No. 19-1696

In the
United States Court of Appeals
for the Eighth Circuit

BUSINESS LEADERS IN CHRIST, an unincorporated association,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF IOWA; LYN REDINGTON, in her official capacity as Dean of Students and in her individual capacity; THOMAS R. BAKER, in his official capacity as Assistant Dean of Students and in his individual capacity; WILLIAM R. NELSON, in his official capacity as Executive Director, Iowa Memorial Union, and in his individual capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Iowa – Davenport, No. 3:17-cv-00080-SMR.
The Honorable **Stephanie M. Rose**, Judge Presiding.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF REVERSAL AND APPELLANT

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Motion for Leave to File Amicus Curiae Brief

Pursuant to Federal Rule of Appellate Procedure 29, proposed *amicus curiae* Foundation for Individual Rights in Education ("FIRE") respectfully moves for leave to file a brief in support of student organization Business Leaders in Christ, the Plaintiff-Appellant. A true and correct copy of the proposed brief accompanies this motion.

FIRE is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has worked to protect student First Amendment rights at campuses nationwide. FIRE believes that to prepare students for success in our democracy, the law must remain unequivocally on the side of robust free speech rights on campus. FIRE coordinates and engages in litigation and authors *amicus* briefs to ensure that student First Amendment rights are vindicated when violated at public institutions such as Defendant-Appellee the University of Iowa and by governmental officials of those colleges and universities.

This case presents important and far-reaching issues implicating the availability of redress following violations of student and student organization established First Amendment rights at public colleges and universities. The students FIRE defends rely on access to federal courts to secure meaningful and lasting legal remedies to the insidious harm of censorship.

FIRE submits that its appearance will benefit the Court's consideration of this appeal. As an advocate for civil liberties on college campuses for the last 20 years, FIRE is well-acquainted with the First Amendment issues relevant to the disposition of the case, as well as with the impact of institutional censorship and speech restrictions on young adults at colleges and universitie

Dated: June 4, 2019

Respectfully Submitted,

/s/ Susan P. Elgin

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A). This motion contains 408 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in fourteen (14) point Times New Roman font.

Dated: June 4, 2019

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 4, 2019, an electronic copy of the Motion for Leave to File Amicus Curiae Brief of Foundation for Individual Rights in Education in Support of Reversal and Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. The undersigned also certifies that the following participants in this case are registered CM/ECF users and that service of the Brief will be

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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.

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Interest of Amicus Curiae

The Foundation for Individual Rights in Education ("FIRE") submits this brief in support of Appellant Business Leaders in Christ to shed further light on the unfortunately commonplace infringement of First Amendment rights on college campuses across the United States, and to urge the Court to deny qualified immunity to university administrators who violate clearly established rights of their students.[1]

FIRE is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has worked to protect student First Amendment rights at campuses nationwide. FIRE believes students can best achieve success in our democracy 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 vindication of student First Amendment rights when violated at public institutions like the Univ

invidious harm of censorship. If allowed to stand, the lower court's ruling will threaten redress of violations of students' First Amendment rights.

FIRE seeks authority to file this *amicus* brief pursuant to Fed. R. App. P. 29(a)(4)(D) by contemporaneously submitting a motion for leave to file. FIRE contacted the parties to seek consent on May 20, 2019. Plaintiff-Appellant Business Leaders in Christ consented to FIRE's request to submit this *amicus* brief. Counsel for Defendant-Appellee the University of Iowa did not respond to FIRE's request.

qualified immunity, as framed by the District Court, compounds the difficulty that students—whose constitutional claims are often mooted by graduation and other factors outside their control—already face when bringing a constitutional challenge to university policies and practices and to the conduct of public officials.

As the instant case demonstrates, public colleges continue to violate student First Amendment rights, despite clearly established legal precedent prohibiting such action. When students face a series of virtually insurmountable hurdles to obtaining a judicial determination or legal consequence, student speech rights are left at risk. Judicial clarity as to the scope and applicability of qualified immunity is needed to secure student

Argument

I. The District Court's Qualified Immunity Analysis Construed the First Amendment Question Too Narrowly.

A. The University's Viewpoint-Discriminatory Application of its Nondiscrimination Policy to Business Leaders in Christ was Clearly Unconstitutional.

In conducting its qualified immunity analysis, the District Court framed the applicable constitutional question too narrowly by focusing on the specific factual context of the selective application of a university nondiscrimination policy by the individual defendant university administrators while disregarding the First Amendment's foundational prohibition of viewpoint discrimination. In looking only at whether "disparate application of a nondiscrimination policy violates a student group's free speech and free exercise rights," *Business Leaders in Christ*

Nothing mandates that courts construe the constitutional question before them as narrowly as possible, as occurred here. "It is not necessary, of course, that 'the very action in question has previously been held unlawful.'" *Ziglar v. Abassi*, 137 S. Ct. 1843, 1866–67 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

As this Court has explained, "the particular action in question need not have been previously held unlawful in order for a court to determine that a government official has indeed violated a clearly established right." *De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 897 (8th Cir. 2014); *see also Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004) ("We do not find it unreasonable to expect the defendants — who hold themselves out as educators — to be able to apply [a well-known legal] standard, notwithstanding the lack of a case with material factual similarities. ... Our precedents would be of little value if government officials were

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fundamental principle that a state regulation of speech had to be content-neutral" and discriminated based on religious nature of speech); *Healey v. James*, 408 U.S. 169, 187 (1972) (denial of recognition for student organization by university president based on his disagreement with the group's "philosophy" violated First Amendment); *Gerlich*, 861 F.3d at 709 ("It has long been recognized that if a university creates a limited public forum, it may not engage in viewpoint discrimination within that forum."); *Gay & Lesbian Students Ass'n. v. Gohn*, 850 F.2d 361, 362, 368elves

In deciding *Gerlich,* this Court did not specifically look for cases involving the selective application of a university trademark policy. Instead, this Court recognized correctly that because precedent clearly established both that (1) the trademark licensing program was a limited public forum and (2) viewpoint discrimination in a limited public forum warrants strict scrutiny, qualified immunity should not be extended to the university officials who applied the trademark policy in a viewpoint discriminatory manner and did not argue or establish that their actions were narrowly tailored to satisfy a compelling governmental interest. *Gerlich*, 861 F.3d at 707.

While any constitutional question could, in theory, be construed so narrowly as to find that the law was not clearly established, it strains credulity to argue that the high-ranking University of Iowa officials sued personally as defendants in this case did not know and should not have known it was impermissible for them to grant some student organizations, but not others, exemptions from the university nondiscrimination policy based on whether those organizations "support the ʿ ŕ ж

II. Students and Student Organizations from Across the Ideological Spectrum Routinely Face Viewpoint-Based Discrimination.

A. Student Organizations Are Frequently Denied Recognition and Funding on the Basis of Viewpoint.

This Court has recognized that subjecting student organizations to "unique scrutiny" and "unusual" procedural requirements on account of their viewpoints violates the First Amendment. *Gerlich*, 861 F.3d at 706 (concluding that Iowa State University's "actions and statements show that the unique scrutiny they imposed on NORML ISU's trademark applications was motivated by viewpoint discrimination."); *Gohn*, 850 F.2d at 367 (concluding that "the First Amendment violation is apparent" after student organization was subjected to an "unusual procedure" in receiving funding and subsequently denied further funding).

Nevertheless, this practice remains depressingly common.

Public universities and officials regularly single out disfavored student organizations from across the ideological spectrum for adverse treatment because of their beliefs, mission, or advocacy. As a nonpartisan organization dedicated to protecting student speech without regard to the speaker's identity or beliefs,

For example, at the University of Rhode Island, a wide variety of political and religious student organizations were routinely denied student activity fee funding based on student government officials' perceptions of their mission until FIRE intervened in 2018.[3] At Wichita State University in 2017, a prospective chapter of Young Americans for Liberty was denied official recognition because of its "dangerous" views regarding the First Amendment.[4] In 2010, the University of South Florida denied recognition to a conservative student group claiming it was too "similar" to a libertarian student group on campus,[5] a justification FIRE has seen employed repeatedly over the years to deny official recognition to student

[3] *VICTORY: Student government abandons discriminatory funding policy at the University of Rhode Island*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Oct. 12, 2018), https://www.thefire.org/victory-student-government-abandons-discriminatory-funding-policy-at-the-university-of-rhode-island. Only after *amicus* FIRE intervened on behalf of the College Republicans, Students for Sensible Drug Policy, ACLU, and BridgeUSA were the student government's viewpoint-discriminatory funding practices ended.

[4] Matthew Kelly,

organizations.[6] These cases, and parallel situations arising at private colleges, demonstrate that institutions of higher learning and university officials continue to look to the viewpoints of student groups when deciding recognition or funding issues despite the longstanding body of law prohibiting this viewpoint discrimination and content-based decisionmaking.

These cases, and parallel situations arising a private colleges,[7] demonstrate that institutions of higher learning and university officials continue to look to the

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[6] *See, e.g.*, Press Release, *Pro-liberty Student Group Lawsuit Prompts UC-Berkeley to Change Policy*, ALLIANCE DEFENDING FREEDOM (July 2, 2018), http://www.adflegal.org/detailspages/press-release-details/pro-liberty-student-group-lawsuit-prompts-uc-berkeley-to-change-policy; *Notre Dame Defends Rejection of 'Redundant' Student Group Amid Controversy*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (June 19, 2014), https://www.thefire.org/notre-dame-defends-rejection-of-redundant-student-group-amid-controversy.

[7] For example, in 2016, Fordham University ref

viewpoints of student groups when deciding recognition or funding issues despite the longstanding body of law prohibiting this viewpoint discrimination and content-based decisionmaking.

B.

Obama by administrators who informed the students that their "mocking" speech violated university policy.[10]

San Francisco State University's chapter of the College Republicans faced a months-long disciplinary investigation in 2006, which became the subject of a successful legal challenge, for allegedly violating the institution's civility policy by holding an "anti-terrorism" rally on campus.[11]

At Pierce Community College in California in 2016, a student was prevented from handing out Spanish-language copies of the U.S. Constitution outside of a tiny "free speech zone" on campus,[12] while a protest against then President-elect Donald Trump could proceed.[13]

Students and student organizations wishing to hear from outside speakers with a dissenting or controversial viewpoint regularly face daunting administrative hurdles that chill or outright censor speech. For example, at Western Michigan University, the Kalamazoo Peace Center's attempt to bring rapper, director, and

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[10] Annie Knox, *Utah university settles free-speech suit with former students*, SALT LAKE TRIB. (Sept. 17, 2015, 5:41 PM), https://archive.sltrib.com/article.php?id=2962838&itype=CMSID. *Amicus* FIRE assisted in the lawsuit's filing.
[11] *College Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).
[12] Perry Chiaramonte, *LA college district abolishes free speech zones as part of lawsuit settlement*, FOX NEWS (Dec. 14, 2018), https://www.foxnews.com/us/la-college-district-abolishes-free-speech-zones-as-part-of-lawsuit-settlement. *Amicus* FIRE represented student Kevin Shaw in the suit.
[13] *Shaw v. Burke*, Civ. No. 17-02386, 2018 U.S. Dist. LEXIS 7584, at *9 (C.D. Cal. Jan. 17, 2018).

political activist Boots Riley to campus in 2014 was denied when university officials insisted that the student organization pay for an undercover law enforcement officer to be present because of Riley's previous involvement with the Occupy movement.[14] After the student organization filed a First Amendment lawsuit, Western Michigan University agreed to change its security fee policies as part of a settlement.[15]

Similarly, the University of California, Berkeley revised its policies as part of a 2018 settlement concluding a First Amendment lawsuit that alleged the university's restrictions on conservative speakers invited to campus by the College Republicans constituted viewpoint discrimination.[16]

Even students who seek simply to criticize their own institutions face regular censorship. At Binghamton University in 2018, students frustrated by what they

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[14] Christina Cantero, *Kalamazoo Peace Center questions university actions to require police at Boots Riley event*, W. HERALD (Apr. 2, 2014), https://www.westernherald.com/news/article_51c8c3e2-b0d1-5a46-944e-475edfada12a.html; *see also Boots Riley to speak tomorrow despite free speech censorship on Western's Campus*, KALAMAZOO PEACE CTR. (Apr. 2, 2014), https://peacecenter.wordpress.com/2014/04/02/boots-riley-to-speak-tomorrow-despite-free-speech-being-sequestered-on-westerns-campus.

[15] Rex Hall Jr., *WMU to pay $35,000 to settle free-speech lawsuit filed by Kalamazoo Peace Center*, MLIVE.COM (May 4, 2015), https://www.mlive.com/news/kalamazoo/2015/05/wmu_to_pay_35000_to_settle_fre.html. *Amicus* FIRE assisted in the lawsuit's filing.

[16] Emily DeRuy, *UC Berkeley reaches settlement with College Republicans in discrimination suit*, MERCURY NEWS

perceived to be an insufficient institutional response to racist expression on campus posted flyers criticizing the university in a campus building—and were threatened with arrest after an officer told them others found the flyers offensive.[17]

After a University of North Carolina at Chapel Hill student's satirical website (titled "UNC Anti-Racist Jeopardy") criticized the university's treatment of its historical relationship to slavery and its response to student protests, the website was targeted for censorship by senior university administrators and ultimately removed from the university's server in late 2018.[18] While UNC Chapel Hill cited a policy provision prohibiting the use of university-hosted sites for "personal projects" as its reason for taking down the student's website, the university allowed many "personal" websites to exist on its server without issue, and internal communications obtained by public records requests revealed that administrators were aware that the provision was not "regularly" enforced.[19] Following a letter from *amicus* FIRE reminding the institution of its legal obligation to apply its policies in a viewpoint-neutral manner, the student was informed that her website would be restored.

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[17] Eugene Volokh, *SUNY Binghamton Tries to Suppress Students' Flyers Because They "Offended" Other Students*, VOLOKH CONSPIRACY (May 22, 2018, 4:22 PM), https://reason.com/2018/05/22/suny-binghamton-tries-to/#.

[18] Jeremy Bauer-Wolf, *Can Chapel Hill Take a Joke With a Point?*, INSIDE HIGHER ED (Mar. 1, 2019), https://www.insidehighered.com/news/2019/03/01/unc-student-alleges-administrators-censored-her-race-relations-website.

[19] *Id.*

Despite the longstanding clarity of

As a result, this case, and the liability of the government actors involved, is at the forefront of ensuring the continuing viability of the well-established First Amendment rights of public university students and student groups such as Business Leaders in Christ.

III. The District Court's Qualified Immunity Ruling Compounds the Significant Hurdles Faced by Students Seeking to Vindicate Their Constitutional Rights and Will Contribute to Self-Censorship.

The many and varied examples of students and student organizations facing viewpoint discrimination provide context for the harm wrought by decisions such as the District Court's that compound the significant hurdles facing students and student organizations seeking to vindicate constitutional rights in court. Indeed, granting qualified immunity based on an excessively narrow reading of precedent inflicts a specific and disproportionate harm on r pM

graduate after four years.[20] The most vocal and active students are likely to be upperclassmen, who, in turn, are likely to be graduating in two years or less.[21] Meanwhile, as of December 2018, the median time it took a federal district court to dispose of a civil case prior to a pretrial conference was 10.7 months, and 25.9 months if resolved at trial.[22] At that same time, the median time from filing a notice of appeal to disposition in the U.S. Court of Appeals for the Eighth Circuit was 6.8 months.[23]

The result of these incompatible timeframes is that courts regularly dismiss claims by student plaintiffs for injunctive and declaratory relief as moot upon their graduation. Among the students who have seen their rights evaporate while waiting

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[20] *Table 326.10,* U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d18/tables/dt18_326.10.asp (last visited May 28, 2019).

[21] *See* Tyler J. Buller, *Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It*, 40 J.L. & EDUC. 609, 630 (2011) ("If one assumes that leadership positions are held by juniors or seniors, the window for successful litigation shrinks to just one or two years before the injury becomes moot.").

[22] *Table C-5: U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, By District & Method of Disposition, During the 12-Month Period Ending December 31, 2018,* ADMIN. OFFICE OF U.S. COURTS, https://www.uscourts.gov/statistics/table/c-5/statistical-tables-federal-judiciary/2018/12/31 (last visited May 28, 2019).

[23] *U.S. Courts of Appeals—Federal Court Management Statistics–Summary—During the 12-Month Period Ending December 31, 2018,* ADMIN

for justice are student prayer leaders,[24] objectors to student prayers,[25] student journalists,[26] ROTC students,[27] valedictorians,[28] students who wanted to demonstrate cookware in their dorms,[29] and numerous other high school students[30] and college students.[31]

In such cases, compensatory or nominal damages claims are frequently the only remaining avenue to vindicate a First Amendment violation. Granting university actors qualified immunity from those claims consequently leaves many

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[24] *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (student forced to apologize for religious valedictory speech held to lack standing to maintain declaratory and injunctive claims); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1098–99 (9th Cir. 2000) (finding First Amendment claims moot where plaintiffs were prevented from giving religious speeches at graduation ceremony).

[25] *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997) (dismissing as moot injunctive and declaratory claims from former students who objected to

students without available relief and public officials beyond accountability. The incentive for schools to aggressively resist even meritorious claims—perhaps especially meritorious claims—is inevitable.

The fact that Business Leaders in Christ is lucky enough to be an organizational plaintiff still active on the University of Iowa campus — and was therefore able to secure a narrowly drawn injunction from the District Court — should not distract this Court from the wide-reaching consequences of the qualified immunity decision under review. First, that decision gives no b

Conclusion

For the foregoing reasons, the Court should reverse the grant of qualified immunity to the individual Defendants and remand the matter to the District Court for submission of assessment of damages and attorney fees.

Dated: June 4, 2019

Respectfully Submitted,

/s/ Susan P. Elgin

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Certificate of Service

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/s/ Susan P. Elgin
Susan P. Elgin

Counsel for Amicus Curiae Foundation for Individual Rights in Education

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