UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

TAYAH LACKIE, Plaintiff, v. MINNESOTA STATE UNIVERSITY STUDENT ASSOCIATION, INC. D/B/A STUDENTS UNITED; ST. CLOUD STATE UNIVERSITY; ROBBYN R. WACKER, in her personal and official capacity as President of ST. CLOUD STATE UNIVERSITY; and LARRY LEE, in his personal and official capacity as Vice President for Finance and Administration at ST. CLOUD STATE UNIVERSITY, Defendants.	Court File No. 0:24-cv-01684 (JWB/LIB) **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

It is "a cardinal constitutional command" that individuals are not forced "to mouth support for views they find objectionable." *Janus v. AFSCME, Council 31*, 585 U.S. 878, 892 (2018). Plaintiff Tayah Lackie objects to the views expressed by Students United, but St. Cloud State University, President Robbyn R. Wacker, and Vice President for Finance and Administration Larry Lee ("State Defendants") forced her to join Students United and pay them dues anyway if she wanted to complete her education.

In their motion to dismiss, State Defendants make no argument that their extraction of fees on behalf of Students United was somehow constitutional. Instead, Defendants hide behind immunity doctrines. State Defendants' dodge works for sovereign immunity, though the doctrine should be revisited in circumstances like these, which Lackie explains further below.

Qualified immunity, however, is a different story. The Supreme Court's strong words in *Janus* pulled on decades of Supreme Court precedent to clearly establish Lackie's rights against compelled speech and association while at college. Before that, though, the Supreme Court held in 2000 that when a university gives student fees to private, political groups, "it may not prefer some viewpoints to others." *Bd. of Regents v. Southworth*, 529 U.S. 217, 233 (2000). Viewpoint neutrality has been clearly established as the guidepost for the distribution of student fees *for decades*, and named Defendants Wacker and Lee haven't even tried to be neutral. Instead, they were personally involved in collecting mandatory fees from Lackie and giving them to Students United, a group that is anything but neutral. Such a system flies in the face of decades of Supreme Court precedent—a conclusion the named Defendants reasonably should have drawn.

STATEMENT OF FACTS

I. State Defendants Force Students to Join and Pay Fees to Students United, a Private Nonprofit Advocacy Group.

Like many college students across the country, students attending one of the Minnesota State Colleges and Universities ("MNSCU") pay student fees. Unlike most "regular student[s]," State Defendants' Br. at 2, however, every MNSCU student must also "be members of"—and pay dues to—a controversial advocacy group. Minn. Stat. § 136F.22, subd. 1; *see* Minn. State Bd. Pol'y 3.7(1).

Some of this is required by state law. Some is not. Every student who attends a university in the Minnesota State system is required to "be [a] member[] of" the "one statewide student association" designated by the Board of Trustees of the Minnesota State Colleges and Universities (the "Board"). Minn. Stat. § 136F.22, subd. 1. The statewide association "set[s] its fees to be collected by the Board." *Id.* § 136F.22, subd. 2. Each university, like St. Cloud State, then collects the fees. *Id.*

The Board designated Students United as the "statewide association" all students must join and pay. Compl. ¶ 19; Minn. State Bd. Pol'y 3.7(1). The Board determined that fees come from every student "for each enrolled credit by each college and university," which "must be credited to [Students United's] account to be spent as determined by [Students United]." Compl. ¶ 20; Minn. State Bd. Pol'y 3.7(3). State Defendants collect 80 cents per credit from

students on behalf of Defendant Students United, and Students United jointly works with the state to assess and collect those fees. Compl. ¶ 21.[1]

Students, like Plaintiff Tayah Lackie, have no option to dissociate from membership. Compl. ¶ 45. Indeed, "any person enrolled from credit" at St. Cloud State is forced to be part of the campus student association,[2] which is "affiliated with its statewide student association"—Students United. Minn. Stat. § 136F.22, subd. 1; *see* Minn. State Bd. Pol'y 3.7(2). Elections are of no consequence either. Students at St. Cloud State elect a student government as the "representative body of the [campus] Student Association."[3] State Defendants' Br. at 4. But no matter what, students remain members of Students United, as long as it remains the *statewide* student association.[4]

II. Students United Uses Students' Mandatory Dues for Political Advocacy on Controversial Matters of Public Concern.

The Board could have chosen to recognize any group as its statewide student association. In fact, Minnesota law suggests that the Board should *not*

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[1] For a description of how Students United works jointly with the state to assess and collect the fees, see Ms. Lackie's memorandum of law opposing Students United's motion to dismiss.

[2] Student Government Constitution, art. I, St. Cloud State Univ., https://www.stcloudstate.edu/studentgovernment/governing-documentation/student-association.aspx.

[3] *Id.*, art. II, https://www.stcloudstate.edu/studentgovernment/governing-documentation/student-government.aspx.

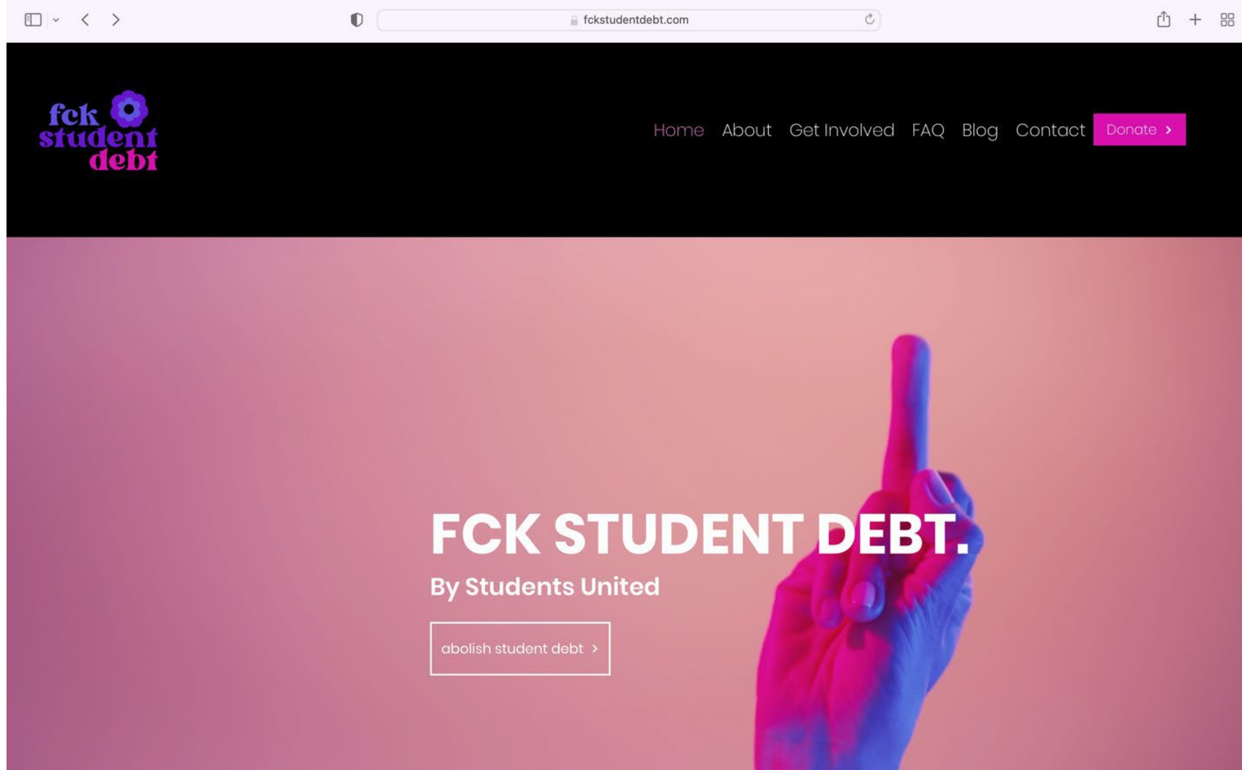
[4] *Id.*, art. I(E).

pick a lobbying organization: the statewide association can only exercise state purchasing authority if it is a nonprofit 501(c)(3) organization. Minn. Stat. § 136F.23.

Students United may claim to be a 501(c)(3) nonprofit,[5] but it devotes substantial resources to lobbying and political advocacy. For example, Students United has aggressively advocated for the abolition of student loan debt. Compl. ¶ 24. It owns (or owned) a webpage called "Fck Student Debt," as shown below.[6] *Id.*

[5] *Who is Students United*, Students United, https://www.studentsunited.org/about (accessed Aug. 5, 2024).

[6] The website is currently unavailable. The website as it appeared on October 30, 2023 is archived at https://web.archive.org/web/20231030204430/https://www.fckstudentdebt.com/.



This webpage was a "special project by Students United to eliminate all of the student loan debt created by higher education institutions in the state of Minnesota and to push federal legislators to cancel student loan debt."[7] *Id.* ¶ 25. Through this initiative, Students United pushed for "big government policy changes" and "increased federal funding for public universities." *Id.* Students United also created an "X" account for the "Fck Student Debt" initiative. *Id.* ¶¶ 26–29. One such tweet, posted on March 27, 2024, is shown below. *Id.* ¶ 29.

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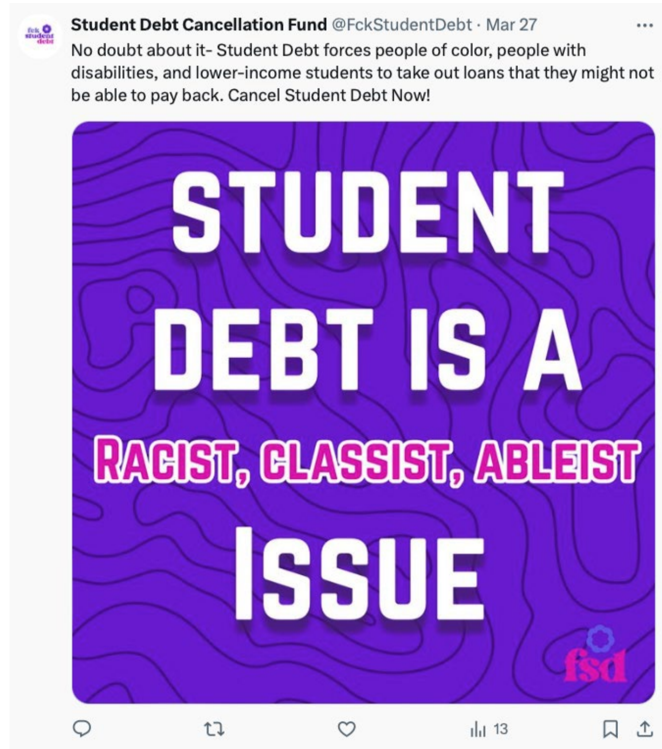
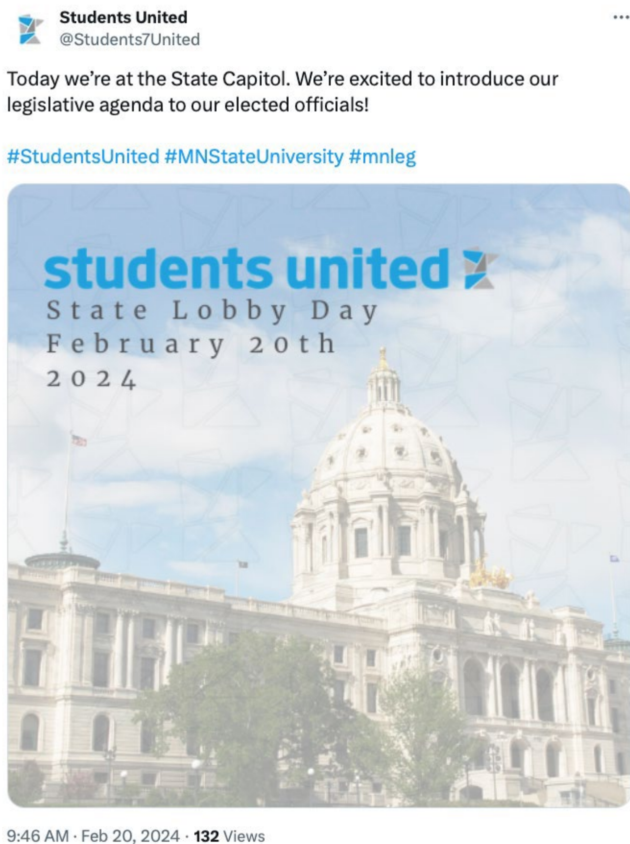
[7] *About*, Fck Student Debt, archived as it appeared on October 30, 2023, at https://web.archive.org/web/20230926200303/https://www.fckstudentdebt.com/about.



And there is more. Students United also lobbies directly at the state and federal level. As part of its advocacy, Students United drafted a 2024 state and federal legislative agenda and sent Students United "student leaders" to Washington, D.C. and the Minnesota Capitol to push them, as advertised on Students United's "X" account. *Id.* ¶¶ 30–33.



The federal legislative agenda urged Congress to pass specific pieces of legislation such as "The Enhance Access to SNAP (EATS) Act of 2023," which would "expand access to SNAP for students enrolled in college part-time or more," the "Freedom to Vote Act," which would substantially change federal election laws, and "The Enhancing Mental Health and Suicide Prevention Through Campus Planning Act."[8] *Id.* ¶ 31. Likewise, Student United's statewide legislative agenda called on legislators to expand SNAP benefits for

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[8] *Students United Federal Legislative Agenda 2024*, https://static1.squarespace.com/static/574e037a1bbee008cb2da343/t/65dcea4f3dd7f0012b1e587d/1708976721816/Federal+Legislative+Agenda+Webfile.pdf (accessed Aug. 5, 2024).

students, expand Minnesota's "Student Borrower Bill of Rights" to include an "individual right of action," "clarify Minnesota's student loan Ombudsperson's market monitoring authority," and push for "universal FAFSA completion" by high school students.[9] *Id.* ¶ 33.

This year's lobbying is by no means an exhaustive list of Students United's advocacy work. *Id.* ¶ 34. The organization identifies itself as "the inclusive voice for all future, current, and former students," and "actively work[s] to represent and support Minnesota State University students and advocate at a local, system, state, and federal level."[10] *Id.* ¶ 35. Political advocacy is Students United's core purpose and pervades all its work. *Id.* Indeed, 36% of Students United's budget—the largest budget category—goes towards "Student Advocacy" "at the Minnesota State Colleges and University system, state government, and federal government levels."[11]

This political speech was primarily funded through mandatory student fees, which accounted for 76% of Students United's funding in 2024. *Id.* ¶ 36. The

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[9] *Students United State Legislative Agenda 2024*, https://static1.squarespace.com/static/574e037a1bbee008cb2da343/t/65c6b29bc5a8bc45238a58c1/1707520669729/State+Legislative+Agenda+Webfile.pdf (accessed Aug. 5, 2024).

[10] *Who is Students United*, Students United, https://www.studentsunited.org/about (accessed Aug. 5, 2024).

[11] *Students United Budget*, Students United, https://www.studentsunited.org/budget (accessed Aug. 5, 2024).

grand total: nearly a million dollars.[12] And Students United takes that money—money it took from students—and spends more of it on political action than anything else.

III. Tayah Lackie was Forced to Join and Support Students United by Defendants.

If Students United were funded like most 501(c)(3) nonprofit organizations, Lackie would not have donated. *Id.* ¶ 47. Lackie began attending St. Cloud State in the Fall of 2021 as a high-school student through the state's Postsecondary Enrollment Options ("PSEO") program. *Id.* ¶ 37. After she graduated from high school, she completed her education at St. Cloud State in the 2023-2024 school year, while working part-time to pay for her classes. *Id.* ¶¶ 38–40. The hard work paid off: Lackie did not incur any student loan debt. *Id.* ¶ 40.

Shortly before graduating, Lackie learned that, despite working hard to avoid incurring her own student debt, she had also been working hard to pay Students United to advocate for the cancellation of the student loans others had incurred. *Id.* ¶¶ 47–48. Lackie was forced to pay $9.60 to Students United for the Fall 2023 semester and $12.00 for the Spring 2024 semester. *Id.* ¶ 41. That was money Lackie worked for and earned to pay for her education, not political advocacy. *Id.* ¶ 48.

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[12] *Id.*

These fees showed up on her school account statements, but Lackie did not know, and she was never told, that she was paying Students United, rather than her college. *Id.* ¶¶ 42–43. Lackie never signed an agreement with Students United to join up and pay. *Id.* ¶ 44. Instead, State Defendants just sent her a bill. *Id.* Opting out was never an option for Lackie, or any student at St. Cloud State. *Id.* ¶¶ 45–46.

Lackie did not want to fund *any* political speech in order to attend St. Cloud State. *Id.* ¶ 49. She especially objects to being forced to give her hard earned money—money she earned to pay for college—to Students United to advocate for the elimination of student loan debt, along with other political causes she disagrees with. *Id.* ¶¶ 47–48. If State Defendants had not enforced the Board's policy against her, Lackie would not have given Students United a dime. *Id.* ¶ 50.

IV. Procedural History

Lackie sued State Defendants and Students United on May 9, 2024, alleging that they violated her First Amendment rights by requiring her to pay and join Students United in order to attend St. Cloud State, and that Students United was unjustly enriched by its acceptance of her mandatory fees. State Defendants and Students United filed separate motions to dismiss on July 15, 2024.

ARGUMENT

"[T]he principal standard of protection for objecting students" from the provision of mandatory student fees to groups that engage in political speech, "is the requirement of viewpoint neutrality in the allocation of funding support." *Southworth*, 529 U.S. at 233. As a university and its administrators, State Defendants should have become familiar with *Southworth* at some point in the 24 years since the Supreme Court issued the decision. That decision, along with the Supreme Court's robust jurisprudence condemning compelled speech and association, should have put the named Defendants on notice that they were violating the First Amendment every time they charged a student for membership in Students United as a condition of enrollment. Their decision to ignore that precedent and keep collecting mandatory student fees on behalf of Students United, without any protection for objecting students like Lackie, is not entitled to the protection of qualified immunity. Moreover, Defendants were personally involved in implementing that policy, making them liable under Section 1983.

As for sovereign immunity, Plaintiff does not contest that, now that the defense of sovereign immunity has been asserted, her claims against St. Cloud State and the official-capacity Defendants can be dismissed. But Plaintiff believes that the doctrine should be revisited in circumstances like these and preserves those arguments for potential appeal to the U.S. Supreme Court.

I. Legal Standard

State Defendants move to dismiss Lackie's claims against Saint Cloud State and the official capacity defendants under Federal Rule of Civil Procedure 12(b)(1), and her claims against the individual capacity defendants under Rule 12(b)(6).

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges a court's subject-matter jurisdiction." *Two Eagle v. United States*, 57 F.4th 616, 620 (8th Cir. 2023). State Defendants make a "facial attack" under Rule 12(b)(1), so this Court "consider[s] only the materials that are 'necessarily embraced by the pleadings and exhibits attached to the complaint.'" *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016) (quoting *Cox v. Mortgage Elec. Registration Sys., Inc.*, 685 F.3d 663, 668 (8th Cir. 2012)). In a facial attack, "the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Id.* (quoting *Osborn v. United States*, 918 F.2d. 724, 729 n.6 (8th Cir. 1990)).

For a motion to dismiss under Rule 12(b)(6), the Court must assume the truth of the Complaint's allegations and make all reasonable inferences in Lackie's favor. *Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 730 (8th Cir. 2015). The Court may only grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) if the Complaint, taken as a whole, lacks "sufficient factual

matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim only lacks "facial plausibility" when the plaintiff fails to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[B]ecause qualified immunity is an affirmative defense," this Court may only grant a motion to dismiss based on qualified immunity "when the immunity is established on the face of the complaint." *Watkins v. City of St. Louis*, 102 F.4th 947, 951 (8th Cir. 2024) (quoting *Weaver v. Clarke*, 45 F.3d 1253, 1255 (8th Cir. 1995)).

II. Qualified Immunity Does Not Shield the Individual-Capacity Defendants.

"Qualified immunity shields public officials from liability for civil damages if their conduct did not 'violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Watkins*, 102 F.4th at 951 (quoting *Dillard v. O'Kelley*, 961 F.3d 1048, 1052 (8th Cir. 2020) (en banc)). If Defendants have qualified immunity, it must be apparent "on the face of the complaint." *Id.* (quoting *Weaver*, 45 F.3d at 1255). To overcome the defense of qualified immunity, Lackie need only "plead facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Id.* (quoting

Dillard, 961 F.3d at 1052). There does not need to be "a case directly on point for a right to be clearly established," but "existing precedent must have placed the statutory or constitutional question beyond debate." *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 980 (8th Cir. 2021) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam)).

Lackie has plainly done so here; it is "beyond debate" that public universities may not force students to subsidize a single viewpoint as a condition of enrollment. But Defendants sidestep Lackie's clear allegations of constitutional violation and claim that they were free to disregard Lackie's First Amendment rights because of Minnesota law.

Defendants' single case citation in support of that point does not mean as much. Defendants' position also casts aside the Eighth Circuit's warning that there need not be "a case directly on point" to provide "fair notice" of unconstitutional behavior. *Id.* Given the Supreme Court's clear jurisprudence on compelled speech and association and *Southworth's* requirement of viewpoint neutrality for student fees, the named Defendants reasonably should have known that forcing students to pay a political organization as a condition of their enrollment violates the First Amendment. Moreover, Lackie has alleged that the named Defendants were personally involved in enforcing that unconstitutional policy.

Finally, "[q]ualified immunity insulates a defendant from all claims for legal damages, but it does not shield a defendant from claims for equitable relief." *Hopkins v. Saunders*, 199 F.3d 968, 976–77 (8th Cir. 1999). Because Lackie seeks disgorgement of fees wrongfully taken from her, she seeks equitable relief, and qualified immunity does not apply.

A. Defendants violated Lackie's clearly established right not to be compelled to support a political organization unless her student fees were distributed in a viewpoint neutral manner.

For decades, the Supreme Court has been clear: "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 585 U.S. at 892 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in political, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). As a result, government schools cannot "compel[] the flag salute and pledge," *see id.* at 642, and states cannot, for example, force newspapers to publish the replies of political candidates whom they criticized, *see Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974), force citizens to express government messages on private property, *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), or force private

associations to admit members, *see Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984).

Defendants' collection of fees for Students United "[c]ompel[s] individuals"—like Lackie—"to mouth support for views they find objectionable" and therefore "violates that cardinal constitutional command." *Janus*, 585 U.S. at 892.

Indeed, similar programs requiring university students to fund political groups have not fared well in the courts—for years. In 1985, the Third Circuit Court of Appeals struck down a nearly identical program in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985). There, Rutgers University imposed a mandatory fee on students to support an independent organization called the New Jersey Public Interest Research Group ("PIRG"). *Id.* at 1061. The group was an "independent, non-profit corporation, controlled by a board of student representatives at the state-wide level." *Id.* And although the group claimed to be "politically nonpartisan," it "participate[d] in state legislative matters and actively engage[d] in research, lobbying, and advocacy for social change." *Id.* PIRG lobbied for a number of measures including "a federal student assistance act, the Equal Rights Amendment, a nuclear weapons freeze, and the enactment of the Pine Lands Preservation Act." *Id.* It was funded under an innocent-sounding "neutral funding policy" by which 25% plus one of the student body could vote to fund PIRG, resulting in a mandatory fee of $3.50

from each student. *Id.* at 1061–62. And if a student did not want to pay PIRG, they could request a refund. *Id.* at 1062.

The question in the case was "whether a state university may compel students to pay a specified sum, albeit refundable, to an independent outside organization that espouses and actively promotes a political and ideological philosophy which they oppose and do not wish to support." *Id.* at 1064. And the answer was obviously "no." As the Third Circuit explained, this was not the case where the University collects student fees for an activity fund where "all student groups on campus are free to compete for a fair share." *Id.* at 1067. The University's funding of PIRG was not "neutral and d[id] not achieve equal access." *Id.* Instead, it allowed "an outside organization independent of a university and dedicated to advancing one position" to extract "compelled contributions from those who are opposed." *Id.* There was no compelling state interest to "justify overriding the plaintiffs' First Amendment rights." *Id.* at 1068.

Notably, in so holding, the Third Circuit drew upon decades of Supreme Court precedent outlawing forced political subsidies from public employees to public-sector unions. *Id.* at 1063 (citing *Int'l Assoc. of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)). Even *Abood*—which the Supreme Court overruled in *Janus* on grounds that *strengthened* employee First Amendment

rights against union-driven compulsion, *Janus*, 585 U.S. at 885–86—held that employees could prevent unions from spending agency fees to "contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representatives." *Abood*, 431 U.S. at 234. In other words, the Supreme Court's protection against compelled speech and association has only gotten *stronger* since the Third Circuit declared that Rutgers was violating students' First Amendment rights.

Since *Galda*, most universities have been more careful. Political speech is usually funded at universities to "facilitate extracurricular student speech" and "further its educational mission." *Southworth*, 529 U.S. at 221. Such schemes are only permissible, consistent with the First Amendment, "if the program is viewpoint neutral." *Id.* at 221. At bottom, "[w]hen a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others." *Id.* at 233. In *Southworth*, some of the student fees were allocated in a viewpoint-neutral manner, and that "neutrality [wa]s the justification for requiring the student to pay the fee in the first instance." *Id.* Another aspect of the funding scheme, however, was suspect because it allowed student groups to be funded or defunded based on a majority vote of the student body. *Id.* at 235. As the Supreme Court explained, "[t]he whole theory of viewpoint neutrality is that minority views are treated with the same respect

as are majority views." *Id.* So the Court remanded for further factual development.

On remand, the Seventh Circuit explained that the students challenging the fees had standing "because they have paid mandatory student fees, and under the Supreme Court's decision in *Southworth*, they are entitled to the protection of viewpoint neutrality." *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566, 595 (7th Cir. 2002). The court then held that most of the University's funding criteria were viewpoint neutral and contained sufficient procedural protections for students. *Id.* The funding of travel grants, however, gave the University nearly unbridled discretion. *Id.* Until the university adopted governing standards to enforce viewpoint neutrality, it "c[ould]not use the mandatory student activity fees of objecting students to fund the travel of groups engaged in political, religious or ideological activities or speech." *Id.*

Controlling U.S. Supreme Court precedent against compelled association and speech and requiring viewpoint neutrality have been clearly established for decades. The First Amendment clearly forbids the government from forcing anyone to join a political association or financially support another's political speech. *Southworth* has been around since 2000. *Abood* was decided in 1977, and *Galda* applied *Abood's* prohibition on forced political expression as a condition of government employment to the student-association context in

1985. *Janus* strengthened that prohibition in 2018 and expressly held that forced subsidy of a union, even if not directly tied to a specific political position, was constitutionally untenable in large part because money is fungible and differentiating between political and non-political spending is impossible. 585 U.S. at 921 ("Abood's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision.").

In sum, it is beyond debate that universities may only dole out mandatory student fees to political associations if they do so in a viewpoint-neutral way.

Since then, the Eighth Circuit has struck down departures from neutrality in the allocation of student fees. *See, e.g.*, *Gay & Lesbian Students Assoc. v. Gohn*, 850 F.2d 361, 368 (8th Cir. 1988) (holding that a student club could not be denied funding because of a disagreement with the group's speech); *Bus. Leaders in Christ*, 991 F.3d at 971, 986 (denying qualified immunity after university engaged in viewpoint discrimination and denied registered student organization status to a student group, therefore preventing it from receiving student fee funding); *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 859, 867 (8th Cir. 2021) (denying qualified immunity after university discriminated against a religious student group). So have other courts. *See, e.g.*, *Amidon v. Student Ass'n*, 508 F.3d 94, 105 (2d Cir. 2007) (holding that university referendum process by which student groups were

funded based on student-government or student-body vote "fail[ed] to provide the protection of viewpoint neutrality the constitution requires").

The funding scheme at issue in this case does not just depart from neutrality; it throws neutrality out the window. Lackie, along with every student at St. Cloud State, is required to be a member of, and pay dues to, Students United. Compl. ¶ 16. There is no neutral funding mechanism by which a portion of student fees are sent to Students United in a viewpoint-neutral manner in order to promote education and discussion on campus. Instead, the individual-capacity Defendants collected dues from Lackie with the *sole purpose* of funding Students United, and those fees went directly to Students United's account. *Id.* ¶¶ 14–15, 21.

It is "beyond debate" that universities cannot extract student fees and give them to their preferred organizations based on that organization's viewpoint. *Bus. Leaders in Christ*, 991 F.3d at 980 (quoting *Kisela*, 138 S. Ct. at 1152). Once Defendants deducted student fees to give them to a private organization, Lackie and other students were "entitled to the protection of viewpoint neutrality." *Southworth*, 307 F.3d at 595. Defendants' failure to even attempt neutrality obviously violated clearly established law.

And while qualified immunity serves to give government officials "breathing room to make reasonable but mistaken judgments," there is no justification to giving "university officers, who have time to make calculated

choices about enacting or enforcing unconstitutional policies . . . the same protection as a police officer who makes a split-second decision." *Intervarsity Christian Fellowship*, 5 F.4th at 867 (first quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011), and then quoting *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting the denial of certiorari)).

Defendants had "fair notice" that their collection of fees for Students United violated the First Amendment. They "turned a blind eye to decades of First Amendment jurisprudence or they proceeded full speed ahead knowing they were violating the law. Either way, qualified immunity provides no safe haven." *Id.*

B. Defendants' single case citation does not establish their entitlement to qualified immunity.

Defendants make no argument that Lackie's First Amendment rights were not violated. Nor could they. Instead, Defendants cite *Ness v. City of Bloomington*, 11 F.4th 914, 921 (8th Cir. 2021), for the proposition that "reliance on a state statute that has not been declared unconstitutional is generally a paradigmatic example of reasonableness that entitles an officer to qualified immunity." In *Ness*, officers relied on Minnesota's harassment statute to warn an individual that she could be arrested for harassment if she continued to videotape children in a park. *Id.* at 921. The Eighth Circuit held that the officers would not have reasonably believed they violated clearly

established law by enforcing the harassment statute. *Id.* The reason: "[t]he alleged flaws in the 2019 harassment statute [were] not so 'gross' and 'flagrant' that no reasonable police officer could have believed that it was constitutional." *Id.*

The brief analysis in *Ness* did not—nor could it—stand for the proposition that government officials get a blank check to violate constitutional rights as long as there is a statute on the books. If that were the case, Section 1983 would be a dead letter. Legislators get legislative immunity, *see Roach v. Stouffer*, 560 F.3d 860, 870 (8th Cir. 2009), so oftentimes the only way to root out unconstitutional laws is to hold those who execute them accountable, *see Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[A]s historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority."). Instead, the key question in determining whether qualified immunity applies is whether "every reasonable official would understand that what he is doing is unlawful." *Ness*, 11 F.4th at 921 (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018)).

True, relying on a state statute *can be* an indication that *officers* reasonably did not understand as much. *See id.* But if a law is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see

its flaws," then government officials' reliance on a statute is not reasonable. *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979); *see also Coates v. Powell*, 639 F.3d 471 (8th Cir. 2011) (explaining that officers will not be entitled to qualified immunity when "the statute is 'obviously' unconstitutional" and that "reli[ance] on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question' is a relevant factor in considering the objective reasonableness of a state official's action" (first quoting *Humphries v. Cnty. of Los Angeles*, 554 F.3d 1170, 1202 (9th Cir. 2009), and then quoting *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251–52 (10th Cir. 2003))). Indeed, as the Tenth Circuit explained in *Roska*, "the presence of a statute is <u>not</u> relevant to the question of whether the law is 'clearly established.'" 328 F.3d at 1252–53. "Rather, a state officer's reliance on a statute is one factor to consider in determining whether the officer's actions were objectively reasonable . . . keeping in mind that the overarching inquiry is one of 'fair notice.'" *Id.* at 1253 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

Further, in *Ness*, the *police officers* enforcing the law were just that: *police officers*. They had to decide how to apply Minnesota and Bloomington law to someone actively videotaping children playing during recess at a Bloomington park, which they were concerned was a violation of an anti-harassment law. 11 F.4th at 918–19. The *Ness* Court specifically noted that "[p]olice officers are not trained as constitutional lawyers." *Id.* at 921. The "reasonableness" of the

police officers' actions in *Ness* had to be analyzed on a different playing field than the university officials in *Intervarsity Christian Fellowship*, who "have time to make calculated choices about enacting or enforcing unconstitutional policies." 5 F.4th at 867 (quoting *Hoggard*, 141 S. Ct. at 2422 (Thomas, J., respecting the denial of certiorari)). The Eighth Circuit clearly distinguished cases like *Ness* from cases like this one.

In sum, qualified immunity is about "fair warning." *Hope*, 536 U.S. at 740 n.10. And the individual-capacity Defendants have had fair warning since *at least* 2000 that any student fees used to fund political speech needed to be doled out in a viewpoint-neutral way. *See Southworth*, 529 U.S. at 233 ("When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others."). That Minnesota Statute section 136F.22 requires a statewide student association does not forgive ignorance of the clearly established constitutional right against compelled speech and association.

Finally, the reason courts sometimes hold that qualified immunity is appropriate when executive officials are enforcing legislative enactments is because "legislators swear to uphold the state and federal constitutions . . . and a presumption of constitutionality accompanies their enactments . . .—a presumption on which executive officials generally may depend in enforcing the legislature's handiwork." *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437,

441 (6th Cir. 2016). Such a presumption, however, does not apply in this case. It was the Board's decision, not the Minnesota Legislature's, to name Students United—a group engaged in controversial political speech—as the statewide association. There is good reason to believe that the legislature intended the statewide student association to be entirely politically neutral. *See* Minn. Stat. § 136F.23 ("The student associations must be nonprofit 501(c)(3) organizations . . . ."). The individual-capacity Defendants could *not* reasonably assume that the Minnesota legislature concluded that forcing students to associate *with Students United* was constitutional given Students United's substantial lobbying efforts. *See* Facts Section II, *supra*.

Likewise, the Minnesota legislature only required that fees be "collected by each state college and university" but never required that those fees come directly from each student, without an option to opt out. Minn. Stat. § 136F.22, subd. 2. At bottom, the named Defendants reasonably should have known that forcing students to pay a political organization violates the First Amendment. The existence of Minnesota Statute section 136F.22 should not have prevented them from drawing that conclusion.

C. Plaintiff has pled sufficient personal involvement by the named Defendants to subject them to liability at this stage.

"Liability under section 1983 requires a causal link to, and direct responsibility for, the deprivation of rights." *Mayorga v. Missouri*, 442 F.3d

1128, 1132 (8th Cir. 2006) (quoting *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990)); *see also Harris v. Pirch*, 677 F.2d 681, 685 (8th Cir. 1982) ("What is required is a causal connection between the misconduct complained of and the official being sued."). Plaintiff has certainly alleged just that. She has alleged that both named Defendants were responsible for collecting dues and did in fact collect dues from Lackie for Students United. Compl. ¶¶ 14–15. She also received a school account statement with an itemized receipt for Students United. *Id.* ¶ 41. Moreover, this collection of dues *is* a constitutional violation, *id.* ¶ 55, directly carried out by the named Defendants. The causal connection could not be any clearer: but for Defendants' actions, Lackie never would have paid Students United.

Defendants' citations in their argument to the contrary are beside the point. *Jackson v. Nixon*, 747 F.3d 537, 545 (8th Cir. 2014), is about a warden's liability for its *supervisory authority* over a prison. It is true that Section 1983 does not impose liability under the doctrine of respondeat superior. *Id.* at 543. But Lackie does not allege that the named Defendants are responsible for *crafting* the policy that compelled her to subsidize and associate with Students United. Instead, named Defendants, even when supervising a department, can be liable if they had "direct involvement . . . in the formation, implementation, *or enforcement* of that policy." *Id.* at 545 (emphasis added). Lackie has alleged

just that, Compl. ¶¶ 14–15, and cannot be expected to do any more at this stage of the case.

Likewise, in *Norgren v. Minnesota Department of Human Services*, 96 F.4th 1048, 1052 (8th Cir. 2024), plaintiffs sued the Commissioner of the Department of Human Services for First Amendment retaliation and compelled speech after they objected to controversial employee trainings. One plaintiff's retaliation claim against the Commissioner failed because he did not plead that she was personally involved in or "implemented" a policy that led to adverse employment action. *Id.* at 1057. As to the compelled speech claims, the court stated that sufficient personal involvement could be shown if the plaintiffs pled that the Commissioner was involved "in creating and implementing the trainings policy." *Id.* That is exactly what Lackie *has* pled here. The collection of dues was unconstitutional and named Defendants implemented the dues-collection policy by "collect[ing] dues from Plaintiff for Students United." Compl. ¶¶ 14–15.

Lackie's allegations about the named Defendants' responsibility for enforcing the dues-collection policy is not speculative. *See Pope v. Fed. Home Loan Mortg. Corp.*, 561 Fed. App'x 569 (8th Cir. 2014) (unpublished) ("'[I]nformation and belief' does not mean pure speculation." (quoting *Menard v. CSX*, 698 F.3d 40, 44 (1st Cir. 2012)). Student tuition bills, which included fees to Students United, Compl. ¶ 41, are administered by Business Services

at St. Cloud State.[13] And Business Services is part of the Finance and Administration Department at the University, headed by the Dean of Finance and Administration.[14] Defendants do not dispute that, when Lackie was a student, Defendant Lee was in charge of the department that billed her for, and collected, dues for Students United.

Moreover, the President of St. Cloud State University is "the Chief executive officer of the college or university," and as part of her duties, must "adher[e] to board policies and system procedures," including the collection of dues on behalf of Students United. Minn. State Bd. Pol'y 4.2(1). Again, Defendants do not dispute that, when Lackie was a student, Defendant Wacker was in charge of adhering to the Board's policy of collecting compelled student fees for Students United. Minn. State Bd. Pol'y 3.7.

In sum, Lackie has certainly alleged that the named Defendants had sufficient personal involvement in the enforcement of the Board's policy, sufficient to survive Defendants motion to dismiss.

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[13] *See Business Services*, St. Cloud State Univ., https://www.stcloudstate.edu/businessservices/default.aspx (accessed Aug. 5, 2024).

[14] *See Leadership and Organizational Chart*, St. Cloud State Univ., https://www.stcloudstate.edu/president/org-chart.aspx (accessed Aug. 5, 2024).

D. Qualified immunity does not apply to Lackie's demands for equitable relief, including the disgorgement of unconstitutionally taken fees.

Finally, "[q]ualified immunity insulates a defendant from all claims for legal damages, but it does not shield a defendant from claims for equitable relief." *Hopkins*, 199 F.3d at 976–77. In *Hopkins*, the Eighth Circuit held that claims for nominal damages were legal in nature, and so were barred by immunity based on the facts of that case, which are not applicable here. But the Court held that "a monetary award may be an equitable remedy if the award is 'restitutionary' in nature, 'such as in actions for disgorgement of improper profits.'" *Id.* at 977 (quoting *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990)).

In sum, claims for equitable relief are not barred by qualified immunity under *Hopkins*. *Id.*; *see ACLU of Minn. v. Tarek ibn Ziyad Acad.*, No. 09-cv-138, 2010 U.S. Dist. LEXIS 44818, at *5–6, 12 (D. Minn. May 7, 2010) (applying *Hopkins* in a case where Plaintiff sought return of state funds received by a charter school in violation of the Establishment Clause, and holding that "qualified immunity does not apply to the Individual Defendants"); *Wilhoite v. Mo. Dep't of Soc. Servs.*, No. 2:10-CV-03026, 2011 U.S. Dist. LEXIS 77150, at *39 (W.D. Mo. July 15, 2011) ("However, to the extent that Plaintiffs are simply asking for a return of their allegedly improperly-taken money . . . qualified immunity is not available."); *accord Curtiss v. Benson*, 583 Fed. App'x 598, 599

(8th Cir. 2014). Lackie seeks disgorgement of fees wrongfully taken from her by the State Defendants and Students United, so she seeks equitable relief.

III. The Eighth Circuit and Supreme Court Should Revisit Sovereign Immunity Doctrine as it Applies to Section 1983.

Sovereign immunity must be asserted, *see United States v. Metro. St. Louis Sewer Dist.*, 578 F.3d 722, 725 (8th Cir. 2009), and State Defendants have done so here. And because of that and the facts of this case, Lackie must concede that current sovereign-immunity and Section-1983 precedent require this Court to dismiss her claims against Saint Cloud State University. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989); *Portz v. St. Cloud State Univ.*, 297 F. Supp. 3d 929, 938 (D. Minn. 2018) ("Eleventh Amendment immunity extends to SCSU because it is an instrumentality of the state.").

Likewise, Lackie concedes that, under current law, the Court can dismiss the official-capacity Defendants. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Raymond v. Bd. of Regents of the Univ. of Minn.*, 140 F. Supp. 3d 807, 813–14 (D. Minn. 2015). Lackie also does not contest that the *Ex parte Young* exception does not apply to this case because she only seeks retrospective relief, and *Ex parte Young* only applies to claims for prospective relief.

However, to be clear, Lackie also seeks nominal damages for her past constitutional injuries against the State Defendants, for which she has standing and a cause of action under Section 1983, as the Supreme Court

recently held. *Uzuegbunam v. Preczewski*, 592 U.S. 279, 290 (2021) ("When a right is violated, that violation 'imports damage in the nature of it' and 'the party injured is entitled to a verdict for nominal damages.'" (internal citations omitted)). And while the Eighth Circuit has held that a claim for nominal damages can be barred by sovereign immunity, that decision is incongruous in several respects with the Supreme Court finding standing under Section 1983 in *Uzuegbunam*. *Compare id.* at 290–91, *with Justice Network, Inc. v. Craighead Cnty.*, 931 F.3d 753, 764 (8th Cir. 2019) ("A declaratory judgment is meant to define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act. . . . retrospective declaratory relief cannot be granted as the Eleventh Amendment does not permit judgments against state officers declaring that they violated federal law in the past." (cleaned up)).

That said, while the intervening Supreme Court decision in *Uzuegbunam* calls into question the validity of *Justice Network's* holding vis-à-vis sovereign immunity and past declaratory relief, the Court must follow the Eighth Circuit—for now. *See United States v. Cavanaugh*, 643 F.3d 592, 606 (8th Cir. 2011). Lackie preserves her right to present this apparent contradiction to the Eighth Circuit or Supreme Court in any possible appeal.

As for the remainder of the sovereign immunity issues, at least one thing is clear: Congress can abrogate a state's sovereign immunity. *Fitzpatrick v.*

Bitzer, 427 U.S. 445, 456 (1976). And it did just that in Section 1983. The Supreme Court has held differently, but Section 1983 was enacted pursuant to the Fourteenth Amendment, whose prohibitions "are directed to the States." *Quern v. Jordan*, 440 U.S. 332, 355 (1979) (Brennan, J., concurring) (quoting *Ex parte Virginia*, 100 U.S. 339, 346–47 (1800)). The logical conclusion is that Section 1983, "in effectuating the provisions of the [Fourteenth] Amendment by '[interposing] the federal courts between the States and the people, as guardians of the people's federal rights,' is also addressed to the States themselves." *Id.* (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

Not only is the congressional intent clear, *see id.*, but there is nothing in the text of Section 1983 to support the current state of affairs. Today, courts draw distinctions between individual- and official-capacity defendants and claims for prospective versus retrospective relief. A state official's liability for an individual-capacity suit is in most cases indemnified by the State itself. *See Edelman*, 415 U.S. at 665 ("It is not pretended that these payments are to come from the personal resources of these appellants."). As a result, there is no good reason for individual-capacity claims to go forward while official-capacity claims cannot. And there is no good reason, under *Uzuegbunam*, that a person should have standing to assert an action for declaratory relief and nominal damages—a mere recognition that her rights were violated—against a state official, but have that same claim barred by sovereign immunity, when the

state pays the $1.00 award against the individual-capacity defendant anyway. The only consistent interpretation of Section 1983 is that it abrogated the states' immunity entirely.

Finally, the Court's holding in *Will*, following *Quern*, 440 U.S. 332 (1979), that "a State is not a 'person' within the meaning of §1983," 491 U.S. at 65, is not supported by the statutory and historical evidence. As Justice Brennan noted in his *Quern* concurrence, the Dictionary Act of 1871, enacted "less than two months before the enactment of the Civil Rights Act, provided that 'in all acts hereafter passed . . . the word "person" may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense.'" 440 U.S. at 356 (Brennan, J., concurring). Justice Brennan showed that "in 1871 the phrase 'bodies politic and corporate' would certainly have referred to the States." *Id*. at 356–57.

Therefore, the Supreme Court should reconsider *Edelman*, *Quern*, *Pennhurst*, *Will*, and their progeny to find St. Cloud State and the official-capacity defendants suable under Section 1983 for damages. This case provides the Supreme Court an excellent vehicle for consideration, even if this Court is unable to correct these errors now.

CONCLUSION

Sovereign immunity aside, the remainder of State Defendants' motion to dismiss should be denied. The bottom line is that Lackie was forced to join and

pay Students United as a condition of enrollment at St. Cloud State. That policy might have gotten its start at the Minnesota Legislature and was further fleshed out by the Board. But it was the named Defendants who implemented and enforced that policy against Lackie. And it was the named Defendants who took Lackie's hard-earned money and gave it to Students United.

The First Amendment was designed to prevent this exact scenario. And as a result, universities have been required—for at least 24 years, by the Supreme Court—to only collect and distribute student fees for private, political speech, in a viewpoint neutral manner. The named Defendants made no attempt to do so—and they should have known better under long-established precedents that are directly on point. This Court therefore should not allow them to hide behind qualified immunity and should deny their motion to dismiss with respect to Plaintiff Tayah Lackie's claims against them in their individual capacities.

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Respectfully submitted,

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