsity. Rather, as Appellants acknowledge, the University responded to the *BLinC* litigation by undertaking a review of the constitutions of campus organizations to identify other organizations that did not repeat—verbatim—the Policy. (Appellant Br. at 9). The review itself was not an enforcement of the Policy against discriminatory conduct. Instead, it was a review of the stated beliefs of each organization as expressed in its governing documents and a selective enforcement of the Policy as between religious and other student groups. The only constitutional right implicated by this review was the First Amendment.

Appellants' argument that the law is unsettled is also based upon the fiction that the Supreme Court's opinion in *Martinez* left unanswered questions that are relevant to this case. It did not. As the majority opinion in *Martinez* freely

acknowledged, "we do not write on a blank slate." 561 U.S. at 683. The opinion cites and reaffirms three prior cases—*Healy*,[7] *Widmar*,[8] and *Rosenberger*—and explained that "[i]n all three cases, we ruled that student groups had been unconstitutionally singled out because of their points of view." *Id.* at 685. Justice Kennedy's concurrence specifically cautioned school administrators that "if the purpose or effect of the policy was to stifle speech or make it ineffective, that, too, would present a case different from the one before us." *Id.* at 706. There is nothing in the *Martinez* opinion that would leave unsettled any question of whether viewpoint discrimination is permitted. It clearly is not, and it does not require extensive legal scholarship to see the difference.

The argument advanced by the Individual Defendants seems to acknowledge that viewpoint discrimination is not permitted. Nevertheless, they claim that the law is "unsettled" because the Supreme Court has not explicitly held that discrimination against viewpoints deemed by the University to be "discriminatory" is also prohibited. The analysis by University administrators should have been based upon the principle that viewpoint discrimination is not permitted—period. That is the holding of the line of cases reaffirmed by *Martinez*. The fact that the Supreme Court did not allow for any exceptions to those holdings does not require years of

[7] *Healy v. James*, 408 U.S. 169 (1972).

[8] *Widmar v. Vincent*, 454 U.S. 263 (1981).

jurisprudence to exclude every possible exception that state actors might propose to the constitutional principle before that principle can be considered settled law.

As was made clear by the majority opinion's reaffirmation of *Healy* and its progeny, the Supreme Court did not intend *Martinez* in any way to alter the bedrock constitutional principle that any restriction on the use of a limited public forum ***must*** be strictly viewpoint neutral. *Martinez* simply found that an "all comers" policy was, by definition, viewpoint neutral. Thus, the only relevant inquiry related to the Individual Defendants' claim of qualified immunity is whether a reasonable University official would understand that the actions taken against InterVarsity were not viewpoint neutral.

The particular facts of this case demonstrate conclusively that the University has selectively enforced its Policy. The record shows, for example, that the University registered the organization Love Works—the group that was formed in response and as an alternative to BLinC. By doing so, the University and the Individual Defendants provided very different treatment of one Christian organization (Love Works) that expresses a viewpoint that the Bible and Christianity accept intimate relationships outside of heterosexual marriage and do not consider such relationships sinful, and two other Christian organizations (BLinC and InterVarsity) that express a viewpoint that the Bible and Christianity do not accept such relationships and consider them sinful behavior that would disqualify a person

from being a spiritual leader. The only basis for the Individual Defendants' differential treatment of Love Works vis-à-vis BLinC and InterVarsity is their differing viewpoints regarding same-sex relationships. It is inconceivable that a reasonable University administrator would not recognize that this is viewpoint discrimination.

This particular type of viewpoint discrimination and application of school policy raises the specter of a violation of another provision of the First Amendment, the Establishment Clause. In effect, the University and its administrators have declared through their actions that "University approved" Christianity holds a particular view of relationships outside of heterosexual marriage, and any doctrine of Christianity that holds a different view is not approved to participate fully in the campus community. It is not an overstatement to say that the University, perhaps inadvertently, has endorsed some forms of Christianity over others.

Healy and its progeny made it clear that a university is not permitted to discriminate on the basis of viewpoint—even when it finds the viewpoint "abhorrent." The Supreme Court in *Martinez* reaffirmed this line of cases without exception, and held that an "all comers" policy was permitted because it was inherently viewpoint neutral. In the face of this settled case law, the Individual Defendants embarked on a project designed to deregister more campus organizations so that BLinC was no longer being "singled out." They did so by reviewing the

governing documents for any expression of belief or viewpoint that was not verbatim the approved university policy. By doing so, the Individual Defendants deregistered InterVarsity and other organizations that expressed viewpoints regarding sexual orientation and relationships that were not "approved" by the University as expressed through its Policy. The end result of this "purge" of organizations that refused to recite the school's text was that the Individual Defendants gave differential treatment to Love Works, BLinC, and InterVarsity based solely on their differing views of sexuality. Any reasonable University administrator would understand that this constitutes viewpoint discrimination and violates the First Amendment.

CONCLUSION

Appellants' claim of qualified immunity strains credulity. As the District Court judge observed, she had already told the University in the *BLinC* case "not to do X" (*i.e.*, selectively enforce its Policy), and "the next thing [the University] did was double X." (Tr. 24). If accepted by this Court, Appellants' view of what constitutional rights are "clearly established" for purposes of qualified immunity would eviscerate the First Amendment protections of free speech, freedom of association, and freedom of religion. Even before the District Court decided *BLinC*, it was "clearly established" in the Eighth Circuit—by virtue of *Gerlich* and otherwise—that viewpoint discrimination is strictly prohibited. This general

principle of First Amendment jurisprudence is not limited in scope to discrimination based on religious views. Rather, unlawful viewpoint discrimination obviously includes—but is by no means limited to—discrimination against particular religious views. Just because prior precedents do not lay out every conceivable First Amendment violation in which university administrators might engage does not afford them a "safe harbor" to violate the Constitution with immunity (and impunity). Here, the Eighth Circuit's general prohibition against viewpoint discrimination had already been applied by the same District Court to the same University's Policy enforced in the same discriminatory way. Under the circumstances, Appellants' claim of qualified immunity should be rejected summarily.

Dated: March 16, 2020

Respectfully Submitted,

By: */s/ Michael J. Lockerby*

Michael J. Lockerby
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D.C. 20007
202.672.5300
mlockerby@foley.com

Robert F. Johnson III
John Sepehri
FOLEY & LARDNER LLP
One American Center
600 Congress Avenue, Suite 3000
Austin, Texas 78701
512.542.7000
rjohnson@foley.com
jsepehri@foley.com

Brandon C. Marx
FOLEY & LARDNER LLP
2021 McKinney Avenue, Suite 1600
Dallas, Texas 75201
214.999.3000
bmarx@foley.com

Michael A. Donadio
Adam J. Kleinfeld
FOLEY & LARDNER LLP
111 Huntington Avenue, Suite 2600
Boston, Massachusetts 02199
617.342.4000
mdonadio@foley.com
akleinfeld@foley.com

Counsel for *Amicus Curiae* Foundation for Individual Rights in Education

CERTIFICATE OF SERVICE

I certify that on March 16, 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/ Michael J. Lockerby
Michael J. Lockerby

Counsel for *Amicus Curiae*
Foundation for Individual Rights in Education

CERTIFICATE OF COMPLIANCE

This *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,161 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point, Times New Roman typeface.

The full text of this *amicus* brief was scanned for viruses using Microsystems 3B Clean Batch Client 4.5.0 and the brief is virus-free.

This *amicus* brief is filed in PDF format to comply with the electronic filing requirements of Eighth Circuit Rule 28A(h).

/s/ Michael J. Lockerby
Michael J. Lockerby

Counsel for *Amicus Curiae*
Foundation for Individual Rights in Education