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 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

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

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:

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[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).

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

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

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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."

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.

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

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

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

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

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

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Respectfully Submitted,

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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.

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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.

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

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