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

WILLIAM CREELEY
SAMANTHA HARRIS
MARIEKE TUTHILL BECK-COON
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
510 Walnut St., Suite 1250
Philadelphia, PA 19106
(215) 717-3473

MICHAEL A. GIUDICESSI
SUSAN P. ELGIN
FAEGRE BAKER DANIELS LLP
801 Grand Ave., 33rd Floor
Des Moines, IA 50309-8003
(515) 248-9000

Counsel for Amicus Curiae Foundation for Individual Rights in Education

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

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 universities across the country.

FIRE's decades of experience make it well suited to aid this Court's understanding of the broad and dangerous implications of the District Court's decision for students throughout the Eighth Circuit seeking to exercise their First Amendment rights. FIRE's amicus brief endeavors to demonstrate how, if allowed to stand, the decision will threaten the expressive and associational rights of students and student organizations, endorse viewpoint-based censorship by public officials, and will compound the significant procedural difficulties faced by students seeking to vindicate their constitutional rights in court. Perhaps most importantly, FIRE seeks to demonstrate that the decision under review will deter future students from exercising their First Amendment rights in the first instance.

For these reasons, proposed *amicus curiae* FIRE respectfully moves for leave to file the attached brief in support of Plaintiff-Appellant Business Leaders in Christ.

Dated: June 4, 2019

Respectfully Submitted,

/s/ Susan P. Elgin

WILLIAM CREELEY
SAMANTHA HARRIS
MARIEKE TUTHILL BECK-COON
Foundation for Individual Rights in Education
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
(215) 717-3473
marieke@thefire.org

MICHAEL A. GIUDICESSI
SUSAN P. ELGIN
Faegre Baker Daniels LLP
801 Grand Avenue, 33rd Floor
Des Moines, IA 50309-8003
(515) 248-9000
susan.elgin@faegrebd.com

Counsel for Amicus Curiae Foundation for Individual Rights in Education

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

/s/ Susan P. Elgin

Susan P. Elgin
FAEGRE BAKER DANIELS LLP
801 Grand Ave., 33rd Floor
Des Moines, IA 50309-8003
(515) 248-9000

Counsel for Amicus Curiae

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 accomplished by the CM/ECF system:

Eric S. Baxter
Daniel H. Blomberg
Eric C. Rassbach
BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 349-7221

Counsel for Plaintiff-Appellant Business Leaders in Christ

William R. Gustoff
Christopher D. Hagenow
WHITAKER & HAGENOW
400 E. Court Ave., Suite 346
Des Moines, IA 50309
(515) 284-5001

Counsel for Plaintiff-Appellant Business Leaders in Christ

George A. Carroll
ATTORNEY GENERAL'S OFFICE
1305 E. Walnut St.
Hoover Building
Des Moines, IA 50319-0001
(515) 281-8330

Counsel for Defendants-Appellees
The University of Iowa, Lyn Redington,
Thomas R. Baker, and William R. Nelson

Dated: June 4, 2019

/s/ Susan P. Elgin

Susan P. Elgin
FAEGRE BAKER DANIELS LLP
801 Grand Ave., 33rd Floor
Des Moines, IA 50309-8003
(515) 248-9000

Counsel for Amicus Curiae

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Des Moines, IA 50309-8003
(515) 248-9000

Counsel for Amicus Curiae Foundation for Individual Rights in Education

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

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 University of Iowa. The students FIRE defends rely on access to federal courts to secure meaningful and lasting legal remedies to the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* FIRE states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

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.

Summary of Argument

The District Court's grant of qualified immunity seriously threatens the ability of public college and university students to redress constitutional violations and prevent their repetition.

In considering whether University of Iowa administrators violated a clearly established constitutional right by denying official recognition to a student organization because of the group's faith-based leadership criteria, the District Court framed the constitutional question excessively narrowly, looking only at case law concerning the selective application of a nondiscrimination policy in the university context rather than at clearly established First Amendment precedent regarding viewpoint discrimination in a limited public forum. This narrow and fact-specific lens contradicts prior decisions of this Court. For example, in a recent case involving selective application of a trademark policy by administrators at Iowa State University, this Court correctly framed the relevant constitutional question as "whether plaintiffs' right not to be subject to viewpoint discrimination when speaking in a university's limited public forum was clearly established," and denied qualified immunity. *Gerlich v. Leath*, 861 F.3d 697, 708 (8th Cir. 2017).

If allowed to stand, the District Court's decision will erode the expressive rights of students and student organizations by limiting recoveries for viewpoint-based censorship and denials of recognition. The near-impossibility of overcoming

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 students' First Amendment rights.

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*, 360 F. Supp. 3d at 907, the District Court disregarded clear precedent from this Court and the Supreme Court of the United States establishing that university administrators who apply a policy to a student organization in a viewpoint discriminatory manner should not receive qualified immunity.[2] In so doing, the court lost sight of the proverbial forest for the trees.

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[2] *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (denying student activity fee funding to student journal based on religious editorial viewpoint violated First Amendment because the state is forbidden from "exercising viewpoint discrimination, even when the limited public forum is one of its own creation"); *Widmar v. Vincent*, 454 U.S. 263, 269, 277 (1981) (university policy denying use of facilities to religious student organization "violated the

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, 368 (8th Cir. 1988) (denial of funding to student group based on viewpoint violated First Amendment).

free to disregard fairly specific statements of principle they contain and focus their attention solely on the particular factual scenarios in which they arose.") (internal citations omitted).

B. The District Court's Analysis Conflicts with the Precedent of This Court.

Indeed, the District Court's framing of the relevant constitutional question conflicts with this Court's qualified immunity analysis in *Gerlich*, 861 F.3d at 704–709. There, this Court considered whether Iowa State University administrators who applied a university trademark policy in a viewpoint-discriminatory manner—to prevent a student group urging the reform of marijuana laws from using the university's trademark on its t-shirt—were entitled to qualified immunity. To determine whether qualified immunity was appropriate, the Court asked "whether plaintiffs' right not to be subject to viewpoint discrimination when speaking in a university's limited public forum was clearly established." *Id.* at 708.

Although this case posed the same question as *Gerlich* of viewpoint discrimination in a limited public forum, the District Court chose to focus only on cases specifically involving "the selective application of a nondiscrimination policy." Requiring factual similarity at such a granular level all but dictates that qualified immunity attach such that public officials can sidestep accountability for constitutional violations that were predictable and avoidable, thereby tacitly negating the *Gerlich* holding on qualified immunity.

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 educational and social purposes of the forum." *Business Leaders in Christ*, 360 F. Supp. 3d at 899.

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, *amicus* FIRE has 20 years of experience defending students censored for voicing a range of political, artistic, and social messages representing viewpoints as diverse as the United States itself.

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

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[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, *SGA votes against recognizing controversial Young Americans for Liberty group*, SUNFLOWER (Apr. 6, 2017), https://thesunflower.com/16806/news/student-government-association/sga-votes-against-recognizing-controversial-young-americans-for-liberty-group. After intervention by *amicus* FIRE, Wichita State administrators appealed the decision, and the group was granted recognition. Mará Rose Williams, *Controversial college group wins right to be active at Wichita State University*, KANSAS CITY STAR (Apr. 14, 2017, 4:25 PM), https://www.kansascity.com/news/local/article144698019.html.

[5] Peter Bonilla, *University Recognizes Young Americans for Freedom: Conservative and Libertarian Groups Were Too 'Similar' to Coexist*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Nov. 30, 2010), https://www.thefire.org/university-recognizes-young-americans-for-freedom-conservative-and-libertarian-groups-were-too-similar-to-coexist-2.

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 refused to recognize a prospective chapter of Students for Justice in Palestine, despite the student government's approval, due to administrative concern that the group's viewpoint contributed to "polarization." Julia Marsh, *Pro-Palestinian club sues Fordham*, N.Y. POST (Apr. 26, 2017, 1:11 PM), https://nypost.com/2017/04/26/pro-palestinian-club-sues-fordham-president. While Fordham is a private university and thus not bound by the First Amendment, it promises expressive rights to students. That promise is now at issue in litigation prompted by the university's refusal to recognize the student organization. Hannan Adely, *Fordham hopes free-speech lawsuit will fade as last plaintiff graduates*, N. JERSEY REC. (May 8, 2019, 12:52 PM), https://www.northjersey.com/story/news/ 2019/05/07/fordham-fights-student-effort-to-join-students-for-justice-in-palestine-sjp-lawsuit/1128059001. In parallel, Williams College's administration was recently forced to take action to recognize the Williams Initiative for Israel, a pro-Israel student organization, after the student government refused to do so, citing concerns about Israel's "oppressive policies." Cnaan Liphshiz, *Williams College Bypasses Student Council's Refusal To Register Pro-Israel Club*, FORWARD (May 17, 2019), https://forward.com/fast-forward/424504/williams-college-israel-student-group.

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. Students and Student Organizations Are Routinely Subjected to Viewpoint-Based Censorship.

Student speakers from both sides of the partisan divide are also regularly targeted for censorship because of their viewpoint. At Joliet Junior College, for example, a student was detained in 2017 by campus police for handing out flyers for the Party of Socialism and Liberation reading "Shut Down Capitalism."[8] An officer told her that given the "political climate of the country," she could not pass out "these types of fliers."[9]

At Dixie State University in Utah in 2015, student members of Young Americans for Liberty were prevented from posting flyers criticizing Cuban revolutionary Che Guevara and former Presidents George W. Bush and Barack

[8] Alicia Fabbre, *Joliet Junior College settles suit over student's claim of First Amendment rights violation*, CHI. TRIB. (Apr. 19, 2018, 8:40 AM), https://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-jjc-lawsuit-0420-story.html. *Amicus* FIRE represented student Ivette Salazar in the lawsuit.
[9] Alicia Fabbre, *Lawsuit: Joliet Junior College workers stopped student from distributing political fliers*, CHI. TRIB. (Jan. 17, 2018, 7:03 PM), https://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-joliet-college-suit-st-0118-20180117-story.html.

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 (Dec. 4, 2018, 3:57 AM), https://www.mercurynews.com/2018/12/03/uc-berkeley-reaches-settlement-with-college-republicans.

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 the First Amendment's prohibition on viewpoint discrimination—and widespread recognition of this prohibition amongst both the general public and public university administrators—the above examples represent the ongoing, widespread problem that *amicus* FIRE archives on its online compendium of instances of viewpoint-based censorship on campus. *See* FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., CASES ARCHIVE, https://www.thefire.org/cases/?limit=all.

And while campus censors often concede their motivating desire to silence a particular message, they just as often deliberately wield facially viewpoint-neutral policies to target unpopular, dissenting, or simply inconvenient speech — as in the case now before this Court. The resulting harm is no different, and the First Amendment's "bedrock principle" — that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" — no less implicated. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "If [it] were not, the First Amendment's guarantees would risk becoming an empty formality, as government could enact regulations on speech written in a content-neutral manner so as to withstand judicial scrutiny, but then proceed to ignore the regulations' content-neutral terms by adopting a content-discriminatory enforcement policy." *Hoye v. City of Oakland*, 653 F.3d 835, 854 (9th Cir. 2011).

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 student populations, whose relatively short time on campus already poses unique challenges in civil rights suits.

The result for current and future students is easy to predict: Administrators will continue to violate student rights and most students will self-censor in response, rather than face a long lawsuit on a dubious road of procedural potholes.

Students are a transient population who frequently have a finite time to seek vindication of their civil rights. Most students at four-year nonprofit colleges

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. OFFICE OF U.S. COURTS, https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2018/12/31-2 (last visited May 28, 2019).

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 inclusion of student-initiated prayer at graduation ceremonies).

[26] *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128 (1975); *Lane v. Simon*, 495 F.3d 1182, 1186–87 (10th Cir. 2007); *Husain v. Springer*, 691 F. Supp. 2d 339, 340–41 (E.D.N.Y. 2009).

[27] *Sapp v. Renfroe*, 511 F.2d 175, 175–76 (5th Cir. 1975) (finding challenge to ROTC guidelines moot after graduation).

[28] *Corder*, 566 F.3d at 1225; *Cole*, 228 F.3d at 1098–99.

[29] *Fox v. Bd. of Trs. of the State Univ.*, 42 F.3d 135, 139 (2d Cir. 1994) (dismissing as moot injunctive and declaratory claims of students prevented from demonstrating cookware in their dorms as part of sales pitch).

[30] *See, e.g., Jacobs*, 420 U. S. at 128; *Adler*, 112 F.3d at 1478; *Cole*, 228 F.3d at 1098–99; *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999); *Ceniceros v. Bd. of Trs. of the San Diego Unified Sch. Dist.*, 106 F.3d 878, 879 n.1 (9th Cir. 1997).

[31] *See, e.g., Lane*, 495 F.3d at 1186–87; *Fox*, 42 F.3d at 139; *Husain*, 691 F. Supp. 2d at 341–43.

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 balm to the leaders of Business Leaders in Christ who have already graduated. Second, as described above, it narrows the range of viable damages claims so severely that only the most strikingly obvious constitutional violations by the most incompetent or malicious actors could survive.

In this case, the grant of qualified immunity meant that the university officials named as defendants evaded nominal damages claims despite the District Court's recognition of clear precedent establishing the legal framework to understand the student First Amendment rights at issue. And as the examples above highlight, the District Court's analysis would inoculate administrative censorship of unpopular, dissenting, or simply inconvenient speech in any number of contexts and campuses.

Because student civil rights lawsuits present inherent deterrents — including the dilemma of challenging collegiate authorities with power over a student's academic career and future prospects — and legal hurdles outside of a plaintiff's control, most students will, understandably, be discouraged from pursuing vindication of their rights in court. The further removal of effective, salutary remedies compounds this difficulty and will encourage constitutional violations to go unaddressed.

Therefore, the qualified immunity decision under review is not only error on the merits, it establishes bad public policy. By shrinking the circumstances that will overcome immunity, it provides incentives for university actors to ignore (or, at best, fail to consider) the law and seek the most convenient solution for the immediate situation.

This pernicious outcome must be viewed in the context of other strong incentives leading to the same result in student civil rights cases. This Court should overturn the District Court's ruling and hold that the law was clearly established at the time the defendant university officials violated Business Leaders in Christ's First Amendment rights.

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.

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Respectfully Submitted,

/s/ Susan P. Elgin

WILLIAM CREELEY
SAMANTHA HARRIS
MARIEKE TUTHILL BECK-COON
Foundation for Individual Rights in Education
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
(215) 717-3473
marieke@thefire.org

MICHAEL A. GIUDICESSI
SUSAN P. ELGIN
Faegre Baker Daniels LLP
801 Grand Avenue, 33rd Floor
Des Moines, IA 50309-8003
(515) 248-9000
susan.elgin@faegrebd.com

Counsel for Amicus Curiae Foundation for Individual Rights in Education

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I certify that on June 4, 2019, I electronically filed the foregoing with the Clerk of the 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/ Susan P. Elgin
Susan P. Elgin

Counsel for Amicus Curiae Foundation for Individual Rights in Education

Certification 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 4,534 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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/s/ Susan P. Elgin
Susan P. Elgin

Counsel for Amicus Curiae
Foundation for Individual Rights in Education